FAIR WARNING

Martin Murphy

Kraska, James. *Maritime Power and the Law of the Sea.* New York: Oxford Univ. Press, 2011. 464pp. $95

"In the unrelenting struggle of peoples," the historian Pete Padfield wrote, "those ascendant at sea have, at least in the modern era, proved consistently successful either singly or in alliance against those with a territorial power base." This notion, which he took from the renowned strategist Colin S. Gray, drove his 1999 history *Maritime Supremacy and the Opening of the Western Mind.* Naval War College law professor James Kraska has written a book that could well have been entitled "Maritime Myopia and the Closing of the American Mind," for that is the story it recounts and the future it foretells unless the United States responds to the tocsin he sounds.

To be effective, naval power requires access to the littorals in times of peace as well as war. Their importance is not in doubt; they contain 70 percent of the world's human population and most recoverable living and nonliving resources. Coastal states without wider maritime interests of their own naturally want to limit access by foreign navies, which for the most part means the U.S. Navy and Marine Corps. It is, therefore, worrisome but not surprising that the promotion of navigational freedom increasingly is being referred to in international academic and policy circles as the "American" problem.

The fundamental debate in oceans policy is the extent and degree to which coastal states can extend their jurisdictions seaward. The key battleground is the exclusive economic zone (EEZ), which altogether accounts for just under 40 percent of the world's ocean space. This concept was created sui generis during the United Nations Convention on the Law of the Sea (UNCLOS) negotiations, as a compromise between the conflicting demands of coastal and maritime states. Coastal states were allowed to control the economic resources found in and under the sea out to a limit of two hundred nautical miles but had no right to impede free movement on and through the water column.

Kraska demonstrates that this compromise is under sustained attack. He argues that the liberal order of the oceans based on the concepts of state sovereignty,

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national self-determination, and legal equality is being replaced by socialist and dependency-theory models. These push a moral agenda of "fairness," which is alien to previous functional conceptions of international law that seek to maximize order. Like any form of politically inspired collective action, "fairness at sea" can only be attained through the imposition of greater state control.

In response, Kraska repeats the cardinal question that Ambassador John Negroponte asked twenty years ago: "Who will protect freedom of the seas?" Kraska's answer is that although many states are interested in that freedom, to the point that some (including Russia, Singapore, and the United Kingdom) will protest attempts to undermine it, none but the United States have the widespread interests or resources worldwide to back up their objections with action.

Taking action requires institutional understanding and political will. Within the U.S. government, institutional understanding of the importance of navigational freedom is limited increasingly to the Department of Defense and, to a degree, the U.S. Coast Guard. While it was encouraging to hear Secretary of State Hillary Clinton announce during her visit to Hanoi in July 2010 that the "United States has a national interest in freedom of navigation, open access to Asia's maritime commons and respect for international law," the reiteration of this longstanding commitment comes somewhat out of the blue. For the most part the Department of Defense appears to have lost the support of the State and Commerce Departments, which have been overwhelmed by pressure from the assiduous efforts of such agencies as the Environmental Protection Agency and National Oceanic and Atmospheric Administration to put environmental protection at the pinnacle of U.S. oceans policy. This means that navigational freedom has lost its preeminence when at the same time the need to build relations with newly assertive (and powerful) coastal states has meant that acquiescence to excessive coastal claims is being offered in exchange for concessions in other policy areas.

Kraska argues strongly that this creeping oceanic enclosure is a genuine risk to international security. His judgment is valuable not only because of his scholarship but because of his practical experience as a Navy judge advocate specializing in the negotiation of oceans law matters. By privileging sea mammals over seamen, parts of the U.S. government, and an international network of like-minded bureaucrats in other states and international organizations that share their belief, are just as active in eroding the U.S. Navy's freedom of maneuver and undermining U.S. national security interests as are China, Burma, Indonesia, and the European Union.

It would be foolish to argue that all those who promote greater state control over the oceans are motivated solely by a desire to keep the U.S. Navy from approaching their coasts. Some, as Kraska points out, are motivated by simple nationalism—to keep what they view as their national patrimonies free from

foreigners. Those at the other end of the spectrum take the view that protecting the common heritage of mankind is a cause more noble than grubby national interest. Some coastal states, however, are using increasingly aggressive legal means—dubbed "lawfare"—to increase control over their EEZs by

- Delegitimization of the use of force and prevention of access by warships
- Sovereignty claims
- Environmental protection.

Kraska highlights the interrelation among all three by pointing out that China has moved from security to resource-related and environmentally based arguments in its campaign to exclude U.S. Navy warships and aircraft from its EEZ. This shift is reflected on the water by its newfound preference for confrontation using coast guard cutters, oceanographic ships, fisheries protection vessels, and even "independent" fishing boats rather than warships.

None of these claims are justified under UNCLOS, whose text is unambiguous; references to it in the authoritative commentary offer no comfort to those who wish to change unilaterally what was agreed. The only course of action for the Chinese is to assert their authority and defy other states, hoping that in time their measures will become accepted. Just as World War II Germany gambled that no one would contest its reoccupation of the Rhineland, so too are these states being proved right as they territorialize what had previously been international waters. Observe China's recent tactics in the South China Sea. For some in China, such as one commentator writing in the *People's Daily* in December 2010, willful misreading of the treaty has become commonplace: "The United States has not signed the U.N. Convention on Law of the Sea because it considers exclusive economic zones to be international waters, which, by its hegemonic logic, should be included in the U.S. sphere of influence." China's stance might be the most egregious on the issue of excessive EEZ claims, but where it leads, others will follow. As Kraska comments, a "combination of boldness and power make Beijing the world's greatest hazard to freedom of navigation in the EEZ."

This work has its weaknesses: the author's review of strategic issues lacks precision, and his summary of relevant maritime history is a Cook's tour of events that naval readers would regard as basic. Yet Kraska's knowledge of events may be sorely needed by readers unfamiliar with the strategic history and context of the law of the sea, and indeed the history bears repeating for those who no longer view the sea as Mahan's highway. In any case, these reservations are small compared to the author's thorough understanding of the subject's legal core and his clear and forthright exposition of the issues.

It is no exaggeration to say that this is an important book. The warning it conveys may have been sounded before, but never so clearly or so comprehensively. It is a warning worth repeating again and again until U.S. government policy regains the full-blooded recognition that freedom of navigation is vital for the sustainment of many of the other freedoms that we take for granted. Anyone concerned with freedom of navigation, and indeed freedom itself, should read this book. Those who are in a position to act on its recommendations need to do so without delay.