

Senate Armed Services Committee
Advance Policy Questions for Ms. Caroline Krass
Nominee to be General Counsel of the Department of Defense

Duties

Section 140 of title 10, U.S. Code, provides that the General Counsel of the Department of Defense (DOD General Counsel) is the chief legal officer of the Department.

1. What is your understanding of the breadth and scope of the DOD General Counsel's duties and responsibilities?

The General Counsel serves as the chief legal officer of DoD, is the primary legal adviser to the Secretary of Defense and other senior DoD leaders, and performs such functions as the Secretary of Defense may prescribe. The General Counsel provides legal advice and counsel on the full scope of the Department's mission and responsibilities, which can range from contracting and acquisitions, to the provision of health care to Service members and their families, to the law of armed conflict, and military justice, to name just a few areas. If confirmed, I anticipate I will be responsible for overseeing and ensuring the provision of timely and accurate legal advice on myriad DoD activities.

2. What is your view of the responsibility and authority associated with the DOD General Counsel's designation as the chief legal officer of the Department of the Defense?

The DoD General Counsel serves as the "chief legal officer of the Department of Defense," in accordance with 10 U.S.C. § 140. DoD Directive 5145.01 provides that the DoD General Counsel "[o]versees, as appropriate, legal services performed within the DoD, including establishing professional responsibility standards and determining, or referring to the cognizant authority, DoD attorneys' adherence to these standards." The Directive further assigns the General Counsel the responsibility to "Establish[] DoD policy on general legal issues, determine[] the DoD position on specific legal problems, and resolve[] disagreements within the DoD on such matters." If confirmed, I will work to ensure consistent and well-reasoned legal advice and counsel are provided across the Department.

3. What is your view of the responsibility and authority vested in the DOD General Counsel by virtue of her service as the Director, Defense Legal Services Agency?

DoD Directive 5145.04 provides that the Defense Legal Services Agency "shall provide legal advice, services, and support to the Defense Agencies, DoD Field Activities, and, as assigned, other organizational entities within the DoD," and further provides that the Defense Legal Services Agency is "under the authority, direction, and control of the General Counsel of the Department of Defense" who also serves as its Director. As Director, the DoD General Counsel is responsible for the professional supervision of the Defense Legal Services Agency attorneys, including, in consultation with the DoD

Component Head concerned, authority for evaluation of their performance, awards, promotions, professional development, and disciplinary or adverse actions. If confirmed, I will work to ensure consistent and well-reasoned legal advice and counsel is provided across the Department, including to the DoD Agencies and Field Activities by the Defense Legal Services Agency attorneys.

4. What is your view of the responsibility and authority vested in the DOD General Counsel by virtue of her service as a Designated Agency Ethics Official?

I believe the role of the DoD Designated Agency Ethics Official is to ensure that the Department maintains a robust and effective ethics program that focuses not only on technical compliance with ethics laws and regulations, but also on the importance of assuring public confidence in our government. If confirmed, I will work closely with senior leaders to set a strong “tone from the top” to reinforce the expectation of ethical conduct by all DoD personnel and ensure the Department devotes the resources needed to administer an effective ethics program.

5. If confirmed, what additional duties and functions might you recommend the Secretary of the Defense prescribe for you, particularly in light of the lines of effort comprising the National Defense Strategy (NDS)?

I have no additional duties or functions to recommend at this time. If confirmed, I will continually review the duties and functions of the DoD General Counsel, and consider how best to support the Secretary of Defense and the Department in carrying out the missions and functions of the Department under DoD strategic guidance, including the National Defense Strategy.

6. If confirmed, specifically what would you do to ensure that your tenure as DOD General Counsel epitomizes the fundamental requirement for civilian control of the Armed Forces embedded in the U.S. Constitution and other laws?

The Goldwater-Nichols Department of Defense Reorganization Act of 1986 enhanced civilian control of the Armed Forces and clearly delineates the operational and administrative chains of command and the responsibilities of DoD senior leadership. The requirement for civilian control of the military is clear. If confirmed, I will work to ensure the Department fully adheres to this law and any related legal provisions. I have been privileged to serve my country as a civilian official in support of our national security, most recently as the Central Intelligence Agency’s General Counsel, and I understand and appreciate that civilian control of the military is a foundational aspect of our democracy; it is a key foundation for our exceptional military, as well as a critically important guarantor of our freedoms. If confirmed, my conduct and legal advice will promote the understanding of, and adherence to, civilian control and authority over the military.

7. Who is the client of the DOD General Counsel?

The Department of Defense and its senior leaders, when acting in their official capacities, are the clients of the DoD General Counsel, and through them the American people.

8. If confirmed, what innovative ideas would you consider providing to the Secretary of Defense to improve the organization and operations of Office of the DOD General Counsel? To improve the delivery of legal services DOD-wide?

I believe that it is important to be working within an institution before deciding what organizational and operational changes are needed. If confirmed, I will continually evaluate ways to improve the effectiveness and efficiency of the Office of General Counsel and the Defense Legal Services Agency.

Qualifications

9. What background and experience do you possess that qualify you for this position?

If confirmed, I believe that my prior experience will serve me well in providing sound and clear legal advice to Secretary Austin and the Department's leadership team. As General Counsel of the Central Intelligence Agency (CIA), my responsibilities included ensuring compliance with all applicable domestic and international laws. I also spent over a decade at the Office of Legal Counsel (OLC) at the Department of Justice, where I provided legal advice to the Department of Defense on a wide range of difficult legal issues. Those issues, some of which I also worked on at the National Security Council (NSC), included matters related to the interpretation of the UCMJ, the application of the Law of Armed Conflict, and domestic and international law principles governing detention and the use of force. For my work at OLC, I was honored to be awarded the Department of Defense Exceptional Civilian Service Award during the George W. Bush Administration and the Department of Defense Medal for Outstanding Public Service during the Obama Administration.

Over the course of my career, including two tours at the NSC, I have developed productive and collegial relationships with lawyers throughout the national security community, including among the career civil service. I have also been a member of the interagency lawyers' group while at the NSC, CIA and Justice. Those relationships will heighten my effectiveness at assisting the men and women of the U.S. Armed Forces, together with the civilian DoD personnel, in protecting our Nation's security. In addition, I have been fortunate to work with many of the lawyers in the Department's Office of General Counsel and Chairman's Legal, and I have been impressed by their dedication to the rule of law.

During my career, I have also worked closely with lawyers and other representatives of many of our Allies, including the Five Eyes and the West Point group, as well as the International Committee of the Red Cross. I believe that our national security is strengthened when the international legal community has a common understanding of each country's approach to legal issues in the national security realm.

10. What leadership and management experience do you possess that you would apply to your service as DOD General Counsel, if confirmed?

Over the past three years, I have served as General Counsel of General Insurance at American International Group, leading and overseeing a global team of 250 legal professionals providing advice in over 80 countries through a time of transformational change in a turn-around environment.

Previously, I served from 2014-2017 as the General Counsel of the CIA, leading and managing a team of approximately 200 attorneys and working to enhance professional development and growth opportunities in a time of constrained resources.

I also led OLC at the Department of Justice as Acting Assistant Attorney General before joining the CIA.

11. Do you believe that there are actions you need to take to enhance your ability to perform the duties of the DOD General Counsel? If so, what are they?

If confirmed, I am eager to meet with the Department's leadership to discuss their strategic priorities as well as to conduct deep-dives with my team in the Office of General Counsel on the myriad complex legal issues currently facing the Department. Although I have previously worked with many of the senior lawyers in the national security community, I would also reach out to the General Counsels of the Defense Agencies early in my tenure, as well as to other lawyers across the interagency.

Major Challenges and Priorities

12. In your view, what are the major challenges that will confront the next DOD General Counsel?

Although it is not possible to predict all of the major challenges that will confront the next DoD General Counsel, several are apparent now. Secretary Austin has outlined his top priorities for the Department, which provide an outline of the major challenges facing DoD. Initially, the General Counsel will need to advise on DoD's key role in supporting U.S. Government efforts in response to COVID-19. If pending legislative proposals to address sexual assault and harassment are enacted, ensuring that such reforms are executed seamlessly will be a significant challenge facing the next General Counsel. The next General Counsel will also need to advise on the legal issues related to the Department's efforts to combat extremism in the ranks. In addition, the next General Counsel will confront legal issues relating to DoD's response to emerging advanced, persistent threats from States such as Russia, Iran, and North Korea and threats from transnational and non-State actors, particularly in the realm of cyber and space. Finally, the next General Counsel will be required to advise on legal issues related to DoD's number one pacing challenge - China.

13. If confirmed, what plans do you have for addressing each of these challenges?

The Department has experienced and capable attorneys who are experts in relevant areas of law, in the Office of the DoD General Counsel, the Defense Legal Services Agency, and in the wider DoD legal community. If confirmed, I would support those attorneys in their efforts to provide the best possible legal advice to decision-makers throughout the Department of Defense to address these significant challenges, and I will also endeavor to assist the Secretary of Defense by providing him with the legal advice needed to lead the Department.

14. If confirmed, what broad parameters would you establish as to the types of legal and policy issues on which you and the Office of the DOD General Counsel *must be consulted*?

If confirmed, I will focus my efforts on the challenges outlined in the Secretary's priorities, and I will draw on the significant legal expertise and dedication of the Office of the DoD General Counsel, the Defense Legal Services Agency, and other lawyers serving in the Department of Defense. If confirmed, I will endeavor to ensure that the Office of the DoD General Counsel is a key player in providing legal advice regarding the development of strategies, plans, and activities within the Department beginning from early stages, and regardless of operational sensitivity. I would strive to accomplish this involvement in a cooperative manner as a matter of routine within the Department, particularly within the Office of the Secretary of Defense.

Relations with Congress

15. What are your views on the state of the DOD Office of the General Counsel's relationship with the Senate Armed Services Committee in particular, and with Congress in general?

I believe Congress, and this Committee in particular, are critical partners with the Office of General Counsel. Maintaining a strong partnership with both Members and staff is essential to ensuring the necessary support for those in uniform and the Department overall.

16. If confirmed, what actions would you take to sustain a productive and mutually beneficial relationship between this Committee and the DOD Office of the General Counsel?

Communication is key. If confirmed, I am committed to building and maintaining open and regular lines of communication to ensure collaboration with committee Members and staff alike.

17. If confirmed, what factors would you consider in determining whether or not to recommend the invocation of Executive Privilege in regard to a request from the Senate Armed Services Committee for information under the cognizance of a

component of the Department of Defense?

As a general matter, I believe the Department should make every effort to produce to Congress the information it seeks. If I am confirmed, I commit to working closely with Congress to facilitate its oversight responsibilities and ensure that the Department is working appropriately to serve the American people

Legal Opinions

18. Are the legal opinions of the Office of the DOD General Counsel binding on all Department of Defense attorneys?

The legal opinions of the DoD General Counsel generally are binding throughout the Department of Defense. 10 U.S.C. § 140 makes the DoD General Counsel the “chief legal officer of the Department of Defense,” and DoD Directive 5145.01 assigns the General Counsel the responsibility to “Establish[] DoD policy on general legal issues, determine[] the DoD position on specific legal problems, and resolve[] disagreements within the DoD on such matters.” If confirmed, I would fulfill those responsibilities, including issuing legal opinions that are binding on the Department of Defense. One exception to this rule applies to the lawyers in the Office of the DoD Inspector General. The General Counsel to the Inspector General is expressly exempted from the scope of 10 U.S.C. § 140 by virtue of Section 907 of the National Defense Authorization Act for Fiscal Year 2009 (5 U.S.C. App. Inspector General Act of 1978 § 8(h)). I note also that Title 10 prohibits any officer or employee of DoD from interfering with the ability of certain senior military lawyers to give independent legal advice to their respective principals.

19. If confirmed, are there specific matters on which your predecessor General Counsels have issued legal opinions that you would expect to reconsider and possibly revise? If so, which opinions, in which practice areas, do you believe might merit reconsideration?

At this time, I am not aware of any legal opinions of the DoD General Counsel that I expect to reconsider and revise, if confirmed. However, if confirmed and such a need arises, I would review those opinions in consultation with the appropriate attorneys and subject matter experts within the Department.

20. If confirmed, how would you ensure that legal opinions of your office are available to all Department attorneys, including judge advocates? Would you consider implementation of a program similar to that through which the Office of Legal Counsel, Department of Justice, makes certain of its opinions available to the public?

If confirmed, I will meet regularly with senior lawyers throughout the Department to keep them informed of relevant opinions and decisions of the DoD General Counsel and will circulate legal opinions generally to the attorneys in the Department, but in particular to those affected by them. If confirmed, I would consider whether any of the DoD General Counsel's written opinions should be made available to the public.

Relationship with the Department of Justice (DOJ)

21. What is your understanding of the relationship between the Department of Defense and the Department of Justice with respect to litigation involving the Department of Defense?

By statute, the Department of Justice is responsible for representing the United States, its officers, and its agencies, including the Department of Defense, in litigation matters. In support of that responsibility, attorneys from the Department of Defense regularly work directly with lawyers at the Department of Justice in cases and other litigation-related matters in which DoD, or one or more of its components or officials, is a party or has an interest.

22. In your view, does the Department of Defense need more independence and litigation-focused resources—either to conduct its own litigation or to increase its capacity and capability to act—as it does currently—in a supporting role to DOJ?

My understanding is that DoD's lawyers have exceptionally strong relationships with their counterparts at the Department of Justice and that the current arrangement serves DoD well. Accordingly, I am not aware of any changes that need to be made at this time.

23. What role do you expect to play, if confirmed, in the development and consideration (or reconsideration) of legal opinions by the Office of Legal Counsel of the Department of Justice that directly affect the Department of Defense?

If confirmed, I expect to work closely and regularly with the Office of Legal Counsel (OLC) at the Department of Justice in a collegial and collaborative fashion on the most complicated legal issues that directly affect the Department of Defense.

24. If confirmed, what actions would you take to address an opinion issued by the Office of Legal Counsel with which you disagreed as a matter of proper interpretation of the law?

If confirmed, should the Office of Legal Counsel (OLC) issue an opinion affecting the Department of Defense with which I disagreed as a matter of proper interpretation of the law, I would express my opinion to the head of OLC and, if necessary and appropriate, the Attorney General, and ask for reconsideration of the OLC opinion. If confirmed, I also expect to continue my close working relationship with OLC and that OLC would follow its prior practice of soliciting my input prior to the issuance of any legal opinion

affecting DoD's interests.

Alternate Dispute Resolution

Alternate Dispute Resolution (ADR) programs encourage the use of dispute resolution and conflict management processes and techniques to assist parties to a dispute in coming to an agreement, short of litigation.

25. What is your view of the role of the DOD General Counsel in facilitating the provision of ADR services to components of the Department of Defense?

As provided in DoD Instruction (DoDI) 5145.5, it is the policy of DoD that each Component establish and implement ADR programs to resolve disputes at the earliest possible stage of the conflict and at the lowest possible organizational level. DoDI 5145.5 further provides that the DoD General Counsel establishes policy and provides guidance on the administration of ADR and oversees ADR activities within DoD. Through the Deputy General Counsel (Legal Counsel), the DoD General Counsel monitors the implementation of policies and procedures pertaining to the use of ADR and serves as the DoD Dispute Resolution Specialist in accordance with Title 5, U.S.C. and DoD Directive 5145.01.

26. Are there particular types of disputes in the context of DOD activities, as to which you perceive ADR may be of particular utility?

It is DoD policy that DoD Components shall use ADR techniques as an alternative to litigation or formal administrative proceedings when appropriate and that any dispute, regardless of subject matter, is a potential candidate for ADR. Based on my experience, I believe that ADR may be particularly useful in certain personnel and acquisition disputes.

Independent Legal Advice by Judge Advocates

27. What is your view of the requirement for the Judge Advocates General of the Services, the Staff Judge Advocate to the Commandant of the Marine Corps, and the legal advisor to the Chairman of the Joint Chiefs of Staff to provide independent legal advice to the Secretaries of the Military Departments, the Chairman of the Joint Chiefs, and the Service Chiefs?

I fully support the ability of the Judge Advocates General of the Military Departments, the Staff Judge Advocate to the Commandant of the Marine Corps, and the legal advisor to the Chairman of the Joint Chiefs of Staff to provide independent legal advice to the Department officials they advise. These officers are responsible for providing legal advice, along with the General Counsels of the Military Departments, to the senior leadership of their respective military departments and to the Chairman. Title 10 expressly directs that no officer or employee of the Department of Defense interfere with the ability of these counsel to give independent legal advice to the leaders they advise. *See* 10 U.S.C. §§ 156, 7037, 8046, 8088, and 9037.

28. What is your view of the responsibility of uniformed judge advocates to provide independent legal advice to military commanders?

It is essential that Judge Advocates, operating under the supervision of their respective Judge Advocate General, be able to provide timely and effective day-to-day legal advice to military commanders in the field. As in all circumstances concerning the provision of legal advice, I believe that such advice should be informed by the views of the Department of Justice, the DoD General Counsel, the General Counsel of the Military Department concerned, and the Judge Advocate General concerned. As noted above, provisions of Title 10 prohibit interfering with the ability of the Judge Advocates General in providing independent legal advice. If confirmed, I will work to foster open lines of communication with colleagues in uniform to ensure we best serve our respective leadership and the Department as a whole.

29. What is your understanding of the DOD General Counsel's responsibilities with regard to military justice and the Judge Advocates General?

My understanding is that decisions in military justice cases are made independently by various personnel in the military justice system, including staff judge advocates, convening authorities, military judges, and court-martial members. Appellate review of cases arising under the Uniform Code of Military Justice sometimes falls under the authority of the Judge Advocates General, and sometimes military appellate courts (and potentially the United States Supreme Court), depending on the severity of the sentence. The General Counsel must protect the independence of those decision makers.

One important role of the DoD General Counsel is to advise the Secretary of Defense, the Deputy Secretary of Defense, and other officials in the Office of the Secretary of Defense on military justice matters. I understand that the Secretary of Defense becomes involved in military justice only in limited circumstances, and the General Counsel provides legal advice to the Secretary in those circumstances. The General Counsel, like the Secretary of Defense and other senior civilian and military officials in the Department, must avoid any action that may constitute or create the appearance of unlawful command influence.

I understand that the DoD General Counsel plays a role in determining whether the Department will ask the Solicitor General of the United States to seek Supreme Court review of cases decided against the government by the Court of Appeals for the Armed Forces and sometimes assists the Office of the Solicitor General in preparing briefs for the Supreme Court in military justice cases. Additionally, I understand that the General Counsel establishes DoD policy on general legal issues, determines the DoD position on specific legal problems, and resolves disagreements within DoD on such matters. Accordingly, in some cases, the General Counsel will establish DoD's legal position that counsel for the government would advocate in military justice proceedings.

I understand that the DoD General Counsel also plays a role in the development of military justice policy, including by reviewing recommendations of the Joint Service

Committee on Military Justice for amendments to the Manual for Courts-Martial and the Uniform Code of Military Justice. The General Counsel offers advice to appropriate policy makers concerning those recommendations. I also understand that, traditionally, the General Counsel has served as an informal DoD liaison to the U.S. Court of Appeals for the Armed Forces. If confirmed, I anticipate that I will continue to fill those roles.

30. If confirmed, what relationship would you establish with the General Counsels of the Military Departments?

If confirmed, I will strive to foster an open and collaborative relationship with the General Counsels of the Military Departments. I fully expect that, if confirmed, I will work closely with them and assist in their providing timely and accurate legal advice to the senior leadership of their respective military departments, and I would further expect they will similarly assist me in the provision of legal advice to the senior leadership of the Department of Defense. The DoD General Counsel serves as the chief legal officer of the Department, but must rely on and work closely with the Military Department General Counsels to best serve the Department and its leadership.

31. If confirmed, what steps would you take to ensure the coordination of legal issues of significance to multiple components of DOD with the Military Department General Counsels and the Service Judge Advocates General?

It is my intention, if confirmed, to meet regularly with the Military Department General Counsels, the Judge Advocates General, Counsel to the Commandant of the U.S. Marine Corps and the Legal Advisor the Chairman of the Joint Chiefs of Staff. Such meetings will serve to exchange information and views, and identify as early as possible issues of significance facing the multiple components of the Department. I will also encourage communication and collaboration, as appropriate, by counsel under my supervision with their Military Department, Military Service and Joint Staff colleagues.

Detainee Matters

32. What role do you expect to play, if confirmed, in addressing legal issues regarding detainees?

If confirmed, I would play a primary role in advising the Secretary of Defense and those who fall under his command on legal issues regarding persons detained by the U.S. military.

33. Do you support the standards for detainee treatment specified in the revised Army Field Manual on Interrogations, FM 2-22.3, issued in September 2006, and in DOD Directive 2310.01E, *The Department of Defense Detainee Program*, dated August 19, 2014?

Yes.

34. If confirmed, what role would you establish for yourself in the ongoing triennial review and revision of FM 2-22.3, *Human Intelligence Collector Operations*? (Intel)

If confirmed, I will work with the Under Secretary of Defense for Intelligence and Security to ensure that the review of FM 2-22.3, *Human Intelligence Collector Operations* is thorough and complete and that any proposed revisions are consistent with U.S. and international law. As part of that process, consistent with Section 1045 of the National Defense Authorization Act for Fiscal Year 2016, I will ensure that the Army Field Manual complies with the legal obligations of the United States and that the practices for interrogation described therein do not involve the use or threat of force.

35. In your view, how will President Biden's ordered withdrawal of U.S. forces from Afghanistan affect the Department's authority to detain unlawful enemy combatants at Guantanamo?

The President has stated that all U.S. forces will be withdrawn from Afghanistan by September 11, 2021. The conflict with Al Qaeda and its associated forces continues, however, and its geographic scope extends beyond Afghanistan. If confirmed as General Counsel, I will work with the Secretary and the Departments of Justice and State to assess the legal basis for continued detention at Guantanamo Bay when that withdrawal is complete.

36. What role would you expect to play, if confirmed, under the procedures for Periodic Review Board applicable to detainees at Guantanamo?

If confirmed, I would expect to provide legal advice to the Secretary of Defense on the status of Guantanamo detainees. In addition, the General Counsel appoints and supervises the legal advisor to the Periodic Review Board.

37. In your view, how has the establishment of a Chief Medical Officer to oversee the provision of medical care to individuals detained at Guantanamo, affected the standard of medical care provided to such detainees?

It is my understanding that Congress established the position of Chief Medical Officer at Guantanamo, reporting to the Assistant Secretary of Defense for Health Affairs, in order to ensure that medical care decisions are sufficiently independent of any non-clinical considerations. I am not personally familiar with the degree to which day-to-day medical care of detainees has been affected. If confirmed, I will support the Assistant Secretary of Defense for Health Affairs in ensuring that the Chief Medical Officer is able to perform his or her duties appropriately and in accordance with applicable law.

Section 2441 of title 18, United States Code, defines grave breaches of Common Article 3 of the Geneva Conventions, including torture and cruel and inhuman treatment.

38. In your view, does section 2441 define these terms in a way that provides U.S. detainees in the custody of other nations, as well as foreign detainees in U.S. custody, appropriate protections from abusive treatment?

Yes.

Military Commissions

39. In your view, does the Military Commissions Act of 2009 provide appropriate legal standards and processes for the trial of alien unlawful enemy combatants?

The Military Commissions Act of 2009 has provided appropriate standards and processes for the trial of alien unprivileged enemy belligerents. If confirmed, I would review whether these processes could be improved.

40. In your view, do military commissions constituted pursuant to the Military Commissions Act of 2009 provide an effective forum for trying violations of the law of armed conflict?

Military commissions are an appropriate forum for trying offenses against the law of war and other offenses traditionally triable by military commission. If confirmed, I would review whether military commission processes could be improved.

41. What changes to the Military Commissions Act of 2009 would you propose, if confirmed, to improve the efficiency and effectiveness of the military commissions system and process?

If confirmed, I may consider, consistent with my responsibilities as chief legal officer for the Department of Defense, recommended amendments to the 2009 Military Commissions Act.

42. As regards military commissions, what is your understanding of the relationship between the DOD General Counsel and the legal advisor to the convening authority, the chief prosecutor, and the chief defense counsel for the military commissions?

The DoD General Counsel, as the chief legal officer of the Department of Defense, is the primary legal advisor to the Secretary of Defense and other senior DoD leaders. By regulation, the Legal Advisor to the Convening Authority and the Chief Prosecutor are supervised by the Deputy General Counsel (Legal Counsel). The Chief Defense Counsel is supervised by the Deputy General Counsel (Personnel & Health Policy). Both the Deputy General Counsel (Legal Counsel) and the Deputy General Counsel (Personnel & Health Policy) report to the General Counsel. The Chief Prosecutor and the Chief Defense Counsel, who play important roles in the military commission process, must exercise independent legal judgment in accordance with the rules and regulations for military commissions promulgated by the Secretary.

Authorization for the Use of Military Force (AUMF)

43. In your view, in what circumstances should the President seek authorization from Congress before using military force?

I respect the essential constitutional role of Congress in decisions to declare war, and I recognize that the War Powers Resolution prescribes that the President shall consult with Congress before introducing United States Armed Forces into hostilities “in every possible instance.”

In general, the President may order certain military action without the prior approval of Congress either (1) pursuant to an existing statutory authorization for use of military force that would apply to the specific circumstances for the contemplated military action, or (2) pursuant to his or her Article II authority to protect important national interests, subject to important constitutional and statutory limitations on the scope and duration of those military operations.

Congress enacted the 2001 AUMF shortly after 9/11 to provide the President authority to take action against al-Q’aida, the Taliban, and their associated forces, and to detain enemy personnel captured during the course of the armed conflict. Congress enacted the 2002 AUMF in the run-up to the 2003 U.S. invasion of Iraq. It authorized the U.S. to defend against the threat posed by Saddam Hussein’s regime and weapons of mass destruction program. Both the 2001 and 2002 AUMFs remain in effect today.

44. What is your understanding of the role of the DOD General Counsel in interpreting the 2001 and 2002 AUMFs and in the application of these AUMFs to military activities?

The DoD General Counsel is responsible for advising the Secretary of Defense and other personnel of the Department of Defense on the interpretation and application of the 2001 and 2002 AUMFs to military operations. The DoD General Counsel also participates in discussions and consultation with attorneys across U.S. departments and agencies to share views on the interpretation and application of the 2001 and 2002 AUMFs to current or proposed military operations.

45. In your view, were Congress to rescind the 2001 AUMF, would the United States have the legal authority to continue to detain alleged members and supporters of Al Qaeda and the Taliban as enemy combatants? Please explain your answer.

Whether the United States may continue lawfully to detain such individuals would depend on the specific facts and circumstances presented, including whether any new or replacement AUMF might apply and whether the United States remained in hostilities against those groups. Any U.S. detention under the law of armed conflict must comply with applicable domestic and international law, including the humane treatment provisions of Common Article 3 of the Geneva Conventions of 1949.

46. In your view, how would U.S. and foreign partner military and detention operations be affected were Congress to rescind the 2002 Authorization for the Use of Military Force? Please explain your answer.

I understand that the United States does not currently rely on the 2002 AUMF as the sole domestic legal basis for any ongoing military operations, but the statute has been cited by administrations over at least the past decade as an “additional authority” that supports U.S. counterterrorism operations against the Islamic State of Iraq and Syria (ISIS) in Iraq and, in certain circumstances, in Syria. On that understanding, repealing the 2002 AUMF likely would not have a significant impact on current U.S. military activities.

47. In your view, would it be appropriate for the United States to use military force against terrorist groups that have not engaged in hostilities directly against the United States, but merely shown an intent to do so? If so, under what circumstances?

The United States always reserves the inherent right to act in self-defense, including against an imminent threat of armed attack. Determining whether an attack is imminent for purposes of a lawful resort to the use of force would depend on the specific facts and circumstances at the time.

Some commentators have recommended rescission of the 2001 and 2002 AUMFs and the enactment of a “replacement” AUMF that would impose one or more temporal, geographic, or other limits (e.g., limits on targeted groups, limits on type of military force) on the President’s authority to use military force.

48. What do you consider to be the factors that would need to be weighed in any decision to enact a replacement AUMF?

I support the Administration’s stated desire to work with Congress to replace the current AUMFs with a narrow and specific framework that will address current threats to the United States, including continuing terrorist threats.

49. In your view, should the American public be provided a clear, unclassified explanation of the legal and policy frameworks under which military force can be used abroad generally, and in each specific case in which the President authorizes such a use of force?

Yes, although operationally sensitive material might need to remain classified in certain circumstances.

50. How has the legal analysis of criteria applicable to the President’s authority to authorize the use of military force pursuant to Article II of the United States Constitution changed over the past several Administrations?

The President may direct certain military operations pursuant to Article II of the Constitution when that action serves sufficiently important national interests and the reasonably anticipated nature, scope, and duration of the operation would not rise to the level of “war” under the Constitution. This has been the longstanding view of both Democratic and Republican administrations across several decades, as reflected in a series of opinions drafted by the Department of Justice’s Office of Legal Counsel.

Identification of Potential Extremist Views

Press reports document the involvement of a small number of active duty military personnel, retired military officers, members of the National Guard, and military veterans in events at the U.S. Capitol on January 6.

51. Are the Department’s policies adequate to address, document, and track extremism in the military and in the DOD civilian workforce, in your view?

It is my understanding that, since taking office in January, Secretary Austin has renewed DoD’s efforts to address and eliminate extremist activities within the Department of Defense. In an April 9th memorandum, the Secretary directed a number of lines of effort and established the Countering Extremism Working Group and various sub-working groups to examine specific issues. I am informed that these efforts are currently underway. If confirmed, I will support these efforts, carefully review current Department policies and the recommendations of the working groups and provide my best legal advice to the Secretary of Defense and other senior leaders to develop effective, comprehensive, and legally appropriate policies to confront extremism.

52. What is your understanding of how the Department balances the need to identify and respond to potentially harmful extremist views held by service members and civilian employees against individual privacy and respect for the rights of service members and civilians to hold and express personal beliefs?

It is my understanding that DoD policy seeks to preserve the right of expression for all DoD personnel to the maximum extent possible in accordance with the U.S. Constitution and consistent with good order and discipline and the national security. Although the vast majority of the men and women of the Department serve with honor and uphold its core values, I agree with the Secretary that the Department cannot tolerate actions of the few that go against the fundamental principles of the oath that Service members and civilian employees take to support and defend the Constitution of the United States against all enemies, foreign and domestic. If confirmed, I will carefully review current Department policies and the recommendations from ongoing reviews by the Countering Violent Extremism Working Group and its sub-working groups, and will provide my best legal advice to the Secretary of Defense and other senior leaders to develop effective, comprehensive, and legally appropriate policies to confront extremism.

53. Do you see a need for a change in this balance?

As noted previously, the Countering Violent Extremism Working Group and its sub-working groups are examining how the Department addresses extremism. These efforts are continuing and have not reported out any recommendations of which I am aware. If confirmed, I look forward to working with the Secretary of Defense and Department leadership to review and provide my best legal advice on the recommendations presented.

54. In your view, do current Department of Defense policies limit the ability to include information about an individual’s extremist views in official records that may assist in the identification of potential insider threats?

I am aware that the Department is actively reviewing such issues to develop a policy that is effective, efficient, and legally appropriate, and that will allow for the identification of Department personnel and applicants who possess such views. I anticipate such policy would require careful and appropriate inclusion of information about extremist views in official records. If confirmed, I will work closely with my colleagues and provide my best legal advice in support of these ongoing efforts to address privacy and other issues that may arise in efforts to better identify potential insider threats.

55. In your view, do current Department procedures hinder the ability to share this type of information with other federal and state agencies charged with identifying and monitoring potential extremist activities?

It is my understanding that such information sharing is one of the issues currently under review by the Department as part of the ongoing lines of effort directed by Secretary Austin. If confirmed, I will work closely with my colleagues and provide my best legal advice in support of these ongoing efforts to factor in privacy and other issues that are associated with sharing such information with other federal and state agencies to better identify potential insider threats.

General/Flag Officer Nominations

Extant law and policy provide that adverse and reportable information pertaining to an officer must be evaluated by senior leaders in the Military Departments and in the Office of the Secretary of Defense prior to the nomination of such an officer for promotion to a general/flag officer grade or for appointment to a position of “importance and responsibility.”

56. In your view, what is the role of the DOD General Counsel in the officer promotion system generally, and more specifically in reviewing the nomination of officers for promotion to general and flag officer grades and positions?

It is my understanding that all reports of promotion selection boards are reviewed by the Office of the DoD General Counsel prior to final action on the report by the Secretary of Defense or the Under Secretary of Defense for Personnel and Readiness. This review comes after similar legal reviews have been conducted at the Military Service and Military Department levels. If the DoD General Counsel determines that a promotion

selection board did not conform to law or policy, it would be the duty of the General Counsel to inform the Secretary of Defense or Under Secretary of Defense for Personnel and Readiness, as the case may be, of the irregularities and to recommend appropriate corrective action. I am also aware that the Office of the DoD General Counsel reviews the nomination package for each officer recommended for appointment to the grade of O-9 or O-10 while serving in a position of importance and responsibility, ensuring that any adverse or reportable information pertaining to an officer is accurately summarized. The Office of the DoD General Counsel also has a role in ensuring that officer promotion policies in DoD regulations accurately reflect the law in Title 10.

57. Do you perceive a need for change in this role? Please explain your answer.

I am not aware of any need to change the role the DoD General Counsel plays in the officer promotion system. If confirmed, I will assess whether that role should change.

58. In your view, are the current policies and procedures governing review of the records of officers whose selection for promotion or assignment requires Presidential or Secretary of Defense approval or Senate confirmation, sufficient to enable informed decisions by the Secretary of the Military Department concerned, the Secretary of Defense, the President, and the Senate? Please explain your answer.

It is my understanding that the current policies and procedures, many of which are based on law, provide the Secretary of Defense, the President, and the Senate sufficient information on which to make informed decisions as to which officers should be promoted and/or assigned to positions of importance and responsibility. If confirmed, I will recommend changes to the current policies and procedures if I determine they are appropriate.

59. In your view, are these policies and procedures fair to the individual officers proceeding through the promotion or assignment processes?

Yes, it is my understanding that these policies and procedures are fair. When adverse information pertaining to the officer is involved, I am aware that the officer's statement regarding such information is included in the appointment or nomination package. If confirmed, I will recommend changes to the policies and procedures if I determine they are appropriate.

The Department of Defense Inspector General (DOD IG) has reported that the number of allegations of ethical and other misconduct against senior Department officials has increased over the past several years.

60. Do you believe ethical violations and other misconduct among the general and flag officer corps and other Department senior officials are on the rise? If so, to what do you attribute this increase?

Based on recent DoD Inspector General semi-annual reports to Congress, I understand that the number of substantiated cases against senior officials, as well as the substantiation rate, has recently decreased. As the Department of Defense Designated Agency Ethics Official, I will, if confirmed, carry out an effective ethics program to prevent, detect, and address ethical misconduct by DoD personnel.

61. If confirmed, what role would you establish for yourself in combatting any such increase?

As the Department of Defense Designated Agency Ethics Official, I will, if confirmed, carry out an effective ethics program to educate and train personnel not only on the rules, but on the importance of maintaining the public's confidence. I will work closely with senior leaders to set a strong "tone from the top" to reinforce the expectation of ethical conduct by all DoD personnel.

62. What resources has DOD made available to provide its senior officials—both military and civilian—the training, legal advice, and assistance they need to adhere to legal and ethical standards, including travel regulations, and ensuring that government resources, including the official time of their military and civilian subordinates—are used only for official purposes? Please explain your answer.

I understand that all new DoD personnel are required, by regulation, to receive initial ethics training within 90 days of joining the Department. The DoD Standards of Conduct Office has established procedures providing for Senate-confirmed Presidential appointees to be trained within seven days of appointment and other senior officials to be trained within 30 days of appointment. Ethics counselors throughout the Department train senior officials at least annually. The DoD Standards of Conduct Office maintains a robust public website with training material and topic-specific information. I am informed that the DoD Standards of Conduct Office experts participate in annual courses to train the almost 3,000 ethics counselors in the Department. Finally, I understand that the Standards of Conduct Office works closely with senior officials and their staffs to provide legal advice on ethics issues that may arise. As the Department of Defense Designated Agency Ethics Official, I will, if confirmed, advocate for sufficient resources to administer an effective ethics program.

Sexual Assault and Sexual Harassment Prevention and Response

63. What is your understanding of the role of the DOD General Counsel in addressing the sexual assault and sexual harassment in the Department of Defense?

It is my understanding that the DoD General Counsel provides legal advice and assistance in support of the Department's efforts to prevent and respond to sexual assault and harassment. The DoD General Counsel works closely with the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps to ensure an equitable and fair military justice system that promotes

justice, good order and discipline, efficiency and effectiveness in the military establishment, thereby strengthening the national security of the United States.

The General Counsel provides legal advice to the Secretary of Defense, the Deputy Secretary of Defense, and the Under Secretary of Defense for Personnel and Readiness on proposed policies, program initiatives, and legislative proposals, and also advises on sexual assault and harassment-related changes impacting the military justice system.

64. What is your assessment of the efficacy of the Department’s sexual assault prevention and response program?

As the Secretary of Defense has made clear, more must be done to address sexual assault and harassment in the Department. If confirmed, I will support the efforts of the Secretary of Defense to combat sexual assault and harassment, which continues to be of significant concern. I will work with my colleagues in the Department to implement effective and lasting change to prevent and respond to sexual assault and harassment.

65. What is your assessment of the efficacy of the Department’s initiatives focused on the prevention of sexual harassment and assaults in the armed forces?

I understand the Department has undertaken initiatives in the area of prevention to include publishing a Prevention Plan of Action and establishing a Violence Prevention workforce. Recently, the Secretary of Defense directed a Department-wide data-driven assessment of sexual assault and harassment prevention and accountability measures. If confirmed, I will review those assessments to better assess the efficacy of the Department’s initiatives.

An independent committee of civilian experts recently conducted a comprehensive assessment of the command climate and culture at Fort Hood, Texas. The Committee’s report documents its finding that the Army’s Sexual Harassment/Assault Response and Prevention (SHARP) program at Fort Hood “appeared to be compliant on the surface, but was hollow and lacking in leadership attention, day-to-day implementation, broad acceptance by the enlisted Soldiers, and full inculcation into the culture and character of the Fort Hood Community.”

66. What is your understanding of the adequacy of Office of the Secretary of Defense oversight of Military Department and Service implementation of policies for the prevention of and response to sexual assaults and sexual harassment in the armed forces?

I was disturbed by the findings of the Fort Hood Independent Committee Review report. Effective oversight by the Office of the Secretary of Defense of Military Department and Service implementation of policies for the prevention of and response to sexual assaults and sexual harassment in the armed forces is imperative. I know that Secretary Austin has committed to do everything in his power to make progress on this critically important issue and to ensure a safe, secure and productive environment for all personnel. If

confirmed, I would provide my best advice to the Secretary regarding any improvements needed.

67. In your view, what is the role of the DOD General Counsel in providing such oversight?

The General Counsel provides legal advice to various components in DoD with oversight responsibility for the sexual assault and harassment programs. If confirmed, I will examine the Office of General Counsel's role in the Department's oversight efforts.

68. What is your view of the adequacy of the human resources the Department has in place to investigate and prosecute allegations of sexual assault in the armed forces and of the training provided to such investigators and prosecutors?

I believe it is critically important to have sufficient human resources in place to investigate and prosecute allegations of sexual assault in the armed forces and to adequately train such personnel. If confirmed, I will work with the Military Departments' General Counsels, Judge Advocates General, and the Staff Judge Advocate to the Commandant of the Marine Corps to ensure adequate resources are in place to conduct competent investigations and prosecutions of sexual assault allegations.

69. What is your view of the value of the Military Departments' Special Victims' Counsel and Victims' Legal Counsel programs? In your view, have these programs had an effect on the reporting and prosecution of allegations of sexual assault in the armed forces? Please explain your answer.

My understanding of the Special Victims' Counsel and Victims Legal Counsel programs is that the victim has access to an attorney-client privileged relationship with his or her counsel that enables the victim to disclose details of their allegations, be informed of their rights, and understand what to expect from the military justice process. If confirmed, I will seek to better understand the effectiveness of these programs in terms of increased reporting and prosecution of allegations of sexual assault in the armed forces.

70. What is your view of the role of the chain of command in changing the military culture in which these sexual assaults and harassment occur?

I believe the role of the chain of command is essential to changing military culture. The chain of command is comprised of leaders who are expected to set the example and the tone of a unit. Leaders who demonstrate decency, dignity and respect at every level of command foster positive command climates. Command climate is a leadership issue, and leaders must be held appropriately accountable in promoting a culture of dignity, respect and inclusion.

DOD reports on sexual assault and sexual harassment in the military generally, and at the Military Service Academies, more specifically, consistently document the correlation of incidents of sexual harassment and incidents of sexual assault.

71. What is your view of the Department's program to prevent and respond to sexual harassment in the armed forces?

If confirmed, I will closely examine this issue.

72. If confirmed, what role would you establish for yourself, in addressing the problem of sexual assault and sexual harassment in the armed forces?

If confirmed, I would support the Department with any legislative, policy, or regulatory efforts to address the problem of sexual assault and harassment proposed by the Department, and provide legal advice on implementation of policies to ensure compliance with applicable laws and regulations.

73. What actions has DOD taken to establish a comprehensive sexual harassment prevention and response policy for its civilian workforce?

I understand that, in addition to its integrated violence prevention policy, in the last year the Department also issued its first comprehensive civilian employee anti-harassment policy, which provides procedures for training, education, and response to all forms of harassment.

74. In your view, does the Department's method for tracking the submission and monitoring the resolution of informal complaints of harassment or discrimination provide DOD leaders, supervisors, and managers, with an accurate picture of the systemic prevalence of these adverse behaviors in the civilian workforce?

I understand that the Department is engaged in a variety of data collection efforts concerning workplace relations. If confirmed, I will support the Department's ongoing efforts to review these data collection tools to ensure leaders have relevant and accurate data concerning the environment and culture of the civilian workforce.

75. Does the Department's method for recording the outcomes of informal complaints of harassment or discrimination provide DOD leaders, supervisors, and managers, with a means of identifying repeat perpetrators in the civilian workforce?

If confirmed, I will support the Department's efforts to provide civilian employees a healthy work environment free from harassment and discrimination and I will evaluate current methods for recording the outcomes of informal complaints and whether those methods assist in identifying repeat perpetrators.

76. Does the Department's method for responding to complaints of harassment or discrimination in the civilian workforce provide appropriate care and services for victims?

I understand that the Department is committed to providing its civilian employees who

believe they have been harassed or discriminated against in the workplace with protection, care, and information about available support resources, including services provided by DoD and public and private entities in the local area. If confirmed, I will support the Department's efforts to provide effective and compassionate care to civilian employees who experience workplace harassment and discrimination.

77. If confirmed, what role would you play in shaping policies and processes for the prevention of harassment and discrimination in the DOD civilian workforce?

If confirmed, I will ensure that the Office of General Counsel supports any legislative or regulatory efforts proposed by the Department to prevent harassment and discrimination in the civilian workforce, and that OGC provides legal advice on implementation of policies to ensure compliance with applicable laws and regulations.

Whistleblower Protection

Section 1034 of title 10, U.S. Code, prohibits taking or threatening to take an unfavorable personnel action against a member of the armed forces in retaliation for making a protected communication. Section 2302 of title 5, U.S. Code, provides similar protections to Federal civilian employees.

78. If confirmed, what role would you establish for yourself in ensuring that service members and civilian employees of the Department of Defense who report fraud, waste, and abuse, or gross mismanagement are protected from reprisal?

If confirmed, I will work closely with the DoD Inspector General, who has responsibility for reprisal investigations, to support efforts to educate and inform senior civilian and military leaders regarding the importance of reporting fraud, waste, abuse, and gross mismanagement and protecting personnel who make such reports from reprisal.

79. If confirmed, what actions would you take to ensure that senior civilian and military leaders understand the need to encourage service members and civilians to report fraud, waste, abuse, and gross mismanagement—within or outside the chain of command or supervision—and to ensure that they can make such reports without fear of reprisal?

As indicated above, if confirmed, I will work closely with the DoD Inspector General, who has responsibility for reprisal investigations to support efforts to educate and inform senior civilian and military leaders regarding the importance of reporting fraud, waste, abuse, and gross mismanagement and protecting personnel who make such reports from reprisal.

80. What role, if any, does the DOD General Counsel play in ensuring the legal sufficiency and consistent execution of DOD IG whistleblower investigations?

The DoD Inspector General has his or her own legal counsel who advises the Inspector General with respect to the legal sufficiency of DoD IG investigations. Under 10 U.S.C. § 1034, however, if a complainant is not satisfied with the disposition of a whistleblower investigation, he or she may submit the matter to the Secretary of Defense for review. It is under this authority the DoD General Counsel may perform a legal review of the investigation and thereby help to ensure consistency of application and interpretation of whistleblower protections across the Department of Defense.

81. What role does or should the DOD General Counsel play in ensuring consistency of application and interpretation of whistleblower protections across DOD and its components?

If confirmed, I would work to ensure consistent application and interpretation of whistleblower protections across DoD and its components when providing legal advice on these matters.

Support to the Department of Defense Inspector General

82. What is the relationship between the DOD General Counsel and the DOD Inspector General?

The position of General Counsel to the DoD IG is established by law in an amendment to the Inspector General Act. The General Counsel to the IG is appointed by the Inspector General of the Department of Defense and acts as the chief legal officer of the Office of the Inspector General; this position is not under the supervision of the General Counsel of the Department of Defense. It is my understanding that the DoD General Counsel does not review the legal sufficiency of Inspector General investigations, including whistleblower investigations, as that role is performed by the General Counsel to the IG. If confirmed, I will assist the Office of the Inspector General as requested and appropriate, and I will provide appropriate legal advice to the Department in conjunction with actions stemming from an investigation.

83. Is the DOD Inspector General bound by the legal opinions of the DOD General Counsel?

Although legal opinions of the DoD General Counsel generally are binding throughout the Department of Defense under 10 U.S.C. § 140, the General Counsel to the Inspector General is expressly exempted from the scope of 10 U.S.C. § 140 by virtue of Section 907 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 (5 U.S.C. App. Inspector General Act of 1978 § 8(h)).

84. What role, if any, does the DOD General Counsel currently have in reviewing DOD IG reports of investigation and inspections? In your view, do you see a need for a change in this role?

My understanding is that the DoD General Counsel reviews certain DoD IG reports of investigation and inspections prior to finalization and release but that the DoD General Counsel does not review the legal sufficiency of Inspector General investigations and recommendations. If confirmed, I will examine whether any changes are needed to this role.

85. Is DOD or component information otherwise protected by the attorney client privilege made available to the DOD Inspector General in the execution of his duties pursuant to the Inspector General Act of 1978, as amended? Please explain your answer.

My understanding is that information otherwise protected by the attorney client privilege is made available to the DoD Inspector General.

Civilian Attorney Recruiting and Retention

86. In your view, does the Office of the General Counsel of the Department of Defense have a sufficient number of attorneys to perform its many missions? Please explain your answer.

While I am not aware of any gaps in attorney staffing impacting mission performance, if confirmed, I will review staffing to ensure that the DoD Office of General Counsel can continue performing its many missions successfully.

87. What is your assessment of your ability, if confirmed, to hire and retain high quality attorneys in the Office of the DOD General Counsel, as well as to provide sufficient opportunity for their development and advancement?

If confirmed, I am confident I will be able to hire and retain high quality attorneys. If I were to become aware of any barriers to hiring, advancing and retaining quality attorneys, I would work to address those barriers.

88. Do you believe that the DOD legal community needs additional incentives and talent management tools to recruit, develop, sustain, and retain a 21st century career civilian attorney workforce? If so, what sort of incentives and tools do you perceive would be helpful?

If confirmed, I will work with senior leaders in the Office of General Counsel and Defense Legal Services Agency to determine if any additional incentives and talent management tools are needed to ensure a high quality career civilian attorney workforce in the coming years. If any incentives and tools are needed, I would work to obtain them.

89. Do you foresee that in the coming years, DOD's demand for civilian attorneys with certain technical-legal expertise (e.g., cyber, space, and intellectual property law) will increase, commensurate with the Department's evolving missions and the 2018 NDS? If so, in what technical-legal specialties would you expect DOD's

requirements to increase, and why?

If confirmed, I will continuously assess the level of technical legal expertise in these areas to determine whether DoD's civilian attorneys possess the requisite skills to remain effective in these critically important subject areas, particularly as needs increase based on the Department's evolving missions.

The DOD General Counsel serves as the selecting official for all OSD career Senior Executive Service (SES) attorney positions.

90. What do you view as the most important executive competencies of an SES attorney and how would you assess these in deciding whether to recommend a particular candidate for selection and appointment to an attorney's position in the career SES?

First and foremost, SES attorneys must be exceptional lawyers with high levels of integrity. Being an exceptional attorney necessarily involves many of the competencies expected of SES members, and I would look for these competencies when assessing candidates through written submissions and interviews. In addition to having excellent problem-solving and technical skills, exceptional attorneys must be innovative and flexible thinkers who can work strategically with senior leaders to lawfully implement the Department's initiatives in a rapidly-changing landscape. They must encourage constructive discussion of differing views to arrive at the best possible legal advice. They must be masterful coalition builders with the ability to persuade others. Finally, they must understand DoD's mission, as well as internal and external factors that affect the organization in order to be effective in providing legal options for senior leader action.

Acquisition

91. What is your understanding of the role of the DOD General Counsel in ensuring that the Department's acquisition programs are executed in accordance with applicable law and policy?

The General Counsel, as chief legal officer, plays a vital role in ensuring that DoD carries out its acquisition programs consistent with applicable law and policy. Attorneys play meaningful roles throughout every acquisition to ensure that DoD acts in full accord with Congressional and Executive intent as expressed through law and policy. If confirmed, I will lead the many hardworking acquisition attorneys throughout the Department in making certain that procurements are conducted fairly and, wherever possible, transparently.

92. What are your views on the overall effects on DOD of defense acquisition reform to date?

My understanding is that dividing the Office of the Undersecretary of Defense for Acquisition, Technology, and Logistics into the Under Secretary for Research and Engineering and the Under Secretary for Acquisition and Sustainment has allowed the successor organizations to focus their efforts on different areas within the technology life cycle and deliver more rapid, robust capabilities to the warfighter.

93. If confirmed, how would you ensure that DOD acquisition officials understand and leverage the flexibilities provided by Congress in the context of acquisition reform?

If confirmed, my job as General Counsel would be to ensure that the flexibilities provided by Congress are utilized whenever they can benefit DoD. Training attorneys and other acquisition professionals on flexibilities provided legislatively will facilitate expanded use of alternative pathways in the Adaptive Acquisition Framework, which will in turn allow DoD to tailor their acquisition strategies to deliver better, faster solutions.

94. Do you perceive benefit to DOD in establishing major acquisition programs under Section 804 authority? What are the risks of doing so? Please explain your answer.

In Section 804 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), Congress gave the Department the authority to create a new type of acquisition pathway, the Middle Tier of Acquisition (MTA) that provides for rapid fielding or rapid prototyping of capabilities needed by the warfighter. The NDAA also amended 10 U.S.C. § 2430(a)(2)(A) to exclude 804 MTA programs from the definition of a Major Defense Acquisition Program (MDAP), which results in the Department having flexibility to tailor an MTA program without the need to comply with the rigid statutory requirements applicable to MDAPs. The principal benefits of an MTA program are a function of this flexibility. There is risk that the provision of information to Congress outside the rigid MDAP statutory framework could fall short of what Congress needs to fulfill its oversight and authorization functions, because there would be no express statutory mandate for providing the information. If confirmed, I will work to mitigate that risk by providing information to Congress even where not statutorily required.

95. If confirmed, what role would you establish for yourself in promoting compliance by both DOD acquisition personnel and contractor personnel with procurement integrity and other ethics laws and policy?

Fair and open procurements are critical to meeting the needs of our warfighters and safeguarding our national security. My role, if confirmed as General Counsel, will be to ensure that the acquisition workforce understands the importance of procurement integrity and the standards of conduct by maintaining a robust ethics and procurement integrity training program and encouraging leaders to set a strong “tone from the top” to reinforce the expectation of ethical conduct by all personnel.

In February 2019, the Congressionally-established Advisory Panel on Streamlining

and Codifying Acquisition Regulations (the “809 Panel”) submitted its final report, detailing 98 recommendations to enhance DOD’s ability to acquire and deliver warfighting capability in a cost-effective and timely manner, better to address the concerns raised by the current international security environment.

96. Given the recommendations of the 809 panel, are there any additional acquisition reforms you would endorse for consideration by Congress?

Although I am not fully versed in the details of the 809 Panel report, if confirmed, I will be happy to review the detailed recommendations of the Panel to identify whether there are additional acquisition reforms for Congress to consider.

97. If confirmed, how would you assess and implement the Panel’s recommendation to reorganize acquisition statutes, including statutory notes?

I understand that the Office of the Under Secretary of Defense for Acquisition and Sustainment has established a working group to assess the 809 Panel’s recommendations on the reorganization of the Title 10 U.S. Code acquisition statutes and accompanying statutory notes. If confirmed, I will continue to work with the working group to complete its efforts and to review the implementation plan for updating the Federal Acquisition Regulations, the DoD FAR Supplement, and DoD issuances.

Risk Aversion

Many attempts at management reform in the Department of Defense, to include personnel reform and acquisition reform, involve allowing senior and local leadership to make maximum use of authorized flexibilities and exceptions to standard practices. It is generally believed that DOD’s so-called “risk averse culture” stifles initiative and traps the Department in a set of antiquated and burdensome practices. At times, this culture of risk aversion has been attributed to the legal advice rendered by DOD and component attorneys.

98. In your view, what role should the assessment of “risk” play in an attorney’s provision of legal advice?

In my view, an attorney’s role is to provide DoD leaders with assessments of legal risks associated with proposed actions to enable senior leaders to make informed decisions. If a particular course of action is legally impermissible, it is the attorney’s obligation to provide that advice. Attorneys should suggest, whenever possible, alternative courses of action that would allow achievement of policy goals, together with the attorney’s assessment of the associated legal risk.

Security Clearance Reform

“Trusted Workforce 2.0” represents a significant overhaul of the system for granting or denying security clearances for access to classified information. In January

2021, the Office of the Director of National Intelligence and the Office of Personnel Management published a proposed new doctrine intended “to guide transformative efforts to reform the U.S. Government personnel security vetting processes [in order] to promote mobility, improve efficiencies and move towards an enhanced risk management approach.” Another January 2021 memorandum brought all Department of Defense civilian, military and contractor clearance disputes under the umbrella of the Defense Office of Hearings and Appeals (DOHA).

99. If confirmed, what role would you and the Office of the DOD General Counsel play in the implementation of “Trusted Workforce 2.0”?

I understand the “Trusted Workforce 2.0” is part of the Federal Personnel Vetting Core Doctrine, which is a general policy statement published by the Acting Director of the Office of Personnel Management as the Suitability and Credentialing Executive Agent and the Director of National Intelligence as the Security Executive Agent. Separately, a February 4, 2021, memorandum from President Biden established an interagency working group to, among other things, “assess implementation of security clearance reforms and reciprocity proposals, additional reforms to eliminate bias, and ensure efficient timelines for completion of security clearance investigations.” If confirmed, I would provide my best legal advice in support of DoD efforts to reform, align, and modernize the DoD personnel security vetting process.

100. What role would you play in the oversight of DOHA and its actions on appeals from the denial of a security clearance? In your view, what benefits attach to the assignment of all security clearance disputes to DOHA?

I am committed to the goal of keeping the Nation safe while providing a fair, consistent, and transparent administrative process to the men and women who serve in important sensitive National security roles. If confirmed, I will oversee the Defense Office of Hearings and Appeals (DOHA). Through this direct line of supervision and oversight, I would ensure the independence, fairness, and consistency of DOHA decisions in the established administrative processes for which DOHA has responsibility. I will also, if confirmed, verify that the rights of individuals are being protected consistent with the Constitution, U.S. statutes, Executive Orders, regulations, and DoD policy. If confirmed, I will have to study further the implications of consolidating additional responsibilities in the Defense Office of Hearings and Appeals.

Conflicts of Interest

Service member and DOD civilian employee conflicts of interest have long been a concern.

101. What is the general prevalence in the armed forces, and in the DOD civilian workforce, of violations of criminal laws and executive branch and DOD ethics regulations relating to conflicts of interest?

I believe preventing potential conflicts of interest is paramount to maintaining the public's trust and confidence in the Department's operations. Based on annual data reported on the Office of Government Ethics website for Calendar Year 2019, I understand that there were only seven statutory violations and 366 regulatory violations in a Department of over 1.7 million full-time personnel. That represents far less than 1% of the total DoD workforce. As the Department of Defense Designated Agency Ethics Official, I will, if confirmed, carry out an effective ethics program to prevent and resolve conflicts of interest and the appearance of conflicts of interest.

102. What role do attorneys in the Office of the DOD General Counsel and in the Defense Legal Services Agency play in ensuring that DOD personnel—military and civilian—timely identify and disclose potential conflicts of interest and take all appropriate steps to avoid or mitigate them?

I understand that experienced and capable attorneys who are experts in this area of the law help DoD personnel identify and prevent potential conflicts of interest through financial disclosure reviews and robust training programs. All senior personnel are required to file public financial disclosure forms within 30 days of arrival and annually thereafter. Likewise, non-senior personnel whose duties require them to participate in matters affecting the financial interests of outside entities are required to file confidential financial disclosure forms. I understand that ethics counselors promptly and thoroughly review these forms for potential conflicts of interest and provide appropriate legal advice. They also work with filers and their supervisors to implement any necessary actions to avoid conflicts of interest. As the Department of Defense Designated Agency Ethics Official, I will, if confirmed, carry out an effective ethics program to prevent and resolve conflicts of interest and the appearance of conflicts of interest.

103. In your view, what essential purpose is served by legal and policy restrictions on post-government employment of DOD personnel—both military and civilian?

I believe the essential purpose served by legal and policy restrictions on post-Government employment of DoD personnel is to preserve the public's trust in the integrity of Department of Defense operations. As the Department of Defense Designated Agency Ethics Official, I will, if confirmed, carry out an effective ethics program to ensure that the public's trust in the Department is maintained.

104. Are the laws and regulations relating to the post-government employment of DOD personnel—military and civilian—adequate, coherent, and comprehensible, in your view?

I believe it is important to have a congruent body of ethics laws applicable to all Government employees and under the authority of the Office of Government Ethics (OGE) to regulate. This ensures fairness and consistency throughout the federal government and among former federal employees, and avoids confusion that may lead to inadvertent violations. If confirmed, I will ensure all ethics laws are implemented effectively.

105. How might such body of laws and regulations be improved, in your view?

I understand that the Government Accountability Office is currently studying the post-Government employment laws and regulations that apply to former DoD personnel, and that the current National Defense Authorization Act requires the Department to brief this Committee, as well as the House Armed Services Committee, on the implementation of these laws and regulations. If confirmed, and the Secretary of Defense designates me to participate, I look forward to speaking with the Committees about these issues, and to participating in the briefing.

Anti-deficiency Act (ADA)

106. What are your ideas for streamlining the investigative and review process attending a determination that an ADA violation has occurred?

The timely, accurate and thorough investigation, review and reporting of Anti-Deficiency Act violations is essential to ensuring the transparency with which the Department stewards appropriated funds. I understand that DoD has robust policies and procedures to ensure the defense agencies and military departments can detect potential ADA violations; however, I believe all processes can benefit from ongoing reviews. If confirmed, I will work to support the Under Secretary of Defense (Comptroller) in improving the Department's current process for addressing Anti-Deficiency Act violations.

Professional Responsibility

107. What is the role of the General Counsel of the Department of Defense in ensuring that attorneys under her supervision adhere to Rules of Professional Conduct? If confirmed, how would you approach this critical supervisory duty with regard to the Office of the DOD General Counsel?

The DoD General Counsel is responsible for the critically important duty of establishing professional responsibility standards for civilian attorneys under her supervision and for overseeing adherence to these standards, in accordance with DoD Directive 5145.01. If confirmed, I will review the rules and procedures currently in place to ensure legal services are provided with the highest degree of professionalism.

108. What is your understanding of the role of the DOD General Counsel with respect to adherence to the Rules of Professional Conduct by DOD component civilian attorneys not under the supervision of the DOD General Counsel and military judge advocates?

My understanding is that the DoD General Counsel retains overall responsibility for the legal services performed by all DoD attorneys, civilian and military. That said, most

matters of attorney professional responsibility are handled by the individual DoD Components through their respective General Counsel or Judge Advocates General.

The American Bar Association’s *Standing Committee on Pro Bono and Public Service* asserts that “[w]hen society confers the privilege to practice law on an individual, he or she accepts the responsibility to promote justice and to make justice equally accessible to all people. Thus, all lawyers should aspire to render some legal services without fee or expectation of fee for the good of the public.”

109. If confirmed, would you favor the creation of a program to permit civilian attorneys in DOD OGC or in a DOD component to engage in *pro bono* work? If not, why not? If so, what would be the appropriate parameters of such a program, in your view?

It is my understanding that a program to permit civilian attorneys in the DoD Office of General Counsel to participate in pro bono work currently exists in accordance with Section 2 of Executive Order 12988, on Civil Justice Reform. I also understand that through this program, DoD participates in the larger Federal Agency Pro Bono Program and the Office of General Counsel provides a Pro Bono Program Coordinator for DoD. In my judgment, DoD Office of General Counsel personnel participation in pro bono activities should be encouraged, consistent with the law. If confirmed, I am prepared to review the current DoD Office of General Counsel Pro Bono Policy to ensure it meets the current needs of DoD and the attorneys who wish to participate in providing pro bono services.

110. If confirmed, what actions would you expect a DOD or component civilian attorney or judge advocate to take should that attorney become aware of improper activities by an officer or employee of the Department who has sought, but failed to follow, the attorney’s legal advice?

As with any DoD Service member or civilian employee, DoD attorneys have an obligation to report activities of DoD officials that are in violation of law, regulation, or DoD policy to the Inspector General or another appropriate authority. I understand that DoD has established reporting requirements for doing so.

111. If confirmed, what actions would you take were it brought to your attention that a certain appointment or designation was potentially in violation of the Federal Vacancies Reform Act and associated case law?

If confirmed, and if it were brought to my attention that an appointment or designation was potentially in violation of the Federal Vacancies Reform Act (FVRA) of 1998, as amended, I would take steps to ascertain the facts, inform the Department’s leadership if I have concerns, and provide them with my best advice to resolve the situation.

112. If confirmed, what actions would you take were it brought to your attention that an individual pending nomination or confirmation by the Senate, to a

Presidentially-appointed, Senate-confirmed office was potentially acting in contravention of the policies of the Senate Armed Services Committee regarding the presumption of confirmation?

I share the Committee's concern that a nominee to a Presidentialy-appointed, Senate-confirmed position should not do anything to presume confirmation. If confirmed, and if it was brought to my attention that a nominee was acting contrary to the policies of the Senate Armed Services Committee regarding the presumption of confirmation, I would take steps to determine the facts, inform the Department's leadership, including the Assistant Secretary of Defense for Legislative Affairs, of the issue, and provide them with my best advice to resolve the situation.

Annual Department of Defense Legislative Program

One of the responsibilities of the DOD General Counsel is to coordinate the Department's legislative program and to provide the Department's views on legislative proposals initiated from outside the Department.

113. If confirmed, what actions would you take to ensure that the Department's legislative proposals are submitted to the Armed Services Committees of the Senate and the House of Representatives in a timely manner, so as to ensure ample opportunity for consideration of such proposals by Congress and the public before markup of the annual NDAA?

If confirmed, I will work with Committee staff to set realistic deadlines for legislative proposal submissions. I will work within DoD and with OMB to ensure those deadlines are respected.

114. What actions would you take, if confirmed, to ensure Congress receives the Department's views on other proposed legislation in a timely manner?

If confirmed, I will work with my colleagues in Legislative Affairs and throughout the Department to ensure timely replies to informal requests for views on specific legislation.

Review of Decisions of Military Department Boards for the Correction of Military Records and Discharge Review Boards

115. When will DOD implement and make available to service members the process for conducting a final review of a request for a discharge upgrade, as required by section 1553a of title 10, U.S. Code?

It is my understanding that the Department of Defense implemented the final review process through the Deputy Secretary of Defense's Memorandum, "Department of Defense Implementing Section 523 of the National Defense Authorization Act for Fiscal Year 2020," dated January 29, 2021. It designated the Secretary of the Air Force, under the oversight of the Under Secretary of the Defense for Personnel and Readiness, as the

lead agent for the Department with responsibility for the formation, operation and management of the final review process of requests for an upgrade in the characterization of a discharge or dismissal as required by section 1553a of Title 10 of the U.S. Code. The January 29th Memorandum also provided procedures for Service members, and their legal representatives, to apply to the new review process, referred to as the Department of Defense Discharge Appeal Review Board, or DARB for short.

116. If confirmed, what role would you establish for the Office of the DOD General Counsel in the operation of this process?

If confirmed, I will review the current Department of Defense Discharge Appeal Review Board (DARB) process and determine the appropriate role for the Office of the DoD General Counsel in its operation.

Execute Orders (EXORDs)

The NDAA for Fiscal Year 2020 requires the Secretary of Defense, upon request by the Chairman or Ranking Member, to provide the Armed Services Committees with access to, and the ability to review, EXORDs signed by the Secretary or the commander of a combatant command. The law allows for an exception to this requirement only in “extraordinary circumstances necessary to protect operations security or the sensitivity of the execute order.”

117. Will you commit to complying with this requirement, if confirmed?

Section 1744 of the NDAA for FY 2020 requires the Secretary to provide access to the relevant execute orders absent extraordinary circumstances. If confirmed, I will provide my best legal advice regarding compliance with this law.

118. Under what “extraordinary circumstances” do you believe it would be appropriate for the Secretary of Defense to limit review of an EXORD by the Armed Services Committees?

If confirmed, I commit to working to accommodate any request from this Committee, including requests for specific execute orders. Limiting review of an execute order would be appropriate when the Secretary concludes that it is required to protect operations security or the sensitivity of the execute order, or otherwise concludes that the execute order may be protected by executive privilege and refers the matter to the White House. If confirmed, I will provide the Secretary with legal advice regarding such determinations to limit review in order to help ensure that they meet the letter and intent of the law.

Military Malpractice Claim Framework

Section 731 of the NDAA for FY 2020 authorized the Secretary of Defense to allow, settle, and pay claims against the United States for personal injury or death incident to the service of a member of the uniformed services that was the result of medical malpractice caused by a Department of Defense health care provider.

119. When can the Congress expect publication and implementation of the final DOD regulations governing the filing, adjudication, approval, and payment of such claims?

I am informed that the draft interim final rule to implement section 731 of the NDAA for FY 2020 is currently with the Office of Management and Budget for review and interagency coordination. Decisions on claims can begin to be issued and payments made to claimants once the interim final rule is published. Once the interim final rule is published, public comments will be considered and a final rule issued within one year thereafter.

120. If confirmed, what role would you establish for yourself in overseeing the implementation of these regulations, once published, across affected DOD components?

If confirmed, I will continue to exercise oversight in the implementation of the regulations to ensure that they are implemented consistently and so that any necessary adjustments are made.

Military Health System Reorganization

Section 702 of the NDAA for FY 2017, as clarified by sections 711 and 712 of the NDAA for FY 2019, transferred the administration and management of military treatment facilities (MTFs) from the Military Services to the Defense Health Agency (DHA). Yet, the Department's implementation of this transfer has been delayed.

121. If confirmed, what role would you establish for yourself in promoting the rapid and efficient transfer to DHA of responsibility and authority for the administration and management of Military Department MTFs?

It is my understanding that both Congress and the Office of the Secretary of Defense have identified the transfer of military medical treatment facilities to the Defense Health Agency as a significant priority. If confirmed, I will support Office of the Secretary of Defense leadership, including the Under Secretary of Defense for Personnel and Readiness and the Assistant Secretary of Defense for Health Affairs, in ensuring the transfer of responsibility for military medical treatment facilities is done effectively and in accordance with all statutory requirements.

Congressional Oversight

In order to exercise its legislative and oversight responsibilities, it is important that

this Committee and other appropriate committees of Congress are able to receive testimony, briefings, reports, records (including documents and electronic communications) and other information from the Department.

122. Do you agree, without qualification, if confirmed, and on request, to appear and testify before this committee, its subcommittees, and other appropriate committees of Congress? Please answer with a simple yes or no.

Yes.

123. Do you agree, without qualification, if confirmed, to provide this committee, its subcommittees, other appropriate committees of Congress, and their respective staffs such witnesses and briefers, briefings, reports, records (including documents and electronic communications), and other information as may be requested of you, and to do so in a timely manner? Please answer with a simple yes or no.

Yes.

124. Do you agree, without qualification, if confirmed, to consult with this committee, its subcommittees, other appropriate committees of Congress, and their respective staffs, regarding your basis for any delay or denial in providing testimony, briefings, reports, records—including documents and electronic communications, and other information requested of you? Please answer with a simple yes or no.

Yes.

125. Do you agree, without qualification, if confirmed, to keep this committee, its subcommittees, other appropriate committees of Congress, and their respective staffs apprised of new information that materially impacts the accuracy of testimony, briefings, reports, records—including documents and electronic communications, and other information you or your organization previously provided? Please answer with a simple yes or no.

Yes.

126. Do you agree, without qualification, if confirmed, and on request, to provide this committee and its subcommittees with records and other information within their oversight jurisdiction, even absent a formal Committee request? Please answer with a simple yes or no.

Yes.

127. Do you agree, without qualification, if confirmed, to respond timely to letters to, and/or inquiries and other requests of you or your organization from individual Senators who are members of this committee? Please answer with a simple yes or

no.

Yes.

128. Do you agree, without qualification, if confirmed, to ensure that you and other members of your organization protect from retaliation any military member, federal employee, or contractor employee who testifies before, or communicates with this committee, its subcommittees, and any other appropriate committee of Congress? Please answer with a simple yes or no.

Yes.