



BENGOSHI 弁護士

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CO's Corner



The *Bengoshi* was created as a means to educate and inform fleet leaders, collateral duty legal officers, and others in the Indo-Asia Pacific AOR with an interest in the complex legal issues that uniquely impact those who serve here. From my perspective as Commanding Officer, it is also a vehicle to showcase the talent of our exceptional group of attorneys, paralegals, and limited duty sailors who will share their knowledge and experience with the larger community. In this edition alone, our featured authors have degrees from Notre Dame, Georgetown, the Fletcher School, Columbia and Harvard. They have also served afloat, ashore and in the dirt in all corners of the world, from Naples to Baghdad, to DC to Hawaii, and here in the FDNF. These exceptional people are like most of the systems and platforms out here. . . the best the Navy has to offer. They are here to serve you. Whether you are in command, a legal officer, or a SOFA sponsored family member, I encourage you to take full advantage of the resources of the Navy JAG and General Counsel Community and RLSO Japan.

CAPT Dom Flatt, JAGC, USN
 Commanding Officer, RLSO Japan

NORTHWESTPAC: ADVANCING OUR BILATERAL PARTNERSHIP

LCDR Brian Haagensen, JAGC, USN

In accordance with Article V of the Treaty of Mutual Cooperation and Security, if an armed attack on Japan occurs, the United States will “act to meet the common danger in accordance with its constitutional provisions and processes.” However, if such an attack should happen, what actions would each nation take? How would we ensure that such action conformed to national (and international) legal norms? Working through difficult questions like these, the Northwestern Pacific Exercise (“NORTHWESTPAC”), conducted at the Naval War College in Newport, Rhode Island, brings together U.S. and Japanese representatives each year in an event that both enhances cooperation and builds mutual understanding.

As background, the Treaty of Mutual Cooperation and Security, signed between Japan and the U.S. in January, 1960, is the cornerstone of the U.S.-Japan alliance. In fulfillment of our obligations under the Security Treaty, the U.S. maintains a robust forward-deployed military presence in Japan. U.S. military presence is further warranted by Japan’s constitutional prohibition on military force. Article 9 of the Japanese Constitution reads: “The Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.” Thus, any offensive military operations by the Japanese Self-Defense Force (JSDF) are subject to the Article 9 constitutional provision. Nevertheless, the past two decades have seen expanded interpretation of Article 9. In May 2015, the Japanese Government interpreted their constitution to sanction the use of force to deter an armed attack. Re-

gardless, Japan’s use of force, in practice, requires both an international and domestic legal basis before military action commences, complicating the use of force. To overcome potential issues in the employment of force in a real-world scenario, the U.S. Navy and Japanese Self-Defense Force conduct bilateral exercises.

NORTHWESTPAC is a high-level war-gaming exercise conducted annually between the Japan Maritime Self Defense Force (JMSDF), Japan Air Self Defense Force (JASDF), Japan Ground Self Defense Force (JGSDF), Commander U.S. Seventh Fleet (C7F), and Commander Naval Forces Japan (CNFJ). This year marked the 29th year for the exercise and included approximately 75 Japanese and 100 U.S. Navy participants.

For NORTHWESTPAC, the Naval War College’s War Gaming Department builds and designs a war game for players assigned to four different gaming cells, each of which fulfills different roles. Three of the four cells are player cells who function as units in the war game. The fourth cell, the adjudication cell, acts as higher headquarters and is comprised of a group of U.S. and Japanese subject matter experts in the areas of surface, air, ground, subsurface and cyber operations.

My role during NORTHWESTPAC was as the legal advisor to the adjudication cell. I was responsible for ensuring the war game was conducted in accordance with international treaties, conventions, and appropriate Rules of Engagement (ROE)/Rules for the Use of Force (RUF).

A recurring challenge in all bilateral exercises

NORTHWESTPAC: ADVANCING OUR BILATERAL PARTNERSHIP

LCDR Brian Haagensen, JAGC, USN

is the ability to share ROE/RUF between players. To avoid classification issues, war games traditionally utilize the International Institute of Humanitarian Law's Sanremo Handbook on Rules of Engagement ("Sanremo ROE"). Sanremo ROE is designed specifically for bilateral and multilateral exercises and facilitates discussion of important use of force concepts in common language. Use of Sanremo ROE for NORTHWESTPAC indeed helps facilitate coordination; however, it does not completely mirror a real world scenario, due to Japan's unique set of ROE rules. Japan has a modified form of ROE called the "Operational Code of Conduct," based on principles of self-defense, as JSDF is prohibited from engaging in offensive military operations by Article 9.

Under the Operational Code of Conduct, use of force is sanctioned in two instances: (1) when there is an armed attack on Japan, and (2) when there is an armed attack on the U.S. and "collective self-defense" is invoked. However, such use of force is still subject to a time-intensive approval process. In these cases, the Prime Minister presides over a cabinet meeting, and obtains approval from the Japanese Diet within 20 days. The approval, if granted, is codified in legislation known as a Defense Operations Order (DOO). The DOO contains the levels of force authorized to repel the armed attack.

Because of this, bilateral operations with the JSDF take time to coordinate, particularly when transitioning from peacetime to wartime operations. NORTHWESTPAC aims to work out com-

plex issues, including those related to the approval process for use of force. The Naval War College provides a desirable forum for such an exercise, as the War Gaming Department has 36 faculty members and professors, 350 computer terminals, and multiple classrooms that facilitate open dialogue for these concepts and issues. The technology and level of experience is world class. While professionally rewarding to the individual players, it is also mutually beneficial to each nation as it helps build strong relationships between American and Japanese naval counterparts. For example, while in the adjudication cell, I worked side by side with Captain Nobuyuki Miyahara, the Director of Operational Law for JMSDF's Command and Staff College. Captain Miyahara had vast experience as an operational law advisor to JMSDF and during the two weeks of NORTHWESTPAC, we engaged professionally and socially. As a result, we were able to express and understand each other's different ideas and opinions on international legal matters. Should an armed attack on Japan occur, the relationships built and the knowledge gained from NORTHWESTPAC may prove crucial in effectuating the Treaty of Mutual Cooperation and Security.

LCDR Haagensen is the Deputy Force Judge Advocate at Commander, Naval Forces Japan; however, he detaches in July to attend the University of Virginia where he will pursue a Masters of Law in International Law.

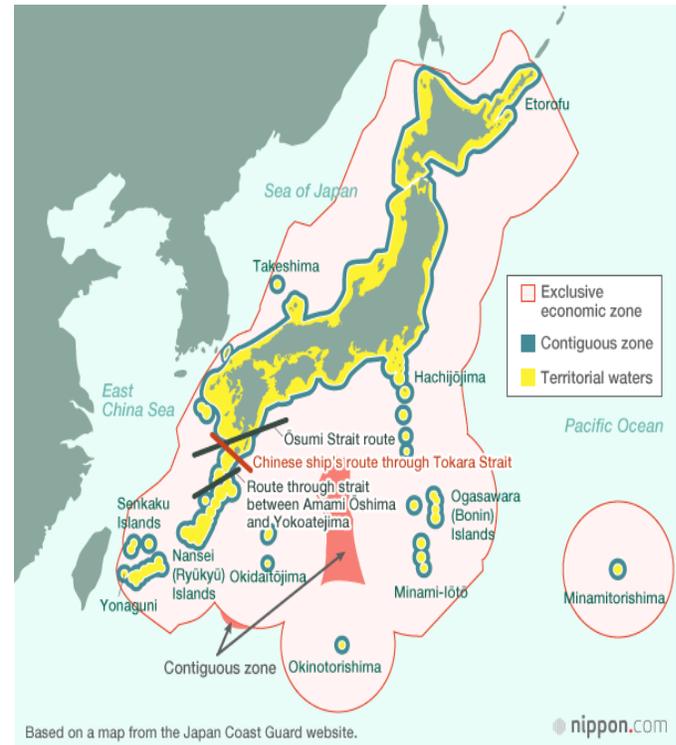
SHOAL WATER STRAITS: JAPAN'S POSITION

LCDR Jessica Pyle JAGC, USN

In June 2016, a Chinese Dongdiao-class reconnaissance ship steamed toward the Tokara Strait, a strip of water in an island chain linking the larger islands of Okinawa and Kyushu. The area is dotted with small islands that are close together, creating a zone that consists almost completely of overlapping territorial seas. The Chinese naval vessel was following two Indian Navy ships on their way to participate in a trilateral exercise involving India, Japan and the United States. On its path, the ship entered Japanese territorial waters near Kagoshima Prefecture without permission from the Japanese government. Japan protested the incursion as a violation of its territorial sovereignty.

The Chinese government's response was that the ship was merely exercising transit passage. Transit passage is a maritime regime that permits vessels to transit international straits without permission from the coastal state, so long as that transit is: (1) continuous and expeditious from one part of the high seas to another; (2) does not threaten the sovereignty of the coastal states, and; (3) the transiting ship (or aircraft) engages only in the activities incident to their normal mode of transit. The United Nations Convention on the Law of the Sea (UNCLOS) preserves the rights of all states to exercise coastline-to-coastline navigational freedoms in international straits, which often brings foreign military vessels in close proximity to the land of coastal states. The large majority of the parties to UNCLOS, and the United States, maintain the position that an international strait is formed in any location where there are overlapping territorial seas, a position that is consistent with China's response to Japan's protest.

For an island country such as Japan, which is not only surrounded by but also comprised of islands separated by ocean waters, transit passage can raise significant national security concerns. Since joining UNCLOS, Japan has emphasized the need for a strait to be "used



for international navigation" in order to be subject to the regime of transit passage, giving the coastal state de facto authority to designate which overlapping areas of territorial seas are international straits. When speaking about the Tokara Strait incident, the Japanese Defense Minister, Gen Nakatani, clearly stated that the Tokara Strait does not meet Japan's standard, despite meeting the geographical conditions: "We cannot accept the argument made by China because those waters are not used for international navigation... I absolutely cannot understand the argument."

Japan's position reflects its unique historical and political situation. Japan was an early party to international efforts to define the use of straits. For example, it was party to the Montreux Convention of 1936, in which the regime of transit passage was affirmed, but warships were required to give eight days' notice prior to commencing a transit. As customary state practice

SHOAL WATER STRAITS: JAPAN'S POSITION

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took territorial sea claims from three nautical miles to twelve, Japan strategically defined its claims in a 1977 law in order to control the flow of traffic near its coast-line in various high-traffic straits. For example, Japan claims only a three nautical mile territorial sea near the Soya Strait, the Tsugaru Strait, the eastern and western channels of the Tsushima Strait, and the Osumi Strait. The modified territorial sea claims allow for unimpeded passage through these areas which can be critical navigational routes for both commercial and military vessels, including those carrying nuclear weapons. For example, Japan asserts that a state has a right to determine whether passage is innocent, and has declared that ships equipped with nuclear weapons cannot engage in innocent passage. Japan maintains the position that all vessels carrying nuclear weapons must give notice before entering territorial waters, and Japan reserves the right to deny passage to any such vessel. The political difficulties of obtaining permission from the Government of Japan can be avoided if a military vessel remains within the designated high seas corridors.

Japan's position, however, is a departure from the majority position on freedom of navigation which supports states treating any overlapping area of the high seas between two areas of the high seas as an international strait. The international straits regime in UNCLOS was highly influenced by the desire for states to move submarines around the globe undetected, a navigational freedom that is incompatible with Japan's position. The Tokara Strait incident of June 2016 is just one example of how Japan's position on international straits affects freedom of navigation. By limiting navigation Japan makes the movement of surface combatants more predictable, and thus more targetable by an adversary that can amass forces on the far side of a limited number of straits. Limiting the straits states can use also gives the coastal state a defensive advantage by limiting

the areas that need to be defended, making a restrictive regime even more attractive. In the June 2016 incident, if China had complied with the Japanese position, those Indian naval vessels would have been far ahead and conducting operations with Japan without the nuisance of an intelligence gathering ship in their wake, long before Japan either granted permission or the Chinese ship made it through a designated strait. Such restrictions may have appeal in the context of a particular exercise or operation. However, they are contrary to the longstanding U.S. policy of protecting high seas freedoms under international law to the maximum extent of the law, a policy worth preserving even in an era of heightened maritime tensions.



LCDR Pyle is the Force Judge Advocate for Commander, Task Force 70. She has previously been assigned as an operational law attorney on the staff of Multi-National Corps—Iraq and the COMUSNAVSO/C4F staff. She holds a JD from Wake Forest and Master of Law in International Law from Columbia University.

SOFA DISCUSSION UPDATE: DUIs IN JAPAN

LT Andrew Giddings, JAGC, USN

Alcohol-related incidents by SOFA members are of major concern to the Japanese, receiving significant press and public attention. During the summer of 2016, after a highly-publicized DUI in Okinawa involving a US service member the Navy implemented a (temporary) alcohol ban, changes to the Liberty policies, and an increase in enforcement onboard naval installations in Japan.

Incidents with Japanese Nationals

The efforts to stem DUIs seemed to be largely effective on the SOFA side. However, during that timeframe there were multiple suspected DUI cases in which the suspect was a Japanese national.

What is particularly disconcerting is that while these drivers tested positive on the field tests conducted by U.S. military authorities, they were not found above the limit on the tests conducted by Japanese police. Since under the SOFA, the Japanese local authorities have criminal jurisdiction over Japanese nationals driving onboard the installations, this effectively meant that the individuals were not charged at all. Out of 26 cases coming from NAFA and CFAY from June 2016 through February 2017, where a Japanese national tested above the limits on the U.S. tests, only one was found to be above the limit by the Japanese police.

This discrepancy led to a concern that the campaign to curb DUIs for the Navy was not getting through to the Japanese MLC and IHA nationals who are part of the military community. It also fostered the idea that SOFA members were being held to a different standard. After investigation, the discrepancies between the Japanese “Kitagawa

Balloon Test” and the Intoxilyzer breathalyzer used onboard Navy bases, seem to be caused by the timing and method of testing.

Timing

When doing a random alcohol test of drivers, U.S. Forces use an initial field sobriety test that simply gives an indication of alcohol use. After a positive reading the suspect is transported to security and given a more accurate test.

With Japanese nationals, there is a delay until the Japanese police arrive and conduct their own test. While generally this was a short time (as little as 15 minutes), sometimes this was over an hour and 15 minutes. Alcohol levels degrade over time, so it is possible for someone who is above the limit to fall below it.

This time lag does not, however, explain all of the cases, since the differences in some levels were quite dramatic. In addition, some of the tests were done within a short time period, but still showed an implausible difference in the alcohol levels detected.

The Testing Process

The second difference is the method of testing. After a positive field sobriety test, the U.S. uses the Intoxilyzer 8000, which pulls air from the lungs to get an accurate digital reading. This is used worldwide by federal, state, and military authorities as the basis for administrative or punitive action, and has been upheld in innumerable administrative and criminal proceedings.

The Japanese around U.S. bases, however, use

SOFA DISCUSSION UPDATE: DUIs IN JAPAN

LT Andrew Giddings, JAGC, USN

the Kitagawa-Shiki Balloon Test, which relies on a filament changing color. This test does not provide nearly the same level of accuracy. It covers a large range and does not consistently pull the most accurate source of air (there is more variation in alcohol levels between breaths at the mouth vice the lungs). It lacks a digital reading so the color could more easily be misread, and the instrument could degrade over time. There is also no log to check whether an official misread the test.

Raising the Issue

The primary forum to address U.S.-Japan criminal SOFA issues is the Joint Committee, a body with representatives of the Japanese Ministries of Defense, Justice, and Foreign Affairs. The Subcommittee on Criminal Jurisdiction treats issues such as this. On 20 October 2016, the DUI issue was raised at a Subcommittee meeting by the Deputy Force Judge Advocate of CNFJ and the NAF Atsugi SJA. The underlying facts and the U.S. concerns were presented, and it was noted that while there are a number of possible explanations, even the appearance of a differential standard would be

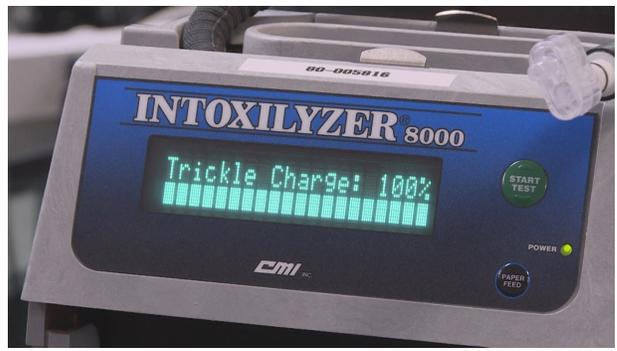
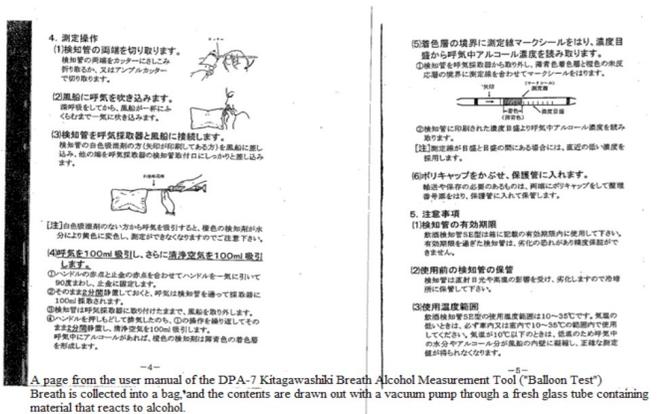
damaging to the overall goals of the U.S. and the Japanese.

The Outcome: A Work in Progress

Before the meeting, higher-level Japanese authorities had been unaware of the issue. The higher level authorities understood the concerns, both from a U.S. perspective and from the perspective of enforcement of Japanese laws, and appreciated the issues being raised to their level. While the situation is not yet completely resolved, the ongoing dialogue is helpful to both sides and the issue has continued to be raised in discussions on law enforcement in Japan.

What is important for SOFA members to understand is that their concerns can be, and are, raised at very high levels. Communication helps everyone, and any such concerns should be raised with the installation SJA office.

LT Giddings is the Staff Judge Advocate assigned the RLSO Branch Office Atsugi. He holds a law degree from Harvard and Master of Arts in Law and Diplomacy from the Fletcher School. Prior to joining the Navy he was Counsel with the International Monetary Fund.



SEXTORTION: WRECKING LIVES & COMPROMISING SECURITY

LN1 Shante Davidson, USN

What Is Sextortion?

Sextortion is the act of using sexual information to extort money or information from someone. It is blackmail, plain and simple. In today's information age, there is also a cybercrime component to it that poses a dangerous risk to our service members. According to reports, the Navy has seen an increase in the number of cases involving sextortion in recent years. Perpetrators of these crimes have been targeting military members via social media and in person.

The classic sextortion scheme proceeds as follows: a perpetrator contacts a would-be victim on social media sites like Facebook or Plenty of Fish, and starts communicating back and forth. (See Parenteau C., NCIS warns sailors of 'sextortion' scam Army, Air Force personnel have also been victimized. February 27, 2015. Retrieved from <http://www.news4jax.com/news/local/ncis-warns-sailors-of-sextortion-scam> on March 9, 2017.) They then move to video-based social media such as Skype or Facetime. Soon, the conversation becomes sexual in nature. The victim is recorded, screen captured, or photographed performing a sexual act, or requesting the performance of some kind of a sexual act. In some cases, the recording is done without the victim's knowledge or consent. Next, the victim is contacted by someone who falsely identifies themselves as law enforcement or a father-figure, and claims the non-service member participant is a minor. The perpetrator accuses the victim of participating in child pornography.

The recording is sent to the victim, and the vic-

tim is told that he or she must either pay, or prepare to have their video or picture sent to their commanding officer. This money is extorted because service members are afraid that disclosure of their conduct will damage their career.

Sextortion is particularly menacing because it may be used to extort additional funds from the member after the initial payment has been made. Once they know the service member will pay, they can keep demanding more money. Since the "evidence" is digital and will never go away, there is no way to effectively stop the extortion.

Sextortion is a growing problem in the Navy. Since August 2012, at least 160 Department of the Navy cases were reported. These cases resulted in at least \$45,000 worth of extorted funds from Naval personnel. NCIS Division Chief Megan Bolduc recalls that one sailor paid over \$11,000 and only stopped because his credit card was maxed out. (See Bergman, J., Navy Sees Increase in Sextortion Cases. May 09, 2016. Retrieved from <http://japan.stripes.com/news/navy-sees-increase-sexual-extortion-cases-issues-warning> on March 9, 2017.) NCIS Far East has had 17 sextortion cases from January 2016 to the present.

According to Stars and Stripes, most of the wire transfers go to international accounts in the Philippines. This payment to a foreign national alone would jeopardize a service member's security clearance. In addition, adversaries may attempt to obtain operational plans, military tactics, and geographical position through the same method of extortion. This poses a serious risk to national securi-

GENERAL POWERS OF ATTORNEY: THE DANGER ZONE

CS3 Kimberly Grissinger, USN

In January of 2017, a 67-year old woman admitted to stealing \$150,000 from her mentally disabled brother. She did so while acting as power of attorney.

A Power of Attorney (POA) is a legal document whereby one person, called the principal, gives another person, called the agent or attorney-in-fact, the power to do something in their place. The principal should have the required legal capacity to give the agent clear and concise instructions. The appointment may be for a fixed period and can be revoked at any time by the principal, provided the principal still has the legal capacity to do so. A power of attorney ceases when the principal dies.

A General Power of Attorney (GPOA) allows the agent to do any and all acts the principal can perform. This includes paying bills, borrowing money in the principal's name, accessing bank accounts and safety deposit boxes, buying and selling real property and vehicles, purchasing life insurance, settling claims, entering into contracts, filing tax returns, obtaining personal, health, or employment information, and on and on.

Although this may seem convenient, it is not always safe. The agent can make legally binding decisions even without the principal's knowledge or prior consent. If the agent's actions are not in line with the principal's wishes, it can cause enormous problems. Unfortunately, there are numerous examples of agents using their broad powers to defraud the principal. The story above is one such example:

The 67-year old woman, Carol Kratzer, was sole power of attorney for her brother since 2007. As power of attorney she had the ability to access his financial records, credit cards, bank accounts, and even work-related papers. After abusing that access, Kratzer pled guilty to forgery and theft by deception for crimes com-

mitted between 2009 and 2014. She abused her position as power of attorney to steal more than \$150,000 from her brother's retirement and bank accounts. She liberally used his credit cards for spas, restaurants, and shopping. Although he had disabilities, the victim worked at the same company for 40 years, saving for retirement, and lived on his own with some assistance. When Mr. Kratzer noticed a questionable line-item on his 401k account, he began to suspect he was being victimized. Kratzer awaits sentencing, but the maximum sentence is 17 years in prison.¹

This example is one reason, among many, to be cautious with GPOAs. Instead, clients should be encouraged to consider a Special Power Of Attorney (SPOA). A special power of attorney narrows what choices the agent can make. The principal can even make several different POAs, with different agents for each. In other words, SPOAs allow the principal to be more specific and take fewer risks. Knowing the potential harms, like those committed by Ms. Kratzer, and the other options, like SPOAs, can save potential victims.

1. See the full article at: <http://www.timesherald.com/article/JR/20170131/NEWS/170139957>

CS3 Grissinger currently serves as a clerk in RLSO Japan's Legal Assistance office, providing essential services for over 22,000 FDNF sailors and their dependents. She has previously served in the USS CURTIS WILBUR (DDG54) and NSA, Bahrain. She is majoring in Criminal Justice at Central Texas College, aspires to transfer to the Legalman rate.

ERD & DIVORCE: CHANGES IN NAVPERSCOM POLICY

LT Joe Horton, JAGC, USN

"I've had enough. I'm leaving you. Pack your bags and go home," yells a service member to his spouse. After four years of marriage, two deployments, and an overseas move to Japan, this military marriage is about to end.

Sadly, this is too common an occurrence. Every divorce presents challenges, and military divorces in Japan are certainly no exception. Due to the foreign environment, pursuing a divorce in Japan can be far more difficult for our Sailors and Marines than their CONUS counterparts. Jurisdictional and foreign legal concerns aside, one particular challenge that has grown more difficult is requesting and receiving an Early Return of Dependents (ERD).

An ERD funds the personal travel and household goods move of a service member's dependents back to the U.S., or their home country, prior to the member's PRD/PCS. This enables the service member to remain in-theater while his or her dependents return home. It also permits the service member to receive the OHA/BAH rate for the new location of their dependents once they return, allowing for continued financial support of those dependents.

The Joint Travel Regulations (JTR) Chapter 5A.3.c., lists many authorized reasons for an ERD, including "marital problems." Under MILPERSMAN 1300-306, NAVPERSCOM is the approval authority for such requests. Before a request can be approved, however, evidence must be submitted via the member's chain of command that substantiates the request. In years past, NAVPERSCOM would accept a separation agreement or a certified copy of the divorce petition as sufficient evidence to approve an ERD. However, such documentation is no longer sufficient.

Service members and their dependents must now

take additional steps in order to improve their chances of receiving an ERD. These steps include scheduling many individual and marital therapy sessions with the Fleet and Family Support Center, Outpatient Mental Health, and Chaplain's office while also obtaining ERD recommendations and threat assessments from these providers. The request should also contain a legal recommendation from a legal assistance attorney explaining the difficulties of acquiring a Japanese divorce and how an ERD would be in the Government's best interest. Even these additional steps do not ensure an ERD. NAVPERSCOM has stated that the only guarantees are a substantiated Family Advocacy Program/ Domestic Violence case or a finalized divorce decree, which could take years. All other cases will require greater substantiation and a higher threshold of review.

This new policy places greater strain on service members and their dependents when marital problems prove too difficult to overcome. Though no couple plans on divorce, Sailors and Marines in our AOR must now plan ahead if they hope to secure the means to return their dependents home. Knowing the necessary steps to secure an ERD will greatly improve their mental and operational readiness when facing marital problems overseas.

LT Horton is the Legal Assistance Division Officer of RLSO Branch Office Sasebo. He has degrees in Political Science and French Literature from Notre Dame, and his Juris Doctorate from Boston College. Before becoming a JAG, he served as a Naval Aviator, flying the HH60-H Seahawk with HCS4/HSC84.

OFFICER MISCONDUCT: EDUCATE OR TERMINATE?

LT Jeffers Boggs, JAGC, USN

With the exception of offenses that require mandatory processing, Commanding Officers (COs) have great flexibility regarding whether or not to initiate separation proceedings against enlisted sailors. Much like nonjudicial punishment (NJP), the CO is often the decision authority as to whether or not a Sailor will be allowed to remain in the United States Navy. This abundance of control over the enlisted process makes the CO's almost utter lack of decision-making-authority in officer cases all the more jarring.

In contrast to imposing NJP upon an enlisted service member, before the proceeding even takes place, MILPERSMAN 1611-010 requires the CO to report to PERS-834 that she intends to impose NJP on an officer. The results of an officer NJP, regardless of rank, must also be immediately reported to PERS 834 once the CO decides to hold the proceeding. At this point, the CO can make a recommendation as to whether or not the officer should be made to show cause; but it is only that, a recommendation.

This process is not problematic if the CO has weighed the officer's offense against the potential outcomes of the PERS review process before making the decision to take an officer to NJP, but it can be quite damaging if COs do not realize the impact of this initial report to PERS. For probationary officers, those who have been in the Navy six years or less, this is particularly problematic, as many young careers are ended without the CO necessarily intending to do so. While more senior officers are granted a Board of Inquiry (BOI) to defend themselves, the career of probationary officers is often ended via a "paper-work" drill in which the officer has no such opportunity. Many of these officers then have to repay tens of thousands of

dollars in education expenses. This also has a great impact on probationary Limited Duty Officers (LDO), who can be reverted to their enlisted status with the stroke of a pen, losing thousands of dollars of retirement.

What can a CO do to punish officer misconduct without risking his or her separation from the Navy? NJP can be a learning tool for enlisted service members who can often continue with their careers despite the CO's punishment, but what is the equivalent for officers when written counseling is not enough? For example, what of a single charge of Driving Under the Influence (DUI) or a liberty violation? Below are some suggestions that could be useful if your CO is ever facing such a situation.

NJP... Without the P

The wording of MILPERSMAN 1611-010 is very specific. It states that once the decision "is made to impose NJP" on an officer, PERS-834 must be notified. One option is to go through the proceedings of an NJP without any intent to impose punishment. If no punishment was ever intended to be awarded at NJP, then no decision was ever made to impose it. Why do this? Well it is certainly a sobering experience to have to come before your CO, Commodore, or Admiral, in your service uniform. Especially since most officers are aware of the implications of NJP. It provides a sharp dose of reality without risking their removal from the Navy, and can be followed by a Non-Punitive Letter of Caution (NPLOC) or Letter of Instruction (LOI) in order to ensure a record of this misbehavior. These forms of counseling are not considered to be nonjudicial punishment in the same way a Punitive Letter of Reprimand is, but they can be

OFFICER MISCONDUCT: EDUCATE OR TERMINATE?

LT Jeffers Boggs, JAGC, USN

utilized to ensure the officer's conduct improves.

A SWO No Mo'

Another intermediate method is the removal of qualifications. This is a great tool to use if the CO would like an officer removed from a community or position but does not wish to Detach for Cause (DFC) or separate her from the Navy. Keep in mind that, contrary to enlisted qualifications, officer qualifications are monitored by a higher authority, which must be appealed to for removal. For example, a Surface Warfare Officer (SWO) maintains his or her designator without the corresponding SWO qualification, but per MILPERSMAN 1210-090, a CO must route a request to pull this qualification via PERS-4. Both COMANVSURFORINST 1412.1C and MILPERSMAN 1210-090 emphasize that revocation of the SWO qualification is not to be used in lieu of DFC, but a recommendation may be made on such grounds as "gross lack of professional or personal judgment and integrity" or "lack of moral integrity." These grounds apply to many officers who have committed misconduct. A pilot's wings may be clipped via a similar process. MILPERSMAN 1620-020 and COMNAVAIRFORINST 5420.1C allow for the convening of Field Naval Aviator Evaluation Boards (FNAEBs), which have the ability to recommend a termination of flight status or the removal of aviation qualifications. While FNAEBs usually occur due to aviation mishaps, the instruction provides that they may also be convened when an aviator demonstrates "certain habits, traits of character, emotional tendencies, or lack of mental aptitude or motivation that make it questionable to continue the member in assigned flying duties."

The CO solely recommending the removal of a

qualification without DFC sends a very different message to higher authorities. It is essentially suggesting that a Lieutenant is not suited to be a SWO or pilot, but may have other uses in the Navy. Revoking a qualification may allow an officer to finish her obligation of service before being separated from the Navy. This prevents her from having to pay back education expenses or lose retirement. However, as a note of caution, the command must be prepared to keep this individual in a different position should her qualification be pulled. This option is therefore ill-suited for situations in which the CO wishes the problematic officer removed from the command.

If a CO believes the officer's offense warrants ending her career, then the above discussion is obviously not applicable. But if your CO is looking to educate rather than terminate, there are ways to impart this message besides the traditional written forms of counseling. SJAs should always be on the lookout for ways to help COs legally effect their disciplinary intent, and PERS's involvement does not have to block this mission for officer misconduct.

LT Boggs earned her Bachelor of Arts in History and Politics from Converse College and worked with the National Council on U.S.-Arab Relations in Washington, D.C. She earned her Juris Doctorate from Georgetown University Law, and worked as the SJA for PHIBRON 11. In June she will PCS to Gulf Port, Mississippi, and work as the SJA for Naval Construction Group 2.

RESULTS OF TRIAL



January 2017:

At a General Court-Martial in Okinawa, Japan, CMCN Bryce A. Cruse, USN pled guilty pursuant to a pretrial agreement to one specification each of absence without leave, attempted sexual assault of a child, and solicitation. On 12 January 2017, the military judge sentenced him to a reprimand, to be discharged with a Bad Conduct Discharge, to forfeit all pay and allowances, to reduction in rank to paygrade E-1, and to confinement for 30 months. Pursuant to the pretrial agreement, confinement greater than 15 months is to be suspended. The suspended confinement may be served if the service member violates the terms of the pretrial agreement.

February 2017:

At a General Court-Martial in Yokosuka, Japan, ABH3 Michael J. Moore, USN pled guilty pursuant to a pretrial agreement to one specification of attempted sexual assault, two specifications of sexual assault, and one specification of unlawful entry. On 24 February 2017, the military judge sentenced him to be discharged with a Dishonorable Discharge, to forfeit all pay and allowances, reduction in rank to paygrade E-1, and confinement for 60 months. Pursuant to the pretrial agreement, all confinement greater than 48 months is to be suspended. The suspended confinement may be served if the service member violates the terms of the pretrial agreement.

March 2017:

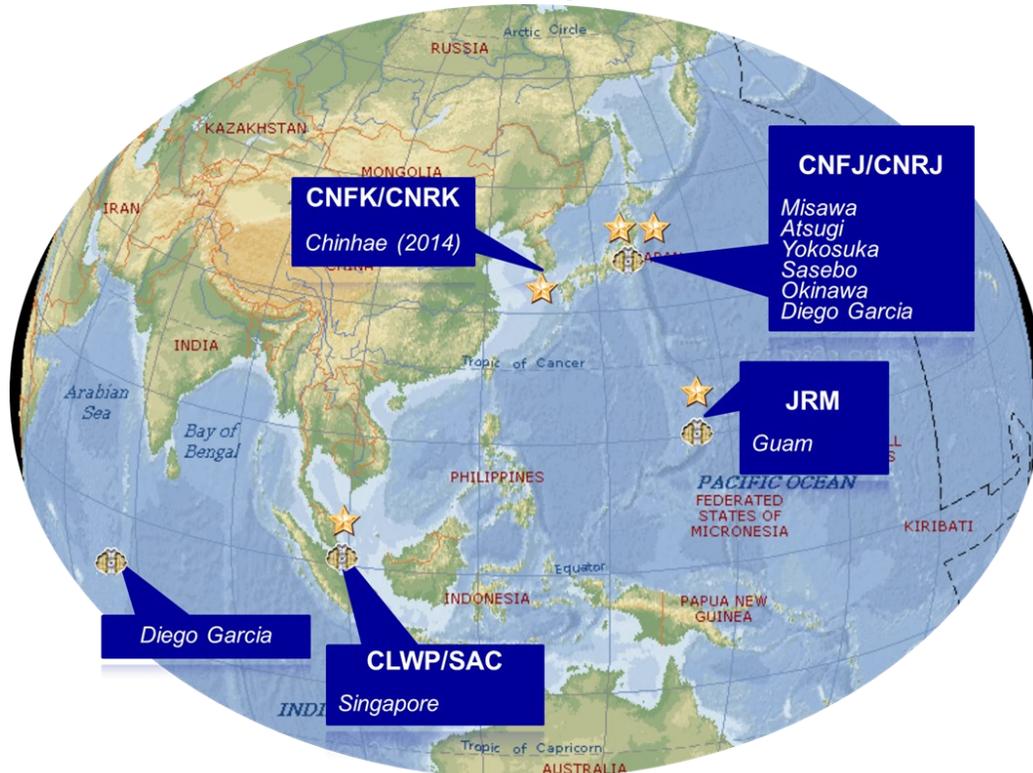
At a General Court-Martial in Yokosuka, Japan, IT2 Jordan L. Mitchell, USN, pled guilty pursuant to a pretrial agreement to one specification of possessing and viewing child pornography. On 31 March 2017, the military judge sentenced him to be discharged with a Dishonorable Discharge, reduction in rank to paygrade E-1, and confinement for 40 months. The pretrial agreement had no effect on his sentence.

April 2017:

There were no General or Special Courts-Martial in Navy Region Japan in April 2017.

CONTACT INFORMATION

Your Nearest Legal Advisors



Yokosuka Command Services: 315-243-9437

Yokosuka Legal Assistance: 315-243-8901

CFAY Legal: 315-243-7335

CNFJ/CNRJ: 315-243-3149

Atsugi: 315-264-4585

Sasebo SJA: 315-252-3387

Sasebo Legal Assistance: 315-252-2119

Misawa: 315-226-4022

Diego Garcia: 315-370-2922

Okinawa: 315-632-3974

Guam Legal Assistance: 315-333-2061

Joint Region Marianas: 315-349-4134

Singapore: 315-421-2305

CNFK: 315-763-8010

C7F: 315-241-9104

CTF70: 315-243-7113

CTF72: 315-264-2860

CTF76: 315-622-1620

USS RONALD REAGAN: 315-243-6656