



# THE 弁護士 BENGOSHI

VOLUME 1, ISSUE 1

OCTOBER 3, 2016

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## South China Sea: Legal Ruling Against China's Maritime Claims

*By LT Joshua Root and LT Caitlyn  
McCarthy*

On July 12, 2016, a United Nations Convention on the Law of the Sea (UNCLOS), tribunal released a land-mark opinion rejecting the People's Republic of China's (PRC's) claim to historic rights within the "Nine-Dash Line", drawn around much of the South China Sea. Additionally, while the tribunal declined to arbitrate on what country has sovereignty over several disputed formations, they decided that the disputed South China Sea formations do not generate resource or territory entitlements.

As long as there have been disputes over land and territory, so too have there been disputes

over the sea and its resources; UNCLOS attempts to standardize these resource and sovereignty claims. Under UNLCOS different land formations generate different entitlements. Mainland coastlines and islands generate the most expansive and exclusive entitlements in the form of maritime zones; rocks, a subset of islands, generate a slightly lesser entitlement with fewer zones, and low-tide elevations like reefs, sandbars, and shoals that are underwater at high-tide do not normally generate any maritime zones. Given this scheme, it is easy to see how a State's sphere of influence can grow quickly depending on the type and number of land formations under their sovereignty.

The PRC has claimed "historic rights" to most of the South China Sea in an area marked by the "nine-dash line". The PRC has artificially built up formations in order to classify them as 'islands' (rather than as rocks or low tide elevations), thus expanding the reach of their exclusive rights. These actions have long created friction with the PRC's neighbors, including the Republic of the Philippines, who claim rights to the same areas and formations under UNCLOS. After years of political dispute, the Republic of the Philippines petitioned an UNCLOS arbitral tribunal to determine the legality of the PRC's claims.

In a clear and boldly written opinion, the arbitrators found

## Changes to ADSEP Separation Authority

*By Benjamin Leatham*

On 10 March 2016, NAVPERSCOM released a new update to MILPERSMAN 1910-704, Determining Separation Authority. This update shakes up the determination of the separation authority for special cases of administrative separation boards. Although processing times in some cases may be increased due to the

changes, they have also helped improve the guilty plea negotiation process for courts-martial.

Formerly, if a court-martial did not award a punitive discharge and a subsequent administrative board recommended an Other than Honorable Discharge, the separation authority was SEC-NAV. This included situations in which a punitive discharge was

awarded and situations in which the Convening Authority did not approve the punitive discharge in clemency. Without assurances that the Convening Authority could guarantee the punitive discharge protection in the pre-trial agreement, negotiations between the government and defense counsel became more difficult. (Continued Page 2)



# South China Sea Cont.

**“The PRC has responded aggressively ... and the Philippines have not followed up with any real plan of leveraging the decision”**

that the PRC’s claim to all resources within the nine-dash line was “not compatible with the Convention” and so unequivocally rejected it as a basis for entitlements under international law. Further, while the tribunal lacked the jurisdiction to decide sovereignty of the formations in the South China Sea, the Philippines petitioned the tribunal to find that the formations in dispute were either rocks or low-tide elevations. The tribunal agreed with the Philippines for all disputed formations under review. The brilliance of the move was that low-tide elevations, further than 12 nautical miles from land, are not subject to sovereignty by any nation, and therefore could not belong to the PRC. Additionally, the Chinese attempts to transform minor rocks into proper islands were dismissed as largely irrelevant to the analysis.

In one sweeping document the map of legitimate maritime claims in the South China Sea shifted dramatically; the prac-

tical impact of the decision, however, is uncertain. The PRC has responded aggressively to the decision, and the Philippines has not followed up with any real plan of leveraging its legal victory. It will take time for the full impact of the decision to be understood, but in the meantime, the decision offers data points and a legal basis for the U.S. to continue challenging excessive maritime claims in the South China Sea through ongoing Freedom of Navigation Operations.



DISPUTED CLAIMS IN THE SOUTH CHINA SEA

# Separation Authority Cont.

The new version of MILPERSMAN 1910-704 delegates the separation authority down to the regional commander “when the sole basis for separation is a serious offense that resulted in a conviction by a special or general court-martial that did not impose a punitive discharge.” The update goes on to specify that this authority includes situations in which an ADSEP board recommends an Other than Honorable discharge or when a board waiver is part of the pre-trial agree-

ment. This new update provides both the government and the accused more flexibility and more certainty in negotiating pre-trial agreements.

Other notable changes include elevating the separation authority to SECNAV level in the following cases: 1) FAP rehabilitation failure; 2) mandatory processing cases in which the board finds misconduct, but recommends retention; and 3) mandatory pro-

cessing cases in which the board finds no misconduct. Additionally, for cases in which the accused is an alleged victim of sexual assault recommended for involuntary separation within one year of the final disposition of his or her sexual assault case, the first flag officer in the chain of command is now the separation authority. For questions regarding processing under these new rules, contact your ISIC JAG, local base JAG, or RLSO Japan Command Services Department.

# Be Informed: Victim's Legal Counsel Program

By LT Lisa Redmond

The Navy Victims' Legal Counsel Program provides survivors of a sexual offense with a dedicated attorney to help victims understand the investigation and military justice process, guard their legal rights and interests, and obtain additional support in accessing resources that may assist in their recovery. This attorney, called the Victim's Legal Counsel (VLC), is provided to Navy service members and other eligible victims of sexual offenses.

VLC's complement the care and support victims already receive through Sexual Assault

Response Coordinators during the investigation and (SARCs), Victim Advocates disciplinary processing of those (VAs), and Family Advocacy reports. Program (FAP) personnel by



providing legal counsel and advice on sexual offense reporting options as well as legal support

Navy victims of a sexual offense will have an opportunity to discuss their concerns confidentially with an attorney who represents their interests so that they are prepared to participate more comfortably and effectively in the investigation and processing of their cases.

Navy Victims' Legal Counsel are assigned regionally to maximize availability of counsel where needed most. There are five VLC's and two Yeomen that cover the Pacific Region.

## VLC Points of Contact:

### Guam:

LCDR Kelly Armstrong, JAGC, USN, (671) 488-8360 or email: [kelly.armstrong@fe.navy.mil](mailto:kelly.armstrong@fe.navy.mil)

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[diandra.card@navy.mil](mailto:diandra.card@navy.mil)

dent,<sup>1</sup> shoplifting, assault, rape, etc.) and who has jurisdiction over the case.<sup>2</sup> Certain civil claims like damage to property are also covered under the SOFA and are handled by experts working with the installation legal office. The key is to alert the relevant parties and check with the legal office since delayed notification can have an impact on our relations with Japanese authorities and their investigative

## How to: Foreign Criminal Jurisdiction (FCJ) Cases in Japan

By LT Andrew Giddings

One unique aspect of being forward-deployed to Japan is that relations between the Japanese authorities and service-members, dependents, and eligible civilians are covered by the Status of Forces Agreement ("SOFA") between the United States and Japan. Signed in 1960, the SOFA has had numerous interpretations, discussions, "Agreed Minutes" and "Agreed Views" (formal decisions on provisions and how they are implemented) and has been the subject of a great deal of debate. This is particularly true in the

wake of incidents in which SOFA-personnel commit crimes against Japanese nationals. These incidents, in turn, can have serious impacts on bilateral relations as well as U.S. security interests, as recent high profile SOFA cases in Okinawa have demonstrated.

So what do you do if you get a call that someone in your Command has gotten in trouble with the Japanese authorities? The answer—call your base security office and your installation Staff Judge Advocate (SJA). In addition to advising local tenant commands, base legal offices in

the FDNF AOR are responsible for Foreign Criminal Jurisdiction (FCJ) matters. In short, they serve as the primary POC's in dealing with the Japanese authorities when SOFA-sponsored members get into trouble, including SOFA rights, apology visits, and liaison with host nation authorities throughout the investigation and (potential) trial process.

There is a SOP that base legal follows in the event that a that a SOFA-sponsored member gets in trouble with local authorities. First, they determine the nature of the incident (i.e. traffic acci-



## How to: Foreign Criminal Jurisdiction (FCJ) Cases in Japan

procedures.

Another initial concern pertains to custody—whether the SOFA-sponsored member will be detained by the Japanese or released for possible future questioning. If the member is taken into Japanese custody, base security and the SJA will travel to the location the member is being held in order to read the member his or her rights under the SOFA prior to questioning by the Japanese authorities. At that time, they will also request release of the member, with the understanding he or she will be available for further questioning.

It is important that SOFA-sponsored members understand that their rights under the SOFA and Japanese Criminal Code are not the same as those in the United States, particularly with regards to arrest and questioning. Major differences include: individuals do not have the right to have a representative present during police questioning; an individual can be held in confinement up to 23 days before even being charged, and the right to remain silent—while recognized under the Japanese Constitution—differs in that one must invoke it after each and every question, and “lack of cooperation” can be used against an individual in a court of law. Individuals are also not permitted the “one phone call” as one would make in the U.S. Rather, the Japanese police will report the incident to U.S. authorities. Once a SOFA rights briefing is given, the member does not

have a right to talk to anyone else.

If a member is not in Japanese custody, or is released, the Legal office will coordinate with your command regarding the SOFA member’s availability (i.e. if he or she has any upcoming deployments, TAD, etc. that would prevent the Japanese from conducting interviews). If the Japanese issued what’s referred to as an Agreed View 40 (“AV-40”), forwarding the case from the police to the prosecutor, then the member will be placed on international legal hold and will be unable to leave Japan. Therefore, the authorities do their best to coordinate this ahead of time with the Commands.<sup>3</sup>

Regardless of custody status, the installation legal office will assist with the “gomenasai”<sup>4</sup> process, which may include the drafting of an apology letter, gift, and/or other consideration to a crime victim. If the accused is willing to participate in this process, it can sometimes be a decisive factor in whether a case proceeds forward, and if so, what punishment is given.

If an indictment is made, the installation legal office will continue its involvement throughout the life cycle of the case from requesting waivers of jurisdiction through acting as trial observers, should the case go to trial. They will also assist SOFA-members in obtaining Japanese legal representation. For criminal cases that will proceed to trial, most SOFA members are entitled to have such attorney fees paid for by the U.S. government. Of note, attorney fees are generally not paid for representation during the earlier phases of an investigation, though the member is able to hire an attorney at his or her own expense for these purposes.

These mechanisms are all to help ensure the SOFA-sponsored member is treated in accordance with the SOFA, Japanese law, international law, and international human rights law. Action (or inaction) by the Japanese does not preclude disciplinary or administrative action by the Command with regard to the SOFA-sponsored member, though the Command must delay such action for the same offenses until after disposition has been made on the Japanese side, and higher approval may be necessary in order to proceed. Recommend contacting base legal or your ISIC JAG prior to proceeding with disciplinary action on a case in which the Japanese have (or had) initial jurisdiction.<sup>5</sup>

While you may dread the 0330 phone call from Base Security that a Sailor in your command has been arrested by the Japanese police, installation security and installation SJAs have been trained to deal with these types of situations. They will help protect the interest of the United States and SOFA-sponsored members, while guiding your command through the process on a step-by-step basis.

***“It is important that SOFA-sponsored members know that their rights under the SOFA are not the same as... in the United States...”***

### FOOTNOTES:

1. Traffic accidents are treated under the Japanese criminal code and can have very real SOFA implications.
2. Article XVII of the Status of Forces Agreement covers who has jurisdiction depending on (i) what the offense is; (ii) who it is against; and (iii) whether the offense was done in the performance of official duties.
3. Installation legal office personnel will discuss with Japanese authorities the timeline of the Japanese investigation, taking into account mission requirements that might conflict. Often, Japanese police/prosecutors are willing to work together to find a mutually-agreeable timeline.
4. “Gomenasai” translates into “[I am] sorry.” It is the customary procedure by which the offender in the Japanese system offers sincere regret and recompense for his or her actions to the victim.
5. The command should also be cognizant of mandatory reporting requirements. Pursuant to COMNAVFORJAPANINST 3100.3D, events/incidents that might meet OPREP-3 NAVY BLUE reporting requirements include the arrest of any SOFA sponsored personnel that occurs off base and injury to a Japanese national or damage to personal property resulting from reckless driving or driving under the influence of alcohol.

# The National Anthem: To Stand or ...

By LT Caitlyn McCarthy

During the 2016 NFL preseason, Colin Kaepernick, the quarterback for the San Francisco 49ers, initiated his now well-publicized (and ongoing) National Anthem protest in support of the Black Lives Matter movement. Traditionally, at the start of each NFL game, the National Anthem is played and the players and fans stand as a sign of respect. Kaepernick refused to stand, later telling media outlets: "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color...."<sup>1</sup>

The patriotism of Kaepernick's actions has been hotly debated by professional news outlets and on social media. The media frenzy has caused several people to join Kaepernick, including one in an unlikely location:

In the first weeks of September, news sources began reporting about a female

Navy sailor stationed at a training command in Florida who took a video of herself sitting in protest during colors. In the video she states "People always want to say 'men and women have died for this flag,' no, correction, men and women have died for my right, and Colin Kaepernick's right, to determine whether or not we want to stand or sit..."

While the debate about this form of protest persists, one thing is very clear—while Colin Kaepernick has the right to sit during the National Anthem, active duty servicemembers **do not**.

OPNAVINST 1710.7A states that "Whenever the National Anthem is played, all naval service personnel not in formation shall stand at attention and face the national ensign. In the event that the national ensign is not displayed, they shall



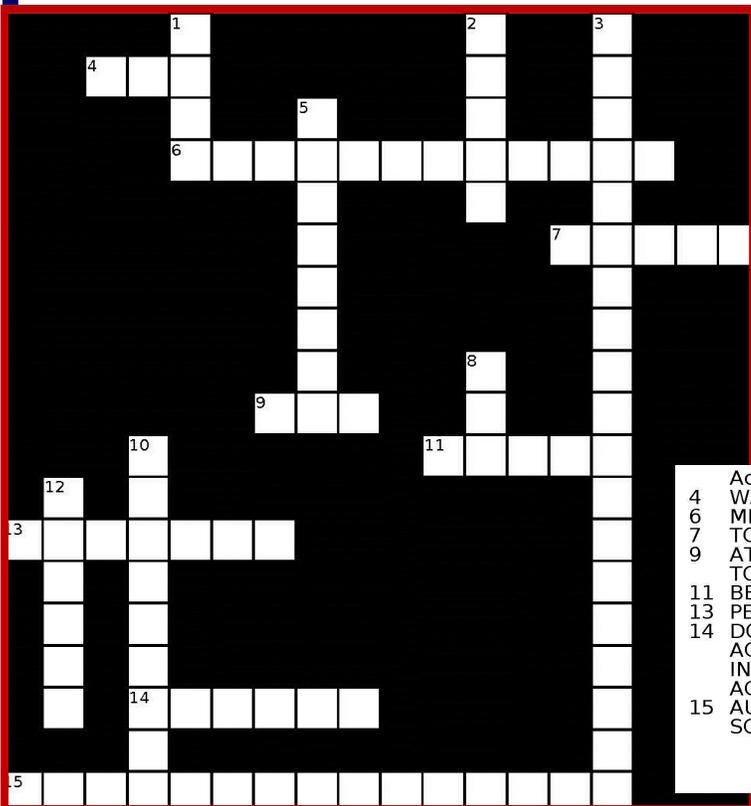
face the source of the music." Additionally, per NAVADMIN 098/09, "During the playing of the national anthem, or the raising, lowering, or passing

of the national flag, Sailors will continue to follow the policy and procedures outline in [OPNAVINST 1710.7A 15 Jun 2001]. Specifically, Sailors not in uniform will face the flag, stand at attention, and place the right hand over the heart." Though servicemembers are protected under the First Amendment, mission requirements and the nature of the military itself necessitate a different application of those protections; "the fundamental necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it" Parker v. Levy, 417 U.S. 733, 758 (1974). The government interest in suppressing the ability to refrain from standing during colors is not related to a suppression of free speech. Rather the government has a substantial interest in good order and discipline and avoiding breaches of customs..

In a world of instant fame, and of social media platforms that beckon remote users to join together in shared experiences, young people (even servicemembers) might be enticed to join the conversation. However, those who choose to do so are advised to read and understand the rules, lest they inadvertently find themselves in hot water.

Footnotes:  
1 <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>

face the source of the music." Additionally, per NAVADMIN 098/09, "During the playing of the national anthem, or the raising, lowering, or passing



## CROSSWORD

- Across
- 4 WATER
  - 6 MILITARY COURT
  - 7 TOKYO
  - 9 ATTORNEY PROVIDED TO VICTIMS
  - 11 BEIJING
  - 13 PERMISSION
  - 14 DOMESTIC ACCEPTANCE OF AN INTERNATIONAL AGREEMENT
  - 15 AUTHORITY TO ACT ON SOMEONE'S BEHALF

- Down
- 1 OVERSEES SAPR PROGRAM
  - 2 PLANK
  - 3 MAKES FINAL RETENTION OR SEPARATION DECISION
  - 5 BEFORE COURT
  - 8 DISCHARGE THAT SIGNALS A SIGNIFICANT DEPARTURE FROM NAVY COMPLETE SEVERANCE FROM ALL MILITARY STATUS
  - 10 AUTHORIZED TO PERFORM LEGAL FORMALITIES



# New Special Power of Attorney Website

Need a special power-of-attorney (SPOA) but don't have the time to wait in line at the Legal Office? Good news! You can now draft a special power-of-attorney yourself! The Naval Legal Service Command

is pleased to announce the release of new special power-of-attorney (SPOA) website at <http://www.jag.navy.mil>, where many of the power-of-attorney forms you need are at your fingertips. All personnel eligible for legal assistance can now fill out special power of attorney forms online, print them, and take the unsigned forms to an au-

thorized notary public for signature and execution. Your Special Power of Attorney (SPOA) may be completed in 6 easy steps.

6) Print and bring it to your command Legal Officer or the installation Legal Assistance Office for notarization.

For any POA not listed on the website, please come into the Legal Assistance office.

**\*\*Remember, the POA will not be valid unless it is signed by you, in person, in front of the notary. Please have two forms of Government photo ID ready.\*\***

The Region Legal Service Office's Legal Assistance locations, hours of operation and contact information are included in the left-hand panel of this page.

- 1) Log on to <http://www.jag.navy.mil>
- 2) Go to the Legal Services tab at the top of the page and select "Legal Assistance."
- 3) Click on "Special Power of Attorney" under Legal Assistance Topics in the middle of the page.
- 4) Choose the SPOA that fits your needs and fill in the information.
- 5) Produce the SPOA by clicking "Generate SPOA".

**Yokosuka:** Monday - Friday from 0800-1530. DSN 315-243-8901, COMM 046-816-8901. Legal Assistance is located at the Personnel Service Detachment (PSD) building on the second floor. Notaries and POAs are done on a first come first serve basis.

**Sasebo:** Monday - Thursday 0800-1500 and Friday 0800 to 1200. DSN 315-252-2119, COMM 011-81-956-50-2119. Legal Assistance is located in building PW47, on the first floor. Notaries and POAs are done on a first come first serve basis.

**Guam:** Monday - Friday 0800-1630. DSN 315-333-2061, COMM 671-333-2061. Legal Assistance is located in building IA on Aldrich Road.

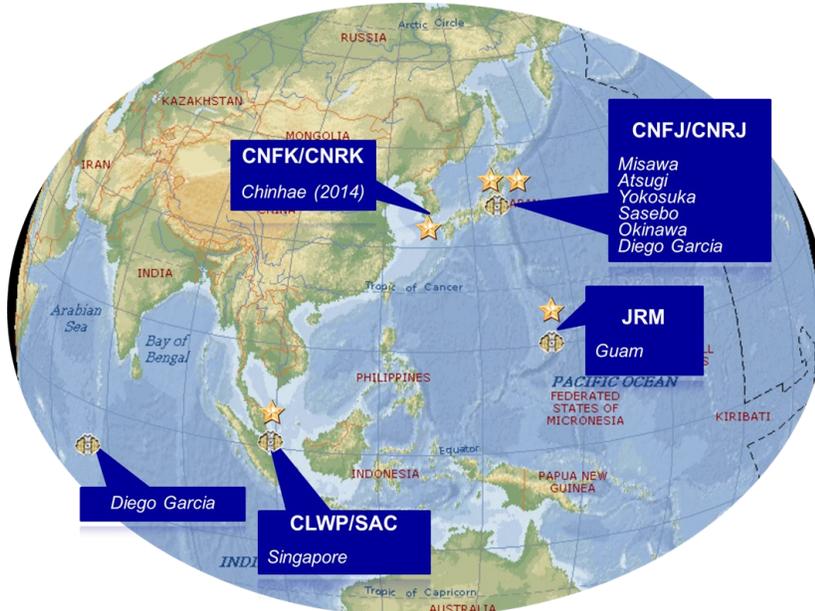
## RLSO Japan Contact Information

### Command Services

<b>Department Head</b>	<b>LCDR Latham Hudson</b>	<b>315-243-8904</b>
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<b>Command Services JAG</b>	<b>LT Caitlyn McCarthy</b>	<b>315-243-9378</b>
<b>Legalman Clerk</b>	<b>LN2 Deanna Banks</b>	<b>315-243-9437</b>



Answer Key



## RLSO JAPAN AOR