

UNITED STATES DEPARTMENT OF DEFENSE

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RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT
CRIMES PANEL

COMPARATIVE SYSTEMS SUBCOMMITTEE

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CONFERENCE CALL

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THURSDAY
APRIL 24, 2014

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The Subcommittee met telephonically at 2:00 p.m. Eastern Daylight Time, Professor Elizabeth Hillman, Chair, presiding.

PRESENT

PROFESSOR ELIZABETH HILLMAN, Chair
HARVEY BRYANT
BG (Ret.) JOHN S. COOKE
COL (Ret.) STEPHEN R. HENLEY
COL (Ret.) LAWRENCE J. MORRIS

ALSO PRESENT:

JANICE CHAYT, Investigator
DILLON FISHMAN, Attorney
MARIA FRIED, Designated Federal Official
SHANNON GREEN, Legislative Analyst
JOANNE GORDON, Attorney
COL PATRICIA HAM, Staff Director
LTCOL KELLY McGOVERN, Supervising Attorney
AMY GRACE PEELE, Technical Writer
TERRI SAUNDERS, Deputy Staff Director

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P R O C E E D I N G S

2:03 p.m.

LT COL McGOVERN: Thank you all for joining us this afternoon. The purpose of this afternoon is to have you all consider two primary sections of the report, and that is those Findings and Recommendations that deal with judicial involvement earlier in the process, and the sentencing portion of the report. If we could start on No. 44, General Cooke has said some --

FEMALE PARTICIPANT: Do we need to do anything to start the meeting? Did we open the meeting?

MS. FRIED: Yes, sorry. The meeting's open. Thank you.

LT COL McGOVERN: Now that the meeting is open, if we could please look at No. 44. General Cooke has some recommendations for those Findings and Recommendations.

BG COOKE: I guess you hand it to

1 me.

2 LT COL McGOVERN: Yes, sir.

3 BG COOKE: Well, as I said in my
4 email, I wasn't part of the discussion that
5 gets into the list to begin with. So I'm not
6 quite sure I understand the background
7 completely. But this notion of a minimum
8 threshold to charge a service member and
9 comparing that to the civilian community, I'm
10 not sure -- the charge, obviously, is a very
11 minimal requirement, but so is the complaint
12 in the civilian proceeding.

13 It's kind of what happens after
14 that, I think that maybe we're really
15 concerned about. But as I said, I wasn't part
16 of the discussion that led to this. I'm not
17 certain where we're going with it.

18 LT COL McGOVERN: Yes, sir. Some
19 of this was generated from a site visit to
20 Quantico, where the AUSA had explained the DOJ
21 threshold, included a consideration of the
22 likelihood of success, and the trial counsel

1 said their threshold was basically if the
2 victim wanted to go forward.

3 So not that we should base
4 everything on one site visit, but clearly both
5 jurisdictions have a number of factors that
6 they consider. Those are differences, so for
7 a comparative analysis, we could highlight
8 those. A standard should be imposed to give
9 commanders more guidance. This would be an
10 opportunity to do that. If you don't think
11 we've heard enough on this topic, we can
12 delete it.

13 BG COOKE: Well, I guess my
14 concern is that when we talk about information
15 on which decisions are made to go forward,
16 there are a lot of different decisions in that
17 process, and I'm not exactly sure where you
18 think we are in the process, from the time
19 somebody has reported a possible crime all the
20 way through either a report of charges in the
21 military or, in the civilian side, an
22 indictment. I think this plucks out of that

1 process a couple of sort of almost extraneous
2 pieces and can tailor them without the
3 context. Does that make sense?

4 LT COL McGOVERN: Yes, sir.

5 MS. FRIED: Yes, sir.

6 COL HAM: Sir, it's Colonel Ham.

7 I know the long discussion in the -- maybe
8 what the committee might -- what it might
9 consider is, you know, is eliminating the
10 finding and recommendation and just keeping
11 the discussion in the report, which goes into
12 what the U.S. Attorney's manual tells
13 assistant U.S. attorneys to consider in
14 charging, and what the Manual for Courts-
15 Martial tell commanders to consider in
16 dispositions, just as a comparison, and then
17 make no finding or no -- make no finding or
18 recommendation.

19 That's certainly appropriate as
20 well, or eliminating the entire section if the
21 subcommittee decides it's really not that
22 useful. But what the --

1 (Simultaneous speaking.)

2 COL HAM: I'm sorry, sir.

3 BG COOKE: Yes, as I said, I have
4 the discussion in front of me. I don't have
5 any objection to ferreting out what each one
6 does, the military and the civilian, and there
7 are differences in the decisions to go forward
8 at certain points, that's certainly worth
9 pursuing. But I'm not sure there's enough, or
10 at least I have enough to make a finding or a
11 recommendation as it stands right now.

12 LT COL McGOVERN: Mr. Bryant, have
13 you just joined the conversation?

14 MR. BRYANT: Just got in, yes.
15 Several busy signals, but here we go.

16 LT COL McGOVERN: Thank you, sir.
17 We are looking at No. 44, and trying to see if
18 you all would like to adjust or eliminate the
19 compare and contrast of charging decision
20 considerations.

21 The one other portion of this was
22 the fact that Section 1708 of the NDAA had

1 maybe made it law that you can strike the --
2 or things that the commander cannot consider
3 being the service member's performance or his
4 military character. So that's where that
5 recommendation also came into play, or that
6 finding.

7 Colonel Morris or Colonel Henley,
8 do you have any feelings one way or the other
9 about 44?

10 COL HENLEY: I do tend to agree
11 with General Cooke on 44(a). Sir, is that
12 your concerns or primarily on 44(a)?

13 BG COOKE: Yes, yes. I'm not
14 concerned with 44(b). I'm concerned with
15 44(a), and then the recommendation sort of
16 follows from 44(a).

17 COL HENLEY: Yes. I wrote just a
18 note to myself, you know, what does threshold
19 mean? Is it a legal threshold, subjective
20 threshold, personal, discretionary threshold?
21 I agree. I think we may -- it's a little
22 confusing the way it's worded. I think I

1 understand what we're trying --

2 BG COOKE: Yes. It's not
3 entirely clear what we mean when we say
4 charging, I think. As I said, in the
5 military, you can proffer -- anybody can
6 proffer, anybody subject to the Code can
7 proffer charges, and all they have to do is
8 swear that they believe they're true.

9 Similarly, in the federal system,
10 any citizen could walk into a police, you
11 know, into a government office, appropriate
12 government office, and swear a complaint
13 that's the equivalent of a charge, and they
14 don't have to say that I think you can prove
15 this by A, B or C; they just have to swear to
16 it.

17 It's what happens after that and
18 how the government decides to proceed with
19 that allegation, their allegation by somebody,
20 and what criteria are used by the various
21 authorities to decide whether to proceed or
22 not to proceed.

1 So we've really collapsed one
2 rather simplistic finding, a more complex
3 process, and it seems to me that we've either
4 got to flesh that out or we ought to not go
5 there.

6 MR. BRYANT: Well first -- this
7 is Harvey Bryant. First of all, the average
8 citizen doesn't just walk into a federal
9 magistrate's office and fill out a complaint
10 to charge rape.

11 BG COOKE: I know, but that --

12 MR. BRYANT: Yes.

13 BG COOKE: I know.

14 (Simultaneous speaking.)

15 MR. BRYANT: That takes prosecutor
16 involvement, and even in our state system,
17 magistrates are not allowed by law to issue a
18 felony warrant unless they've consulted with
19 the prosecutor. So anyway, that's just --
20 that doesn't address exactly what you see the
21 issue here.

22 It seems to me what we're trying

1 to get at is factors taken into account in
2 initiating charges. I'm not going to use
3 proffer or the other term, but as opposed the
4 factors that go into charging decisions in
5 civilian jurisdictions.

6 LT COL McGOVERN: Gentlemen, just
7 upfront, the court reporter will need us to
8 identify ourselves before we speak, just for
9 the record, as an administrative note.
10 Second, the goal of finding what to talk
11 about, what is the JAG, prosecutor and
12 commander, what are they considering, or what
13 is the civilian prosecutor considering when
14 they're thinking about going towards trial
15 versus an alternate disposition?

16 BG COOKE: Right.

17 LT COL McGOVERN: So --

18 COL MORRIS: This is Larry Morris.
19 I'm probably just parroting what the others
20 have said on 44(a).

21 But I agree on all, it seems to
22 mix charging with disposition. The last

1 sentence I'm just not sure is accurate, you
2 know. I'm not sure the -- currently, the
3 minimum threshold amount, just objectively is
4 not safe. I mean, the manual says whatever.
5 You know, when you charge you have to assert
6 personal belief that the stuff is true. So
7 it's -- I think that's misleading.

8 Then we talk about a non-exclusive
9 list of factors to consider once charges are
10 preferred as you, you know, look at the range
11 of disposition actions.

12 (Simultaneous speaking.)

13 COL MORRIS: - just to say that
14 we've compared the charging, the disposition
15 rubric as between the civilians and the
16 military?

17 LT COL MCGOVERN: Yes sir, and to
18 consider whether or not it would be better to
19 establish a clearer standard after you've
20 considered all these factors. DOJ, for
21 instance, weighs heavily the probability of
22 success, and that was clear in the JSC-SAS

1 interviews as well, that that is an important
2 consideration of all the considerations.

3 Here, we have several cases where
4 we've heard commanders are going forward
5 against the IO's advice. So could it set them
6 up for success if there was a clearer
7 standard? Once you've considered all these
8 factors, you really then you have to look at
9 either probability of success on the merits or
10 something else.

11 I have no problems deleting this
12 section if it requires further study or
13 consideration.

14 MR. BRYANT: Well, this is Harvey
15 Bryant, if I may comment. Maybe what we can
16 do here on 44(a) is have that last sentence
17 say, "however, the minimum threshold the
18 military could charge a service member with an
19 offense does not necessarily take into account
20 the provability of charges, which differs from
21 civilian jurisdiction."

22 I'd leave out the whole subjective

1 thing because I'm, like the others who have
2 spoken, I'm not sure what we're -- what that
3 even means or what we're trying to say when we
4 say subjective factors are being used, or
5 being taken into account. And I understand
6 that encompasses 44(b), character and military
7 service. But what about that? If we just
8 say does not necessarily take into account
9 provability of charges, which differs from
10 civilian jurisdiction?

11 COL MORRIS: But isn't the
12 question of civilian jurisdiction that
13 charging virtually means going to trial, as
14 opposed to with us, where we have more of a
15 staged process, and that maybe we would not
16 want, especially in the sexual assault area,
17 to have provability be an explicit factor,
18 especially at that stage, or to end up then
19 screening too hard for that, which can then
20 mean not bringing potential cases fully to the
21 light of day, because you ditch them too early
22 on the idea that they may not be winnable.

1 COL HENLEY: This is Steve Henley.
2 I too think if we just leave it with the
3 reference to charging in that last sentence,
4 that's still confusing. If the finding really
5 goes to the -- comparing civilian and military
6 disposition guidance.

7 What if you said, you know,
8 ultimately both military and civilian
9 authorities determine how to dispose of an
10 allegation based upon the specific facts of
11 each case. However, a disposition of sexual
12 assault cases in the military does not
13 necessarily take into account the provability
14 of the charges, which appears to differ from
15 civilian jurisdictions.

16 Then the finding itself is limited
17 to disposition. You start with disposition
18 and you end up with disposition, and you're
19 not -- the provability of charges at the
20 charging phase seems that's a little
21 inconsistent. The idea is you're charging
22 someone. The provability of the charge is at

1 the charging stage, versus disposition.

2 COL HAM: Sir, that is the
3 standard in the U.S. Attorney's manual, that
4 they consider -- Mr. Bryant can -- but this is
5 all in the discussion portion, which I'm
6 sorry, I know you don't have at this point.

7 But that is the standard to
8 determine whether to charge, you know,
9 initiate a prosecution against a citizen in
10 the U.S. Attorney's manual, to consider right
11 upfront the likelihood of success and the
12 likelihood of proof beyond a reasonable doubt.
13 In some state jurisdictions, it's even
14 stronger.

15 LT COL MCGOVERN: But I think the
16 way you worded it, Colonel Henley, definitely
17 captures the fact that we can contrast the
18 factors considered and scopes. It was in
19 sexual assault as well.

20 So we can play with that and then
21 run it by you all, to see if that's a little
22 more acceptable for you. If not, then we can

1 omit it altogether.

2 BG COOKE: This is John Cooke
3 again. I just want to note that the
4 recommendation which purportedly followed this
5 finding speaks entirely in terms of proffering
6 charges.

7 LT COL McGOVERN: Yes, sir.

8 BG COOKE: Which is, you know, at
9 the very beginning of this process and anybody
10 subject to the Code can do it, whereas a U.S.
11 Attorney's or an AUSA's decision to seek an
12 indictment, for example, there's already been
13 a vetting of the case and some decisions made
14 about whether it should go forward.

15 So just we're talking apples and
16 oranges here, and we just need to -- whatever
17 we say, we need to, I think, clear that up.

18 COL HAM: Yes, sir.

19 LT COL McGOVERN: Yes, sir. It
20 may be best just to eliminate it.

21 COL HENLEY: Would that eliminate
22 -- this is Steve Henley. Would that eliminate

1 44(b) as well?

2 COL HAM: Sir, you can have a
3 finding and no recommendation. There's no
4 requirement to have a recommendation and a
5 finding. You can have findings that stand
6 alone, or later in the report, we also talk
7 about the good soldier defense proposal in the
8 Victim's Protection Act.

9 So we can incorporate this finding
10 into that, to show how they're chipping away
11 at the consideration of the accused's military
12 service. So we can still tie it in, and it
13 may even work better in that circumstance.

14 COL HAM: If you want 44(b),
15 please don't think that we're suggesting that
16 you keep or not keep anything, this is Colonel
17 Ham.

18 You tell us what you want us to
19 do. This is our first take on what you all
20 discussed in all of your deliberations. But
21 please just tell us to eliminate what you're
22 not comfortable with, and that's what we do.

1 LT COL McGOVERN: But I think
2 those are great points for 44. That was a
3 difficult section to try to compare and
4 contrast. So we'll set it aside for now and
5 if it appears -- anyone else feels strongly
6 about it, we can reconsider it. But we can
7 move on to No. 45. I think that gets to the
8 heart of the proposal that the judge become
9 involved earlier in the process.

10 CHAIR HILLMAN: Kelly, this is
11 Beth Hillman. I just wanted to say I've been
12 on the call for like two minutes, and I'm glad
13 you all straightened out 44 because I didn't
14 know what to make of that. I'll be happy to
15 read whatever you came up with for fixing
16 that. So anyway.

17 LT COL McGOVERN: We're
18 considering deleting it. But while we have
19 Colonel Morris and Colonel Henley especially
20 on the line, who engaged in a debate before
21 about the involvement of the military judge,
22 if you all could weigh in on these next few

1 findings and recommendations, I think that
2 would be extremely helpful.

3 COL HENLEY: This is Steve Henley.
4 I of course support the recommendations. I
5 had a couple of cosmetic changes to 45(a), the
6 second sentence. "Military judges should be
7 involved in the military justice process from
8 the time of preferral of charges." I would
9 strike the words "the time of."

10 It would read "military justice
11 process from preferral of charges or
12 imposition of pretrial restraint." The 45(c)
13 recommendation, it says "including whether a
14 cadre of junior judges should normally handle
15 many of these new responsibilities."

16 The term "junior judges" might
17 imply they're not as qualified. I might add
18 "junior field grade judges," and rather than
19 "should," "could."

20 LT COL MCGOVERN: Okay.

21 MR. BRYANT: This is Harvey
22 Bryant. Are there judges who are not field

1 grade?

2 COL HENLEY: No, not -- no. There
3 used to be captains, and I think General Cooke
4 could talk better as to when that stopped.
5 But I know in the Army you have to be a major,
6 and I think the Marines also major, and I'm
7 not sure the other services allow -- you have
8 to be O5, a lieutenant colonel or a commander
9 or above, I believe.

10 MR. BRYANT: That was my
11 understanding too, and that's why I wondered
12 why we put -- I agree with you. Maybe junior
13 is not -- that doesn't evoke great images.
14 But say "junior field grade" since they're all
15 field grade anyway. I don't know.

16 BG COOKE: This is John Cooke.
17 Well, I was going to say first yes, I was a
18 captain and military judge. I think I was one
19 of the last ones, and I think that's why they
20 stopped doing it.

21 (Laughter.)

22 MR. BRYANT: Sir, you just said

1 that for the record.

2 BG COOKE: What if we just said a
3 cadre of specialized judges or something like
4 that? I mean I could live with just a cadre
5 of judges or additional judges. But if we
6 think that these are going to be people more
7 like magistrate judges vis-a-vis district
8 judges, then maybe rather than junior,
9 specialized or some other term would be
10 appropriate.

11 COL HAM: Sir, this is Colonel
12 Ham. That was exactly the discussion, of
13 whether they would perform the function kind
14 of akin to a federal magistrate, and you
15 captured it exactly, if the subcommittee ends
16 up going with it.

17 BG COOKE: Yes. Well, I think --
18 this is John Cooke.

19 COL HENLEY: Steve Henley.

20 BG COOKE: Go ahead, Steve.

21 COL HENLEY: I agree, sir. I
22 think there might be a better way to describe

1 the qualifications of these individuals than
2 calling them junior judges. Whatever that
3 term is, I'm not sure, but I agree with
4 Colonel Ham. I think the discussion was
5 something akin to what the Army currently has,
6 sort of the one-year baby judge program.

7 But handling the equivalent of
8 federal magistrate duties, with a view that
9 they would then graduate into presiding over
10 courts martial.

11 BG COOKE: Well, this is John --
12 (Simultaneous speaking.)

13 MR. BRYANT: This is Harvey
14 Bryant. This is Harvey Bryant.

15 BG COOKE: You put the limited
16 jurisdiction judges.

17 MR. BRYANT: You could do that.

18 BG COOKE: All right, Harvey.

19 MR. BRYANT: I was just going to
20 say we could use the word possibly newer, as
21 opposed to junior. I don't know.

22 CHAIR HILLMAN: This is Beth

1 Hillman. How about designated?

2 MR. BRYANT: Limited jurisdiction

3 --

4 (Simultaneous speaking.)

5 CHAIR HILLMAN: How about
6 designated? This is Beth. I'm afraid we're
7 being too specific. This is too -- we're
8 getting too specific, I think. I think junior
9 has a negative connotation we want to avoid.
10 But Kelly, can you work on some different
11 language for us there?

12 LT COL MCGOVERN: Will do.

13 MR. BRYANT: This is Harvey.
14 Before we leave 45, up in the findings in 45
15 -- and I apologize for the sound and frequency
16 over here right now.

17 It's just a grammatical thing. In
18 the continuing first sentence in 45, where it
19 says "become involved in allegations proffered
20 which can cause result," I think don't we want
21 to say "cause or result," or take out one of
22 those words and inefficiencies. It's just a

1 typo or an oversight, a little grammatical
2 oversight. All right.

3 LT COL McGOVERN: Okay, thank you.

4 COL HAM: Members, this Colonel
5 Ham. Again, we apologize. We've got a new
6 teleconference system, and there's a bit of a
7 delay, which you can hear. It sounds when
8 you're talking over each other. We apologize
9 for that. We're trying to get it fixed.
10 Colonel Morris, did you want to weigh in on
11 this?

12 COL MORRIS: Yes. I think the
13 term "rookie judges" would be just fine. But
14 --

15 (Laughter.)

16 COL MORRIS: I mean, it can be --
17 I'm just going to have to disagree, you know,
18 because there's no -- I just think I have
19 different perspective on some aspects of the
20 judge thing, and that's how they recognize
21 where the majority is.

22 But if you -- at least the way

1 this is here, you recommend tightening or
2 making a little more precise the language in
3 45(a) and 45(b). You use the term involved in
4 both places and I think you might want to say
5 then, "and rule on motions regarding," and be
6 given -- be granted authority to do whatever
7 the things are that you're talking about
8 they're doing. Otherwise, when whoever reads
9 this and says what's our implementing
10 guidance, then you end up with people having
11 to construe what "involved" means.

12 So I think a pretty clear, even if
13 it's an including but not limited to list,
14 gives a clearer sense of where the integration
15 of the judge is now, and then the
16 corresponding changes to 42, an understanding
17 of that whole part of the pretrial process
18 should be clearer to the reader.

19 LT COL McGOVERN: And sir, could
20 you go ahead and let us know what your
21 dissenting opinion is because there's a
22 possibility we could craft this in a way to

1 compromise it, that may be acceptable to
2 everybody.

3 COL MORRIS: I mean, there are
4 different pieces that the judge is involved
5 in, and pardon me, not all -- I guess to read
6 it, because I think -- and there is efficiency
7 and justice that comes from earlier rulings on
8 witnesses and that kind of stuff. Just if you
9 make a decision sooner, you avoid consumption
10 of resources and all.

11 But you know, for example, the
12 sentencing aspect, I think we ultimately
13 recommend scheduling sentencing, don't we, and
14 I'm content with the current system there,
15 which is well-identified in General Cooke's
16 writings.

17 BG COOKE: This is John Cooke. I
18 would -- I agree with the findings and
19 recommendations here, but I think Colonel
20 Morris has a point, and I would just cite back
21 to the subsequent page, where we quote from
22 the Army's statutory proposal, and in (b)

1 where it says "for good cause shown, the
2 military judge any other person," et cetera,
3 et cetera.

4 It struck me that in that -- if we
5 live with that language, we're going to have
6 to tinker a little here, because it's a quote.
7 But it should be -- but the judge may rule
8 upon a motion or petition from somebody.

9 We're not going to grant judges
10 just a charter to go out and start telling
11 commanders and other people what to do,
12 because it relates to some case. So some
13 language that indicates that we want to expand
14 the jurisdiction and authority of judges to
15 act from the time of preferral.

16 But it would be in the course of
17 litigation, where somebody was failing to do
18 so, bring to the judge an issue and the judge
19 resolved it. The judge doesn't have just a
20 charter to go out and do good as he or she
21 sees fit.

22 COL HAM: Members, this is Colonel

1 Ham. Two general comments. One thing that is
2 not within your bailiwick but you might want
3 to roll into your thought is the new codified
4 victim rights in the Uniform Code of Military
5 Justice. Victim Services Committee is looking
6 deeply into those and any additional
7 recommendations.

8 But there are a number of issues
9 where their right to be heard, there's
10 currently no mechanism for it, and other
11 rights that exist, regardless of whether there
12 is a court martial proceeding or a set of
13 charges making their way through the system,
14 and I guess that's all I can say about that,
15 because until you see their recommendations
16 and whether the judge would be involved in
17 that, it might be something to consider.

18 The second thing is of course this
19 whole set of recommendations impacts much more
20 than sexual assault cases, and you might want
21 to think about a couple of findings that you
22 can propose to explain, I think sort of like

1 General Cooke did in his sentencing draft, why
2 you believe that this is necessary in sexual
3 assault cases, and the difficulty, as General
4 Cooke describes, of limiting changes like this
5 to one category of cases, if that makes sense.

6 MR. BRYANT: This is Harvey
7 Bryant. Yes, it makes sense. We say in that
8 recommendation 45(a) this change would impact
9 all practices, not just sexual assault cases.
10 But it has come to our attention as an issue
11 and a problem, from both trial counsel and
12 defense counsel in the sexual assault cases,
13 that somehow we need to frame that.

14 While I'm on here, if I didn't say
15 so earlier, it's Harvey Bryant, maybe we could
16 straighten out 45(a) by saying -- oh, I had it
17 and I lost it while I was talking. Access the
18 military judges to -- military judges need to
19 be made available or access the military
20 judges for rulings on various matters brought
21 before them by both the defense and trial
22 counsel.

1 That's more wording than it needs
2 to be, but I think that's really what we're
3 talking about, is they become -- they're
4 available. They're accessible and required to
5 make these pretrial rulings on subpoenas and
6 experts and that sort of thing.

7 BG COOKE: Yes, this is John
8 Cooke.

9 (Simultaneous speaking.)

10 BG COOKE: You're right. I'm
11 with you, Harvey. I think if we -- we might
12 even want to expand it beyond trial counsel
13 and defense counsel. Given what Colonel Ham
14 just mentioned, we might want to afford
15 victims some access.

16 But the legislation and the
17 implementing regulations need to spell out a
18 process of bringing these things to the judge,
19 so that it's pretty clear to the client who
20 can bring something and what the judge may do
21 with that, as opposed to just sort of an open-
22 ended anybody can come into the judge with

1 something that's remotely related to a
2 possible criminal proceeding, and ask the
3 judge to get involved in frankly all kinds of
4 command matters.

5 So I don't think we have to define
6 it. But I think we need to provide that kind
7 of language, that suggests that Congress and
8 the President and service secretaries or
9 whatever can define that more clearly.

10 LT COL MCGOVERN: This is all very
11 --

12 MR. BRYANT: This is Harvey
13 Bryant. That's why I was saying you relate
14 this and put the actual language out, defense
15 counsel, trial counsel and victim's advocate,
16 something like that. So yes, not everybody's
17 just walking in the door saying hey judge,
18 will you do this.

19 LT COL MCGOVERN: Right. So my
20 understanding to adjust the findings and
21 recommendations in 45 is to make it more
22 specific in part, to expand jurisdiction, to

1 act at the time of referral in accordance with
2 litigation, making military judges more
3 accessible, trial counsel, defense counsel,
4 special victims counsel and victims.

5 We can work on this to give me a
6 direction of where we need to go to make this
7 more acceptable to the members. Again, this
8 is an important change that the subcommittee
9 is recommending. So I want to make sure that
10 we get it right. If you have any proposals of
11 how it can be written, please email me. You
12 all are much smarter than I am, and I would
13 love your thoughts in writing, to make sure I
14 capture it appropriately.

15 And again, Colonel Morris, if
16 there's anything that would make these more
17 acceptable to you, so that you don't have to
18 write a dissent, we'd love to entertain those
19 as well.

20 COL MORRIS: I understand, thanks.

21 LT COL MCGOVERN: Did anyone have
22 issues, then, with, let's see --

1 CHAIR HILLMAN: Kelly, this is
2 Beth. I just have one comment. I think part
3 of the challenge here is that our rationale
4 for the change isn't evident when we have this
5 represented out of the context of the larger
6 report, and yet it's helpful to us, because we
7 do want, as you pointed out already, those who
8 look only at the findings and recommendations,
9 to find them grounded and persuasive.

10 So I think the same structural
11 issue that we grappled with this morning is
12 here. I mean we don't see a sufficient
13 distinction between the military and civilian
14 systems at this point in the process, given
15 the changes in the Article 32, which is I
16 think part of what Colonel Morris was
17 concerned about, to what's left of the 32 now.

18 So the larger context that we make
19 in the report will help push this forward.
20 One proposal for you, before we leave this.
21 I wonder, is there something we want the
22 military judges to do after preferral or

1 imposition of pretrial restraint, other than
2 rule on motions?

3 I mean could we say we granted
4 authority to rule on motions brought by, you
5 know, the parties to the case, trial counsel,
6 defense counsel, special victims counsel. Is
7 that -- that seems to narrow this some in my
8 mind anyway. Is that insufficient to do what
9 we want here?

10 COL HAM: You're, I think you have
11 the draft of the report on these issues, and
12 there are a number of things detailed.
13 Actually, it's in two different -- it's in 45
14 and 46. It's a number of pretrial issues, you
15 know, not limited to but including, I guess,
16 maybe the best way to put it and -- but it
17 does not include anything about any statutory
18 victims rights at this point.

19 And then 46 goes into request for
20 witness evidence and other matters. So that
21 kind of our -- both of those together, I
22 think, encompass everything that the

1 subcommittee talked about. But if there's
2 something we missed or if there's something to
3 delete, that's what we need your input on, I
4 think at this point.

5 (Simultaneous speaking.)

6 COL HAM: Or this is an idea of
7 what this could include, if you want to leave
8 it more open. That's up to you as well.

9 CHAIR HILLMAN: This is Beth
10 again. Thanks, Colonel Ham. I thought 45 is
11 about a specific piece, and 46 is related, but
12 then lists additional pieces. I just wondered
13 if we could be specific in 45 by saying rule
14 on motions, because that feels to me like what
15 we're doing in 45.

16 Then 46 is another, you know,
17 grant of authority we're making to military
18 judges prior to trial as well, that lists a
19 lot of specifics in there that may, you know,
20 generate additional comments.

21 LT COL MCGOVERN: Okay.

22 BG COOKE: This is John Cooke.

1 I'm sorry. Can I ask a question here? Are we
2 treating the victim who's represented as a
3 party?

4 LT COL McGOVERN: Not according to
5 the UCMJ as currently written, sir.

6 BG COOKE: That's what I --

7 LT COL McGOVERN: Congress
8 directed the RSP, and this went to the Victims
9 Services Committee, to determine the issue of
10 legal standing. Not whether they're a party,
11 although I understand that's a fine
12 difference. So the Victim Services
13 Subcommittee has undertaken an assessment of
14 that, in order to respond to what Congress
15 asked them to do.

16 But apart from that, Congress
17 directed the Secretary of Defense to draft
18 enforcement mechanisms for all the rights they
19 codified. There is an enforcement mechanism
20 in the federal Crime Victim Rights Act.
21 Congress did not put one in the Military
22 Victim Rights Act and left to the Secretary of

1 Defense to decide that, and the subcommittee
2 has assessed that as well.

3 I guess that's about all I can
4 tell you until the report is final. But there
5 are a number of rights that the Secretary of
6 Defense was directed to find a mechanism for,
7 and they will make recommendations in that
8 area, some of which would obviously a right to
9 be heard, you know, suggesting to a court and
10 others may as well. I think that's about all
11 I can say.

12 LT COL MCGOVERN: This is Colonel
13 McGovern. Current fact is there are still the
14 two parties, the government and the accused,
15 and it's working its way through case law, as
16 to how much accessibility the Special Victims
17 Counsel has access to the court, and can make
18 motions and be heard.

19 So definitely not a party at this
20 point, but a witness with representation who
21 can be heard.

22 BG COOKE: Well, this is John

1 Cooke. It seems to me, I don't think we want
2 to get too specific in this recommendation,
3 given the uncertainty of it, how this may turn
4 out. But I think if the judge's authority is
5 extended to earlier in the process, then
6 certainly a potential piece of that would be
7 to handle some issues relating to the victim
8 and the victim's counsel.

9 So we ought to -- we ought to at
10 least mention that or leave that open, and of
11 course that affords the basis for this
12 particular, you know, our particular issue to
13 be supportive of this more broad authority for
14 the judge.

15 LT COL MCGOVERN: And again, I
16 think when I originally drafted 45, it was an
17 up-front portion saying in general, there's a
18 proposal to have the judge involved earlier,
19 and then the follow-on were the specific ways
20 in which the judge could be involved.

21 But I don't want to confuse it,
22 the issues at all. So we can make 45 more

1 specific, and then reiterate with 46 those
2 times when it will be especially important,
3 because of the challenges defense counsel are
4 currently facing. Do you all want to move on
5 to 46?

6 MR. BRYANT: Harvey Bryant.
7 Wouldn't the -- it makes sense to me if we
8 just took the findings in 46, because 45 and
9 46 are all really aimed at the same issues.

10 LT COL McGOVERN: But again sir,
11 looking at this without seeing the report and
12 the discussion, because the things that
13 support 45 is the analysis of the Army's 2004
14 study, where they really flushed it all out,
15 and then 46 is more of what you all actually
16 heard at site visits and that you found are
17 particular problems for defense counsel having
18 to go through trial counsel for all their
19 requests.

20 So we can certainly try merging,
21 but I was keeping those as two separate
22 approaches.

1 BG COOKE: So you absolutely
2 reflected that's what we heard while we were
3 in the field. All right.

4 LT COL McGOVERN: I'll play with
5 it. Did you have issues with 46?

6 BG COOKE: 46(b)'s a finding.
7 Let me see real quickly here. I don't like
8 the word "unfair." That bothers me, that the
9 process to obtain witnesses is unfair.
10 Perhaps I'd be real comfortable with saying --
11 witnesses. There's an equal or words like
12 imbalance toward trial counsel's favor, or
13 imbalance in favor of trial counsel. Unfair
14 has a lot of negative connotations that I
15 think is not what we should be conveying here.

16 LT COL McGOVERN: Yes sir.

17 BG COOKE: I think we're just
18 trying to equalize the process.

19 LT COL McGOVERN: We'll change it
20 to imbalance.

21 BG COOKE: Thank you.

22 COL HENLEY: This is Steve Henley.

1 I have a couple of word choice suggestions to
2 46(b). We consider changing as follows.
3 "Congress enact necessary and appropriate
4 legislation increasing the authority of
5 military judges prior to referral, in order to
6 rule on defense and government witness and
7 expert requests."

8 LT COL MCGOVERN: Okay, sir.

9 COL HENLEY: And then the
10 Discussion section on the top of the next
11 page.

12 BG COOKE: Can I go back to that?
13 This is John Cooke. On 46(b), are we saying
14 now that the trial counsel will have to get
15 the judge's approval?

16 LT COL MCGOVERN: Yes sir.

17 BG COOKE: Okay.

18 LT COL MCGOVERN: Judge Henley --

19 BG COOKE: Yes, okay. I just
20 want to be clear. Okay.

21 COL HENLEY: Well, I think that
22 was at least some of the --

1 (Simultaneous speaking.)

2 COL HENLEY: I didn't go on any
3 site visits, but my understanding is one of
4 the complaints was the requirement that the
5 defense -- the government doesn't have to go
6 through the same process. So I think the
7 discussion amongst the subcommittee members
8 was whatever process we come up with, it
9 should be applicable to both sides.

10 (Simultaneous speaking.)

11 COL HENLEY: Yes. So the top of
12 the next page, where it starts "If the trial
13 counsel or if the request requires." The last
14 sentence that a "military judge cannot order
15 a Convening Authority to expend funds. The
16 judge may abate the proceedings if the
17 government declines to produce the witness."

18 LT COL McGOVERN: Okay.

19 BG COOKE: There's an appeals --
20 this is John Cooke. In the first sentence, I
21 think it should say "If the trial counsel, or
22 if the request requires it, the Convening

1 Authority's decision denies." I think there's
2 a word missing in that, but you can take a
3 look at it.

4 LT COL McGOVERN: Okay.

5 BG COOKE: And I have one in the
6 next paragraph. This is sort of along the
7 lines of Harvey's earlier comment about
8 fairness. Following Footnote 8, I would say
9 "in order to ensure fairness," rather than
10 "intended to increase fairness."

11 LT COL McGOVERN: Okay.

12 COL HENLEY: I think I just lost
13 you.

14 BG COOKE: That's the second
15 paragraph, the one that is -- it's right by
16 Footnote 8.

17 CHAIR HILLMAN: Under 46(b).
18 This is Beth.

19 BG COOKE: Yes, under 46(b).
20 Just a minor.

21 COL HENLEY: On that point, can
22 you insure "fairness," or the "perception of

1 fairness"? Again, that's just a word choice.
2 But I'm sure there's still going to have
3 people who think the process is not fair.

4 CHAIR HILLMAN: We could just cut
5 that clause. This is Beth. We could just cut
6 that clause and say military defense counsel
7 requested.

8 BG COOKE: Yes.

9 LT COL McGOVERN: That's an
10 excellent suggestion.

11 BG COOKE: Yes, that's better.

12 (Simultaneous speaking.)

13 COL HENLEY: That's it on 46.
14 This is Steve Henley.

15 COL MORRIS: Can I ask to go back
16 for a second, please, to 46(b),
17 recommendations. I mean, I sure agree with
18 the overall sentiment of equalizing defense,
19 simplifying and taking out a lot of the
20 obstacles to defense witnesses. If we really
21 want to make them equal, I mean the government
22 does have the burden of proof, does have

1 subpoena power.

2 Are we effectively saying, you
3 know, you're going to cut that back to the
4 government and have their routine witness, you
5 know, demands of requests and production go
6 through a judge?

7 COL HENLEY: Well, this is Steve
8 Henley. I think from a judge's perspective,
9 requiring the trial counsel to go through the
10 legal analysis that the defense now -- defense
11 counsel is required to go through, would
12 streamline the process, and would force the
13 prosecutors to think early on whether those
14 witnesses are actually necessary to their
15 case. I agree.

16 COL MORRIS: I think there's not
17 really a dispute on the government side. You
18 can still go out and get who you want, and the
19 fact that the defense should be given -- that
20 the defense shouldn't have to go through the
21 government doesn't necessarily require that
22 you make it harder or even more transparent on

1 the government's side though.

2 COL HENLEY: Right. This is Steve
3 Henley. If the judge rules -- right. If the
4 judge rules against the government, you're
5 right. I think --

6 COL MORRIS: But that wouldn't be
7 in front of them on the witness issues, Steve.

8 COL HENLEY: Well --

9 COL MORRIS: Maybe I'm misreading
10 what you're saying.

11 COL HENLEY: It's a preliminary
12 stage, much like the 32 is now. I mean you
13 have to go before a judge, articulate the
14 relevance and necessity of the witness. The
15 judge rules. Whether the government's bound
16 by judge's determination, you're right. They
17 could still go ahead and expend the funds and
18 bring the witness, if the witness is
19 necessary.

20 I guess my point is if the judge
21 has ruled that the witness is unnecessary to
22 the proceedings, and they bring the witness

1 anyway, you think the judge is going to allow
2 the witness to testify?

3 COL MORRIS: I think there's a
4 heck of a lot of -- I don't know. I guess I
5 don't see that as necessarily a -- I don't see
6 that change as necessary to bring about what
7 I think I understood the committee's overall
8 intent to be, which was to take away the
9 government being an undue obstacle to the
10 defense getting timely and appropriate
11 witnesses or expert assistance.

12 CHAIR HILLMAN: Colonel Morris,
13 this is Beth. I -- and General Cooke, you
14 raised this too. This does feel like a big
15 change. Colonel Henley push back, if I'm
16 misunderstanding this. But this sort of
17 implies a symmetric treatment of trial counsel
18 and defense counsel.

19 Yet there's nothing symmetric
20 about the government and the accused in a
21 criminal trial. The government has the burden
22 and the accused has very limited resources,

1 compared to the government.

2 Yet this inserts the military
3 judge, although perhaps a different judge than
4 the judge that would be ruling at trial, into
5 the process of allocating resources to the
6 government, which strikes me as a sort of
7 systemic change that I'm not sure does
8 address, as Colonel Morris has set out, what
9 we are actually trying to do here. Colonel
10 Henley, what do you think about that?

11 COL HENLEY: Well, I think when we
12 were discussing this, I think the concern was
13 the perception that both sides were being
14 treated the same, and if they were, then there
15 would be no complaints. It's whatever process
16 was required to obtain experts for the
17 particular trial.

18 It could apply equally to the
19 government and the defense, and you may
20 disagree with having to go before the judge.
21 But if both sides had to do that, then it
22 seemed fair.

1 Larry, I don't disagree. I think
2 the defense -- again, from the site visit that
3 I didn't go on, my understanding was the
4 complaint primarily was having to justify the
5 need for experts to the trial counsel. That
6 was the initial concern.

7 If that's the case, going to the
8 military judge, assuming the judge has the
9 authority to do so, and that's connected to
10 the authority of the military judge prior to
11 referral. Whether or not the government's
12 obligated to go through the same process, I
13 think that addresses what the primary defense
14 concern is.

15 Requiring the government, from a
16 judicial perspective, and that's what I was
17 talking about, it seems like an inefficient
18 use of resources, when the judge has to
19 address these at trial. If you're able to
20 resolve some of these witness and expert
21 issues earlier on in the process from both
22 sides, that seems to be a good thing.

1 It doesn't address the defense
2 concerns; it's just an efficient use of
3 limited resources and time from a judicial
4 perspective.

5 LT COL McGOVERN: Colonel Henley,
6 based on the site visits, the concern was
7 expressed from the defense counsel that you'll
8 interview -- that they were having to reveal
9 their hand to the trial counsel by going
10 through these requests.

11 So by going through the judge,
12 then they're not having to necessarily reveal
13 their hand. In our discussions with you, it
14 was trying to make an equal playing field.
15 But as Dean Hillman pointed out and others,
16 but it's not equal playing field because the
17 government does have the burden of proof.

18 Since this is an issue that is
19 still causing debate among the members, would
20 you be comfortable at this time making a
21 recommendation that the defense go through the
22 judges, rather than going through the trial

1 counsel or government, and suggesting that
2 there be study or consideration whether this
3 should also apply to the government.

4 CHAIR HILLMAN: This is Beth.

5 (Simultaneous speaking.)

6 CHAIR HILLMAN: Go ahead,
7 Colonel.

8 COL HENLEY: I think, you know, if
9 you eliminated the requirement -- this is
10 Steve Henley again -- if you eliminated the
11 requirement for the government, the trial
12 counsel to go through the military judge for
13 expert witness, would you allow them, the
14 defense counsel, to go to the judge ex parte?

15 LT COL MCGOVERN: Possibly, as
16 they do in some jurisdictions, and in those
17 where the judge would determine this requires
18 hearing from both sides, and again some of the
19 expert requests, the government may need to go
20 through you.

21 But I guess the concern is the way
22 it's written now, there may be an implication

1 that for any witness, the government should be
2 going through the judge, and that does seem
3 different than what's required in most
4 civilian practices, where the prosecutors, the
5 DOJ prosecutors just contact the FBI. If they
6 want to find a witness, they go find them.

7 COL HENLEY: This is Steve Henley
8 again. I think my recollection is that it
9 wasn't any witness. It was expert witnesses
10 and expert assistance really was the driving
11 concern here. So it's not every witness would
12 have to go and get judicial stamp of approval.

13 It would be government expert
14 assistance and expert witness requests.
15 Whether you give that to the defense and not
16 the government, I don't have any strong
17 concerns. You're right, if the government
18 wants to expend funds unnecessarily, then they
19 can do so, I suppose.

20 From experience, I've seen any
21 number of occasions where the government trial
22 counsel has expended funds for expert

1 assistance and witnesses, and it had nothing
2 to do with their case at trial. So this was
3 an avenue, at least up front, early on, that
4 they could have the judge look at the
5 necessity of assistance or the witness and
6 make a ruling.

7 Whether it was binding, I don't
8 think was the issue, and I don't think it
9 would be. I think that trial counsel could
10 certainly ask the Convening Authority to
11 expend funds, even though the judge, at least
12 preliminarily, ruled there was no showing of
13 necessity or the witness would not be relevant
14 at trial.

15 But if the consensus from the
16 group is strike the government from the
17 recommendation, then that's fine. I don't
18 have a problem with that.

19 LT COL McGOVERN: Well sir, I
20 think --

21 MR. BRYANT: This is Harvey
22 Bryant. I'm in favor of that, that we pretty

1 much leave the government where it is, but we
2 have at least or at least address issues that
3 the defense counsel has, regarding revealing
4 their case and who they have to go to to get
5 authority.

6 The other thing I have to say, I
7 mentioned this morning to the neighbor that I
8 was going to take to physical therapy, and I'm
9 just sitting out in the parking lot. He's
10 ready to go and I don't think it's right to
11 have him in the call while this is going on.
12 So I will be back in touch tomorrow afternoon.

13 LT COL McGOVERN: Thank you.

14 MS. FRIED: Thank you.

15 LT COL McGOVERN: And we're
16 running out of time. There's another
17 subcommittee conference call. Just one other
18 point. Beth addressed the defense having to
19 go through the trial counsel for non-expert
20 witnesses.

21 That was one of the major issues
22 as well. The Convening Authority is going to,

1 you know, the captain or the major who's the
2 trial counsel, who then decides whether
3 something's relevant and necessary, and then
4 triggering motions in front of the military
5 judge to decide all of that.

6 COL HENLEY: Are you talking about
7 the defense having to go to -- going to the
8 military judge, for a lay witness production?

9 LT COL McGOVERN: Yes sir. One of
10 the major complaints heard repeatedly from the
11 defense was they have to go to the trial
12 counsel for all witnesses, and to the
13 Convening Authority for expert witnesses.

14 CHAIR HILLMAN: This is Beth.
15 Doesn't the subpoena power address that too,
16 which we also make a recommendation on?

17 LT COL McGOVERN: You don't
18 subpoena military witnesses.

19 CHAIR HILLMAN: Oh, you mean
20 military witnesses. You're talking
21 specifically for service members.

22 LT COL McGOVERN: Right. For

1 instance, if some member were overseas; a
2 defense counsel wanted to speak to them. They
3 would have to go through the trial counsel to
4 try to get access. That, they claim, is
5 routinely denied.

6 So in this case, you could go to
7 the judge and say no really, I want to
8 interview all 25 of these people in this bar
9 fight, and that's where Colonel Henley had
10 given the analogy no, you only need one or
11 two, where a judge involvement may be
12 beneficial.

13 CHAIR HILLMAN: Right. Well, I
14 guess we'll have to --

15 BG COOKE: This is John Cooke.

16 CHAIR HILLMAN: Go ahead, General
17 Cooke.

18 BG COOKE: Okay. Well, I was
19 just going to say it seems to me, even if we
20 strike the government from our recommendations
21 here in 46, aren't we solving that problem for
22 the defense? We're talking about all

1 witnesses, regular and expert.

2 LT COL McGOVERN: Yes sir.

3 BG COOKE: I think we should do
4 that.

5 CHAIR HILLMAN: This is Beth.
6 Agreed. So I recommend for redrafting this
7 then, that we strike the second clause in that
8 46(a) recommendation, that says "and similarly
9 require trial counsel to submit witnesses and
10 expert requests," and then we make clear, you
11 know, what we've just talked about now, which
12 is I think our understanding of exactly what
13 General Cooke said. We do want defense
14 counsel not to go through the trial counsel
15 for anything.

16 BG COOKE: Again, government in
17 46(b).

18 LT COL McGOVERN: Yes sir. Okay.

19 COL HAM: This is Colonel Ham. So
20 the clarification is the government doesn't go
21 to the judge for expert assistance or
22 witnesses as well?

1 LT COL McGOVERN: To make a change
2 for the government is the subcommittee's
3 consensus?

4 BG COOKE: Right. This is John
5 Cooke again. I think that's right. I mean
6 the government has a natural deterrent, if you
7 will, to doing that stuff, in that it's coming
8 out of its pocket. Now if it does it, it
9 seems to me it opens the door for the defense
10 -- gives the defense more leverage when it
11 goes to the judge and says well, they've got
12 this guy; we need a similar guy.

13 So I don't see a need for the
14 judge to get in and weigh the trial counsel's
15 choices. It's not going to -- to me, it's not
16 going to change the fairness of the
17 proceedings. The defense comes back and says
18 well, they've got that and we want this.

19 COL HAM: Colonel Ham. Sir, I'm
20 sorry to interrupt this. We have -- I think
21 we have another teleconference starting at
22 three o'clock, one of the other subcommittees.

1 I'm sorry we're stacked here.

2 CHAIR HILLMAN: This is Beth.
3 Let's close up then. Thank you everybody.
4 General Cooke, it's good to hear your voice
5 again, if not see you in person, and we'll
6 look forward to the next call. I guess some
7 of us are back tomorrow, and thank you, Kelly
8 and everybody, Colonel Ham for all this work.

9 MS. FRIED: The meeting's closed.

10 (Whereupon, at 3:04 p.m., the
11 meeting was adjourned.)

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C E R T I F I C A T E

MATTER: DOHA Adult Sexual Assault Crimes Panel

DATE: Thursday, April 24, 2014

I hereby certify that the attached transcription of pages 1 to 69 inclusive are to the best of my belief and ability a true, accurate, and complete record of the above referenced proceedings as contained on the provided audio recording.

Neal R Gross

NEAL R. GROSS

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