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From: WHS Pentagon EM Mailbox Judicial Panel
To: Carson, Julie K CIV (US)
Subject: RE: Public Comment: Anti-Sexual Assault Measures in the Armed Forces: Proposal to The President and Armed Services Committees

-----Original Message-----

From: hcooley@jpcattorneys.com [mailto:hcooley@jpcattorneys.com]
Sent: Thursday, October 29, 2015 6:45 PM
To: Carson, Julie K CIV (US)
Subject: Fwd: Anti-Sexual Assault Measures in the Armed Forces: Proposal to The President and Armed Services Committees

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This contains a letter to the President and a supporting memo. There are no responses to that, although Congresswoman Brown has shown interest.

Also, bios are included.

Below is a summary of the proposal.

Note, last year when we wrote a letter to SECDEF (see next email) about BCMRs, we knew that a follow-on was required to address the larger systemic issues service-wide. The letter to the President and the memo reflect that effort.

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----- Original Message -----

From: "hcooley@jpcattorneys.com" <hcooley@jpcattorneys.com>
To:
Date: at

Subject: Fwd: Anti-Sexual Assault Measures in the Armed Forces: Proposal to The President and
Armed Services Committees

Senior Counsel Dare,

Thank you for contacting us about our efforts regarding sexual assault in the military.

INTRODUCTION

We are honored that Human Rights Watch has expressed interest in this problem and contacted us for assistance. In our letter to the President we referred to sexual assault as a human rights problem warranting advocacy. This is particularly the case regarding the retaliation rapes cited on page 1 and giving women hope and avenues for relief on page 7. We expand on the human rights problem in the memorandum at 17-20 (Section D), 24 (Lincoln and Truman), 29 ("What is at stake" is "a major policy question of human dignity and civil rights in the bosom of an Armed Forces that is proud of its heritage to liberating the world from tyranny...), and 40-42 (J. Ginsburg's "essential human dignity").

We know that contacting high ranking people who are interested in a project is a predicate for any movement. Albeit naively, we sent this with only a press release but without prior contacts – we don't have any -- to the President, VP, Armed Services Committees, and Congressional Black Caucus. We thought there would be some interest in this, but only one member of the CBC has shown interest recently.

We lamented that we could not do more, but thought, as citizens, we tried to surface our concerns in the arena. Imagine our surprise at your call. Sexual assault is a serious human rights problem that undermines US moral authority to exercise judgment over the treatment of women by groups such as Boko Haram and similar human rights violators. Servicewomen suffer in silence. They are often isolated and trapped with no way out, cannot contact the media, cannot leave their posts, and cannot escape. Someone must speak for them. The women senators have tried and achieved some levels of success but not enough. Our firm can only play a support role. But it takes super-heavyweight such as HRW to incentivize the public, Republicans, Democrats, and the White House to examine this problem in its full scope – not just one narrow slice such as eliminate commanders (an understandable but impractical solution equivalent to ruling that a football coach has no say over sexual assault issues regarding his or her players, except in this case the game is war for real not football) – and take broad institutional action.

Darlye and I saw the military turn around a big race and drug problem, and with committed leadership, congressional oversight and public interest it can again. Our solution is not to exclude commanders, but to include them with the understanding there is no career advancement for failure by them personally or by their subordinates.

I am pleased to summarize the material orally via phone and or via email. Darlye and I also periodically in NY. I have relatives in NYC Jersey (in sight of the Empire State Bldg) , and Conn. Darlye's youngest daughter is at Princeton.

SYNOPSIS OF PROPOSAL

Following are the highlights of our most recent proposal.

a. Summary

Our proposal is in two parts. First, is a 9-page letter to The President. Please examine that first. Below, it is styled as the "POTUS Final Letter." By the way, we regard this proposal as an essential predicate to the November 2014 letter to SECDEF.

Second, a longer memorandum that elaborates upon and details the approaches outline to The President. Through those communications we hope to broaden the dialogue on anti-sexual assault measures and hasten transformational changes.

b. Authors

The authors of the proposal are two former Army officers and current members of the Northern Virginia law firm of Jordan Patrick & Cooley LLP: Howard G. Cooley, a partner in the firm and retired Army colonel; and, Daryle A. Jordan, the firm's managing partner and a former Army major who advised commanders during the Gulf War. Our 1-page bios are attached for your information.

c. Overview

The major contribution we hope to make is a dialogue for transformational change on a much larger and comprehensive scale than that proposed by the Pentagon. We do so through a blend of history, doctrine, Congressional intent, law and contemporary analysis. We summarize the culture of violence to which women are subjected in the military, the grim history and adverse ramifications of sexual assault regarding servicemembers, the possibility that over 300,000 female servicemembers have been subjected to sexual assault since 1948, and the military's institutional failure to respond effectively at all levels, from the Chairman of the Joint Chiefs of Staff, to Service Secretaries of the Army and Navy, and installations, including commanders. As a result of that massive structural injustice, we argue The President, Congress and Armed Forces have an extraordinarily high duty of care toward women servicemembers, and those women require exceptional lifelines from The President, Congress, the Armed Forces and the public. We are attempting to fulfill part of our public duties by sounding the alarm for a broader doctrine and an expanded approach based on vision, imagination, and a connection of the dots.

d. The Constellation

We offer a "constellation" of remedies in the form of proposed seven-steps as vital foundations to combating sexual assault because they promote robust relief for women servicemembers that is beyond the control of the conventional command structure, and that thwarts efforts by commands to maroon women servicemembers away from access to powerful assistance.

Although omitted from the Pentagon's strategic plan to The President, the seven-step proposal includes (1) an executive order establishing a comprehensive national anti-sexual assault policy; (2) the creation of a worldwide anti-sexual assault command that advises commanding admirals and generals worldwide regarding the appropriate disposition of sexual assault and related allegations, and assumes jurisdiction over certain sexual assault cases; (3) the appointment of the commander of the anti-sexual assault command as a member of the Joint Chiefs of Staff and principal advisor to The President and Congress regarding sexual assault, women's issues, and sexual orientations (it could be expanded to include religion and race); (4) a DoD-level special board for correction of military records for sexual assault and related matters; (5) greater access to federal court by military sexual assault victims; (6) enhanced special security for women servicemembers on a 24/7 basis for each installation worldwide; and, (7) heightened personnel evaluations for all military and civilian personnel involved in sexual assault dispositions at every level, from basic training to Service Secretariats.

As lawyers and former military officers, we believe some of the details in the proposal are riveting – such as our contention that women servicemembers may have sustained the longest period of continuous assault and violence in the history of the Armed Forces; their suffering is equivalent to the Ku Klux Klan beatings and murders of African-American veterans in the South in 1946; the Armed Forces failed to develop a strong anti-rape doctrine notwithstanding the 17,000 women US servicemembers raped in Europe and Africa during WWII; and, a discussion in the memorandum of a middle ground between Members of Congress opposed to preventing commanders from handling sexual assaults and those who believe commanders should be so removed.

We view the problem as a War Against Sexual Assault, and see the need for a ground force. The impetus for that came, in part, from (1) a RAND report stating that servicewomen attacked by sexual assault have no route for escape (RAND Corporation (Francis, Schell, and Tamielian), *Enemy Within: Military Sexual Assault Inflicts Physical, Psychological, Financial Pain*, Summer 2013); (2) Washington Post Reporter Rajiv Chandrasekaren's presentation of a sobering assessment of the sad conditions experienced by women veterans (*A Legacy of Pain and Pride*, The Washington Post (March 29, 2014)); (3) Professor Alicia Arrizon, "Invisible Wars": Gendered Terrorism in the US Military and the Juarez Femicidio, Chapter 9 in Editor Ponzanesi's *Gender, Globalization and Violence: Postcolonial Conflict Zones* (2014) (rape and sexual assault in the Armed Forces are "symptomatic" of the "gendered wars" and "invisible terrorism" directed at "female soldiers" – a social pandemic in which, incredibly, the "military" has "failed its female soldiers so miserably."); (4) Columbia Journalism School Professor Helen Benedict, *The Private War of Women Soldiers*, Salom.com (March 7, 2007); see Benedict, *The Lonely Soldier: The Private War of Women Serving in Iraq* (2009) (women servicemembers cannot trust the military to protect them from sexual assault, and, the dangers of rape were so widely recognized that some officers in charge of females in Iraq routinely warned them not to go to or use latrines or showers without another woman for protection); and, (5) our own experiences in the military and in private practice.

e. Echelon Approach

We concluded women and the Armed Forces require a liberation force that operates on the ground worldwide.

The first echelon consists of a comprehensive doctrine for the Armed Forces to implement in the form of an executive order that establishes the vision for the Armed Forces in years to come.

The second echelon incentivizes commanders to enforce anti-sexual assault policy through personnel evaluations with a stronger link to the enforcement of that policy.

The third echelon consists of a 24/7 guard force, in which a designated unit is directed to supplement the military police and patrol housing, workplace locations, remote locations, etc.

The fourth echelon is the National Defense Command (anti-sexual assault command) to not only advise all military levels on sexual assault and anti-sexual assault measures, but that has exceptional powers to work with commands, prod them, investigate problems, and involuntarily remove languishing cases from commands and conduct courts-martial on its own accord (National Defense Command). Essentially, DoD needs the equivalent of Clint Eastwood to enforce anti-sexual assault policy and we go to great lengths to justify it. In that process, we analogize the plight of women servicemembers to black WWII veterans hunted, attacked and killed by Southerners in 1946, and assert the overall condition of women is similar to the outcast status of blacks that made them a suspect classification for purposes of racial discrimination. The Pentagon, however, appears highly unlikely to admit that its failure to quash sexual assault has spiraled to the point that women in today's military warrant protection as a suspect classification, particularly in light of the invasiveness of sexual assault and the \$4.4 billion annual medical price tag to pay for the ravages of sexual assault.

We also propose a series of additional measures that strengthen commands and installations reviewing sexual assault. By the way, we address clearly that our proposal is not just for women, but covers men servicemembers, gays, bisexuals, lesbians, transgender, same-sex marriage and same-sex couples, etc. Our thesis is, in effect, "if women are catching hell, then the reality for the sexual orientation community is bleak."

As a fifth echelon, to ensure The President and Congress will receive truthful and direct information and recommendations to provide proper guidance, we propose elevating the Commander of the National Defense Command to the Joint Chiefs of Staff. That precludes the prospect that women and members of the sexual orientation community will be stranded by the highest leadership. In light of the military's protracted neglect of a horrible situation for women, and the prospects for covert resistance to the sexual orientation community, Congress and The President should change the paradigm with a major institutional move that sets the tone that discrimination based on gender and sexual orientation will

not be tolerated. We understand this will be a tough sell to the Joint Chiefs, but provide strong arguments in support of our proposition.

As a sixth echelon, we propose structures that will review the work of commanders and installations and reverse them as required. The primary workhouse would be a special DoD-level board for correction of military records for sexual assault and related matter that hears appeals for expedited relief (for example: although the local command ignores a gay servicemember's pleas for assistance in the field, where the unit taunts and threatens him, the DoD special relief board could order the immediate transfer of that servicemember, or if a gay soldier with HIV believes he is not getting the proper treatment at Camp Swampy, that DoD board for sexual assault and related matters could order that soldier to Walter Reed for care). Let me add, that if a women servicemember on an island in the Atlantic or Pacific or is in another remote deployment location and is hounded for sex with no relief, with a letter, email, or phone call, the DoD Special Board for Correction of Military Records for Sexual Assault and Related Matters, could immediately transfer her and then address the situation.

We recommend establishment of the DoD Board for Correction of Military Records for Sexual Assault and Related Issues primarily because of flawed procedures and substantive decisions, the Army and Navy boards for correction of military records do not fairly adjudicate credibility challenges to the chain of command and installations. Since they staunchly resist change and constitute the majority of the BCMR cases within DoD, it is essential that servicemembers receive the fair evaluation of their cases within the military system as intended by Congress. The most expedient and effective course is to create a DoD BCMR – a measure I am confident would be applauded by every member of the bar or lawyer that has represented a client before the Army and Navy BCMRs in servicemember challenges to the judgment, discretion, credibility, motives, and fairness of the chain of command regarding sensitive personnel matters, such as assertions of sexual assault victimization, discrimination based on gender and sexual orientation, retaliation, and other areas. If properly structured and staffed, the DoD BCMR should dramatically lift the quality of administrative law jurisprudence and truly serve as the final sentinel and guardian for justice for servicemembers in the area of sexual assault and related issues.

And if the DoD board fails, as a seventh echelon, we propose the easing of standards for access to federal courts, so that a federal court judge could intervene for women servicemembers just as federal courts intervened in the South so blacks and Hispanics could attend white schools.

f. Conclusion

The foregoing is a summary of the constellation we envision.

We are just a very small law firm – we are not like Morrison and Foerster (although at their request I have served as co-counsel with them) – so we do not have any reach in the government. In November 2014, when we sent a complaint regarding and proposals for improving boards for correction of military records (BCMRs) to the Secretary of Homeland Security and SECDEF Hagel, a representative for Secretary Johnson called us and engaged in a substantial discussion of our issues – noting 100% of its Coast Guard BCMR members were lawyers and their case load was only 200 a year as opposed to the thousands and thousands of Army and Navy cases. We were satisfied with those fruitful discussions. However, since we heard no response from SECDEF or his general counsel and several other DoD senior leaders, we concluded that it was prudent to contact the Office of The President and the Armed Services Committees.

We think we have a good idea and a vision that is more comprehensive than that of the Pentagon. With the prospects of suicide and depression and all of the other adverse effects of sexual assault, this is an emergency situation and we want to contribute to repairing what is a civil rights tragedy. We try to discuss the realities that servicemembers face and that are not captured in the lofty big picture reports to the major decision-makers. Indeed, even if we mailed our proposal to Under Secretary Fanning, his staff would automatically reroute it to the Army Review Boards Agency which houses the Board for Correction of Military – which would never mention such problems to him when he becomes Secretary. So, again, we concluded the long odds were better sending the proposal to the White House and Armed Services Committees than to the Army and Navy. But nothing has happened as we suspected.

Enter HRW...

Howard Cooley

Jordan Patrick Cooley