Sea-Air-Space 2021 Prequel: Law Of Sea Convention Could be Negotiated to Overcome Constitutional Objections, Analyst Says



Ensign James Bateman, from Huntsville, Alabama, scans the horizon utilizing the “big eyes” while standing watch on the on the bridge wing as the guided-missile destroyer USS John S. McCain (DDG 56) conducts freedom of navigation (FON) operations in late 2020. *U.S. NAVY / Communication Specialist 2nd Class Markus Castaneda*

ARLINGTON, Va. — The United Nations Convention on the Law of the Sea (UNCLOS) could be ratified by the U.S. Senate if a few objections were addressed, a naval analyst said.

Speaking 20 July in a webinar of the Navy League's Sea-Air-Space Prequel, Marine Corps Col. James McGinley, a retired naval aviator and a lawyer, said that the UNCLOS could be challenged on constitutional grounds that it could negate the right of the U.S Senate to provide "advice and consent."

The UNCLOS, signed by 168 nations, governs a wide array of maritime issues including economic, military, commerce, mining interests. It has yet to be ratified by the Senate, where it last was given a hearing in 2012.

"The United States was a huge part of the formation of UNCLOS back in the '80s," he said. "The United States signed [in 1994] but did not ratify," said retired Adm. Jonathan Greenert, former chief of naval operations, also speaking in the webinar.

Speaking of the example of Arctic energy exploration and seabed mining, retired Adm. Paul Zukunft, former commandant of the Coast Guard, said during the webinar, "We have a right to this, yet we haven't signed onto the ground rules to lay claim what is rightfully ours."

Zukunft also pointed to the absurdity of the Chinese "Nine-Dash Line," which the Chinese Communist Party uses to claim most of the South China Sea as its territorial waters.

"If you use that same [justification], then Denmark and Leif Ericsson should probably claim the United States EEZ [Exclusive Economic Zone]," Zukunft said. "We don't have a voice at that forum because we have not ratified the Law of the Sea convention. We're trying to resolve this with Freedom of Navigation [FON] exercises but at the end of the day, the fact that we don't have a voice at the table for this aspect of maritime governance, all we can do is sit back and watch, and try to counterbalance using economic or military leverage to correct that behavior."

The admiral said the Coast Guard has 65 bilateral agreements

with other nations "that allow us to board vessels of those signatory nations – whether it's a fishing violation, [an] encounter [with] drug movement, or even the potential of a weapon of mass destruction in the maritime domain – [the Coast Guard is authorized to] stop, apprehend, search those vessels on behalf of those flag nations."

FON "doesn't represent a policy," Greenert said. "It is nothing more than a statement by us concerning free passage in certain straits or waters of the world.

"What's happening right now is China is showing some real mischief and it goes beyond some of the seabed issues and Nine Dash Line issues," he said. "China is starting to reinterpret UNCLOS. They're pushing things around within the convention. Frankly, in my view, they need to be confronting by another leader. For example, China is working to change the definition of 'high sea' to their advantage. China is working to put the [EEZs] per UNCLOS to be controlled by the littoral nation. They have 28 land-locked countries in the United Nations on board in this endeavor."

Greenert said that if this provision were adopted, military operations would need permission of the littoral nation.

McGinley spoke about the legal logjam of UNCLOS in the U.S. Senate.

"As it exists today, there has been such consistent resistance to ratification," he said. "We're now pushing half century. A lot of the original thinking on this was in 1956. There are parts of [UNCLOS] that are extraordinarily helpful to the U.S. and to our interests, but I worry that the poison pills that are buried in this thing – over 208 pages – are enough to keep us from success."

McGinley suggested two approaches to achieve ratification.

"One would be a hard pivot and talk to the key opposition

folks in the Senate and say, ‘Here’s what we need. What works for you?’ and then start with a fresh piece of paper with regard to – not to the entire globe – but to the key maritime partners as well as some of the other maritime nations we think would be most important to success,” he said.

“A second would be to take a radically different approach in the Senate,” he continued. “Part of the problem is Articles 309 and 310. The Constitution’s Article 2 Section 2 gives us advice and consent for our Senate. Part of what happens under the RUDS [Reservations, Understandings and Declarations] in any treaty is the ability for our Senate to say, ‘When we look at these words, we understand to mean this. Here is a statement of what we agree to,’ or, ‘here are our reservations; we don’t agree to these particular articles, but we do agree to these other articles.’”

McGinley explained the poison pills in the treaty.

“This is an odd treaty in that it purports to take away the constitutional right of the U.S. Senate to provide its advice and consent. … It is so significant that a ratification could actually face a successful constitutional challenge,” he said. “A fresh piece of paper would go beyond that, but if the Senate wanted to go forward with it, they ought to do it very publicly … that we are specifically rebuking 309 and 310, and then take a very tight look at Article 82 – which is a real significant transfer of the American families’ money – and also look at Article 144 – which is a straight-up transfer of technology. Almost all of this was negotiated at a time when we did not have the technological capability, so when those pills were put in, they were thought of as worthless and so far in the future it wouldn’t matter. Now those are real, and they are significant. They’re part of what makes this treaty harder to pass with each passing year.”

McGinley explained why the United States has been able to set a good example despite lack of ratification.

“My hat is off to the [U.S.] Navy, which I’ve watched out in the 5th Fleet with extraordinary seamanship,” he said. “It is that professionalism that has developed international customary law to the point that, even though we are not parties to this treaty, we actually exemplify – through our own conduct, and over time we have developed – norms.”

McGinley noted that in 2016 China said it would ignore binding arbitration from the verdicts from the court of arbitration about one of the islands in the South China Sea.

“It’s as if they have never signed the treaty,” he said. “So, it comes down to non-parties behaving as if they were parties and parties behaving as if they had never signed it. … The U.S. Navy’s professionalism still sets the standard and is developing navigational norms and customary international law as a result of their professionalism.”