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
PROCEEDINGS

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
LT COL McGOVERN: Yes, sir.

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

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

LT COL McGOVERN: Yes, sir. Some of this was generated from a site visit to Quantico, where the AUSA had explained the DOJ threshold, included a consideration of the likelihood of success, and the trial counsel
said their threshold was basically if the victim wanted to go forward.

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

BG COOKE: Well, I guess my concern is that when we talk about information on which decisions are made to go forward, there are a lot of different decisions in that process, and I'm not exactly sure where you think we are in the process, from the time somebody has reported a possible crime all the way through either a report of charges in the military or, in the civilian side, an indictment. I think this plucks out of that
process a couple of sort of almost extraneous
pieces and can tailor them without the
context. Does that make sense?

LT COL McGOVERN: Yes, sir.

MS. FRIED: Yes, sir.

COL HAM: Sir, it's Colonel Ham.

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

That's certainly appropriate as
well, or eliminating the entire section if the
subcommittee decides it's really not that
useful. But what the --
(Simultaneous speaking.)

COL HAM: I'm sorry, sir.

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

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

MR. BRYANT: Just got in, yes.

Several busy signals, but here we go.

LT COL McGOVERN: Thank you, sir.

We are looking at No. 44, and trying to see if you all would like to adjust or eliminate the compare and contrast of charging decision considerations.

The one other portion of this was the fact that Section 1708 of the NDAA had
maybe made it law that you can strike the -- or things that the commander cannot consider being the service member's performance or his military character. So that's where that recommendation also came into play, or that finding.

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

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

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

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

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

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

It's what happens after that and how the government decides to proceed with that allegation, their allegation by somebody, and what criteria are used by the various authorities to decide whether to proceed or not to proceed.
So we've really collapsed one rather simplistic finding, a more complex process, and it seems to me that we've either got to flesh that out or we ought to not go there.

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

BG COOKE: I know, but that --

MR. BRYANT: Yes.

BG COOKE: I know.

(Simultaneous speaking.)

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

It seems to me what we're trying
to get at is factors taken into account in initiating charges. I'm not going to use proffer or the other term, but as opposed the factors that go into charging decisions in civilian jurisdictions.

LT COL McGOVERN: Gentlemen, just upfront, the court reporter will need us to identify ourselves before we speak, just for the record, as an administrative note.

Second, the goal of finding what to talk about, what is the JAG, prosecutor and commander, what are they considering, or what is the civilian prosecutor considering when they're thinking about going towards trial versus an alternate disposition?

BG COOKE: Right.

LT COL McGOVERN: So --

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

But I agree on all, it seems to mix charging with disposition. The last
sentence I'm just not sure is accurate, you know. I'm not sure the -- currently, the minimum threshold amount, just objectively is not safe. I mean, the manual says whatever. You know, when you charge you have to assert personal belief that the stuff is true. So it's -- I think that's misleading.

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

(Simultaneous speaking.)

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

LT COL McGOVERN: Yes sir, and to consider whether or not it would be better to establish a clearer standard after you've considered all these factors. DOJ, for instance, weighs heavily the probability of success, and that was clear in the JSC-SAS
interviews as well, that that is an important consideration of all the considerations.

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

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

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

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

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

I too think if we just leave it with the reference to charging in that last sentence, that's still confusing. If the finding really goes to the -- comparing civilian and military disposition guidance.

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

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

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

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

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

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

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

LT COL McGOVERN: Yes, sir.

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

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

COL HAM: Yes, sir.

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

COL HENLEY: Would that eliminate -- this is Steve Henley. Would that eliminate
44(b) as well?

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

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

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

You tell us what you want us to do. This is our first take on what you all discussed in all of your deliberations. But please just tell us to eliminate what you're not comfortable with, and that's what we do.
LT COL McGOVERN: But I think those are great points for 44. That was a difficult section to try to compare and contrast. So we'll set it aside for now and if it appears -- anyone else feels strongly about it, we can reconsider it. But we can move on to No. 45. I think that gets to the heart of the proposal that the judge become involved earlier in the process.

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

LT COL McGOVERN: We're considering deleting it. But while we have Colonel Morris and Colonel Henley especially on the line, who engaged in a debate before about the involvement of the military judge, if you all could weigh in on these next few
findings and recommendations, I think that would be extremely helpful.

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

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

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

LT COL McGOVERN: Okay.

MR. BRYANT: This is Harvey Bryant. Are there judges who are not field
grade?

COL HENLEY: No, not -- no. There used to be captains, and I think General Cooke could talk better as to when that stopped. But I know in the Army you have to be a major, and I think the Marines also major, and I'm not sure the other services allow -- you have to be 05, a lieutenant colonel or a commander or above, I believe.

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

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

(Laughter.)

MR. BRYANT: Sir, you just said
that for the record.

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

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

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

COL HENLEY: Steve Henley.

BG COOKE: Go ahead, Steve.

COL HENLEY: I agree, sir. I think there might be a better way to describe
the qualifications of these individuals than
calling them junior judges. Whatever that
term is, I'm not sure, but I agree with
Colonel Ham. I think the discussion was
something akin to what the Army currently has,
sort of the one-year baby judge program.

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

BG COOKE: Well, this is John --

(Simultaneous speaking.)

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

BG COOKE: You put the limited
jurisdiction judges.

MR. BRYANT: You could do that.

BG COOKE: All right, Harvey.

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

CHAIR HILLMAN: This is Beth
Hillman. How about designated?

MR. BRYANT: Limited jurisdiction

(Simultaneous speaking.)

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

LT COL McGOVERN: Will do.

MR. BRYANT: This is Harvey.

Before we leave 45, up in the findings in 45 -- and I apologize for the sound and frequency over here right now.

It's just a grammatical thing. In the continuing first sentence in 45, where it says "become involved in allegations proffered which can cause result," I think don't we want to say "cause or result," or take out one of those words and inefficiencies. It's just a
typo or an oversight, a little grammatical oversight. All right.

LT COL McGOVERN: Okay, thank you.

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

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

(Laughter.)

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

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

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

LT COL McGOVERN: And sir, could
you go ahead and let us know what your
dissenting opinion is because there's a
possibility we could craft this in a way to
compromise it, that may be acceptable to everybody.

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

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

BG COOKE: This is John Cooke. I would -- I agree with the findings and recommendations here, but I think Colonel Morris has a point, and I would just cite back to the subsequent page, where we quote from the Army's statutory proposal, and in (b)
where it says "for good cause shown, the
court, any other person," et cetera,
et cetera.

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

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

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

COL HAM: Members, this is Colonel
Ham. Two general comments. One thing that is not within your bailiwick but you might want to roll into your thought is the new codified victim rights in the Uniform Code of Military Justice. Victim Services Committee is looking deeply into those and any additional recommendations.

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

The second thing is of course this whole set of recommendations impacts much more than sexual assault cases, and you might want to think about a couple of findings that you can propose to explain, I think sort of like
General Cooke did in his sentencing draft, why you believe that this is necessary in sexual assault cases, and the difficulty, as General Cooke describes, of limiting changes like this to one category of cases, if that makes sense.

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

While I'm on here, if I didn't say so earlier, it's Harvey Bryant, maybe we could straighten out 45(a) by saying -- oh, I had it and I lost it while I was talking. Access the military judges to -- military judges need to be made available or access the military judges for rulings on various matters brought before them by both the defense and trial counsel.
That's more wording than it needs to be, but I think that's really what we're talking about, is they become -- they're available. They're accessible and required to make these pretrial rulings on subpoenas and experts and that sort of thing.

BG COOKE: Yes, this is John Cooke.

(simultaneous speaking.)

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

But the legislation and the implementing regulations need to spell out a process of bringing these things to the judge, so that it's pretty clear to the client who can bring something and what the judge may do with that, as opposed to just sort of an open-ended anybody can come into the judge with
something that's remotely related to a possible criminal proceeding, and ask the judge to get involved in frankly all kinds of command matters.

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

LT COL McGOVERN: This is all very --

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

LT COL McGOVERN: Right. So my understanding to adjust the findings and recommendations in 45 is to make it more specific in part, to expand jurisdiction, to
act at the time of referral in accordance with litigation, making military judges more accessible, trial counsel, defense counsel, special victims counsel and victims.

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

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

COL MORRIS: I understand, thanks.

LT COL McGOVERN: Did anyone have issues, then, with, let's see --
CHAIR HILLMAN: Kelly, this is Beth. I just have one comment. I think part of the challenge here is that our rationale for the change isn't evident when we have this represented out of the context of the larger report, and yet it's helpful to us, because we do want, as you pointed out already, those who look only at the findings and recommendations, to find them grounded and persuasive.

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

So the larger context that we make in the report will help push this forward.

One proposal for you, before we leave this. I wonder, is there something we want the military judges to do after preferral or
imposition of pretrial restraint, other than
rule on motions?

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

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

And then 46 goes into request for
witness evidence and other matters. So that
kind of our -- both of those together, I
think, encompass everything that the
subcommittee talked about. But if there's something we missed or if there's something to delete, that's what we need your input on, I think at this point.

(Simultaneous speaking.)

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

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

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

LT COL McGOVERN: Okay.

BG COOKE: This is John Cooke.
I'm sorry. Can I ask a question here? Are we treating the victim who's represented as a party?

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

BG COOKE: That's what I --

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

But apart from that, Congress directed the Secretary of Defense to draft enforcement mechanisms for all the rights they codified. There is an enforcement mechanism in the federal Crime Victim Rights Act. Congress did not put one in the Military Victim Rights Act and left to the Secretary of
Defense to decide that, and the subcommittee
has assessed that as well.

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

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

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

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

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

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

But I don't want to confuse it, the issues at all. So we can make 45 more
specific, and then reiterate with 46 those
times when it will be especially important,
because of the challenges defense counsel are
currently facing. Do you all want to move on
to 46?

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

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

So we can certainly try merging,
but I was keeping those as two separate
approaches.
BG COOKE: So you absolutely reflected that's what we heard while we were in the field. All right.

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

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

LT COL McGOVERN: Yes sir.

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

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

BG COOKE: Thank you.

COL HENLEY: This is Steve Henley.
I have a couple of word choice suggestions to 46(b). We consider changing as follows.
"Congress enact necessary and appropriate legislation increasing the authority of military judges prior to referral, in order to rule on defense and government witness and expert requests."

LT COL McGOVERN: Okay, sir.
COL HENLEY: And then the Discussion section on the top of the next page.

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

LT COL McGOVERN: Yes sir.
BG COOKE: Okay.

LT COL McGOVERN: Judge Henley --
BG COOKE: Yes, okay. I just want to be clear. Okay.
COL HENLEY: Well, I think that was at least some of the --
(Simultaneous speaking.)

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

(Simultaneous speaking.)

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

LT COL McGOVERN: Okay.

BG COOKE: There's an appeals -- this is John Cooke. In the first sentence, I think it should say "If the trial counsel, or if the request requires it, the Convening
Authority's decision denies." I think there's a word missing in that, but you can take a look at it.

LT COL McGOVERN: Okay.

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

LT COL McGOVERN: Okay.

COL HENLEY: I think I just lost you.

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

CHAIR HILLMAN: Under 46(b).

This is Beth.

BG COOKE: Yes, under 46(b).

Just a minor.

COL HENLEY: On that point, can you insure "fairness," or the "perception of
fairness"? Again, that's just a word choice. But I'm sure there's still going to have people who think the process is not fair.

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

BG COOKE: Yes.

LT COL McGOVERN: That's an excellent suggestion.

BG COOKE: Yes, that's better.

(Simultaneous speaking.)

COL HENLEY: That's it on 46.

This is Steve Henley.

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

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

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

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

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

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

    COL HENLEY: Well --

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

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

    I guess my point is if the judge has ruled that the witness is unnecessary to the proceedings, and they bring the witness
anyway, you think the judge is going to allow
the witness to testify?

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

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

Yet there's nothing symmetric
about the government and the accused in a
criminal trial. The government has the burden
and the accused has very limited resources,
compared to the government.

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

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

It could apply equally to the
government and the defense, and you may
disagree with having to go before the judge.
But if both sides had to do that, then it
seemed fair.
Larry, I don't disagree. I think the defense -- again, from the site visit that I didn't go on, my understanding was the complaint primarily was having to justify the need for experts to the trial counsel. That was the initial concern.

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

Requiring the government, from a judicial perspective, and that's what I was talking about, it seems like an inefficient use of resources, when the judge has to address these at trial. If you're able to resolve some of these witness and expert issues earlier on in the process from both sides, that seems to be a good thing.
It doesn't address the defense concerns; it's just an efficient use of limited resources and time from a judicial perspective.

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

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

Since this is an issue that is still causing debate among the members, would you be comfortable at this time making a recommendation that the defense go through the judges, rather than going through the trial
counsel or government, and suggesting that there be study or consideration whether this should also apply to the government.

CHAIR HILLMAN: This is Beth.

(Simultaneous speaking.)

CHAIR HILLMAN: Go ahead, Colonel.

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

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

But I guess the concern is the way it's written now, there may be an implication
that for any witness, the government should be
going through the judge, and that does seem
different than what's required in most
civilian practices, where the prosecutors, the
DOJ prosecutors just contact the FBI. If they
want to find a witness, they go find them.

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

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

From experience, I've seen any
number of occasions where the government trial
counsel has expended funds for expert
assistance and witnesses, and it had nothing
to do with their case at trial. So this was
an avenue, at least up front, early on, that
they could have the judge look at the
necessity of assistance or the witness and
make a ruling.

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

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

LT COL McGOVERN: Well sir, I
think --

MR. BRYANT: This is Harvey
Bryant. I'm in favor of that, that we pretty
much leave the government where it is, but we
have at least or at least address issues that
the defense counsel has, regarding revealing
their case and who they have to go to to get
authority.

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

LT COL McGOVERN: Thank you.

MS. FRIED: Thank you.

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

That was one of the major issues
as well. The Convening Authority is going to,
you know, the captain or the major who's the trial counsel, who then decides whether something's relevant and necessary, and then triggering motions in front of the military judge to decide all of that.

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

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

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

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

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

LT COL McGOVERN: Right. For
instance, if some member were overseas; a defense counsel wanted to speak to them. They would have to go through the trial counsel to try to get access. That, they claim, is routinely denied.

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

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

BG COOKE: This is John Cooke.

CHAIR HILLMAN: Go ahead, General Cooke.

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

LT COL McGOVERN: Yes sir.

BG COOKE: I think we should do that.

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

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

LT COL McGOVERN: Yes sir. Okay.

COL HAM: This is Colonel Ham. So the clarification is the government doesn't go to the judge for expert assistance or witnesses as well?
LT COL McGOVERN: To make a change for the government is the subcommittee's consensus?

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

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

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

CHAIR HILLMAN: This is Beth.

Let's close up then. Thank you everybody.

General Cooke, it's good to hear your voice again, if not see you in person, and we'll look forward to the next call. I guess some of us are back tomorrow, and thank you, Kelly and everybody, Colonel Ham for all this work.

MS. FRIED: The meeting's closed.

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

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