

**Advance Policy Questions for Paul Ney**  
**Nominee for General Counsel of the Department of Defense**

**Department of Defense Reforms**

**The National Defense Authorization Acts for Fiscal Year 2017 and 2018 included the most sweeping reforms since the Goldwater-Nichols Department of Defense Reorganization Act of 1986.**

**Do you support these reforms?**

Yes, I support the reforms.

**What other areas for defense reform do you believe might be appropriate for this Committee to address?**

If I am confirmed, I would have the opportunity to work with senior leaders in the Department and would have a better sense of what the Department's needs would be. I also then would be able to ascertain how the implementation of the reforms in the National Defense Authorizations Acts for Fiscal Years 2017 and 2018 are proceeding and whether to recommend any modifications or additional reform measures.

**Duties**

**Section 140 of title 10, United States Code, provides that the General Counsel of the Department of Defense (DOD General Counsel) is the chief legal officer of the Department of Defense and that the DOD General Counsel shall perform such functions as the Secretary of Defense may prescribe.**

**What is your understanding of the duties and functions of the DOD General Counsel?**

The General Counsel, as the chief legal officer of the Department of Defense, is the primary legal adviser to the Secretary of Defense and other senior DoD leaders.

**If confirmed, what duties and functions do you expect that the Secretary of Defense will prescribe for you?**

The Defense Department carries out unique military and national security functions, as well as a wide variety of activities ranging from providing health care to its military personnel and their families to working with and training important allies and partners, and much in between. If I am confirmed, I expect that I will be responsible for overseeing the provision of timely and accurate legal advice on myriad DoD activities. I eagerly anticipate the challenge, if I am confirmed, of providing legal advice on a broad portfolio of subject areas essential to optimizing the readiness and effectiveness of our troops.

**Who is the client of the DOD General Counsel?**

The Department of Defense and its senior leaders in their official capacities are the clients of the DoD General Counsel.

**Qualifications**

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

In the three decades that I have practiced law I have been fortunate to have had a wide variety and range of subject matter and practice experience and to have worked with and learned from outstanding professional colleagues. The diversity and scope of my law and business background has served me well during my the several years of public service in the offices of the General Counsel of the Department of the Navy and the Department of Defense, as well as in my current position as the Chief Deputy Attorney General of the State of Tennessee. I believe that those years of experience will help me fulfill the duties and responsibilities of the DoD General Counsel.

**Do you believe that there are actions you need to take to enhance your ability to perform the duties of the DOD General Counsel?**

Yes. Throughout my career I have found that continuous study of subject matter, hands-on experience, and a commitment to working with and learning from my colleagues and teammates to achieve our objectives enhance my ability to perform my duties. I learned from my previous service in the offices of the General Counsel in the Department of the Navy and the Department of Defense that these positions require and provide these opportunities.

**Major Challenges and Priorities**

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

The published summary of the recently updated National Defense Strategy describes the key strategic challenges and objectives and the strategic approach to guide the Department of Defense. It identifies three primary lines of effort to meet those challenges: rebuilding military readiness as we build a more lethal Joint Force; strengthening alliances as we attract new partners; and reforming the Department's business practices for greater performance and affordability. I believe that each of the lines of effort will require the support and advice of the DoD General Counsel and the Office of General Counsel, and, if I am confirmed, I look forward to providing legal advice to help meet these and other challenges facing the Department.

**If confirmed, what plans do you have for addressing these challenges?**

The Department has experienced and capable attorneys who are experts in relevant areas of law, both in the Office of the DoD General Counsel and in the wider DoD legal community. If I am confirmed, I hope to lead those attorneys and ensure that they have the resources and support that they need to provide the best possible legal advice to decision makers throughout the Department of Defense as we address these significant challenges. If I am confirmed, I would also endeavor to assist the Secretary of Defense by providing the legal advice he needs to lead the Department.

**What do you see as the most significant legal issues the Department of Defense will face in the coming year?**

If I am confirmed, I will immediately seek more clarity on this question in order to address these problems as quickly and thoroughly as possible. However, from my current perspective, as mentioned above, confronting the problems the National Defense Strategy describes as the Department's major challenges, and doing so in a way that supports and upholds the rule of law, will require significant legal expertise and dedication. If I am confirmed, I will work to ensure that the Office of General Counsel is prepared in every way to advise the Secretary and his staff. I anticipate other areas that will need the attention of the Office of General Counsel will include continuing to support the Department's efforts to prevent and respond to sexual assault in the armed forces, to optimize the Department's business practices, to address the threat of cyber warfare, and to resolve on-going litigation surrounding military detention operations and military commissions.

**Does the DOD Office of the General Counsel have the resources to deal with these issues?**

If I am confirmed, I will be able to develop a better sense of the Office of the General Counsel's resource needs. My prior experience working with many of the lawyers now in the Office gives me great confidence in the capabilities of the Office. If I determine that additional resources are necessary, I will work with the Department to obtain them.

**What broad priorities will you establish in terms of issues that must be addressed by the DOD Office of the General Counsel?**

If I am confirmed, I will work to ensure that the DoD Office of General Counsel capably supports the Secretary's vision of a headquarters "where leadership can harness opportunities and ensure effective stewardship of taxpayer resources." I believe that the first priority for the General Counsel in fulfilling this vision should be to ensure that the Office of General Counsel staff has the skills, training, resources, and leadership required to support the leadership of the Department effectively.

**Relations with Congress**

**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?**

The Department appears to work well with both the Senate Armed Services Committee and with the Congress as a whole. I have always believed DOD personnel understand the importance of maintaining strong and collaborative relationships with Congress. If I am confirmed, I will continue to maintain and cultivate those strong relationships, especially those involving the Defense Oversight Committees.

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

I strongly believe any successful relationship is built on open, honest, and timely communication. If I am confirmed, I am committed to building and maintaining open lines of communication with Congress. I will work closely with Members of this Committee, the Congress as a whole, as well as the professional staffs of the Defense Oversight Committees.

**Legal Opinions**

**Are legal opinions of the DOD Office of the General Counsel binding on all lawyers within the Department of Defense?**

The legal opinions of the DoD General Counsel generally are binding throughout the Department of Defense. Under 10 U.S.C. § 140, the DoD General Counsel is the “chief legal officer of the Department of Defense,” and under DoD Directive 5145.01, the General Counsel is responsible for “[e]stablish[ing] DoD policy on general legal issues, determin[ing] the DoD position on specific legal problems, and resolv[ing] disagreements within the DoD on such matters.” 10 U.S.C. § 140, however, does not apply to the General Counsel to the Inspector General. In addition, Title 10 prohibits any officer or employee of DoD from interfering with the independent legal advice of certain senior military lawyers.

**If confirmed, how would you ensure that legal opinions of your office are available to Department attorneys, including judge advocates?**

Legal opinions issued by the DoD General Counsel should be available to lawyers across the Department. If I am confirmed, I will ensure that legal opinions are circulated to attorneys in the Department, especially those affected by them. I will also meet regularly with senior lawyers in the Department to keep them informed of new legal opinions.

**If confirmed, are there specific categories of DOD General Counsel legal opinions that you expect to reconsider and possibly revise? If so, what categories?**

I am not aware of any current legal opinions that, if I am confirmed, I would expect to reconsider or revise.

### **Relationship with the Department of Justice**

**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?**

The Department of Justice has the statutory responsibility to represent the United States and its officers, employees, and agencies, including the Department of Defense, in litigation. Attorneys from the Department of Defense work closely with Department of Justice lawyers on matters in which DoD, or one or more of its components or officials, is a party or has an interest.

**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 (OLC) of the Department of Justice that directly affect the Department of Defense?**

If I am confirmed, I expect to work closely with the Office of Legal Counsel of the Department of Justice on the most complicated legal issues confronting the Department of Defense, as I did before when I served as the Deputy General Counsel (Legal Counsel) in the Department. By continuing to foster a close working relationship with OLC, I will strive to ensure that DoD and its officials have the benefit of the highest-caliber legal advice within the Executive Branch.

**What actions would you take in response to an opinion issued by OLC with which you disagreed as a matter of proper interpretation of the law?**

The Attorney General, usually acting through the Assistant Attorney General for OLC, sometimes is called on to issue legal opinions that are binding on the entire Executive Branch, including the Department of Defense. If I am confirmed, and in the event that OLC issues an opinion with which I disagree as a matter of law, I would express my opinion to the Assistant Attorney General or, if necessary and appropriate, the Attorney General and ask for reconsideration of the OLC opinion. I hope to have developed a sufficiently close working relationship with OLC that my input would be considered prior to issuance of the legal opinion.

**In your view, does the Department of Defense need more independence and resources to conduct its own litigation or to improve upon its current supporting role?**

My understanding, informed in part by my prior service at DoD, is that the

Department's lawyers have exceptionally strong relationships with their counterparts at the Department of Justice and that the current arrangement serves the Department well. Accordingly, I am not aware of any specific changes that need to be made at this time, but if I am confirmed, I will remain open to suggestions or requests for change from DoD lawyers.

### **Military Justice Matters**

**In response to attempts within the Department of Defense to subordinate legal functions and authorities of the Judge Advocates General to the General Counsels of the Department of Defense and the Services, Congress enacted legislation prohibiting any officer or employee of the Department of Defense from interfering with the ability of the Judge Advocates General of the Services and the legal advisor to the Chairman of the Joint Chiefs of Staff to provide independent legal advice to the Chairman, Service secretaries, and Service chiefs.**

**What is your view of the need 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 Service secretaries, Chairman of the Joint Chiefs, and Service chiefs?**

The Judge Advocates General of the Military Departments, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff must provide their best independent legal advice to the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the Service Chiefs, as appropriate. While they need not seek advice from the Department of Justice, the DoD General Counsel, or the Military Department General Counsel concerned, their views should be informed by relevant legal guidance from them.

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

Judge advocates within the Services and joint commands must provide legal advice to military commanders that is independent of improper external influence. Judge advocates must be able to provide timely and effective day-to-day legal advice to military commanders in the field without seeking approval or input from the DoD General Counsel. In doing so, their 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.

**If confirmed, would you propose any changes to the current relationships between the uniformed judge advocates and the Service General Counsels?**

I am not aware of any change that I would propose to the current relationships between the uniformed judge advocates and the General Counsel if I am confirmed.

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

Decisions in military justice cases are independently made by the commander of the accused, the convening authority, the military judge, and court members. Appellate review of cases arising under the Uniform Code of Military Justice (UCMJ) is provided by the Military Departments' Courts of Criminal Appeals, the U.S. Court of Appeals for the Armed Forces (CAAF), and potentially the U.S. Supreme Court through writs of certiorari. The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps play crucial roles in providing military justice personnel and training in their respective Military Services and supervising the administration of military justice. The Secretary of Defense becomes involved in military justice only in limited circumstances. The General Counsel of the Department of Defense similarly plays a limited role in the military justice system's operation. For example, the General Counsel of the Department of Defense determines whether the Department of Defense will ask the Solicitor General to seek Supreme Court review of cases decided against the government by CAAF and sometimes assists the Office of the Solicitor General in preparing briefs for the Supreme Court in military justice cases. The General Counsel plays a more significant 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 or the UCMJ and offering advice to appropriate policymakers concerning those recommendations. Traditionally, the DoD General Counsel has also served as an informal DoD liaison between the Department and CAAF. If I am confirmed, I will continue to fulfill those roles.

**In your view, is it essential to preserve the role of the military commander, including the joint force commander in deployed situations, for military justice matters?**

I am aware that since I last served in the Department of Defense, the issue of the military commander's role in military justice matters has been the subject of a great deal of discussion and study, including by Congressionally mandated Federal Advisory Committees. If I am confirmed, I plan to study carefully those analyses of the commander's role in the military justice system.

**What are your views on whether it would be appropriate to preserve the role of the commander for the entire spectrum of military operations, from deployment to redeployment, in combat areas as well as in garrison?**

I understand that unity of command is an important principle of joint military operations and that it is implemented largely through the commanders of the geographic combatant commands. I also understand that forces in garrison must prepare to support operations in more than one potential theater of operations. Thus, the Secretaries of the Military Departments exercise full authority over many forces in garrison in the United States. Forces are typically transferred to the command of the relevant geographic combatant command upon the forces' deployment to a specific area of responsibility. If I am

confirmed, I would expect to participate in any consideration of proposals to refine this division of responsibility.

## **Detainee Issues**

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

If confirmed as DoD General Counsel, I will provide legal advice and counsel on a wide range of issues. Given the Department's ongoing combat operations, I expect to be called upon to provide legal advice on the handling of detainees. In so doing, I will ensure that the Department adheres to all of its legal obligations under the Constitution, treaties, and laws of the United States.

### **What role did you play in addressing legal issues regarding detainees when you served as the Acting Navy General Counsel, Principal Deputy General Counsel of the Department of the Navy, and Deputy General Counsel for Legal Counsel in the Department of Defense?**

As the Deputy General Counsel (Legal Counsel), I oversaw and coordinated habeas and other litigation involving Guantanamo detainees and provided legal advice on legislative and other matters involving detainees. I also supervised the Office of the Chief Prosecutor for Military Commissions.

### **Do you believe interrogation techniques derived from Survival, Evasion, Resistance, and Escape (SERE) techniques are a lawful and effective way to acquire useful intelligence?**

No, the only interrogation techniques, approaches, and treatment related to intelligence interrogations that are authorized by U.S. statute are those authorized by and listed in Army Field Manual 2-22.3, "Human Intelligence Collector Operations." SERE techniques are not authorized by or listed in Army Field Manual 2-22.3. Furthermore, I understand that Department of Defense policies prohibit specifically the use of SERE techniques for intelligence interrogations. DoD Directive 3115.09, "DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning," specifies that "Use of SERE techniques against a person in the custody or effective control of the DoD or detained in a DoD facility is prohibited."

### **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, and required by section 1045 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92)?**

Yes.

**What role, if any, do you believe the DOD General Counsel should play in the interpretation of section 1045 of the National Defense Authorization Act for Fiscal Year 2016?**

When appropriate, the General Counsel of the Department of Defense should advise the Secretary of Defense and Deputy Secretary of Defense regarding the requirements of this provision of law.

If I am confirmed, and if asked to advise on this provision of law, I would expect to consult closely with other Department lawyers, including the Judge Advocates General and the Legal Counsel to the Chairman of the Joint Chiefs of Staff.

**What role do you believe the Judge Advocates General should play in the interpretation of this provision of law?**

When appropriate, each Judge Advocate General should advise the Secretary of his or her respective department as well as other officers and agencies of their respective military departments.

The Judge Advocates General and other military lawyers should play a prominent role in the interpretation of standards related to the treatment of detainees. The Judge Advocates General and the lawyers they lead bring experience and an important perspective to these and many other matters, and they play a vital role in supporting military forces worldwide. In particular, judge advocates give timely, day-to-day legal advice to military commanders in the field.

**In your view, does the United States have the legal authority to continue holding alleged members and supporters of Al Qaeda and the Taliban as enemy combatants?**

Yes. Congress and the federal courts have made clear that the Executive Branch possesses the authority to detain individuals who were part of, or substantially supported, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners. This authority includes the power to detain any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.

**Do you believe the United States has legal authority to hold U.S. citizens as enemy combatants? If so, please explain.**

Yes. U.S. citizenship alone does not immunize individuals who are captured on the battlefield from detention under the laws of war.

**In your view, should the U.S. Government continue the current Periodic Review Board process and the process of transferring detainees to other countries, subject to the restrictions currently in law?**

Executive Order 13567 establishes a policy and process to review, on a periodic basis, the continued detention of detainees held by the Department of Defense at Guantanamo. The Deputy Secretary of Defense issued a Policy Memorandum in November 2017 updating the procedures applicable to the Periodic Review Board process. I support this process, including transfer where appropriate, subject to existing legal restrictions.

**What role would you expect to play, if confirmed, under the Periodic Review Board procedures for reviewing the status of Guantanamo detainees and determining whether the United States should continue to hold such detainees?**

If confirmed, I expect to provide legal advice to the Secretary of Defense on the status of Guantanamo detainees. The General Counsel also appoints the legal advisor to the Periodic Review Board and is in the legal advisor's supervisory chain.

**In your view, do federal courts have the procedures and capabilities needed to fairly and appropriately review the detention of enemy combatants, pursuant to habeas corpus petitions, where necessary under current law?**

Yes. The courts have provided detainees with meaningful opportunities to contest the legality of their detentions while, at the same time, protecting core national security interests, such as classified information.

**In your opinion, what are the legal and ethical requirements of the Department of Defense to ensure that detainees who are not in the custody of the Department but are subject to joint interrogations by the Department and partner nation security forces are treated humanely and according to the Geneva Conventions? Is it sufficient for the Department to receive assurances that detainees will be treated according to the Geneva Conventions or does the Department have an affirmative obligation to verify those assurances?**

I believe that it is very important to continue to hold ourselves to the highest standards for the humane treatment of detainees, and that we must make clear to our foreign partners that we also expect them to hold themselves to the same standards. I understand that DoD requires DoD personnel, including DoD contractor personnel supporting intelligence interrogations (as incorporated in their contracts), to ensure that all intelligence interrogations, detainee debriefings, and tactical questioning conducted by DoD personnel, either unilaterally or with other U.S. Government or foreign partner personnel, are conducted humanely in accordance with all applicable law and policy and to report any violations of applicable law or policy to the combatant commander in whose area of responsibility the violation occurred for appropriate action. Applicable law and policy can include international law, such as the 1949 Geneva Conventions or other law of war rules, U.S. law, such as the Detainee Treatment Act of 2005 and section 1045 of the National Defense Authorization Act for Fiscal Year 2016, Executive orders, including Executive Order 13491, "Ensuring Lawful Interrogations," DoD policies, and U.S. Army Field Manual 2-22.3, "Human Intelligence Collector Operations." I also understand that

the DoD Law of War Program requires the reporting of any possible, suspected, or alleged violation of the law of war, for which there is credible information, including potential abuses by partner nation security forces. In addition to the requirement to treat detainees humanely, DoD personnel must not be complicit in any mistreatment of detainees, including detainees in the custody of partner nation security forces. For example, I believe that DoD personnel must not encourage, condone, or seek to rely on the mistreatment of detainees in any way. I understand that assurances are only one part of processes to encourage partner nation security forces to respect legal requirements, and I believe that assurances should be carefully assessed for their credibility and reliability.

**What are the legal and ethical requirements of the Department of Defense to ensure that detention facilities that are not run by the Department but are used for joint interrogations with partner nation security forces are run in accordance with the Geneva Conventions? Is it sufficient for the Department to receive assurances that detainees in those facilities will be treated according to the Geneva Conventions or does the Department have an affirmative obligation to verify those assurances?**

Please see the answer to the previous question, which is intended to be responsive to both questions.

**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.**

**In your view, does section 2441 define these terms in a manner that provides appropriate protection from abusive treatment to U.S. detainees in foreign custody and to foreign detainees in U.S. custody?**

Yes.

### **Military Commissions Act**

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

Yes, although the Military Commissions Act of 2009 uses the term “alien unprivileged enemy belligerents” rather than “alien unlawful enemy combatants,” the Act provides appropriate standards and processes for their trials by military commission.

**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?**

Yes, military commissions pursuant to the Military Commissions Act of 2009 provide an effective forum for trying alien unprivileged enemy belligerents for offenses against the law of war and other offenses traditionally triable by military commission.

**If confirmed, what role would you expect to play, if any, in determining whether Guantanamo detainees should be tried for war crimes, and if so, in what forum?**

If I am confirmed, I would expect to provide legal advice, as necessary, to the Secretary of Defense on these matters. I would also note that the General Counsel does not have the authority to decide whether to refer charges to a military commission. Rather, the Convening Authority of the military commissions has that responsibility.

**What is your view on whether the United States should close the detention facility at Guantanamo Bay, Cuba?**

The detention facility at Naval Station Guantanamo Bay remains a safe and lawful location to detain alien unprivileged enemy belligerents to prevent their return to the battlefield.

**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?**

While the General Counsel is the chief legal officer of the Department, these specified lawyers, all of whom play key roles in the military commissions process, must exercise independent legal judgment in accordance with the rules and regulations for military commission.

**Are you concerned about the length of the pretrial procedures for the current military commission cases?**

The Military Commissions Act of 2009, Rules for Military Commission, Regulation for Trial by Military Commission, and the Military Commissions Rules of Court set forth the procedures to be followed when an accused is charged and tried before a military commission. The length of time that process takes is unique and specific to each case and ultimately decided by the individual legal and factual issues before the commission, many of which bear directly on due process and national security considerations.

**In your view, what are the advantages of prosecuting alleged terrorists in military commissions?**

Military commissions, as established by the Military Commissions Act of 2009 and associated rules and regulations, provide a just process for trying offenses against the law of war and other offenses triable by military commission. This process complies with the U.S. and international law.

**Do you see the need for any changes to the Military Commissions Act of 2009?**

If I am confirmed, I may consider, consistent with my responsibilities as chief legal

officer for the Department, recommended changes to the 2009 Military Commissions Act.

### **Authorization for the Use of Military Force**

#### **In what circumstances should the President seek authorization from Congress before using military force?**

I am aware that the War Powers Resolution provides that “the President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.” I support a broad policy of consultation with Congress on matters involving the contemplated use of military force; such consultation could be in various forms, and might involve seeking authorization from Congress in appropriate circumstances.

#### **In your view, does the President require prior authorization from Congress before using military force against North Korea? Please explain why or why not.**

I am aware of the published Department of Justice Office of Legal Counsel opinions describing limited circumstances under which the President has the power to commit U.S. forces abroad and to take military action for the purpose of protecting important national interests even without specific prior authorization from Congress. If I were asked to provide advice regarding North Korea following confirmation and appointment as DoD General Counsel, I would apply the legal standard set forth in those opinions as well as any subsequent authoritative guidance from the Department of Justice.

#### **In what circumstances, if any, do you believe it would be appropriate for the U.S. military to use force, including deadly force, against U.S. citizens?**

Only in exceptional circumstances and in accordance with U.S. law would it be appropriate for the U.S. military to use force against U.S. citizens. As the U.S. Supreme Court has made clear, it is “vital,” even during wartime, not to “give short shrift to the values that this country holds dear or to the privilege that is American citizenship.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion). Bearing this in mind, the Supreme Court has marked out narrow circumstances in which the use of force might nevertheless be appropriate. For example, Supreme Court cases have explained that U.S. citizenship does not prevent U.S. citizens who have joined enemy forces during armed conflict from being regarded as enemy belligerents. *See, e.g., id.* at 519; *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

#### **In what circumstances, if any, do you believe it would be appropriate for the U.S. military to use force, including deadly force, inside the United States?**

It would be appropriate for the U.S. military to use force inside the United States only in exceptional circumstances. For example, using force inside the United States as necessary to protect against a terrorist attack like that perpetrated on September 11, 2001, would be appropriate.

**Shortly after 9/11, Congress passed the Authorization for the Use of Military Force (Public Law 107-40), which provides that “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” This 2001 AUMF remains in effect and provides the legal authority for certain U.S. military actions.**

**What is your understanding of the role of the DOD General Counsel in interpreting the 2001 AUMF and in the application of the AUMF to military activities?**

The role of the DoD General Counsel is to advise the Secretary of Defense, the Office of the Secretary of Defense, and, as appropriate, other personnel of the Department of Defense, on the interpretation of the 2001 AUMF and its application to military operations.

**What is your understanding of how the 2001 AUMF intersects with the international law of armed conflict?**

In *Hamdi v. Rumsfeld*, a plurality of the U.S. Supreme Court interpreted the 2001 AUMF “based on longstanding law-of-war principles.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion). Specifically, the Court explained that “[b]ecause detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.” *Id.* at 519; *accord id.* at 587 (Thomas, J., dissenting).

**In your view, does the Department of Defense have the legal authorities it needs to conduct military operations against entities responsible for 9/11, ISIS, and other forces who plan further attacks against the United States?**

I understand that Secretary Mattis testified in October of last year that Article II of our Constitution and the 2001 and 2002 AUMFs provide sufficient legal authority for U.S. forces to engage and defeat the continuing threat posed by al-Qa’ida, the Taliban, and ISIS. I believe that these would also be sufficient legal authorities to conduct military operations against other such terrorist forces planning attacks against the United States.

**In your view, do existing legal authorities provide the U.S. military the legal flexibility it needs to respond to new and emerging terrorism threats?**

Yes. Existing statutory authorizations for the use of military force, together with the President's constitutional authorities, currently provide adequate authority for military operations necessary to counter foreseeable new or emerging terrorist threats.

**In your view, is there a sufficient national and international legal basis to authorize armed conflict against ISIS? Please explain.**

Yes. I understand that Article II of the U.S. Constitution and the 2001 and 2002 AUMFs provide sufficient domestic legal authority for U.S. forces to prosecute the armed conflict against ISIS. I further understand that U.S. self-defense, collective self-defense of Iraq, and the consent of various host countries provide a sufficient international legal basis for the prosecution of that conflict.

**Without the 2001 AUMF, would the U.S. military have the legal authority to use force, including deadly force against members of Al Qaeda, the Taliban, ISIS, and associated forces? If so, under what circumstances?**

Whether the U.S. military would have the legal authority to use force without the 2001 AUMF would depend on the specific facts and circumstances that were presented, including whether another AUMF might apply. In the absence of congressional authorization, the President may order the use of military force to protect a sufficiently important national interest, subject to certain important limitations. In general, the President has the constitutional authority to defend the United States against terrorist groups engaged in armed conflict against the United States. For example, President Clinton authorized the use of military force against al-Qaeda in 1998 before the enactment of the 2001 AUMF.

**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 use of military force against a terrorist group that has not directly attacked the United States may be appropriate, in certain cases, such as to respond to a threat of imminent terrorist attack on the United States or U.S. interests abroad or to terrorist attacks on an ally or partner of the United States.

**What is your view on including temporal, geographical, or other limits (e.g., related to targeted groups, type of military force) in a new AUMF that modifies or replaces the 2001 AUMF?**

I share the view expressed by Secretary Mattis in October of last year that repealing the 2001 and 2002 AUMFs would only cause unnecessary policy and legal uncertainty, which could lead to additional litigation and public doubt. Accordingly, any new AUMF should be in addition to those established sources of authority. I also share the

Secretary's view that any new AUMF should not be time-restricted or geographically constrained.

### **Criminal Jurisdiction over Contractors on the Battlefield**

**The Military Extraterritorial Jurisdiction Act (MEJA) was enacted in 2000 to extend the criminal jurisdiction of U.S. courts to persons employed by or accompanying the U.S. armed forces outside the United States.**

**In your view, does MEJA provide appropriate jurisdiction for alleged criminal actions of contractor employees in Iraq, Afghanistan, and other areas of combat operations?**

Yes. It is important to ensure that all persons supporting our Armed Forces, wherever they are located, are held appropriately accountable if they commit criminal acts.

**What changes, if any, would you recommend to MEJA?**

I am not currently aware of the need for any changes to MEJA. If I am confirmed, I would evaluate MEJA's operation to determine if any such change is necessary.

**Section 552 of the National Defense Authorization Act for Fiscal Year 2007 extended criminal jurisdiction of the military courts under the Uniform Code of Military Justice (UCMJ) to persons serving with or accompanying an armed force in the field during time of declared war or a contingency operation, such as our current operations in Iraq and Afghanistan.**

**In your view, does the UCMJ provide appropriate jurisdiction for alleged criminal actions of contractor employees in Iraq and Afghanistan and other areas of combat operations?**

I am aware that both MEJA and Article 2(a)(10) of the Uniform Code of Military Justice, 10 U.S.C. § 802(a)(10), provide means to hold civilians serving with or accompanying our Armed Forces overseas in combat operations appropriately accountable if they commit crimes. Ensuring such accountability is vitally important. I am not currently aware of any necessary change to the current statutory provisions providing such jurisdiction.

**What is your view of the procedures agreed upon by the Department of Defense and the Department of Justice to reconcile jurisdictional responsibilities under MEJA and the UCMJ?**

I am aware generally that there are procedures to reconcile these responsibilities that are laid out in Department of Defense Instruction 5525.07, "Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes" (June 18,

2007). If I am confirmed, I will evaluate whether this MOU strikes the appropriate balance for the exercise of criminal jurisdiction.

**What changes, if any, would you recommend to the UCMJ to ensure appropriate jurisdiction for alleged criminal actions of contractor employees?**

At this time, I have no recommendations to amend the UCMJ. If I am confirmed, I will evaluate whether any changes should be made to ensure appropriate jurisdiction for alleged criminal actions of contractor employees within the constitutional boundaries the Supreme Court has established for trial of civilians by courts-martial.

**Identification of Potential Extremist Views**

**In your view, do current Department of Defense policies limit the ability to include information about extremist views in official records that may assist in the identification of potential threats?**

I understand that DoD Intelligence Components may only collect, retain, and disseminate information concerning United States (U.S.) persons consistent with Executive Order 12333, which requires specific Attorney General-approved procedures. The DoD procedures preclude DoD Intelligence Components from investigating or collecting and maintaining information about U.S. persons solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States.

The mission of DoD Intelligence Components is focused on foreign intelligence and counterintelligence, both of which require a foreign connection. To the extent that the "extremist views" of a U.S. person would be included in official records of a DoD Intelligence Component, the inclusion would be because the information qualified for permanent retention based upon specific criteria in the DoD procedures, or because the information was under evaluation for possible permanent retention as foreign intelligence or counterintelligence.

Beyond the constraints specific to DoD Intelligence Components, I understand that the Privacy Act, 5 U.S.C. 552a, which applies to an agency's maintenance of records on U.S. citizens and lawful permanent residents ("individuals"), prohibits an agency from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552(e)(7). Thus, to the extent that "extremist views" contained in official records would describe the First Amendment activities of an individual, maintenance of such information would be permitted under the Privacy Act if pursuant to an authorized law enforcement activity.

I understand that DoD policy restricts DoD's acquisition of information on non-DoD affiliated persons. It is my understanding that while such restrictions could potentially

limit (depending on the specific facts at issue) DoD's ability to acquire "information about extremist views," in DoD records, this policy permits the acquisition of such information pursuant to several authorized activities, notably the protection of DoD personnel, functions, and property.

**In your view, do current Department procedures hinder the ability to share this type of information with other official agencies charged with identifying and monitoring potential extremist or terrorist activities?**

In my view, it is important to ensure that information necessary for the U.S. government agencies that have a mission to identify and monitor potential extremist or terrorist activities is lawfully obtained and disseminated in a timely manner. If I am confirmed, I look forward to examining how departmental policies support this in a manner consistent with the law.

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

I understand that initial and periodic background investigations are required for all service members in the U.S. Armed Forces and that the information collected during an investigation is managed in accordance with applicable laws and DoD policies, including those related to privacy and confidentiality. I understand that DoD policy requires that any doubt as to whether an individual is eligible to hold a national security position, due to security concerns or adverse information, be resolved in favor of national security, consistent with applicable law. Service members and civilian personnel are afforded due process before they are denied favorable national security eligibility determinations. In addition, DoD policy requires that all service members be subject to continuous evaluation to monitor their eligibility to hold sensitive positions.

**Do you see a need for a change in this balance?**

If I am confirmed, I look forward to examining this topic in greater detail.

### **Religious Guidelines**

**In your view, do Department of Defense policies concerning religious accommodation in the military appropriately accommodate the free exercise of religion and other beliefs, including individual expressions of belief, without impinging on those who have different beliefs, including no religious belief?**

It is my understanding that Department policies strive to accommodate the free exercise of religion by all Service members, and that the Department respects and places a high value on the rights of individuals to express their own religious beliefs, including the right to hold no beliefs. If I am confirmed, I will review Department policies on this

issue.

**In your view, do existing policies and practices regarding public prayers offered by military chaplains in a variety of formal and informal settings strike the proper balance between a chaplain's ability to pray in accordance with his or her religious beliefs and the rights of other service members with different beliefs, including no religious beliefs?**

Military chaplains are an integral part of the fabric of the armed forces and play an important role in furthering the well-being and readiness of our service members and their families. I understand that Department policies allow Military Chaplains to perform religious services in accordance with the tenets of their respective religions, and provide guidance to chaplains concerning the respectful incorporation of religious beliefs in a pluralistic setting. If I am confirmed, I will be able to determine whether the Department's current policies strike the proper balance.

**Section 533 of the National Defense Authorization Act for Fiscal Year 2013, as amended by section 532 of the National Defense Authorization Act for Fiscal Year 2014, protects individual expressions of religious belief, unless such expressions of belief could have an adverse impact on unit cohesion and good order and discipline.**

**In your view, may a member of the armed forces who has a sincerely held belief in opposition to same-sex marriage be subject to adverse personnel action or similar other adverse action, if he or she shares those personal views on the subject in a personal capacity? What if a member expresses his or her views in opposition to same-sex marriage in an official capacity?**

The protections provided by Section 533 of the NDAA for FY 2013, as amended, are predicated on the expression not having an adverse impact on military readiness, unit cohesion, and good order and discipline. I have confidence in the ability of our military commanders to exercise their professional judgment and knowledge of their units to make the fact-based and unique determinations required in such cases, such as the questions posed above. It is my understanding that Department policy incorporates Section 533 and provides guidance to our commanders in this area, and if I am confirmed I will review such policy to ensure the guidance is legally sufficient.

**The Religious Freedom Restoration Act provides very broad protections for religious liberty, and provides that the Government, which includes the military, may not substantially burden a person's exercise of religion unless it furthers a compelling government interest, and that any such burden must be the least restrictive means of furthering that interest.**

**Do you believe that uniformity of appearance in the military constitutes a compelling government interest?**

It is my understanding that Department policy provides that DoD has a compelling

government interest in mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline, health, and safety, on both the individual and unit levels. I further understand that it is Department policy that an essential part of unit cohesion is establishing and maintaining uniform military grooming and appearance standards. If I am confirmed, I will carefully review Department policies in this area to ensure they are legally sufficient.

**If so, do you believe that denying certain faith groups the ability to deviate from uniform and grooming standards, e.g., in maintaining an unshorn beard, in observation of their sincerely-held religious belief, is the least restrictive means of furthering that interest?**

It is my understanding that Department policy reflects the requirements of the Religious Freedom Restoration Act (RFRA) and that all requests for accommodation are assessed on a case-by-case basis, based on the unique facts involved. I am unable to comment on any specific individual's request for an accommodation. If I am confirmed, I will carefully review Department policies in this area to ensure they are legally sufficient and I will provide my best legal advice to the Secretary of Defense on such matters that are presented to me.

**How does the practice of allowing waivers for tattoos, including for religious-themed tattoos, and medical shaving profiles for service members both home and deployed, affect your analysis?**

I am unable to comment on any specific individual's request for an accommodation, or any waivers granted to individuals by their Military Service, but do understand that issues of religious accommodation are reviewed on a case-by-case basis under the requirements found in law under RFRA and the constitution. If I am confirmed, I will carefully review Department policies in this area to ensure they are legally sufficient and I will provide my best legal advice to the Secretary of Defense on such matters that are presented to me.

### **General Officer Nominations**

**In your view, what is the role of the DOD General Counsel in the officer promotion system, particularly in reviewing general officer nominations?**

It is essential that the integrity and independence of the promotion selection process be maintained. Based on my prior service at the Department of Defense, I know that the Secretary of each Military Department, in consultation with his or her General Counsel and Judge Advocate General, has the primary responsibility to ensure that the promotion selection process for both regular and reserve officers complies with law and DoD policy. However, I am also aware that all reports of promotion selection boards are reviewed by the DoD Office of General Counsel before final action on the report by the Secretary of Defense or the Under Secretary of Defense for Personnel and Readiness.

If I am confirmed and I were to determine that a promotion selection board failed to

conform to law or policy, it would be my duty to inform the Secretary of Defense or Under Secretary of Defense for Personnel and Readiness of the irregularities and to recommend appropriate corrective action. Additionally, through advice to the Secretary of Defense and the Under Secretary of Defense for Personnel and Readiness, the DoD Office of General Counsel has a role in ensuring that officer promotion policies promulgated in DoD regulations accurately reflect the law.

**Do you see a need for change in this role?**

If I am confirmed, I will assess whether any change in this role would be appropriate.

**Under DOD Instruction 1320.04, adverse and alleged adverse information pertaining to general and flag officers must be evaluated by senior leaders in the military services and in the Office of the Secretary of Defense prior to nomination for promotion and certain assignments.**

**What is the role, if any, of the DOD General Counsel in reviewing and providing potentially adverse information pertaining to a nomination to this Committee?**

It is my understanding that the DoD Office of General Counsel reviews all nomination packages pertaining to officers with adverse information before the packages are forwarded to the Secretary of Defense for action. The DoD Office of General Counsel helps ensure that any adverse information ascribed to such officers is supported by evidence in the associated reports of investigation and is communicated to the Armed Services Committee accurately. I am informed that the General Counsel and his or her staff often provide specific advice to the Under Secretary of Defense for Personnel and Readiness and the Secretary of Defense on difficult or unusual cases.

**What is your understanding of the sufficiency of the Services' processes for ensuring that the Services consider adverse or potentially adverse information prior to forwarding an officer's nomination to the Senate for confirmation?**

While I am not familiar with specific Service processes for ensuring the appropriate consideration of adverse information, I have not been advised that they are insufficient. Any Service process must ensure that the requirements of DoD Instruction 1320.04, which implements the requirements of title 10, U.S.C., sections 615 and 14107, pertaining to adverse information, are met.

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

**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, what do you believe to be the reason?**

I am not currently in a position to know the reason for the reported increase in the number of allegations of misconduct by senior officials or whether there has been an increase in substantiated allegations. If I am confirmed, I will be in a position to learn more about this important matter.

**What are your ideas to improve the knowledge and education of these senior officials and their families with regard to the laws and rules that apply to them?**

If I am confirmed, I will be in a position to ascertain whether there is more that can be done at the DoD-level to improve knowledge and education in this critical area.

### **Military Personnel Policy and Cases**

**In your view, what role, if any, should the DOD General Counsel and civilian attorneys assigned to the DOD Office of the General Counsel play in military personnel policy and individual cases, including cases before Boards for Correction of Military Records?**

The Office of the DoD General Counsel may be required to provide legal advice on a very broad range of issues. Working closely with the Office of the Under Secretary of Defense for Personnel and Readiness, which has responsibility for Departmental policy for the Military Department boards for the correction of military records, the Office of the General Counsel provides legal advice on policy issues affecting military personnel and performs a pre-publication legal sufficiency review of every DoD military personnel policy issuance.

**In your view, do commanding officers have the requisite authorities to reduce the number of non-deployable service members assigned to units in order to improve unit readiness?**

I am unable to comment in detail on the authorities available to commanding officers, or how they have been recently employed by them. It is my understanding that the Department has been closely reviewing this issue, and if I am confirmed, I will work closely with the Office of the Under Secretary of Defense for Personnel and Readiness, which has responsibility for Departmental policy in this area, to ensure the Department is making full use of available authorities and that all policy in this area is legally sufficient. I will also provide my best legal advice to the Secretary of Defense on any additional authorities he may wish to request from Congress.

### **Selective Service Act**

**Do you believe Congress should amend the Selective Service Act to require the registration of women?**

Yes. In view of developments in recent years opening all military positions and units to women, the factual underpinnings upon which Supreme Court upheld the

constitutionality of a single gender Selective Service Act several decades ago no longer exist. I understand that the Military Commission on National Commission on Military, National and Public Service is studying this issue, and I look forward to reviewing its assessment, and working with congress if confirmed.

### **Sexual Assault Prevention and Response**

#### **What is your understanding of the role of the DOD General Counsel in addressing the problem of sexual assault and sexual harassment in the Department of Defense?**

I see the Office of General Counsel working with the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps to ensure military justice is a fair and equitable system of appropriate accountability that promotes justice, good order and discipline, efficiency, and effectiveness in the military establishment, thereby strengthening the national security of the United States.

One way the General Counsel does this is by providing legal advice to the Under Secretary of Defense for Personnel and Readiness on proposed policies, DoD issuances, legislative proposals, and exceptions to policy relating to the scourge of sexual assault and on sexual assault-related changes to the UCMJ.

#### **What is your assessment of the Department's sexual assault prevention and response program?**

I understand that the Department has made significant efforts to address this problem and is implementing many recommendations and improvements. It is my understanding that the Department is also actively confronting the issue of retaliation against victims and witnesses who report a sexual assault. This is a critical challenge we need to address in order to eliminate the potential fear of retaliation, which can discourage victims and witnesses from coming forward to report a crime, receiving the support they need, and holding alleged offenders appropriately accountable. If I am confirmed, I will conduct a thorough assessment of the current program and work with my colleagues in DoD and with the Congress regarding the sexual assault prevention and response program.

#### **What is your understanding of the adequacy of the Department's oversight of military service implementation of Department and Service policies for the prevention of and response to sexual assaults?**

It is my understanding that there is robust oversight of Department policies for the prevention of and response to sexual assaults. I also understand that the Director, Sexual Assault Prevention and Response Office, hosts quarterly integrated product team meetings attended by senior leaders from the Services, National Guard Bureau, Office of Secretary of Defense, and Office of the DoD Inspector General, which also serves as a forum for information sharing and updates. A representative of the Office of the General Counsel also attends. If I am confirmed, I will continue to support the Office of General

Counsel participation.

**What is your view of the provision for restricted and unrestricted reporting of sexual assaults?**

As I understand it, unrestricted reports of sexual assault must be referred to military criminal investigative organizations for investigation and commanders are notified of the allegations, including personally identifiable information (PII) of the victim and alleged offender, if known. In contrast, a restricted report allows a victim to disclose the details of the assault to specific individuals and receive medical treatment and counseling without triggering an automatic investigation or command notification. In a restricted report, the PII of neither the victim nor alleged offender is disclosed to commanders. The goal of restricted reporting is to give the victim immediate support and medical care, and, potentially, the confidence to come forward eventually with an unrestricted report that would allow the Department to hold the alleged offender appropriately accountable. I see merit in providing both reporting options to victims, to encourage even those victims who desire privacy to come forward and have access to medical care. If I am confirmed, I would support further study on the effectiveness of both options in addressing sexual assaults.

**What is your view of the role of the chain of command in providing necessary support to the victims of sexual assault?**

This is a leadership issue. I believe the chain of command is instrumental in maintaining a fit and ready force and that helping a service member recover and receive the necessary support during the recovery process furthers that goal. It is the responsibility of the commanders to establish and maintain a culture of dignity and respect, first and foremost by embodying those values.

**What is your understanding of the adequacy of Department resources and programs to provide victims of sexual assault the medical, psychological, and legal help they need?**

I understand the Department has a robust support program to assist service members who report sexual assault allegations. I understand that there is a 24/7 response time and that sexual assault cases are treated as priority cases in military treatment facilities. I understand that service members are entitled to their own Special Victims' Counsel to advise and counsel service members throughout the process.

**What is your view of the steps the Department has taken to prevent additional sexual assaults both at home stations and deployed locations?**

It is my understanding that the Department has a robust training program for all personnel to ensure they understand what sexual assault is, how to prevent it, and how to respond. I understand that the Department provides bystander intervention training so that service

members have the tools they need to intervene if they think another person is not in a safe environment.

**What is your view of the adequacy of the training and resources the Department has in place to investigate and prosecute allegations of sexual assault?**

The training and resources in place appear to be adequate. It is my understanding that the Department established a cadre of special victim investigators and prosecutors who are specially trained in sexual assault. These individuals collaborate closely with each other and other relevant stakeholders, such as the sexual assault response coordinator. Prosecutors and investigators receive comprehensive training on victims' rights, issues unique to sexual assault cases such as the role of alcohol or drugs, interviewing techniques, and best practices for navigating victims through the military justice process. If I am confirmed, I would work with the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps, to support their efforts in this regard.

**What is your view of the value of the Services' Special Victims' Counsel and Victims' Legal Counsel Programs? Have these programs had an impact on the reporting and prosecution of allegations of sexual assault in the Services? If so, what is that impact?**

My view is that the Special Victims' Counsel and Victims' Legal Counsel Programs programs have been a success. Victims may gain more confidence knowing that they have their own attorney to advise them on reporting options, the military justice process and their rights, thereby providing victims with the confidence to make a report.

**What is your view of the role of the chain of command in changing the military culture in which these sexual assaults occur?**

I think the chain of command has a critical role to play in changing military culture. Commanders are responsible for the good order and discipline of their units and are indispensable to creating a zero-tolerance climate for sexual assaults as well as a zero-tolerance climate for those who retaliate against victims and witnesses. Leaders at every level must maintain a professional and respectful culture.

**In your view, what would be the impact of requiring a judge advocate outside the chain of command, rather than commanders, to determine whether allegations of sexual assault should be prosecuted by the military?**

I believe commanders have an essential role in the military justice process, which should be preserved. Based on what I have witnessed, most commanders are skilled leaders with experience making difficult decisions, which at times can be life or death matters. Military personnel expect and look to their commanders to make those types of decisions. If I am confirmed, I will closely examine this issue.

**Annual reports on sexual assault in the military and annual reports on sexual harassment and violence at the military service academies consistently document the direct correlation of incidents of sexual harassment and incidents of sexual assault.**

**What is your view of the Department's program to prevent and respond to sexual harassment?**

Training at all levels on acceptable and professional conduct and effective leadership is essential to changing the climate and culture of a unit. Climate surveys are a good tool for commanders to assess their unit's climate and perceptions, and also learn about conduct occurring in the unit, and take corrective action as appropriate.

**What additional steps would you take, if confirmed, to address the problem of sexual assaults and sexual harassment in the Department?**

I believe the Department is making progress in this area. If I am confirmed, I would work with the USD (P&R) to examine additional steps that would be necessary to address any gaps in current policy.

### **Abusive Online Conduct**

**This Committee has considered testimony on reports that certain members of Marines United, an unofficial Marine Corps Facebook group, were found to be posting degrading comments and sharing nude photos of female service members. Members of the group included a number of active-duty service members, former military members, and military retirees.**

**What is the current Department of Defense policy for use of social media by service members?**

I am not familiar with the intricacies of current DoD and Military Department policies concerning social media use and misuse by service members. If I am confirmed, I will study this matter closely.

**In your view, is this policy adequate to address abuses such as what occurred in the Marines United incident?**

I do not have sufficient familiarity with the current policies regarding social media use by service members to have an informed opinion on whether they are adequate. If I am confirmed, I will study this matter closely.

**If confirmed, what action would you take to ensure that service members are not subjected to abusive online conduct?**

If I am confirmed, I would provide legal advice to DoD policymakers concerning steps to protect service members from abusive online conduct. I would also review existing legal

authorities, including the recently enacted Article 117a, Uniform Code of Military Justice, to determine whether additional statutory or regulatory provisions would be appropriate.

**In your view, do the Services have sufficient legal authority to hold offenders accountable for such misconduct?**

I am aware that Congress recently enacted a new punitive article of the Uniform Code of Military Justice, Article 117a, to expressly criminalize the wrongful distribution of intimate visual images or visual images of sexually explicit conduct. I do not have sufficient information to form an opinion as to whether that new punitive article provides sufficient legal authority to hold offenders appropriately accountable or whether additional authority is needed. If I am confirmed, I would evaluate that issue.

**What legislative authorities, if any, do you believe are necessary to address this problem?**

As indicated in my previous answer, I am aware that Congress recently legislated in this area. I do not presently have sufficient information to form an opinion as to whether additional legislation is necessary or appropriate.

### **Whistleblower Protection**

**Section 1034 of title 10, United States Code, prohibits taking retaliatory personnel action against a member of the armed forces as reprisal for making a protected communication. By definition, protected communications include communications to certain individuals and organizations outside of the chain of command. Moreover, Congress recently amended this law to remove the ability of a service secretary to make a contrary factual finding that reprisal did not occur after an inspector general found that it did.**

**If confirmed, what actions will you take to ensure that senior military leaders understand the need to protect service members who report misconduct to appropriate authorities within or outside the chain of command?**

If I am confirmed, I will provide my best legal advice to the Secretary of Defense, and senior civilian and military defense officials, on whistleblower cases that come under my review to ensure those who have made whistleblower communications are afforded the protections they are entitled to under the law. Moreover, I will seek to ensure that throughout DoD we have appropriate policy in place on whistleblower protection. Lastly, I believe that all senior defense officials have an obligation to emphasize, in both their words and actions, the importance of whistleblower protection and the benefits derived by DoD from investigations and reviews based on protected communications. If I am confirmed, this will be a personal point of emphasis for me.

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

It is my understanding that the position of General Counsel to the DoD IG is established by law in the Inspector General Act, as amended. 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. However, if I am confirmed, I would assist the Office of the Inspector General as requested and appropriate, and would provide appropriate legal advice to the Department in conjunction with actions stemming from an investigation.

**What role does or should the DOD General Counsel play in ensuring consistency of application and interpretation of whistleblower protections across the Services and the Department?**

Although I have not yet had the opportunity to study the Department's current policies in sufficient detail to provide an opinion on this matter, if I am confirmed, I would work to ensure consistency while providing legal advice on such matters.

**Support to the Department of Defense Inspector General**

**What role, if any, does the DOD General Counsel currently have in reviewing DOD IG investigations and recommendations?**

It is my understanding that the DoD General Counsel does not review the legal sufficiency of Inspector General investigations and recommendations. This review is provided by the General Counsel to the Inspector General.

**What role, if any, do you think the DOD General Counsel should have in reviewing these investigations and recommendations?**

It would be appropriate for the DoD General Counsel to assist the Office of the Inspector General as requested by that Office.

**Attorney Recruiting and Retention Issues**

**If confirmed, how do you assess your ability to hire and retain high quality attorneys in the Department and provide sufficient opportunity for advancement?**

If I am confirmed, I would not anticipate difficulty in hiring and retaining high quality attorneys in the Department. I would determine whether these attorneys are provided sufficient opportunities for advancement and professional fulfillment. If they are not, I would take steps designed to improve these opportunities.

**In your view, does the Department of Defense have a sufficient number of civilian and military attorneys to perform its missions?**

While I am currently not able to assess this, if I am confirmed I would explore whether the Department has sufficient legal resources, including paralegals, to meet the Department's needs both in terms of quantity and quality. If not, I would recommend additional hiring or other means to remedy any deficit.

**In your view, what incentives for successful recruiting and retention of attorneys, if any, need to be implemented or established?**

I am not currently aware of any incentives that are necessary, but if I am confirmed, the steps described above would help me make this assessment.

**Civilian Attorneys**

**Judge advocates in the armed forces benefit from an established career progression, substantial mentoring and training opportunities, and exposure to a broad spectrum of legal areas and leadership responsibilities. By contrast, civilian attorneys in the military departments normally do not have established career programs and may do the same work for many years, with promotion based solely upon longevity and vacancies.**

**What is your understanding of the personnel management and career development system for civilian attorneys in the Department of Defense?**

Although I am not currently certain what personnel management and career development programs exist across the Department to facilitate career progression, if I am confirmed, I would ascertain what programs are in use and whether they are effective.

**In your view does that system need revision? If so, what do you see as the major problems and what changes would you suggest?**

If there are legal offices in which promotions are based solely on longevity and vacancies, I would work with those offices if I am confirmed to remedy the situation. I also would take steps to remedy any other deficiencies I uncovered.

**Acquisition Issues**

**What role should the DOD General Counsel play in ensuring that the Department of Defense's procurement programs are executed in accordance with the law and Defense acquisition policy?**

As the chief legal officer of the Department of Defense, the DoD General Counsel has an essential role in ensuring that DoD's procurement programs are squarely in compliance with law and policy as established by Congress. If I am confirmed, I would direct my

team of highly qualified acquisition attorneys to ensure that the Department conducts procurements fairly and openly, mindful of the need to be good stewards of the American taxpayers' dollars. Moreover, I would be very clear that the Department needs to comply with all statutory and regulatory limitations and prohibitions against acquiring defense items and services from identified countries, and encourage full participation in the Committee on Foreign Investment in the United States process to ensure that investment by foreign adversaries in the homeland does not diminish our capabilities or advance theirs.

**What role should the DOD General Counsel play in ensuring that Department acquisition officials understand flexibilities provided by Congress in the acquisition and financial statutes and can take advantage of those flexibilities to act in the best interests of the Department?**

The job of the DoD General Counsel is to apply the laws promulgated by Congress as they relate to the Department. I commit to you that, if I am confirmed, I would approach this task with the full understanding of the intent of Congress to provide flexibilities in the acquisition process in order to meet the needs of the mission at hand and the interest of the American taxpayer to get value for DoD's acquisitions. One example of a flexible statutory authority in which I would support greater use is that of the Other Transactions authority. I understand that some DoD components, including by way of example the Defense Advanced Research Projects Agency and the Defense Innovation Unit Experimental, are using Other Transactions agreements alongside contracts negotiated under the Federal Acquisition Regulation, and I would encourage greater use of this legislatively bestowed flexibility wherever appropriate throughout the Department.

**What role should the DOD General Counsel play in ensuring that ethics provisions on conflicts of interest are followed both by Department personnel and contractors?**

Full compliance with the rules of ethics in the area of conflicts of interest is the key to the Department's ability to provide an honest and even playing field in all areas, and especially in the area of acquisition. The rules are clear, even if individual circumstances can get murky; and I would commit, if I am confirmed, to ensuring that these ethics provisions are followed to the letter by DoD personnel and contractors, including through increased training and supervision of contracting personnel.

**Allegations of fraud and abuse during contingency contracting in Iraq and Afghanistan have been wide-spread.**

**What role should the DOD General Counsel play in ensuring that Department personnel are properly trained in contingency contracting and are supervised in the performance of their duties?**

I am aware of these allegations of fraud and abuse, which serve to tarnish the significant work accomplished, sacrifices made, and hardships endured, by DoD personnel and contractors in Iraq and Afghanistan. If I am confirmed as DoD General Counsel, I will

direct that DoD contracting personnel working in contingency operations are fully trained, supervised, and supported in the performance of their duties to ensure that this sort of alleged fraud and abuse does not occur in the future. There is no excuse for any misuse of the American taxpayers' dollars and flouting of the rules.

### **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 a risk averse culture has stifled this type of initiative within the leadership and workforce and thus trapped the Department in a set of antiquated and burdensome practices and oversight processes.**

**If confirmed, what role would you play to support efforts to allow Defense Department organizations to make maximum use of new and existing flexible management, acquisition, and personnel authorities so as to enable risk-taking and innovation in Department processes?**

Secretary Mattis has spoken recently about his desire to foster a culture of innovation across the department. My role, should I be confirmed as the DoD General Counsel, will be to ensure that attorneys within the DoD Office of the General Counsel understand the flexibilities as well as the limits provided in law and regulation, and advise their respective clients accordingly. DoD's attorneys should make sure that their clients are aware of any legal risks associated with various options, but they also should make it part of their jobs to think of ways to mitigate the risks. Ultimately, it is up to the decision maker to determine how best to proceed, after fully understanding the range of options available. I believe that providing legal advice in this manner will enhance appropriate risk-taking and innovation within the Department, while still adhering to the law.

**If confirmed, how will you work to have your office combat the culture of risk aversion?**

I believe that decision makers within the Department will be more willing to exercise the full scope of their authority (i.e., take risks) if they trust that their attorneys have the ability and expertise to identify accurately the range of possible options legally available and any associated legal pros and cons. Should I be confirmed, I would strive to enhance attorney training and professionalism within the organization, and to strengthen the important bond between attorney and client.

### **Detecting Conflicts of Interest**

**Personal and organizational conflicts of interest have become a major concern. The Department of Defense's expanded use of private contractors being tasked to perform key functions that the Services had formerly performed in-house and the new requirement to**

**fill thousands of Defense Department civilian positions with experienced, qualified individuals present challenges in preventing conflicts of interest and the appearance of conflicts of interest.**

**What do you think the Department of Defense should do, and what should be the DOD General Counsel's role, in ensuring that the Department identifies personal and organizational conflicts of interest and takes the appropriate steps to avoid or mitigate them?**

The DoD General Counsel is the Designated Deputy Agency Ethics Counsel (DAEO) for the Department of Defense. The DAEO has the primary responsibility for directing DoD's ethics program, which includes: assisting in the vetting and confirmation process for all DoD Presidentially-appointed, Senate-confirmed officials; promulgating and updating DoD regulations and policy; providing legal advice and assistance on matters that include conflicts of interest and financial disclosure reports; training DoD's military and civilian ethics counselors; and training the DoD workforce assigned around the world.

If I am confirmed I pledge that DoD will maintain a robust ethics program with dynamic training that addresses identifying and preventing conflicts of interest. I understand that DoD has numerous measures in place, including formal screening arrangements for senior officials, values-based, leader-led ethics training, and an added layer of supervisor review of financial disclosure reports to address conflict of interest issues.

**What is your understanding of the steps the Department takes to identify and address potential conflicts of interest during the hiring process?**

The Office of Government Ethics requires each agency to notify prospective employees, as well as new supervisors, that they will be subject to the conflict of interest statutes and regulations. I understand that the DoD General Counsel, as the Designated Agency Ethics Official, annually reviews and confirms that the DoD has implemented appropriate processes to comply with these requirements.

## **Legal Ethics**

**What is your understanding of the role of the DOD General Counsel with respect to legal ethics by Department of Defense attorneys?**

The General Counsel oversees 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.

**What is your understanding of the action a Department attorney or a judge advocate should take if the attorney becomes aware of improper activities by a Department official who has sought the attorney's legal advice and the official is**

**unwilling to follow the attorney’s advice?**

All Department attorneys must comply with laws and regulations including applicable reporting requirements. If an attorney believes that a DoD Official’s actions will or have violated law or regulation, the attorney must take appropriate action. In accordance with DoD Directive 5505.06, “Investigations of Allegations Against Senior Officials of the Department of Defense,” allegations against Senior DoD Officials must be reported to the DoD Inspector General within five working days. Allegations against all other DoD officials should be reported up through the attorney’s supervisory chain for consideration and action, including transmittal to the appropriate authorities.

**Do you believe that the present limits on pro bono activities of government attorneys are generally correct as a matter of policy or does the policy need to be reviewed and revised?**

To my knowledge, current policy limits on pro bono activities strike the right balance between encouraging and supporting those activities that help others and promote the professional development of government attorneys while ensuring that such attorneys do not put themselves in conflict with their responsibilities as Federal officials and their ethical principles as attorneys.

While opportunities for government attorneys to represent outside clients in actions before the Federal government may be limited, I know that many opportunities for pro bono work remain for working with clients in representations in state courts, such as in domestic violence and landlord/tenant disputes, as well as in non-representational capacities, such as through advice clinics and will drafting workshops. If confirmed, I am prepared to review the existing Department policy on pro bono activities to ensure that it continues to meet the needs of the Department and those attorneys within the Department who wish to serve their communities in such a fashion.

**In your view, do the laws, regulations, and guidelines that establish the rules of professional responsibility for attorneys in the Department provide adequate guidance?**

To my knowledge, the laws, regulations, and guidelines that establish the rules of professional responsibility for DoD attorneys provide adequate guidance and hold DoD attorneys to the highest standards of professional conduct. However, if I am confirmed, I will be vigilant in ensuring that these standards are maintained and will make appropriate modifications to these rules and the procedures for administering inquiries regarding professional conduct, if necessary.

**If confirmed, what actions would you take if it were brought to your attention that a civilian appointment were potentially in violation of the Federal Vacancies Reform Act?**

If I am confirmed and it were brought to my attention that an appointment potentially

violated the Federal Vacancies Reform Act, I would obtain the facts pertaining to the appointment and provide my best legal advice to the Secretary regarding the appointment. If I believed the appointment would violate the Federal Vacancies Reform Act, I would provide that advice.

### **Law of the Sea**

#### **What are your views on whether the United States should accede to the United Nations Convention on the Law of the Sea (UNCLOS)?**

The Department of Defense has traditionally supported accession to the Law of the Sea Convention. As Secretary Mattis recently noted, the Law of the Sea Convention largely reflects customary international law. If I am confirmed, I look forward to working with Congress on this issue.

#### **From a national security standpoint, what do you see as the legal advantages and disadvantages of the United States being a party to UNCLOS?**

This is not an issue I have worked with in detail. However, I understand that the Department has supported becoming a party to the Law of the Sea Convention because it would enhance the U.S. security posture around the globe, including by enabling the United States to reinforce all of the rights, freedoms, and uses of the sea and airspace recognized in the Convention.

#### **In your view, is customary international law alone sufficient to safeguard U.S. navigational and overflight rights and freedoms worldwide?**

As noted above, I understand the Department of Defense believes the Law of the Sea Convention largely reflects customary international law. To the extent that accession would enable the United States to reinforce all of the rights, freedoms, and uses of the sea and airspace recognized in the Convention, including the navigational and overflight rights that are critical to the global mobility of U.S. forces, it would be useful to be a party to the Convention. If I am confirmed, I look forward to working with Congress on this issue.

### **Processing the Annual Department of Defense Legislative Request**

**One of the current 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.**

**If confirmed, what actions will you take to ensure that the Department's legislative proposals are submitted in a timely manner to ensure ample opportunity for consideration by Congress before markup of the annual National Defense Authorization Act?**

One of the current 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. The Office of Legislative Counsel (OLC), within the Office of the General Counsel, is responsible for submitting DOD's legislative proposals to Congress during each NDAA cycle. If I am confirmed, I will ensure that OLC works within the Department and with the Administration to ensure timely delivery of DOD's legislative proposals to Congress so the Committee has sufficient time to review each proposal.

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

I will work to ensure that the Department provides its views to Congress, as requested, on any proposed legislation in a timely manner.

### **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, and other communications of information.**

**Do you agree, if confirmed, to appear before this Committee and other appropriate committees of Congress?**

Yes.

**Do you agree, if confirmed, to appear before this Committee, or designated members of this Committee, and provide information, subject to appropriate and necessary security protection, with respect to your responsibilities as the DOD General Counsel?**

Yes.

**Do you agree to ensure that testimony, briefings, and other communications of information are provided to this Committee and its staff and other appropriate committees in a timely manner?**

Yes.

**Do you agree to provide documents, including copies of electronic forms of communication, in a timely manner when requested by a duly constituted committee, or to consult with the Committee regarding the basis for any good faith delay or denial in providing such documents?**

Yes.

**Do you agree to answer letters and requests for information from individual Senators who are members of this Committee?**

Yes.

**If confirmed, do you agree to advise the Department of Defense to provide to this Committee relevant information within the jurisdictional oversight of the Committee when requested by the Committee, even in the absence of the formality of a letter from the Chairman?**

Yes.

**In what circumstances may the Department of Defense not provide to the Committee documents that fall within the Committee's jurisdictional oversight when requested by the Committee? In such circumstances, if confirmed, what would you do to meet the needs of the Committee?**

If I am confirmed, I am committed to accommodate requests for documents made by this Committee, and will always work to ensure the needs of the Committee are met in the most expeditious manner.