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Chapter 4

Sea Power and the Law of the Sea: The Need for a Contextual Approach*

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The beginnings of the U.S. Navy's third century may have signalled a rethinking of navies' roles in the international power process and ultimately in all aspects of international interaction. Ken Booth's *Navies and Foreign Policy* appeared in 1976, following D.P. O'Connell's *Influence of Law on Sea Power* (1975), Edward Luttwak's *Political Uses of Sea Power* (1974) and James Cable's *Gunboat Diplomacy* (1971). And, for the Soviets, Adm. S.G. Gorshkov has produced his "summa of naval power," *Sea Power and the State*, said to be "dense, rich, logical and almost overpowering in breadth."[1]

The latest American study on the relationship of military power at sea to international law as the flow or process of authoritative and controlling decision is Mark W. Janis' *Sea Power and the Law of the Sea.*[2] His theme is well stated in the introduction and his final chapter:

> The law of the sea is the creature of international order, reflecting patterns of compromise and consensus, insofar as they exist, among the competing and complementary interests of states. Since security interests are vital to every country, it is only reasonable to expect that States will consider sea power when devising ocean policy. It would be remarkable if a workable legal order for the oceans did not accommodate national naval interests.
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> Sea power influences the development of the law of the sea not only by imposing the need to reconcile naval interests in international negotiations, but when naval force is used to advance national claims to international law of the sea. . . . Navies often [have] a role in this process of . . . law making. . . .
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> International society, like any society, needs a more complex legal system when more actors relate in more ways. The steadily increasing number of ocean users and uses means that a more detailed ocean law is inevitable. Navies will be ensnarled in this new complexity. But the new ocean order will not only impede the accomplishment of some naval missions, it will facilitate others. Remembrance and reverence of the old ocean order will not be enough. Navies must reexamine their relationships to the law of the sea and their preferences for legal rules keeping the emerging ocean order in mind.

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He acknowledges that "the new ocean order is bound to create some difficulties for naval operations," noting that the old ocean order was ideally suited for the mobility of powerful navies, whereas the emerging new consensus "will impose restraints on ocean use where before there were none."

This article will first review Janis' exposition of these themes. Second, his book will be examined in context of those other recent publications noted in my first paragraph. Third, his monograph will be examined in the context of international law to illustrate the breadth of sources that must be considered when a naval operation is being planned or when situations develop in the ocean environment. Finally, the article will illustrate the utility of the contextual method of problem solving through decision theory, particularly the policy science approach. While *Sea Power* has certain shortcomings, whether viewed from the perspective of a traditional lawyer or from the policy science vantage point, the book is a very commendable first effort by an outstanding young scholar with real promise.

The first four chapters focus on the four major naval powers—the United States, the Soviet Union, Great Britain, France—and these States' interests in law of the sea (LOS) issues, each nation's domestic interests in "ocean policy processes," and the reflection of naval interests in each country's ocean policy. Chapter five primarily analyzes the coastal navy States' interests in the main law of the sea issues. Each of the first four chapters begins with the major powers' conceptions of their navies' missions or roles as seen by the head of its navy or by an authoritative decisionmaker in the equivalent of the U.S. Department of Defense, in the sub-chapter on naval interests in law of the sea issues. The subchapter continues by analyzing the strategic deterrent forces and those vessels that would carry out conventional missions. The reader is referred to standard sources such as *Jane's Fighting Ships* for descriptions of each country's navy, but Janis might also have considered the heightened power of combinations such as NATO, the Rio Pact, the Warsaw Pact, or other published alliances. Chapter 1 analyzes the principal legal issues in present law of the sea negotiations that affect the U.S. Navy: right of passage through straits, including analysis of straits crucial to American naval interests; transit along coasts, and therefore the issue of the territorial sea; and military use of the deep seabed. This theme is repeated in succeeding chapters to demonstrate that the Soviet Union, Britain and France have positions similar to the United States on straits and the territorial sea, although the British and French stance is less clear and may be subject to change in the future. The United States and the U.S.S.R. differ on the issue of military uses of the seabed, the United States favoring a regime permitting implantation of listening services, while the Soviet Union has desired complete demilitarization of the seabed. Janis sees this difference as resulting from "scientific lag" or perhaps from propaganda intents, and notes third-world support for total demilitarization.

The bulk of the fifth chapter recounts the differences between the naval powers and the coastal States on the straits issues and the general consensus for a 12-mile territorial sea except for questions related to economic resources. The discussion of naval interests in law of the sea issues in the first five chapters cites standard references relating to naval missions and naval forces. Janis relies on treaties and standard works on the law of the sea in laying the groundwork for his analysis of recent international negotiations relating to the law of the sea issues. He frequently cites the *Informal Single Negotiating Text* (ISNT), the *Revised Single Negotiating Text* (RSNT), or individual States' positions relating to the negotiations, and cites U.N. General Assembly resolutions in point.

Janis' summary of the United States internal decisionmaking process for formulating a coherent oceans policy reveals the bewildering complexity, or morass, of governmental agencies that have an input, or finger in the pie, for these issues. While the corresponding subchapters on the role of British and French naval interests in the ocean policy process also discuss the internal governmental decisionmaking processes, some attention is paid to the strength of private shipping interests and public opinion. Except for indirect references to pressures on Congress, and a summary of commercial interests, and non-governmental organizations, there is little discussion of the great influences these groups can bring (and have brought) to bear on official decisionmaking. The U.S.S.R. Navy's role in its ocean policy process is, as with most things Soviet, still much of "a riddle wrapped in a mystery inside an enigma." However, certain externalities of Soviet national interests, such as its growing merchant fleet, and the composition of the U.S.S.R. delegation to the law of the sea conference give some keys to its internal decision process, as Janis suggests. One egregious omission from the analysis in the chapter on coastal navy States is any discussion of the pressures that shipping interests of countries such as Japan and the Pan-libhon nations (Panama, Liberia, Honduras) may have exerted on the negotiations or the national decision process.[3] Similarly, there is little mention of the interest of states that are great consumers of fish and other marine resources.

Janis sees these crucial interests of the world's navies in ocean policy: the breadth of the territorial sea, conditions for the right of transit through international straits for warships, and the use of the deep seabed for military purposes. In each chapter he relates the legal position of the major naval powers and the coastal States to the available stated positions of their navies' decisionmakers. As with the Soviets in other aspects of the book, concrete information is scarce. The coastal States' positions vary and perforce are only summarized.

The sixth chapter, "Navies and the Development of the Law of the Sea," examines naval interests' influence on the development of the law of the sea, or the "process [of] authoritative decision [that] generates [the] law of the sea both by custom and by convention," referring to the work by Professors Burke and McDougal.[4] The sub-chapter on naval power's influence on the development

of customary law of the sea notes the beginnings of customary international law in the last two centuries, then plunges abruptly into the 1972-73 cod war between the United Kingdom and Iceland. While the latter conflict makes the point, a more complete historical discussion might have mentioned the evolution of the cannon-shot rule into the 3-mile limit, the developing practice or custom of collecting debts by gunboat diplomacy in the 19th century, or the Corfu Channel Case of 1947. These customs have since been vindicated or repudiated by international convention. Introduction of such paradigms would have provided a natural transition to the subchapter on "Naval Interests and the Law of the Sea Negotiations." The influence of naval action on international custom and custom's impact on national courts was not discussed, nor did the author discuss the reciprocal effect of customary international law on seapower, a theme of O'Connell's study and a factor perceived by Cable. Janis' study of the interplay of naval interests and the development of international agreements to govern the regime of the oceans is primarily concerned with the recent Law of the Sea Conference negotiations. The naval input into the development of treaty norms is old; for example, Matthew Fontaine Maury, and therefore the U.S. Navy, was a major force in early conferences on weather problems. Similarly, the opposition of naval interests as articulated by Alfred Thayer Mahan to arbitration,[5] which perforce requires a treaty, must have had its influence. As O'Connell has pointed out, treaty law has also had an influence on the employment of naval force.

The final chapter, "Navies and the New Ocean Order," concludes that the new ocean order—whether based on convention or consensus through new customary norms—"is bound to create some difficulties for naval operations." The old regime was based on freedom of the seas "suited for the mobility of powerful navies." The new norms for the oceans will follow a theme of restricted use. "The navies of the world will not only be called upon to respect new national regional and international maritime laws, but sometimes [will be] expected to help establish rules in times of conflict and uncertainty." Janis views the United States and the Soviet Union, more than the lesser naval powers, as facing the great dilemma (or frustration) of possessing relatively overwhelming naval force in an era of decreased high seas mobility due to the new restrictive international norms. O'Connell would agree with Janis that "the law of the sea . . . dictates the practicalities of [the] deployment of sea power," and that the professional insights of the naval officer who is aware of the law, and the lawyer who understands what goes on inside warships, must be the result of a continuing dialogue.[6] O'Connell would also inject the developing technology of navies as an active factor in self-defense, permitted under international law, contrasted with Janis' apparent conclusion that the new norms may serve as only a cramp on the style of the mobile navy. More importantly, O'Connell would urge the world's naval staffs (and, this writer would add, decisionmakers at the national policy level) to take the predicted trends that have been postulated and plan

accordingly, including "machinery . . . for rapid appreciation of the legal issues and equally rapid reaction if the theory of self-defense is to be effectively translated into terms of sea power."[7]

A Comprehensive Approach to the Law of the Sea and Seapower. Janis' monograph is an excellent linear study of the relationship of seapower and the law of the sea, particularly in the situation of peacetime norms. However, a law-oriented study of the problem would demand a more comprehensive approach, both as to sources for norms and the theoretical foundations of international law.

While his fifth chapter does justice to two traditional sources of international law, treaties and custom, inexplicably he omits reference to general principles of law recognized by civilized nations, and the subsidiary sources of judicial decisions and the "teachings of the most highly qualified publicists of the various nations." To be sure, these sources may not be as clear-cut or as persuasive as treaties or custom, but such national court decisions as *Pacquet Habana*[8] or *Schooner Exchange v. McFadden*[9] have had great influence on the development of international law.

Similarly, writers such as Hugo Grotius, John Bassett Moore, Myres S. McDougal, or Grigori Ivanovich Tunkin, are frequently cited. Janis often refers to these writers, but he does not list them as a source. The perspective of any author in international law should be considered as well; compare the widely varying approaches of Professor Ian Brownlie or Lord McNair,[10] representing the traditional British and European school in style or in thought; the views of jurists from emerging nations such as Judge Roy,[11] who see a larger community of law and legal institutions; the input of great regional scholars such as Judge Alvarez and Carlos Calvo,[12] who reflect the perspectives of Latin America; the Soviet approach to international law issues, as, for example, G.I. Tunkin's concept of the relationship of law and the Communist revolution;[13] or the policy science approach of Professor Myres S. McDougal. Janis has treated Soviet perspectives on international law elsewhere, with specific reference to Admiral Gorshkov's works,[14] but articulation of these perspectives might have explained the theory behind the pronouncements.

Janis' monograph relies heavily on conventions among states, the preparatory work for such treaties, the debates of international organizations and conferences (which may or may not be part of the *travaux preparatoires*—preparatory work, or "legislative history" as American lawyers would put it—of treaties), and customary international law. However, nowhere does the author note the important distinction between treaties among nations and binding as to them and the important use of families of treaties as general evidence of customary international law. The great division of authority on the proper use of *travaux preparatoires* is not developed. The importance of the Truman Proclamation,

asserting jurisdiction over the continental shelf adjacent to the United States, and the Latin American States' claims for a wide fishing zone, could have been tied to a generally recognized source for customary international law that he would urge for the world's navies, namely, practice among nations. Some discussion of national attitudes about law and sources of the law would have been a useful addition to the study.

A comprehensive examination of law of the sea issues should also explore the problem in its total context. Viewed in its largest geographic scope, the law of the sea includes the land, the sea and its tributary waters, the seabed, airspace and outer space. Each of these geographic features is interrelated with the others, and the legal regime of the sea and the seabed cannot be properly considered without a thought for the other geographic arenas. For example, what does it profit a nation to demand a 3, 6 or 12-mile limit for purposes of coastline security if its adversary can collect all the data it needs by reconnaissance satellite in violation of the Convention on Peaceful Uses for Outer Space? The naval commander's judge advocate must have an appreciation of the circumstances that would permit destruction of such satellites. Air operations are a major factor in naval power today, yet there was little integration of what rules there are for air warfare and for peaceful use of airspace. Janis' scope is peacetime use of the oceans; however, the law of armed conflict—also a part of international law—has important norms binding on nations, particularly in a projection context:[15] rights of fishing vessels, rights of merchant ships, submarine cable protection, mine warfare and blockade, the rights of belligerent vessels in neutral ports, hospital ships, the rights of disadvantaged persons involved in naval operations (the wounded and shipwrecked at sea, civilians, and prisoners of war), and so on. Janis might have mentioned the Nuclear Non-Proliferation Treaty, the Antarctic Treaty, or the Latin American nuclear free zone both for their possible impact on oceanic law problems and as part of the trend relative to peaceful uses of the deep seabed.

Janis has recognized the connection between the peacetime uses of the sea, the usual context the LOS negotiations contemplate, and the different factors at work during war,[16] but he does not so state in *Sea Power*. Assuming that the scope is to be limited to peacetime naval operations, or to cold war confrontations, discussion of the United States-U.S.S.R. Agreement on Incidents at Sea, conventions on the international rules of the road, mercantile agreements that indicate policy shifts as important as those in the LOS negotiations, and the welter of environmental treaties and national legislation,[17] would have placed the evolving oceanic law in deeper perspective. Finally, the naval officer—be he line commander or judge advocate—must be aware of the ever-present factors of national criminal statutes that limit or prescribe conduct on the oceans, his own code for military discipline, and his navy's general regulations that may have the force of law. To be sure, these sources are usually considered in the context of individual responsibilities, but fleet commanders also risk indictment or charges

preferred for participation in piracy, hazarding vessels, or disobedience of lawful regulations and orders, for example.

Thus while his study is valuable as written for a monograph on the role of naval power and current trends in the Law of the Sea Conference negotiations, a broader perspective would have resulted in a more comprehensive analysis. The product would have been a weightier, and therefore perhaps less attractive book for many readers. Sea lawyers will be happier with *Sea Power* as it is, to be sure. For the professional military man who is not a lawyer, these comments are not published to denigrate a fine monograph, but to apprise him of the need to probe more deeply, perhaps with the aid of his judge advocate, for more definitive answers to very complex issues.

Time will provide an additional gap in the coverage of *Sea Power* as the law of the sea continues to develop along certain established lines and perhaps with some of the new inputs discussed above. Already, the *Informal Consolidated Negotiating Text* has emerged from the Law of the Sea Conference to supplant the *Revised Single Negotiating Text* relied on by Janis. The accelerating pace of legal developments should prompt text publishers in this area, as in others, to adopt the military services' use of looseleaf, ring-binder formats for easy insertion of changes rather than the traditional hard-cover binding.

A Policy Science Approach to Problems of the Law of the Sea. At least one great configurative, multidimensional policy science study of the law of the sea has been written,[18] and others are no doubt on the way or in print. McDougal and his Yale associates took over a thousand pages to consider *The Public Order of the Oceans* under this method, compared with the 109 pages of *Sea Power.* Even explanations of the policy science approach to problem solving have been lengthy. The scholarship in this field has been extensive. The policy science approach is, of course, not the only school of jurisprudence,[19] but it may be unique in its theory about law in the social process, as distinguished from theories of law as an entity unto itself, to be studied in a vacuum. The policy science model is, of course, not the only relatively new method for examining complicated issues and is only one of many innovative processes of informed decision-making. Among the more familiar for the military commander are systems analysis and game theory, often based on economics or numbers. Others include economic analysis, decision analysis, and cost-benefit analysis, often computer-supported. Even as such models may "offer the basis for an improved explanation of happenings in international politics,"[20] the policy-science schema may help the decisionmaker in placing law and its role in context. These complex analytical tools are not necessary for simple decisions, and there are the problems of keeping the study realistic and the terminology understandable. However, use of a new or metalanguage, as with the employment of Latin terms by doctors or lawyers by providing agreed meanings, may promote clarity.

Effective Power Process. This part of the article will sketch the policy science model and will place Janis' book, and other recent studies related to oceanic law, in that context to illustrate how the system works and its potential usefulness for the naval decisionmaker, be he professional military man or legal specialist. Concentration will be made on the effective power process, as distinguished from the larger social process model. References, except to the recent studies reviewed in this article and occasionally, to policy science materials, will be minimal, but the reader's attention is invited to the more comprehensive analyses available elsewhere, upon which this section of the article is based.[21]

Social Process. Policy scientists begin their consideration of problems in the context of the social process, that ongoing interaction of persons and other participants (nations, navies, etc.) in an increasingly interdependent series of communities, starting with a world community and working down through a series of the interlocked, interdependent and interacting communities (regional organizations such as NATO, the EEC, etc.; nations, state and local governments) to the smallest (the family or the tribe). The social process may be divided into eight value processes: power, the giving and receiving of support in government, politics, and law; wealth, the production and distribution of goods and services, and consumption; enlightenment, the gathering, processing and dissemination of information; skill, the opportunity to acquire and exercise capability in vocation, professions and other social activities; well-being, synonymous with safety, health and comfort; affection, personal intimacy, friendship and loyalty; respect, personal or ascriptive recognition or worth; rectitude, participation in forming and applying norms or responsible conduct. Through the methodology of claim, participants (individuals, navies, nations) act in various ways to optimize these values as goals through various institutions that affect resources (often known as "base values," "base" being employed in the same sense of source of resources as the original connotation of "naval base"). These eight value processes "have no magical quality and are chosen for their convenience in [the] analysis of [the] social process."[22] To put theory into realities for the naval commander: Morale is a constant problem and a sought-after goal aboard ship. Examined in the policy-science context, values for enhancing morale might include: proper administrative or disciplinary measures to punish shipboard theft as corrosive of morale (power); encouragement of advancement through successful completion of rate examinations, thereby increasing sailors' pay and prestige (wealth, enlightenment, respect); ordering men to leadership school (enlightenment, skill, rectitude); encouraging leave and liberty, commensurate with the needs of the service (well-being in the sense of improved mental health from a "change of pace"); affection, developed, through renewal of shoreside friendships.

These goals are, of course, achieved through a continuum of time, space and other dimensions known to policy scientists as phase analysis, which will be

reviewed later in this article. Law, as part of the effective power process (as distinguished from naked power, or the assertion of authority by sheer expediency or brute force), is seen as the flow of authoritative and controlling decision. Put other ways, law is the comprehensive process of authoritative decision, or the constitutive process, in which rules are continuously made and remade. The functions of rules of law are to communicate the perspectives (demands, identifications and expectations) of people in communities about this comprehensive process of decision. The rational application of these rules in particular instances requires their interpretation, as with any other communication, in terms of who is using them, with respect to whom, for what purposes, and in which contexts. Law is seen, then, as the proper result of the power process; but to a policy scientist law must be viewed in the broader context of other values—for example, law (as commonly understood by laymen) must be considered in relation to the "laws" of wealth or economics (also as commonly understood by the layman). Furthermore, the functioning of the effective power process, or law, must be considered against a background of interdependent nations and other communities. "No State has complete freedom of effective choice today. We are all scorpions in the same bottle."[23]

Janis' study does not explicitly adopt a policy science approach. He does recognize this interactive process indirectly by his reference to McDougal and Burke's *Public Order of the Oceans* in Chapter 6, and in his introductory declaration that "[t]he law of the sea is in the midst of turmoil." Regrettably, he does not postulate a definition of "the law of the sea," although he is careful to define seapower as "force and threat of force on the oceans." It would appear, however, from close examination of the book and its sources that he goes at least halfway toward the policy scientist's contextual treatment of law within the social process. Citation of U.N. General Assembly resolutions (not considered "law" by traditional writers), preparatory works of conventions (not approved by some scholars as bases for interpretation of treaties except in specific circumstances), and the inclusion of various pressure groups' attitudes, i.e., the U.S. maritime industries' positions on law of the sea issues), point toward Janis' unarticulated employment of policy scientists' phase analysis.

Phase Analysis. Phase analysis is a breakdown of law as the comprehensive process of authoritative decision into component elements and sequences, even as the careful military commander plans an operation with explicit reference to timing, units of friendly and enemy forces involved, and so on. The policy scientist's phase analysis includes six or seven descriptive reference points: (1) participants (who interacts, from individuals through nations and the world community as a whole); (2) perspectives (how a participant views a problem, i.e., as a neutral, detached observer or as an advocate of a point); (3) situations (the physical circumstances of an interaction, which include geographic features (a

river being a more perceptible boundary, for example, than the territorial sea's limit); the place of the interaction on a time continuum; institutionalization, or the degree of organization in which interactions occur (the current "turmoil" over the law of the sea perhaps being an example); and crisis level, which may generate different expectations under varying intensities of crisis);[24] (4) base or resource values-power, skill, enlightenment, wealth, respect, rectitude, affection, and well-being—that participants have at their command for achievement of desired ends in the legal process; (5) strategies-coercive or persuasive modalities through diplomacy, ideology, economics, or military force—for the manipulation of base values to achieve denied goals; (6) outcomes and (7) effects, short and long-term results of the process of interaction.

Janis obliquely employs a similar but not as comprehensive analysis. With respect to his chapter on the United States, for example, he lists the almost bewildering cast of actors involved in decisions on the ocean policy process: the executive branch, Congress, non-governmental institutions, and their components. Curiously, reference to the federal judiciary with its capacity to fashion a federal common law to promote uniform international law norms,[25] or to interpret the U.S. Constitution and the federal statutes and treaties that are the supreme law of the land,[26] was omitted. Perspectives of the actors—from what viewpoints the participants speak—are indicated by inference, particularly in the chapter on the U.S. Navy. In this regard, Booth's more general analysis of the "players" and their characteristic perspectives should also be consulted. The geographic situations at stake—straits passage, width of the territorial sea, and deep seabed interests—are one of the central themes of the book. However, as indicated above, discussion of other dimensions of the geographic planes of the oceans as embedded in international law norms other than the law of the sea negotiations is limited. Power resources—particularly the strengths of the world's navies and equivalent of the U.S. Coast Guard—are given careful attention by Janis, but he does not discuss other important power variables such as the impact on deterrence decisionmaking of the other two legs of the Triad, land-based ICBMs and the Strategic Air Command, not to mention Army and Marine Corps forces that would be involved in the projection phase of any naval operation. The important factors of national wealth and the levels of readiness (skills) and training (enlightenment) are mentioned, but there is little attention given to those often untangible, but nevertheless real, resources of respect, affection, etc.[27]

The strategy of military coercion or suasion is a great theme of *Sea Power*, which recognizes by implication strategies of diplomacy, (the LOS negotiations), economics (claims of the U.S. fishing industry), and ideology (implicit in Adm. S.G. Gorshkov's description of the U.S. Navy as "an instrument of imperialist policy"). The distinction between coercive strategy using military force, and persuasive military strategies, recognized by Cable and Luttwak, albeit with different terminology, would have sharpened the focus of inquiry. A similar

demarcation between coercive and persuasive economic, diplomatic and ideological strategies would have been helpful. Booth's chapter on "The Function of Navies," with its triangular diagram of navies' diplomatic, military and policing roles, is perhaps the best illustration of the use of naval power (a resource) as a diplomatic or military instrument. His policy objectives of prestige, and standing demonstrations of naval power in distant waters as part of the manipulation objective, would be seen as ideological strategies by the policy scientist. He says little about navies' use in economic strategy, except under the policing policy objectives of resource enjoyment and contribution to internal development. If Booth had not limited his work to navies and naval affairs, doubtless he would have expanded on economic aspects of maritime strategy. His succeeding chapters develop these strategies and their interrelationships. There is a big difference, for example, between a persuasive economic strategy founded on subsidizing the U.S. merchant marine so that it can compete with foreign rivals and civil penalties, criminal fines and forfeitures, or restrictions on fishing and importation of illegally caught fish under the Fishery Conservation and Management Act of 1976. Outcomes and effects, the results of the interactive process, are of course dependent on the quality of treatment of the phases that precede them. Although not articulated as such, *Sea Power* does recognize that the oceans decision process has products—e.g., the Fishery Conservation and Management Act, or the demise of the 3-mile limit—that are the result of this complex interrelated and interdependent process.

Authority Functions. The policy scientist also perceives the threads of seven authority functions within the legal process:

> intelligence-gathering, the obtaining and supplying of information to the decision maker; promotion, the recommendations of policy; prescription, the promulgation of norms—as in legislation; invocation, the provisional application of a prescription—as by a grand jury indictment; application, the final application of a prescription—as by an appellate decision; termination, the ending of a prescription; and appraisal, the evaluation of the degree of policy realization achieved.[28]

The Fishery Conservation and Management Act is an apt illustration. Regional fishery management councils, established by the Act, must prepare fishery management plans that must contain descriptive data and may contain catch limits and permit requirements. This illustrates the intelligence-gathering function. The promotion function begins when the Secretary of Commerce reviews and approves the plan, thereby promoting its policies. The prescription function is completed when the Secretary publishes the plan in the *Federal Register*, the official daily gazette of the U.S. Government. Invocation would occur when an authorized officer issues a citation, arrests anyone, or seizes fishing vessels or fish, subject to later trial of the case. The application function would occur when the

federal district courts try the case subject to appeal. Termination of a prescribed rule under the Act might occur when a new law of the sea treaty is ratified by the United States. The appraisal function of the Act includes reports by the Secretary of Commerce to Congress and the President, research, and reports by the fisheries councils to the Secretary. *Sea Power* was not written in a law-science-policy format, and hence has little explicit reference to the authority functions. Primary attention has been given to the intelligence, promotion, prescription and appraisal functions as Janis describes the background and development of the LOS negotiations.

The Decision Process. Having completed this comprehensive matrix for describing the interaction of values in the context of phase analysis and authority functions, the policy scientist would proceed to the decision process, consisting of five steps or "intellectual tasks": (1) clarification of goals; (2) description of past trends; (3) analysis of conditions affecting those past trends; (4) projection of future trends, and (5) evaluation of policy alternatives. As Professor Moore has correctly observed, "These tasks are performed by all of us, implicitly or explicitly, when we make any decision."[29] With addition of feedback loops, this general process is found in all decisionmaking models. The basic military planning process employs similar methodology. *Sea Power* does state the goals or missions of the world's principal navies as articulated by their admirals. Should these be goals for the law of the sea as a whole, and should not a broader goal—national as coinciding with the general international ideals of the U.N. Charter perhaps reduced to a preference for human dignity—have been stated as the core ideal from which other subgoals descend and depend? Nearly all nations mentioned in *Sea Power* are parties to the U.N. Charter and therefore must be held accountable to its principles and purposes. Even if the analysis considers only the goals of armed forces or navies as the relevant focus, a generalized classification such as that employed by Booth might have been more comprehensive:

(1) Projection of force functions
  - (i) General war
  - (ii) Conventional wars
  - (iii) Limited wars and interventions
  - (iv) Guerrilla wars

(2) Balance of power functions
  - (v) Strategic nuclear deterrence
  - (vi) Conventional deterrence and defence
  - (vii) Extended deterrence and defence
  - (viii) International order

(3) Diplomatic functions
  - (ix) Negotiating from strength
  - (x) Manipulation

(xi) International prestige

(4) Domestic functions

(xii) Border/coastguard responsibilities

(xiii) Nation-building

As Booth points out, such a classification "can only provide a guide and perspective for the specific analyses[,] . . . the ultimate aim when assessing such a subjective and contextual concept as utility."[30] These goals, or value preferences, are usually socially derived and are therefore strongly influenced by current conventional values. It would therefore behoove the military decisionmaker to attempt to approximate widely accepted societal ideas, beliefs, and goals (often crystallized with positive law or statements such as the U.N. Charter Preamble) as he postulates his goals and subgoals within the military decision process. Perhaps this is one reason why the Vietnam War "went wrong," in the view of some.

Immediate past trends, and conditions affecting those trends, are described by Janis in the context of the 1958 law of the sea treaties and developments through 1975. A look at deep-rooted past trends, such as those behind the traditional 3-mile limit, and reasons for such trends, might have underscored his thesis as to the role navies and naval power may play in developing the law of the sea. Janis projects certain future trends, recites policy alternatives, and evaluates these alternatives in the light of their impact on the world's principal navies. Courses are charted "for the reconciliation of naval interests in the new international ocean order," but his preferred choice is not stated.

Conclusions. As Professor Knight has observed, there are at least three schools of thought on the role of international law in national security policymaking:

> International law is a "pious fraud" and should have no effect whatever on the making of national security policy.
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> International law should be considered as one among many relevant factors in determining national security policy.
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> International law should be regarded as absolutely binding on the United states and determinative of all national security policy decisions.[31]

None of the authorities reviewed in this article, and particularly Janis' fine monograph, would adhere to the "pious fraud" view. The difference between the "absolutely binding" approach and the "among factors" theory is an issue of perspective and breadth of approach. Any good lawyer will say that you must obey the law. Janis would not quarrel with this; he is concerned with how some of the law of the sea came to be, the influencing factors on this law, and factors that can (or should) influence its development. He does omit certain sources and substantive parts of the law, and both the lawyer and the professional military man should be aware of this book's lack of a configurative legal approach. To

have done so would have required a treatise at least the size of Colombos' *International Law of the Sea* (over 850 pages of text). The policy scientist, and those engaged in other broad-based, multidisciplinary examinations of the problem of ocean space, would assert that international law is but one influential factor in the oceans policy process. The policy scientist would say that international law is but the outcome of the effective power process, only one aspect of the total social process. The policy scientist would therefore include those holding international law to be "absolutely binding" as part of a larger, more complex, configurative matrix. Booth recognizes the complex relationship between navies and foreign policy; the policy scientist insists that there is an equally complex relationship between policy, one outcome of which is law (a factor that must also be considered) and naval force, one aspect of military strategy, which has as its alternatives diplomacy, economics and ideology. Booth has carefully limited his book to a focus on navies and naval affairs and not maritime affairs. *Sea Power* would supply part of the mosaic for effective decisionmaking under this concept, and thus represents a valuable increment to the field from the policy science viewpoint.

Even with these limitations, Janis has produced a fine book that should be of immediate assistance to the naval officer or the military lawyer who grapples with these complex problems of the law of the sea. Its quality gives promise of excellent contributions to future scholarship from the author. It would be hoped, however, that this article has reemphasized the complex nature of the "troubled common" of the altered ocean environment, whether seen from the aspect of the military commander, the lawyer, or the policy scientist. Not many military commanders can or should make policy or practice law; not many lawyers can or should make policy or wage war; not many policy scientists or decision theorists wage war or practice law. All three disciplines, and other professions as well can, however, learn from the processes of the others and appreciate the multifaceted issues of seapower and ocean law in the United States' third century. It is hoped, however, that the lawyers, analysts, policy scientists and concerned military officers will pool resources to assist governments in evolving a workable law of the sea, based on sound policies, for the new order of the oceans.

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Notes

1. Kenney, *A Primer on S.G. Gorshkov's Sea Power of the State*, Naval War College Review 94 (Spring 1977).
2. Mr. Janis, a Princeton graduate and a Rhodes Scholar at Oxford University where he received the B.A. and M.A. in jurisprudence, taught international law and relations at the Naval Postgraduate School as a Naval Reserve officer, received his J.D. degree at the Harvard Law School and is now an associate of the New York law firm of Sullivan & Cromwell.
3. To be sure, the distinction between passage of merchant ships and warships through straits was drawn, but there is no comparison of size of major maritime carriers as was done for the four great powers.
4. MCDOUGAL & BURKE, THE PUBLIC ORDER OF THE OCEANS (1962).

5. WESTCOTT, MAHAN ON NAVAL WARFARE 285-90 (1941). Mahan's opponent was Elihu Root, prominent New York lawyer, Secretary of State, and a founder of the American Society of International Law.

6. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER 189 (1975).

7. *Id.*

8. 175 U.S. 677 (1900). (International custom)

9. 11 U.S. (5 Cranch) 116 (1812). (Sovereign immunity)

10. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2nd ed. 1973) and THE LAW OF TREATIES (1961).

11. Roy, *Is the Law of Responsibility of States for Inquiries to Aliens a Part of Universal International Law?* Am. J. Int'l L. 863, 881-83 (1961).

12. See the dissenting opinion of Judge Alvarez in the Asylum Case (Colombia v. Peru), [1951] 1.C.J. Report, pp. 266, 290. The "Calvo Clause," frequently found in international concession agreements with Latin American nations, states that a foreigner doing business there is entitled only to nondiscriminatory treatment; he consents to be treated only as the host state's nationals are treated. The foreign investor agrees not to seek the diplomatic protection of his own nation and submits questions arising from the agreement to local jurisdiction.

13. TUNKIN, THEORY OF INTERNATIONAL LAW (Butler trans. 1974). For a historical perspective on Russian attitudes toward international law, see BUTLER, THE SOVIET UNION AND THE LAW OF THE SEA 3-16 (1971).

14. Janis, *The Soviet Navy and Ocean Law*, Naval War College Review 52 (March-April 1974).

15. Ken Booth recognizes this role of navies, albeit in a foreign policy/naval affairs, nonlaw context.

16. See Janis, *Dispute Settlement in the Law of the Sea Convention: The Military Activities Exception*, 4, no. 1, Ocean Devel. & Int'l L. 51.

17. Three collections of treaties and national legislation and regulations in this vast and rapidly expanding field are: Bureau of National Affairs, *International Environment Guide* (1975). BARROS & JOHNSTON, THE INTERNATIONAL LAW OF POLLUTION (1974), and BENEDICT, THE AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE (7th ed. 1973), the last containing treaties and legislation related to all maritime matters.

18. *Supra* n. 4.

19. The major schools of jurisprudence see law as: a positive command ("Positivism") from the sovereign, a prevailing concept in Anglo-American legal philosophy developed in the 19th century by John Austin, a former British Army officer; natural law, which viewed law as pointing to an ideal for the future, and which still finds currency among scholars, although it was in popular vogue in the 18th century and influenced internationalists such as Hugo Grotius or thinkers such as Thomas Jefferson, principal author of the United States' Declaration of Independence; legal realism or sociological jurisprudence, developed in this century to attempt to explain law in the context of the social sciences, a familiar exponent being Justice Oliver Wendell Holmes; the historical school, seeing law in the context of the historical development of a people, a philosophy primarily advanced by German thinkers; the Communist approach. This brief sketch is a vast overgeneralization, but is included to note the variety of theories involving law, even as there are many, and often conflicting, theories about military strategy and policy or military operations.

20. BOOTH, NAVIES AND FOREIGN POLICY 136 (1977).

21. Suziki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, I Yale Studies in World Public Order 3, note 1 and p. 5, note 2 (1974); Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 Va. L. Rev. (1968), 186, p. 664, note 3 and p. 665, note 4.

22. Moore, *supra* n. 21 at 669.

23. McDougal, *Authority to Use Force on the High Seas*, 20 Naval War College Review (December 1967).

24. See Bathurst, *Crisis Mentality: A Problem in Cultural Relativity*, Naval War College Review 55 (January-February 1974) and Piersall, *An Analysis of Crisis Decision-Making* (Center for Naval Analyses Professional Paper No. 41, 1970).

25. See WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 281 (3rd ed. 1976).

26. U.S. Constitution, art. VI, section. For the classic example of how a treaty may validly regulate activity that an act of Congress may not, see *Missouri v. Holland*, 252 U.S. 416 (1920).

27. Compare Booth's recognition of the "interconnectedness" of land, sea and air forces. Booth, *supra* n. 20 at 188-189.

28. Moore, *supra* n. 21 at 671.

29. *Id.* at 672.

30. BOOTH, *supra* n. 20 at 224.

31. Knight, *The Law of the Sea and Naval Missions*, U.S. Nav. Inst. Proc. 32 (June 1977). The article is a good survey of current law of the sea problems, arranged by legal issue, and urges that the United States "take all measures necessary to ensure that future legal developments concerning the use of ocean shore do not unacceptably retard [its] ability to carry out traditional and prospective missions of [its] naval forces," including setting precedents for rights of navigation before a crisis arises.