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Freedom of Navigation Assertions: The United States as the World's Policeman

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Abstract

In line with its "Freedom of Navigation" program, the United States conducts "operational assertions" by sending naval vessels to violate what it considers to be the excessive maritime claims of other states. Efforts have been made to legitimate this program to the public and elected officials on both liberal and realist grounds: Freedom of navigation is an important component of the liberal international order while also central to the exercise of U.S. naval power. However, it does not follow that military assertions, which create a security risk and are inconsistent with liberal principles, should take precedence over diplomatic and multilateral steps. Rather, the program has faced little scrutiny to date due to its relative obscurity.

Keywords

foreign policy, freedom of navigation, international law, U.S. Navy, liberal international order, United States, United Nations (UN), China

Freedom of navigation operational assertions (FONAs[1]) are a mission carried out mainly by the U.S. Navy. The mission is to ensure that when other nations impose what the United States considers excessive restrictions on the freedom of navigation (FON) in any place in the world, the Pentagon will send naval ships or aircraft to

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demonstrate that the United States will not accept such restrictions. The United States also publicizes these assertions at the end of each fiscal year in order to further support the international norms and laws that call for FON or at least the U.S. view of these norms and laws. (As one Naval Judge Advocate General [JAG] puts it, "it is an 'in your face,' 'rub your nose in it' operation, that lets people know who is the boss. At least when it comes to FON—the U.S. *does* serve as the world's cop").[2] FONA is part of a larger FON program, which also draws on diplomatic protests and multilateral consultations, run by the State Department (Maritime Security and Navigation, n.d.; see also Chen, 2003).

The analysis proceeds in four parts. Part I of this article describes FONA. Part II briefly discusses the normative and legal justifications provided for FONA and their assumptions about the extent to which the American public favors liberal internationalism or American unilateralism and "realism," that is, power-based, foreign policy. Part III studies what FONA reveals about the liberal, rule-based, international order which the United States claims it is seeking to uphold, of which FON is a key element. Part IV studies what FONA reveals about the role FON plays in U.S. military strategy, particularly in terms of power projection and access to littoral regions, that is, in "realist" terms. The article concludes by noting the "importance of being unimportant" in the sense that the limited budget, personnel, and publicity devoted to FONA make it largely invisible to the public and hence not subjected to scrutiny.

Part I: FONA (and FON)

FONAs are low-profile operations. The Defense Department itself does not currently publish a detailed description or justification of the program. Instead, it publishes only a brief yearly summary of FONA on the website of the Under Secretary of Defense for Policy, listing the countries against which an assertion was conducted, the "excessive claims" that were protested, and whether or not multiple assertions were carried out against a given country (without going into specific details about the date or number of operations). According to these reports, the number of countries against which assertions were conducted has fluctuated over time, ranging from as few as 5 each in 2005 and 2006 to as many as 15 in 2000 or 12 in 2013 (Department of Defense, 2015). The countries affected include not just U.S. rivals such as China and Iran but also much smaller powers and nations friendly to the United States such as the Philippines, Taiwan, and Canada.

For example, the United States conducted assertions against India, a neutral major power with which the United States has generally good relations, for requiring authorization "for military exercises or maneuvers" in its Exclusive Economic Zone (EEZ; Department of Defense, 2015; UN, 2013).[3] Iran was subject to assertions for the same restriction as well as for "excessive straight baselines" and "restrictions on right of transit passage through Strait of Hormuz to signatories." Oman was subject to assertions for its claim to allow only innocent passage,[4] or the right to transit

waters subject to certain restrictions, for ships transiting the Strait of Hormuz. The United States targeted the tiny Maldives for its restriction on military activity in its EEZ and requirement that "nuclear-powered ships" obtain authorization before entering its territorial sea (Smith & Morison, 2005). The Seychelles was on the list of operational assertions on two occasions for requiring prior permission for warships to enter its territorial sea (Groves, 2011). The Philippines, which the State Department recognizes as a longtime ally (Collective Defense Arrangements, n.d.), was confronted almost every year for its "claims [of] archipelagic waters as internal waters" (Department of Defense, 2015). Indonesia, as another archipelagic state, has likewise been frequently targeted for "partial designation of archipelagic sea lanes," that is, for making provision only for north–south sea lanes between its islands and not for any east–west route (Groves, 2011). China was subject to assertions in 2013 for "excessive straight baselines," "security jurisdiction in [its] contiguous zone," "jurisdiction over airspace above the [EEZ]," restrictions on survey activity in the EEZ, and restrictions of innocent passage in territorial waters (Department of Defense, 2015). The United States also targeted Taiwan, Vietnam, Indonesia, and Cambodia for similar reasons. Malaysia was targeted for requiring nuclear-powered ships to gain authorization before entering territorial waters. Most assertions were carried out by the U.S. warships and some by U.S. bombers. For instance, following China's November 2013 declaration of an air defense identification zone in the East China Sea, the United States sent a pair of B-52 bombers into the zone without informing China (Keck, 2013).

The State Department also has an FON program that mainly files demarches, or official protests, when other nations impose excessive restrictions on the FON. This practice is aimed at "stressing the need for and obligation of all States to adhere to the customary international law rules and practices reflected" in the United Nations Convention on the Law of the Sea (UNCLOS), is discussed subsequently (Roach & Smith, 2012, p. 7).[5] The FON program was instituted in 1979 during the Carter administration, although it was preceded by occasional protest sailings (Roach & Smith, 2012, p. 8).

For example, in response to Canada's assertion of straight baselines, or control of all water between two points on the coast rather than at a constant distance from the land, the United States issued in 1967 a protest note that it "considers the action of Canada to be without legal justification [and] contrary to established principles of international Law [and as such] does not recognize the validity of the purported lines and reserves all rights of the United States and its nationals in the waters in question" (Roach & Smith, 2012, p. 95). In 2002, the United States issued a diplomatic note to Chile protesting a law requiring prior authorization for ships carrying nuclear or otherwise hazardous materials in territorial waters or the EEZ, asserting that unrestricted innocent passage "regardless of cargo, armament, or means of propulsion" is one of "fundamental tenets" of the law of the sea, noting that the United States "does not accept" the law, and requesting that Chile revise it (Roach & Smith, 2012, p. 409). And so on and so on.

Such operations are intended to be "routine and frequent," though operational assertions against "particularly sensitive" countries require the approval of the Joint Chiefs of Staff or the President in order to avoid excessive political risk (Aceves, 1995, p. 293; Mandsager, 1997, p. 122). According to a 1979 memo issued by the commander in chief of the U.S. Atlantic Command (CINCLANT) following the establishment of the FON program, U.S. naval forces of the Atlantic Fleet "were ordered to avoid operating in a manner which might be construed as acquiescent to claims inconsistent with U.S. maritime rights," and indeed "in certain instances, U.S. forces must consider going out of their way to contest a maritime claim" (Aceves, 1995, p. 281). These operations can be carried out "at many levels in the chain of command," so while normally directed by the combatant commander or the fleet commander, for example, the U.S. Pacific Fleet or the U.S. Pacific Command, they can occur "even further down in the chain of command, or they can come from Washington D.C."

More broadly:

> U.S. military forces, ships and aircraft, will exercise their [navigational] right under international law wherever the U.S. thinks they are entitled to go, and it is only in special areas that they require higher approval. If it's not in a special area that requires higher approval, than a ship's commanding officer could go ahead and go through an area that might be under the claim of another country, and that would be called an FON assertion, but it's not really part of the formal FON program.

In short, FONAs are—as their very title reveals—assertive operations. The United States uses its military forces to undergird its positions regarding what FON entails. The targets of these operations include not merely potential foes such as China and Russia but also friendly nations and allies such as Canada. In this matter, the United States is acting unilaterally, without appeal to international institutions such as the UN, multilateral institutions such as the North Atlantic Treaty Organization (NATO), or informal coalitions such as those composed to fight the Islamic State (ISIS).

Part II: Normative and Legal Justifications

Until World War II, foreign policy and military decisions could be made with relative inattention to the public. However, in the decades that followed, as increasing segments of the public acquired higher education, and mass media developed, growing parts of the electorate became aware and interested in these decisions. Hence decisions makers have increased their efforts to gain public support, the most widely used measure of legitimation (Etzioni, 2011, p. 105; Spencer, 1970, p. 134). Scholars still differ greatly in the amount of weight they assign to public opinion; some—mainly realists—see it as much less important than other factors, while idealists see it as much more consequential.[6] However, both see it as playing an increasing role.

The case in support of FON, which FONAs seek to buttress, has long and strong normative and legal roots. FON in Western thought has its origins in the work of 17th-century Dutch jurist Hugo Grotius who argued that the world's oceans were free rather than state owned. Grotius' ideas eventually prevailed, and during the height of British power, the Pax Britannica (1812–1914), FON was a key element of British naval policy, which aimed to facilitate free trade. Piracy, state-sponsored (privateering) or independent, was rampant until the 19th century, when international antipiracy efforts were made in force and the 1856 Paris Declaration Respecting Maritime Law banned privateering.

The justification of FON never claimed it has an absolute status. Grotius recognized that coastal countries should have some sovereignty over their coastal waters (Papastavridis, 2014, p. 25). From the 17th through the early 20th century, the prevailing maritime norm was the 3-mile territorial sea, based on the "cannon-shot rule" that a country should have control of the seas within range of its weapons (Swarztrauber, 1972, p. 46). By the 1930s, countries' exclusive rights to the resources within those territorial waters were widely recognized (Churchill & Lowe, 1988, p. 121). Over the 20th century, however, coastal states expanded their maritime territorial claims, an increasing number of countries claimed a 12-mile territorial sea (Roach & Smith, 2012, p. 136).

A growing disagreement among various nations concerning what FON entailed and what was excluded created a demand for a formal international legal regime, leading to maritime law initiatives over the 20th century, with the participation of national governments and intergovernmental and nongovernmental organizations. The Hague Codification Conference of 1930 demonstrated widespread acceptance of the 3-mile territorial sea but failed to produce a formal agreement (Miller, 1930). The 1958 UNCLOS I was more successful, producing four treaties that reached "a measure of agreement" on definitions and rules for territorial waters, the contiguous zone,[7] the high seas, and the continental shelf, while putting forward "principles and mechanisms" for the management of fisheries on the high seas. It reflected and codified customary international law to some extent but also contained "pioneering" provisions on pollution as well as "very controversial" material on fisheries (Treves, 2013). The United States acceded to all four treaties (O'Rourke, 2015, p. 15).

These conferences failed to resolve the key disputes over the extent of the territorial sea and control over fisheries beyond that limit as did the Second UN Conference on the Law of the Sea that followed it in 1960 (Brows, 2007, p. 255). In particular, the need for four separate treaties in 1958 reflected insufficient consensus to produce a single comprehensive treaty (Treves, 2013). In order to reach a compromise on these disputes, the Third UN Conference on the Law of the Sea (UNCLOS III) was held beginning in 1973. This conference was long and difficult. Lasting two decades, it was one of the longest international negotiations in history, but it was ultimately successful. It concluded in 1982 with the UNCLOS, also referred to simply as the "Law of the Sea," which contained 320 articles and 9 annexes, and was eventually signed by over 150 states and ratified by over 130 (Rosen, 2014).

Far from acting unilaterally, the United States was a leading proponent of UNCLOS III, which was viewed by State Department officials as very much in the U.S. interest (Moore, 1975). During the negotiations, the United States cooperated with the Soviet Union to push for broad freedoms of negotiation and overflight (Moore, 1980) and focused particularly on innocent passage by military ships through territorial waters, transit rights through straits, FON and other noneconomic activity in the EEZ, and freedom for deep seabed mining (Galdorisi & Kaufman, 2002, p. 268).

The negotiations, which involved considerable give and take by the participating nations and in which the United States played an important role, resolved many serious disputes between coastal and maritime states. The resulting Law of the Sea limited territorial waters to 12 nautical miles in breadth and recognized innocent passage rights within them, established a contiguous zone extending an additional 12 miles to facilitate coastal state law enforcement, and also established the EEZ, recognizing coastal states' jurisdiction over natural resources up to 200 nautical miles of their coasts, including fisheries. It also established legal regimes for archipelagic waters, international straits, deep seabed mining, and environmental protection. In doing so, it reconciled the conflicting claims of its state parties, balanced the rights and interests of coastal and maritime states, and both supplemented and codified customary maritime law, making it "a monumental achievement in multilateral negotiations" (Aceves, 1995, p. 268). One hundred sixty-three UN member states, including most major powers, signed and ratified and the Law of the Sea, while 14 states signed but did not ratify, and only 16 states neither signed nor ratified (UN, 2014). The United States is one of the few countries that did not accede to the Law of the Sea.

It is important for all that follows that UNCLOS provides mechanisms for resolving conflicting interpretations of its articles. Part 15 of UNCLOS, entitled "Settlement of Disputes," provides four dispute resolution mechanisms. One is the International Tribunal for the Law of the Sea (ITLOS), which has jurisdiction over disputes and legal questions relating to UNCLOS. Since that law entered into force in 1994, ITLOS has heard 22 cases relating to "prompt release of [detained] vessels and crews, coastal State jurisdiction in its maritime zones, freedom of navigation, hot pursuit, marine environment, flags of convenience and conservation of fish stocks" (ITLOS, 2015).

A second dispute resolution option is the International Court of Justice, the main judicial body of the UN, to which all UN member states are parties. In addition, UNCLOS contains two distinct procedures for setting up temporary arbitration tribunals. Furthermore, the UN General Assembly reviews UNCLOS annually, issuing resolutions on pressing issues such as environmental protection and sustainable fishing (UN, 2015).

In short, FON has a long and strong normative and legal support. In the past, numerous differences among nations as to what it entails have been worked out through negotiations and consultations leading to a major compromise, consensus,

and treaties. Moreover, such treaties provide for mechanisms for resolving any remaining issues or newly rising issues. The U.S. played a key role in these constructive developments. However, it is one of the few nations that refused to accede to UNCLOS. Instead of drawing on mechanisms for dispute resolutions regarding restrictions on the FON, the United States considers excessive, it often acts unilaterally and in an assertive manner, drawing primarily on its military forces.

The United States justifies FONA in two very different ways. One line of justification holds that FON is a global public good, and the United States is called upon to protect it—for the good of all comers; the other—that FON is essential for own security of the United States and hence it must ensure that this freedom is not eroded. Both justifications are combined in the following statement found in a number of FON-related official documents: ''For over 20 years, the United States has reaffirmed its long-standing policy of exercising and asserting its freedom of navigation and overflight rights on a worldwide basis. Such assertions by the U.S. preserve navigational freedoms for all nations, ensure open access to the world's oceans for international trade, and preserve global mobility of U.S. armed forces'' (Cohen, 2001, p. 1; see also U.S. Navy, 2007).

Studies of American public opinion about foreign policy differ a great deal in terms of how they assess the extent to which the American society supports liberal versus realist foreign policies (or ''doves'' vs. ''hawks''). One notes first of all that important segments of the public are neoisolationist, in the sense that they seek a reduced, but not end to, U.S. involvement overseas whether that involvement entails support for the UN and foreign aid or military operations.[8] Second, some studies find that large segments of the American electorate favor liberal internationalist positions (Council on Foreign Relations, 2011), while others find that the majority favors realist positions (Drezner, 2008). It is important to note in this context that many Americans hold a mix of these positions, sometimes the majority sides with a liberal position (for example, a large majority supports U.S. participation in the International Criminal Court) and sometimes with a realist position (e.g., Americans are more supportive of the use of force to pursue ''realpolitik missions'' than ''humanitarian or peacekeeping'' ones; Drezner, 2008, p. 59; Smeltz, 2012, p. 23). These facts help explain the reason the U.S. government seeks to legitimate FONA in both liberal and realist terms.

The article next turns to examine the validity of the two major legitimations employed simultaneously to justify FONAs.

Part III: FONAs—for liberalism

FONAs are justified on the grounds that global order—in particular the rule-based, liberal international order—serves all nations well, that FON is a key element of this order, and that the United States is called upon to uphold this order.

President Woodrow Wilson was one of the first to articulate and actively promote the liberal international order (Ikenberry, 2009, p. 7). ''Absolute freedom of

navigation upon the seas, outside territorial waters'' was one of Wilson's 14 points (Till, 2011). Stewart Patrick lists ''freedom of the seas'' among the key principles that ''have underpinned the Western-dominated liberal order since 1945'' (2011). Christian Le Mière points out that ''the global public good'' of FON, which ''has been ensured by the U.S. since the end of the Second World War, and before that by the Royal Navy,'' has become much more widely accepted and clearly defined since being ''clarified'' at UNCLOS III (2014).

The liberal justification of FONA faces a major challenge. This is the case because the liberal justification goes way beyond considering FON as a key public good—it also calls for resolving differences through diplomatic means and via international institutions. In contrast, as far as FONA is concerned, the United States decides on its own which new restrictions introduced by any nation in the world are ''excessive,'' and what it considers the correct interpretation of international law and UNCLOS. And it unilaterally applies its military force—not some Blue Helmeted force or even that of NATO or of a coalition—to enforce the rules. In short, in these matters the United States acts as accuser, judge, jury, and executioner. That is, the United States here is acting, as it is often accused, as world's policeman. It knows what the law is and has taken it upon itself to enforce it. This is a very different model than that of the liberal international order, and it is much more that of a hegemon.

Those who favor FONA have made several arguments in support of this American enforcement role. One argument is that excessive restrictions on the FON are clearly illegal, and hence the United States is merely exercising its rights in challenging them. Thus, according to J. Ashley Roach and Robert Smith, what the United States views as excessive maritime claims, or those that claim ''sovereignty, sovereign rights, or jurisdiction over ocean areas'' in a way that is ''inconsistent with the terms of the LOS convention,'' are simply ''illegal in international law'' and moreover ''threaten the rights of other States to use the oceans'' (2012, p. 17). Hence, the United States is merely exercising its navigational rights by carrying out FON operational assertions or otherwise ignoring such rules.

Another argument in favor of the FON program, and particularly operational assertions, is that of precedent. Roach and Smith argue that ''it is accepted international law and practice that, to prevent changes in or derogations from rules of law, states must persistently object to actions by other states that seek to change those rules'' (2012, p. 9). However, it does not follow that therefore the United States (and not, for instance, the UN) is the one called upon to act. A Naval officer who carried out several FONAs himself suggested to the author that in order to maintain long agreed international norms and laws, the United States must act when some nation makes excessive claims because otherwise it would seem to acquiesce to the changes. And it must do so to friends and adversaries alike, in order not to seem to discriminate, leading the adversaries to demand the same rights granted to allies. All this may be true but does not explain why the rejection of claims must be carried out by military rather than by diplomatic means. One may say that diplomatic means

are used (by filing demarches), which is indeed the case, but it does not follow why these must be followed or accompanied by Naval assertions—if the goal is to indicate that the United States (as a self-appointed enforcer of the world order) does not acquiesce to the change and refuses to accept it as a legal precedent.

One may also argue that UNCLOS reflects a contract, in which interested parties have come together, expressed their differing preferences, and negotiated a mutually acceptable compromise, after which a set of rules is established to be followed until both sides agree to change them. In this view, the restrictions on military activities deemed excessive by the United States were "rejected" or "not envisioned" during the UNCLOS III negotiations and "would never have been accepted by the maritime powers" (Pedrozo, 2010, p. 29) However, it still does not follow that if one side holds a contract to have been violated, one party can go and use force to enforce it. Instead, the liberal order calls for the peaceful resolution of such disputes by arbitration or other such means.

These justifications do not take into account some generic and some specific arguments against FONA. The very status of international law is not as self-evident as defenders of FONA imply. Laws command such a respect when they are enacted by a duly elected legislature, in a liberal democratic state. International laws do not command the same standing, though they surely command considerable normative and prudential following (Goldsmith & Posner, 2006). Above all, even domestic laws and constitutions, and surely international laws, are subject to different interpretations and to revisions (e.g., by UN Security Council resolutions or new treaties) and, to differences regarding who is called upon to enforce them. This is not only clear in general but also specifically in matters concerning the FON. UNCLOS fails to define key terms (Roach & Smith, 2012, p. 30, p. 414), leading to stark differences in interpretations of the Law of the Sea by those opposing or backing coastal state maritime claims (Haiwen, 2010; Pedrozo, 2010). Roach and Smith—whose book is considered the most comprehensive and authoritative text on the subject—state at one point that claims viewed by the United States as inconsistent with the Law of the Sea are simply "illegal in international law"—yet then spend nearly 700 pages demonstrating that conflicting interpretations of UNCLOS are widespread (2012, p. 17).

There is great room for legitimate differences as to what the law means and for using multilateral mechanisms and institutions to determine which interpretation should be followed. Instead, however, under FONA the United States finds itself in the odd position of claiming that it is the sole power willing and able to protect a key element of the liberal order, FON, but—refusing to accede to the treaty that enshrines it.

In short, FON is indeed an important element of the rule-based, liberal international order and a major public good. However, FON operational assertions cannot be justified by appealing to the value of this order, because it is centered on consensus building, diplomatic negotiations, and multilateral institutions and not unilateral rulings and enforcement by use of the military.

Part IV: A Realist's Assessment

The value of the FON, as well as the need to buttress it, is also justified by the U.S. government on the grounds that they are essential to U.S. national security. This realist justification is provided both in general terms and rather as specific ones. The United States is a major naval power compared to other nations that either do not have much of a navy (China has only recently launched its first aircraft carrier and has little experience in naval warfare) or rely much more on their land forces (e.g., Russia; O'Rourke, 2014; Robson, 2014). Hence, on the face of it, the unencumbered right to move forces about in the seas advantages the United States.

Roach and Smith spell out this key claim in the following terms: The United States "requires maritime mobility" for its national security and "has more to lose than any other State if its maritime rights are undercut." As the world's preeminent naval power, it is in the interest of the United States to maximize its legal right to project naval power: "even though the United States may have the military power to operate where and in the manner it believes it has the right to, any exercise of that power is significantly less costly if it is generally accepted as being lawful" (2012, pp. 8–9). More broadly, U.S. military strategy recognizes that "joint assured access to the global commons and cyberspace constitutes a core aspect of U.S. national security and remains an enduring mission [...] the maritime domain enables the bulk of the [U.S. military's] forward deployment and sustainment, as well as the commerce that underpins the global economic system" (Mullen, 2011, p. 9). Likewise, Dennis Mandsager argues that without FON, "the ability of the United States to project military power, provide logistics support, maintain forward presence, and accomplish missions such as disaster relief, humanitarian assistance, and noncombatant evacuations, will be severely hampered" (1997, p. 216). The purpose of FON is to "preserve the global mobility of U.S. forces by avoiding acquiescence in excessive maritime claims of other nations" according to Jonathan Odom, the DOD Oceans Policy Advisor (2014, p. 16) and James Kraska (2011, pp. 1–2). More specifically, FON was crucial during the Cold War for nuclear deterrence because it served to protect the right for ballistic missile submarines to transit international straits while submerged, a right that was threatened by the expansion of the territorial sea (Groves, 2011).[9]

FON is particularly relevant to U.S. maritime power projection in East Asia. The United States used to be able to demonstrate its commitment to defend its allies in the region by merely sending its aircraft carriers. For instance, when China seemed to threaten to use force to integrate Taiwan into the mainland in 1996, the United States ordered two carrier battle groups to transit the Taiwan Strait, and this sufficed to persuade Beijing to back down (Trigkas, 2014). In recent years though, China has developed antiship missiles and other weapons that are viewed by the U.S. military as greatly undermining the U.S. ability to rely on its naval vessels to project power. Hence the U.S. developed an Air Sea Battle (ASB) concept that entails neutralizing

A2AD weapons on the Chinese mainland in the event of war with China (Krepinevich, 2010)—raising concerns that such action would lead to an all-out war that may well include nuclear arms (White, 2013, pp. 122–124). The evolution of ASB, which was renamed the Joint Concept for Access and Maneuver in the Global Commons in 2015, has been informed by the understanding that FON and power projection are mutually reinforcing and that "access-restricting capabilities directly threaten U.S. and partner freedom of maneuver in the global commons, while also threatening the fundamental assurances necessary for global security and prosperity" (Morris et al., 2015, p. 1; Etzioni, 2014).

A critical review of these arguments finds little reason to doubt that the United States has strong security reasons to favor the FON. However, it does not follow that military assertions are the preferred way to ensure this freedom, especially as the first step to counter what the United States views as excessive restrictions. Instead, moves such as operational assertions should serve as a fallback option should diplomatic steps and multilateral steps fail.

In effect, FONA adds a security risk, as they can quite readily escalate into dangerous clashes between the forces of the super powers. Roach and Smith, for example, acknowledge that "demonstrations of resolve" by U.S. operational assertions risk "the possibility of military confrontation" (2012, p. 643). Two major instances of such confrontation include the Black Sea bumping incident involving the Soviet Union and the Gulf of Sidra clashes with Libya (Pear, 1989; Rolph, 1992). While these took place decades ago, they illustrate the risks involved, and parallel recent Chinese–U.S. naval confrontations (although the latter have involved surveillance by U.S. forces rather than outright FONAs; Gertz, 2014; Tyson, 2009). There might well be occasions in which security interests compel the United States to act in ways other nations consider provocative. The United States might well be justified, for example, in conducting surveillance when it has reasons to fear an attack. However, engaging in such operations for asserting rights before drawing on less risky measures seems unjustified even from a realist viewpoint.

Moreover, it is far from clear that all claims by numerous nations across the world should be treated in the same manner. Some deviate much less from the letter and spirit of the treaty and customary law than others; some seem quite reasonable on the face of it; and many could be viewed as a call for renegotiation (which as we showed has often been carried out in the past through the three UNCLOS conventions and before and after) rather than rejected out of hand.

A major case in point is the requirement that military ships identify themselves or give advance notice before entering territorial waters (not to be conflated with the right to board and search these ships). Such a requirement seems particularly reasonable for ships that carry nuclear weapons or otherwise hazardous materials. Thus, scholars have pointed out that customary international law "allows transit states to require notification, before such shipments can pass through their territorial seas or EEZs," although others disagree (Dixon, 2006). As for military affairs, in

statements on acceding to the Law of the Sea, Bangladesh and Malta argued that "Effective and speedy means of communication are easily available and make the prior notification of the exercise of the right of innocent passage of warships reasonable and not incompatible with the Convention" (UN, 2013). These claims were made by nations including Djibouti, Egypt, India, Indonesia, Taiwan, Vietnam, and Yemen. Rather than try to accommodate or negotiate about these claims, the United States conducted operational assertions against them. In contrast, the United States has much stronger reasons to oppose restrictions that actually hinder U.S. mobility, including requirements for prior permission for innocent passage in territorial waters (as claimed by China and the Maldives) and requirement for innocent passage with permission through an international strait (as claimed by Oman).

Beyond the question whether restrictions the United States deems excessive indeed harm national security, the realist defense of FONA as currently practiced raises deeper questions about the U.S. role in the world. The United States holds that it needs to be able to project power in any place in the world and hence must be free to move its aircraft carrier battle groups and other naval assets. However, some of the restrictions nations seek to place on FON in effect question whether the time has come for the United States to project less power, especially in areas in which new regional powers are rising.

Answering this and related questions will take the discussion way beyond the scope of this article because they concern the general strategic decisions about U.S. role as a global power in face of rising new powers. It suffices to state here that assertions seek to uphold a hegemonic position, but this is not the position the United States has chosen in many other fronts. Thus, the United States responded to the Russian invasion of Ukraine and even to the rise of ISIS only after it consulted and cooperated with a broad coalition of other nations. That is also the line the United States follows with regard to the Iran nuclear negotiations and in its treatment of North Korea. FONA seems a relic from a more assertive, powerful, unilateral United States, the one that won the Cold War.

One reason that the weakness of the liberal justification for FONA and the doubt raised by the realist justification are very rarely faced seems to be due to what economists call the "importance of being unimportant" (Case, Fair, & Oster, 2011, p. 107). This concept holds that when a particular item, say the costs of nails, amounts to a very small fraction of the total costs of a project, say a housing development, the producers of this item can significantly increase the price of this item—without the customer switching to a different producer or substituting a different item. Evidence suggests that FONA is basically not known to the public. *The New York Times* and *Washington Post* published no articles on FONA over the last 5 years, though *The New York Times* did carry few brief updates on the subject by *Reuters*. It remains to be seen if this relic from a more hegemonic era would not be scaled back, if FONA came under the kind of scrutiny to which several other military assertions have been subjected.

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Notes

1. This article abbreviates such assertions as FONAs (for FON assertions). The official acronym relating to the programs under discussion is FON.
2. Off the record briefing under Chatham House rules, in Washington, DC, February 2, 2012.
3. The Exclusive Economic Zone, or EEZ, is defined as "an area beyond and adjacent to the territorial sea," typically 200 nautical miles in breadth, in which states have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources." See the United Nations Convention on the Law of the Sea, part 5 (UN, 1982)
4. Innocent passage is defined by the Law of the Sea as "continuous and expeditious" navigation "through the territorial sea" that "is not prejudicial to the peace, good order or security of the coastal State [and] shall take place in conformity with this Convention and with other rules of international law" (UN, 1982).
5. Roach and Smith's 2012 book includes a wide array of the associated demarches.
6. For example, Scott Burchill asserts that "Some liberals emphasize the institutional constraints on liberal–democratic states, such as public opinion, the rule of law, and representative government" (2005, p. 60). Joseph Nye argues that:

   > Another problem for those who urge that we accept the idea of an American empire is that they misunderstand the underlying nature of American public opinion and institutions. Even if it were true that unilateral occupation and transformation of undemocratic regimes in the Middle East and elsewhere would reduce some of the sources of transnational terrorism, the question is whether the American public would tolerate an imperial role for its government. (2004, p. 263)

7. An area extending beyond a coastal State's territorial waters in which, under the Law of the Sea, that state, "may exercise the control necessary" to prevent and punish "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea." See the UN Convention on the Law of the Sea 4:33 (UN, 1982).
8. For example, Charles Glaser asserts that, based on an assessment:

   > that the United States can be secure simply by taking advantage of its power, geography, and nuclear arsenal, so-called neoisolationists conclude that the United States should end its alliances in Europe and Asia because they are unnecessary and risky. If the United States can deter attacks against its homeland, they ask, why belong to alliances that promise to engage the United States in large wars on distant continents? (Glaser, 2011, p. 90)

   For a more expansive and critical view of this trend, see Bret Stephens' *America in Retreat* (2014).
9. Dennis Mandsager adds a whole slew of other and current U.S. security needs the servicing of which requires FON: these include the ability of "military forces to engage in flight

operations, exercises, surveillance and intelligence activities, and weapons testing," as well as "other lawful uses of the oceans important to U.S. military interests, albeit not directly related to navigation, include[ing] laying submarine cables, hydrographic surveys, telecommunications activities, and the collection of marine weather and oceanographic data" (1997, p. 117).

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