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Thursday, February 8, 2018

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

The committee met, pursuant to notice, at 10:43 a.m. in Room SH-216, Hart Senate Office Building, Hon. James Inhofe presiding.

Committee Members Present: Senators Inhofe [presiding], Fischer, Cotton, Rounds, Ernst, Tillis, Sullivan, Graham, Sasse, Reed, McCaskill, Shaheen, Gillibrand, Blumenthal, Donnelly, Kaine, King, Heinrich, Warren, and Peters.

1 OPENING STATEMENT OF HON. JAMES INHOFE, U.S. SENATOR
2 FROM OKLAHOMA

3 Senator Inhofe: The meeting will come to order.

4 Let me apologize for a little late start, but this is
5 the morning of the National Prayer Breakfast, and there are
6 about seven of us that are not back yet from that, and we're
7 holding off for just a few minutes.

8 I think in deference to our good friend, Senator
9 Corker, let's go ahead and get an introduction. I assume
10 that's why you're here.

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1 STATEMENT OF HON. BOB CORKER, U.S. SENATOR FROM
2 TENNESSEE

3 Senator Corker: That's why I'm here, and I thank you
4 so much. I served for six months on the Armed Services
5 Committee, and it's one of the most buttoned-up committees
6 here. I'm honored to be here with all of you, and I'm
7 especially honored to introduce our candidate.

8 Chairman Inhofe, Ranking Member Reed, and members of
9 the committee, I'm pleased to be here with you today to
10 introduce Paul Ney, who has been nominated to serve as
11 General Counsel for the Department of Defense.

12 I'd like to extend a warm welcome to Paul and his
13 friends. I know he's got several here. They're friends of
14 mine also. They're here to support him.

15 Paul has worked for the State of Tennessee ably and
16 well for many years, currently serving as the Chief Deputy
17 Attorney General. For two years he was Director of the
18 Mayor's Office of Economic and Community Development.

19 Paul received his law degree, as well as an MBA, from
20 Vanderbilt University and has been a member of the Tennessee
21 bar since 1985.

22 But Paul is no stranger to Washington and the
23 Department of Defense. During the Bush Administration he
24 served as Acting General Counsel for the Navy, where he led
25 600 Navy lawyers stationed all around the world. From there

1 he became Deputy General Counsel for the Department of
2 Defense, where he advised senior Defense officials on
3 constitutional law issues, litigation, detainee policy, and
4 other weighty matters.

5 When people who have worked closely with Paul describe
6 him, they use words like "respected," "warm," "well liked."
7 For someone who is as accomplished and capable as he is,
8 Paul is surprisingly humble. He has a great respect for the
9 permanent Civil Service and uniformed personnel, and he
10 strives to help them succeed.

11 I wholeheartedly support his nomination and thank the
12 committee for holding this hearing, and encourage my
13 colleagues to support his confirmation.

14 Thank you so much for allowing me to do this. It's an
15 honor to be with you, and good luck.

16 Congratulations to the other nominees.

17 Senator Inhofe: Thank you, Senator Corker. We
18 appreciate your patience this morning.

19 This morning we're going to be considering the
20 nominations of Paul Ney to be General Counsel, Department of
21 Defense; Kevin Fahey to be Assistant Secretary of Defense
22 for Acquisition; Thomas Ayres to be General Counsel of the
23 Department of the Air Force; and Lisa Gordon-Hagerty to be
24 Under Secretary of Energy for Nuclear Security.

25 We thank you for being here this morning.

1 We have seven required questions, and so that requires
2 an answer from each one of you audibly. As I ask these, if
3 you'd start on your side and go on down so we can hear you.

4 First, have you adhered to applicable laws and
5 regulations governing conflicts of interest?

6 Mr. Ney: I have.

7 Mr. Fahey: Yes.

8 Mr. Ayres: Yes, Senator.

9 Ms. Gordon-Hagerty: Yes, Senator.

10 Senator Inhofe: And will you ensure that your staff
11 complies with deadlines established for requested
12 communications, including questions for the record in the
13 hearings?

14 Mr. Ney: I will, Senator.

15 Mr. Fahey: Yes.

16 Mr. Ayres: Yes.

17 Ms. Gordon-Hagerty: Yes.

18 Senator Inhofe: Will you cooperate in providing
19 witnesses and briefers in response to congressional
20 requests?

21 Mr. Ney: Yes.

22 Mr. Fahey: Yes.

23 Mr. Ayres: Yes.

24 Ms. Gordon-Hagerty: Yes.

25 Senator Inhofe: Will those witnesses be protected from

1 reprisal for their testimony in briefings?

2 Mr. Ney: Yes, Senator.

3 Mr. Fahey: Yes.

4 Mr. Ayres: Yes.

5 Ms. Gordon-Hagerty: Yes.

6 Senator Inhofe: Do you agree, if confirmed, to appear
7 and testify upon request before this committee?

8 Mr. Ney: Yes, Senator.

9 Mr. Fahey: Yes.

10 Mr. Ayres: Yes.

11 Ms. Gordon-Hagerty: Yes.

12 Senator Inhofe: Do you agree to provide documents,
13 including copies of electronic forms of communication, in a
14 timely manner when requested by a duly constituted
15 committee, or to consult with the committee regarding the
16 basis for any good-faith delay or denial in providing the
17 documents?

18 Mr. Ney: I do.

19 Mr. Fahey: Yes.

20 Mr. Ayres: Yes.

21 Ms. Gordon-Hagerty: Yes.

22 Senator Inhofe: And have you assumed any duties or
23 undertaken any actions which would appear to presume the
24 outcome of the confirmation process?

25 Mr. Ney: I have not.

1 Mr. Fahey: No.

2 Mr. Ayres: No.

3 Ms. Gordon-Hagerty: No.

4 Senator Inhofe: And the last one: Have you assumed
5 any duties or undertaken any actions which would appear to
6 presume the outcome of the confirmation process?

7 I think we did that twice, but let's hear it again.

8 Mr. Ney: No.

9 Mr. Fahey: No.

10 Mr. Ayres: No.

11 Ms. Gordon-Hagerty: No.

12 Senator Inhofe: Okay. Thank you very much.

13 All right. We were going to go into some detail about
14 your backgrounds. Of course, you've already had an
15 excellent introduction by Senator Corker. However, since
16 we're getting a late start, Senator Reed and I have decided
17 to forego our opening statement. We're looking forward to
18 your testimony.

19 I want to particularly say how important it is when we
20 get into the acquisition part. Senator McCain probably has
21 talked more about the acquisition downfall and the problems
22 that we've had than any other issue, and I know it's true
23 because I came to the Senate from the House Armed Services
24 Committee some 22 years ago, and it was a problem then. So
25 we have a couple of people here who can resolve that

1 problem.

2 We're looking forward to your testimony.

3 We'll start with you, Mr. Ney.

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1 STATEMENT OF PAUL C. NEY, JR., TO BE GENERAL COUNSEL
2 OF THE DEPARTMENT OF DEFENSE

3 Mr. Ney: Senator, if I may read my opening statement?

4 Senator Inhofe: Yes, your opening statements are good.
5 We try to confine them to 5 minutes. Your entire statement
6 will be made a part of the record.

7 Mr. Ney: Yes, sir.

8 Good morning, and thank you, Senator Inhofe, Senator
9 Reed, and distinguished members of this committee. It is a
10 privilege today to appear before you, and with your
11 permission I will submit my written statement for the
12 record.

13 Senator Inhofe: Without objection.

14 Mr. Ney: First, I must thank President Trump for
15 nominating me for the position of General Counsel of the
16 Department of Defense, and I must also express my gratitude
17 to Secretary Mattis for placing his trust and confidence in
18 me.

19 I wish to express my gratitude to Chairman Corker for
20 so kindly introducing me this morning, and for his support
21 and encouragement.

22 Also, I thank my family and friends, especially my
23 mother, who is back home in Nashville, and my brothers and
24 their families back home in New Jersey, for their support,
25 love and friendship. I hope that they all know how I feel

1 about them, and I hope that my conduct always gives them a
2 reason to be proud.

3 And I thank all of you on the committee and your staff
4 members for the time you have invested in this process and
5 considering my nomination.

6 I am speaking with you this morning fully recognizing
7 the critical and essential role that this committee and the
8 Senate play in this appointment process and the critical and
9 essential relationship between this committee and the
10 Department of Defense, of which I will be a part if I am
11 confirmed.

12 I previously served in both the Office of the General
13 Counsel of the Department of the Navy and the Office of
14 General Counsel of the Department of Defense. Because of
15 that experience, I am acutely aware of the immense
16 responsibility entrusted to the General Counsel of the
17 Department of Defense, and, if confirmed, I will be
18 profoundly grateful for the honor to again serve in the
19 Office with so many of my former colleagues at OGC.

20 I believe that my prior public service and law practice
21 experience will serve me well in supporting Secretary Mattis
22 and the Department's leadership by providing timely,
23 accurate, and sound legal advice in support of their
24 priorities, including those set forth in the recently issued
25 National Defense Strategy: strengthening military readiness

1 and building a more lethal force; strengthening our
2 alliances and attracting new partners; and reforming the
3 Department for greater performance and affordability.

4 Inspired by the unsurpassed work ethic and patriotism
5 of the Department's military and civilian professionals, I
6 am prepared to work tirelessly to address the Department's
7 challenges and opportunities. Among those challenges and
8 opportunities are the demand for continued definition of the
9 law related to cyber warfare and hostilities in the cyber
10 domain, the blight of sexual assault in the military, and a
11 just and effective resolution to detainee litigation.

12 Early on in my time in the Department of the Navy, I
13 worked with a Navy JAG officer who said to me: "Sir, my job
14 is to help you succeed." I immediately liked the sound of
15 his self-styled job description. And I think -- and I hope
16 that others in the Department believe -- that he performed
17 his job superbly.

18 I am a little embarrassed to say, however, that the
19 wisdom of his words did not hit home immediately, and it
20 took some time for me to figure it out. But I finally came
21 to understand that my response to him should have been "and
22 my job is to help you succeed." Indeed, in our common
23 mission, each of us must look to our teammates and recognize
24 that we will perform best when we are helping each other
25 succeed at our respective duties. There are no challenges

1 that we cannot overcome when that spirit prevails.

2 That is how I view my responsibilities as a lawyer,
3 counselor, advisor, advocate, and public servant. If
4 confirmed, I will be totally committed to helping the Office
5 of General Counsel, the Department of Defense, and this
6 committee succeed together in our common duty to prepare and
7 support our military and civilian personnel and their
8 families in defending our nation and securing our freedoms.

9 Thank you for your consideration today. I look forward
10 to answering your questions.

11 [The prepared statement of Mr. Ney follows:]

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1 Senator Inhofe: Thank you, Mr. Ney.

2 Mr. Fahey?

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1 STATEMENT OF KEVIN M. FAHEY TO BE ASSISTANT SECRETARY
2 OF DEFENSE FOR ACQUISITION

3 Mr. Fahey: Thank you, Mr. Chairman, Ranking Member
4 Reed, and distinguished members --

5 Senator Inhofe: Did I pronounce that correctly?

6 Mr. Fahey: Yes, sir. Yes, Senator.

7 Thank you, Mr. Chairman, Ranking Member Reed, and
8 distinguished members of this committee for the opportunity
9 to appear before you today for the consideration of my
10 nomination for Assistant Secretary of Defense for
11 Acquisition.

12 I start by thanking President Trump, Secretary Mattis,
13 and Under Secretary Lord for their confidence in me and
14 their support for my nomination. It is truly humbling and
15 an honor to be considered for this critical position in a
16 time when Defense acquisition needs to be effective,
17 efficient, and responsive to give our military what they
18 need and deserve to do their jobs. I accepted the offer to
19 be nominated because I believe the conditions are set to
20 really make a difference because of the support of Congress,
21 the direction of this committee, and the leadership in the
22 Pentagon.

23 On a personal note, I would like to thank my parents
24 who, no question, are looking down on me from heaven today.
25 It was my father who, as a career DOD civil servant at

1 Watertown Arsenal in Massachusetts, instilled in me what it
2 means to be a civil servant and influenced my decision to
3 make it a career.

4 I would also like to thank my wife Judy, my wife of
5 over 35 years, who is sitting right behind me, for her
6 continued love and support. She knows that if I am
7 confirmed, she will once again see very little of me, but
8 knows that my passion is supporting our military. In my
9 opinion, there is no more rewarding profession.

10 Sitting next to my wife are two good friends, Michele
11 DeSouza and Bob, and thank you for being here today.

12 I would like to thank my two sons, who are not here
13 with me today -- Mackenzie is a Ph.D. student at Indiana
14 University, and Keegan is an undergraduate student at
15 Georgia Southern -- for their continuous love and support.

16 Lastly, I want thank Mackenzie and Erin for giving me
17 my first grandchild, Declan Fahey, last November, helping to
18 remind us all that we need to keep this country safe for
19 generations to come.

20 If confirmed, I will work closely with this committee
21 on innovative ways to continue to improve Defense
22 acquisition. I believe the actions of Congress over the
23 last several years have set the conditions for success, in
24 addition to the tremendous leadership of Secretary Mattis
25 and Under Secretary Lord. I believe my background of 35

1 years as a civil servant and the last two years consulting
2 with industries, both large and small, will serve me well if
3 confirmed for this position.

4 I graduated from the University of Massachusetts as an
5 engineer and was an Army intern many years ago. My first
6 real job was at Watervliet Arsenal in New York, which was
7 part of the organic industrial base, building cannon
8 barrels. Then I moved to Picatinny and I was there for 17
9 years, where I had several jobs. I was a systems engineer,
10 chief engineer for a major program, a deputy PM for a major
11 program, and my last job at Picatinny was Deputy PEO for
12 Ammunition. I then moved to the Detroit Arsenal, where I
13 was PEO Ground Combat Systems for five years, and then PEO
14 Combat Support/Combat Service Support for five years.

15 During my time as Deputy PEO and my two-time PEO, we
16 were at war, so I effectively learned how to field
17 capabilities quickly, having a big role on rapid
18 acquisitions like Stryker and the Mine Resistant Ambush
19 Protection program known as MRAP, in addition to continuous
20 improvements to our combat and tactical fleets.

21 I finished my career in the Pentagon as the Army's
22 Chief Systems Engineer, working directly for the Army
23 Acquisition Executive, and was very active in cross-
24 portfolio analysis and better buying power.

25 Being in the Pentagon, I realized that in many

1 instances people writing policies on how to do business have
2 never actually had to execute. I believe my experience of
3 having to execute programs at every level will allow me to
4 work well across the acquisition community to improve
5 acquisition execution. Over the last couple of years I have
6 been consulting with industry, helping them understand what
7 the government is asking for so they could be responsive to
8 the government's needs. This emphasized to me the
9 importance of good communications, collaboration, and
10 transparency with industry.

11 I would like to thank this committee for its
12 consideration of my nomination and look forward to answering
13 your questions.

14 [The prepared statement of Mr. Fahey follows:]

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1 Senator Inhofe: Thank you, Mr. Fahey.

2 In our haste, we didn't remind you, you're certainly
3 welcome to introduce any of your family members who are
4 here.

5 Did we miss one for you, Mr. Ney?

6 Mr. Ney: No, Senator. I have my friends from
7 Nashville here. My mother is at home. My brother is back
8 home in New Jersey.

9 Senator Inhofe: And they're watching you intently.
10 Very good. Thank you.

11 Mr. Ayres?

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1 STATEMENT OF THOMAS E. AYRES TO BE GENERAL COUNSEL OF
2 THE DEPARTMENT OF THE AIR FORCE

3 Mr. Ayres: Senator Inhofe, Ranking Member Reed, and
4 members of the committee, thank you for the opportunity to
5 testify before you today.

6 I would like to thank President Trump for nominating
7 me, and Secretary Mattis and Secretary Wilson for their
8 confidence in recommending me, for the opportunity to serve
9 again in the Department of Defense.

10 I have been blessed to have been surrounded by role
11 models of military service my entire life, so it only seemed
12 natural for me to take the oath when I was 17 years old, and
13 to remain subject to that oath for over 37 years.

14 My father passed away exactly 16 years ago today, but
15 he was my biggest role model. He enlisted in the Army,
16 earned combat infantry badges in both Korea and Vietnam, and
17 retired as a Lieutenant Colonel. My mother raised my older
18 brother and I in places like Panama, Fort Leonard Wood, and
19 Fort Polk, and supported my brother as he enlisted and also
20 served in Vietnam. My mother's brothers, my uncles, though
21 both born in Italy, served in the United States Navy during
22 World War II.

23 My mother and brother live in Pittsburgh and cannot
24 join us today, but I am accompanied by my wife and our three
25 children. Our daughter Quinn recently graduated college and

1 is working here on Capitol Hill. Our son Matthew is a
2 sophomore in college, and Finn is a senior in high school.
3 All three of them are young adults of character, and I could
4 not be more proud of them. In fact, their strength of
5 character developed over frequent moves and numerous
6 deployments is largely attributable to my wife, Mary. She
7 is herself an Army veteran and the daughter of a career Navy
8 pilot who flew combat missions in Korea and Vietnam. I am
9 truly thankful for Mary, love her very much, and without her
10 love, patience, and unyielding support, I could not have
11 followed a path of service.

12 Speaking of that service, though formerly an Army
13 officer, if confirmed, I would be incredibly honored and
14 humbled to join the ranks of the United States Air Force.
15 Besides having worked with, and in one case directly for,
16 superb Air Force Judge Advocates throughout my military
17 career, I know firsthand the importance of our Air Force as
18 a truly dominant force.

19 In May 2002, I flew into Bagram Air Base in
20 Afghanistan, awed by the skill of the pilots as they
21 accomplished an in-flight refueling, and in blackout
22 conditions cork-screwed in from 30,000 feet to reach that
23 distant base. Many on this committee I know have
24 experienced that same flight.

25 Less than a year later, I was equally impressed in

1 Kuwait attending daily briefings on the Shock and Awe air
2 campaign. Serving as a Staff Judge Advocate, when our
3 division headquarters' convoy crossed the berm into Iraq, I
4 was riding with the division's Air Liaison Officer, or ALO,
5 an Air Force Lieutenant Colonel, in an Air Force Humvee,
6 driven by an Air Force Technical Sergeant. And most of the
7 Rules of Engagement advice I gave in relation to that
8 deployment, and others, was in regard to the use of Air
9 Force ordnance. So I have no doubt I appreciate the gravity
10 of the work done by the Air Force and the importance of the
11 United States Air Force remaining the world's dominant force
12 in the sky.

13 Further, I recognize the complexity of the current
14 global environment and the dangers and requirements facing
15 our Armed Forces today. The Air Force in particular faces
16 enormous challenges. The Air Force must always be ready to
17 fly, fight, and win in the sky, in space, and in cyber. For
18 26 years the Air Force has conducted continuous combat
19 operations, resulting in a growing toll on airmen, their
20 readiness, and their equipment. Past efforts to downsize
21 combat-experienced pilots, skilled technicians and airframes
22 unfortunately intersected with an increasing need for air,
23 space, and cyber power.

24 As the Chief of Staff of the Air Force says, "Air and
25 space superiority are not American birthrights." Near-peer

1 competitors in particular are investing heavily in advancing
2 the sophistication of their air, space, and cyber
3 operations.

4 In the midst of these national security concerns, I
5 understand the Air Force concurrently faces some very
6 difficult legal challenges. The Air Force remains fully
7 engaged in the critically important and ongoing effort to
8 end sexual harassment, sexual assault, and retaliation.
9 While progress has been made, even more can be done to gain
10 and maintain the trust of every airman and every citizen,
11 the prospective mothers and fathers of future airmen.

12 The legal challenges, of course, go beyond the issue of
13 sexual assault to include implementing changing personnel
14 programs, confronting environmental concerns, addressing and
15 defining the norms for cyber and space operations, and
16 meeting the urgent need to improve the efficiency and
17 flexibility of acquisition processes.

18 The complexity of these issues seems daunting, yet I
19 would be humbled to serve the Secretary of the Air Force and
20 join the incredibly professional team of the Office of
21 General Counsel, and the Judge Advocate General of the Air
22 Force, both civilian and uniformed attorneys, paralegals,
23 and support staff, to meet these challenges.

24 If confirmed, I commit to meeting them and every issue
25 in a principled manner, with renewed enthusiasm and

1 determination to discover innovative solutions, and with
2 transparency to this committee as we move forward.

3 Thank you for considering my nomination, and I look
4 forward to your questions.

5 [The prepared statement of Mr. Ayres follows:]

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1 Senator Inhofe: Thank you, Mr. Ayres.

2 As a reminder, I think most of you know we're going to
3 have a vote at 11:30. Senator Reed and I have talked this
4 over, and we're going to work all the way through the vote.
5 So for the members who want to get down there and get on
6 record, they can do it, and we will go uninterrupted.

7 Ms. Gordon-Hagerty?

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1 STATEMENT OF LISA E. GORDON-HAGERTY TO BE UNDER
2 SECRETARY OF ENERGY FOR NUCLEAR SECURITY

3 Ms. Gordon-Hagerty: Thank you, Senator Inhofe.
4 Senator Inhofe, Ranking Member Reed, distinguished members
5 of the committee, it is a tremendous privilege to appear
6 before you today. I am honored and grateful for this
7 incredible opportunity to serve my country again, and I wish
8 to thank President Trump and Secretary Perry for having
9 placed their trust and confidence in me, putting forward my
10 nomination as Under Secretary of Energy for Nuclear Security
11 and the Administrator of the National Nuclear Security
12 Administration.

13 Senator Inhofe, thank you for allowing me to introduce
14 my family. Here with me today is my husband, Walt Houston,
15 a retired Navy special operations veteran to whom I am
16 incredibly grateful for his unwavering support throughout
17 this process. Thank you, Walt, for your love and for your
18 past and continued service to our country.

19 Also with me today is my daughter, Ocie, a sophomore at
20 Radford University.

21 Watching from afar is my mom, Irene Gordon, who just
22 turned 92 years old and is the bedrock of our family. My
23 parents instilled in me a strong bond within our family, and
24 without the unconditional love and support of my brothers,
25 Mike and Ted, my sisters Jill, Gail and Lynne, and their

1 families, I would not be the person I am today.

2 I am also thankful for my mother- and sister-in-law who
3 are watching from California.

4 I am also extremely grateful to the many close friends
5 and colleagues who are here today, and I thank them for
6 their prayers and support.

7 The Department of Energy and NNSA, through its world-
8 class scientific and technical expertise, have several
9 unique but interdependent responsibilities: stewardship of
10 a safe, secure, reliable, and robust nuclear weapons
11 stockpile; supporting naval reactors and their unparalleled
12 capabilities to power the nation's nuclear fleet and
13 submarines; and international efforts to prevent a rogue
14 nation or terrorist group from acquiring a nuclear or
15 radiological device and preventing or deterring weapons of
16 mass destruction.

17 If confirmed, my top priorities will be the effective
18 execution of these enduring national security missions.

19 To ensure that our premier workforce has the tools
20 needed to accomplish their mission, I will be focused on
21 several top priorities, in particular infrastructure
22 modernization. More than half of NNSA's facilities are more
23 than 40 years old, and nearly 30 percent date back to the
24 Manhattan Project era. I will work closely with Congress to
25 meet the long-term challenges of modernizing NNSA's

1 infrastructure.

2 That said, even with the successful execution of a
3 modernization plan, no institution can operate without a
4 great team. If confirmed, I will ensure that the nuclear
5 security enterprise continues to employ the brightest and
6 the best by recruiting, retaining, and growing the highly
7 skilled workforce needed to maintain the U.S. nuclear
8 weapons stockpile, from our incredibly dedicated Federal
9 workforce to our partners throughout the national security
10 complex.

11 The nature of the work done by NNSA does not always
12 lend itself to a high profile. However, the agency's role
13 is integral to maintaining a modern and appropriately
14 tailored nuclear deterrent in an ever-changing geopolitical
15 environment. NNSA and its stakeholders are part of the
16 foundation for preserving peace and deterring aggression
17 against the United States, our allies, and our partners. If
18 confirmed, I will ensure that NNSA delivers on its
19 commitments to its stakeholders and accomplishes these vital
20 missions.

21 My work for or with NNSA's national security complex
22 brings a unique skill set of more than 30 years of
23 experience and vision to this position. During this time, I
24 have had the privilege to work with some of our nation's
25 most talented and dedicated scientists, engineers, and

1 safety and security professionals. Upon completing graduate
2 school, my first position was as a health physicist at the
3 Lawrence Livermore National Laboratory which instilled in me
4 a great respect for the national security complex. Since
5 that time I have devoted my career to the national security
6 mission as a professional staff member on the House Energy
7 and Commerce Committee, working at the Department of Energy
8 in Military Application Defense Programs, and as a member of
9 the National Security Council staff combating terrorism. To
10 lead the NNSA would be the highest honor of my career and a
11 challenge, if confirmed, I will relish.

12 The United States is at a crossroads regarding the
13 foundation of our national security. Should I be confirmed,
14 I will work tirelessly to ensure that our great nation has
15 the tools in its national security apparatus so that the
16 NNSA can provide the critical support to our customer, the
17 Department of Defense, and our other very important
18 stakeholders and partners.

19 I thank you again, Senator Inhofe, for having invited
20 me here to appear before this committee today. I am
21 prepared to answer any questions you may have now and, if
22 confirmed, to address any questions you may have in the
23 future. Thank you.

24 [The prepared statement of Ms. Gordon-Hagerty follows:]

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1 Senator Inhofe: Thank you, Ms. Gordon-Hagerty, and all
2 of you who are here today.

3 Senator McCain is not with us today, not here at this
4 meeting, but I can assure you if he were, the first thing
5 he'd come out with, Mr. Fahey, is acquisition. He'd remind
6 us of what has happened in the past, and I'm particularly
7 sensitive to it, being from Oklahoma, somewhat familiar with
8 our ground operations, what we're supposed to be doing.
9 Senator McCain would remind us that we spent over \$2 billion
10 on the Crusader, junked that program, lost it, then went
11 into the future combat system. That was a \$20 billion loss.

12 And this isn't new to any of us here. I can remember
13 talking about this way back when I was in the House Armed
14 Services Committee. We're talking about 20 years ago.

15 So you're the guy who has to come up with all the new
16 ideas. Anything off the top of your head you want to share
17 with us? Very short.

18 Mr. Fahey: Yes, sir, Senator. I've seen hundreds of
19 programs, so I know what's good and what's bad. I will tell
20 you that I really believe the set-up of the R&E and a lot of
21 the direction from this committee of prototyping early and
22 often to drive out risk early is a big part of that, because
23 what you see in a lot of these programs is we're over-
24 ambitious with the requirement we're given and the
25 execution.

1 So the key is driving out risk early and often, and
2 prototyping is a big part of that.

3 Senator Inhofe: Yes. Well, that's good. And I'd like
4 for the record maybe to come into some detail on how you
5 plan to attack this. Again, this is a tough one. It's one
6 that should have been in a long time ago, and I think you
7 have the right background to make this happen. Thank you
8 very much.

9 Mr. Fahey: Thank you, Senator.

10 Senator Inhofe: There's a controversy over the thing
11 that came out just the other day, one that I feel very, very
12 strongly about, and that is keeping aggressively open GITMO,
13 Guantanamo Bay. I can remember people complaining about it,
14 and there are people here on this committee who don't agree
15 with this position, but I do, and I think it's very
16 important.

17 People don't understand the differences, Mr. Ney,
18 between combatants, enemy combatants and criminals. They're
19 not one and the same, so we're limited in the resources we
20 can use.

21 The question I would ask you is how will you support
22 the Secretary of Defense and provide independent legal
23 advice while maintaining our lawful detention of enemy
24 combatants at GITMO?

25 Mr. Ney: Senator, I had a little bit of experience in

1 that when I previously served in the Pentagon in the Office
2 of General Counsel and the Department of Defense. The
3 detainee matters were part of my responsibilities. So we
4 did provide that sort of advice to Deputy Secretary of
5 Defense England at the time, and I would continue to provide
6 that advice in a way that's consistent with international
7 law and, more importantly in some respects, the domestic law
8 that's been refined over the past decade regarding our
9 detainee facilities.

10 The President has said recently in his executive order
11 that GITMO is to remain in operation. It is a safe, humane,
12 secure, and legal operation, and I will consult and advise
13 the Secretary to complete any mission that he sees necessary
14 in how we use GITMO.

15 Senator Inhofe: Well, I'd also add that eight years
16 ago, nine years ago, in the previous administration, there
17 was an effort by President Obama at that time to close it,
18 and we stopped that from happening in this committee, so
19 those are the sentiments that are here.

20 The last thing I want to mention would be to you, Ms.
21 Gordon-Hagerty, and that is when you look at the nuclear
22 triad, the things that you're going to be dealing with, is
23 there anything further you didn't mention in your opening
24 statement as to how we're going to attack this? Where are
25 our weaknesses as you see them right now that you're going

1 to be dealing with?

2 Ms. Gordon-Hagerty: Senator Inhofe, I think the
3 biggest obstacle that we have ahead of us is sustained and
4 robust funding. We need to ensure that we have --

5 Senator Inhofe: And predictable.

6 Ms. Gordon-Hagerty: And predictable. Thank you.
7 Predictable funding for ensuring the maintenance of the
8 current stockpile and all of the future needs that are
9 headed upon us, especially those that are laid out in the
10 Nuclear Posture Review.

11 Senator Inhofe: Yes, very good.

12 Senator Reed?

13 Senator Reed: Well, thank you very much, Mr. Chairman.

14 And thank you all for your testimony and your
15 willingness to serve.

16 Mr. Ney, this is a variation on the issue that Senator
17 Inhofe raised, which is the Military Commission Act of 2009
18 provides a legal mechanism. It hasn't worked very well. I
19 don't think we've been able to successfully prosecute anyone
20 at Guantanamo.

21 What do you propose to do about that to make it work or
22 to advise us as to alternative legislation, perhaps?

23 Mr. Ney: Senator, if confirmed, the Military
24 Commissions will be at the top of my priority list. I'm
25 aware that we have, I believe, three trials or prosecutions

1 ongoing. They are in various stages of the prosecutorial
2 process. Some of the delay, I believe, is necessary and
3 appropriate because it reflects that we have extended due
4 process to the defendants, and we don't want to rush things
5 through this process at the risk of denying them what the
6 courts and what the people of this nation would expect of
7 our military justice system, and the commissions as well.

8 I would look at that closely and make a determination
9 and advise Secretary Mattis, if confirmed, of how I think we
10 might better address the war crimes issues that are
11 currently being addressed in the Commission, if there is a
12 better way to do that. But these processes have been
13 refined over the past 15 years, much of it through the
14 leadership of this committee, and I think it is a good
15 process and a necessary process.

16 Senator Reed: We have a much higher and speedier
17 record in Federal district courts. So you would consider
18 that when you advise the Secretary on the disposition of an
19 individual?

20 Mr. Ney: Yes, Senator. I would certainly review that
21 and take a look at that and not take any option off the
22 table for delivering the justice that we want to see.

23 Senator Reed: The Chairman, Mr. Fahey, asked a
24 question that I was going to ask. That's why he's the
25 Chairman. But basically, let me just say your experience in

1 the service is going to be critical because what we've tried
2 to do under Senator McCain's leadership is devolve many of
3 these decisions from your role down to the service. So
4 again, I think we're very pleased that someone with detailed
5 experience like you had in a service is going to be looking
6 at, from the DOD perspective, how these services are taking
7 on these new missions. Just let me make that comment and
8 wish you well.

9 Mr. Fahey: Senator, I think that's wonderful. As a
10 PEO, that's what I always tried to do, is delegate authority
11 and responsibility and set the environment to be successful.
12 I think that's when you get innovation. When you tell
13 everybody what to do, they're working to the process, not to
14 the results.

15 Senator Reed: Thank you, Mr. Fahey.

16 Mr. Ayres, you have an extraordinary military
17 background. Most of the individual counsels that go into
18 the Department also have extensive civilian backgrounds,
19 because some issues dealing with our contracting and HR
20 issues, et cetera, which might have crossed your path. I'm
21 just wondering how you are going to make sure you've got a
22 comparable civilian perspective, as well as what you have,
23 an excellent military perspective, as a JAG.

24 Mr. Ayres: Senator, I would certainly rely upon the
25 expertise of the entire team. I certainly think that the

1 civilian control of the military, that governance layer
2 between this committee and the uniformed members, is the
3 Secretary and the other appointees under the Secretary, and
4 the point of that governance layer is to ensure that we
5 abide by the rules and regulations, as you're given that
6 power to give the rules and governance by our Constitution
7 and Article 1, Section 8. So I think I can rely upon the
8 expertise of many of the counsel within the Office of
9 General Counsel, and I do have some experience in managing
10 litigation over acquisitions and protests, so they're not
11 unheard of to me, and I look forward to the challenge if I
12 am confirmed, Senator.

13 Senator Reed: Thank you.

14 And finally, Ms. Gordon-Hagerty, one of your top
15 priorities, as you indicated, is the revitalization of the
16 infrastructure. Do you have some priorities there in terms
17 of either specific facilities or specific products that you
18 think should be the number-one effort?

19 Ms. Gordon-Hagerty: Yes, Senator. I do have several
20 priorities, and they're in no particular order. However, I
21 do believe, because of the infrastructure issues that the
22 NNSA and Department of Energy, that the long overdue
23 increases and the revitalization that needs to take place in
24 the NNSA, I believe that, first of all, we need to look at
25 the plutonium strategy. I understand there is an AOA being

1 undertaken right now, to which I'm not privy. However, we
2 do need to have a robust program to ensure that we can make
3 pits, war-reserve pits, and to make sure that we have a
4 sustained capability to produce the number of war-reserved
5 pits as outlined by the Nuclear Weapons Council. That would
6 be my number-one priority, although there are many that are
7 a close second.

8 Senator Reed: Thank you.

9 Ms. Gordon-Hagerty: Thank you.

10 Senator Inhofe: Senator Fischer?

11 Senator Fischer: Thank you, Mr. Chairman.

12 Mr. Fahey, I appreciate your response to this
13 committee's advance policy questions where you list the
14 programs supporting the nuclear modernization among your top
15 priorities. As you know, almost all of the delivery systems
16 that make up our nuclear triad have been extended decades
17 beyond their service lives. Since 2013, STRATCOM commanders
18 have testified that previous decisions to delay and defer
19 nuclear modernization have exhausted the margin for error on
20 our recapitalization schedule.

21 Do I have your commitment that you will keep this
22 schedule in mind and closely monitor these programs to
23 ensure that they stay on track?

24 Mr. Fahey: Yes, you do, Senator.

25 Senator Fischer: Thank you. As you advise the

1 Undersecretary of Defense for Acquisition and Sustainment on
2 programs related to nuclear modernization, will you be open
3 to the use of, as appropriate, rapid acquisition authorities
4 to ensure that the acquisition schedule is not a casualty of
5 excessive bureaucracy and extreme aversion to risk?

6 Mr. Fahey: Yes, Senator.

7 Senator Fischer: The new guidance of the National
8 Defense Strategy calls for three primary lines of effort for
9 the Department of Defense to execute, and one of these is
10 "reforming the Department's business practices for greater
11 performance and affordability."

12 How do you intend to implement that guidance?

13 Mr. Fahey: Yes, Senator. So, I think a lot of that is
14 the idea of, one, to delegate the authority responsibilities
15 to the maximum extent you can, because what I believe that
16 will allow you to do is focus on the critical few and do a
17 better job on portfolio management of what's most important
18 across the Department, like the kill chain.

19 And I believe that also allows us as the Secretary of
20 Defense to focus on the up-front -- the most critical piece
21 of a program is up front, when you determine the
22 requirements -- what is it going to cost, what is the
23 schedule -- and make sure they're achievable, or that the
24 technical approach and acquisition strategy support the risk
25 of that program. And I think given that we're going to

1 delegate a lot of the programs, we'll have more time to do
2 what we should be doing.

3 Senator Fischer: What do you think is the greatest
4 barrier that we're facing right now to really see an
5 effective use of our taxpayer dollars?

6 Mr. Fahey: Senator, I personally believe, and it's
7 probably going to be hard to believe, but it's culture,
8 right? Some of it will be the culture of we're here to help
9 you do it right, not here to oversee you. I'll tell you, as
10 a PEO, a lot of times I was managing the process, I wasn't
11 managing my programs.

12 Senator Fischer: Do you think the culture is risk
13 averse? Is that an issue?

14 Mr. Fahey: Absolutely, Senator.

15 Senator Fischer: How are you going to address that?

16 Mr. Fahey: I really do believe a lot of the
17 initiatives out of this committee -- I mean, one of the big
18 ones, I believe, is the rapid prototyping, right? I think
19 that gives people the opportunity to see what's in the realm
20 of the doable and get a really good feel for performance
21 early and often.

22 Senator Fischer: Early and often. How do you move up
23 schedules in a bureaucracy? How are you going to move up
24 schedules to do things early and often on top of everything
25 else that a team is going through?

1 Mr. Fahey: Senator, I'll give you an example. If you
2 look at the Undersecretary of Defense for R&E with the idea
3 that they'll do rapid prototyping and they'll do maturity of
4 technologies, so that when we establish a program of record
5 it will be executable, some of the problems we have is when
6 we start a program, the technologies are still immature, so
7 we're maturing technologies at the same time we're trying to
8 execute the schedule of a program of delivery.

9 So I believe that a lot of the things we're going to do
10 up-front to make sure that the technologies are mature, the
11 idea of if it's not mature to get everything, this idea of
12 an 80 percent solution. If you read the National Military
13 Strategy, it's giving them the equipment they need when they
14 need it, and give them the relevant equipment, and do the
15 evaluations of is it better than what they got and will it
16 serve them right.

17 Senator Fischer: As a result of the reorganization of
18 the AT&L and the reform efforts of this committee, we've
19 seen a number of program authorities that are transitioning
20 to the service level, and one of the issues you highlight as
21 a concern is the possibility of overly incentivizing service
22 chiefs to be too optimistic about the cost and delivery
23 schedules.

24 I think the comments that you just made maybe reflect
25 that. Am I reading too much into that?

1 Mr. Fahey: No, Senator. I believe early in the
2 program we are going to be working together, and here's what
3 I see as far as delegating the authority. Now our job is to
4 be part of their team in executing their program. It's not
5 like we're going to ignore their program, but we're no
6 longer in an oversight perspective. We're part of your team
7 as you're executing it. It will still be our job to be sure
8 the schedules are accurate, the costing, the CAPOs still do
9 the costing to make sure the cost and schedule estimates up
10 front are executable.

11 Senator Fischer: Thank you, sir.

12 Thank you, Mr. Chairman.

13 Senator Inhofe: Thank you.

14 Senator McCaskill?

15 Senator McCaskill: Thank you.

16 I have asked a number of other nominees who have been
17 before this committee -- Secretary of the Army Mark Esper
18 and Secretary Wilson and Undersecretary Lord -- about the
19 DOD IG report that was issued in November called "The Top
20 DOD Management Challenges." I asked all of them if they had
21 read it.

22 Let me ask you, Mr. Fahey: Have you read this report?

23 Mr. Fahey: Yes, ma'am, I have read it.

24 Senator McCaskill: Okay.

25 Mr. Fahey: I had seen that hearing, and I had read it.

1 Senator McCaskill: I warned everybody that I was going
2 to ask about it in every hearing. I recommend it to all of
3 you for reading because it is the management challenges that
4 are always the subject of these hearings. I'm going to ask
5 about a couple of areas specifically.

6 First of all, overseeing the CORES, when I started
7 looking at CORES back when I started going into Iraq right
8 after I got elected, looking at all the contracting abuses
9 that occurred, the saga of Logcap and all the abuses of
10 Logcap and the cost-plus, I realized the CORES guys were
11 like the last guys on the totem pole that got a clipboard,
12 no training, no oversight. Frankly, they weren't doing
13 anything. And we really tried to revamp the CORES position,
14 and I think we've made a lot of progress over the last 10
15 years.

16 I want to make sure that we don't fall back on that.
17 So I was concerned that the CORES was in there, how they're
18 being overseen, the contracting operating representatives in
19 each unit.

20 But sustainment and supply chain management were two
21 that really got my attention. The sustainment problem, this
22 is an example that really just ought to -- like everybody
23 ought to sit up and take notice. In a 12-month period, from
24 February 2015 to January 2016, DOD used 2,000 separate
25 contracts awarded to 590 different contractors for

1 helicopter spare parts for the H-60.

2 You can't make that up. That is bizarre; \$400 million.
3 The same parts were often purchased from different
4 contractors for different prices, the same part.

5 So, Mr. Fahey, I really hope that after you've had time
6 to get into this position, that you will come back and show
7 how we can do better than that.

8 Mr. Fahey: Yes, Senator.

9 Senator McCaskill: You have to admit that, on its
10 face, that's absurd.

11 Mr. Fahey: Yes, Senator. If confirmed, there has been
12 a lot of direction also on how do we do better data
13 analytics on service contracts. I'm not familiar at this
14 time on where we're at on that. But if confirmed, that's
15 one of the things I'll look at immediately.

16 Senator McCaskill: The other one that really got my
17 attention was the supply chain management risks. The fact
18 that an adversary could infiltrate our supply chain,
19 sabotage, introduce unwanted function or otherwise
20 compromise the design or integrity of Defense systems, I
21 would be anxious to get feedback from you about that supply
22 chain management risk piece of this. The fact that that was
23 identified as one of the top management challenges of DOD is
24 of great concern, especially in the times we live.

25 Mr. Fahey: Yes, Senator, that's very concerning. If

1 confirmed, I'll look into it. Some of the problem is that a
2 lot of the systems that we had established was way before
3 our understanding of the cyber problems, right? So if
4 confirmed, I'll look into it immediately.

5 Senator McCaskill: Yes, and we can't probably take a
6 lot of time to have 16 different committees and five
7 different takes on what we need to do because, obviously,
8 this is a technology-driven problem, and the slower we go at
9 trying to address it, the more behind we're going to get.
10 So I hope we can put the afterburners on.

11 Mr. Ney, I was pleased to see the DOD policy come down
12 yesterday on harassment prevention and response. Have you
13 had a chance to familiarize yourself with the new -- I know
14 it was just announced yesterday. Are you at all familiar
15 with the new policy that has been promulgated?

16 Mr. Ney: Very modestly, Senator.

17 Senator McCaskill: Okay. Well, I will, just for the
18 record -- there are a couple of things I want to follow up
19 with. I like it that if it's a substantiated claim, it goes
20 into the record of the soldier. I want to make sure we
21 understand what "substantiated" is. In the Army, it's a
22 preponderance. I want to make sure that there is a
23 preponderance level across the entire DOD.

24 And then secondly, I'm concerned that this policy
25 doesn't apply to contractors or civilians, and I would like

1 that issue to be addressed as soon as you get a chance.

2 Mr. Ney: Yes, Senator.

3 Senator McCaskill: Thank you.

4 Mr. Ney: If confirmed, I will.

5 Senator McCaskill: Thank you, Mr. Chairman.

6 Senator Inhofe: Senator Graham?

7 Senator Graham: Thank you, Mr. Chairman.

8 Mr. Ney, do you believe an authorization to use
9 military force is required before President Trump could
10 launch an attack, a preemptive attack, on North Korea?

11 Mr. Ney: Senator, I believe that the President as
12 Commander-in-Chief and the executive officer, the chief
13 executive of the nation, has authority under certain
14 circumstances to launch an attack and use our military
15 forces against a foreign enemy.

16 Senator Graham: Would a preemptive attack on North
17 Korea be one of those circumstances?

18 Mr. Ney: It could be. It depends on those
19 circumstances.

20 Senator Graham: Okay. In terms of the current AUMF,
21 would you welcome a new one?

22 Mr. Ney: Senator, with regard to a new AUMF, I concur
23 with Chairman Corker and Secretary Tillerson and Secretary
24 Mattis, who I think have all spoken in favor of a
25 complementary or supplementary AUMF.

1 Senator Graham: Would you support an AUMF that limits
2 military operations based on time?

3 Mr. Ney: I would not, sir. I think that would be
4 unwise.

5 Senator Graham: Would you support an AUMF that limited
6 military operations based on location?

7 Mr. Ney: No, Senator.

8 Senator Graham: On means?

9 Mr. Ney: Senator, no, I would not support it. In my
10 role as a lawyer I would be advising the Secretary and our
11 leadership on that, and they would make those decisions, of
12 course.

13 Senator Graham: Okay. In terms of enemy combatant, is
14 it going to be the policy of the Trump Administration that
15 we can hold people as unlawful enemy combatants without
16 reading them their Miranda rights if they qualify under that
17 definition?

18 Mr. Ney: Senator, I cannot speak to what the policy is
19 or what the President's will be. But I can say that there
20 are circumstances under which we will hold enemy combatants,
21 and they would not be entitled to the full panoply of rights
22 we generally accord to U.S. citizens in the United States.

23 Senator Graham: Ms. Hagerty, you're well qualified for
24 your job. You made a statement in writing: "I believe the
25 dilute and dispose approach is a proven less costly

1 alternative to the MOX facility. If confirmed, I am
2 committed to ensuring that the 34 metric tons is disposed
3 of, that NNSA meets its obligation." Are you just repeating
4 what you were told?

5 Ms. Gordon-Hagerty: Senator, based on the information
6 that was available to me, I believe that statement is
7 accurate. And given our conversation yesterday -- and I
8 appreciate your having seen me -- I'm committed to working
9 with you, Secretary Perry, the contractor and the
10 stakeholders in the state of South Carolina to ensure we can
11 develop a path forward.

12 Senator Graham: So there are two ways we can do this,
13 the easy way or the hard way. The easy way is for you to
14 say this is what I was told and I don't know how less costly
15 it is. Do you know how less costly it is?

16 Ms. Gordon-Hagerty: I understand there was a revised
17 cost estimate given in 2016.

18 Senator Graham: Do you know how accurate that is?

19 Ms. Gordon-Hagerty: No, sir, I have not been --

20 Senator Graham: Do you know if the people in New
21 Mexico will take the dilute and dispose option?

22 Ms. Gordon-Hagerty: I understand that there have been
23 discussions with the state of New Mexico --

24 Senator Graham: What did they say?

25 Ms. Gordon-Hagerty: I understand just from what I've

1 read in the newspapers and publicly available information
2 that the Department of Energy did submit a modification to
3 the disposal plan with the state of New Mexico.

4 Senator Graham: Has it been accepted?

5 Ms. Gordon-Hagerty: That I don't know.

6 Senator Graham: Okay. So would you agree with me --
7 will you be open-minded about this statement, the statement
8 do you believe it's less costly?

9 Ms. Gordon-Hagerty: Yes, I will certainly be open-
10 minded to that. I'm willing to and have agreed that I will
11 review all the available data.

12 Senator Graham: What do the Russians say about this
13 changing course?

14 Ms. Gordon-Hagerty: From what I understand, Senator,
15 the United States had sent a team to Russia and discussed
16 with them --

17 Senator Graham: What did they say?

18 Ms. Gordon-Hagerty: They have stated that they will
19 not discuss this until the Congress has made a decision or
20 the MOX strategy has been decided.

21 Senator Graham: Do you remember when Putin said he
22 objects to this, this is not what they agreed to in 2004,
23 that the MOX was the exclusive means of disposition by the
24 United States and now we're changing course in midstream and
25 he says he will object to that? Are you familiar with that

1 statement?

2 Ms. Gordon-Hagerty: Yes, Senator.

3 Senator Graham: Okay. Other than knowing what the
4 Russians will do, what New Mexico will say, and a real
5 definition of what "less costly" means, we're in good shape.

6 So here's the deal. For the committee, the MOX program
7 I think is 70 percent complete, and I will fight like crazy
8 to stop it unless you can convince me that something else
9 actually works, and I look forward to working with you. Is
10 that a fair position for me to take, do you think?

11 Ms. Gordon-Hagerty: Thank you, Senator Graham, and I
12 promise that I will work closely with you and your staff.
13 Thank you.

14 Senator Graham: Thank you.

15 Senator Inhofe: Senator Shaheen?

16 Senator Shaheen: Thank you, Mr. Chairman.

17 Congratulations to each of you on being nominated for
18 these positions, and thank you for your willingness to take
19 them on if confirmed.

20 Mr. Fahey, I wanted to follow up a little bit on
21 Senator McCaskill's questions about management at DOD. As
22 I'm sure you're aware, in December of 2017 DOD began its
23 first Department-wide financial audit in its history, and
24 this week we saw a troubling report on Politico regarding
25 the result of an internal audit of the Defense Logistics

1 Agency which showed that DLA failed to document more than
2 \$800 million in construction projects. Furthermore, the
3 audit pointed out that its financial management is so weak
4 that its leaders and oversight bodies have no reliable way
5 to track the huge sums it's responsible for.

6 So I think this audit raises real questions about
7 whether DOD is going to be able to effectively manage the
8 additional funding that we're providing in this budget
9 agreement that hopefully will pass. I certainly support it.
10 But as somebody who is going to be in charge of the
11 acquisitions, how should DOD effectively balance
12 accountability and accelerating its acquisition processes?

13 Mr. Fahey: Senator, I'm not totally familiar with that
14 assessment or that audit, but I am a real believer that we
15 need to do a better job in data analytics and have the data
16 analytics for decision-making, which will be one of my top
17 priorities if confirmed.

18 Senator Shaheen: Well, how do you feel about making
19 sure we know where the money is going?

20 Mr. Fahey: Senator, that would be part of it. I mean,
21 to do the data analytics, you have to have the right data.

22 Senator Shaheen: I think it's helpful to use language
23 that the American public understands, so following the money
24 is one of those.

25 Mr. Ney, last year when you were Chief Deputy Attorney

1 General for the Tennessee AG's Office, you were involved in
2 legally challenging the Federal Government's threats to cut
3 funding to school districts if they adopted policies that
4 required students to use the restroom according to the
5 gender listed on their birth certificate. So this goes to
6 the issue of transgender restrooms.

7 Mr. Ney: Yes, Senator.

8 Senator Shaheen: Now, DOD recently stated that they
9 would admit transgender military members and allow current
10 transgender members of the military to remain in the
11 military. If you're confirmed for this position, will you
12 uphold the policy that DOD has announced relative to
13 transgender members?

14 Mr. Ney: Absolutely, Senator.

15 Senator Shaheen: Thank you.

16 Mr. Fahey, to go back to acquisition again, the Small
17 Business Innovation Research Program has really helped to
18 provide innovation for our military and diversify the
19 industrial base. A third of participants in SBIR each year
20 are new companies. I sit on the Small Business Committee in
21 the Senate, and one of the things that I hear often from
22 small businesses is that they want access to be able to
23 compete for DOD contracts, they want to bring their
24 innovative thinking and technologies to DOD.

25 So how can we better ensure that small businesses have

1 that ability to compete within DOD?

2 Mr. Fahey: Senator, as you know, small business is a
3 big part of the Department of Defense. There are quite a
4 few professionals in the Department of Defense whose sole
5 job is to work on that. I mean, over 500.

6 The challenge tends to be, as you probably know, that
7 the Department of Defense is so big, so sometimes it's hard
8 for the small business to figure out where to go. Michelle
9 DeSouza, my friend, she is a small business owner from
10 Michigan. I first got to know her when I was PEO of Combat
11 Service Support. I met her at a small business conference
12 and didn't realize she did work for me. For the last two
13 years I've been on her board of directors and realized that
14 she taught me more about how hard it is to work for the
15 government than I could tell her about how to do it.

16 So that would be a top priority, and I think I have
17 really good insight because I've listened to her tell me
18 what the problems are over the last two years.

19 Senator Shaheen: Well, I'm delighted to hear that, and
20 I will hold you to that commitment if you're confirmed.

21 Mr. Ayres, as you know, there was a very sad tragedy in
22 November of 2017 when 26 people were shot and killed at a
23 church in Sutherland Springs, Texas. As we learned later,
24 one of the issues had to do with the inappropriate and
25 inadequate inclusion of names in a national criminal

1 background check system, the NIC system. So I think I would
2 applaud Secretary Wilson for her prompt response and her
3 efforts to follow up and make sure that doesn't happen
4 again.

5 Can you commit that you will do everything you can to
6 improve the communication and making sure that we comply
7 with the required background checks?

8 Mr. Ayres: Absolutely, Senator. It will be one of my
9 highest priorities.

10 Senator Shaheen: Thank you.

11 Thank you, Mr. Chairman.

12 Senator Inhofe: Thank you.

13 Senator Cotton?

14 Senator Cotton: Thank you, and thank you to our
15 nominees for your willingness to serve our country, in most
16 cases once again.

17 Ms. Gordon-Hagerty, the Undersecretary of Energy for
18 Nuclear Security, Administrator for Nuclear Security
19 Administration is one of the most consequential jobs in our
20 government, even if it's not one of the most prominent jobs.
21 It is truly a zero-defect, no-fail environment.

22 You've worked in this field before. You write in your
23 testimony about some top priorities, in particular nuclear
24 modernization. You note with alarm, which I share, that
25 more than half of NNSA's facilities are over 40 years old.

1 Almost a third date back to the Manhattan Project era.

2 Could you talk to us a little bit about your
3 modernization plans for the infrastructure of our nuclear
4 enterprise?

5 Ms. Gordon-Hagerty: Senator Cotton, you're exactly
6 right. The numbers that I quoted are exactly true. In
7 order for the United States to ensure that we have an
8 effective nuclear deterrent depends on the National Nuclear
9 Security Administration and DOE. And for that to happen, we
10 must be able to modernize and have a robust, modern,
11 flexible, and appropriately tailored system throughout the
12 nuclear weapons complex. In order to do that, we need
13 reliable and sustained funding. For what it's worth,
14 there's a backlog of facilities of more than \$2.5 billion
15 currently at DOE and NNSA because the facilities have not
16 been able to be updated and maintained.

17 In order to do that, we need to ensure that Congress
18 provides us with the necessary resources to do so. I
19 believe that there's a good staff over at the NNSA, a
20 dedicated Federal workforce that will allow me, if
21 confirmed, to be able to put together and constitute a plan
22 of action going forward, but we do not have any more time.
23 We're long overdue for an upgrade to our facilities to
24 modernize the nuclear weapons complex to be able to do what
25 we can to sustain the current nuclear weapons stockpile, as

1 well as put in place the requirements for future nuclear
2 weapons matters.

3 Senator Cotton: In your opinion, is the two-year
4 budget deal on which the Senate will vote later today that
5 provides over \$160 billion over the next two years for
6 Defense suitable for you to execute that modernization plan?

7 Ms. Gordon-Hagerty: I believe that that will be an
8 outstanding start. But again, my statements will be
9 predicated on having reliable and consistent funding. But
10 that will certainly go a long way. And if confirmed, I look
11 forward to executing those missions.

12 Senator Cotton: Thank you.

13 You also write that you will ensure that the nuclear
14 security enterprise continues to employ the brightest and
15 the best by recruiting, retaining, and growing the highly
16 skilled workforce needed to maintain the U.S. nuclear
17 weapons stockpile. This has obviously been something of a
18 challenge in recent years, since the end of the Cold War.
19 Our nuclear enterprise has lost much of its longstanding
20 expertise among individuals who have been working in our
21 labs or in the Department of Energy or in our military.

22 Can you talk about your plan to retain but also recruit
23 new talented individuals?

24 Ms. Gordon-Hagerty: Yes, Senator Cotton. Since my
25 background happens to be having started out as a health

1 physicist at Lawrence Livermore National Laboratory, and
2 also being a Federal official in military application at
3 headquarters DOE, I think I bring a unique perspective. And
4 while I do have a number of different ideas, I know that the
5 Department and NNSA have gone out and tried to recruit a
6 highly technical and highly qualified workforce for the
7 future. However, I do have a number of plans.

8 I'm really excited to get out to colleges and
9 universities because I think there is a real untapped
10 potential to show young people that they can actually commit
11 to supporting our national security and looking at
12 opportunities in math and science and STEM programs
13 especially to be able to support and contribute to our
14 national security. I think that's untapped potential.

15 I also think that there is another opportunity that
16 perhaps is a mid-career opportunity. There are a lot of
17 people that are burned out, I believe, that are working
18 their jobs every day, maybe even in Silicon Valley, and we
19 can give them opportunities that perhaps they wouldn't
20 otherwise have, challenges of working in high-performance
21 computing, working in cutting-edge science.

22 It's a wonderful opportunity, and I have to say I've
23 had a very rewarding career, and because I've spent all of
24 it in national security, like I said, at one of the
25 laboratories as a Federal official, I would be excited to go

1 out and speak to others about perhaps coming and joining us
2 at the DOE and NNSA.

3 Senator Cotton: Thank you. I think that's very
4 important. I think that the budget that hopefully the
5 Senate will pass later today and the President will be able
6 to sign will provide both to NNSA and the nuclear enterprise
7 at large with the money that it needs to modernize
8 facilities as well as our nuclear triad, but also to recruit
9 and retain the personnel critical that will also be a
10 challenge for you and for Secretary Perry and Secretary
11 Mattis. As I said, there is probably no more consequential
12 job in the government than the one you're about to take. I
13 appreciate your willingness to take it on.

14 Gentlemen, I apologize that we didn't get to have an
15 exchange, but best of luck to all of you as you move forward
16 in service to our nation.

17 Senator Inhofe: Thank you, Senator Cotton.

18 As we said, we're going to be rotating in and out to
19 vote. The vote is now taking place. Senator Reed is
20 presiding.

21 Senator Reed: [presiding] And on behalf of Chairman
22 Inhofe, let me recognize Senator Gillibrand.

23 Senator Gillibrand: Thank you, Mr. Chairman and Mr.
24 Ranking Chairman.

25 Mr. Ney, the military, including the Reserve component,

1 is dealing with contamination as a result of chemicals known
2 as PFCs expelled by firefighting units on the bases. There
3 are two known Air Guard sites in New York, one at the 106th
4 at Dobrevsky, and another at the 105th in Newburgh. I've
5 been very frustrated with the lack of clarity coming from
6 the OSD about cleanup on Reserve component bases and
7 required in last year's NDAA. That language should be sent
8 to Congress allowing for this cleanup to ensure clean
9 drinking water is restored to the surrounding communities.

10 Are you aware of this issue?

11 Mr. Ney: I'm somewhat aware of it, Senator.

12 Senator Gillibrand: If confirmed, will you work
13 swiftly to address legal concerns regarding water
14 contamination at the National Guard facilities so that we
15 can get this contamination cleaned up?

16 Mr. Ney: Yes, Senator.

17 Senator Gillibrand: Mr. Ayres, if confirmed as General
18 Counsel of the Air Force, will you commit to moving quickly
19 on matters related to PFC contamination, eliminating
20 bureaucratic barriers and ensuring that we fully address
21 these contaminated areas?

22 Mr. Ayres: Yes, Senator.

23 Senator Gillibrand: Thank you.

24 Mr. Ney, sexual assault and harassment in the military
25 continues to be a serious problem and a major detractor on

1 mission readiness. Last month, women gathered outside the
2 Pentagon to demand better of military leadership. The
3 response they got inside the building was another zero
4 tolerance message. We have been hearing zero tolerance for
5 decades, and yet the numbers of reported offenses keeps
6 going up, retaliation of survivors is around 60 percent for
7 three years in a row, and prosecution rates are actually
8 going down.

9 What will you do differently in your role as General
10 Counsel to combat this problem?

11 Mr. Ney: Senator, I have to reiterate the zero
12 tolerance for sexual assault policy. It is a blight on the
13 military. It is unacceptable, and I'm particularly
14 disturbed by the rates and reported incidents of
15 retaliation. That is a leadership issue. It starts at the
16 top, and I know that Secretary Mattis has taken this bull by
17 the horns in terms of demonstrating the leadership that he
18 expects from our commanders and our civilians.

19 Senator Gillibrand: With all due deference to
20 Secretary Mattis, every Secretary of Defense since Dick
21 Cheney was Secretary of Defense has very clearly said we
22 have zero tolerance for sexual assault. So words coming
23 from the Secretary of Defense hasn't gotten this done in a
24 long time. It's literally not getting done. We are flat in
25 the number of people who are actually reporting, about

1 6,000-- 4,000 openly, 2,000 confidentially -- and our rate
2 of retaliation has barely budged in three straight years
3 even though this committee made it a crime.

4 So what do you want to do differently? I get that
5 Secretary Mattis says the right words, but what are you
6 going to do differently to actually prosecute sexual assault
7 in the military?

8 Mr. Ney: I think we have underway, thanks to the
9 leadership of this committee and your bringing this issue to
10 the fore, a few things in the process. One is the pilot
11 program concerning the career track for our Staff Judge
12 Advocates to ensure that -- to determine whether that will
13 be a better way of providing the expertise necessary to
14 handle these complex and difficult cases. We are, I think,
15 in the second year of that program, from what I understand.
16 If confirmed, I intend to look at that, consult with the
17 Staff Judge Advocates and the General Counsel in the
18 military departments and get a sense of what we're learning
19 from that experience and is it helping us in our prosecution
20 to show that we have more capable prosecutors.

21 But then I go back to the retaliation issue, and that
22 is a leadership issue.

23 Senator Gillibrand: Yes, and the leadership has been
24 failing miserably at it, because they are the ones that
25 should be doing the investigations of retaliation and

1 actually prosecuting people for retaliating against other
2 service members. So it's 100 percent a leadership issue and
3 100 percent failure of that leadership. So what are you
4 going to do differently to get them to prosecute cases of
5 retaliation?

6 Mr. Ney: We will be better at the leadership issue.
7 We must be. It's imperative that we do that and provide a
8 safe environment, and especially the retaliation. Our
9 people have to feel safe to tell us that something is going
10 on because if there is a perpetrator, that person will
11 repeat if they're not stopped early.

12 Senator Gillibrand: So why not let the prosecutors
13 decide if a crime has been committed and let them judge, as
14 we do in the civilian world? Why not give it to someone who
15 actually has the legal expertise and desire to convict
16 criminals, not necessarily keep the people that they like in
17 the unit or have other biases towards?

18 Mr. Ney: Senator, I have a concern based on the
19 essential participation of command in the military justice
20 system. The command depends on it, the unit cohesion
21 depends on it. I think the people in the command expect the
22 commander to have that authority. Conversely, the military
23 justice system depends on the commanders' authority to
24 create the unit, the culture, the climate of dignity and
25 respect that we need to have.

1 The Staff Judge Advocate and the commanders work
2 closely in these determinations --

3 Senator Gillibrand: Not the prosecuting lawyers. They
4 do not. They don't work at all together. The only advice
5 the commander gets is from his general counsel, who is not
6 necessarily a criminal lawyer. So the actual prosecutor
7 does not have any conversations with the commander until it
8 comes to him to prosecute.

9 Mr. Ney: I think the pilot program is going to speak,
10 in part, to that issue in determining whether this career
11 track is going to be helpful, because we have a system in
12 which our Staff Judge Advocates have broad responsibilities,
13 but most of them in that position have prosecutorial
14 experience, have defense experience, are familiar with the
15 criminal justice aspects of the military justice system.
16 Whether they need more to help combat this blight I will
17 look at, if confirmed.

18 Senator Gillibrand: Thank you.

19 Senator Reed: On behalf of Chairman Inhofe, Senator
20 King.

21 Senator King: In light of the vote, Mr. Chairman, I'm
22 going to ask a few questions for the record and then go to
23 the floor.

24 Mr. Ney, I understand you haven't been confirmed yet,
25 and therefore haven't been in the job. But I would ask that

1 one of your first tasks would be to review with the staff,
2 the professional staff and others and come back to us as
3 we're considering the National Defense Authorization Act for
4 this year with suggested changes in the UCMJ. Are there
5 provisions -- and I understand you can't answer this now,
6 but this is a month from now. But I hope that this is
7 something you can develop for us and give us some guidance
8 if there are changes that you think are necessary that we
9 can help with. That's what we're here for. So I hope
10 you'll take that on as an early task.

11 Mr. Ney: Certainly, Senator. I believe that's one of
12 my responsibilities, or would be if confirmed as a General
13 Counsel, and certainly I would engage our military
14 department Staff Judge Advocates, and also the general
15 counsels.

16 Senator King: Thank you.

17 Mr. Fahey, acquisition we could talk about forever. We
18 had a long hearing yesterday afternoon with Senator Cotton
19 on Army acquisition. I would like you, if you could for the
20 record, to give us one or two pages on what you believe are
21 the top priorities for improving the acquisition process
22 within the Department of Defense, because right now it's not
23 adequate in terms of cost or speed or one of the things that
24 concerns us most, and we've heard this in this committee,
25 the loss of bidders from smaller companies, particularly

1 advanced technology companies who have just given up on the
2 process because it's so cumbersome and time-consuming.

3 So again, I don't expect an answer today, but I would
4 request that you supply us -- and it doesn't have to be an
5 elaborate 40-page paper -- a couple of pages, here are the
6 six things we should do to improve the process. Some will
7 be internal, and some might be statutory. If there are
8 statutory changes that we can make, please let us know
9 because I believe this is an urgent priority, because we are
10 losing our qualitative edge. We've been able to ride on
11 that for some time. That's no longer necessarily the case.
12 So acquisition reform is not only an economic question, I
13 think it's a national security question.

14 Mr. Fahey: Yes, Senator.

15 Senator King: Thank you.

16 And then finally, Ms. Gordon-Hagerty, do you have any
17 responsibility with regard to non-proliferation in other
18 countries, or are you strictly in charge of our nuclear
19 facilities here?

20 Ms. Gordon-Hagerty: Senator, if confirmed, the NNSA
21 does have broad responsibilities for the technical response
22 and for our capabilities within nuclear non-proliferation,
23 yes.

24 Senator King: Again, we're all going back and forth to
25 vote, but I hope that that can be an important part of the

1 emphasis in your position because, frankly, I believe one of
2 the most terrifying realities that we face is nuclear
3 proliferation. North Korea may not attack us, but they may
4 sell the technology to somebody else who would.

5 So I hope you'll commit to paying -- I know you have a
6 lot of responsibilities in the modernization, but I hope you
7 will commit to paying close attention to this issue, because
8 I believe this is one of the future, near-future issues that
9 we really have to be concerned about.

10 Ms. Gordon-Hagerty: Yes, Senator, and I will.

11 Senator King: Thank you.

12 Thank you, Mr. Chairman.

13 Senator Sasse: [presiding] Senator Heinrich?

14 Senator Heinrich: Thank you, Mr. Chair.

15 Ms. Gordon-Hagerty, I want to start by thanking you for
16 your focus on pits. We very much appreciate the attention
17 you're giving to that and your statement here this morning.

18 As you know, Los Alamos National Laboratory is the
19 nation's Center of Excellence for pit production, which is
20 critical to maintaining our nuclear deterrent. In 2014, the
21 Nuclear Weapons Council and Congress endorsed a modular
22 building strategy at Los Alamos that would fully meet the
23 nation's requirements to maintain the stockpile and provide
24 a safer, more modern facility for its workers.

25 However, recently -- and you alluded to this earlier --

1 the NNSA conducted an analysis of alternatives that totally
2 omitted this current strategy to meet the nation's needs and
3 instead compared new alternatives to an outdated plan that
4 Los Alamos actually abandoned years ago. Does that make
5 sense to you, that we would analyze an old plan when we have
6 a new plan that's already been effectively endorsed by the
7 NWC and Congress?

8 Ms. Gordon-Hagerty: Senator, how you described it does
9 not make sense to me. But I am committed, if confirmed, to
10 take a look at all of the relevant data, the current and
11 past data, and the plutonium analysis of alternatives and
12 commit to you that I will look at it from an objective
13 viewpoint.

14 Senator Heinrich: Great. That is exactly what we want
15 to hear. It obviously didn't make sense to me, but it also
16 didn't make sense to the Department of Energy's own
17 independent cost estimate and Program Evaluation Office,
18 which thoroughly rejected both the process and the findings
19 of that analysis.

20 So, I don't want to belabor this, but would you agree
21 that the whole purpose of doing an analysis of alternatives
22 should be to provide a fair and accurate analytical
23 comparison of the options?

24 Ms. Gordon-Hagerty: Yes, Senator.

25 Senator Heinrich: Would it surprise you to know that

1 the analysis of alternatives also explored a significant
2 increase in pit production and square footage beyond what
3 the DOD requirements were and actually omitted any
4 consideration that there might be additional cost associated
5 with moving to a site not considered a Center of Excellence
6 in pit production?

7 Ms. Gordon-Hagerty: Senator, I am somewhat familiar
8 with that information. But if confirmed, I will commit to
9 you that I will look at all of the available data and make
10 an objective recommendation based on all of the data.

11 Senator Heinrich: Is it fair to ask that as you're
12 doing that, that you make sure that the current modular
13 approach is considered in that overall analysis?

14 Ms. Gordon-Hagerty: Yes, sir.

15 Senator Heinrich: Okay, great.

16 I want to thank you for your willingness to meet with
17 me, your attention to this issue. It has been somewhat
18 frustrating to me that NNSA has taken three years to get to
19 this point, only to find out that we weren't actually
20 looking at the current set of alternatives. I think that's
21 been not only a poor use of time but obviously also a poor
22 use of taxpayer dollars, and we're looking forward to
23 working with you to get this process back on track.

24 Ms. Gordon-Hagerty: Thank you, Senator.

25 Senator Heinrich: Thank you.

1 Thank you, Chairman.

2 Senator Sasse: Mr. Kaine?

3 Senator Kaine: Thank you, Mr. Chairman.

4 Thanks to the witnesses, and thank you for your
5 service. Congratulations on your nominations.

6 Mr. Ney, I would like to ask you a couple of questions.
7 The news has reported yesterday and today that the U.S.
8 engaged in air strikes against the Syrian government to
9 support the Syrian Defense Forces following an effort by the
10 Syrian government military to push the Defense Forces back
11 in an area near the Euphrates River. To your understanding,
12 what is the legal justification, domestic and international,
13 for the United States military to be engaged in air strikes
14 against the Syrian government?

15 Mr. Ney: Well, Senator, my understanding is that that
16 military activity is justified domestically under our
17 Authorization for the Use of Military Force from 2001, and
18 in addition supported by the Article 2 powers of the
19 President. Furthermore, I would say that the Congress had,
20 I believe, in the NDAA, perhaps it was two years ago,
21 authorized the expenditure of funds to support Syrian forces
22 in our battle against ISIS in Syria --

23 Senator Kaine: Do you think an authorization or an
24 appropriation of money to the U.S. military to battle ISIS
25 supports U.S. military action against the Syrian government,

1 the sovereign government of Syria?

2 Mr. Ney: Not directly, sir. However, when the forces
3 who are our partners and allies are attacked, I do believe
4 that we have the authority to defend them and defend
5 ourselves and our interests in that fight against ISIS.

6 Senator Kaine: You've seen the Administration take a
7 number of steps now to take military action against the
8 Syrian government, and I'd like to focus on the 2001
9 authorization. That authorization allows the United States
10 to go after the perpetrators of the 9/11 attack. Are you
11 asserting that the Syrian government was connected at all
12 with perpetrating the attacks of 9/11?

13 Mr. Ney: No, sir.

14 Senator Kaine: It has generally been viewed as an
15 authorization to take military action against al Qaeda and
16 against the Taliban which harbored al Qaeda. Both the Obama
17 and Trump Administrations have asserted that that
18 authorization also enables military action against ISIS.
19 There is argument about that, since ISIS wasn't formed until
20 two years after the 9/11 attack, but there's argument there.

21 But I've never heard it asserted that the 9/11
22 authorization gives any kind of legal authority to take
23 military action against the Syrian government. In fact,
24 when President Obama was contemplating such military action
25 for a very legitimate purpose, punishing Syria for using

1 chemical weapons against civilians in 2014, he felt that
2 that needed a new congressional authorization and came to
3 Congress to seek it.

4 Is it the position of this administration, the current
5 administration, that the 9/11 authorization is sufficient to
6 allow military action against the government of Syria absent
7 any additional congressional action?

8 Mr. Ney: Senator, I cannot speak for this
9 administration. If confirmed, I would certainly be in a
10 better position to answer that sort of question. I would
11 say, however, that in self-defense for legitimate military
12 action by the United States, its allies, its partner forces
13 in the fight against ISIS, military action against an
14 aggressor is appropriate.

15 Senator Kaine: The operative phrase in what you said
16 is "in the fight against ISIS." This is being reported as a
17 tug of war, this particular airstrike, as a tug of war
18 between the Syrian government and the Syrian Defense Forces
19 over property that they each hold, and they're pushing the
20 line back and forth, and it's actually not in an area where
21 there is currently active engagement in the fight against
22 ISIS, which has gone pretty well. Thank God for the
23 American troops and the coalition.

24 Let me go further. The New York Times has had articles
25 recently suggesting that the U.S. wants to stay in Syria

1 with military force in Syria sort of post-ISIS to try to
2 stop influence by Iran and other nations. Are you aware of
3 any legal rationale that would justify the U.S. maintaining
4 a physical presence in a sovereign nation against their
5 objection for the purposes of checking Iran? Can we go into
6 somebody else's house to try to battle someone when the
7 owner of that house has not asked us in?

8 Mr. Ney: Senator, I am not aware of that intent, nor
9 am I aware of that legal authority that supports that sort
10 of activity that you've just characterized.

11 Senator Kaine: Thank you.

12 Senator Graham asked you some questions about the
13 current authorization and whether it might need to be
14 adjusted with respect to North Korea. There is an effort
15 underway in the Foreign Relations Committee to do so that's
16 bipartisan. Both Secretaries Mattis and Tillerson have said
17 they don't think they need it but that they would welcome
18 Congress finally weighing in to give some shape to this
19 after 17 years, and if confirmed I would look forward to
20 working with you on that matter.

21 Mr. Ney: And I would look forward to working with you
22 and this committee, Senator.

23 Senator Kaine: Thank you.

24 Thank you, Mr. Chairman.

25 Senator Inhofe: [presiding] Thank you, Senator Kaine.

1 Senator Warren?

2 Senator Warren: Thank you, Mr. Chairman; and thank you
3 to our witnesses for being here today and for your
4 willingness to serve.

5 Mr. Ney, you're nominated to be the top lawyer at the
6 Department of Defense. Our commander in the Middle East,
7 General Votel, recently said hundreds of ISIS foreign
8 fighters have been captured on the battlefield following the
9 campaign to retake Mosul and Raqqa. Many of these fighters
10 are currently held by U.S.-backed opposition forces.

11 Do you believe that the United States currently has the
12 legal authority to detain ISIS fighters indefinitely without
13 giving them a trial or without charging them with what they
14 have done wrong?

15 Mr. Ney: Senator, if they are judged enemy combatants
16 under the law of war, yes, they can be detained during the
17 hostilities.

18 Senator Warren: Well, that's my question, though. How
19 does that happen? Is that just a blanket? Can we just hold
20 them indefinitely without making a determination on this?

21 Mr. Ney: The determination that must be made to hold
22 them indefinitely during the course of hostilities under the
23 law of war is that they are enemy combatants, and we are
24 permitted under that international law to take them off the
25 battlefield to protect ourselves.

1 Senator Warren: And you believe we get that from the
2 2001 AUMF that you were just talking about?

3 Mr. Ney: Yes, Senator.

4 Senator Warren: I just don't quite understand how that
5 makes sense. The 2001 Authorization for the Use of Military
6 Force was passed over 17 years ago in response to the 9/11
7 attacks. That was well before the creation of ISIS. I
8 don't understand how you think Congress could have intended
9 to authorize operations against an organization that didn't
10 even exist yet. So it looks like to me you're using
11 outdated legal authority here.

12 Mr. Ney: Senator, both the previous administration and
13 this administration I think correctly are viewing ISIS as
14 the product of the metastasizing of al Qaeda.

15 Senator Warren: So you believe the AUMF gives you
16 authority to act 17 years later?

17 Mr. Ney: The 2001 AUMF, yes, ma'am.

18 Senator Warren: Let me ask you another question about
19 this, and that is the ACLU is representing a dual national
20 American citizen who was detained in Iraq after allegedly
21 fighting for ISIS in Syria, and the Trump Administration has
22 not said clearly whether this suspect will face criminal
23 charges in Federal court or remain in military detention
24 indefinitely. So let me ask you the question in the
25 abstract, not for a particular person, except we know that

1 this is now an urgent question to be answered.

2 What legal rights does this dual national U.S. citizen
3 have in detention, and does the United States have legal
4 authority to transfer him to the custody of a third-party
5 country?

6 Mr. Ney: Senator, I'm a little reluctant because this
7 is right in the midst of this litigation, as I understand
8 it, and if I were to be confirmed I might walk into a
9 situation --

10 Senator Warren: But I'm not asking about an
11 individual. I'm saying this is an urgent problem, but as a
12 matter of law what I want to know is whether or not a dual
13 national under circumstances like this has any basic rights
14 as a citizen under our Constitution.

15 Mr. Ney: Senator, I believe that citizenship in the
16 United States provides certain rights beyond those which
17 other unlawful enemy combatants would be accorded, and
18 they're being looked at now, is my understanding, as to what
19 they are, particularly with respect to dual citizenship or
20 the issue of --

21 Senator Warren: So he does have some rights; you're
22 trying to figure out what they are.

23 Mr. Ney: I believe that is the current status.

24 Senator Warren: I'm not asking for current status.

25 I'm asking for your opinion. You're the one who is here,

1 and the questions are about whether or not you should be the
2 chief lawyer for the Department of Defense.

3 Mr. Ney: Senator, if confirmed, that would be
4 precisely the questions that I would be wanting to --

5 Senator Warren: Well, I think we have a right to know
6 what your opinion is here. That's relevant to my vote here.

7 Mr. Ney: Yes, Senator. And my opinion is that a
8 person in that status has certain rights attendant to his
9 American citizenship.

10 Senator Warren: All right.

11 So, one more. Last week, President Trump signed an
12 executive order authorizing continued use of Guantanamo to
13 detain individuals currently there and add new detainees.
14 The order said nothing about habeas corpus or the Supreme
15 Court's ruling that even detainees at Guantanamo can
16 challenge the legality of their detention.

17 Last month 11 detainees, including two who have been
18 approved for transfer, petitioned a Federal district court
19 for a writ of habeas corpus, and the petition is currently
20 under review. Now, the Supreme Court ruled that detainees
21 at Guantanamo have the constitutional right of habeas corpus
22 to challenge the legality of their detention. Do you agree
23 with the Supreme Court's ruling?

24 Mr. Ney: Yes, Senator.

25 Senator Warren: Good. ISIS and al Qaeda are enemies,

1 so we can all agree it's in our national security interest
2 to prevent them from returning to terrorism or returning to
3 the battlefield. But if confirmed, you will be responsible
4 for making sure we do that in a way that is legal and
5 consistent with the principles of the Constitution. Thank
6 you.

7 Mr. Ney: Yes, Senator. Thank you.

8 Senator Warren: Thank you, Mr. Chairman.

9 Senator Inhofe: Senator Blumenthal?

10 Senator Blumenthal: Thank you, Mr. Chairman; and thank
11 you all for your willingness to serve our nation.

12 Mr. Ney and Mr. Ayres, I am sure you're familiar with
13 the Sutherland Springs shooting that involved a murderer who
14 bought a gun, was able to buy a gun because the Air Force
15 failed to submit information about his conviction in a UCMJ
16 proceeding. Unfortunately, that lapse is far from isolated.
17 Information that the Secretary has provided us and that the
18 Department of Defense as a whole has furnished indicate
19 that, in fact, like many states, the military has failed to
20 report convictions for domestic violence.

21 Last week I wrote a letter to the FBI Director urging
22 him to act in coordination with the Department of Defense to
23 protect the safety of all Americans by ensuring that
24 information submitted to the FBI is properly incorporated
25 into all relevant background check databases. That's the

1 issue here, whether the Department of Defense is providing
2 that information. I would ask for each of your commitment
3 that you will advocate and advance that policy. Also, what
4 issues do you think have been the barrier in the past to
5 that legal requirement being followed? It is a legal
6 requirement.

7 Maybe I'll begin with Mr. Ayres.

8 Mr. Ayres: Thank you, Senator. That shooting was a
9 tragedy upon a tragedy, the first tragedy the shooting
10 itself, but the second tragedy that it might have been
11 preventable if the court martial conviction was properly
12 reported. So certainly a priority of mine, if confirmed, is
13 to ensure that every conviction is properly reported, and I
14 know the services are working on that now. I've been told
15 the services are working on that now. That's important.

16 But I think one of the things I would also look at if
17 confirmed is whether the convictions equate to the processes
18 and the information data systems. So if something is called
19 a certain crime under the Uniform Code of Military Justice,
20 does it equate to being known as a violent crime under the
21 information systems that a person who is convicted of
22 Military Justice acts would not be allowed to get a weapon
23 when they shouldn't be allowed to get a weapon. I think
24 that's something that I would look at, Senator, if
25 confirmed, to make sure that there's complete transparency

1 and portability.

2 Senator Blumenthal: Thank you.

3 Mr. Ney, how about the Department as a whole?

4 Mr. Ney: Senator, if confirmed as General Counsel to
5 the Department of Defense, I view my principal
6 responsibility as working with the general counsels of the
7 military departments and ensuring that their efforts are
8 successful in closing any gaps; and in addition, if there
9 are any gaps that would fall outside the departments
10 themselves and the responsibilities of our GCs in those
11 departments, I want to fill those gaps. I'm going to
12 support them in this initiative and work with them in any
13 way I can.

14 Senator Blumenthal: Thank you.

15 Mr. Ney, you were asked by Senator Graham about the use
16 of preemptive military force against North Korea. I think
17 you said under some circumstances the President could use
18 that kind of preemptive strike without prior authorization
19 from Congress under some circumstances?

20 Mr. Ney: Yes, Senator.

21 Senator Blumenthal: I think you'll agree he could not
22 do so.

23 Mr. Ney: Yes, Senator, definitely.

24 Senator Blumenthal: Based on what you know now, given
25 that you do not have access to classified information but

1 taking what we know publicly, which is that North Korea has
2 a nuclear warhead, it has an ICBM that is evidently unproven
3 to reach the United States -- so far the tests have failed
4 to confirm that it could reach the United States with the
5 missiles that it has right now; we don't know more -- would
6 you say a preemptive strike would require congressional
7 authorization?

8 Mr. Ney: Based upon what I know, which is the publicly
9 available information and the diplomatic efforts of
10 Secretary Tillerson and the President, I don't see that as
11 meeting the circumstances that are, for instance, laid out
12 in the 2016 White House guidance. That speaks more
13 specifically to the matrix that we would review in
14 determining whether there is an imminent threat to an
15 important national security interest.

16 Senator Blumenthal: You would agree with me that
17 congressional authorization would be required under the
18 circumstances known publicly right now?

19 Mr. Ney: From what I know, yes, sir.

20 Senator Blumenthal: Thank you.

21 Thank you, Mr. Chairman.

22 Senator Inhofe: Thank you, Senator.

23 Let me just take the Chairman's prerogative to remind
24 you of something that I don't think I need to remind you of,
25 Mr. Ney, and that is that the Office of the Director of

1 National Intelligence confirmed in March of 2017 that
2 approximately 30 percent of those enemy combatants who have
3 been released from GITMO have returned to the battlefield,
4 some killing Americans.

5 Senator Sullivan?

6 Senator Sullivan: Thank you, Mr. Chairman; and thank
7 you to the nominees and your families for your willingness
8 to serve. It's not always easy, so it's certainly something
9 that you should be commended for, and particularly the
10 families. You guys always have to go through a lot, and it
11 can be difficult, so I want to thank everybody here.

12 Mr. Ney, I want to dig into this AUMF issue a little
13 bit more here. To Senator Graham, when he asked if the
14 President had the authority to conduct an armed attack
15 against North Korea, you said it depends on the
16 circumstances; yes, but only in certain circumstances.

17 So, this is an enormously important issue, as you know,
18 and you're going to play an enormously important role in
19 this. You referenced the White House guidelines. I'm not
20 really sure what your reference is. I would say you want to
21 probably check the Constitution before you check the White
22 House guidelines, if that's your starting point. On this
23 topic, it's probably your ending point.

24 So what would the circumstances be from your
25 perspective where the President didn't need authority from

1 the Congress, and what circumstances where he would need it?

2 Maybe I'll pose a couple of questions.

3 I'll start with an easy one, I think easy. It's 1950.

4 North Korea launches a huge, massive attack over the 38th

5 Parallel. President Truman did not come to Congress. He

6 had to respond. Does the President need authority to

7 respond to an aggressive, all-out attack?

8 Mr. Ney: Senator, typically no.

9 Senator Sullivan: Okay, I would agree with that.

10 It's 2003 or 1990. We have forces massed in a foreign

11 country and we launch a preemptive ground attack. The

12 president in both cases, Republican presidents, went to the

13 Congress to get authorization. So a preventive or

14 preemptive ground war on the Korean Peninsula launched by

15 the United States, would the President need authority from

16 the Congress to do that?

17 Mr. Ney: Senator, I have to say it's difficult to deal

18 in these hypotheticals because --

19 Senator Sullivan: That's not too hypothetical.

20 Mr. Ney: Well, the information, the imminence of the

21 activity that North Korea is engaged in would be one of the

22 major factors in determining whether the President's

23 authority to protect the national interest and his duty to

24 protect the national interest is --

25 Senator Sullivan: We all have authority to protect the

1 national interest.

2 Mr. Ney: Yes, sir. But the President has authority to
3 use military force and --

4 Senator Sullivan: We have the authority to declare
5 war.

6 Mr. Ney: Yes, sir. But sometimes the President may
7 use those forces short of declaring war, short of what is
8 considered to be the declaration of war, and this is borne
9 out through the past 50 years --

10 Senator Sullivan: A preventive or preemptive ground
11 war launched by the United States of America on the Korean
12 Peninsula. I've had numerous witnesses come before this
13 committee during their confirmations saying that that would
14 require the authorization of the Congress. If you're not
15 going to say that as the General Counsel of the Department
16 of Defense, I'm going to have a hard time supporting you.

17 Mr. Ney: Senator, the way you phrase it, as a war --

18 Senator Sullivan: No -- okay.

19 Mr. Ney: -- as a ground war, necessarily would require
20 that the Article 1 authority of Congress be implicated
21 because Congress has the authority to declare war. I think
22 the prior authorization would be necessary then. But there
23 is military force that can be used under the authority of
24 the President under Article 2 to protect important national
25 interests without prior authorization from Congress.

1 Senator Sullivan: I don't disagree with that at all.
2 I'm talking about a major war, a ground war, or even an air
3 war launched by us, launched by the United States military.

4 Mr. Ney: I think to prosecute a war, the Constitution
5 requires that the Congress authorize it.

6 Senator Sullivan: Okay. I hope this is not going to
7 be a big issue this year, but this might be one of the
8 biggest things we focus on, and a lot of people are going to
9 be looking at and relying on your advice, including your
10 advice to the Secretary, including your advice to the
11 President, and it's an area that I will certainly want to
12 meet with you before your vote to have a little bit more of
13 a discussion on this.

14 I'll make just a final quick question to Mr. Fahey. I
15 think the Secretary has put together the dream team in terms
16 of the acquisition members, including the Deputy Secretary
17 for the DOD that's going to provide us a once-in-a-lifetime
18 opportunity to really try to fix this acquisition system
19 that I think everybody acknowledges is broken.

20 What would you say are the key things that we need to
21 be doing? And please, please, if confirmed, I would beg you
22 to give us ideas here in the Congress on how to fix what is
23 clearly a broken system that's imperiling our national
24 security.

25 Mr. Fahey: Senator, I first agree with you about the

1 dream team. It's one of the reasons I'm so excited to
2 serve, if confirmed. But I think there are a couple of
3 pieces.

4 One is the big piece of delegating authority and
5 responsibility. I'm a big believer that if you delegate
6 authority and responsibility, you set the environment for
7 people to succeed. That's where you get innovation, right?
8 When you basically oversee everything and you check
9 everything, basically people are managing to the process,
10 not to the results that we want. So that's a big thing.

11 The other big thing which I really believe is a big
12 need in the Department is for having an analytical system
13 that actually helps us really see the data that we all have.
14 I think there's a big void in the Department of Defense of
15 having data analytics to make decisions.

16 Senator Sullivan: Thank you.

17 Thank you, Mr. Chairman.

18 Senator Inhofe: Thank you, Senator Sullivan.

19 I appreciate very much your patience and being here.
20 It's been a very good hearing. We appreciate you.

21 And we are adjourned.

22 [Whereupon, at 12:23 p.m., the hearing was adjourned.]

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