

Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

HEARING TO CONSIDER THE NOMINATIONS OF:
HONORABLE BRAD R. CARSON TO BE THE UNDER
SECRETARY OF DEFENSE FOR PERSONNEL AND
READINESS;
JENNIFER M. O'CONNOR TO BE THE GENERAL COUNSEL
OF THE DEPARTMENT OF DEFENSE; AND
TODD A WEILER TO BE AN ASSISTANT SECRETARY OF
DEFENSE FOR MANPOWER AND RESERVE AFFAIRS

Thursday, February 25, 2016

Washington, D.C.

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Thursday, February 25, 2016

U.S. Senate
Committee on Armed Services
Washington, D.C.

The committee met, pursuant to notice, at 9:32 a.m. in Room SD-G50, Dirksen Senate Office Building, Hon. John McCain, chairman of the committee, presiding.

Committee Members Present: Senators McCain [presiding], Inhofe, Sessions, Ayotte, Fischer, Cotton, Rounds, Ernst, Tillis, Sullivan, Lee, Graham, Reed, Manchin, Gillibrand, Blumenthal, Donnelly, Hirono, Kaine, King, and Heinrich.

1 OPENING STATEMENT OF HON. JOHN McCAIN, U.S. SENATOR
2 FROM ARIZONA

3 Chairman McCain: Good morning.

4 The Armed Services Committee meets this morning to
5 consider the nominations of Mr. Brad Carson to be Under
6 Secretary of Defense for Personnel and Readiness; Ms.
7 Jennifer O'Connor to be General Counsel of the Department of
8 Defense; and Mr. Todd Weiler to be Assistant Secretary of
9 Defense for Manpower and Reserve Affairs.

10 We welcome all of you here this morning, as well as any
11 members of your families. As is our tradition, at the
12 beginning of your testimony, we welcome you to introduce any
13 members of your family joining you this morning.

14 Mr. Carson, the Department of Defense recently
15 announced two rounds of Force of the Future proposals.
16 However, the Department has never provided this committee
17 any information whatsoever on these proposals.

18 I am informed that you are the main architect of the
19 Force of the Future. As an individual who previously
20 appeared before this committee as a nominee to be the
21 General Counsel of the Department of the Army and later as
22 Under Secretary of the Army, your failure to provide
23 information to this committee stands in stark contrast to
24 the commitment you have previously made to provide witnesses
25 and briefers in response to congressional requests. The

1 Department has repeatedly ignored my requests for more
2 details and refused to brief me or my staff. You will be
3 expected to answer questions from the committee today on the
4 record.

5 Many of these Force of the Future proposals appear to
6 be solutions in search of a problem. We are eager to learn
7 what clearly identified problems you propose solving with
8 your proposals, and of course, we want a full description of
9 the background research, cost analysis, and analysis of the
10 impact on military readiness that served as the foundation
11 for the development of such proposals. I find it deeply
12 disturbing that you are proposing to add expensive fringe
13 benefits allegedly aimed at retention during a time when we
14 are asking 3,000 excellent Army captains to leave the
15 service who would have otherwise chosen to remain on active
16 duty.

17 From my perspective, this initiative has been an
18 outrageous waste of official time and resources during a
19 period of severe fiscal constraints. It illustrates the
20 worst aspects of a bloated and inefficient defense
21 organization. I look forward to your explanations and
22 empirical data on this important issue.

23 Ms. O'Connor, the General Counsel of the Department of
24 Defense is the chief legal officer and the advisor to the
25 Secretary of Defense on matters involving our Nation's

1 fighting forces. The enormous responsibility for this
2 position is reflected in the names of those who have served
3 as DOD General Counsel: Secretary Cyrus Vance, Paul Warnke,
4 Jamie Gorelick, Judith Miller, William Haynes, Secretary Jeh
5 Johnson, and most recently Stephen Preston. These
6 individuals and others who served in this key position
7 brought a depth of legal judgment and experience in national
8 security.

9 This is a position where, if confirmed, you must be the
10 voice of authority for a range of issues with serious
11 national and international implications, ranging from our
12 Nation's freedom to navigate wherever and whenever needed,
13 our ability to fight and win using legal authorities ranging
14 from rules of engagement to authorizations for the use of
15 military force, and our responsibility to provide secure and
16 humane detention of unlawful combatants. I hope you have
17 come prepared to address how you would approach these
18 pressing issues today.

19 Mr. Weiler, you are nominated for a newly created
20 position within the Department of Defense as a result of a
21 reorganization for the Under Secretary of Defense for
22 Personnel and Readiness. As this is a new office, we are
23 interested to hear how you envision this position fitting
24 into the broader Department of Defense organizational
25 structure and what role this office will play in managing

1 DOD personnel.

2 Again, I thank the witnesses for their willingness to
3 serve and look forward to hearing their testimonies.

4 Senator Reed?

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1 STATEMENT OF HON. JACK REED, U.S. SENATOR FROM RHODE
2 ISLAND

3 Senator Reed: Thank you very much, Mr. Chairman. And
4 I join you in welcoming our nominees, and I thank you for
5 holding this hearing to fill important civilian vacancies in
6 the Department of Defense, all of which directly or
7 indirectly impact our service men and women and the civilian
8 workforce of the Department. The positions for which these
9 individuals have been nominated involve significant and
10 challenging duties.

11 Mr. Carson, who has been nominated for the position of
12 Under Secretary of Defense for Personnel and Readiness, has
13 significant experience in the private sector and government
14 that should prepare him for this position, including service
15 as the General Counsel of the Army and the Under Secretary
16 of the Army. Mr. Carson is a Rhodes Scholar who served on
17 active duty in the Navy as recently as 2009 when he was
18 deployed to Iraq.

19 Ms. O'Connor, nominated as the next General Counsel of
20 the Department of Defense, is currently serving as a Deputy
21 General Counsel for the Department, giving here significant
22 insight into the legal challenges the Department faces.
23 Prior to that, she was Deputy White House Counsel where she
24 worked with attorneys from the Department of Defense and
25 other Federal agencies on a wide variety of legal issues.

1 Ms. O'Connor has extensive service in government and in the
2 private sector, all of which will serve her well as DOD
3 General Counsel. The DOD General Counsel is the primary
4 legal advisor to the Secretary of Defense, and as such, it
5 is extremely important that this position be filled as soon
6 as possible.

7 Mr. Weiler, nominated to be the first Assistant
8 Secretary of Defense for Manpower and Reserve Affairs since
9 the position was recognized in the 2015 National Defense
10 Authorization Act, also brings significant government and
11 private sector experience that will serve him well in this
12 new position. Mr. Weiler is an Army combat veteran, serving
13 the Gulf War prior to serving as a Deputy Assistant
14 Secretary of the Army for Manpower and Reserve Affairs in
15 the Clinton administration. For the past 16 years, Mr.
16 Weiler has worked in the private sector, but has continued
17 his involvement with wounded warrior and suicide prevention
18 programs, which will also serve him well in this new
19 position.

20 Again, I thank you, Mr. Chairman, for holding this
21 hearing. I look forward to hearing from our witnesses.

22 Chairman McCain: Thank you.

23 These are standard questions that are asked of all
24 civilian nominations, and I would appreciate it if in
25 response to these questions that you would answer "yes" or

1 "no" or "I will" or "won't."

2 In order to exercise its legislative and oversight
3 responsibilities, it is important that this committee and
4 other appropriate committees of the Congress are able to
5 receive testimony, briefings, and other communications of
6 information.

7 Have you adhered to applicable laws and regulations
8 governing conflicts of interest?

9 Mr. Carson: Yes.

10 Ms. O'Connor: Yes.

11 Mr. Weiler: Yes.

12 Chairman McCain: Will you ensure that your staff
13 complies with deadlines established for requested
14 communications, including questions for the record in
15 hearings?

16 Mr. Carson: Yes.

17 Ms. O'Connor: Yes.

18 Mr. Weiler: Yes.

19 Chairman McCain: Will you cooperate in providing
20 witnesses and briefers in response to congressional
21 requests?

22 Mr. Carson: Yes.

23 Ms. O'Connor: Yes.

24 Mr. Weiler: Yes.

25 Chairman McCain: Will those witnesses be protected

1 from reprisal for their testimony or briefings?

2 Mr. Carson: Yes.

3 Ms. O'Connor: Yes.

4 Mr. Weiler: Yes.

5 Chairman McCain: Do you agree, if confirmed, to appear
6 and testify, upon request, before this committee?

7 Mr. Carson: Yes.

8 Ms. O'Connor: Yes.

9 Mr. Weiler: Yes.

10 Chairman McCain: Do you agree to provide documents,
11 including copies of electronic forms of communications, in a
12 timely manner when requested by a duly constituted committee
13 or to consult with the committee regarding the basis for any
14 good faith delay or denial in providing such documents?

15 Mr. Carson: Yes.

16 Ms. O'Connor: Yes.

17 Mr. Weiler: Yes.

18 Chairman McCain: Have you assumed any duties or
19 undertaken any actions which would appear to presume the
20 outcome of the confirmation process?

21 Mr. Carson: No.

22 Ms. O'Connor: No.

23 Mr. Weiler: No, sir.

24 Chairman McCain: Mr. Carson, in your response to
25 advance policy questions from this committee, you state you

1 were not serving in violation of the Federal Vacancies
2 Reform Act. You have now indicated that you did not take
3 any action that would appear to presume the outcome of the
4 confirmation process. I disagree.

5 For the record, on November 30th, 2015, I notified
6 President Obama by letter that Mr. Carson's appointment as
7 the acting Under Secretary of Defense for Personnel and
8 Readiness violated the Federal Vacancies Reform Act of 1998.
9 Without objection, a copy of that letter will be included in
10 the record of this hearing.

11 [The information follows:]

12 [COMMITTEE INSERT]

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1 Chairman McCain: The law in this area is well
2 established. Last August, the United States Circuit Court
3 of Appeals for the District of Columbia in the case SW
4 General, Inc. v. National Labor Relations Board ruled that
5 the Federal Vacancies Reform Act applies to all acting
6 officers and that an acting officer serves in violation of
7 the Federal Vacancies Reform Act when he or she occupies an
8 acting position while being nominated for that position.

9 The court further ruled that actions taken by any
10 person who is not acting in compliance with the Federal
11 Vacancies Reform Act shall have no force or effect and may
12 not be ratified.

13 As the court noted, advice and consent is more than a
14 matter of etiquette or protocol. It is a structural
15 safeguard intended to curb executive abuses of power and to
16 promote a judicious choice of persons for filling the
17 choices of the union.

18 Without objection, a copy of that decision will be
19 included in the record.

20 [The information follows:]

21 [COMMITTEE INSERT]

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1 Chairman McCain: Just this last week, the Inspector
2 General of the Office of Personnel Management notified the
3 President's acting Director of OPM, Beth Cobert, that she
4 too was serving in an acting capacity in violation of the
5 Federal Vacancies Reform Act, citing that same D.C. Circuit
6 case.

7 Following the decision of the D.C. Circuit Court, it
8 appears that Mr. Carson's service as the acting Under
9 Secretary of Defense for Personnel and Readiness from on or
10 about July 8, 2015 violated the Federal Vacancies Reform
11 Act. If so, all actions you took, Mr. Carson, while serving
12 in that acting position are null and void and may be subject
13 to legal challenge in the Federal courts.

14 In my letter to the President last November, I
15 requested that the committee be informed of the
16 administration's proposed actions with regard to any actions
17 taken by Mr. Carson while serving in an acting capacity. As
18 of today's hearing, the administration has not provided that
19 requested information.

20 You currently serve as acting Principal Deputy Under
21 Secretary of Defense for Personnel and Readiness, a position
22 you have held since you were appointed by the President on
23 January 5th, 2016. According to the official Department of
24 Defense website, quote, the Principal Deputy Under Secretary
25 of Defense for Personnel and Readiness is delegated full

1 power and authority to act for the Under Secretary of
2 Defense for Personnel and Readiness and exercise the powers
3 of the Under Secretary of Defense for Personnel and
4 Readiness on any and all matters that the Under Secretary of
5 Defense for Personnel and Readiness is authorized to act,
6 except in those areas where delegation of the Under
7 Secretary of Defense for Personnel and Readiness' authority
8 is otherwise restricted by a higher authority or prohibited
9 by law. Unquote.

10 I am not convinced that your initial Vacancies Act
11 violation is remedied by moving to another acting position
12 in which you exercised all the authority and powers of the
13 original vacant position.

14 This committee takes with the utmost seriousness the
15 Senate's constitutional duty to give advice and consent on
16 presidential nominations. In recognition of that
17 constitutional duty, recent administrations have issued
18 guidance to nominees on the actions they must avoid. If
19 followed, that guidance allows nominees to prepare for the
20 important duties and responsibilities that they will
21 undertake, if confirmed by the Senate. Nominees disregard
22 that guidance at the peril of presuming confirmation.

23 The Department of Defense Office of General Counsel
24 issued a memorandum for prospective nominees for Senate
25 confirmed presidential appointments in the Department of

1 Defense on January 15, 2009. The memo identifies 10
2 specific problems to avoid.

3 Without objection, a copy of that memo will be included
4 in the record.

5 [The information follows:]

6 [COMMITTEE INSERT]

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1 Chairman McCain: That memo stipulates that, quote,
2 until you are confirmed, you must act in a manner consistent
3 with your roles, which is limited to preparing for your new
4 duties and responsibilities. Unquote.

5 The committee notes for the record that in addition to
6 the general prohibition on appearing to presume
7 confirmation, your actions, as described in your response to
8 the committee's advance policy questions, suggest you have
9 violated nearly all of those principles. You have hired
10 staff as special assistants. You have represented the
11 Department with outside organizations, think tanks, Federal
12 labor unions, foreign military officials, and the media.
13 Therefore, your conduct during the period you were serving
14 as acting Under Secretary of Defense and your continued
15 conduct while serving as acting Principal Deputy Under
16 Secretary of Defense for Personnel and Readiness, as
17 described on the official DOD web and by your conduct, is
18 contrary to the guidance of the DOD General Counsel memo and
19 is inconsistent with the time-honored principle that
20 presidential nominees must not presume Senate confirmation.

21 Senator Reed, do you have any comments or questions?

22 Senator Reed: Mr. Chairman, my only comment is that
23 you have raised significant issues, which is the purpose of
24 this hearing to allow the witnesses to respond to those
25 issues.

1 Thank you, Mr. Chairman.

2 Chairman McCain: Thank you.

3 In the opinion of the chair, the nominee has not
4 adequately addressed the violations of the Federal Vacancies
5 Reform Act identified in my letter to the President or in
6 the advance policy question responses.

7 Further, it appears the nominee has presumed
8 confirmation against the sound guidance by the DOD General
9 Counsel and contrary to the independent constitutional
10 authority of the Senate to give advice and consent prior to
11 confirming a presidential nomination.

12 The committee will give due consideration to these
13 matters.

14 Mr. Carson, you may comment on these matters and you
15 may proceed with your opening statement. Mr. Carson?

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1 STATEMENT OF HON. BRAD R. CARSON TO BE UNDER SECRETARY
2 OF DEFENSE FOR PERSONNEL AND READINESS

3 Mr. Carson: Thank you, Senator McCain, Senator Reed.
4 Thank you for holding the hearing.

5 This is, as you mentioned, my third appearance in 4
6 years, as I have been nominated to various positions at the
7 Department of Defense.

8 I can tell you have many questions for me. I will
9 forego a more formal opening statement and submit that for
10 the record.

11 If I may just say a few words of thanks, first to
12 President Obama for nominating me to this position; to
13 Secretary Ash Carter for placing his faith in me; to the
14 people in the Army. I tried to contribute as much as I
15 could to the U.S. Army in two jobs there, but I took much
16 more from them. And I leave those positions with an awe for
17 their sacrifice and for their service.

18 To the great people at Personnel and Readiness, whom I
19 have had a chance to serve alongside with now for 9 months,
20 they have one of the largest, most controversial, most
21 important portfolios in the Department of Defense, if not
22 the entire government. And I am honored to work alongside
23 them.

24 And finally to my wife behind me, who has been a fellow
25 traveler in many adventures. I am grateful to her as well.

1 I look forward to your questions.

2 [The prepared statement of Mr. Carson follows:]

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1 Chairman McCain: You do not wish to respond to my
2 comments.

3 Mr. Carson: Sir, I would simply say this. I never
4 asked to be the acting Under Secretary of Defense for
5 Personnel and Readiness. I was the Under Secretary of the
6 Army, a terrific job. When Secretary Carter came to me and
7 asked if I would take this job to be, I think, the ninth
8 person over the last 7 years to hold the difficult job, at
9 that time, the orthodox interpretation of the Vacancies Act
10 was such that there was no legal question at all about my
11 appointment as acting Under Secretary.

12 When we received your letter, I was subsequently asked
13 to resign the position of acting Under Secretary of Defense,
14 which I did. I became the acting Principal Deputy. And
15 every act I have taken since then is consistent with the
16 role of the acting Principal Deputy.

17 And in no way have I presume confirmation. No
18 statement of mine will ever be found that suggests that.
19 And no action of mine will state to that effect either.

20 Chairman McCain: Thank you.

21 Do you wish to introduce any of your family members?

22 Mr. Carson: My wife Julie, who is right behind me.

23 Chairman McCain: Welcome.

24 Ms. O'Connor?

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1 STATEMENT OF JENNIFER M. O'CONNOR TO BE GENERAL
2 COUNSEL OF THE DEPARTMENT OF DEFENSE

3 Ms. O'Connor: Thank you, Mr. Chairman, Ranking Member
4 Reed, and members of the committee. It is a great honor to
5 appear before you today as the nominee to be the General
6 Counsel of the Defense Department.

7 I would not be here but for the dedication and support
8 of my family and my colleagues. In particular, I want to
9 thank my wonderful husband David and my children, Ian and
10 Dylan, both of whom are here. And I also would like to
11 thank --

12 Chairman McCain: Welcome.

13 Ms. O'Connor: Thank you.

14 I also want to thank and introduce my father, Austin
15 O'Connor, and his wife Mebeth. He is a former enlisted Army
16 MP and he is here today as well.

17 Chairman McCain: Welcome.

18 Ms. O'Connor: I am also grateful for the confidence
19 placed in me by President Obama and Secretary Carter and for
20 their support of my nomination.

21 If confirmed, I will pledge my continued personal
22 commitment to the rule of law. I will work to ensure that
23 the Department remains in full compliance with all
24 applicable law, and I will also pledge to keep in mind the
25 importance of protecting our country from national security

1 threats and always to work to help define lawful paths to
2 support our military and civilian personnel as they work to
3 achieve our mission objectives.

4 Following the Secretary's lead, I will pledge my best
5 efforts to ensure that the Armed Services Committee are kept
6 properly informed in furtherance of your critical oversight
7 responsibilities.

8 And finally and most important, as General Counsel, I
9 pledge to serve the people who serve us, the fine men and
10 women of the U.S. armed forces and the civilian personnel
11 who support their mission. As the daughter and niece and
12 cousin of seven former service members, who span the Army,
13 Navy, Air Force, and Marine Corps, I have long been inspired
14 by their commitment to this country, and having worked
15 closely with our men and women in uniform over the past
16 months as the Deputy General Counsel at the Department, I am
17 honored to continue serving them as the General Counsel of
18 the Department.

19 If confirmed, I will make every effort to live up to
20 the confidence placed in me, and I want to thank you for the
21 opportunity to be heard today. I also want to wish a speedy
22 recovery to Senator McCaskill. And I look forward to your
23 questions.

24 [The prepared statement of Ms. O'Connor follows:]

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Chairman McCain: Mr. Weiler?

1 STATEMENT OF TODD A. WEILER TO BE AN ASSISTANT
2 SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS

3 Mr. Weiler: Chairman McCain, Ranking Member Reed, and
4 distinguished members of the committee, I am honored to be
5 here today as the President's nominee for the Assistant
6 Secretary of Defense for Manpower and Reserve Affairs.

7 If confirmed, I look forward to working with you and
8 your staffs on the challenging issues that face the
9 Department in this year and set a pathway forward for future
10 M&RAs.

11 I would like to begin by thanking my family, friends,
12 and colleagues that are here today. They are the backbone
13 to my success in and out of government service, beginning
14 with my spouse, while unable to be here, and certainly been
15 my rock for over 8 years and demonstrates every day the
16 perseverance and strength of character needed for strong
17 family and a successful career.

18 I would also like to recognize someone else that is not
19 here. In my last year of college and only months before I
20 was commissioned in the Army, my mother passed. But I know
21 that she would be very proud of her three boys. She taught
22 us the importance of selfless and altruistic service.

23 I am pleased to be joined here today by my younger
24 brother Dana and his wife Angel. He serves with the FAA and
25 recently transferred to D.C. from Oklahoma. They are a

1 light for so many as they have set the example by
2 demonstrating courage and determination in life that comes
3 from facing struggle and sacrifice.

4 All of these folks, family and friends, set the example
5 of compassion and caring that I hope to bring to this
6 position.

7 If confirmed, I commit to bring the lessons that I have
8 learned from government and private sector service to the
9 M&RA family. I commit to enter each day with a constant ear
10 to the voices of our service members and their families. I
11 realize that this is a new position and that it has great
12 challenges from total force personnel policy changes to
13 benefit adjustments, efficiencies, and continued
14 mobilizations. These are the challenges that I will not
15 shrink from but will face each day with a determination and
16 resolve to improve the Department while maintaining
17 compassion for its people.

18 It has been many years since I served in the Army and
19 later as a Deputy Assistant Secretary to that service, but I
20 look forward to bringing that experience and a diverse
21 background in government service, entrepreneurial commercial
22 leadership, and nonprofit advocacy to the issues that face
23 our service members and their families. I have always
24 remembered from my entry into the Army mission first, people
25 always.

1 I thank you for this humbling opportunity, and I look
2 forward to your questions.

3 [The prepared statement of Mr. Weiler follows:]

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1 Chairman McCain: Thank you very much, Mr. Weiler.

2 Mr. Carson, you briefed the media, Federal labor
3 unions, think tanks, and foreign governments on your Force
4 of the Future initiatives, but you have never briefed this
5 committee. Why?

6 Mr. Carson: So there has never been a single request
7 of me to brief this committee that I have turned down.

8 Chairman McCain: So it is up to us to ask for a
9 briefing from you rather than you to offer a briefing to us.

10 Mr. Carson: I have offered on many occasions. I am
11 told --

12 Chairman McCain: Formally you have requested to brief
13 this committee?

14 Mr. Carson: I have been told on many occasions the
15 committee has asked us to give information, my name has been
16 volunteered to come over here as Mr. Varney would --

17 Chairman McCain: That is not how it works, Mr. Carson,
18 and you know it and I know it. The way it works is that you
19 have something that you think the committee and Congress
20 should know about and you ask to come over and brief the
21 committee and Members of Congress. And we have no record of
22 you doing that.

23 Mr. Carson: The matters we have worked on in Force of
24 the Future and other matters at P&R have been predecisional.
25 They were inappropriate to brief to the Senate at that time.

1 Chairman McCain: But you could brief labor unions,
2 media, think tanks, and foreign governments.

3 Mr. Carson: I did not brief any of them with
4 information I did not give to the U.S. Senate. The labor
5 unions are important to notice. They have predecisional --

6 Chairman McCain: What do you mean that you did not
7 give to the U.S. Senate -- how did you give it to the United
8 States Senate?

9 Mr. Carson: We delivered the reforms, version 2.0 of
10 Force of the Future, to the Senate Armed Services Committee,
11 sir.

12 Chairman McCain: And you never asked to come over and
13 brief the committee on those proposals.

14 Mr. Carson: We have told the committee on many
15 occasions --

16 Chairman McCain: You never asked. Mr. Carson, you are
17 parsing words. When Members of Congress have major policy
18 decisions -- when the administration has major policy
19 decisions -- and certainly these are far-reaching -- they
20 ask to come over and brief the committee of oversight. That
21 is standard procedure. You did not do it, Mr. Carson.

22 Mr. Carson: Twice, sir, I have been to the Senate
23 Armed Services Committee.

24 Chairman McCain: I would be very interested in seeing
25 a written record of that happening because I know of no one

1 on this staff nor any member who has been briefed by you or
2 requested to be briefed by you. Perhaps you can correct the
3 record. We will leave the record open for you to correct
4 that record if that is indeed the case.

5 How many special assistants have you hired for your
6 office?

7 Mr. Carson: Sir, over the last 7 or 8 months, we
8 probably have four or five special assistants.

9 Chairman McCain: Four or five special assistants. And
10 of the 32,000 employees in the P&R organization, you needed
11 to hire additional assistants.

12 Mr. Carson: Sir, these are political appointees. We
13 are very fortunate at P&R that because of the exciting work
14 we are doing and the way that the organization is handling
15 some of the most important national security issues that
16 people have wanted to work for us. And so we have not added
17 to the aggregate Department of Defense headcount in any way.
18 It is that people have wanted to come and be a part of this.
19 Really young men and women --

20 Chairman McCain: Unpaid?

21 Mr. Carson: No, sir. But they were working elsewhere
22 in the Department of Defense when they were called into our
23 office.

24 Chairman McCain: A recent article in the Atlantic said
25 about your leadership of this team, quote, he soon turned

1 full-time the all-consuming initiative. His small staff
2 worked around the clock from a cramped office in the
3 Pentagon's E ring. By early summer, inflatable air
4 mattresses started appearing under many of their desks.

5 At what point did you involve the services in
6 developing your Force of the Future proposals?

7 Mr. Carson: They were involved from the very first
8 day, sir.

9 It is important to remember that the genesis of the
10 Force of the Future initiative was from Secretary Carter
11 himself while I was still the Under Secretary of the Army.
12 I fell into the job and onto the three working groups that
13 were already established with representations from both the
14 uniformed and civilian side of all the services. We had
15 meetings 6 hours a week. Hundreds of people were involved
16 from the services. Over the last 8 or 9 months, the
17 services have been intensely involved from the service
18 chiefs to the service secretaries to all of their
19 personnelists, so much as line editing with the various
20 chiefs of staff of the services.

21 Chairman McCain: It is very interesting because that
22 is not what we hear from the uniformed military. That is a
23 very interesting different view of events.

24 Did you bother to read the Department of Defense
25 General Counsel memo on presumption of confirmation and what

1 actions you should avoid?

2 Mr. Carson: I have read that, sir, yes.

3 Chairman McCain: And yet, you violated almost all of
4 them. Do you believe you are above the rules set by this
5 committee?

6 Mr. Carson: I have never violated that memorandum nor
7 had any presumption of confirmation, sir.

8 Chairman McCain: Of course, that is not the view of a
9 circuit court -- your actions.

10 Mr. Carson: As I noted, I resigned the position
11 immediately upon being told of your letter that was sent to
12 the Department of Defense.

13 Chairman McCain: And I just gave you a quote, sir,
14 concerning the interpretation of the law which was recently
15 as a result of a court decision. So that is your view
16 versus that of the circuit court.

17 I have no further questions. Senator Reed?

18 Senator Reed: Thank you, Mr. Chairman.

19 Mr. Carson, just to clarify, you were acting Under
20 Secretary of Defense for Personnel and Readiness when the
21 circuit court made a decision that since you are a nominee,
22 you could not hold that position. And you, in response not
23 only to the circuit court but the letter from the committee,
24 took affirmative action and resigned from that position. Is
25 that correct?

1 Mr. Carson: Yes, Senator.

2 Senator Reed: Then you became the Principal Deputy
3 Assistant to that position effectively. And so your conduct
4 then would be measured by what is appropriate for the
5 Principal Deputy Assistant to do, not only within the
6 building but contacting other people outside. And in your
7 view, you complied explicitly and sincerely with the duties
8 of the Principal Deputy Assistant. Is that accurate?

9 Mr. Carson: Yes.

10 Senator Reed: With respect to building the new force,
11 the initiative that you worked on that has been the subject
12 of the questions, I understand -- and you might provide some
13 perspective -- that the Deputy Secretary of Defense and the
14 Vice Chairman of the Joint Chiefs of Staff were intimately
15 involved in this process. Can you describe their roles?

16 Mr. Carson: Yes. As I mentioned, the process started
17 long before I became the acting Under Secretary of Defense
18 last spring, and the working groups developed more than 120
19 position papers that filtered up to me. After we ourselves
20 distilled those, the Vice Chairman of the Joint Chiefs and
21 the Deputy Secretary of Defense got a group together
22 composed of the vice chiefs of the services, as well as the
23 under secretaries. The "Implementation Group" it was known
24 as. And we had exhaustive meetings about what to do on the
25 Force of the Future and the right thing to recommend to the

1 Secretary of Defense.

2 Senator Reed: So in effect, certainly at the most
3 senior levels, the uniformed personnel, the Vice Chief, and
4 others were involved on an almost day-to-day basis in this
5 construct. Is that accurate?

6 Mr. Carson: Yes. And the M&RAs in the services were
7 as well.

8 Senator Reed: Ms. O'Connor, you have a very
9 challenging job before you. Could you identify quickly what
10 you feel are the most immediate issues that the new defense
11 counsel would face?

12 Ms. O'Connor: Senator, you are right. There are
13 challenging issues in front of the Department. Some of the
14 most immediate ones are the ongoing issues that the General
15 Counsel faces, which is to provide accurate and as quick as
16 possible and as supportive as possible legal advice to the
17 Secretary regarding the conflicts that we are engaged in to
18 fight ISIL and our other enemies in the Middle East.

19 Other issues that are facing the Department are as this
20 committee has raised and the statute has directed and also
21 the Secretary has made a commitment to his addressing sexual
22 assault. And that is an issue that the General Counsel
23 works on alongside the policy leaders of the Department.

24 It is a job that has a wide portfolio. It includes
25 personnel matters. It includes cybersecurity, legal

1 analysis as well. And obviously, we have the issues that
2 were presented by the administration to this committee and
3 others on Tuesday regarding how to handle the ongoing
4 detainees at Guantanamo Bay. That is just sort of a flavor
5 of some of the big issues that are facing the General
6 Counsel.

7 Senator Reed: Thank you.

8 And, Mr. Weiler, you have an extensive career in
9 business, as well as experience as a combat officer in the
10 Army. And you are taking on a role that is essentially a
11 new role. Do you have sort of several major issues you
12 would like to address immediately?

13 Mr. Weiler: Senator, I think that one of the major
14 issues, because this is a new office, are the naturally
15 occurring processes that occur as such. So it will be
16 ensuring that the staff is working across functional lines.

17 I also see the need to reassure our Reserve components,
18 because this was just a Reserve affairs position, that
19 actually the representation in more functional duties across
20 the portfolio will help the Reserve components by having
21 representation in those other areas. So I see those as
22 major challenges right away.

23 Senator Reed: Thank you very much.

24 Thank you, Mr. Chairman.

25 Chairman McCain: Senator Inhofe?

1 Senator Inhofe: Thank you, Mr. Chairman.

2 Mr. Carson, I have known you for a long time. Right?

3 Mr. Carson: Yes, sir.

4 Senator Inhofe: While we have had differences in the
5 past on political issues, we have gotten along very well.
6 Have we not?

7 Mr. Carson: Yes, sir.

8 Senator Inhofe: And you have been up for confirmation
9 several times, and has anyone on this panel been a stronger
10 support of you than I have?

11 Mr. Carson: No, sir, I do not think so.

12 Senator Inhofe: Well, having said that, I was
13 disappointed when complaints were brought to my attention
14 and to the attention of other members of this committee
15 about your leadership and the command environment that
16 exists in the Office of the Under Secretary of Defense for
17 Personnel and Readiness. I have read reports and I have
18 been briefed, as others have, regarding -- I am choosing the
19 words very carefully here -- a hostile work environment that
20 has been fostered under your leadership in the Office of
21 Under Secretary.

22 Now, these are whistleblower things. I understand
23 that. Sometimes they are with merit and sometimes without
24 merit. And so I have no way of knowing. But it is
25 extremely concerning that they have been called to my

1 attention.

2 Are you aware of any of these issues?

3 Mr. Carson: No, sir. And I would strenuously object
4 to this characterization. I have never heard that
5 allegation. And people have many means to make those kinds
6 of allegations at the Department of Defense --

7 Senator Inhofe: You have answered my question.

8 Let me ask you. Are you familiar with what a command
9 climate assessment is?

10 Mr. Carson: Sure, absolutely, sir.

11 Senator Inhofe: Have you had a command climate
12 assessment in your office of you particularly, your
13 leadership?

14 Mr. Carson: No, we do not do that for civilians. The
15 military does that, but it is not typical for the civilians
16 to do that.

17 Senator Inhofe: But is it permissible?

18 Mr. Carson: Yes, certainly. I would be happy to do
19 that.

20 Senator Inhofe: Well, that answers my question.

21 I think that it is serious, but it may not be true.
22 And so I am going to request a command climate assessment,
23 and I am going to ask the committee to delay a vote to
24 report your nomination until we get that. It could be done
25 very quickly.

1 Mr. Carson: Absolutely, sir. I can assure you there
2 is no hostile work environment. I will dispute that
3 allegation.

4 Senator Inhofe: And I hope that is the case.

5 Ms. O'Connor, I told you I was going to ask this
6 question. I will preface it, which I did not preface to
7 you. It has been my observation in the last 7 years that
8 this President has had total disregard for the law in many
9 cases, specific cases. I think it was in the National
10 Defense Authorization Act of 2014 when we put the
11 requirement on for a 30-day notice for anyone being released
12 from Gitmo, and it was 5 months later that the Taliban 5
13 were released in disregard of that law.

14 Now, on Tuesday, the President announced his plan for
15 the closure of Guantanamo. The plan also includes the
16 transfer of 35 of the remaining detainees to be shipped to
17 -- 60 to the United States' soil. These remaining 60 are
18 the highest risk that are out there.

19 Now, every year since 2009, Congress has passed laws to
20 prevent both the closure of the base and the transfer of
21 detainees to the U.S. soil.

22 In your answers to our advance policy questions, you
23 answered questions on your view regarding language in the
24 fiscal year 2016 NDAA that again prevents bringing
25 terrorists detained at Gitmo to the United States. So you

1 have had a chance to study this. And I am just asking
2 legally can you see anything in here that would allow the
3 President to legally circumvent those aspects of the law
4 that would preclude those releases or funding of
5 transferring to the United States.

6 Ms. O'Connor: Senator, as I think I said in the
7 advance policy questions and in answer to your question, it
8 is the position of the Department that the provisions that
9 you cited prohibit the transfer of detainees from Guantanamo
10 Bay to the United States. The Attorney General testified
11 about this yesterday, and she said that was her view as
12 well. That is my view as well.

13 Senator Inhofe: Okay. I think that is very clear, and
14 I appreciate your answer. And we will be hoping that that
15 does not happen.

16 Thank you, Mr. Chairman.

17 Chairman McCain: Let me just follow up. Do you
18 believe that the President was following the law when he
19 failed to notify the Congress within 30 days of the release
20 of the five prisoners who he released in exchange for
21 Bergdahl?

22 Ms. O'Connor: Senator, my understanding of that -- and
23 it was not something I was involved in, but I have an
24 understanding --

25 Chairman McCain: Well, I want your legal opinion, Ms.

1 O'Connor.

2 Ms. O'Connor: It is my understanding that the
3 Department has provided in letters to this committee, as
4 well as to --

5 Chairman McCain: I am asking for your opinion, Ms.
6 O'Connor.

7 Ms. O'Connor: So my understanding of it --

8 Chairman McCain: I am asking for your legal opinion.
9 You are a lawyer. You are going to be the chief legal
10 counsel. What is your view? Did the President -- did he or
11 did he not violate the law when he failed to notify the
12 Congress 30 days ahead of the release of the five prisoners
13 in exchange for Bergdahl? That is a pretty straightforward
14 question, Ms. O'Connor.

15 Ms. O'Connor: The administration did not give 30 days
16 notice. The legal analysis of why that was appropriate is
17 that the --

18 Chairman McCain: I will ask you for the last time for
19 your opinion. I just asked you a series of questions, if
20 you would give your opinions to this committee when asked.
21 I am asking you whether the President acted in violation of
22 the law when he did not notify the Congress 30 days ahead of
23 the exchange of prisoners for Bergdahl.

24 Ms. O'Connor: In the circumstances presented, it was
25 not a violation of the law.

1 Chairman McCain: So it is your opinion that it was not
2 a violation of the law.

3 Ms. O'Connor: In the extremely unusual circumstances
4 there, it was not.

5 Chairman McCain: Thank you.

6 Senator Manchin?

7 Senator Manchin: Thank you, Mr. Chairman.

8 And thank you all for your service and coming here
9 today.

10 I will address this to Ms. O'Connor first. I feel
11 strongly that we need an open debate about the authorization
12 of use of military force, AUMF, as you know, related to our
13 conflict with ISIS. I think we owe it to the American
14 people what our purpose and direction and how we are going
15 to take this on. And in reviewing your advance policy
16 questions for the committee, I was glad to see that although
17 you felt like the administration's current legal authority
18 was adequate, you support getting a specific statutory
19 authorization to use military -- AUMF. And I really
20 appreciate that.

21 So I would like to know in your opinion what would
22 having an AUMF in the fight against ISIS clear up with the
23 current mess we are in now with an all-encompassing AUMF.

24 Ms. O'Connor: Senator, it is a good question.

25 The current legal authority for the battle against

1 terrorism, against ISIS that we are engaged in is from the
2 2001 AUMF.

3 Senator Manchin: Correct.

4 Ms. O'Connor: And that provides the legal authority
5 for all the activities that the Department is engaged in.

6 The administration proposed a new AUMF for other
7 reasons, including the perspective that it would be
8 important to our allies, to our enemies, and to our troops
9 for the two branches of government together to issue a
10 current vote of support for the efforts there. And I think
11 in general, statutes that are old are statutes that should
12 be taken a look at --

13 Senator Manchin: So you are encouraging basically we
14 should have a new AUMF. You still feel that strong about
15 it.

16 Ms. O'Connor: Certainly it seems like it would be a
17 good idea.

18 Senator Manchin: Thank you.

19 Ms. O'Connor: Mr. Weiler, if I can, when I first
20 became a Member of the Senate and came to the Armed Services
21 Committee, at that time Admiral Mullins came before us and
22 he was asked what is the greatest threat the United States
23 of America faces, which I would ask all of you to think
24 about that. His answer, without even blinking or thinking,
25 was the national debt. The national debt at the time he

1 came before us was \$14 trillion. We are at \$19 trillion.
2 People think we might go as high as \$22 trillion very
3 shortly. And I know everybody was sequestered. We have a
4 lot of problems, a lot of things that we are concerned
5 about, and protecting the homeland is at the forefront of
6 all of this.

7 How do you think the national debt affects our ability
8 to defend our country?

9 Mr. Weiler: Senator, I think that it affects probably
10 all things in the government and in particular how we fund
11 our forces and keep them ready.

12 Senator Manchin: How does it compare to some of the
13 global challenges we are facing as far as imminent threats?
14 Do you rate it as high or --

15 Mr. Weiler: I would definitely say it is high. Yes,
16 Senator.

17 Senator Manchin: It is a challenge. It really is.

18 Mr. Weiler: Global crises may come and go. This has
19 been a long-term issue and will continue to be so.

20 Senator Manchin: Thank you.

21 Mr. Carson, also on yours, I think when you were Under
22 Secretary of the Army, you had said at an event that
23 brigades in the Army National Guard are not one-for-one
24 substitutes. But I have read your article, and I think you
25 were complimentary in what the reservists do, the National

1 Guard, and how we -- I think all of you and both you two are
2 especially going to be involved with the Guard.

3 And the only thing I would say as a former governor,
4 the Guard is near and dear to me and to all of us. But I
5 was able to see the Guard up close and personal, what they
6 do. If it was not for the Guard, I do not think half of the
7 people -- I do not think the majority of the people in this
8 country would even know the military, the strength of the
9 military, the sacrifices of the military. They keep it
10 real. And we continue to see the reduction in forces there,
11 but also we see the increase of contractors. I have a hard
12 time justifying why we still have such a strong contracting
13 force and we are basically dwindling away our national
14 Reserves and our National Guard.

15 So if you could speak to that, sir, the National Guard
16 strength and the Reserve strength.

17 Mr. Carson: Absolutely, Senator. I am a great admirer
18 of the Reserve component both in the Air Force and Army
19 Guard and the various Reserve components across the entire
20 Department of Defense. I served in Iraq with the Red Bulls,
21 the Minnesota National Guard, who were given the weighty
22 responsibility of running an entire section of the country,
23 and so I know firsthand how remarkable they are. And today
24 that same unit is in the Sinai doing an important mission
25 for us as well. So you will never hear a negative word

1 about the Guard or Reserve from me.

2 Senator Manchin: Do you think they are capable to do
3 that same one-on-one job?

4 Mr. Carson: Absolutely.

5 Senator Manchin: Or is the training different, or is
6 the training not up to speed to what the regular Army is
7 getting?

8 Mr. Carson: I think the regular Army gets more of that
9 training, but I think when the National Guard has the
10 training opportunities and is getting ready for deployment,
11 they can do the same missions as the active component.

12 Senator Manchin: Anybody else have any comments on
13 that, the Guard and Reserve units?

14 Mr. Weiler: I completely agree, Senator.

15 Senator Manchin: Thank you.

16 Chairman McCain: Senator Sessions?

17 Senator Sessions: Thank you, Mr. Chairman.

18 You know, the Defense Department is the great
19 Department of the United States Government. It takes more
20 than half of the discretionary spending, \$600 billion a
21 year. This committee has a duty in my opinion to ensure
22 that the top officials who operate that Department are
23 really the best that we can have. Yes, you would want to
24 reflect the views of the President in many ways, but you
25 have duties that go beyond that. You have a duty to

1 faithfully adhere to the law, to never take a position that
2 is contrary to national security interests of the United
3 States.

4 And there is a growing unease that we are seeing,
5 particularly in the latter days of this administration, less
6 and less professionals and more and more people holding a
7 position that basically will be politically loyal to the
8 White House. That is just the way it is. And I am
9 concerned about it.

10 Mr. Carson, I want to make clear, in response to the
11 follow-up on Senator McCain's question, that you claim you
12 have met with the committee on the Force of the Future
13 proposals. And I think the members of this committee would
14 know if that has happened. I believe you did not. Are you
15 saying you actually met with this committee to discuss Force
16 of the Future proposals?

17 Mr. Carson: I met with staff in August of last year,
18 sir.

19 Senator Sessions: When did this Force of the Future
20 start?

21 Mr. Carson: It started in April or May. That is when
22 I got involved. It actually started in February, about 5
23 months earlier than that.

24 Senator Sessions: Well, this is an important matter.
25 And what we know and what we believe, from what I have

1 understood from senior defense military officials, that you
2 met at great length with a select group --

3 Chairman McCain: Without infringing on the Senator's
4 time, I am informed by staff, Mr. Carson, that you came over
5 for a pre-confirmation conversation, but not specifically on
6 the Force of the Future. I guess we will have to clear it
7 up for the record. But our staff says it was not on Force
8 of the Future. It was on your pre-confirmation
9 conversation.

10 Mr. Carson: It is worth discussing all of this
11 because, obviously, it is an issue of concern to the
12 committee. I showed up in August and the conversation was
13 about Force of the Future.

14 I had another scheduled event over here where
15 apparently we had our wires crossed, and Mr. Varney told me
16 I needed to come back another time. We delivered the reform
17 proposals to the committee. On various occasions, our
18 legislative affairs staff, when the committee asked for
19 experts to come talk about Force of the Future, said that
20 Mr. Carson himself is the expert and can talk to you. And
21 that request was turned away.

22 Chairman McCain: Well, Mr. Carson, we will leave the
23 record open because that is clearly not the depiction of
24 events by my staff, nor do I know of any Senator that
25 received a request from you to brief them on Force of the

1 Future.

2 Mr. Carson: If I may add one more thing to that. I am
3 happy to go anywhere to brief it. I will come this
4 afternoon and walk through all of the spreadsheets, the
5 analysis. I have been on the road trying to talk to people
6 about what we are doing. And I am happy to go anywhere
7 anytime to talk to anyone about these issues. And I have
8 never turned down any request --

9 Chairman McCain: It is nice of you to classify us as
10 "anyone," Mr. Carson. There is a responsibility that most
11 people feel they have to Congress.

12 Senator Sessions, please proceed.

13 Senator Sessions: Let me tell you what I am concerned
14 about. We hear that you met with a group of people and went
15 far down the road in developing this plan of the Force for
16 the Future before senior military people were really
17 involved and that they are frustrated about it and do not
18 feel like that they have been properly consulted. We will
19 pursue this further. But I will give you a brief chance to
20 respond to that. You have given your side of it that you
21 had many meetings. All I am telling you is people did not
22 feel like they were engaged in it.

23 Mr. Carson: They were very engaged in it, Senator,
24 from the very start of this. I can assure you of that.

25 Senator Sessions: All right. That is your position.

1 Others have a different view, I have to tell you.

2 And there is an unease here because the White House is
3 widely perceived to be suspicious of the military and have
4 not been comfortable with the recommendations they make and
5 have, in many ways, sought to get around that. And that is
6 why we are raising it, just to be frank with you. And our
7 top people have said that, that the White House is
8 disrespectful and suspicious of military advice. So I just
9 hate to say it.

10 Ms. O'Connor, have you ever served in the military?

11 Ms. O'Connor: No, sir, I have not.

12 Senator Sessions: Have you ever read the Uniform Code
13 of Military Justice?

14 Ms. O'Connor: I have certainly read provisions of it.
15 I have not read it end to end.

16 Senator Sessions: You have not participated in a court
17 martial or an Article 15 or made a decision about that?

18 Ms. O'Connor: I have not been a military lawyer.

19 Senator Sessions: You had a period of time at the IRS.
20 You worked on cleaning up, trying to move through the Lois
21 Lerner matter. Is that right?

22 Ms. O'Connor: I would be happy to describe that if you
23 would like me to.

24 Senator Sessions: Did you work on those issues?

25 Ms. O'Connor: So when I was at the IRS, as I am sure

1 you recall, when the agency faced an incredible crisis, the
2 President fired the leadership of the agency and brought in
3 an acting Commissioner for a temporary period of time until
4 a new Commissioner could be confirmed. That acting
5 Commissioner brought a small team with him for a number of
6 purposes. One was to try to manage the agency in the
7 interim, try to fix some of the management problems, and an
8 important piece of his job --

9 Senator Sessions: Well, my time is about out.

10 I just would note you also were at HHS during the
11 Obamacare rollout, which did not go so well.

12 What my concern is -- is it not true that there are
13 thousands of former JAG officers, thousands of lawyers who
14 specialized in military issues who have served in the
15 military, who understand these issues, who have dealt with
16 authorizations for utilization of military force, who have
17 written papers on it and studied it? Would some of those
18 who have that kind of experience not be a better nominee to
19 the Department of Defense than someone who has apparently
20 had no experience whatsoever in these issues?

21 Ms. O'Connor: I know the time has run. May I answer
22 the question?

23 Senator Sessions: You can answer.

24 Ms. O'Connor: Senator, I am extremely qualified for
25 this position. I have practiced law for almost 2 decades,

1 and in that practice, it has included practice in the
2 government working in a number of different positions with a
3 very diverse range of experiences that cross Federal
4 agencies, as well as both at the White House and the
5 Department of Defense where I have worked specifically with
6 the Department of Defense and its issues. I also spent 15
7 years in one of the most well regarded national security and
8 defense practices in private practice.

9 I think that you are right, that because I have not
10 been in the JAG Corps, the operational issues that those
11 lawyers face are new to me. But in the position I have been
12 in at the Defense Department, I have had a tremendous
13 experience already meeting the staff judge advocates for the
14 combatant commanders at PACOM and EUCOM and AFRICOM, and I
15 am getting to know and working with the legal advisor to the
16 Chairman of the Joint Chiefs and getting to know the TJAGs.
17 I would expect that in those areas which are new to me, I
18 will rely on their tremendous expertise and advice going
19 forward as those issues arise.

20 Senator Sessions: Well, thank you. As a lawyer, I
21 would just there is almost no issue that will come before
22 you that you will not have to start from the beginning to do
23 your research on. It would be very helpful if we had a
24 nominee in this critical position that sets legal policy for
25 the Department of Defense who already understands the great

1 issues that the Department of Defense has to deal with.

2 Thank you, Mr. Chairman.

3 Chairman McCain: Senator King?

4 Senator King: Mr. Carson, your responsibilities in
5 this position, if confirmed, would involve, I note,
6 readiness as well as personnel. It strikes me that in a
7 time of essentially fixed budgets, those two
8 responsibilities are inevitably going to come into some kind
9 of conflict. Can we maintain the proper level of readiness,
10 training, and deal with increasing personnel costs into not
11 only the immediate future but the longer-term future? Are
12 we not heading for some real dangerous tradeoffs here?

13 Mr. Carson: I think there are tradeoffs across the
14 budget, especially when the specter of sequestration still
15 looms in a couple of years.

16 But personnel in many ways informs the readiness
17 questions. When you talk to the services about their
18 readiness concerns, it is often driven by personnel. Take
19 the Army, for example. The downsizing has created enormous
20 turmoil. They are reconfiguring what is in the BCT. They
21 have 50,000 unavailable soldiers who cannot be deployed,
22 39,000 medically so, 11,000 in some kind of legal process.
23 And so the personnel churn and the lack of available people
24 makes a unit unready. And sometimes the training issues for
25 those same people lead to degradation of unit readiness as

1 well.

2 Senator King: I am concerned that we are making
3 decisions and doing drawdowns and force reductions based
4 upon old news. The budget caps essentially we are working
5 on were put in place in 2011, pre-Syria, pre-ISIS, pre-
6 Ukraine, pre-South China Sea. Do you think we should
7 reexamine those decisions? It just seems like we are
8 reducing our force structure at a time of, as Director
9 Clapper testified, unprecedented threats and danger to this
10 country.

11 Mr. Carson: I think there are great dangers on the
12 horizon, Senator. And of course, to meet those, it is not
13 only about the people, as important as they are, it is about
14 having the right kind of equipment, the right kind of
15 training. And so there are tradeoffs across the budget to
16 do that. I think the budget submitted by Secretary Carter
17 adequately balances those. But there is no question that
18 for me in the era of the all-volunteer force, the continued
19 health of our personnel is something that I am nothing short
20 of obsessed about.

21 Senator King: Often when we are talking about
22 spending, we talk about absolute dollars, \$600 billion. And
23 of course, that is a huge amount of money and it is about
24 half of the discretionary budget. I would point out,
25 however, that in 1967 the defense budget constituted 8.6

1 percent of GDP. In 1985, it was 5.9 percent. Today it is
2 3.3 percent and falling. So as a percentage of GDP, our
3 national defense budget has shrunk almost by two-thirds in
4 the last 40 years at a time, again, of unprecedented
5 threats. I just think that is information that the public
6 should have.

7 Mr. Weiler, to follow up on some of the other questions
8 about the Guard and Reserve. Again, we are talking about
9 declining force levels. As I talk to Guard members and
10 businesses in Maine, a concern is the Reserve and the Guard
11 have become much more of an active duty force called upon
12 repeatedly for repeated deployments, and it is making it
13 harder to maintain the support of the employer community and
14 the potential recruits.

15 How do we balance that or return to a balance where the
16 Guard and Reserve are not going to be called upon to such an
17 extent that it compromises the underlying efficacy of that
18 system?

19 Mr. Weiler: Senator, I think first of all is where
20 possible, predictability is extremely critical, being able
21 to offer predictability not only in the rotation but to
22 their employers, to the families, and so forth.

23 Senator King: I agree. That is what I am hearing.

24 Mr. Weiler: When I was in the Pentagon before, we were
25 having a lot of discussions around we need to engage more

1 with the Guard and Reserve to get them part of the total
2 force. And now I see your point on the other side.

3 I think, if confirmed, one of the major issues that I
4 would look into is how we maintain that balance while still
5 keeping the Guard and Reserve an integral part of the total
6 force.

7 Senator King: Again, as we are declining in force
8 levels, it seems to me inevitable that there will be greater
9 demands on the Guard and Reserve. And perhaps the answer is
10 everybody just needs to know what the deal is going in in
11 terms of predictability. But I am concerned that we might
12 undermine support for the Guard and Reserve unless we can
13 clarify exactly what the role is going to be on an ongoing
14 basis.

15 Mr. Weiler: And I do recognize that, Senator, and I
16 think in particular with not only the family issues but
17 really involving their career employers, I think that is
18 extremely important. And certainly if confirmed, it would
19 be an issue that I would be interested in working on.

20 Senator King: Thank you.

21 Thank you, Mr. Chair.

22 Senator Reed [presiding]: On behalf of the chairman,
23 Senator Cotton.

24 Senator Cotton: Ms. O'Connor, I want to return to a
25 question that you had earlier from, I believe, Senator

1 Inhofe and Senator McCain about Guantanamo. You have said
2 that current law -- prohibits is the word you used --
3 prohibits the transfer of Guantanamo detainees to the United
4 States. On page 10 of your testimony, though, you twice
5 used the word "restrict," which would appear to use some
6 legal room. Does current law prohibit under all
7 circumstances the transfer of detainees to the United
8 States?

9 Ms. O'Connor: Yes, Senator.

10 Senator Cotton: So you agree with Attorney General
11 Lynch and Lieutenant General Maybel on that point.

12 Ms. O'Connor: Yes, I do, sir.

13 Senator Cotton: If President Obama were to order the
14 military to transfer those detainees to the United States,
15 would you expect military officers to disobey that order?

16 Ms. O'Connor: I have no anticipation that that is
17 going to happen, but the position of the Department, the
18 position of the Attorney General in my view is that the
19 restrictions that are there now are the law and they prevent
20 that.

21 Senator Cotton: Do military officers take an oath to
22 obey the orders of the President?

23 Ms. O'Connor: Yes.

24 Senator Cotton: No, they do not.

25 Ms. O'Connor: No, no, no, not the President, the

1 Constitution. Sorry I anticipated your question and jumped
2 ahead.

3 Senator Cotton: That is correct because we expect
4 officers, unlike enlisted personnel, to understand the
5 difference and be able to make a tough decision whether they
6 are a lieutenant or a general to disobey an unlawful order.

7 Ms. O'Connor: We all take an oath to the Constitution.

8 Senator Cotton: But officers in particular, are
9 expected to disobey an unlawful order, such as the unlawful
10 order to transfer detainees from Guantanamo to the United
11 States.

12 Ms. O'Connor: They all take an oath to the
13 Constitution.

14 Senator Cotton: I want to give you a chance to clear
15 up another question which you discussed earlier about the
16 transfer of five Guantanamo detainees in exchange for Bowe
17 Bergdahl, who now faces court martial charges. You said
18 that the law required 30 days notice. You said that the
19 administration did not give 30 days notice. You said,
20 quote, it was not a violation of the law. End quote. Do
21 you care to square that circle?

22 Ms. O'Connor: Certainly. And again, I was not
23 involved in the legal analysis and was not involved in
24 advice before the exchange or anything. This is something
25 that I understand from having read the position of the

1 Department as provided to this committee and others.

2 And the legal position is -- the legal explanation is
3 that in the extremely limited circumstances in which what
4 the President was trying to do was save the life of a
5 service member, that was the assessment at the time, that
6 the operation might not go forward and that his life was in
7 danger if they had to wait 30 days, that in that very
8 limited circumstance, you would not read that provision to
9 prohibit what happened.

10 Senator Cotton: Do you agree with that interpretation?

11 Ms. O'Connor: It is not a matter of a personal
12 opinion. I did not do the analysis, but that is what the
13 legal analysis is.

14 Senator Cotton: Well, you will be the General Counsel
15 of the Department of Defense called upon for such analysis.
16 So I am asking now for your legal opinion. Do you agree
17 with that interpretation?

18 Ms. O'Connor: That legal interpretation was one that I
19 understand the Department and the Department of Justice
20 worked through together. I do not have any reason to
21 question it, but I have not delved into it myself
22 personally.

23 Senator Cotton: Well, it would seem a very plain
24 violation of the black letter of the law. I wonder if that
25 kind of legal gymnastics will be used to warrant a transfer

1 of the Guantanamo detainees to the United States.

2 Ms. O'Connor: What I can tell you, Senator, is that I
3 view this position as extremely important and one that,
4 although it is a position nominated by the President and
5 confirmed by the Senate, it is not a political position, it
6 is a lawyer position. And for us and for me, but for all
7 lawyers I would hope, certainly for me, the touchstone is
8 the Constitution and the statutes. That is how I will act
9 if I am confirmed, if I am fortunate enough to be confirmed
10 by this committee.

11 Senator Cotton: Do you consider yourself an expert in
12 congressional investigations and crisis management?

13 Ms. O'Connor: I would not characterize myself that
14 way, no.

15 Senator Cotton: Your biography at your previous
16 private employer at your law firm held out your practice
17 areas to include public policy and strategy, congressional
18 and executive branch and multi-state investigations, crisis
19 management, crisis communications, legislative and
20 administrative solutions, and managing public policy risk.
21 Does that sound like you are holding yourself out as an
22 expert in congressional investigations?

23 Ms. O'Connor: That sounds like what the website --
24 that was one of the things that I worked on in private
25 practice, yes.

1 Senator Cotton: When you, after 15 years in private
2 practice, left private practice to join the IRS, were you
3 involved in the Lois Lerner matter?

4 Ms. O'Connor: So what I did --

5 Senator Cotton: That as a yes or no question.

6 Ms. O'Connor: -- among my various responsibilities, I
7 worked on providing information, as requested, to the
8 various investigations that were seeking it.

9 Senator Cotton: Thank you.

10 Then you went to HHS during the healthcare.gov
11 controversy. Were you involved in that matter?

12 Ms. O'Connor: While I was at HHS, one of the
13 responsibilities that I had was to help provide information
14 to the congressional committees and others that were seeking
15 information about the launch of the health care website.

16 Senator Cotton: And then you went to the White House
17 where you were Deputy White House Counsel about the time
18 that Benghazi Select Committee started. Were you involved
19 in that matter?

20 Ms. O'Connor: One of my responsibilities was to work
21 with the committee as it requested information from the
22 White House.

23 Senator Cotton: Have you ever been a chief legal
24 officer of an agency of the United States?

25 Ms. O'Connor: No, I have not.

1 Senator Cotton: Have you ever been chief legal officer
2 or an office or department of an agency?

3 Ms. O'Connor: No. I am serving as the Deputy General
4 Counsel now, and I was the Deputy White House Counsel and
5 had senior legal positions at HHS and at the IRS.

6 Senator Cotton: Before 5 months ago, did you ever hold
7 a legal position where the majority of your work centered on
8 national security law?

9 Ms. O'Connor: Well, my position at the White House
10 covered all of the departments, and so that was a piece of
11 what I worked on there. And I also would say that across my
12 government legal positions, many of the issues that are
13 facing different agencies are the same as the ones that face
14 the Department. There is privacy law. There is
15 cybersecurity protection law. There is civilian personnel
16 law. There is a wide, wide range of regulations and
17 statutes that govern all of the departments. And frankly,
18 it is an asset I think to any department to have lawyers and
19 other professionals who have a diverse experience across
20 other departments and the kind of experience to know how
21 other departments have handled similar kinds of issues.

22 Senator Cotton: Well, thank you. My time has expired,
23 but I have to say, given the answers and given the movement
24 from Lois Lerner to the healthcare.gov to the Benghazi
25 controversy, I am worried about what this presages for

1 Guantanamo Bay in the last 9 months of this presidency.

2 Senator Reed: On behalf of the chairman, Senator
3 Donnelly, please.

4 Senator Donnelly: Thank you, Mr. Chairman.

5 Before I begin today, I would like to briefly note my
6 growing disillusionment with some of the hearings we have
7 had in the confirmation process not among any of the members
8 here. But it has been my experience that too often some of
9 the nominees come before this committee, smile at us, nod at
10 us, make commitments to us that are then forgotten or
11 discarded as soon as their confirmation goes through. I
12 would rather have a nominee disagree with me than to simply
13 nod, say yes, and then do the exact opposite a few days
14 later.

15 Mr. Carson, last April, you delivered a report to this
16 committee on how the Department of Defense and the VA are
17 working together to ensure we have adequate mental health
18 resources to meet the needs of our service members and their
19 families. On page 10 of that report, it reads the overall
20 numbers for the services' current mental health staffing
21 indicate near 100 percent staffing, although the number of
22 billets may lag actual requirements. The number of billets
23 may lag actual requirements. It is a pretty big question
24 mark. Do you believe we have enough mental health providers
25 in the military health system today?

1 Mr. Carson: I am not sure, but I am skeptical whether
2 we do or not, sir. We have made a heroic effort every year
3 putting 10 percent more into the health care budget for
4 behavioral health. We have increased the number of civilian
5 and uniformed behavioral health providers by 30 and 40
6 percent, respectively. We have embedded them in primary
7 care clinics. We have been world leaders on this issue.
8 But we know the questions of PTSD, depression, anxiety,
9 other behavioral health conditions only seem to remain
10 insoluble to us.

11 And so I am closely monitoring it. I work with HA all
12 the time -- our health affairs people -- on this issue. And
13 so it is a grave concern for me that I am watching closely.

14 Senator Donnelly: Well, I am concerned that DOD is
15 ineffectively assessing how many providers we do need.

16 I want to bring up another report. Last January, GAO
17 delivered a report to Congress that laid out serious
18 problems in how the Department of Defense and the individual
19 services report on their mental health provider staffing
20 needs. On page 20, GAO points out that in their quarterly
21 reports to the Department, the Army does not use the DOD-
22 approved model for assessing provider needs. In the Navy
23 and the Air Force, they do not assess provider staffing
24 needs at all. Instead, they report the number of providers
25 they are authorized to have and then list that as the number

1 they need. I think that is outrageous.

2 And what is even worse is that when the GAO recommended
3 the Department of Defense fix it, the Department refused.

4 So, Mr. Carson, if confirmed, what will you do to give
5 the Department and the committee an honest assessment of our
6 mental health provider needs?

7 Mr. Carson: I can give you my assurances, Senator,
8 that if confirmed, I will do that. As has already been
9 discussed today, there are not many sacred cows in the
10 Department of Defense I am not willing to take on. I am
11 happy to look at that question. I think it is enormously
12 important, as important an issue as anything else we do that
13 is in my portfolio.

14 Senator Donnelly: Mr. Weiler, my home State of Indiana
15 has the Nation's fourth largest Guard contingent. Fighting
16 for policies that help maintain and improve their readiness
17 is a key part of your job, if confirmed, and that includes
18 mental resiliency. I am concerned that mental health
19 programs that work well for active duty service members do
20 not always translate well to meet the very different
21 structure and the very different lives of traditional Guards
22 and Reserves. Do you see that as an issue, and how will you
23 work to help improve the mental health services and make
24 sure that what is delivered is what is needed?

25 Mr. Weiler: Senator, although that particular area is

1 not within the M&RA portfolio, the Reserve side is. And I
2 think one of the things that, if confirmed, I would look
3 into would be the manpower analysis that supports the
4 numbers that these units should have.

5 Additionally, I think that we need to look at all of
6 those kinds of family support and service member support
7 services that go to Reserve, Guard, and geographically
8 dislocated active component folks and pay particular
9 attention that those services are being delivered in the
10 communities where they are as opposed to 100 or 150 miles
11 away at active component installations. So that would be
12 something that, if confirmed, I would certainly look into,
13 that we are providing that high level of service where those
14 folks are.

15 Senator Donnelly: There is something else I would like
16 you to do as well, and that is to get back to me with a list
17 of your priorities, including specific programs or services
18 that you believe can play the strongest role. And then I
19 need you to give me a list of the specific changes that you
20 intend to make, which are the most important and which are
21 the ones you are going to be working on first. Will you do
22 that?

23 Mr. Weiler: Senator, I will.

24 Senator Donnelly: Thank you.

25 Thank you, Mr. Chairman.

1 Senator Reed: Thank you.

2 On behalf of Chairman McCain, Senator Ernst, please.

3 Senator Ernst: Thank you, Ranking Member Reed, and
4 thank you for appearing in front of our committee today.

5 Mr. Carson, it is my understanding that your goal is to
6 make the Department of Defense the Nation's most progressive
7 employer. Is this true? Just a simple yes or no, please.

8 Mr. Carson: Yes. My ambition is to --

9 Senator Ernst: Yes. Thank you.

10 Considering the fact that all military occupational
11 specialties are now open to women to provide greater
12 opportunities to women in the military, which I do support
13 as well, would you consider that it would be also
14 progressive to require women to register for the Selective
15 Service like their male counterparts?

16 Mr. Carson: I think the issue from a policy
17 perspective is this. We should divorce the question of
18 registration from that of the draft. We have had service
19 chiefs talk about the need for a draft. The Secretary, no
20 doubt testifying right now before the House Appropriations
21 Committee on Defense, is speaking to his strong conviction
22 that we do not need a draft. The Center for Naval Analysis
23 just this week came out and said that only 13 percent of
24 youth are even eligible to serve in the military. Whatever
25 one might think about contingency, in which a draft might be

1 needed, the more interesting public policy question is
2 whether the registration requirement is necessary for it.
3 The GAO has said differently to that.

4 Senator Ernst: So the stance of the administration,
5 your stance is that there should be no Selective Service.

6 Mr. Carson: No. That is my personal view about it.
7 If you ask me, the policy questions that this committee and
8 the rest of the Nation must address is whether the
9 registration requirement is still a viable -- still a
10 necessary one for us. It is one we have to debate among
11 ourselves. The Selective Service Act does not fall under
12 the jurisdiction of the Department of Defense. It would be
13 inappropriate for me to opine about their continued
14 existence.

15 Senator Ernst: I think that you are correct that it is
16 established by Congress. However, the determination to open
17 up combat roles to women was made by the administration, and
18 I think it was done in a manner that was very fast. It is
19 not being implemented maybe as methodically, as deliberative
20 as many of us that have served in the military and, of
21 course, our service chiefs would like to see. So that
22 decision was made by the administration.

23 So I think when we look at Selective Service, the
24 administration needs to own up to their decision and then
25 because we do have an existing policy with Selective

1 Service, they need to make their recommendation to Congress
2 on whether we have women sign up for Selective Service or
3 not.

4 So thank you for your answer.

5 Ms. O'Connor, where would you stand on that perspective
6 as well, whether we need a draft or whether women should be
7 required to sign up for Selective Service?

8 Ms. O'Connor: As a lawyer, I do not have a view on
9 whether we need a draft. I think that is something that the
10 military departments and other experts in the area should
11 comment on.

12 And I agree with what Mr. Carson said, that there is a
13 policy discussion that needs to take place about exactly
14 what the military's needs are and what the country's needs
15 are both for registration and for a draft. There is
16 obviously a statute, and so for that to change, it will
17 require an act of Congress. And I think that there needs to
18 be a dialogue on it.

19 Senator Ernst: I do think there needs to be a
20 dialogue, and considering the fact that we are trying -- I
21 am sorry -- the administration is trying to make our
22 military forces, the DOD, the most progressive employer out
23 there, I think then the administration, the DOD, does need
24 to come back with us on these policy discussions. And they
25 need to have an opinion on that. So if there is anything

1 that I would recommend that you take back to the
2 administration, it would be that they need to find a stance
3 on this so that we can be best advised of their position.

4 Mr. Carson, many of the Force of the Future proposals
5 really mirror some of the unique benefits of the Fortune 500
6 companies. And I think you spent a lot of time working with
7 these companies on their benefits. But I would state that
8 no one at any of these Fortune 500 companies takes an oath
9 to the Constitution to defend us against enemies, foreign or
10 domestic. And these employees certainly do not enlist with
11 the understanding that they make the ultimate sacrifice to
12 our country in an effort to accomplish their assigned
13 mission or to protect their fellow service members on their
14 left or their right.

15 At what point did you involve service members in your
16 discussion for our Force of the Future proposals?

17 Mr. Carson: It is precisely because they make those
18 kind of commitments, that they do risk their life, that we
19 have an extraordinary obligation to take care of them.

20 Senator Ernst: But do you agree that a Fortune 500
21 company has a very different mission than that of our
22 military members?

23 Mr. Carson: Very much so. Very much so.

24 Senator Ernst: Okay. My time has expired. Thank you
25 very much.

1 Thank you, Ranking Member.

2 Senator Reed: Thank you.

3 On behalf of the chairman, Senator Gillibrand, please.

4 Senator Gillibrand: Thank you, Mr. Chairman, for this
5 hearing.

6 Thank you all for your public service and for your
7 willingness to serve the Department of Defense. I am very
8 grateful for that.

9 I want to talk a little bit about military sexual
10 assault and some of the work we still have to do to end that
11 scourge.

12 The Department of Defense is required to submit an
13 annual report to Congress each year providing the number of
14 sexual assault reports made during the calendar year. This
15 number includes the cases that were reported through the
16 military chain of command, as well as the number of
17 restricted reports made to care providers. However, this
18 number does not include those assaults that occurred during
19 a domestic violence incident and that were reported to the
20 family advocacy program.

21 I am sure you agree that we should be focused on
22 getting a clearer picture of the issue and the scope by
23 accounting for these cases in a different report. I do not
24 believe the public is getting an accurate picture of the
25 scope of the sexual assault crisis in the military.

1 And I will just give you some anecdotal evidence. When
2 I reviewed 100 sexual assault cases in 2013 from the four
3 largest bases, all reported cases in that four bases, what I
4 found was that more than half of the victims were civilians,
5 and more than half of those were spouses. Now, those were
6 the only unrestricted reports that were filed. That did not
7 include reports filed outside of the chain of command. So
8 there is an indication that in that population -- it was
9 more than half that were civilians. That is not included in
10 the SAPRO report unless it is an unrestricted report.

11 So do you support the inclusion of all reports of
12 sexual assault, including those made to the family advocacy
13 program in the Department of Defense annual SAPRO? I think
14 this is relevant to Mr. Carson and Ms. O'Connor.

15 Mr. Carson: Yes, absolutely. My goal is to integrate
16 and have easily accessible all of the data, not only the
17 sexual assault numbers we have reported in the past, but
18 those from family advocacy and from any other source that
19 they may arise. We need to integrate those into a single
20 report and make sure that those numbers are visible to
21 Congress and other stakeholders.

22 Ms. O'Connor: I think having all the information in
23 order to move forward is important, and if confirmed, I
24 would support Mr. Carson's efforts.

25 Senator Gillibrand: The goal I think would be to --

1 because right now, SAPRO is only filled out -- it is a
2 confidential survey. It is only filled out by service
3 members. So we could at least extend it to service members'
4 spouses as a general matter. We cannot extend it to
5 civilians in the community because that is too difficult.
6 But spouses are within the family of the military, and I
7 think if we did do that, we would have a much better picture
8 of what the problem looks like. And I would be grateful for
9 your support.

10 Mr. Carson: It makes sense to me, Senator.

11 Senator Gillibrand: Okay.

12 I have heard many stories from service members about
13 retaliation after coming forward to report a sexual assault.
14 Not only have I heard this from survivors, but also
15 bystanders who intervened on behalf of a survivor. The
16 Department has expressed commitment to addressing
17 retaliation. Yet, I continue to hear these stories. From
18 each of you, what additional measures do you believe are
19 necessary to prevent retaliation? And what can commanders
20 do to better prevent retaliation and also address it when it
21 occurs?

22 Mr. Carson: Perhaps I should start with that, Senator.
23 I have spent the last 6 months, at the request of the
24 Secretary of Defense, developing a retaliation strategy,
25 which is now basically complete. And it has several lines

1 of effort. First of all is standardizing across the
2 services what retaliation means. It could be everything
3 from criminal acts that we might involve the military
4 criminal investigation organizations in to something like
5 social ostracism on Facebook or in the unit itself. So
6 standardizing those definitions.

7 Bringing allegations of retaliation into the case
8 management group. It is already looking at sexual assaults
9 where we can track them over time.

10 And much as you have thought on better data for sexual
11 assault, including the inclusion of the FAP data, we need to
12 integrate all of that data into a single source where we
13 know how many retaliation cases are going on, what happens
14 to them, how they are adjudicated.

15 And finally, for the commanders, we have to educate
16 them. So there are many -- and perhaps most examples of
17 retaliation do not give rise to criminal activity. They are
18 about social ostracism, devastating, but it is not something
19 one takes to court martial about. So we have to educate
20 commanders about what the available means they have to
21 remedy this social ostracism.

22 At the same time, part of our retaliation strategy is
23 trying to think more smartly about the use of social media,
24 which is often the mechanism for retaliation here. There
25 are free speech concerns that the lawyers have. The good

1 order and discipline is being threatened by the abuse of
2 social media in many cases, and so telling commanders what
3 they can do about that within the limits of the law.

4 Senator Gillibrand: Let me just pause you for a
5 second. Some retaliation, half of the retaliation, is
6 either from administrative or from professionals. So I
7 appreciate that you are dealing with peer-to-peer because
8 that is about half as well. But I am concerned when the
9 last SAPRO report said, from the perception of the survivor,
10 that approximately 30 percent was administrative and
11 approximately 30 percent was professional, not one case for
12 retaliation was filed. And so we made it possible, I think,
13 in the last NDAA to be able to file a case directly to the
14 IG. But if those cases of professional and administrative
15 truly are retaliation, who is responsible for investigating
16 that, and how come we have not seen any cases?

17 Mr. Carson: Well, the IG is responsible for it right
18 now. And there have been a handful of cases, only six or
19 seven, which in no way comports with the 62 percent of
20 respondents who have said that. So there is a huge gap
21 there that is one of the known unknowns. And so one of our
22 goals is, by tracking these cases, by standardizing
23 definitions, to understand what is happening, where they are
24 arising, which will allow us to have better intervention
25 strategies. If it is administrative in nature, the IG will

1 investigate that, but it is a very cumbersome process, as
2 you know. So we have to have other means to hold the
3 commanders accountable for what is happening in the units.
4 That is the strategy. But right now, what is really going
5 on in the retaliation space is a bit of a void for us, and
6 so finding better data is going to be a critical part of the
7 solution.

8 Senator Gillibrand: Thank you, Mr. Chairman.

9 I am sorry. If either of you two have answers you
10 would like to give, would you please put it in writing and
11 send it to my office? This is the subject matter.

12 And then for the record, the third question is do you
13 support using a PACER or a PACER-like system so we have
14 better transparency specifically. Thank you.

15 [The information follows:]

16 [COMMITTEE INSERT]

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1 Senator Gillibrand: Thank you, Mr. Chairman.

2 Senator Reed: On behalf of the chairman, Senator Lee.

3 Senator Lee: Thank you very much, Mr. Chairman.

4 Mr. Carson, I would like to start with you if I could.
5 Last July, it was announced that the Department of Defense
6 would lift the ban on transgender persons serving in the
7 military after a 6-month review period. And then earlier
8 this year, there was a proposed rule that was published in
9 the Federal Register that would allow TRICARE to begin
10 covering hormone replacement treatment for gender dysphoria.

11 How closely have you been involved on those decisions
12 on the release of that proposed rule? And tell us a little
13 bit about why this has become such a high priority within
14 the Department of Defense.

15 Mr. Carson: The issue of transgender service is one
16 that the services themselves raised. There are 77 openly
17 serving transgender service members today, 27 in the Army,
18 37 in the Air Force, 11 in the Navy, 2 in the Marine Corps.
19 And so the services for the last year have been clamoring
20 for guidance about what to do because many times service
21 members found themselves in a place with a service member
22 who was among the very best in their unit. They had no
23 desire to separate or administratively punish. But at the
24 same time, they read regulations which seemed to prohibit
25 transgender service. And so they were at a loss for what to

1 do. So they came to us, to me asking for guidance. And
2 that is the genesis of that July memorandum.

3 Senator Lee: Would the treatment itself -- is there a
4 risk that the treatment itself could interfere with
5 someone's combat readiness while they are undergoing the
6 treatment or after treatment?

7 Mr. Carson: Very little risk of that.

8 Senator Lee: Now, I would like to turn for a minute to
9 the quote that Senator Ernst shared with you with respect to
10 your intention to make the Department of Defense, quote, the
11 Nation's most progressive employer. At a time when we are
12 reducing total force numbers, what specific warfighting and
13 military readiness needs have you identified that would be
14 advanced by doing that? In other words, how does becoming
15 the Nation's most progressive employer help you enhance
16 military readiness and our combat mission within the
17 Department of Defense?

18 Mr. Carson: Everything we have done is to improve the
19 combat mission of the U.S. military. Making us a place
20 where you believe that your personal aspirations and
21 professional ambitions can be reconciled, making it a place
22 where you believe you can raise a family and continue to
23 serve allows us to recruit and retain the right kind of
24 people. Both of those issues are looming crises for us.
25 And so this is about saying to folks that you should come

1 and be a part of us.

2 Senator Lee: Now, when I talk to people who were in
3 the military, who are either in the military now or are
4 considering a possible future in the military, they tend to
5 express concerns going along the lines of making sure that
6 they will receive adequate training, that the equipment that
7 they will need to protect our country's national security
8 will be up to par, and things like that. They are also
9 concerned about things like how we treat our veterans and
10 how we treat military personnel and how we compensate them
11 and so forth.

12 I do not think I have ever met a service member or a
13 prospective service member who has expressed concern about
14 going into the military or continuing to serve in the
15 military on the basis that the military is not the most
16 progressive employer in the Nation. Perhaps you are hearing
17 something different than what I am hearing. Where is this
18 coming from?

19 Mr. Carson: Sir, the survey data done by the Defense
20 Equal Opportunity Management Institute, by various marketing
21 agencies that work under the Department of Defense suggest
22 that the reason that women are leaving in droves, with a
23 retention rate only one-third that of men through 10 years,
24 only one-half through 20 years is because of family
25 concerns.

1 And perhaps anecdotally because I think the anecdotes
2 are really important, Senator, if you go to somewhere like
3 Harvard Business School, it will seem like the entire 75th
4 Ranger Regiment has decamped to the classes up there. And
5 you ask them why they would leave, why would these
6 extraordinary soldiers leave a unit as high speed as the
7 Ranger Regiment, and they will tell you that the bureaucracy
8 especially around personnel weighed them down. And they no
9 longer felt that they could realize what they wanted in
10 their own lives in military service. That is what we are
11 trying to change.

12 Senator Lee: I thank you for your answer. I struggle
13 with this one. I struggle with it a lot because, again,
14 what I hear from people, they are worried about equipment,
15 they are worried about how we treat them, how we train them.
16 I have never once heard somebody say I was going to go into
17 the military but I am not going to because DOD is not the
18 world's most progressive employer.

19 Ms. O'Connor, I would like to follow up briefly on a
20 conversation you and I had in my office. Do you believe the
21 U.S. Government under the 2011 authorization -- or for the
22 2001 authorization for the use of military force has the
23 authority either under that act or under any iteration of
24 the Defense Authorization Act to capture and indefinitely
25 detain a U.S. person on U.S. soil?

1 Ms. O'Connor: Senator, I think that that issue has not
2 been resolved by the courts, but as a policy matter, the
3 President has said that he would not allow that to happen
4 during this administration.

5 Senator Lee: Does the statutory text convey that
6 authority in your opinion?

7 Ms. O'Connor: The statutory text of the 2001 AUMF does
8 not get into detail at that kind of level.

9 But the courts have held that the Government has the
10 authority to detain enemy combatants, and a U.S. citizen is
11 not immune from being detained. The courts have also held
12 that U.S. citizens have due process rights and
13 constitutional rights. And that is why the administration
14 has a practice, consistent with those requirements, of
15 having the Department of Justice do a specific
16 constitutional analysis whenever a detainee is captured who
17 might be an American citizen.

18 Senator Lee: I see my time has expired. I do have
19 some concerns with this. I do think the Defense
20 Authorization Act contains language that suggests the
21 Government does have this authority. I personally believe
22 that is unconstitutional for the United States under any
23 circumstance to detain a U.S. person on U.S. soil
24 indefinitely. That is why we have a Bill of Rights, and the
25 Bill of Rights does protect that in a number of respects.

1 And I believe that those who argue otherwise are reading too
2 much into precedent that should not apply here.

3 Thank you.

4 Senator Reed: Thank you, Senator.

5 On behalf of the chairman, Senator Blumenthal.

6 Senator Blumenthal: Thank you, Mr. Chairman.

7 I want to thank all of you for your willingness to
8 serve. Each of you has extraordinary qualifications and
9 background in public service and in private life. And I
10 just want to express my gratitude and support for your
11 nomination.

12 Let me ask you, Ms. O'Connor. You may be familiar with
13 the recent reforms that have been adopted, first by
14 Secretary of Defense Hagel and now adopted as well by
15 Secretary Carter, relating to the discharge correction
16 boards and veterans who have suffered from post-traumatic
17 stress who may have been discharged with less than honorable
18 or a bad conduct discharge. A number of these discharges
19 are the result of post-traumatic stress, which was
20 undiagnosed and untreated at the time.

21 This issue has acquired a momentum. I advocated that
22 the policies be changed. Secretary of Defense Hagel agreed.
23 But the use of the boards has not been as widespread as we
24 hoped perhaps because there has been insufficient outreach
25 to those veterans. But the basic idea is that those

1 veterans who suffered from post-traumatic stress, whether
2 post 9/11 or in previous conflicts whose conditions were
3 undiagnosed and who were discharged less than honorably
4 ought to have the opportunity of seeking review now that
5 their conditions could be diagnosed. As you know at the
6 time of the Vietnam and Korea conflicts, there was no such
7 thing as post-traumatic stress as a diagnosed condition,
8 although shell shock, battle fatigue caused many of our
9 Nation's men and women in uniform to be discharged for those
10 kinds of conditions.

11 So I would like your commitment that you will be an
12 advocate insofar as there are legal issues here, and a lot
13 of the human conditions are surrounded by legal issues. I
14 do not mean to make light of them as a lawyer, but they will
15 take some intervention, advocacy, and outreach. And I would
16 like your thoughts and your commitment on that issue.

17 Ms. O'Connor: Senator, I appreciate everything that
18 you said, and it is obviously an important issue. It is not
19 one that I have had an opportunity to work on yet at the
20 Defense Department, but if confirmed, I do give you my
21 commitment that I will take the issue seriously and work on
22 it and would be happy to work with you and your office on
23 it.

24 Senator Blumenthal: Thank you. I would appreciate
25 that. It is a bipartisan issue.

1 Mr. Carson: Could I add to that, Senator, if I may?

2 Senator Blumenthal: Yes. Sorry.

3 Mr. Carson: I have followed that issue closely. The
4 "New York Times," "NPR" have written lengthy, very moving
5 stories about that situation.

6 I think you are right, that Secretary Hagel's memo of
7 2014 did change how these things are being handled. They
8 went from 5 percent success rate at the BCMRs to a 40
9 percent success rate.

10 Just this week in my capacity, after reading those
11 stories, I issued a new memo circulated to all the military
12 service organizations and veterans service organizations
13 saying that same presumption that Secretary Hagel put in
14 place applies retroactively going back as far as we have
15 service members. And irrespective of administrative
16 finality or whatever statute of limitations periods might
17 have expired, you have the right to a de novo review on
18 these issues with the presumptions that have proved
19 successful over the last year. So I am cautiously
20 optimistic that we will get after this problem in a way you
21 see satisfying.

22 Senator Blumenthal: I really appreciate that answer,
23 and I perhaps should have directed my question to you in the
24 first place. So thank you, and I look forward to working
25 with all of you on this issue.

1 Let me ask maybe all of you. On the issue of
2 behavioral and mental health care, which Senator Donnelly
3 raised, as you know, the suicide rates continue to be much
4 too high among our veterans but also among our military
5 active duty, including our Reserves and National Guard. And
6 so I would like, again, your commitment that you will focus
7 on this issue. I do not ask you for a plan right now. But
8 my own answer to the question that Senator Donnelly asked
9 you about the adequacy of the numbers of providers and
10 mental health care professionals available to our military
11 is that in fact the number continues to be inadequate. It
12 is in the rest of civilian society as well, but it remains
13 so in our military as well. So, again, your response and I
14 hope your interest and commitment on this issue.

15 Mr. Carson: I oversee the Department of Defense
16 Suicide Prevention Office, and I would be happy to come talk
17 to you about the work. I agree with you. We had 443
18 suicides last year across all components. The Reserve
19 components has proved persistently high, and we do have some
20 plans in that regard. And I look forward to coming by and
21 talking to you about them personally.

22 Senator Blumenthal: Thank you. I would welcome that.

23 Thank you very much, Mr. Chairman. Thank you all.

24 Senator Reed: Thank you, Senator.

25 On behalf of the chairman, Senator Tillis, please.

1 Senator Tillis: Thank you, Senator Reed.

2 Thank you all for being here. You should be proud of
3 the fact that you are here despite the questions you may get
4 asked by any one of us. I am sure you and your family are
5 very proud of this moment.

6 Ms. O'Connor, I want to come back to you. I am not an
7 attorney, but I want to come back and see if I can
8 understand the thought process behind what I believe you
9 said was the extraordinary circumstances in the Bergdahl
10 case made the statutory requirement to give the Congress 30
11 days notice something that the President had discretion to
12 do, that somehow he was not in violation of the law.

13 So just hypothetically let us assume Mr. Bergdahl, who
14 is now going through court martial, was not a part of that
15 transaction. Let us assume he is there today. And his
16 captors have threatened -- because I think you mentioned
17 that his life was being threatened. That was the
18 extraordinary circumstance that the President was operating
19 under. So let us assume he is there today, and the same
20 captors come to the President and say that they will release
21 him if the President will transfer the current Gitmo
22 detainees to the United States. Do you think that that
23 would be an extraordinary circumstance where the President
24 could again potentially not obey the law given that it was
25 used in the prior example?

1 Ms. O'Connor: No. And I think that the statutes that
2 govern the restrictions to bring detainees to the United
3 States, which are multifaceted -- they are restrictions on
4 literally transferring people from Guantanamo Bay to the
5 United States. But they also include restrictions on
6 modifying buildings, constructing buildings, purchasing
7 buildings for the purpose of -- and there are funding
8 restrictions. And when you put all of them together, it is
9 not possible.

10 Senator Tillis: Can you conceive of any circumstance
11 where the President may have a basis in your legal opinion
12 to violate the transfer of detainees under any extraordinary
13 circumstances?

14 Ms. O'Connor: No. The position is that the
15 restrictions that are in place now prohibit the transfer to
16 the United States of the detainees who are at Guantanamo,
17 and the Attorney General testified as to that yesterday.
18 She is the chief legal officer of the executive branch.

19 Senator Tillis: Yes. I like that position. I just
20 hope it is one that is maintained through the remainder of
21 this administration.

22 I did have a question on the AUMF, and it relates more
23 to the time that I have spent either in the Middle East or
24 down at Fort Bragg and other places. I hear the call for a
25 new authorization for the use of military force, but it

1 seems to me that the presidential policy guidelines -- in
2 other words, what the President chooses to do within the
3 context of the AUMF -- have been more often than not some of
4 the impediments that we think our men and women in uniform
5 or the officers are confronted with when making decisions
6 about engaging the enemy or engaging ISIL or any of the
7 other enemies particularly in the Middle East.

8 So what am I missing in terms of this -- from your
9 legal perspective, I should say, what would a new AUMF do
10 for you and for the Department that cannot already be done
11 under the current AUMF?

12 Ms. O'Connor: The current AUMF authorizes all of the
13 activity. It is the legal basis for what we are doing and
14 it authorizes all of the activities that we are engaged in.

15 To your point about the combatant commanders having the
16 authority to do what they need to do, I mean, I will tell
17 you I would be very concerned if they thought that they did
18 not have the authority to do what they needed to do. And if
19 confirmed, I would make it an extremely high priority to do
20 whatever I could, as appropriate, to assist them because I
21 think what they are doing is critically important. And I
22 think that the legal teams that work with them out in the
23 field -- those are military lawyers -- do as well to help
24 them work through to be able to do exactly what they think
25 they need to be doing.

1 Senator Tillis: Mr. Weiler, depending upon what
2 happens over the next few months, your tenure could be long
3 or short. I think Senator Donnelly asked you a question
4 about some of the priorities and things that you are
5 interested in. I would like for you to communicate those
6 back to my office.

7 But if you feel like you only had a year to do things,
8 what do you hope to accomplish, just very quickly. You can
9 get into the details later in my remaining time. What are
10 going to be your top priorities, the things that you are
11 just going to hammer on if confirmed?

12 Mr. Weiler: Senator, first of all would be taking on
13 the challenge of the creation of this new office and
14 ensuring that, one, the Reserve components understand that
15 there is no lessening of commitment to them.

16 Second would be families really. This has been a lot
17 of the work that I have done in the commercial sector. So I
18 think ensuring strong families makes a strong service
19 member, makes a strong military. So that would be another
20 area that I would focus on immediately.

21 Senator Reed: Thank you very much.

22 Senator Sullivan, please, on behalf of the chairman.

23 Senator Sullivan: Thank you, Mr. Chairman.

24 I appreciate the witnesses' testimony.

25 Let me ask Ms. O'Connor. I got to tell you I am a

1 little bit disturbed by your answers on some of these legal
2 questions. I think the White House has admitted they
3 violated the law with regard to Bergdahl. So your kind of
4 twisting and rationalizing that is disturbing to me.

5 Let me kind of dig a little deeper, though, on kind of
6 what you see your role is. So I am a former attorney
7 general in the State of Alaska. And like the Attorney
8 General of the United States or other attorneys general
9 across the country, there is always a bit of a big issue.
10 So let me just ask you this. Where do you believe as the
11 General Counsel, if you became that, of the Department of
12 Defense your loyalty lies?

13 So let me give you some hypotheticals. Does your
14 loyalty lie to the rule of law and the American people, or
15 does your loyalty lie to the President or the Secretary of
16 Defense? So let me try to unpack that a little bit.

17 Let us say that you get confirmed and you look at what
18 is going on with this Gitmo decision, and you really look at
19 the law, the NDAA passed last year. There are a lot of us
20 who think the President -- and he has got a reputation for
21 this. His administration certainly does -- pressing the
22 limits of his executive authority, ignoring the rule of law.
23 Let us say that you take a hard look at it. In your heart
24 of hearts, you think what the President is doing on Gitmo is
25 against the rule of law. He does not have the authority to

1 do it according to the law. So you conclude that. Let use
2 that as an assumption.

3 And then you have the White House and the Secretary of
4 Defense come and say, you know what. We are doing this.
5 Our General Counsel, the Attorney General -- they kind of
6 agree. So get on board.

7 What is your role? Where is your loyalty? I am very
8 disturbed by your answers because you seem like you are
9 flipping all over the place to support the President's
10 policies when I believe your loyalty is to the rule of law
11 and the American people. What would you do in that
12 hypothetical? Would you support the President, or would you
13 say I cannot do that, I think it violates the law, I am
14 going to resign?

15 Ms. O'Connor: Senator, you are absolutely right. The
16 commitment that I have and that I would have, if confirmed
17 to this position, is to the rule of law. It is to the
18 Constitution, first of all, and to the rule of law.

19 Senator Sullivan: So would you resign in that kind of
20 case? If the White House said, hey, I know you think that
21 the Gitmo move by the President is illegal, but so what, we
22 do not, get on board, what would you do? And again, I am
23 assuming that you concluded -- you have got a strong legal
24 background -- that what they are doing is illegal. What
25 would you do?

1 Ms. O'Connor: I just want to address the other things
2 you said, and I will answer that.

3 My commitment and true north is the Constitution and
4 the statutes that guide the Department and the government.

5 Senator Sullivan: Even though your answer on Bergdahl
6 seems -- boy, I think that is real weak to be perfectly
7 honest. I think the White House has admitted they violated
8 the law there.

9 Ms. O'Connor: As I explained, I was not involved in
10 the analysis.

11 Senator Sullivan: Yes, but you were asked for your
12 legal opinion, and legal opinion was that was good to go. I
13 think that is a real stretch. To be honest, I was looking
14 fine at your confirmation. I am very, very concerned right
15 now given your answers in this hearing. So I am sorry. I
16 know I keep interrupting. Can you finish?

17 Would you resign if you thought the President was
18 violating the law on Gitmo?

19 Ms. O'Connor: So just to get back to the point you
20 were making about the Bergdahl exchange, what I want to make
21 clear is that I did not provide any legal advice on it. I
22 have read the letters that the Department has sent to this
23 committee.

24 Senator Sullivan: You said you thought it was legal.

25 Ms. O'Connor: I am explaining what the letters to this

1 committee, written by other people, have said.

2 Senator Sullivan: Let me just real quick, if you can
3 just answer. Would you resign your position if you were the
4 General Counsel of the Department of Defense, you read the
5 law, and you thought the President was violating the law on
6 Gitmo or anything else relating to DOD-related matters?
7 What would you do?

8 Ms. O'Connor: My commitment is to the rule of law --

9 Senator Sullivan: You are not answering my question.
10 Do not dodge me. What would you do? Would you resign or
11 would you kind of get behind the President and say, roger
12 that, I will just make the best legal argument I can to
13 support you, Mr. President? What would you do?

14 Ms. O'Connor: I would give my very best legal advice
15 to the Secretary of Defense because the position that I am
16 seeking confirmation for is to be the General Counsel of the
17 Department of Defense.

18 Senator Sullivan: Wait. So you would, even though you
19 thought -- remember, the question assumes that you thought
20 Gitmo was illegal. And they are going to go forward with
21 the President's plan anyway. What would you do? You would
22 get behind them and support them. Is that what you just
23 told me?

24 Ms. O'Connor: I have not said that.

25 Senator Sullivan: I thought you just said that.

1 Ms. O'Connor: No.

2 Senator Sullivan: Okay. Then just answer the
3 question.

4 Ms. O'Connor: If confirmed as the General Counsel of
5 the Department, what my responsibility would be would be to
6 give my very best -- not political, my very best legal
7 advice consistent with the Constitution and the statutes
8 that govern the Department to the Department. And that is
9 what I would do.

10 Senator Sullivan: Okay. You are not answering my
11 question. I have asked you five times if you thought that
12 what the President was doing and the Department of Defense
13 was doing was illegal with regard to Gitmo and the President
14 and the Department of Defense said we are doing it anyway,
15 you voiced your opinion, and you told people you thought
16 they were violating the law, then what would you do? Would
17 you resign or would you say, okay, I will give my best legal
18 argument and try to put the best face on this? So just
19 answer that question directly. Would you resign?

20 Ms. O'Connor: I have not yet seen a situation that
21 presents anything like that.

22 Senator Sullivan: It has happened in U.S. history
23 before. Right? You have had Attorneys General resign when
24 the President -- you know, the Saturday Night Massacre under
25 the Nixon administration. You had senior officials

1 resigning saying I am not going to do that because I think
2 it violates the law. So it is a legitimate question,
3 particularly with this administration that presses the
4 envelope of their constitutional legal authority on a
5 regular basis. So just can you give me an answer to that
6 question?

7 Ms. O'Connor: Certainly as you note, there are
8 circumstances in history that present that, but a lot comes
9 before anybody gets to that point. And among the lot that
10 comes before anybody gets to that point is collegial
11 interactions and debate amongst the lawyers involved. I
12 would engage in that, and I would engage in giving my very
13 best legal advice consistent with the Constitution and the
14 statutes to the Secretary of Defense.

15 Senator Sullivan: And if the President moved forward
16 on something you thought was illegal, you would not resign?

17 Ms. O'Connor: As I said, a lot would come before
18 anybody would get to the few instances in history where that
19 has happened. It is not a common thing that happens. What
20 happens is that lawyers engage, lawyers talk. I would very
21 vigorously make my voice known and my legal analysis known.
22 I would give advice to the Secretary. I would certainly
23 talk to the Attorney General, if that was what was
24 warranted. And we would work our way through it. It is
25 impossible to address the hypothetical that you are laying

1 out.

2 Senator Sullivan: Okay.

3 Senator Reed: Thank you, Senator Sullivan.

4 On behalf of the chairman, Senator Ayotte.

5 Senator Ayotte: Thank you, Chair.

6 I want to thank the witnesses for being here and for
7 your service to the country.

8 I would like to follow up, Ms. O'Connor. I do not know
9 if you are familiar with section 1036 of the 2016 defense
10 authorization, but it is specific to the closure of the U.S.
11 Naval Station in Guantanamo. And it actually says very
12 clearly that the DOD cannot appropriate or spend any dollars
13 to close or abandon the naval base in Guantanamo, to
14 relinquish control of Guantanamo, or to implement a material
15 modification to the treaty between the United States of
16 America and Cuba about Guantanamo.

17 So this provision of law -- do you think that -- the
18 President is going to Cuba. The Cubans want Guantanamo
19 back. Given this provision of law in place, do you think
20 the President has any legal authority to implement a
21 material modification to the treaty between the United
22 States and Cuba? And also, do you think he has any legal
23 authority to close, abandon, or relinquish control to Cuba
24 given this provision of law that is in place and is the law
25 of the land right now?

1 Ms. O'Connor: I understand that Assistant to the
2 President Ben Rhodes spoke to this a couple days ago and
3 said there was absolutely no instance in which this was
4 going to happen.

5 Senator Ayotte: So my question to you -- there is no
6 instance this is going to happen, but my question to you --
7 you are the lawyer. You are the General Counsel. Is there
8 legal authority? Yes or no. Is this law valid that we
9 passed in this committee, and should the President follow
10 it?

11 Ms. O'Connor: The President should follow the statutes
12 that govern the executive branch, and the Department follows
13 the statutes, has a practice of and does follow the statutes
14 that govern the Department. I have not examined that
15 provision. My understanding is that nobody has raised any
16 prospect of there being a plan of this happening. If I were
17 confirmed and it were raised, I would certainly look at the
18 legal issues that were involved in it. I am not familiar
19 with what exactly the processes are.

20 Senator Ayotte: What role do you have right now?

21 Ms. O'Connor: Deputy General Counsel.

22 Senator Ayotte: Well, you are Deputy General Counsel.
23 You are not familiar with this part of the defense
24 authorization on Guantanamo?

25 Ms. O'Connor: Senator, there are numerous deputy

1 general counsels with different portfolios. I have not had
2 the opportunity to dig into the law around that particular
3 provision. And I think one of the reasons I have not had an
4 opportunity to do that is that absolutely nobody within the
5 executive branch has suggested this is going to happen.

6 Senator Ayotte: Well, I would suggest that this is a
7 valid law. Not only should no one in the executive branch
8 suggest that this is going to happen, but it would be
9 against the law. And I would hope as General Counsel, you
10 would tell the President of the United States it is against
11 the law. It is plainly in the 2016 defense authorization.

12 So I want to know from you -- these are some tough
13 questions. If the law says plainly, for example, on
14 Guantanamo you cannot modify the treaty, you cannot change
15 the base, and also with, obviously, the transfer of the
16 detainees to the United States, are you going to tell the
17 President that here is what the law says, so you cannot do
18 it?

19 Ms. O'Connor: My advice, if confirmed to this
20 position, will be to the Secretary. But, yes, absolutely I
21 will interpret the statutes and advise the Secretary
22 according to what they say.

23 Senator Ayotte: Excellent.

24 I also want to ask you about another provision
25 pertaining to Guantanamo. It is something I worked on in

1 the defense authorization. There is a section 137 of the
2 NDAA, which requires the Secretary of Defense to submit an
3 unclassified report to Congress regarding the individuals
4 that are being held at Guantanamo, their backgrounds, and to
5 provide a list and information with the exception of,
6 obviously, anything that would jeopardize intelligence
7 sources and methods.

8 And this is late. It was due January 24. Somehow the
9 administration was able to submit a plan to us but has not
10 actually given the American people the information about who
11 is there, what do we know about them, how dangerous are
12 they.

13 And this is very important to me. And so I expect that
14 report to be submitted really before this process on
15 nominations go forward. So I hope that you will go back and
16 ask the Department to finish this report. It could not be a
17 more important time to have this report in light of the
18 President's submission of this so-called plan to close
19 Guantanamo. Will you do that?

20 Ms. O'Connor: Yes, Senator. I understand that that
21 report is in development.

22 Senator Ayotte: I think it is very important that we
23 receive it right away. And it is not going to continue to
24 be in development. This is important to us if we are going
25 to look at these issues.

1 I also want to end with a final question that is very
2 important to the men and women that serve our country and
3 especially our New Hampshire National Guard. I recently
4 learned that our airmen at Al Udeid Air Base in Qatar are
5 being forced to live in potentially unhealthy facilities and
6 may be getting sick from black mold exposure.

7 Despite efforts by the local command there and repeated
8 requests of our airmen, the situation has not been fixed.
9 In the last month, approximately 100 New Hampshire Air
10 National Guard members experienced unacceptable living
11 conditions, and I am told that this black mold is coming out
12 of showers, it is in the bathrooms, it is in the curtains,
13 and that some of our airmen are becoming sick and having
14 symptoms as a result of it.

15 So I would like to ask all of you, especially Mr.
16 Carson and Mr. Weiler, to have your commitment, if
17 confirmed, you commit to looking into this issue, doing
18 everything in your power to fix -- to work with OSD and make
19 sure that our men and women are not being made sick by
20 facilities that obviously they are already in a difficult
21 situation with the service they are giving us, meaning we
22 are asking them to do a lot for us. And we are grateful for
23 their service. So I am just asking you. I do not want to
24 hear from my Guard that they are getting sick from mold.
25 You know, obviously, they put their lives on the line, and I

1 am asking for a commitment from both of you that you will
2 follow up on this.

3 Mr. Carson: Senator, as the acting Principal Deputy, I
4 will do more than just commit to you. If confirmed, I will
5 immediately look into it and try to have something back to
6 you by the end of next week with an explanation of what we
7 are doing, a mitigation strategy about that. It is the
8 first I have heard of that, but I will take it for action
9 and get back to you immediately about it.

10 Senator Ayotte: I really appreciate it, and if you
11 need any additional information, we are happy to follow up
12 with you. Thank you.

13 Senator Reed: Thank you.

14 On behalf of the chairman, Senator Graham, please.

15 Senator Graham: Ms. O'Connor, what is your portfolio
16 as Deputy General Counsel? What lanes do you work in?

17 Ms. O'Connor: I have a variety of responsibilities.
18 One of them is litigation, which covers a wide range of
19 areas. One of them includes the Office of Hearings and
20 Appeals. I provide legal advice as requested by different
21 components on different topics and as requested by the
22 Secretary on various topics.

23 Senator Graham: Have you ever been asked to give legal
24 advice about Guantanamo Bay?

25 Ms. O'Connor: Issues that touch Guantanamo Bay are

1 within my portfolio, yes.

2 Senator Graham: So why did you have a hard time
3 answering the question about the statute?

4 Ms. O'Connor: The question was posed as a hypothetical
5 about the President relinquishing the base I believe, and
6 that is just not an issue that I have dug into.

7 Senator Graham: I was here late. Did you say the
8 President could not transfer prisoners by executive order?
9 Is that correct?

10 Ms. O'Connor: What I said in response to the questions
11 about whether the NDAA restrictions prohibit transferring
12 detainees to the United States is that the current statutory
13 provisions prohibit transferring the detainees who are
14 currently at Guantanamo Bay to the United States. That is
15 why the administration's plan that was submitted on Tuesday
16 seeks to work with Congress to have those restrictions
17 removed.

18 Senator Graham: But do you agree without Congress'
19 approval, that you cannot do that?

20 Ms. O'Connor: Yes.

21 Senator Graham: Well, let us go back to the language
22 by Senator Ayotte. It says pretty clearly that you cannot
23 modify an agreement regarding Guantanamo Bay with the
24 Cubans. Why is that confusing compared to this other
25 provision?

1 Ms. O'Connor: Senator, it is not confusing. I just
2 have not read it recently, and so being asked to give a
3 formed legal opinion on the spot is difficult.

4 Senator Graham: Fair enough.

5 The future of detention. If we captured a high-value
6 target tomorrow, does this administration allow for law of
7 war detention?

8 Ms. O'Connor: Yes.

9 Senator Graham: Where and how long?

10 Ms. O'Connor: Senator, the 2001 AUMF --

11 Senator Graham: I know we have legal authority to
12 detain somebody that is an enemy combatant. But my question
13 is if we caught someone tomorrow and we wanted to give them
14 that designation, go through the court proceedings to say
15 you are an enemy combatant, where would we hold them and for
16 how long?

17 Ms. O'Connor: There are not date-specific limitations
18 on how long somebody can be held.

19 Senator Graham: What is the longest someone -- has
20 anybody been designated an enemy combatant during the Obama
21 administration for detention purposes?

22 Ms. O'Connor: I think I cannot discuss that in this
23 setting --

24 Senator Graham: Okay.

25 Ms. O'Connor: -- because it is classified.

1 Senator Graham: I cannot think of any, but maybe I am
2 wrong. There may have been.

3 Where do we put these people?

4 Ms. O'Connor: Where detainees have been detained on
5 the battlefield or -- on the battlefield, there are case-by-
6 case determinations made that involve all of the agencies
7 that are involved in these processes.

8 Senator Graham: I am talking about tomorrow.

9 Ms. O'Connor: Excuse me?

10 Senator Graham: If we caught somebody tomorrow, where
11 would they go and how long would we hold them?

12 Ms. O'Connor: So again, there are issues involved
13 there that cannot be discussed in a public setting.

14 Senator Graham: I do not buy that. I do not believe
15 that we are -- do we have secret jail that I do not know
16 about?

17 Ms. O'Connor: Let me answer the question this way.
18 Our combatant commanders and the forces that we have in the
19 field have plans that are available to them to detain. They
20 address these issues on case-by-case bases.

21 Senator Graham: Do we have the ability to detain and
22 hold somebody that is an enemy combatant in Iraq?

23 Ms. O'Connor: Do we have the authority to do it?

24 Senator Graham: Yes.

25 Ms. O'Connor: Yes. We have the legal authority to do

1 that, yes.

2 Senator Graham: Well, that is groundbreaking for me.
3 So U.S. forces, if they captured somebody in Iraq -- they
4 could hold them under U.S. custody as an enemy combatant.

5 Ms. O'Connor: They can detain enemies picked up in
6 Iraq, yes.

7 Senator Graham: We can hold them as an enemy combatant
8 for an indefinite period of time without talking to the
9 Iraqi Government? Can we do that in Afghanistan?

10 Ms. O'Connor: What we are doing in Iraq is working
11 with --

12 Senator Graham: I will tell you you cannot do that in
13 Afghanistan.

14 Ms. O'Connor: -- partners. What we are doing in Iraq
15 is working with partners.

16 Senator Graham: Here is my question. This is
17 disturbing. There is no legal authority for the U.S. forces
18 in Afghanistan to hold someone under U.S. control as an
19 enemy combatant. We gave that up when we transferred
20 everybody from Bagram from U.S. control to Afghan control.
21 There is no legal authority for us to hold somebody in Iraq
22 under U.S. custody as an enemy combatant for an indefinite
23 period of time. We just do not have that power. And I just
24 want to know why you think we do.

25 Ms. O'Connor: Senator, my understanding is that under

1 our international legal authorities, as well as our 2001
2 AUMF, we do have the authority to capture on the battlefield
3 and to hold --

4 Senator Graham: So it is your testimony that an
5 American soldier in Iraq, if they stumble upon somebody they
6 want to capture, they can hold that person in U.S. custody
7 in Iraq, ship them to America without the Iraqis being
8 involved?

9 Ms. O'Connor: No, I did not say that. In each place,
10 there are different agreements with different partners that
11 we have.

12 Senator Graham: We gave that power up. It is quite
13 the opposite. We do not have the authority to do that.

14 So, anyway, thank you very much for your testimony.

15 Senator Reed: Thank you, Senator Graham.

16 Senator Sullivan has asked for additional time.

17 Senator Sullivan?

18 Senator Sullivan: Thank you, Mr. Chairman.

19 I want to follow up on some questions that Senator King
20 had talked about on the Army end strength. So, Mr. Carson,
21 Mr. Weiler, I would like to get some of your thoughts on how
22 you think about these issues.

23 You know, one of the things we do here in the
24 committee, both in public and in private meetings, quite
25 frequently is talk to the generals, talk to the military

1 commanders at all the different levels. And I think it is
2 pretty clear within the Army -- General Odierno wrote a
3 couple op-eds on this, you know, even as he was finishing up
4 as the Chief of the Army, that going to 450 now is too
5 risky, given the strategic -- 450,000 active duty forces in
6 the Army -- given the strategic challenges that we face
7 globally.

8 So there is a lot of talk about how we got to the 450
9 number. Sometimes people blame it on sequester. Actually,
10 I am pretty sure, if you look at some of the documentation,
11 that the White House and DOD were aiming for that number
12 pre-sequestration. General Odierno and others frequently
13 now are saying, look, that is too risky for the country.
14 490 maybe, 500. I think it should be north of 500,000.

15 But how do you work through that when the generals are
16 coming to you and you are the civilians in charge of
17 manpower -- when the generals are coming to you saying, hey,
18 you know what, it is a new game out there. Russia is
19 resurgent. ISIS is growing. The North Koreans are looking
20 very aggressive. We need to change course here. When you
21 hear that -- and it is pretty much out there. Trust me. We
22 are hearing it. I am sure you guys are hearing it -- from
23 the military commanders who, to be honest, probably have a
24 better sense of this than the civilian leadership, how do
25 you react to that? What do you do?

1 Let me just ask more directly. Do you agree that 450
2 is a right size for the Army, or do you agree with the
3 generals that are saying that is too risky, we need to
4 change course and go to a higher number?

5 Mr. Carson: Let me take that, if I may, Senator.
6 Since I was the Under Secretary of the Army and the General
7 Counsel of the Army before that, I have been through many
8 debates about the proper force structure for the U.S. Army.

9 I believe what General Odierno has consistently said
10 was that the 450 number posed risk or perhaps significant
11 risk to execution of the Defense Strategic Guidance. When
12 any commander comes to a civilian leader and says that they
13 believe that the force structure is not adequate to meet the
14 mission, it is incumbent upon us not only to listen, because
15 that is best military advice, but to do something about
16 that.

17 The 450 number -- I do believe we would all like to see
18 a larger Army.

19 Senator Sullivan: So how do we get there? I agree
20 with you on that.

21 Mr. Carson: More money. Every 10,000 people is about
22 \$1 billion to the Army budget. And so the question is they
23 need more money --

24 Senator Sullivan: But did you request that in the
25 President's budget to go to an Army of higher than 450? If

1 you did, I did not see it. I would be pleased if you did.
2 So correct me if I am wrong.

3 Mr. Carson: The ramp down in the Army has been slow,
4 and so they still are at about 450 even though that is the
5 trajectory they are on. They have all said that that meets
6 Defense Strategic Guidance, although risk is present on the
7 horizon.

8 Senator Sullivan: So if you are confirmed, will you
9 commit to a number that is higher than 450 in your capacity
10 as a senior civilian leader?

11 Mr. Carson: That will be an Army determination, not
12 mine as the Under Secretary of Defense --

13 Senator Sullivan: What if the Army came back and said
14 490? If confirmed, would you agree with that?

15 Mr. Carson: I would say the Army could use 490,000
16 people, but the Department of Defense would need \$30 billion
17 to \$50 billion more a year in top line to pay for that.

18 Senator Sullivan: So where are you on that issue? 450
19 or 490? In your strategic judgment, what is best for the
20 United States of America?

21 Mr. Carson: I listen to the military leaders who will
22 tell you that 450 can meet the Defense Strategic Guidance.

23 Senator Sullivan: They are not saying that now.

24 Mr. Carson: The Chairman I believe would testify to
25 that fact. I believe the other military commanders. I

1 believe General Milley would tell you that while there is
2 risk --

3 Senator Sullivan: Just yesterday, General Milley said
4 that one of the brigade combat teams that was slated to be
5 cut, the 425 Airborne Brigade Combat Team, the only one in
6 the Asia-Pacific -- he said, quote, I think it would be
7 contrary to the strategic national interest to go ahead and
8 pull the 425 at this time. My thought is that we should
9 extend that. Do you agree with that assessment? I know
10 that is just hot off the presses.

11 Mr. Carson: Sure. That makes sense to me, sir.

12 Senator Sullivan: Will you commit to supporting
13 General Milley if he recalibrates on what the Army needs in
14 terms of force posture not only with regard to the 425 but
15 overall levels of the Army that in his best military
16 judgment is needed to keep our country safe?

17 Mr. Carson: Yes, absolutely.

18 Senator Sullivan: Would you?

19 Mr. Weiler: Yes, Senator.

20 Senator Sullivan: Let me ask just one final question
21 of Mr. Carson. You were talking to questions with Senator
22 Ernst about progressive military policies. I am not 100
23 percent sure what that means. But sometimes I worry that we
24 lose sight of what the main purpose of the military is. Do
25 you have a sense of what the mission of the Marine Corps

1 infantry is? It is pretty succinct.

2 Mr. Carson: Sure, littoral combat, to dominate the
3 littoral battlefield.

4 Senator Sullivan: Close with and destroy the enemies
5 of our Nation?

6 Mr. Carson: Yes, absolutely.

7 Senator Sullivan: Do you think that is still the
8 number one mission no matter what? We got all these other
9 things that we are talking about. Do you believe that that
10 is the number one mission that we should imprint in every
11 member of DOD to remember and remind them that the number
12 one mission of our military members is to close with,
13 destroy, and kill the enemies of our Nation? Do you agree
14 with that?

15 Mr. Carson: Yes, clearly.

16 Senator Sullivan: Good, okay.

17 Thank you, Mr. Chairman.

18 Senator Reed: Thank you, Senator Sullivan.

19 On behalf of the chairman, I thank the witnesses for
20 their testimony, and the hearing is adjourned.

21 [Whereupon, at 11:36 a.m., the hearing was adjourned.]

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