Eight National Security Myths:
United Nations Convention on the Law of the Sea

Myth #1: The United States does not need to join the Convention. We are getting along just fine relying on military might and customary international law.

We are at war. The President, his war cabinet, the Joint Chiefs of Staff, and the Commandant of the Coast Guard urge the Senate to provide its advice and consent to the Law of the Sea Convention because it enhances our national security.

The Convention codifies navigation rights and freedoms essential for the global mobility of our armed forces and the sustainment of our combat troops. Benefits include:

- a 12 nautical mile limit to territorial seas
- innocent passage through territorial seas
- archipelagic sea lanes passage though island nations like Indonesia
- laying and maintaining submarine cables for communication
- warship right of approach and visit
- sovereign immunity of warships and public vessels
- transit passage in international straits (and their approaches)
- high seas freedoms in exclusive economic zones (EEZs)

The last two are the most important. Transit passage gives us freedom of movement above, on, and below the surface in critical chokepoints such as the Straits of Singapore and Malacca, Hormuz, and Gibraltar, and the Bab el Mandeb. Exercising high seas freedoms in foreign EEZs includes conducting military activities.

Our non-party status is hurting us. It denies us a seat at the table when the 155 parties to the Convention interpret (or try to amend) those rights and freedoms; it denies us use of an important enforcement tool against coastal state encroachment (binding dispute resolution); it hinders us in our efforts to recruit more countries to the Proliferation Security Initiative (PSI); it creates a seam between us and our coalition partners; it prevents us from gaining legal certainty for our extended continental shelf in the Arctic (and elsewhere); and it denies U.S. companies access to deep seabed mining sites.

Relying on customary international law as the basis for those rights and freedoms is an unwise and unnecessary risk. Our Soldiers, Sailors, Marines, Airmen, and Coast Guardsmen put their lives on the line, every day, to preserve the rights and freedoms codified in the Convention; they deserve to be on the firmest legal ground possible as they go into harm's way; they deserve the legal certainty that accrues from treaty based rights.

Myth #2: Joining the Convention will surrender U.S. sovereignty by submitting the U.S. Navy to the jurisdiction of international courts or tribunals.

Military officers serving as members on the United States delegation that negotiated the Convention ensured that it contained a military activities exemption from dispute resolution, which is ironclad. The Convention they helped craft permits a maritime nation, like the United States, to use compulsory dispute resolution as a sword against foreign coastal state encroachment while simultaneously shielding military activities from review.

Given the central importance of this issue, it is important to review the compulsory dispute resolution procedures contained in Part XV, Section 2 of the Convention, and explain, in detail, how Article 298 of the Law of the Sea Convention, under its express terms, will permit the United States to completely exempt its military activities from dispute resolution, and prevent any opposing State or court or tribunal from reviewing our determination that an activity is an exempted military activity.

Part XV, Section 2 of the Convention is titled, "Compulsory Procedures Entailing Binding Decisions." Section 2 is comprised of eleven Articles (286 – 296), which contain the compulsory dispute resolution procedures that some are concerned could be used to effect a review of our military activities.

Section 2 begins with Article 286, which provides that, except as provided in Section 3 of the Part XV, "any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to Section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section."

Article 287 then provides the choice of procedure election. The President has asked the Senate to reject the first two choices available, the International Court of Justice and the International Tribunal for the Law of the Sea, and instead choose arbitration (what are referred to formally as arbitral tribunals).

Now, let's move on to Section 3, which is titled, "Section 3. Limitations and Exceptions to Applicability of Section 2." In Section 3 we find Article 298; and in Article 298, subparagraph 1, it states in pertinent part:

> 1. When signing, ratifying, or acceding to this Convention or at any time thereafter, a State may…declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes…"

There then follows three categories of disputes: Maritime boundary disputes, disputes involving military activities, and disputes involving matters before the United Nations Security Council. The president has asked the Senate to exempt all three categories.

The key language from Article 298.1 is: "A State may declare that it … does not accept any one or more of the procedures provided for in section 2." It is the right of the State, and solely the State, to completely and preemptively reject all of the dispute resolution procedures provided for in Section 2. It is those very procedures that the

opposing State or international court or tribunal would have to rely upon to try to assert authority over us.

It simply does not get any better than that---not in private contract law nor in treaty law. What this Convention makes clear is that a State party can completely reject all the dispute resolution procedures—on its own terms—for disputes involving maritime boundaries, military activities, and matters before the Security Council.

There is simply no process or procedure whereby our determination can be subject to review, because we have already preemptively rejected all the procedures provided for in Section 2, including article 287 (choice of forum), article 288 (the right of a court or tribunal to determine its own jurisdiction), article 290 (provisional measures) and article 292 (prompt release).

All permanent members of the United Nations Security Council (except the United States) and numerous other countries have taken the military activities exemption. They, like us, would never accept a court or tribunal acting *ultra vires*---beyond the limits of the Convention itself.

Myth #3. Our intelligence activities will be constrained because the Convention's provisions on innocent passage prohibit intelligence collection in the territorial sea and require submarines to surface in the territorial sea.

U.S. intelligence collection activities at sea are not constrained by the Convention.

This matter was fully reviewed at closed hearings before the SSCI and SASC in 2004. At the unclassified level we can comment that those Committees concluded, after receiving testimony from DoD, CIA, and DoS, that the Convention does not affect US intelligence collection activities. Those agencies confirmed that testimony in recent correspondence to the SFRC.

With regard to innocent passage, the United States already obligates itself to abide by articles 19 and 20 of the Convention, and we are already formally bound to the same obligations in the 1958 Territorial Sea Convention.

Myth #4. Maritime Interdiction Operations will be constrained because Article 110 of the Convention limits warships to only boarding ships suspected of engaging in Piracy, Slave Trade, or Unauthorized Broadcasting, or being without Nationality.

This is simply not true. Article 110, which codifies the peacetime right of "approach and visit," expressly provides in its opening clause that the interdiction authorities it provides are *in addition to* those interdiction authorities that we already enjoy, because they are "derived from powers conferred by treaty." This language is consistent with the preamble of the Convention, which clearly states, "matters not regulated by the Convention continue to be governed by the rules and principles of international law."

We and our coalition partners routinely conduct interdiction operations under powers derived from treaty, including interdictions conducted pursuant to Flag State consent, Port State control measures, resolutions passed by the United Nations Security Council, the wartime right of Visit and Search, and our inherent right of self-defense as reflected in article 51 of the UN Charter.

Before moving to the next myth, it is worth noting that Article 110 of the Convention contains a key authority for conducting interdictions that was not found in its antecedent provision of the 1958 High Seas Convention. Under Article 110, a warship can conduct a boarding if it suspects that the target vessel is without nationality. We rely on that authority frequently in our maritime interdiction operations.

Myth #5. The Convention's provisions on "peaceful purposes" (Articles 19(2)(a), 39(1)(b), 88, 141, 240) and the prohibition in Article 301 against using force or threatening to use force in any manner inconsistent with the UN Charter or the principles of international law, will be used to constrain military activities.

Those provisions simply reflect the incorporation into the Law of the Sea Convention of the same obligations that we---and the international community as a whole---already have under the UN Charter; obligations that we fully support.

It would make little sense to have the provision in Article 298(1) allowing a State to completely reject dispute resolution for military activities, if military activities were already barred by articles 88 and 301.

The negotiating history on the Convention is clear on this point. In 1976, Ecuador attempted to turn the "peaceful purposes" provisions into an arms control obligation. They got nowhere. In response to the argument by Ecuador in 1976, the U.S. replied:

> "The term 'peaceful purposes' did not, of course, preclude military activities generally. The United States has consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement."

See 66-68th plenary sessions in 1976.

In 1985, the Secretary General of the United Nations reported that, "military activities which are consistent with the principles of international law embodied in the Charter of the United Nations, in particular Article 2, paragraph 4, and Article 52, are not prohibited by the Convention on the Law of the Sea."

It is ironic that Convention opponents would raise today a long-discredited and failed argument raised by Socialist countries in the 1970s.

Myth #6: If the US Navy seizes a terrorist vessel on the high seas or captures a vessel carrying weapons of mass destruction, it will be subject to "prompt release" under Article 292 of the Convention.

There are two things wrong with that argument. First, under Article 298 of the Convention, the United States will reject all the dispute resolution procedures for disputes concerning US military activities, and those procedures include Article 292. (See Myth #2 above.)

Second, Article 292, itself, is quite clear that it only applies to the prompt release of vessels seized for violating fishing or marine pollution regulations in Exclusive Economic Zones.

Specifically, in the very first sentence in Article 292, it states that a tribunal or court may only order the prompt release of vessels when, "it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial surety…"

There are only three provisions in the Convention for prompt release of vessels upon the posting of a reasonable bond or other financial surety: Articles 73, 220, and 226, and those expressly involve fishing cases and marine pollution cases.

In fact, the International Tribunal for the Law of the Sea has ordered the prompt release of vessels seven times in its entire history---all involved the release of fishing vessels in accordance with Articles 292 and 73.

The negotiating history of the treaty is crystal clear on this point. (See pages 67 – 71 of Volume V of the University of Virginia Commentary, which is widely recognized as the definitive commentary on the Convention.)

Myth #7: Article 23 of the Convention, which recognizes the right of innocent passage for nuclear powered ships and ships carrying nuclear or other inherently dangerous substances, will prevent the United States from interdicting a North Korean vessel in U.S. territorial seas (or another Nation's territorial seas) even if the vessel is carrying a nuclear bomb for delivery to Iran.

As noted earlier, the U.S. already is bound to and abides by the provisions on innocent passage; thus, foreign flag ships already have the right to exercise innocent passage through the territorial sea of the United States (and other nations' territorial seas).

Article 23 of the Convention was adopted at the insistence of the U.S. delegation to protect the innocent passage of U.S. warships and to prevent U.S. ships from having to declare their cargo as a condition of entering foreign territorial seas.

Article 23 does not constrain U.S. interdiction activities in any manner whatsoever. As noted earlier, the United States relies on *all of its interdiction authorities* (and those of its friends and allies) to combat the transport of weapons of mass

destruction. Indeed, the founding principles of the Proliferation Security Initiative (PSI) are based on PSI participants using their respective national legal authorities and international law (including the Convention) to interdict weapons of mass destruction and related material.

If a North Korean ship were carrying a nuclear weapon to Iran, it would be interdicted. In fact, vessels carrying North Korean and Libyan material have been interdicted under PSI in accordance with the Law of the Sea Convention.

Myth #8: Had the United States been subject to the Law of the Sea Treaty, President Kennedy could not have quarantined Cuba with the U.S. Navy, President Ford could not have used the Navy to rescue the Mayaguez, and President Reagan could not have sent a Navy carrier force to defy Qaddafi of Libya in the Gulf.

This is completely untrue. All the above operations were conducted in accordance with international law.

- President Kennedy established a quarantine around Cuba under the authorities of the UN Charter (Article 51 on self-defense and Article 52 on regional security arrangements) and the Rio Treaty (which established the Organization of American States (OAS)). On October 23, 1962, OAS voted to approve a U.S.-sponsored quarantine of Cuba.

- President Ford's use of military force to rescue the Mayaguez and its crew was a lawful use of force in self defense under Article 51 of the UN Charter.

- President Reagan deployed an aircraft carrier task force into the Gulf of Sidra to challenge Libya's unlawful claim that the Gulf was Libyan internal waters. During U.S. freedom of navigation operations in the Gulf, United States Navy aircraft engaged Libyan aircraft in self-defense in accordance with Article 51 of the UN Charter.

The Convention does not in any manner whatsoever restrict, condition or infringe upon our inherent right of self-defense as reflected in Article 51 of the UN Charter. Nor does it affect our rights under the law of armed conflict.

The Law of the Sea Convention does not constrain or limit the President's options to defend our country; it *enhances* them by codifying navigation rights and freedoms that are essential for the global mobility of our armed forces and the sustainment of our combat troops.

That is why the President, the Joint Chiefs of Staff, the Commandant of the Coast Guard, and every former living Chief of Naval Operations have all urged the Senate to provide its advice and consent on the Convention.