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The *NSLQ* welcomes submissions from every branch of the U.S. Armed Forces and international partners. Submissions may be in the form of a first-person account, law review, after-action review, or an account of lessons learned. Each submission must be a Microsoft Word file, single-spaced, and in 11-point Arial font. Authors should submit articles ranging from 1,500 to 7,000 words, but exceptions will be considered on an individual basis. Submissions should adhere to *The Bluebook: A Uniform System of Citation* (21st ed. 2020), but we offer editorial assistance as we understand that authors may have constraints on their time.Submissions should be reviewed for public release. Submissions must be submitted via email to the editor-in-chief or to the CLAMO email at usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@army.mil.

THE NATIONAL SECURITY LAW QUARTERLY

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By Order of the Secretary of the Army:

RANDY A. GEORGE
General, United States Army
Chief of Staff

Official:

MARK F. AVERILL
Administrative Assistant
to the Secretary of the Army
2511803

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ARTICLES

CLAMO Director Introduction

LTC Michael H. Lamphier, USA
Director, CLAMO

Welcome to the second 2025 edition of National Security Law Quarterly, Volume 25-2. This is the second edition as an official Army publication! CLAMO thanks all of the authors of the enclosed articles who realize that "supporting the warfighter" through relevant scholarly discussion is one way we all can steward the profession.

This quarter CLAMO welcomed back Capt Mitchell McCulley, USMC, from deployment to CJTF-HOA. We farewelled the CLAMO NCOIC, 1SG Trey Angle, who is now serving as the First Sergeant for the Direct Commission Course at Fort Benning, GA.

In March, members of CLAMO participated as legal advisors at "Set the Globe 2025" in Suffolk, VA. The purpose of the exercise was to conduct a first ever global sync of multiple and simultaneous Tier 1 exercises utilizing a common problem set and story line. The training audience consisted of 5 geographic CCMDs and 3 functional CCMDs.

In the first week of April, TJAGLCS hosted the Domestic Operations Short Course. Over 100 participants from different components came to Charlottesville, VA to learn about the foundational legal elements of Defense Support of Civil Authorities, the national response framework, and homeland defense.

As CLAMO continues to monitor the DoD's support to the Southern Border through its participation in weekly multi-agency meetings, we ask the field to contribute articles and send over best practice tips related to it.

CLAMO's newsletter, the Monthly Awareness Push (MAP) continues to grow. Sign up now by emailing us! Also, continue to email us your if you are interested in publishing in the NSLQ or want to share articles via the MAP: usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@army.mil

Remember to always Support the Warfighter.
Publishing is "A" way.

Loose Lips Sink Submarines: Can Congress Reveal America's Secrets?

By Maj Marc D. Jessup, USMC

The American submarine campaign against Japan during World War II was a decisive factor in the duration and outcome of the war.[1] In the immediate aftermath of Pearl Harbor, submarines were the United States' only substantive strategic weapon, and over the war's course, the submarine force – comprising approximately 1.6% of the entire United States Navy – accounted for over 50% of all Japanese tonnage sunk.[2] The historical record of this epic campaign is replete with courage and triumph but also tragedy and controversy.

A lesser-known controversy concerns the revelation of a formidable secret: American submarines could dive deeper than the Japanese knew.[3] This proved a substantial advantage because the Japanese Navy set their depth charges to detonate much shallower than they should have had they known.[4] In June of 1943, Congressman Andrew May revealed this decisive secret.[5] In a press conference following a wartime tour, Congressman May "said, in effect, don't worry about our submarines; the Japanese are setting their depth charges too shallow."[6] Reports of his press conference were widely and carelessly reported.[7] After the war, Vice Admiral Charles Lockwood, who served as Commander, Submarine Forces, Pacific from early 1943 through the end of the war, estimated that May's thoughtless remark condemned ten American submarines and 800 sailors.[8] This historical footnote prompts an important, unresolved question: can Congress reveal America's secrets? Or, more academically, can the legislative branch disclose information the executive branch has classified?

As with all questions of national security powers, inquiry begins with the Constitution but swiftly moves on. The Constitution does not exhaustively allocate national security authority but vaguely disperses it between the executive and the legislative branches.[9] Where the President is the "Commander in Chief" and has a major role in conducting America's foreign affairs,[10] Congress also wields formidable authority, from declaring war to regulating the military.[11] Accordingly, the Constitution ordains national security as a cooperative enterprise with authorities split between the executive and legislative branches.[12]

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[1] *See* CLAY BLAIR JR., SILENT VICTORY: THE U.S. SUBMARINE WAR AGAINST JAPAN 17-18 (1975); *see* David Vergun, *Submarine Warfare Played Major Role in World War II Victory*, DOD NEWS (Mar 16, 2020), https://www.defense.gov/News/Feature-Stories/Story/Article/2114035/submarine-warfare-played-major-role-in-world-war-ii-victory/.
[2] James M. Scott, *America's Undersea War on Shipping*, NAVAL HISTORY, Dec. 2014 (Vol. 28, No. 6), https://www.usni.org/magazines/naval-history-magazine/2014/december/americas-undersea-war-shipping; *see* BLAIR, *supra* note 1, at 877-79.
[3] *See* BLAIR, *supra* note 1, at 424; *see* Blake Stilwell, *How a Congressman's Press Conference Killed 800 US Sailors*, WE ARE THE MIGHTY (Apr. 29, 2020), https://www.wearethemighty.com/mighty-tactical/congressman-deadly-press-conference/.
[4] *See* BLAIR, *supra* note 1, at 424; *see* Stilwell, *supra* note 3.
[5] BLAIR, *supra* note 1, at 424; Stilwell, *supra* note 3.
[6] BLAIR, *supra* note 1, at 424.
[7] BLAIR, *supra* note 1, at 424; Stilwell, *supra* note 3.
[8] BLAIR, *supra* note 1, at 424.
[9] *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
[10] *See* U.S. CONST. art. II, § 2.
[11] *See* U.S. CONST. art. I, § 8.
[12] *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 7-8 (7th ed., 2020); *see Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

The arbiter of these branches, the Supreme Court, prompts the next tier of consideration. While the Supreme Court has never squarely addressed this question, two cases include relevant dicta. In *Department of the Navy v. Egan*, the court considered whether the Merit Systems Protection Board had authority to review a decision to deny a security clearance.[13] Answering in the negative, the court associated the "authority to classify and control access to information bearing on national security" with the President's "Commander in Chief" authority.[14] However, the court stopped short of total executive deference, acknowledging, "*unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."[15] Congress has occasionally "provided otherwise"[16] in matters of national security – even going so far as to manage tactical aspects of the executive's warfighting enterprise[17] – but not on this specific matter; thus, the court deferred to the executive.

The other case casting a shadow on this subject is *Environmental Protection Agency v. Mink*.[18] The respondent was Congresswoman Patsy Mink, who filed an action under the Freedom of Information Act (FOIA) for executive branch records regarding nuclear testing after the President refused a direct request for the information.[19] Part of the court's opinion addressed FOIA Exemption 1, which precludes disclosure when the material sought is classified.[20] In ruling for the government, the court, referencing FOIA's legislative history, pointed out that *Congress* left this exemption to the executive branch's discretion.[21] Since the records the government claimed under Exemption 1 were properly classified, the court concluded they were beyond FOIA's reach.[22] However, in drawing this conclusion, the court was careful to note that Congress could have selected a different test or criteria for withholding,[23] "strongly indicating that [] (de)classification is not the *exclusive* prerogative of the executive."[24]

Beneath the Supreme Court, the vying positions of the executive and legislative branches warrant examination, albeit cautiously. Since both branches have a biased interest in the scope of their authority, their positions don't command the deference – let alone constitutional authority – of judicial branch determinations. Not

[13] 484 U.S. 518, 520 (1988) (The respondent, Thomas Egan, was hired by the Navy to work on nuclear submarines and thus the loss of a security clearance imperiled his job).
[14] *Id.* at 527.
[15] *Id.* at 530 (emphasis added).
[16] *Id.* at 530.
[17] *See Little v. Barreme*, 6. U.S. 170 (1804) (During the Quasi War with France, Congress authorized the seizure of American ships sailing *to* French ports. At issue was the seizure of a ship sailing *from* a French port. This seizure was in keeping with a directive from the Secretary of the Navy ordering the Navy to "prevent all intercourse, whether direct or circuitous, between the ports of the United States, and those of France or her dependencies [for covered vessels]." The court concluded that the seizure was unlawful; despite (wise) executive direction to the contrary, Congress had limited the executive's hand – only seizures of vessels sailing *to* French ports were lawful.); *see* DYCUS, *supra* note 12, at 63.
[18] 410 U.S. 73 (1973).
[19] *Id.* at 74.
[20] *Id.* at 81-85; *see* 5 U.S.C. § 552(b)(1) ("This section does not apply to matters that are- (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.").
[21] *Id.* at 81 ("Congress chose to follow the Executive's determination in these matters and that choice must be honored.").
[22] *Id.* at 85.
[23] *Id.* at 83 ("Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures -- subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering.").
[24] Sarah Levine & Simon Brewer, *Devin Nunes and the Chamber of Secrets: Congress's Power of Declassification*, YALE LAW SCHOOL, MEDIA FREEDOM AND INFORMATION ACCESS CLINIC, CASE DISCLOSED BLOG (Mar. 1, 2018), https://law.yale.edu/mfia/case-disclosed/devin-nunes-and-chamber-secrets-congresss-power-declassification (emphasis added).

surprisingly, disagreement between the two obtains.

Congress believes it has authority to reveal classified information to the public.[25] This is reflected in the current House and Senate rules.[26] In the House, the Permanent Select Committee on Intelligence is authorized to disclose classified information to the public on majority vote of the committee.[27] However, before disclosure, the committee notifies the President of the vote.[28] This triggers a five-day clock.[29] If the President "personally in writing" objects to the proposed disclosure, "provides reasons therefor," and certifies that the national security threat of disclosure outweighs the public interest in the information" within five days, then the committee may not disclose the information.[30] Anything short of such a response permits the disclosure.[31] In the event of a proper objection, the committee may refer the matter to the House; if the House votes to disclose the information, then the committee may disclose it (*despite* the President's objection).[32] Curiously, the rule contemplates the potential release as *disclosure* of information rather than *declassification*;[33] it is unclear what import (if any) this distinction has.[34]

The Committee Rules for the Senate Select Committee on Intelligence contemplate a similar power and cite a 1976 Senate Resolution as authority.[35] This 1976 Resolution provides essentially the same procedure as the House rules reflect.[36] Despite these rules, Congress has never relied on them to disclose classified information to the public over executive objection.[37]

In addition to these internal procedures, Congress has directed declassification by statute.[38] A recent example is the COVID-19 Origin Act of 2023, which required the Director of National

[25] CONGRESSIONAL RESEARCH SERVICE, IF12183 PROCEDURES FOR DECLASSIFYING INTELLIGENCE OF PUBLIC INTEREST (2022) [hereinafter CRS IF12183].
[26] *Id.*; Levine & Brewer, *supra* note 24.
[27] H.R. Res. 8, 117th Cong. Rule X, Clause 11(g)(1) (2021).
[28] H.R. Res. 8 at Rule X, Clause 11(g)(2)(A) (2021).
[29] H.R. Res. 8 at Rule X, Clause 11(g)(2)(B)&(C) (2021).
[30] *Id.*
[31] H.R. Res. 8 at Rule X, Clause 11(g)(2)(B) (2021).
[32] H.R. Res. 8 at Rule X, Clause 11(g)(2)(C) (2021); Levine & Brewer, *supra* note 24 ("If the President objects, a majority vote by the Committee may then take the issue to the House for a final vote. If the House votes affirmatively, the information may be disclosed despite Presidential opposition, and without putting the question to the Senate.").
[33] H.R. Res. 8, 117th Cong. Rule X, Clause 11(g) (2021).
[34] *See* Katherine R. Seifert & Carter Burwell, *A New Say in Secrecy: Congress Takes up Classification Reform*, LAWFARE (Dec. 14, 2023), https://www.lawfaremedia.org/article/a-new-say-in-secrecy-congress-takes-up-classification-reform ("[t]his distinction may be of limited practical effect, but it could be legally important—congressional release of information that is still classified may give rise to liability under the Espionage Act, assuming the circumstances of disclosure do not fall within the scope of the Speech or Debate Clause.").
[35] SENATE SELECT COMM. ON INTEL, 112TH CONG., RULES OF PROCEDURE FOR THE SELECT COMMITTEE ON INTELLIGENCE UNITED STATES SENATE (comm. print; as amended Feb. 15, 2011); S. Res. 400, 94th Cong. § 8 (1976).
[36] S. Res. 400, 94th Cong. § 8 (1976); CRS IF12183, *supra* note 25, at 1 ("Standing rules of the Senate Select Committee on Intelligence (SSCI) give the committee the authority to declassify and publicly disclose information in its possession, after a vote affirming that the disclosure would serve the public interest. . . . This procedure, however, gives the President an opportunity to object in writing to the disclosure within a five-day window of being notified of the SSCI vote. The President must provide the reasons for why the national interest in keeping the information classified outweighs the national interest. In such instances, the question of disclosure is referred to the entire Senate in closed session for consideration. The Senate can approve or disapprove the disclosure [or refer the matter back to the SSCI].").
[37] Seifert, *supra* note 34.
[38] *E.g.*, in 2022 Congress used the Consolidated Appropriations Act to compel the Director of National Intelligence (DNI) to review classified information related to the September 11, 2001 terrorist attacks for appropriate declassification in the interest of the public. This, of course, stopped short of a unilateral Congressional declaration making certain classified information available to the public since it afforded the DNI discretion to determine what information "can be appropriately declassified and shared with the public." Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, Division X, § 310, 136 Stat. 49, 972 (2022) (codified at 50 U.S.C. § 3161 note ("Director of National Intelligence Declassification Review of Information Relating to Terrorist Attacks of September 11, 2001")).

Intelligence to "declassify any and all information relating to potential links between the Wuhan Institute of Virology and the origin of the Coronavirus Disease 2019," including a variety of specifically-identified information.[39] However, the Act did not slip by without (nuanced) executive protest.[40] Shortly after its passage, the President released a statement that, read closely, appears to rebuff Congress's authority to direct the declassification involved; "[i]n implementing this legislation, *my Administration will declassify and share as much of that information as possible, consistent with my constitutional authority* to protect against the disclosure of information that would harm national security."[41]

Finally, there is an argument that members of Congress may claim the protections of the Speech or Debate Clause[42] to read classified information into the record of Congress or include it in the text of a bill.[43] This argument may seem like a stretch, but it has historical precedent. In 1971, Senator Mike Gravel read sizeable portions of the *Pentagon Papers* into the congressional record and placed all the written material in the public record.[44] Separately, Gravel also released and published the material; this prompted a criminal investigation and court proceedings to quash a related subpoena that eventually culminated in a Supreme Court case.[45] The court concluded that the Speech or Debate Clause did not protect this separate act – the commercial arrangements to publish the material;[46] however, the court acknowledged the Clause's generous protections for legislative activity within Congress that is an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[47] This suggests that disclosure of classified material under the protections of the Speech or Debate Clause will withstand contrary rules when the disclosure "is an integral part of [Congress's] deliberative and communicative processes."[48] In summary, there are three potential avenues for Congress to publicize information the executive branch has classified: (1) via the disclosure process in the House or Senate rules; (2) through lawmaking; or (3) by

[39] COVID-19 Origin Act of 2023, Pub. L. No. 118-2, § 3, 137 Stat. 4, 4-5 (2023) (codified at 50 U.S.C. § 3161 note ("Declassification of Information Related to the Origin of COVID–19")).
[40] *See* Press Release, President Joseph R. Biden, Jr., Statement by the President on S. 619, the COVID-19 Origin Act of 2023 (Mar. 20, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/20/statement-by-the-president-on-s-619-the-covid-19-origin-act-of-2023/#:~:text=619%2C%20the%20COVID%2D%E2%81%A019%20Origin%20Act%20of%202023&text=Today%2C%20I%20am%20pleased%20to,2019%20(COVID%E2%80%9319).
[41] Press Release, *supra* note 40 (emphasis added).
[42] U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. *They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest* during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and *for any Speech or Debate in either House*, they shall not be questioned in any other Place." (emphasis added)).
[43] Keven Kosar & Daniel Schuman, *Can Congress Access Classified Information?*, UNDERSTANDING CONGRESS PODCAST, AMERICAN ENTERPRISE INSTITUTE (Sep. 5, 2023), https://www.aei.org/podcast/can-congress-access-classified-information-with-daniel-schuman/.
[44] *Gravel v. United* States, 408 U.S. 606, 609 (1972); Parker Higgins*, Fifty Years Ago Today, Senator Mike Gravel Read the Pentagon Papers Into the Official Record. More Lawmakers Should Follow his Lead*, FREEDOM OF THE PRESS FOUNDATION (Jun 29, 2021), https://freedom.press/news/fifty-years-ago-today-senator-mike-gravel-read-the-pentagon-papers-into-the-official-record-more-lawmakers-should-follow-his-lead/.
[45] *Gravel*, 408 U.S. at 609-11.
[46] *See id.,* at 622-27.
[47] *Id.* at 625.
[48] *Id.*

inclusion within the public record of a proceeding.[49]

Despite these mechanisms, the executive branch holds a dim view of Congressional authority over classified information.[50] The Office of Legal Counsel (OLC) argues the President wields "ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information" that Congress cannot circumvent.[51] A robust discussion of this topic exists in an oft-cited 1998 OLC opinion.[52] At issue was the propriety of two bills proposing different procedures by which intelligence community (IC) whistleblowers could disclose classified information to Congress.[53] The opinion deemed the Senate bill unconstitutional because it would permit whistleblowers to supply classified information *directly* to Congress, notwithstanding any contrary law or rule.[54] However, the opinion found the House bill acceptable because it gave executive branch officers (agency heads) discretion to review and prevent whistleblower disclosures to Congress under certain circumstances.[55] Within the analysis, the opinion recounts a long history of Presidential primacy over classified information, including the authority to *withhold* classified information from Congress.[56]

A more recent OLC opinion on this subject strikes a less unilateral tone, acknowledging that Congress is not entirely precluded from lawmaking "in a manner that touches upon disclosure of classified information."[57] While avoiding a deep

[49] A less direct, but potentially effective alternative to these options is coercion – leaning on the executive to use its own authority to declassify certain information. For example, in December of 2023, Senator Ron Wyden blocked the nomination vote on Lieutenant General Timothy Haugh, to succeed General Paul Nakasone as the director of the National Security Agency (NSA) and Commander of United States Cyber Command. Senator Wyden's action apparently followed pressure by the Senator on the NSA to release certain information about the intelligence community's use of commercially available information. Once Senator Wyden blocked the nomination vote, the NSA relented, releasing the requested information in an unclassified letter to Senator Wyden that he promptly made public. *See* Maggie Miller & Jake Sakellariadis, *Wyden to Block Senate Vote on New NSA, Cyber Command Lead*, POLITICO (Nov. 30, 2023), https://www.politico.com/news/2023/11/30/wyden-block-senate-vote-nsa-cyber-command-00129432; *see* Press Release, Senator Ron Wyden, NSA Must Answer Whether it is Buying Americans' Location Data and Web Browsing Records Before New Director Is Confirmed (Nov. 30, 2023), available at: https://www.wyden.senate.gov/news/press-releases/wyden-nsa-must-answer-whether-it-is-buying-americans-location-data-and-web-browsing-records-before-new-director-is-confirmed#:~:text=Washington%2C%20D.C.%20%E2%80%93%20U.S.%20Senator%20Ron,data%20and%20web%20browsing%20records; *see* Zeba Siddiqui, *US National Security Agency Buys Web Browsing Data Without Warrant, Letter Shows*, REUTERS (Jan. 26, 2024), https://www.reuters.com/technology/cybersecurity/national-security-agency-buys-web-browsing-data-without-warrant-letter-shows-2024-01-26/.

[50] *See* NATIONAL SECURITY INTELLIGENCE AND ETHICS 222 (Seamus Miller et al., eds, Routledge, 2022).

[51] *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (Nov. 26, 1996), *available at* https://www.justice.gov/d9/olc/opinions/1996/11/31/op-olc-v020-p0402_0.pdf (quoting Brief for the Appellees, *American Foreign Serv. Ass'n v. Garfinkel*, 488 U.S. 923 (1988) (No. 87-2127)).

[52] *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (May 20, 1998), *available at* https://www.justice.gov/d9/olc/opinions/1998/05/31/op-olc-v022-p0092_0.pdf.

[53] *Id.* at 92-94.

[54] *Id.* at 93 ("S. 1668 would thus vest any covered federal employee having access to classified information with a unilateral right to circumvent the process by which the executive and legislative branches accommodate each other's interests in sensitive information. Under S. 1668, any covered federal employee with access to classified information that—in the employee's opinion—indicated misconduct could determine how, when and under what circumstances that information would be shared with Congress. Moreover, the bill would authorize this no matter what the effect on the President's ability to accomplish his constitutionally assigned functions.").

[55] *Id.* at 94 ("[s]ignificantly, unlike S. 1668, H.R. 3829 provides that the head of the agency or the Director of Central Intelligence may determine "in the exceptional case and in order to protect vital law enforcement, foreign affairs, or national security interests" not to transmit the inspector general's report to the Intelligence Committees and not to permit the employee or contractor directly to contact the Intelligence Committees.").

[56] *Id.* at 94-97.

[57] *See Security Clearance Adjudications by the DOJ Access Review Committee*, 35 Op. O.L.C. 86, 95 (Jun. 3, 2011), *available at* https://www.justice.gov/d9/opinions/attachments/2021/02/18/2011-06-03-security-clearance-adjud.pdf ("[w]e agree with the FBI that the President's constitutional authority to classify information concerning the national defense and foreign relations of the United States and to determine whether particular individuals should be given access to such information "exists quite apart from any explicit congressional grant." But that does not imply that Congress entirely lacks authority to legislate in a manner that touches upon disclosure of classified information." (internal citations omitted)).

discussion of this subject, the opinion suggests that "[t]he key question in identifying [limits on Congress's authority over classified information] is whether Congress's action is "of such a nature that [it] impede[s] the President's ability to perform his constitutional duty.""[58] Nonetheless, it is difficult to read this test as anything but circular and manipulative because the determination of what might "impede" and the exact scope of the President's "constitutional [duties]" afford ample room for interpretation.[59]

As this brief comparison of the executive and legislative branches' positions illustrates, there is no consensus between the branches on the precise outlines of authority each possesses regarding classified information.[60] Moreover, despite dicta in a few Supreme Court cases, the court has not directly addressed – let alone resolved –whether Congress can disclose classified information against the President's desires.[61]

This topic has generated resurgent interest in the wake of various recent scandals and contretemps involving classified information.[62] Two bills – one in the House,[63] one in the Senate[64] – were introduced in 2023 to address sundry concerns prompted by these affairs. The House bill would limit the authority to delegate original classification authority to specific positions.[65] The Senate bill would set criteria for the classification levels[66] and adjust the standard for when information may be classified by requiring that the national security jeopardy associated with disclosure must *outweigh* public interest in the information.[67] Neither bill has garnered significant traction to date, and these provisions are just the highlights; nonetheless, these bills reveal an intent to wade into the President's traditional dominion over classification[68] and matters historically governed by executive order.[69] Moreover, they suggest a view by their proponents that past executive deference in this area was a matter of Congressional

[58] *Security Clearance Adjudications by the DOJ Access Review Committee* at 96 (quoting *Morrison v. Olson*, 487 U.S. 654, 691 (1988)).
[59] *See id.*
[60] NATIONAL SECURITY INTELLIGENCE AND ETHICS, *supra* note 50, at 222.
[61] *See id.* at 222; *see* Levine & Brewer, *supra* note 24.
[62] *See* Levine & Brewer, *supra* note 24; *see* Michael D. Shear & Katie Rogers, *Investigators Seize More Classified Documents From Biden's Home*, N.Y. TIMES (Jan. 21, 2023), https://www.nytimes.com/2023/01/21/us/politics/biden-documents.html?searchResultPosition=4; *see* Alan Feuer, et al., *Justice Department Charges Trump in Documents Case*, N.Y. TIMES (Jun. 9, 2023), https://www.nytimes.com/2023/06/09/us/politics/trump-indictment-charges-documents-justice-department.html?searchResultPosition=9; *see* Maggie Haberman & Glenn Thrush, *F.B.I. Found One Classified Document After Searching Pence's Home*, N.Y. TIMES (Feb. 10, 2023), https://www.nytimes.com/2023/02/10/us/politics/pence-fbi-home-search.html?searchResultPosition=1; *see* Michael Crowly, *Airman Charged in Leak of Classified Documents*, N.Y. TIMES (Apr. 14, 2023), https://www.nytimes.com/2023/04/14/us/politics/jack-teixeira-classified-documents-leak.html?searchResultPosition=4; *see* Press Release, Senator Mark Warner, Senators Introduce Bipartisan Legislation to Reform the Security Classification System (May 10, 2023), https://www.warner.senate.gov/public/index.cfm/2023/5/senators-introduce-bipartisan-legislation-to-reform-the-security-classification-system.
[63] Sensible Classification Act of 2023, H.R. 5977, 118th Cong. (2023).
[64] Classification Reform Act of 2023, S. 1541, 118th Cong. (2023).
[65] H.R. 5977, 118th Cong. § 3 (2023) (*e.g.*, § 3(c)(2): "[a]uthority to originally classify information at the level designated as "Top Secret" may be delegated only by the President, in the performance of executive duties, the Vice President, or an agency head or official designated pursuant to subsection (a)(2).").
[66] S. 1541, 118th Cong. § 821(c) (2023).
[67] S. 1541, 118th Cong. § 821(c)(1) (2023) ("Subject to paragraphs (2) and (3), information may be classified under this title, and classified information under review for declassification under this title may remain classified, *only if the harm to national security that might reasonably be expected from disclosure of such information outweighs the public interest in disclosure of such information*." (emphasis added)).
[68] *See Egan*, 484 U.S. at 527.
[69] *See* Exec. Order No. 13525, 75 Fed. Reg. 705 (Jan. 5, 2010) (President Obama's executive order implementing the executive branch's classification regime; successive presidents have left it in place as of this writing).

acquiescence, not exclusive Presidential prerogative.

Regardless of where this road goes, the root question – can the legislative branch disclose information the executive branch has classified? – appears unlikely to secure definitive resolution in the near future. Nonetheless, it remains difficult to square an unfettered executive hand with America's constitutional system of checks and balances.[70] "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[71] Accordingly, while the executive branch, sensibly, should command wide latitude in the field of classification, it should not be unlimited.

The prevailing House and Senate rules and Congress's lawmaking function reflect reasonable avenues for Congress to disclose America's secrets – even where the President objects. However, Congress is still beholden to the public, and this obligates responsibility and judgment in the exercise of power. So, in review, Congressman May might have had constitutional avenues to make his infamous disclosure, but wisdom should have secured his silence. *As then, so now*.

[70] *See* Levine & Brewer, *supra* note 24 ("If necessary, Congress should proceed to disclose without the President's approval. We believe it does have this constitutional authority. The original proponents of the HSPCI and SSCI correctly understood that Congress has an important structural role to play in restraining executive power, particularly where claims of national security are asserted. Congress must not simply defer to the President whenever he or she invokes the talisman of "national security." Doing so would undermine its status as a co-equal branch of government.").
[71] *Myers v. U.S.,* 272 U.S. 52, 293 (1926).

Syria's Roadmap to Recovery: Government Recognition, Lifting Sanctions and Transitional Governance

By MAJ John Balouziyeh[1], USA, and Olivia Wang[2]

Introduction

On December 8, 2024, the Russian Foreign Ministry announced that Bashar al-Assad had resigned as President of Syria and he had been offered asylum in Russia.[3] In a public statement, the Ministry added that following talks with "a range of participants of the conflict on the territory of the Syrian Arab Republic, he took the decision to resign from his presidential post and leave the country, giving instructions to proceed with the peaceful transfer of power."[4] The announcement followed the rapid collapse of the government's military forces in Syria in the wake of an offensive from Hay'at Tahrir al-Sham (HTS) and other opposition groups, including the Turkish-backed Syrian National Army (SNA), that culminated in the capture of Damascus.[5]

HTS leader Ahmed Al-Sharaa (also known as Abu Muhammad Al-Julani) stated that Syrian public institutions would temporarily be held by Syrian Prime Minister Mohammad Ghazi al-Jalali until the political transition was completed.[6] On December 10, 2024, Al-Jalali was replaced by Mohammed al-Bashir as Interim Prime Minister.[7] On January 29, 2025, during the Syrian Revolution Victory Conference in Damascus, the Syrian General Command appointed Ahmed Al-Sharaa as president for the transitional period,[8] slated to last until March 1, 2025.

The transitional government's next steps in Syria will impact a range of international legal issues in Syria, including whether states confer recognition to the transitional government as the legitimate government of Syria, whether the U.S. and E.U. ease and ultimately lift sanctions on Syria, and the extent of humanitarian aid and foreign investment in Syria. If the transitional government takes concrete steps towards applying international law in Syria, protecting fundamental rights, including minority rights, fighting terrorism and committing to democratic institutions, free elections and constitutional governance, the new government will attract recognition by third party states, inflows of foreign direct investment and the lifting of sanctions.

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[1] John Balouziyeh, a Major in the USAR Judge Advocate General's Corps (JAG), serves as Chief of National Security Law for Task Force Spartan and as a Partner in the Public International Law, International Sanctions, Business and Human Rights, and National Security Law groups of Curtis, Mallet-Prevost, Colt & Mosle LLP.

[2] Olivia Wang, a May 2024 graduate of Duke Law School, Olivia Wang serves as a Law Clerk in the Litigation and Economic Sanctions departments of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York.

[3] David Gritten, *Bashar al-Assad and family given asylum in Moscow, Russian media say*, BBC (Dec. 8, 2024), available at https://www.bbc.com/news/articles/cqx89reeevgo.

[4] *World reacts to Bashar al-Assad's fall, capture of Syria's Damascus*, AL JAZEERA (Dec. 8, 2024), available at https://www.aljazeera.com/news/2024/12/8/world-reacts-to-bashar-al-assads-fall-capture-of-damascus.

[5] Antoinette Radford, *The Assad regime ruled Syria for 50 years. Here's how it fell in less than two weeks*, CNN (Dec. 9 , 2024), available at https://www.cnn.com/2024/12/09/middleeast/timeline-syria-assad-regime-toppled-intl/index.html.

[6] *What happened in Syria? How did al-Assad fall?*, AL JAZEERA (Dec. 8, 2024), available at https://www.aljazeera.com/news/2024/12/8/what-happened-in-syria-has-al-assad-really-fallen.

[7] Mohammed al-Bashir, *Who is Syria's new interim prime minister?*, MIDDLE EAST EYE (Dec. 10, 2024), available at https://www.middleeasteye.net/news/mohammed-al-bashir-who-syria-new-interim-prime-minister.

[8] Timour Azhari & Tom Perry, *Syria's Sharaa declared president for transition, consolidating his power*, REUTERS (Jan. 30, 2025), available at https://www.reuters.com/world/middle-east/syrias-leader-sharaa-named-president-transitional-period-state-news-agency-says-2025-01-29/.

Government Recognition within the Context of Regime Change in Syria

Overview

Three legal doctrines are used to inform whether states confer recognition to new governments: the traditional doctrine, the Tobar doctrine and the Estrada doctrine. In determining whether a new government should be accorded recognition, two of these doctrines—the traditional and Tobar doctrines—look to a series of factors, including whether the new governments have the consent of their people, indicate a willingness to comply with treaty obligations and international law and respect democratic and constitutional governance and free elections. The third approach—the Estrada Doctrine—does not consider any of these factors. Rather, this doctrine confers automatic recognition to all governments in all circumstances, even those that ascended to power by extra-constitutional means, without regard to human rights or constitutional governance. Because the majority approach to government recognition—the traditional doctrine—looks to whether new governments have indicated a willingness to comply with treaty obligations and international law, the Syrian transitional government's next steps will shape the ability of the government to achieve recognition from and enter into relations with other governments.

Government Recognition Doctrines

Traditional Approach (Effective Control Doctrine)

Under the traditional doctrine, the most well-known and "dominant candidate for a legal rule of recognition,"[9] a state recognizes a new foreign government when the government is in de facto control of territory, has the consent of its people, and indicates a willingness to comply with international law. Some scholars equate the traditional doctrine with the effective control doctrine. Although the elements of the traditional approach may vary according to different scholars, the common thread is that effective control is a necessary, but on its own an insufficient, element to accord recognition. The traditional approach also considers factors such as whether recognition is in the best interest of the recognizing government, which render the approach flexible and pragmatic.[10]

The traditional approach requires states to determine "(1) whether the government is in de facto control of the territory and in possession of the machinery of the state; (2) whether the government has the consent of the people, without substantial resistance to its administration, that is, whether there is public acquiescence in the authority of the government; and (3) whether the new government has indicated its willingness to comply with its obligations under treaties and international law."[11] De facto control of the territory, or "effective control of the territory and the machinery of the state,"[12] is "a necessary condition for government recognition."[13]

Additionally, in deciding whether to recognize a new government, the state: must make a political judgment [on] whether recognition would be in its best interest…[and] it usually will consider 'the existence of non-existence of evidence of foreign intervention in the establishment of the new regime; the political orientation of the government and its leaders; evidence of intention to observe democratic principles, particularly the holding of elections; the

[9] Justin Cole & Oona A. Hathaway, *Recognition Rules: The Case for a New International Law of Government Recognition*, NYU L. REV. (forthcoming 2025) (manuscript at 32).
[10] L. THOMAS GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES 8 (1978), quoting MARJORIE MILLACE WHITEMAN, DIGEST OF INTERNATIONAL LAW 73 (1963).
[11] *Id.* at 5–6.
[12] *Id.* at 6.
[13] *Cole & Hathaway, supra note 9 (manuscript at 31).*

attitude of the new government toward private investment and economic improvement. Importantly, also, the interest of peoples, as distinguished from governments, is of concern. These, and other criteria, depending upon the international situation at the time, have been considered, with varying weight.[14]
Thus, "[o]ne might fairly characterize the traditional approach to recognition as flexible and pragmatic. Each decision to recognize is somewhat ad hoc, with the political interests of the recognizing state the major consideration."[15] Of the three approaches, the traditional approach is the most robust and flexible in recognizing new foreign governments, which is likely why it is the majority approach.

Tobar Doctrine (Doctrine of Legitimacy)

The Tobar or Betancourt Doctrine calls on states to refuse to recognize new governments unless free and fair elections are held to elect new leaders. It "attempts to encourage democratic and constitutional government by refusing to recognize any government that comes to power through extraconstitutional means until a free election is held and new leaders elected."[16] This approach, emphasizing democratic legitimacy, disincentivizes "individuals or armed groups from using force to gain control of the governmental apparatus."[17] The Tobar approach treats legitimacy as a "necessary criterion in addition to effective control,"[18] although effective control, while "also essential, is insufficient."[19]

Due in part to the rigidity of the doctrine, the Tobar Doctrine has never enjoyed widespread acceptance outside of Central and South America.[20] Critics have noted that the doctrine has interfered with domestic political processes of sovereign states and is intolerable of revolutionary change. It is often criticized for its "substantial interference with the domestic political processes of sovereign states, and because it bars revolutionary change as a method to overthrow even corrupt and despotic governments."[21] Nonetheless, "this view of recognition has attracted substantial support from a number of states as well as regional and international organizations."[22]

Estrada Doctrine (Automatic Recognition of All Governments)

In stark contrast with the Tobar Doctrine, the Estrada Doctrine purports not to interfere in the domestic affairs of sovereign states and automatically recognizes all governments in all circumstances, even those that came into power by extra-constitutional means. Put forward by Estrada, the Mexican Secretary of Foreign Relations,[23] the Estrada Doctrine refrains from making determinations as to the legitimacy of new governments. In this way, the doctrine prevents states from passing judgment on the internal affairs of other states or embarrassing states that recognize governments with abusive human rights records. It permits governments to avoid the perception that they approve or condone the acts of the governments being recognized. The Estrada Doctrine thus advocates the exact opposite of the Tobar Doctrine, and confers the automatic recognition to new governments.

"The Estrada Doctrine embraces the principle of unfettered national sovereignty

[14] GALLOWAY, *supra* note 10, at 8, quoting WHITEMAN, *supra* note 10, at 73.
[15] *Id.* at 8.
[16] *Id.*at 10.
[17] Cole & Hathaway, supra note 9 (manuscript at 36).
[18] *Id.* (manuscript at 32).
[19] *Id.* (manuscript at 36).
[20] GALLOWAY, *supra* note 10, at 10.
[21] *Id.*
[22] Cole & Hathaway, supra note 9 (manuscript at 36).
[23] MALCOLM N. SHAW, INTERNATIONAL LAW 380(5th ed. 2003).

and rejects interference with the domestic affairs of one state by another through the granting or withholding of recognition."[24] Estrada believed that such interference constituted an unwarranted assessment of the internal affairs of other states, which he believed had an unrestricted right "to accept, maintain or replace their governments or authorities."[25] "States that have adopted the Estrada Doctrine often say they recognize states, not governments; however, as a practical matter, many states depart from the doctrine whenever they perceive a major political advantage in using the recognition instrument."[26] Legitimacy plays no role in the Estrada Doctrine, and "any change in government is regarded as an internal matter, reserved for the black box of a state's domestic politics."[27] But unlike the traditional approach, the Estrada approach thus purports to "abolish formal government recognition altogether."[28]

The Estrada Doctrine has several shortcomings. It does not resolve questions of government recognition whenever there are competing governments. It has also been criticized as "minimizing the distinction between recognition and maintenance of diplomatic relations."[29]

Analysis

Under the majority traditional approach to government recognition, states do not automatically confer recognition to new governments that take power by force. Rather, states recognize new foreign governments that have the consent of their people and indicate a willingness to comply with international law. Because of this requirement that a new government indicates a willingness to comply with international law, the new Syrian government's compliance with Syria's treaty obligations and international law more broadly will play an important role in the conference of recognition. For those states that adopt the Tobar Doctrine, recognition will be predicated on satisfaction that the new government was confirmed through free, fair and legitimate elections.

Lifting of Sanctions

The Syrian transitional government's next steps will also impact international sanctions on Syria and whether the international community ultimately decides to lift them. The U.S. and E.U. have already begun the gradual process of easing their respective Syria sanctions programs.

U.S. Sanctions

In an effort to facilitate the provision of public services, the continuity of governance, and humanitarian assistance in Syria, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) issued General License 24 (GL 24) on January 6, 2025. GL 24 expands authorizations for activities and transactions in Syria following the end of Bashar Al-Assad's rule on December 8, 2024. It authorizes a range of transactions with the transitional Syrian government, eases restrictions on transactions in support of the sale, supply, storage, or donation of energy to or within Syria, and permits transactions that are ordinarily incident and necessary to processing the transfer of personal remittances. Deputy Secretary of the Treasury Wally Adeyemo announced that during this period of transition, the U.S. Treasury will "continue to support

[24] GALLOWAY, *supra* note 10, at 9.

[25] Cole & Hathaway, *supra* note 9 (manuscript at 40), quoting Press Statement of Sept. 27, 1930, translated in 25 AM. J. INT'L L. 203 (Supp. 1931).

[26] GALLOWAY, *supra note 10, at* 9.

[27] Cole & Hathaway, *supra* note 9 (manuscript at 40).

[28] *Id*.

[29] SHAW, *supra* note 23, at 380..

humanitarian assistance and responsible governance in Syria."[30]

GL 24, which is currently set to expire on July 7, 2025, may be extended as the U.S. government continues to monitor the evolving situation on the ground in Syria. OFAC's announcement highlights that "Syria is one of OFAC's most comprehensively sanctioned jurisdictions" as a result of human rights abuses committed by the former regime as well as the former regime's "support for terrorism, and destabilizing actions across the region."[31] If the new regime commits to upholding international law, including Syria's obligations under the Chemical Weapons Convention, while combatting terrorism and working towards the stabilization of Syria and the wider regime, it is likely that the duration of GL 24 will be extended, and further U.S. sanctions imposed on Syria will be eased. As the U.S. Treasury continues to monitor the situation on the ground in Syria, additional sanctions exemptions may also be issued.

E.U. Sanctions

Similarly, in Europe, the E.U. has been closely monitoring the on-the-ground situation in Syria and assessing whether the country's new rulers will demonstrate a commitment to human rights and the rule of law. On January 27, 2025, E.U. foreign ministers agreed to a roadmap to begin lifting sanctions on Syria, while "insisting that the measures should be reimposed if they see any abuses by the country's new rulers."[32] E.U. foreign policy chief Kaja Kallas announced that while the E.U. aims to move quickly, "we also are ready to reverse the course if the situation worsens," favoring a "snap back" mechanism to reimpose sanctions if Syria's new leaders fail to uphold their obligations under international law.[33]

Foreign Investment

Since the beginning of the Syrian conflict in March 2011, Syria's annual exports have dropped from USD 8.8 billion to USD 1 billion, shrinking Syria's economy by 54%.[34] Foreign investment can contribute substantially to rebuilding Syria's war-torn economy, but multinational companies will naturally be cautious about investing in a post-conflict country whose leadership remains unknown and untested.[35] Should Syria's leadership demonstrate a concrete commitment to strengthening the rule of law and property rights, a stable environment ripe for foreign investment will emerge, shepherding in much-needed capital that will rebuild Syria's infrastructure, reduce poverty and create jobs in Syria's war-torn economy.

This investment will depend on the ability of Syria's transitional government to convince investors that Syria is a safe destination for their capital. Recognizing this premise, Syria's new leaders have already begun a campaign to draw in foreign investment. At the World Economic Forum meeting in Davos, Switzerland on January 22, 2025, Syrian Foreign Minister Asaad Hassan al-Shibani announced that Syria will open its economy to foreign investment while working on energy and electricity partnerships with the Gulf Cooperation Council (GCC) states, including with Qatar to supply Syria with 200 megawatts of

[30] *U.S. Treasury Issues Additional Sanctions Relief for Syrian People*, U.S. DEPT. OF TREASURY (Jan. 6, 2025), available at https://home.treasury.gov/news/press-releases/jy2770.
[31] *Id.*
[32] Lorne Cook, *EU cautiously agrees roadmap to ease sanctions on Syria in wake of Assad's downfall*, ASSOCIATED PRESS (Jan. 27, 2025), available at https://apnews.com/article/eu-syria-sanctions-easing-lifted-hts-875dc2a6dec5d54b459f580baa1426eb.
[33] *Id*.
[34] Ana Carolina Garriga & Brian J. Phillips, *Will multinational companies flock to Syria? Maybe, if foreign aid arrives first*, THE CONVERSATION (Feb. 3, 2025), available at https://theconversation.com/will-multinational-companies-flock-to-syria-maybe-if-foreign-aid-arrives-first-248406.
[35] *Id.*

electricity and gradually increase the amount.[36]

Key Takeaways

Whether Syria's new leaders adopt a governance model that upholds human rights and the rule of law will have far-ranging implications in government recognition, the lifting of sanctions, and, ultimately, attracting the foreign investment necessary to rebuild Syria's war-torn economy. The U.S. has already issued a general license to facilitate transactions with Syria's transitional governing institutions, ease restrictions on transactions in support of the sale and supply of energy to Syria, and permit transactions that are ordinarily incident to processing the transfer of personal remittances. The E.U. has announced a roadmap to begin lifting sanctions on Syria, while insisting on a "snapback" mechanism as Europe's leaders continue to monitor the on-the-ground situation in Syria. States have already begun recognizing Syria's new leaders as the legitimate government of Syria, and more are likely to follow suit if the new leaders take concrete steps toward applying international law, including the Chemical Weapons Convention, protecting human rights, combatting terrorism and committing to democratic institutions and constitutional governance. These steps toward building a governance environment will do more than attract government recognition; they will also attract the foreign investment that is necessary to shepherd in much-needed capital, reduce poverty, create jobs, and rebuild Syria's war-torn economy.

[36] *Davos-Syria's economy will be open for foreign investment, foreign minister says*, REUTERS (Jan. 22, 2025), available at https://www.reuters.com/world/middle-east/davos-syrias-economy-will-be-open-foreign-investment-foreign-minister-says-2025-01-22/.

International Law Concerns With the Recent Enactment of Regulation Number Three by the People's Republic of China Coast Guard

LCDR Anthony Rodrigues, USCG, CLAMO

Introduction

The South China Sea is an exceptionally important area of water.[1] The South China Sea facilitates over one-third of the world's maritime traffic, contains over 12 percent of the world's fisheries, and has significant untapped oil and gas reserves.[2] This sea touches many shores—The People's Republic of China ("PRC"), the Philippines, Vietnam, Malaysia, Brunei, and the island of Taiwan.[3] Each of which has rightful maritime zones which are important commerce, sustenance, and strategic areas for their populace.[4]

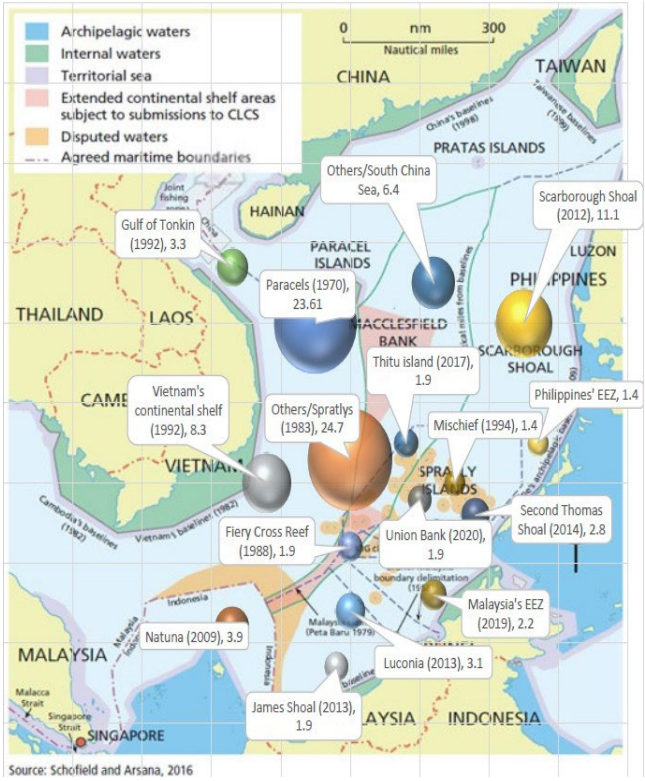
The PRC has long made excessive maritime claims in the South China Sea at the expense of neighboring countries. The PRC is not alone in having disputed claims within the sea. Members of the Association of Southeast Asian Nations (hereinafter, "ASEAN") also have disputed claims, including Brunei, Malaysia, the Philippines, Taiwan, and Vietnam. However, the PRC stands alone in both the scale of their excessive claims and their provocative actions to demonstrate control. These actions involve the threat or actual use of force under the guise of law enforcement. The PRC makes excessive claims to both maritime zones (areas of water) and maritime features (rocks, low tide elevations, and islands). The disputed area is depicted by nine or ten dashes forming a curved line. The PRC has remained vague in what exact type of maritime zone it claims within the nine-dash line. Many ASEAN members' maritime claims fall within the nine-dash line. The PRC also claims the island of Taiwan and does not fully respect the strait of Taiwan as an international strait.[5]

The United States considers the provisions of the United Nations Convention on the Law of the Sea (hereinafter, "UNCLOS") that reflect traditional maritime practices to be customary international law. Under Article 16 of UNCLOS, coastal states are required to formally declare maritime claims by submitting detailed charts or coordinates to the Secretary-General of the United Nations.[6] However, the PRC has failed to provide such documentation with the necessary specificity to be legally meaningful under UNCLOS.[7] Instead, the PRC asserts its maritime claims through actions rather than legal declarations, using large-scale construction projects on disputed features and aggressive maritime law enforcement to establish de facto control in the South China Sea (hereinafter, "SCS").[8]

The U.S. Department of State emphasizes that while the PRC is clear in their attempt to claim the "islands" within the nine-dash line, their vague assertion regarding maritime zones is open to different interpretations.[9] The PRC's claims over

[1] Dr. Hasim Turker, *Maritime Chessboard: The Geopolitical Dynamics of the South China Sea*, GEOPOLITICAL MONITOR (Aug. 2, 2023), https://www.geopoliticalmonitor.com/maritime-chessboard-the-geopolitical-dynamics-of-the-south-china-sea.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *China and Taiwan: A really simple guide*, BBC NEWS (Jan. 7, 2024), https://www.bbc.com/news/world-asia-china-59900139.
[6] *See* U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
[7] *See* Steven Stashwick, *80 Percent to Zero: China's Phantom South China Sea Claims*, THE DIPLOMAT (Feb. 9, 2016), https://thediplomat.com/2016/02/80-percent-of-zero-chinas-phantom-south-china-sea-claims.
[8] *Id.*
[9] *See* U.S. DEP'T OF STATE, LIMITS IN THE SEAS NO. 150 (2022), at 5, https://www.state.gov/wp-content/uploads/2022/01/LIS150-SCS.pdf [hereinafter "Limits in the Seas No. 150"].

features are also complex because there are competing claims[10] in addition to the PRC's overly expansive idea of what qualifies as an island.[11] Article 121 of UNCLOS states that an island is a feature that is naturally formed and remains above water at high tide.[12] The PRC has frequently dredged to either create new "islands" from submerged features or expand the land size of already existing land features to militarize them to further project power.[13] Once an "island" is created, the PRC vaguely claims territorial waters around the "island" even though their methods are not supported by UNCLOS as they are not naturally formed. Similarly, the PRC will project claims to rights over natural resources surrounding a "rock" in contravention of Article 121 section three which limits sovereign rights around a land mass that cannot sustain human habitation or economic life on its own.[14]



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On 22 January 2013, the Philippines initiated arbitral proceedings against the PRC's excessive SCS claims with an arbitral tribunal under Annex VII of UNCLOS.[15] The PRC did not recognize the tribunal's jurisdiction and did not participate in the proceedings.[16] The tribunal released its award on 12 July 2016 where it found the nine-dash line invalid, determined that two areas the PRC was building up were naturally considered low-tide elevations which do not generate maritime zones, and that the PRC was infringing upon Philippines' EEZ rights by harassing Filipino fishing vessels.[17] The PRC has ignored the award and continues on the same path of escalating aggression towards its claims within the SCS.[18] The scholar Dung Huynh has compiled the coercive measures undertaken by the PRC in the SCS from 1970 until 2021, mapping these incidents based on their location of occurrence.[19]

[10] Practitioners should be aware of the Asia Maritime Transparency Initiative's interactive SCS island map. https://amti.csis.org/scs-features-map/.
[11] *See* Limits in the Seas No. 150, *supra* note 9.
[12] *See* UNCLOS, *supra* note 6, pt. II, art. 121.
[13] *See Territorial Disputes in the South China Sea,* COUNCIL ON FOREIGN REL. (Sep. 17, 2024), https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea.
[14] *See* UNCLOS, *supra* note 6, pt. II, art. 121.
[15] *The South China Sea Arbitration*, PCA-2013-19 (Perm. Ct. Arb. Jul. 12, 2016), https://pca-cpa.org/en/cases/7.
[16] *Id*.
[17] *Id*.
[18] *See* Joshua Kurlantzick & Abigail McGowan, *Why Tensions in the South China Sea are Bolstering the U.S.-Philippines Alliance*, COUNCIL ON FOREIGN REL. (Sep. 5, 2024), https://www.cfr.org/expert-brief/why-tensions-south-china-sea-are-bolstering-us-philippines-alliance.
[19] Dung Huynh, *Facing the Ravenous Sea Dragon: How Weaker Nations Confront Chinese Coercion in the South China Sea*, RAND (2022), https://www.rand.org/pubs/rgs_dissertations/RGSDA2470-1.html.
[20] *Id.* at 60; Please note the date in each area corresponds to the first occurrence of coercion at that location.

I. The People's Armed Police Force's Coast Guard and their New Regulation

The People's Armed Police Force's Coast Guard (hereinafter, "China Coast Guard" or "CCG") was created in 2013 by unifying five different maritime agencies and is currently the largest coast guard in the world.[21] This allows persistent force projection in the region. The CCG has the unique mission of "rights enforcement operations" which entails deploying coast guard vessels into disputed waters to "maintain a visible presence . . . enforce Chinese domestic laws," and contest other states' use of the area.[22] In 2018, control over the CCG was given to a military organization known as the Peoples' Armed Police during peacetime with the ability to switch to the People's Liberation Army during war.[23] CCG operations in the SCS during war or peace are controlled by the Southern Theater Command.[24] CCG ships commonly operate alongside naval ships from the People's Liberation Army Navy and a militia of fishing vessels from the People's Armed Forces Maritime Militia.[25] The PRC patrols the contested areas of the SCS at a minimum of over 200 days per year.[26]

In 2021, the PRC enacted a sweeping new Coast Guard Law that immediately raised concerns within the international community.[27] This law was further implemented in 2024 by the China Coast Guard Order No. 3 (hereinafter, "CCGR-3").[28] Both the Coast Guard Law and CCGR-3 deliberately maintain ambiguity regarding their jurisdiction by referencing enforcement in "waters under the jurisdiction of our country," with no further granularity.[29] This vagueness effectively allows the PRC to falsely justify its own enforcement actions across the vast expanse of the nine-dash line, an area which overlaps the rightful maritime zones of numerous nations.[30]

Several provisions in these laws are particularly concerning. The Coast Guard Law authorizes the use of force in the defense of maritime sovereignty (Art. 22), permits the removal of unapproved structures or devices "of any kind" within the PRC's claimed waters or islands (Art. 20), and grants authority to expel or forcibly remove foreign government vessels (Art. 21).[31] CCGR-3 further expands these powers, including the detention of vessels (type unspecified) that enter territorial waters illegally (Art. 105) for up to six months (Art. 257), the creation of "temporary maritime security zones" (Art. 35) with no geographic

[21] *See* Tim Fish, *Has the China Coast Guard Reached Its Limit?*, ASIAN MILITARY REVIEW (Jan. 23, 2024), https://www.asianmilitaryreview.com/2024/01/has-the-china-coast-guard-reached-its-limit.
[22] *Id*.
[23] *Id; see also The Coast Guard Law of the PRC*, JAPAN MINISTRY OF DEFENSE, https://www.mod.go.jp/en/d_act/sec_env/ch_ocn/index.html.
[24] *Id*.
[25] *Id*.
[26] *Control By Patrol: The China Coast Guard in 2023*, ASIAN MARITIME TRANSPARENCY INITIATIVE (Mar. 29, 2024), https://amti.csis.org/control-by-patrol-the-china-coast-guard-in-2023/.
[27] *Coast Guard Law of the People's Republic of China*, Air University, https://www.airuniversity.af.edu/Portals/10/CASI/documents/Translations/2021-02-11%20China_Coast_Guard_Law_FINAL_English_Changes%20from%20draft.pdf (last visited Sep. 19, 2024) (Annotated changes from draft law); *See* Nguyen Trung, *How China's Coast Guard Law Has Changed the Regional Security Structure*, ASIA MARITIME TRANSPARENCY INITIATIVE (Apr. 12, 2021), https://amti.csis.org/how-chinas-coast-guard-law-has-changed-the-regional-security-structure/.
[28] *Provisions on Administrative Law Enforcement Procedures of Coast Guard Agencies*, FAOLEX DATABASE (May 28, 2024), https://www.fao.org/faolex/results/details/en/c/LEX-FAOC227010 (not translated).
[29] *See* Kamlesh K. Agnihotri, *Setting the 'Dragon' Amongst the Pigeons: China Coast Guard Regulation-3 Takes Effect*, NAT'L MARITIME FOUNDATION (Aug. 26, 2024), https://maritimeindia.org/setting-the-dragon-amongst-the-pigeons-china-coast-guard-regulation-3-takes-effect/.
[30] *See China's Military Aggression in the Indo-Pacific Region*, U.S. DEP'T OF STATE, https://2017-2021.state.gov/chinas-military-aggression-in-the-indo-pacific-region (last visited Sep. 19, 2024).
[31] *Force Majeure: China's Coast Guard Law in Context*, ASIA MARITIME TRANSPARENCY INITIATIVE (Mar. 30, 2021), https://amti.csis.org/force-majeure-chinas-coast-guard-law-in-context [hereinafter, Force Majeure].

limitations, and the designation of surveying or mapping activities within the PRC's claimed jurisdiction as "grave and serious" offenses (Art. 263).[32] These provisions not only contradict international law but also impede freedom of navigation and escalate the risk of maritime conflict in the region.

II. Concerns under International Law

a. Rights Enforcement

The PRC's "rights enforcement" mission primarily involves deploying maritime law enforcement assets to patrol disputed waters, assert its claims, and intimidate other nations operating in the area.[33] PRC vessels have engaged in a range of aggressive actions, including ramming and sinking a Vietnamese vessel, blocking resupply missions to Philippine personnel, using water cannons against Philippine vessels, and surrounding maritime features in a coordinated show of force. These operations serve as a means of enforcing the PRC's excessive claims through coercion rather than legal mechanisms.[34]

The PRC's rights enforcement activities, particularly when conducted beyond its legally recognized waters under UNCLOS, risk violating international law. First, as a member of the United Nation's Security Council, the PRC is aware that attempting maritime law enforcement in non-investigatory and violent ways can be inconsistent with the U.N. Charter. Second, rights enforcement in disputed waters where the arbitral award stated the PRC has no sovereign jurisdiction is an additional or continued violation of UNCLOS.

The PRC conducting rights enforcement in disputed maritime territory could lead to an aggrieved state arguing that PRC enforcement actions violated the U.N. Charter and triggered self-defense. Article 2(4) of the U.N. Charter states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[35] Article 51 states that "[n]othing in the present Charter shall impair the right of individual or collective self-defence . . . ."[36] International cases and legal scholars frequently recognize that law enforcement actions on another state's vessels in disputed waters "may carry the risk of becoming the triggering event [of armed conflict] when they are seen by the other side to involve the use of force rather than police action."[37] As a hypothetical example, one can imagine a Philippine Coast Guard vessel operating in their own waters which the Philippines call the West Philippine Sea 30 nautical miles from their own shore, when a CCG vessel intercepts them to claim the Filipino vessel is violating the sovereignty of the PRC, which is over 400 nautical miles away. The Filipino vessel refuses to leave as they are close to the shore within the rightful maritime zone of the Philippines while the CCG vessel's crew thinks they are doing dutifully executing the rights enforcement mission. The vague new PRC laws enable the CCG crew to think it is reasonable to spray the Filipino vessel with water and ram into it until it leaves. This is a violation of the Philippines' sovereign rights in that maritime zone and the requirement to refrain from the use of force against the territorial integrity of another state.

The same concern is encompassed in UNCLOS. Article 301 says members "shall

[32] Agnihotri, *supra* note 29.
[33] *See* Diane A. Desierto, *China's Maritime Law Enforcement Activities in the South China Sea*, 96 INT'L L. STUD. 257 (2020).
[34] *Id*. at 259.
[35] *United Nations Charter Full Text*, UNITED NATIONS, https://www.un.org/en/about-us/un-charter/full-text (last visited Feb. 19, 2025).
[36] *Id*.
[37] Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award*, 13 J. CONFLICT & SEC. L. 49, 54 (2008).

refrain from the threat or use of force against the territorial integrity . . . of any State."[38] Articles 2 and 3 of UNCLOS collectively establish that a coastal state's sovereignty extends only up to 12 nautical miles (NM) from its baseline.[39] While Article 22 of the China Coast Guard Law authorizes the use of force to protect sovereignty within China's territorial sea, the PRC extends this justification into waters where other coastal states have legitimate maritime rights. The PRC's reliance on historical sovereignty claims to justify these actions lacks legal standing under UNCLOS. Beyond the territorial sea, maritime rights in the Contiguous Zone, Exclusive Economic Zone (EEZ), and high seas are explicitly defined by UNCLOS and do not grant sovereign control in the manner the PRC asserts. Beijing's attempt to apply domestic enforcement powers beyond its lawful jurisdiction not only undermines UNCLOS but also threatens regional stability by escalating confrontations at sea.[40]

To comply with UNCLOS, the PRC would be limited to protecting only the rights delineated by the convention in the prescribed zones.[41] UNCLOS enforcement would likely not include harassing foreign vessels because of their mere presence. Instead, enforcement actions would need to be based on specific UNCLOS-prescribed rights, such as stopping a foreign vessel from unauthorized fishing in the PRC's EEZ. It is antithetical to use UNCLOS in an expansionist way to claim maritime areas away from other nations. Moreover, UNCLOS provides conflict resolution mechanisms to avoid the need for countries to rely on force when asserting their maritime rights and resolving disputes over perceived maritime zones.[42] The PRC has refused to acknowledge the result of this process for the exact area of sea concerned.

Forcible Measures to Detain Foreign Warships or Government Vessels

The PRC's new maritime laws, which authorize the detention of ships entering territorial waters and the forcible removal of foreign government vessels, are in direct conflict with applicable UNCLOS provisions. These laws are a continuation and codification of the PRC's claim that any ship needs permission to enter their territorial seas, [43] which does not align with the concept of *innocent passage* as defined by UNCLOS.[44]

Under UNCLOS, ships of all states, including warships, enjoy the right of innocent passage through the territorial sea (hereinafter, "TTS") of coastal states without prior notification or permission. Passage is considered innocent if it is not prejudicial to the peace, good order, or security of the coastal state and is continuous in nature.[45] UNCLOS provides a specific list of activities that are considered prejudicial, primarily precluding certain military operations.[46] Chinese scholars have stated that these measures are meant to "[deter] and [counteract] the illegal acts of U.S. and other Western countries' warships . . . from

[38] *See* UNCLOS, *supra* note 6, pt. XVI, Art. 301.
[39] *See* UNCLOS, *supra* note 6, pt. II, Arts. 2-5; *See Maritime Zones and Boundaries*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.noaa.gov/maritime-zones-and-boundaries (last visited Sep. 19, 2024).
[40] *See* UNCLOS, *supra* note 6, pt. II, Arts. 33, 55-58, 89.
[41] *Id*. at Arts. 2, 33, 56, 77.
[42] *Id*. at pt. XV.
[43] Maritime Claims Reference Manual, China (2023), U.S. DEP'T OF DEFENSE, https://stjececmsdusgva001.blob.core.usgovcloudapi.net/public/documents/China_2023.pdf.
[44] *See* UNCLOS, *supra* note 6, pt. II. Art. 17; *see Jackson Hole Agreement*, NAT'L U. OF SINGAPORE (Sep. 23, 1989), https://cil.nus.edu.sg/wp-content/uploads/2019/02/1989-USA-USSR-Joint-Statement-with-Attached-Uniform-Interpretation-of-Rues-of-International-Law-Governing-Innocent-Passage-1.pdf (the United States stated, jointly with the U.S.S.R., that there is no requirement to seek permission before conducting innocent passage).
[45] *See* UNCLOS, *supra* note 6, at Art. 18.
[46] *Id*. at Art. 19.

infringing on [our] waters . . . ."[47] However, this interpretation contradicts articles 21 and 24 of UNCLOS. While UNCLOS allows coastal states to adopt laws regulating innocent passage, it explicitly prohibits laws that have "the practical effect of denying or impairing the right of innocent passage."[48] Article 25 allows a coastal state to temporarily suspend innocent passage for security concerns with prior notice and non-discrimination among foreign ships.[49] The PRC does not take these steps. The PRC's codification of forcibly removing foreign government vessels increases the risk of international security incidents. UNCLOS provides a more measured approach, stating that if a warship does not comply with coastal state regulations, the coastal state may request the warship to leave the territorial sea immediately.[50] The common practice is to use direct ship communication or file diplomatic protests, rather than resorting to forcible removal.

The PRC is exploiting a gap in UNCLOS regarding specific actions a coastal state can take when a vessel refuses to leave its territorial waters upon request. While UNCLOS Article 30 allows coastal states to require non-compliant ships to depart, it does not explicitly detail enforcement measures. Article 31 then stipulates that the flag state of a non-compliant warship is responsible for damages to the coastal state.[51] The PRC appears to interpret this lack of specificity as tacit permission for more aggressive tactics. Even though some states, including the United States, do allow for the potential use of force in extremis, there are required inform, warn, and watch steps to see if the vessel fixes the issue at hand. Additionally, these steps are usually only used in undisputed waters.

The 2021 PRC Coast Guard Law, which authorizes detention of foreign ships for up to 60 days, directly conflicts with the principle of sovereign immunity for warships under international law and article 30 of UNCLOS. History has been clear on the sovereignty of state vessels. One scholar put it clearly, "[t]he sovereign equality of states, of course, prevents the existence of such a hierarchical relationship between nations. The exercise of jurisdiction against foreign vessels with a sovereign status will therefore in principle—save for permissive rules or waivers to the contrary—be unlawful."[52] A PRC detention of a foreign government vessel, without more, would be violative of this hierarchical relationship rule. In other words, their country's vessel is on equal footing with any other country's vessel.

b. Use of Force Provisions

Chapter six of the 2021 Coast Guard Law includes explicit language for the use of "police equipment and weapons" against foreign ships.[53] This chapter includes use of force allowances for situations expected of any coast guard entity. However, there are some troubling articles, namely Article 47. The second provision of this article states that the agency "may use handheld weapons" after a warning in the situation where "foreign ships" enter jurisdictional waters and "refuse to obey stopping order or refuse to accept boarding" and other measures do not prevail.[54]

International concern has arisen due to the ambiguity of whether these use of force provisions apply to warships and other government vessels since these vessels,

[47] Haoran Cui, *A Study on the Interpretation and Application of the 'International Concern Provisions' of the Chinese Coast Guard Law*, CUI MARINE DEVELOPMENT 4 (2024), https://doi.org/10.1007/s44312-024-00021-6.
[48] *See* UNCLOS, *supra* note 6, at Art. 24.
[49] *Id*. at Art. 25.
[50] *Id*. at Art. 30.
[51] *Id*. at Art. 31.
[52] Kwast, *supra* note 37.
[53] *Coast Guard Law*, *supra* note 27.
[54] *Id*. at Art. 47(2).

acting essentially as extensions of another country, are generally immune from compulsive use of force.[55] Any attempt to justify the use of force against warships, outside of necessary self-defense, could be a violation of the immunities of warships. These concerns are fueled by the PRC's past actions against government vessels from neighboring countries. It is crucial to consider international law on the use of force in an MLE context. The International Tribunal on the Law of the Sea, in the M/V Saiga (No. 2) opinion, held that "international law . . . requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances."[56] This ruling underscores that coastal states' use of force remains subject to the "general principles of international law such as necessity and proportionality."[57] The PRC would likely not be able to show necessity based on a government vessel not leaving the area after the CCG vessels have travelled to the disputed waters (which the PRC treats as part of their TTS) as this is the obvious situation that is created by their actions.

The PRC's expansionist ideas of maritime operations coupled with the concerning use of force provisions may make it difficult for the PRC to claim that force was used in a maritime law enforcement operation when most of the world may see the same force being used as an armed attack on another sovereign. Surely, the PRC will point to the Coast Guard Law and CCG-3 as national law that the enforcement operations were policing. However, the tribunal in the arbitration between Guyana and Suriname analyzed the actions taken by Suriname against the Guyanese vessel when Suriname claimed it was a law enforcement operation.[58] In that case, Suriname Navy gunboats circled an oil drilling rig in an area of disputed sea and told the rig to stop operations and move to Guyanese waters or else "the consequences will be theirs."[59] The Tribunal declared that the Suriname crew's actions were military actions rather than the claimed law enforcement actions.[60] The Tribunal pointed to the quick use of excessive force more geared toward destruction than toward actually investigating to make a case package for law enforcement.[61] In this regard, if PRC continues to use force in disputed areas with no real investigation or adjudicative efforts, then their militaristic intent becomes clear.

The implementation and interpretation of the PRC's new Coast Guard Law and related maritime regulations will be crucial in determining the extent to which the PRC adheres to its UNCLOS commitments. If the PRC operates or further clarifies their new law to cement the concerning divergences from UNCLOS detailed above, it could indicate a decision to prioritize national law over international maritime conventions within their legal system. The PRC is likely to point to these new national laws to color their SCS actions as legitimate law enforcement. The world should be ready to rebuke these claims.

III. Compared to other Coast Guards in the region

[55] *See* UNCLOS, *supra* note 6, Arts. 29-32.
[56] *M/V Saiga* (No. 2) (Saint Vincent and the Grenadines v. Guinea) (1999) 120 ILR 143, 155.
[57] DONALD ROTHWELL & TIM STEPHENS, THE INTERNATIONAL LAW OF THE SEA 234 (2d ed. 2016).
[58] Kwast, *supra* note 37, at 76-78.
[59] Guyana v. Suriname, PCA-2004-04, Award (Permanent Court of Arbitration, Sep. 17, 2007), https://pcacases.com/web/sendAttach/902.
[60] Kwast, *supra* note 37, at 76-78.
[61] *Id*.

Country	Law/Regulation	Use of Force language	Foreign/Sovereign Vessel language
Indonesia	Law No. 32 of 2014 on Maritime Affairs	None	"Jurisdiction in enforcement of sovereignty and law to foreign vessel . . . ."[62]
Malaysia	Maritime Enforcement Agency Act 2004	As an example of non-innocent passage.	None
Philippines	Republic Act No. 9993 (Coast Guard Act); Republic Act No. 10654 (Fishing)	None; none	None; Entry of foreign vessel into Philippine waters is prima facie case that the vessel is fishing.
Vietnam	Law of the Sea of Vietnam (2012); Coast Guard Law (2018)	May not force a foreign vessel navigating TTS (not heading to internal waters) to stop except to counter pollution; Can open fire on ships at sea in detailed situations.	Verbiage in-line with UNCLOS regarding asking foreign/government vessels to leave TTS; none.

The concerning provisions of the China Coast Guard Law and the CCGR-3 do seem to be unique compared to other nations in the Southern East Asia region. One of the few analyses completed compared the new CCG Coast Guard law to other regional nations and U.S. maritime laws concentrated on the use of force via weapons.[63] The analysis concluded that while the use of force may seem consistent with other coast guards in some regard, the language in the applicable articles of the Coast Guard Law is "explicit" compared to the remainder of the law for the purpose of sending a tough message to neighboring countries.[64] However, use of force rules do not by themselves telegraph whether the coast guard will operate within the framework of UNCLOS.

The main maritime laws of each nation and their maritime enforcement entities, coupled with their actions at sea, are more dispositive. Further detailing the difference from the PRC's neighbors, no other nation used explicit language against foreign sovereign vessels or warships.

a. The Philippines

In recent years, the most serious international incidents have been PRC aggression towards Filipino vessels.[65] These confrontations have raised concerns about the potential triggering of the mutual defense treaty between the United States and the Philippines.[66] Since 2011, the PRC has significantly escalated their coercive measures against the Philippines.[67] Despite this persistent aggression, the current Philippines administration has maintained its commitment to aligning its maritime laws with UNCLOS.

The Philippines Coast Guard Law of 2009, implemented by the Republic Act number 993, details a straightforward role of

[62] *See Law of the Republic of Indonesia Number 32 of 2014 on Marine Affairs*, JDIH Art. 59, https://jdih.bpk.go.id/File/Download/52196cb6-15e8-488d-9960-3f82a6276208/uu%20no%2032%20tahun%202014%20engish.pdf (last visited Jan. 13, 2025).
[63] *See Force Majeure*, *supra* note 31.
[64] *Id*.
[65] *See How the U.S. and the Philippines Should Counter Beijing's Aggression in the South China Sea,* ATLANTIC COUNCIL (Oct. 15, 2024), https://www.atlanticcouncil.org/blogs/new-atlanticist/how-the-us-and-the-philippines-should-counter-beijings-aggression-in-the-south-china-sea; *See China's Maritime Disputes*, COUNCIL ON FOREIGN REL., https://www.cfr.org/timeline/chinas-maritime-disputes (last visited Sep. 25, 2024).
[66] *FACT SHEET: U.S.-Philippines Bilateral Defense Guidelines,* U.S. DEP'T OF DEF. (May 3, 2023), https://www.defense.gov/News/Releases/Release/Article/3383607/.
[67] Huynh, *supra* note 19. This chart shows the types and amount of coercive PRC actions against the Philippines.

the Philippine Coast Guard (hereinafter, "PCG") and commonly refers to the compliance with international treaties.[68] The PCG regulations grant broad authority to the PCG, but at the same time, clarify that the boarding of vessels is limited to "merchant ships."[69] In comparison, the PRC Coast Guard laws leave this vague in some parts and in other parts explicitly say they will take action against foreign government ships.[70]
The Philippines has recently taken legislative actions to domestically codify the 2016 arbitral award via the Maritime Zones Act and the Archipelagic Sea Lanes Act.[71] The main feature of these acts is to codify in national law both the maritime zones (territorial sea, contiguous zone, and exclusive economic zone) and to establish proper archipelagic sea lanes for use by foreign and domestic ships.[72] Filipino politicians have stated the act is meant to show respect for UNCLOS and to "oppose China's aggressive actions" in the Filipino Exclusive Economic Zone.[73] It is clear from the PCG regulations and use of force posture that the Philippines is trying to function within the framework of UNCLOS and avoid aggressive actions at sea. Conversely, the PRC reportedly responded to the new PCG laws by claiming straight baselines around Scarborough shoal, yet another action challenging the established maritime order.[74]

b. Vietnam

Vietnam, like the Philippines, demonstrates a strong commitment to UNCLOS through its domestic legislation and international engagement. Vietnam has incorporated UNCLOS principles through its domestic Law of the Sea Act,[75] but also has explicit use of force language in their Coast Guard law.[76] The Vietnam Law of the Sea states in the second article that where the law differs from an international treaty, the treaty shall prevail.[77] The law also hits on two other relevant points. First, the fourth article states that Vietnam settles disputes with other countries through "peaceful means in conformity" with UNCLOS.[78] Second, Articles 23 and 28 combine to codify innocent passage as detailed in UNCLOS and state that foreign official vessels that do not comply with maritime laws will be asked to leave.[79] This contrasts with the PRC law as it shows compliance with the wording and intent of UNCLOS and is far less escalatory.

However, the Vietnam Coast Guard law does have explicit use of force verbiage. Article 14 of the law states that, "[w]hile on duty, officers . . . shall be entitled to use military weapons, explosive materials and other accessories, and may fire military guns [under applicable regulations.]"[80] The Article states that certain "ships and boats at sea" can be fired upon under any four conditions mainly focused on offenders of a law fleeing

[68] *Philippines Coast Guard Law of 2009*, THE REPUBLIC OF THE PHILIPPINES (2009), https://www.coastguard.gov.ph/images/GAD/RA_9993_PCG_LAW_OF_2009.pdf.
[69] *See Implementing Rules and Regulations Rule 3(k)*, THE REPUBLIC OF THE PHILIPPINES (2011), https://mepcom.coastguard.gov.ph/wp-content/uploads/2020/08/IRR-of-Republic-Act-No-9993.pdf.
[70] *See supra* section III of this paper.
[71] *See Philippines Enforces Sovereignty with New Maritime Zones Act*, THE RIO TIMES (Aug. 7, 2024), https://www.riotimesonline.com/philippines-enforces-sovereignty-with-new-maritime-zones-act.
[72] *Id*.
[73] *Id*.
[74] *See Manila and Beijing Clarify Select South China Sea Claims*, CTR. FOR STRATEGIC & INT'L STUD. (Nov. 21, 2024), https://www.csis.org/analysis/manila-and-beijing-clarify-select-south-china-sea-claims.
[75] *See Vietnam Coast Guard Law*, THU VIEN PHAP LAUT (Nov. 19, 2018), https://thuvienphapluat.vn/van-ban/EN/Bo-may-hanh-chinh/Law-33-2018-QH14-on-Vietnam-Coast-Guard/402479/tieng-anh.aspx.
[76] *See Vietnam Law of the Sea*, ASIA MARITIME INDEX (2012), https://maritimeindex.org/wp-content/uploads/2021/12/VN-LOTS.pdf.
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Vietnam Coast Guard Law*, *supra* note 75, at Art. 14.

from law enforcement.[81] This is more aggressive verbiage compared to what is present in the laws of other regional countries (while not as escalatory as the PRC).

Vietnam's approach to relations with the PRC has evolved significantly in recent decades. While historical tensions led to conflicts in the past, Vietnam has adopted a more nuanced hedging strategy in recent years.[82] Vietnam shares a land border and is a trade partner with the PRC which may encourage a more cautious approach to maritime disputes. Additionally, Vietnam uses a "Four No's" policy meaning no miliary alliances, no siding with one country over another, no foreign military bases, and no using force in international relations.[83] Despite Vietnam's cautious approach, recent events have compelled it to take a firmer stance against PRC aggression in the SCS. In October 2024, a significant incident occurred when the PRC reportedly attacked a Vietnamese fishing vessel near the Paracel Islands. This event prompted Vietnam to issue a joint statement with the Philippines condemning PRC's actions in the SCS.[84] Given recent incidents, there is potential for escalation in future maritime encounters involving the Vietnam Coast Guard.

c. Indonesia

Indonesia, located at the southern end of PRC's dash line, has been the most physically resistant to PRC vessels.[85] Indonesia has both successfully detained and fired warning shots at Chinese fishing vessels that were illegally fishing in Indonesian waters.[86] Indonesia has also deployed sizable fleets of up to 20 combatant and patrol ships to maintain a presence in the maritime areas where PRC shows interest.[87] At the same time the country was increasing the size of its Navy, they also signed an order to create a unified Maritime Law Enforcement agency akin to a Coast Guard. As an example of Indonesia's attitude toward excessive SCS claims, the past president of Indonesia, when speaking about contesting PRC vessels near the Natuna islands stated, "yes, if you want to fight, we are ready."[88]

The Maritime Security Agency (BAKAMLA) was created by presidential regulation to be a coast guard like agency mainly by coordinating both its own assets and assets from other agencies.[89] Predicting how an encounter between the PRC and Indonesian vessels will play out is difficult, in part, because of the smorgasbord of Indonesian maritime agencies and laws. There are ten agencies with some role to play in maritime law enforcement that are operating under 15 different laws and regulations.[90] To narrow the potential scenario, as of 2022, only six of these agencies had patrol assets.[91] BAKAMLA needs continued growth as the true coast guard-like entity to gain more acceptable by the pre-existing agencies.[92]

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[81] *Id*.
[82] *Fair Winds & Following Seas: Maritime Security & Hedging in the South China Sea*, BLUE SECURITY 14 (Aug. 2023), https://www.latrobe.edu.au/__data/assets/pdf_file/0004/1489891/bluesecurity03.pdf.
[83] *See Assessing Vietnam's Maritime Governance Capacity*, ASIA MARITIME TRANSPARENCY INITIATIVE (Jan. 10, 2024), https://amti.csis.org/assessing-vietnams-maritime-governance-capacity-priorities-and-challenges.
[84] *Vietnam Accuses China of 'Brutal' Attack on Fishing Boat in South China Sea*, TIME (Oct. 3, 2024), https://time.com/7038886/vietnam-south-china-sea-attack-boat-injuries.
[85] Scott Bentley, *The Maritime Fulcrum in the Indo-Pacific: Indonesia and Malaysia Respond to China's Creeping Expansion in the South China Sea*, U.S. NAVAL WAR COLLEGE (2023), at 4.
[86] *Id*.
[87] *Id*.
[88] *Id*. at 16.
[89] *Id*. at 35.; Before BAKLAMA, the MLE efforts were led by the Surveillance Ship Directorate (DKP). *Id*.
[90] Evan Laksmana, *Remodeling Indonesia's Maritime Law Enforcement Architecture*, 44 CONTEMPORARY SOUTHEAST ASIA 1, 122, 136 (2022), https://www.jstor.org/stable/10.2307/27130810.
[91] *Id*.
[92] *See Id*.

BAKAMLA's organic statute is Law No. 32 of 2014, also known as "the maritime law."[93] Under this law, BAKAMLA has the authority to "stop, inspect, arrest, seize, and transfer sea vessels to the relevant authorized agency for further proceedings."[94] However, the real power within BAKAMLA is the regulation that allow it to make maritime policy and coordinate maritime operations with the various other agencies.[95] Yet there is still internal strife. There is another agency that claims to be the de facto coast guard for Indonesia while both agencies' enabling laws somewhat conflict.[96] Some critics also point out that BAKAMLA does not have in-depth investigatory powers as they are told to pass the seized vessel to another agency.[97] Work is on-going to draft new regulations to better integrate and support BAKAMLA.[98]

Further tensions between the PRC and Indonesia over the SCS seem unlikely as of this writing. In November 2024, the Indonesian President signed an economic development agreement with the PRC regarding the area of overlap in the SCS.[99] A joint message was released speaking about peaceful and prosperous times for the two countries.[100] Yet some scholars were concerned that Indonesia may be giving up sovereign waters in that area in the long run.[101]

d. Malaysia

In Malaysia, the main maritime law enforcement law is the Malaysian Maritime Enforcement Agency Act 2004 (Act 633). This law established the Malaysian Maritime Enforcement Agency (MMEA), also known as the Malaysian Coast Guard. The MMEA is charged with stopping and boarding vessels to enforce laws within the "Malaysian Maritime Zone."[102] Malaysia takes special care to respect the regime of innocent passage. The MMEA's organic law states that "no vessel shall be stopped, entered, boarded, searched, inspected, or detained within the area of territorial sea if the passage of the vessel . . . is an innocent passage."[103] Further, the only explicit mention of the use of force is in relation to receiving force from a vessel as an example of non-innocent passage.[104]

Malaysia has strong economic and military ties with the PRC.[105] The country has diplomatically confronted the PRC when the PRC conducts coercive acts directly toward Malaysia, however, the country attempts to avoid weighing in on big power competition with the PRC.[106] There have yet to be any threat of or actual use of force by the PRC on Malaysian assets at sea.[107] In 2020, there was a multiday standoff between PRC and Malaysian vessels in the SCS over an oil and gas exploration area which resolved

[93] Arie Afriansyah, Christou Imanuel, & Aristyo Rizka Darmawan, *Nurturing Hero or Villain: BAKAMLA as the Indonesian Coast Guard*, COGITATIO (Apr. 17, 2024), https://doi.org/10.17645/pag.7806.
[94] *Id*. at 4.
[95] *Id*. at 5.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] Stanley Widianto, *Indonesia Says it Has no Overlapping South China Sea Claims with China*, REUTERS (Nov. 11, 2024), https://www.reuters.com/world/asia-pacific/indonesia-says-it-has-no-overlapping-south-china-sea-claims-with-china-despite-2024-11-11.
[100] *Id*.
[101] *Id*.
[102] *Malaysian Maritime Enforcement Act*, ASIA MARITIME INDEX, https://maritimeindex.org/legal-document/malaysian-maritime-enforcement-agency-act-2004 (last visited Jan. 15, 2025).
[103] *Id*.
[104] *Id*.
[105] *Fair Winds*, *supra* note 82, at 10-11.
[106] *Id*.
[107] *See* Huynh, *supra* note 19, at 106.

peacefully.[108] Recently, Malaysia has explored for oil and gas within their EEZ, part of which PRC claims, and has stood firm on their rights to exploration even after receiving protest notes from the PRC.[109] Malaysia is likely to avoid maritime use of force with the PRC to continue their overall strong relationship.

IV. Summary

The PRC's Coast Guard Law (2021) and China Coast Guard Order No. 3 (2024) represent a deliberate escalation in the South China Sea, reinforcing China's strategy of using domestic law and maritime law enforcement as a tool of coercion. These laws grant the China Coast Guard expansive and ambiguous enforcement powers, including the authority to use force, detain foreign vessels, and enforce domestic laws in disputed waters—all in direct contradiction to UNCLOS and established international legal norms. Unlike other regional coast guards, which operate within clear legal frameworks, China's maritime law enforcement is designed to challenge the sovereignty of neighboring states, ignore the binding 2016 Arbitral Tribunal award, and undermine the rules-based international order.

If these legal measures continue to be applied aggressively, they could serve as a trigger for greater regional instability, increasing the risk of direct confrontation between China and other South China Sea claimants, particularly the Philippines and Vietnam. The escalation of physical confrontations at sea, including the harassment of foreign vessels and the use of water cannons, suggests that China is already testing the limits of its new legal authorities. Ultimately, China's Coast Guard Law is more than a legal instrument—it is a blueprint for attempted maritime dominance.

[108] *Maritime Standoff Between China and Malaysia Winding Down*, U.S. NAVAL INST. (May 13, 2020), https://news.usni.org/2020/05/13/maritime-standoff-between-china-and-malaysia-winding-down.
[109] *Malaysia Will Not Stop South China Sea Exploration*, REUTERS (Sep. 5, 2024), https://www.reuters.com/world/asia-pacific/malaysia-will-not-stop-south-china-sea-exploration-despite-china-protests-pm-2024-09-05/.

CONFERENCES AND COURSES CALENDAR

May 2025

7-8 Advanced National Security Law, Newport, Rhode Island (invite only)

12-22 Operations Law Course 25-B, Maxwell AFB, AL

19-25 NATO Joint Targeting Course, Oberammergau, Germany

June 2025

2-16 Intelligence Support to Irregular Warfare, Oberammergau, Germany

16-23 NATO Orientation Course, Oberammergau, Germany

July 2025

28-1AUG 21st Intelligence Law Course, Charlottesville, VA

CLAMO Points of Contact (DSN: 521)

Director LTC Michael Lamphier	micheal.h.lamphier.mil@army.mil (434) 971-3210
National Guard Representative MAJ Elijah Beaver	elijah.t.beaver.mil@army.mil (434) 971-3391
Navy Representative LCDR Nicolaus Gruesen	nicolaus.c.gruesen.mil@army.mil (434) 971-3382
Army Representative MAJ Jason Johnson	jason.t.johnson76.mil@army.mil (434) 971-3201
Coast Guard Representative LCDR Anthony Rodrigues	anthony.m.rodrigues4.mil@army.mil (434) 971-3390
Marine Corps Representative Capt Mitchell McCulley	mitchell.r.mcculley.mil@army.mil (434) 971-3248
German Exchange Officer Mr. Norman Vogt	norman.v.vogt.fn@army.mil (434) 971-3132
Polish Exchange Officer Lt Col Grzegorz Janiszewski	grzegorz.r.janiszewski.fm@army.mil (434) 971-3158
Army Representative MAJ Matthew Baek	matthew.j.baek.mil@army.mil (434) 971-3248
Army Reserve Representative LTC Paul Robson	paul.l.robson.mil@army.mil
Organizational Email	usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@army.mil

SUPPORTING THE WARFIGHTER

PIN: 220555-000