

The Free Sea: The American Fight for Freedom of Navigation (Book Review)

James Kraska and Raul Pedrozo's book is a timely piece of scholarship to facilitate greater understanding about freedom of navigation from American perspective.

In late 2015, the USS Lassen navigated within 12 nautical miles of the reclaimed Subi Reef, which is one of the sources for tensions between China and its neighbors in the South China Sea. Then, at an event hosted by Washington-based Center for Strategic and International Studies on January 27, 2016, Admiral Harry Harris, then Commander of the US Pacific Command, said “[Y]ou will see more of them, and you will see them increasing in complexity and scope”. By February 2019, the US has taken other fourteen freedom of navigation operations (FONOPs) in a variety of modes and locations in the South China Sea.

The FONOPs are always controversial. They are hailed by some but questioned by many others. In the context of increased US-China rivalry, one may wonder whether those FONOPs are merely convenient excuses for the US’ interventions into the South China Sea affairs. If so, how long would the US’ commitment to FONOPs in this area last? Furthermore, because the US is not a party to the United Nations Convention on the Law of the Sea (UNCLOS), what is the legal basis for the US to define the nature and scope of freedom of navigation (FON)? Notably, it is a customary rule that all states enjoyed freedom of navigation in the high sea, but it is obscure on whether one state's warships would have the right of innocent passage in other states' territorial seas.

Against that background, *Free Sea: The American Fight for Freedom of Navigation* co-authored by James Kraska and Raul Pedrozo is a timely piece of scholarship to facilitate greater

understanding about freedom of navigation from American perspective. The authors argue that the American freedom of navigation is consistent with UNCLOS as stated, “All ships, including warships, enjoy the right of innocent passage through the territorial sea of coastal states” (p. 224) and “all nations enjoy the right to traverse the high seas and ocean without hindrance” (Atlantic Charter 1941). Overall, the book elaborates how the US has made significant contributions to the establishment and operationalization of the FON principle.

Along this line, drawing extensively on the American primary and secondary sources, the book chronologically narrates eleven anecdotes about challenges to the US’ interests in the span of over 200 years, from the birth of a fragile federal nation to the established major power under Donald Trump's leadership. Those challenges varied from piracy’s ransom requests for merchant ships (the Barbary Wars), to the seizures of American ships during wars and armed conflicts (the Quasi-War, the War of 1812, the SS Mayaguez Incident), to attacks against US intelligence-collecting naval ships (the Gulf of Tonkin Incident and the USS Pueblo Incident), to the blockade of access to strategic seas (The Black Sea Bumping Incident, the Persian Gulf, the Gulf of Sidra and the South China Sea). As argued, those events had considerable implications for the US’ contemporary naval operations and its foreign posture. As early as the 1790s, Barbary pirates’ seizure of American merchant vessels prompted the construction of the first American warships in 1794. In 1915, the sinking of the *Lusitania*, a passenger liner carrying the US and British citizens by a German submarine entangled US in World War I. In 1968, North Korea’s capture of the *USS Pueblo* changed the US Navy’s intelligence gathering method. Meanwhile, the alleged Gulf of Tonkin attack was a “blank check” resulted in the US’ decade-long engagements in Vietnam (Chapter 2).

The eleven accounts altogether denote an evolution of the FON doctrine throughout three centuries of which the Americans are portrayed as the key architects. FON used to be very different from those which are codified in UNCLOS 1982. In the 18th and 19th centuries, FON

was not an automatic and equal right for every state. One party to a war might seize neutral merchant vessels traversing the sea on the charge that they were hired to ship “wrong” cargoes for the adversary. As a neutral state in major wars in Europe, Washington was keen on establishing the “freedom of neutral states to use the seas during times of war” (p.78). In 1917, US President Woodrow Wilson also made efforts to establish FON as “a peace-time right of all states” (p.78). His Fourteen-Point proposal laid the foundation for the establishment of the League of Nations that served as the key platform for universalize FON principle.[\[1\]](#)

Based on such an extensive body of empirical evidence, the book argues that the today's FON principle is the culmination of the long-standing struggle for common prosperity. The fight for FON has shaped the US as a global power and provided impetus to build a strong, modern naval force for the purpose of “maintenance of the world system” where seas are “open to all men, its use common to all” (p.4). To this end, the authors suggest that US should increase investments in its naval build-up to conduct routine air and naval patrols, invoke strong counter-measures against China, Russia and Iran or any states which impede the customary rule of FON and more importantly. They also call for the US ratification of UNCLOS in the earliest convenience.

For those who are curious about FONOPs in the South China Sea, the book is informative and helpful. Chapter 11 elaborates the debate between the US and China on the legal competence of a coastal state over foreign military activities in its EEZ. They explore in details two case studies involving China’s interference with American warships and military aircrafts, namely Chinese fighter jets’ interception of the US EP-3 maritime surveillance aircraft in 2001 and China’s maneuvers to prevent US naval ships from conducting surveys in the East China Sea, Yellow Sea and South China Sea. In those incidents, the US is of the view that foreign states’ military crafts enjoy the right to conduct military activities in one coastal state’s Exclusive Economic Zone like in the High Sea as long as those operations are in line with “international peaceful uses of the seas”. Meanwhile, China argues that coastal states enjoy exclusive jurisdiction over foreign

vessels' activities in its EEZ and territorial sea. According to the authors, it is no way right interpretation. The debate is even more contentious in the context of the South China Sea, where China has excessive maritime claim and disputes with neighboring states over offshore features. Those events triggered heated debate on the legality of China's nine-dash line claim and the legal regime applied to those offshore features. These questions were subsequently answered by the ruling of the *South China Sea Arbitration* of July 12, 2016.

Kraska and Pedrozo also argue that FONOPs has helped preserve navigational rights and freedom for all nations. FONOPs were instrumental to modify behaviors of the Soviet Union, Libya and Iraq. The most successful case was the agreement on "The Uniform Interpretation of Rules of International Law Governing Innocent Passage" signed by the Soviet Union and the US, stating that "all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required". The book also pointed to the costly mistake that the US made in the Gulf of Sidra, where the US' allies got confused and ignored its efforts in upholding FON. Though never being free from criticism as well as unprofessionalism, FONOPs have generated invaluable public goods and the US Navy will continue their FONOPs for its sake.

But for those who are skeptical of FONOPs, there have been questions over their effectiveness. Despite certain favorable outcomes elsewhere, FONOPs are yet effective in constraining China's behavior in the South China Sea. Firstly, all of the previous cases are long lasting conflicts and confrontations and tragic events marked as turning points. Such a scenario is not desirable in the South China Sea. Secondly, in those cases, FONOP was a part of a larger strategy employing various measures to restore order at sea; in the South China Sea, FONOPs alone are not sufficient. Thirdly, as indicated in the book, the success and failure of FON were by and large counted on personal inclination of the leadership in Washington. Jefferson, Wilson and Reagan were honored

as heroes, while some may be no up to the task. The current leadership in Washington has yet shown reliable commitment to uphold the legal order in the South China Sea.

The book stressed the need to renovate the US Navy. It is practical and rational as the US naval force is facing unprecedented challenges in the Indo-Pacific region. First, the case for continuing FONOPs is strong as US adversaries increased assertiveness. Second, the US Navy serves as the backbone of American reassurance to regional allies and partners. Third, the US Navy needs technological advancements to maintain supremacy. Historical evidence shows the arrival of new technologies would not only open up new frontiers but also generate newfound disputes in the legal fronts. The authors strongly recommended further enhancement of maritime domain awareness, modernization of weapons, and improvements in intelligence collection.

In general, the authors showed efforts to strike a balanced view. They apparently refrained from deifying the American fights for freedom of navigation. Instead, both successes and failures are discussed. All the cases point to a fact that the US always struggled inside and outside to shape and to uphold freedom of navigation. It is all the matter of choice. The book would have been more convincing if it included some doctrinal analysis to dissuade the view that the US 's choices were heavily colored by the New Heaven School, which considers international law a pragmatic and short-lived tool to implement foreign policies serving the US' own interests.

The book is in line with recent literature works that underline the US perspective in global governance, which put emphasis on “the maintenance of the world system, rather than the narrow pursuit of simple national interest” (p.4). It is also aimed to demonstrate that the US is a “steward of the global common” who struggles for an “international system in which peace and prosperity can flourish” (p.2). The book provides additional, but valuable, insights into the US thinking for those who work in the field of oceanic law and governance. Many people may have never critically questioned how the current legal order at sea was made and therefore, regretfully did take it for granted.

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[1] The context could well explain to international law students about why the *SS Lotus* case finding: “[V]essels on the high seas are subject to no authority except that of the State whose flag they fly” (PCIJ Series A 1927 No. 9 at p. 25) was considered a milestone in 1927.