The Influence of Law on Sea Power
Doctrines: The New Maritime Strategy
and the Future of the Global Legal Order

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For much of the 2006-2007 academic year, elements of the U.S. Naval War College facilitated an elaborate process designed to provide the intellectual foundations for the Chief of Naval Operations and his staff to draw upon in drafting a new Maritime Strategy. The process brought together experts from throughout the world to take part in workshops, strategic foundation “war” games, conferences and listening sessions. It was my privilege as the 2006-2007 Charles H. Stockton Chair in International Law to serve as legal advisor throughout the process. In the next half hour I hope to summarize for you the contributions of international law experts in the process, their efforts to help define the relationship between maritime strategy and law and share with you my own thoughts on the implementation of the strategy in the coming years.

Three decades have now elapsed since Daniel Patrick O’Connell challenged our thinking with his book on The Influence of Law on Sea Power. In it, the New Zealander expert on public international law argued shortly before his death in Oxford in 1979 that because the law of the sea “has become the stimulus to sea power, not its restraint,” future naval operations planning staffs must acquire a thorough appreciation of the law.

In contrast to Admiral Alfred Thayer Mahan and the more recent naval historians who, while providing illuminating analyses of the influence of sea power on history, mostly disregard the influence of international law on sea power, Professor O’Connell forcefully argued that sea power doctrines can no longer be considered in isolation from the relevant law. More importantly, O’Connell recognized that international law can be a powerful strategic enabler. The question I asked myself as I launched into my new tasking when I arrived in Newport last fall was “Had the naval strategy community heeded Professor O’Connell’s monition?”

THE MARITIME STRATEGY PROJECT

Let me attempt to answer that question by taking you on a brief tour of the Naval War College’s maritime strategy development process and the role of law and legal advisors in that process.

The CNO’s Maritime Strategy Charge

At the June 2006 Current Strategy Forum, Admiral Mike Mullen, one year into his tenure as the Chief of Naval Operations, called for the development of a new Maritime Strategy to guide the maritime services in the coming years. It was to be a strategy of this age and
for this age. The new strategy document was slated to join several other naval capstone planning documents, including Sea Power 21 and Marine Corps Strategy 21, the CNO-CMC Naval Operations Concept, the Navy Strategic Plan, and the Coast Guard Strategy for Maritime Safety, Security and Stewardship. Last spring, the Commandants of the Marine Corps and the Coast Guard announced their readiness to join the CNO in signing the new Maritime Strategy when it is completed, making it a true strategy of all three sea services. Last summer, the CNO tasked the Naval War College to acts as broker for an ordered competition of maritime strategy ideas; ideas that would inform and guide the carefully selected team charged with drafting the new strategy. The College was also asked to facilitate a conversation with the country—indeed with the world—to describe our process and solicit feedback.

**Security Strategies in the United States**

We were not asked to compose the new strategy on a blank canvas. Indeed, we worked on one that was already suffused with an elaborate landscape, or perhaps I should say seascape. The new Maritime Strategy will be nested in what has become a multifaceted web of security strategies for the nation, all of which emanate from the National Security Strategy of the United States. The National Security Act of 1947, as amended by the Goldwater-Nichols Act of 1986, requires the President to annually submit to Congress a National Security Strategy (NSS) report. The President’s NSS vision is in turn implemented by the National Defense Strategy promulgated by the Secretary of Defense and the National Military Strategy issued by the Chairman of the Joint Chiefs of Staff. Closely related to those are the National Strategy for Maritime Security, the National Strategy for Homeland Security, the Maritime Strategy for Homeland Security, the National Strategy for Combating Terrorism and the National Strategy to Combat Weapons of Mass Destruction.

I should add that this was not the first time the U.S. Navy has launched a grand strategy development project. Indeed, research by the Center for Naval Analyses last fall identified at least 17 Navy capstone planning documents since the 1970s. When I looked through those earlier strategies I discovered part of the answer to my opening question on Professor O’Connell’s message: none of those Navy strategy documents expressly discussed the role of law and legal institutions in naval operations, other than to make a passing reference to the self-evident fact that naval mobility would be better assured if the U.S. acceded to the 1982 U.N. Convention on the Law of the Sea.

**Strategy as a Critical Component of the Geo-Strategic Environment**

Strategy is said to be “a prudent idea or set of ideas for employing the instruments of national power in a synchronized and integrated fashion to achieve theater, national, and/or multinational objectives.” I will come back to the instruments of national power later. In setting out to achieve those national objectives, strategy must be adapted to the strategic environment in which it will operate. Accordingly, to provide the development team with the foundation they needed to prepare maritime strategy options for the CNO, the Naval War College began by convening a Geo-strategic Environment Workshop. To
identify relevant components of the future strategic environment the participants drew heavily on the National Intelligence Council’s 2020 assessment, “Mapping the Global Future.”

This audience is likely familiar with much of the strategic environmental picture, so I will only summarize the most salient findings. Geopolitical entropy, disorder and uncertainty are on the rise. The world is said to be suffering from a global security deficit. Unsustainable population growth rates, the “youth bulge” and chronic unemployment are most pronounced in those regions lying in the so-called arc of instability. State sovereignty and territorial integrity are on the decline. State powers are increasingly diffused and devolved. Many states, even some of the most developed states, are besieged by an unrelenting flow of weapons, drugs, money and migrants across their borders. At the same time, through what some have described as the democratization of violence and of technology, states have lost their historical monopoly on the large-scale use of force and on access to WMD technologies.

Indeed, the global picture looks much the same as it did in 1921, when William Butler Yeats penned his apocalyptic poem The Second Coming:

Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.

Grim verses, indeed, whose dark and disturbing images still ring true.

Economic security is widely recognized as a vital interest of the state. Yet, present efforts are not sufficient to meet even basic security needs within the borders of many states, let alone the kind of stability needed by the globalized, interdependent and tightly connected economy of the 21st century. Contemporary security strategies must be designed to manage threats to the public order. Those threats come from states and non-state actors. The threats may be found and managed in the commons, at boundaries between the commons and states, along the borders of adjacent states, or wholly within states. We are painfully aware that the threats know no geographical boundaries, particularly as globalization increases the porosity of borders.

In an age when the international supply chains that sustain the global economy and the seas over which those chains are carried are the common concern of all states, global order—including order on the sea—is the new raison d’état and must be the goal of every maritime security policy and strategy. Irresponsible and incompetent flag states; failing and failed states; transnational terrorist organizations; criminal syndicates engaged in trafficking in weapons, drugs and humans; and illegal, unreported and unregulated fishing all undermine order in the commons. Here in the global commons, where the pinch from flag states falling short in their responsibility to “effectively” exercise
jurisdiction and control over their vessels if felt most acutely, the security deficit is most urgent.

The Strategic Foundations Games

Following the Geo-Strategic Environment Workshop, a series of executive group meetings and war games were conducted in September and October of 2006, to develop strategic foundations for use in the Maritime Strategy Options Development Workshop in December. Those options were later vetted through Options Refinement Decision Support Event in February of 2007. The International Law Department provided legal advice to all of the war game teams and to two of the executive groups. Early on in the process, they also provided a brief to the Red Team Executive Group suggesting possible “lawfare” strategies that might be used against the Blue Team. During this same period, the NWC hosted a conference on the Maritime Implications of China’s Energy Strategy, an Intercessional Conference on Maritime Strategy, and a workshop entitled Economics and Maritime Strategy: Implications for the 21st Century. ILD attended each of the events and an ILD member participated in the Economics and Maritime Strategy workshop, submitted a paper on legal interoperability challenges and made a presentation on International Cooperation in Securing the Maritime Commons.

The Future Global Legal Orders Workshop

Let me now turn to something of greater interest to this audience, all of whom will appreciate that Law—that is, rule sets, legal processes and legal institutions—are as much a part of the geostrategic environment and therefore the planning “context” as geography, demographics, organizational culture and technology. And, like those other strategic factors, law is dynamic.

The international system consists principally of sovereign states, who collectively comprise a horizontal, non-hierarchical global order that has historically been described as one of moderated anarchy, at least by the realists. Conventional wisdom posits that within that system, international institutions and organizations ameliorate the anarchy, but with few exceptions they do so without disturbing its horizontal structure.

The experts who participated in the Geo-Strategic Environmental Workshop exhibited little faith in existing international organizations and in international law. Let me give you three sample findings. First, they concluded that “Some international organizations are looking long in the tooth and incapable of coping with emerging challenges.” Next they concluded that “Some of the institutions that are charged with managing global problems may be overwhelmed by them” and “The number of bilateral agreements will rise as international organizations continue to fall short in their objectives.” Given the experts’ harsh judgment of international organizations and regimes, their prescription: “International Organizations: Out with the old, in with the new” should not surprise you.

The GSEW report left some of us wondering whether their views were widely shared by international law experts. And mindful that the state of the future global legal is a vital
component in geostrategic environment, the President of the NWC convened a two-day workshop that brought 42 legal experts together to examine the “Global Legal Order 2020.” Those experts—some of whom are in the room with us today—were asked to provide the legal component that is too often neglected in strategy documents.

With few exceptions, military strategists have a long history of giving short shrift to international law in their writings. The origin of the problem can be traced back to Carl von Clausewitz, who contemptuously referred to those “certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom.” George F. Kennan, the leading architect of America’s Cold War containment security strategy, is also remembered for his attack on what he saw as an excess of “legalism and moralism” in American foreign policy during the Wilson presidency years. Regrettably, international lawyers have not always done their part to engage with strategy planners, to help them forge plans that can achieve strategic goals while respecting and even advancing the rule of law. The experts who came to Newport were ready to do just that, in the hope that the strategists were ready to listen.

The workshop began with a brief discussion of some assumptions proposed by the conference chair concerning the role and reach of law. The first was the pragmatic observation that the new maritime strategy must be adapted to the global legal order in which it will function. The second was that a robust and respected legal order has the potential to save lives, by providing predictability and preventing conflicts, and by providing effective and peaceful means to resolve conflicts that do arise. The third assumption was that, while the future state of the legal order is uncertain, it can, to some degree, be mapped and shaped, and—as Thomas Friedman reminds us—the future belongs to the shapers and adapters.

To avoid what the influential British strategist Colin Gray labels the “sin of presentism,” the legal experts attempted to widen their temporal lens by exploring several “alternative futures,” using the scenario planning method championed by futurists like Peter Schwartz and Philip Bobbitt. They initially discussed six scenarios that would collectively map the future global legal order, before adopting an approach that focused on twelve areas of potentially significant changes in the legal order. For each of the twelve areas, the experts examined the possible trends in the rule sets, legal processes and institutions, and the compliance levels. Next, they were asked to consider the consequences of those changes to the maritime strategy mission inventory and for the means and methods for carrying out those missions. Finally, they were asked what the new maritime strategy should say (and not say) about international law.

One would expect that 42 lawyers from 11 different nations would find little on which to agree. To some extent, that was the case with this group. There was, however, one question on which every expert agreed: the new maritime strategy should include an express reference to international law. As one expert put it, international law “is the foundation on which we operate; it is why we are there.”

THE ROLE OF LAW IN THE NEW MARITIME STRATEGY
As the legal experts concluded, there are a number of compelling reasons to embrace the rule of law in the new maritime strategy and no sufficient reason for failing to do so. The Navy’s new strategy must be consistent with higher level security strategies. The 2006 National Security Strategy of the United States expressly cites the importance of enforcing the rule of law. Similarly, the presidential directive on national maritime security made it clear that in developing the *National Strategy for Maritime Security* (NSMS) the United States will act consistently with international and U.S. law. The NSMS opens its chapter on “strategic objectives” by quoting the presidential directive to “take all necessary and appropriate actions, consistent with U.S. law, treaties, and other international agreements to which the United States is party….”

But even if the higher level strategy documents were silent on the role of law, a maritime strategy that acknowledges the importance of law as an ordering force and a unifying theme for the crucible of international relations—in short, the “center” Yeats longed for—will be far more compelling and durable. Such a document would also be a source of pride and inspiration for the members of our armed forces, a confidence building measure for our friends and allies, and a key enabler in our ability to shape the future global order.

**Law as an Ordering Force**

The United States has a long tradition of calling upon international law when it serves the national interest. In the late 18th and early 19th centuries, the infant republic raised international law objections to Great Britain’s boarding of U.S. vessels on the high seas and impressment of U.S. sailors into the Royal Navy, and against the Barbary states for piratical attacks on U.S. merchantmen in the Mediterranean Sea and its approaches. Two other disputes between the United States and Great Britain—leading respectively to *The Caroline* exchange of notes and the *Alabama* arbitration award—produced enduring international principles well-known to this audience. More recently, the nation invoked international law against Iran for breaching the inviolability of the U.S. embassy in Tehran and holding U.S. diplomatic personnel and other citizens hostage, and against the People’s Republic of China for its conduct when a U.S. Navy EP-3 was forced to land on Hainan Island following a mid-air collision with a Chinese fighter.

Although national interest is surely the midwife of security policy and strategy, at the same time states have repeatedly demonstrated their willingness to cooperate with other states to achieve common goals or resolve common problems. Globalization and its just-in-time and just-enough logistics imperatives have fundamentally altered the strategic calculus, virtually mandating a cooperative approach to maritime security. Accordingly, the new maritime strategy must be mindful of national interests and ever-alert to shared interests. A strategy that narrowly focuses on national interests while turning a tin ear to the interests of other states will surely reinforce existing perceptions of the United States and drive away potential partners. By contrast, it takes but little imagination to see that a new maritime strategy that defines and articulates in compelling terms a framework for achieving shared goals and joint solutions to common problems is much more likely to make other states want to flock to the nascent 1,000 ship navy.
Finding common ground among national interest should not be difficult. For some, the need to promote and protect the international trade and transportation system on which the globalized and energy-hungry world depends is a vital national interest. It is also a shared interest. In the words of some “commerce craves security.” For other states, particularly those in West Africa, South America and Southeast Asia, protecting offshore fisheries from poachers is more a matter of survival than profit. Still other states consider threats to the environment as national “security” issues. Consider, for example, small island developing states, for whom global warming and its attendant rise in the sea level presents an existential threat. A strategy that promotes and protects sustainable and equitable access to marine living resources and the marine environment is sure to have broad appeal. At the same time, however, none of these interests can be obtained if the larger system is fraught with disorder and violence.

Professor Colin Gray concludes that “order is the prime virtue; it is the essential prerequisite for security, peace, and possibly justice. Disorder is the worst condition.” The spread of terrorism and weapons of mass destruction threaten chaos, as effective power shifts away from states to non-state actors and super-empowered individuals. To the extent that civilization rests in part on the control of violence, and the growing capacity of non-state actors to inflict such violence now casts a menacing shadow over the planet, the role of law as the deep stratum undergirding international security becomes more apparent and more urgent. Law has the potential to serve as the indispensable binding force to check and perhaps reverse our social and institutional entropy. If the states’ grip on law lessens, and states become increasingly prone to use military force, the binding force so vital to civilization may be fatally weakened.

In a geostrategic environment everywhere characterized by growing uncertainty, rapid change and instability, rule sets can promote greater predictability and stability. But rule sets must be given the level of respect and enforcement necessary for credibility or no state will be willing to rely on them. Rule sets like the U.N. Charter, LOS Convention, anti-terrorism treaties and the nonproliferation regime can increase order, but only if they are complied with. We recognize that not all states and non-state actors will voluntarily comply with the rule sets, whether the rules under consideration are those relating to nonaggression and nonproliferation or to trafficking for profit. If voluntary compliance falls short, we must work to redouble our efforts to restore compliance to the levels necessary for public order. That may come through presence, education, deterrence, capacity building of states or of global or regional international organizations. But make no mistake, while each of these approaches will be vital to our success, they will likely never be sufficient unto themselves to provide the needed level of security in the coming years. Even if, as Thomas Hobbes warned, “covenants, without the sword, are but words and of no strength to secure a man at all,” even the most committed contrarian would not counsel us to turn our backs on covenants. For that reason, it is vital that the maritime strategy provide a rule-based approach for enforcing the global legal order. You might have heard about one blueprint for such an approach: the global maritime partnership, known more colloquially as the multinational 1,000 ship navy. I will say more about that in a moment.
In considering enforcement approaches I would like to suggest to you that effective enforcement of global rule sets will require a new way of thinking that transcends the so-called “DIME” construct. The DIME approach, which looks to the state’s diplomatic, information, military and economic “instruments of national power,” is too narrow for a global environment in which non-state actors pose significant, even existential risks to states. This Cold War artifact, which is currently taught at U.S. war colleges, assumes that only a narrow set of instruments are available and that they will be used against states. In the post-Cold War, post-9/11, post-Bali, Madrid, London subway and Lebanon 2006 world, it is clear that instruments of national power will increasingly be used against non-state actors, like Al Qaeda, Hezbollah and transnational criminal syndicates, and that the DIME approach is not always well suited to them. The United States already reaches well beyond the DIME framework, using a variety of leadership, managerial, institutional, cultural, technological, law enforcement, judicial and financial measures, such as freezing assets. Some of the rule violations that threaten public order are and will remain “M” issues. But many are “enhanced L” issues, calling for enhanced law enforcement measures. This broader, meta-DIME framework, if you will, will be vital to any maritime strategy; certainly for the Coast Guard and other interagency players with maritime safety and security missions. The new strategy must acknowledge that without the Coast Guard U.S. maritime forces will not have a seamless approach to maritime security, for without them the strategy will lack the only alternative “end game” to killing your adversaries or detaining them in Guantanamo Bay: arresting and prosecuting them. The Coast Guard puts the “L” (law enforcement) factor in what is otherwise a limited DIME tool kit for addressing many of our maritime security problems.

Law as a Unifying Theme

Several of the outside experts engaged in the maritime strategy development process hosted by the Naval War College highlighted the need for the new document to include a “compelling narrative” that will ensure it is read and studied. How do you select a theme that will counter the many centrifugal forces, unify the elements of the strategy, and serve as the leadership spark and catalyst to bring together the three maritime services with overlapping yet unique identities, the other interagency players so essential to the mission, and international friends and allies, while at the same time winning over or at least muting intergovernmental and nongovernmental organizations? I suggest that law and its proven, albeit imperfect, capability to promote order, security and prosperity can be a powerful unifying theme and force in the new maritime strategy in the globalized, media-sensitive world in which we find ourselves. In fact, the new strategy has the potential to go a long way toward rehabilitating the reputation of the United States as an overweening scofflaw, producing benefits well beyond the three services involved.

Global security requires global cooperation and, for many, law provides the language and logic of cooperation. Adherence to shared rule sets can be an effective unifying force. Some would go so far as to say it is now imbedded in the cosmopolitan DNA. For that reason, an explicit embrace of the rule of law could prove to be one of the most attractive features of the new maritime strategy for the Navy’s interagency and international partners. Promotion and implementation of rule sets would give the strategy
internal coherence and broad external appeal. Any strategy that downplays, or still worse
denigrates, international law and international organizations, as does the current National
Defense Strategy of the United States, ill serves the nation’s long term interest. Much of
the world still considers the U.N. the primary if not sole source of legitimacy for the use
of force. A strategy that suggests that military force will be deployed in a manner that
some will conclude violates the U.N. Charter, which prohibits the use of force or even the
threat to use force against the political independence or territorial integrity of a state, will
further isolate the nation.

The importance of common rule sets, based on international law, as a unifying force in
combined operations will not be lost on those who observed the evolution of the
Proliferation Security Initiative and the recent U.N. Security Council resolutions on
proliferation threats to international peace and security. Both make clear that most of the
world will insist on an approach that respects international law.

Early positions taken by then-Under Secretary of State John Bolton at the July 2003 PSI
participating states’ meeting in Brisbane suggested that the United States advocated a
position on boarding foreign flag vessels believed to be transporting weapons of mass
destruction that some other states believed might go beyond what current international
law permits. At their meeting in Paris three months later, several of the PSI participating
states responded to the U.S. opening position with a call for all participating states to
subscribe to a common Statement of Interdiction Principles. The two-page statement
eventually adopted at that meeting, and still in force, twice expresses the participating
states’ commitment that PSI activities will be carried out in a manner consistent with
international law. Similarly, Security Resolutions 1540, condemning proliferation of
weapons of mass destruction to non-state actors, and 1718, applying similar prohibitions
to North Korea, both expressly tie any enforcement measures to the applicable rules of
international law.

Law and the Expectations of Our Partners

Vice Admiral Morgan has been the leading voice in the 1,000 ship multinational navy
concept. Admiral Harry Ulrich, Commander of Naval Forces Europe, espouses a
relatively simple formula for the global war on terrorism: have more partners than your
adversaries have. Does the Global Maritime Partnership need a unifying Global
Maritime Strategy that promises to respect the rules of international law? Many of the
potential 1,000 ship navy partners think so.

In their response to the “1,000 Ship Navy” article by Admirals Morgan and Martoglio,
the naval commanders of France, Ghana, India, Portugal and Spain all referred to the rule
of law or legal considerations. The French commander, for example, observed that any
1,000 ship navy operations must be “in full compliance with the U.N. Convention on the
Law of the Sea.” Portugal expressly referred to the “rule of law,” and India asked
whether the 1,000 ship concept should be established under the aegis of the United
Nations. Admiral Soto of the Spanish Navy observed that “Together we must find a legal
solution to preserving the natural flow of friendly maritime trade while denying freedom
of action to those criminals who attempt to use the maritime space for illegal activities.” It seems clear that respect for international law has the potential to unite or fracture the embryonic 1,000 ship navy.

One year later, many of those same foreign CNO’s were asked to respond to Admiral Mullen’s plan for a new U.S. Maritime Strategy. Once again, international law figured prominently in several of the responses. The Commandant of the Brazilian Navy urged that the new strategy “be guided by principles sanctioned by international law,” a view shared by the Secretary General of the Peruvian Navy and the Portuguese Navy Chief of Staff. Their counterpart in Colombia emphasized the need for an “international legal mechanism of cooperation.” Uruguay’s reply was also directly on point: “Multilateral cooperation among navies is legitimate activity when it is based on the law.” The Commander of the Lebanese Navy cited the Law of the Sea Convention and cautioned against the United States acting alone, while the new Chief of Staff for the Spanish Navy highlighted the need for the U.S. Navy “to operate alongside its allies in accordance with international law.” The Australian Maritime Doctrine elegantly and forcefully captures the central importance of law and legitimacy for one of America’s most respected partners:

… Australia’s use of armed force must be subject to the test of legitimacy, in that the Government must have the capacity to demonstrate to the Parliament and the electorate that there is adequate moral and legal justification for its actions. [T]his adherence to legitimacy and the democratic nature of the Australian nation state is a particular strength. It is a historical fact that liberal democracies have been more successful in the development and operation of maritime forces than other forms of government, principally because the intensity and complexity of the sustained effort required for these capabilities places heavy demands upon a nation’s systems of state credit, its technological and industrial infrastructure, and its educated population. Sophisticated combat forces, in other words, depend directly upon the support of the people for their continued existence.

Finally, a bit closer to home, in the 2007 U.S. Coast Guard Strategy for Maritime Safety, Security, and Stewardship, the Commandant of the Coast Guard, who you will recall will be asked to join in the coming maritime strategy, has clearly identified the need to update and strengthen maritime regimes to address emergent threats and challenges and that support U.S. ocean policy. More specifically, the Commandant has concluded that the “nation needs a set of coordinated and interlocking domestic and international regimes that … balance competing uses within the maritime domain” and that “Strengthened rules, authorities, and agreements … enable consistent, coordinated action on threats and provide an acceptable framework of standards that facilitate commerce and maritime use.” The lessons seem plain: A Navy-led maritime strategy that similarly acknowledges the important contributions of rule sets to promoting public order is far more likely to attract the support of interagency and international partners.

Law and Our Opportunity to Shape and Influence
We here all understand that the law is not complete, nor is it perfect. We also know that it can and will be influenced, adapted, developed, clarified and explained—in other words, shaped—in the coming years. Who will be most influential in the law development enterprise? Those who embrace the rule of law, while working to remedy its shortfalls, or those who sullenly turn their back on the enterprise?

In his 2006 Current Strategy Forum remarks, Admiral Mullen cited as two of the nation’s three enduring naval strengths the capacity to “influence” and “to build friends and partners.” The legal experts had something to say about both. There seemed to be widespread agreement among the experts that it is not enough to simply know and follow the rules of international law; there is also an urgent need to shape those rules. For example, leadership on freedom of navigation—for warships and the commercial vessels on which those warships and the global economy depend—will be crucial in the coming years. Some of experts’ assessments reveal the magnitude of the coming challenge to shape international maritime law on navigation issues:

- 38% of the experts believe that the regime for innocent passage in the 12 mile territorial sea will not remain stable between now and 2020. When they were asked the same question about transit passage through international straits and archipelagic sea lanes passage, the numbers went up to 41% and 51% respectively.

- 95% of the experts believe that in the coming years more states will claim the right to exercise jurisdiction and control over military activities in their 200 mile exclusive economic zones.

The legal experts widely agreed on the need for effective leadership to preserve navigation rights. To lead on freedom of navigation, or any other law of the sea issue, it is critical that the United States become a party to the 1982 LOS Convention and participate in the United Nations’ annual law of the sea processes. To encourage others to respect those parts of the rule set about which we are most concerned—the navigation rights of warships/military aircraft and the nonproliferation regime, for example—we must be clear that we respect the entire rule set, as consented to by each state, including the provisions that might seem less important to us, but might be of far greater importance to other states. We cannot hope to “shape” the global or regional legal order unless we are a good faith participant in the system. After all, why would any state acquiesce in letting us define a rule set if they know that we intend to later exempt ourselves from it?

At the same time, there is growing concern that law is increasingly used by less powerful states and by non-state actors as an asymmetric instrument to discredit or otherwise balance against more powerful states, even proclaiming that less powerful states are not bound by the same rules. It has been observed that less powerful states respond to sea control strategies by more powerful adversaries by employing sea denial strategies and tactics. Naval mines commonly come to mind; but lately “lawfare” strategies that seek to restrict the navigation rights and freedom of action of powerful states, by exerting pressure on them to bind themselves to new legal regimes, or by employing existing legal
regimes to discredit the more powerful state. As Professor Davida Kellogg at the University of Maine has argued forcefully, the response to such tactics must not be a reflexive denigration of law, but rather a decisive and well reasoned rejoinder that unmasks this abuse of the law.

The new maritime strategy will almost certainly have an effect on the law by what it says—or does not say—about the role of law in modern maritime security operations. As Professor Vaughan Lowe points out, in a system where international law is made in part by state practice, navies make international law every day by what they say and what they do. At the same time, and for the same reason, it will affect the ability of the United States to influence the future direction of international regimes and organizations. The Navy can create or ease friction by what it says or does not say about the law in the new strategy and enhance or erode its credibility and therefore its effectiveness as a shaping influence.

**Law and Preserving and Enhancing the Service Ethos**

At an early Naval War College session involving veterans of prior Navy maritime strategy drafting teams, Professor Roger Barnett spoke of the importance of understanding the Navy’s culture in crafting any capstone strategy document. That culture, it seems to me, plainly includes a sensitivity to international law. In describing the most desirable qualifications for a naval officer, Captain John Paul Jones wrote that the “naval officer should be familiar with the principles of International Law…because such knowledge may often, when cruising at a distance from home, be necessary to protect his flag from insult or his crew from imposition or injury in foreign ports.” U.S. Navy Regulations have long codified the requirement for its members to comply with international law. Compliance is facilitated by a proactive training and education program.

International law was among the first subjects taught in the opening days of the Naval War College in 1884 and the Naval War College is still the only war college in the United States to have an independent International Law Department. The first civilian appointed to the faculty was James R. Solely, appointed in the Foundation Year of the College to teach international law. The first academic chair established at the Naval War College was the Chair in International Law, established on July 11, 1951, and filled by Harvard’s Bemis Professor of International Law and Permanent Court of International Justice judge Manley O. Hudson.

I believe that our personnel have a right to expect that their capstone strategy will honor the rule of law. We have a new generation of men and women who are drawn to the all-volunteer forces by a combination of pride, patriotism and the need for self affirmation. They are at their best when they believe in themselves, their service and their nation. Our accession programs and ceremonies emphasize respect for law and principle. The oath of office for military officers includes a pledge to support and defend the Constitution of the United States—not a monarch, but rather a body of law. The core principles of the Navy, Marine Corps and Coast Guard all highlight the importance of
honor, which for Marines expressly includes the obligation to respect human dignity. Those creeds also recognize the importance of courage; one version expressly includes “moral courage,” describing it as the inner strength to do what is right and to adhere to a higher standard of conduct. The service members who take these oaths and are moved by these creeds represent our nation’s finest, and they deserve to know more than merely how and where they will fight; they deserve to know why they fight—that is, the principles they are being asked to support and defend. The Navy lieutenant junior grade leading her boarding team onto a freighter in the Persian Gulf during a PSI operation and the battalion landing team sergeant major ordering his Marines into the LCACs and CH-46s to execute a non-combatant evacuation operation should both be able to see their core values reflected in the maritime strategy that sent them on their mission.

CONCLUSION

The decision by the Naval War College to integrate faculty from the college’s International Law Department and outside legal experts into the strategy development process wisely ensured that the core strategy development team had access to a thoughtful and informed assessment of the future global legal order. Legal participation in the process by no means assures that the law will play a role in the new strategy, but there’s every reason to believe that it will.

Respect for the rule of law is a signal strength for those who practice it and a vexatious, corrosive and embarrassing source of friction for those who fail to do so. By clearly embracing a position that promises—and demands—respect for the rule of law in the new maritime strategy, the Navy can seize the opportunity to enhance its legitimacy and its ability to attract coalition partners, instill pride in its members and position itself to more effectively shape the global order.

But let there be no mistake: “respect” for the rule of law entails more than the one-sided obligation to obey the relevant laws advocated by asymmetricians. It also means that the Navy will expect others to comply with the law, including those provisions that, in the words of John Paul Jones more than two centuries ago, “protect” the nation, its vessels and aircraft, and their navigation rights and freedoms.

With all the build-up it has been given, the new strategy must not fall short in providing a fresh and proactive approach to a demonstrably new threat environment that has shaken a lot of people’s confidence in the U.S. national security system. It should be a strategy of hope and action, rather than one born of despair and cynicism. Whether you are an idealist aspiring to establish a Shining City on the Hill that reveres the rule of law for its own sake, or a calculating utilitarian methodically calibrating means to ends, there is much to value in a more robust rule of law, forcefully advocated by the three maritime service chiefs. For the Utilitarians, ask the Marines in Fallujah, Ramadi and Kandahar whether the threat environment was better or worse after images of the disgraceful and lawless acts at the Abu Ghraib prison flashed across the Internet and Al Jazeera. While you’re at it, ask them how it affected their pride as American service members. We
cannot always control the behavior our members, but our service chiefs can be firm and unequivocal about the fundamental principles for which we stand.

It must seem to many that the world has not changed much since the inter-war years that drove Yeats to lament the loss of conviction by the best, the rise of passionate intensity by the worst, and the collapse of the “center.” What he left unspoken is the source and nature of that center and how we might fortify it. For many in Yeats’ age, the ordering force to provide that center was to be found in the hopeful vision of a new League of Nations. Their modern counterparts look to the rule of law developed and implemented by forward-thinking states coming together in respected and competent international organizations.

I want to close with a report on informal surveys I conduct each year at my law school. In the first week of classes back in Seattle I ask my students for their views on the “rule of law.” They have so far been unanimous in their approval of the principle, though some are skeptical of its empirical record. But when I then ask them to define the rule of law, their brows furrow and they grow silently pensive. We shouldn’t be too hard on them. Few law school casebooks attempt to describe the rule of law or postulate its force or trajectory. And you will not be too surprised to learn that the Department of Defense Dictionary does not define it. The legal profession has a well earned reputation for persuasive communication. And I believe, as did Alexis de Tocqueville, that we in the legal profession have a special province and duty. If law is the language and logic of global cooperation, we are its most proficient expositors. As such, it is, I believe, incumbent upon us all to embrace the rule of law and its international corollary the pacta sunt servanda norm as our lodestar, as the Center for this tumultuous new century. In short, it is time for us to take the baton from the late Professor O’Connell and advance it steadily forward toward that elusive and asymptotic finish line.

Thank you for you kind attention.