

**Senate Armed Services Committee**  
**Advance Policy Questions for Mr. Liam P. Hardy**  
**Nominee for Appointment to be Judge on the**  
**United States Court of Appeals for the Armed Forces**

**Duties and Qualifications**

**Subchapter XII of chapter 47 of title 10, United States Code, establishes the United States Court of Appeals for the Armed Forces (USCAAF) and provides for its organization and administration.**

**1. What is your understanding of the duties and functions of USCAAF and its judges?**

Answer: The Uniform Code of Military Justice (UCMJ) establishes the USCAAF as a court of record and authorizes it to review decisions of the four military Courts of Criminal Appeals (CCAs) with respect to matters of law. 10 U.S.C. §§ 867, 941. The USCAAF judges use this authority to correct legal errors, resolve conflicts on legal issues among the four CCAs, and provide civilian oversight of the military justice system. While located in the Executive Branch, USCAAF's function is judicial. *Ortiz v. United States*, 138 S. Ct. 2165, 2180 (2018).

**2. What background and experience do you possess that qualify you to perform these duties?**

Answer: I believe that my service in the Judicial and Executive Branches of the federal government, my time as a litigator in private practice, and my work in academia have prepared me to perform the duties of a USCAAF judge.

During the four years after I graduated from law school, I served as a law clerk for three different federal judges. First, for Judge Margaret Ryan of the USCAAF. Next, for Chief Judge David Sentelle of the U.S. Court of Appeals for the District of Columbia. And finally, for Justice Clarence Thomas of the Supreme Court of the United States. My exposure to those extraordinary jurists gave me tremendous insight into the appellate decision-making process. More recently, I have served as a Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel. In that role, I provide legal advice in response to requests from the various executive branch agencies and the other components of the Department of Justice. Such requests often require the drafting of legal opinions and the resolution of legal disputes between various parties—a process with considerable similarities to the duties of an appellate judge.

As a partner in the litigation practice group of Kirkland & Ellis, I represented my clients in a wide variety of complex litigation matters at both the trial and appellate levels. I also advised clients on a wide range of legal issues including federal statutes and regulations, constitutional and administrative law, and intellectual property rights. If confirmed, my litigation experience will assist me in understanding issues coming before the USCAAF arising from alleged errors in the litigation context.

Finally, I teach courses in military justice at both Harvard Law School and Notre Dame Law School. The process of preparing and teaching these courses has deepened my understanding of the area of the law that falls under the USCAAF's jurisdiction.

**Cases on the USCAAF docket address a broad range of legal issues, including constitutional law, criminal law, evidence, criminal procedure, ethics, administrative law, and national security law.**

**3. What background and experience do you have in each of these domains?**

Answer: In each phase of my legal career, I have encountered a broad range of complex legal issues, including constitutional law, criminal law, evidence, criminal procedure, ethics, administrative law, and national security law. As a law clerk at the USCAAF, the U.S. Court of Appeals for the District of Columbia Circuit, and the Supreme Court of the United States, I assisted in the analysis and resolution of many cases dealing with these subjects. Similarly, in my current position as a Deputy Assistant Attorney General in the Department of Justice's Office of Legal Counsel, my duties frequently involve the analysis of particularly complex and important issues involving constitutional law, administrative law, national security law, and ethics. The litigation group in Kirkland & Ellis' Washington D.C. office, where I spent all my time in private practice, specializes in trying cases dealing with constitutional and administrative law. And finally, my experiences teaching military justice at Harvard Law School and Notre Dame Law School have provided me with the opportunity to explore every aspect USCAAF's jurisprudence, from its origins and legal foundations at the time of the Founding to the latest amendments to the UCMJ.

**4. What background and experience do you have in the application and judicial construction of the Uniform Code of Military Justice?**

Answer: Every part of my legal career has involved the interpretation and application of statutes, but two experiences focused specifically on judicial construction of the UCMJ. The first experience was my service as a clerk in the chambers of Judge Margaret Ryan of the USCAAF. Clerking at the USCAAF gave me a deep appreciation for and understanding of the military justice system, and I have closely followed the subsequent developments in the court's jurisprudence and Congress' amendments to the UCMJ. My understanding of the UCMJ deepened further as the result of the second experience—teaching courses in military justice at both Harvard Law School and Notre Dame Law School. The courses I teach focus on how the UCMJ, and the judicial decisions interpreting the UCMJ, affect the application of various aspects of constitutional law and criminal procedure in the military justice system.

**5. Do you believe that there are actions you need to take to enhance your ability to perform the duties of a USCAAF judge?**

Answer: As explained above, my service in the Judicial and Executive Branches of the federal government, my time as a litigator in private practice, and my work in academia have prepared me to perform the duties of a USCAAF judge. If confirmed, I commit to working with the USCAAF Clerk of Court to ensure that I fully understand the current rules of court. I will also take every opportunity to learn from the current, as well as former, USCAAF judges.

## Relationships

**What is the role of each of the following officials or organizations with respect to the military justice system and, if confirmed, what would your relationship be with each?**

### **6. The Secretary of Defense**

Answer: The Secretary of Defense has several roles with respect to the military justice system. For example, the Secretary has authority to convene general, special, and summary courts-martial, 10 U.S.C. §§ 822(a)(2), 823(a)(1), 824(a)(1), and to designate the general court-martial convening authority for joint commands and joint task forces, Rule for Courts-Martial (RCM) 201(e)(1)(B). In addition, pursuant to 10 U.S.C. § 833, the Secretary, in consultation with the Secretary of Homeland Security, issues non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should consider when addressing allegations of violations of the UCMJ. The Secretary of Defense, in consultation with the Secretary of Homeland Security, appoints one member of the Military Justice Review Panel and appoints six additional members taking into consideration recommendations by the Chairmen and Ranking Members of the Senate and House Armed Services Committees, the Chief Justice of the United States, and the Chief Judge of the USCAAF. 10 U.S.C. § 946(b)(3). The Secretary of Defense also selects the Chair of the Military Justice Review Panel from among its members. 10 U.S.C. § 946(d). In cases in which the USCAAF affirms a death sentence, the Secretary of Defense provides the record, along with certain accompanying documents, to the President for action, along with a recommendation. RCM 1204(c)(2)(B). Additionally, the Secretary of Defense exercises authority, direction, and control over the Department of Defense (DoD). 10 U.S.C. § 113. In the exercise of that authority, the Secretary of Defense has an important role to play in the military justice system, including recommending amendments to the UCMJ to Congress and changes to the MCM to the President.

The Secretary of Defense, however, has a very limited relationship with USCAAF judges. The UCMJ provides that the USCAAF “is located *for administrative purposes only* in the Department of Defense.” 10 U.S.C. § 941 (emphasis added). Accordingly, while the Secretary of Defense provides logistical and other support to the USCAAF, such as providing security for USCAAF’s courthouse, the Secretary has no authority to remove the USCAAF judges or direct their decisions in any case.

### **7. The General Counsel of the Department of Defense**

Answer: The DoD General Counsel also has several roles with respect to the military justice system. For example, the General Counsel is responsible for administering the federal regulation establishing the Joint Service Committee on Military Justice. 32 C.F.R. 152.4(a)(1). That committee conducts an annual survey of the military justice system, proposes changes to the MCM, and proposes legislation to amend the UCMJ. *Id.* § 152.1(b). The General Counsel also determines DoD policy on general legal issues, determines the DoD position on specific legal problems, and resolves disagreements within the DoD on such matters. DoD Directive 5145.01, “General Counsel of the Department of Defense (GC DoD),” ¶ 3.j (Dec. 2, 2013, as amended). The General Counsel also coordinates significant litigation with the Department of

Justice, including cases in which Supreme Court review of a USCAAF opinion is sought. *Id.*; DoD Instruction 5030.7, “Coordination of Significant Litigation and Other Matters Involving the Department of Justice” (August 22, 1988). Like the Secretary of Defense, the General Counsel does not have a direct relationship with USCAAF judges. The General Counsel has no authority to remove the USCAAF judges or direct their decisions in any case.

### **8. The Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps**

Answer: The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps play several key roles in the military justice system. For example, the Judge Advocates General designate officers to serve as military judges and appellate military judges, 10 U.S.C. §§ 826(c), 866(a), and they may review the records of certain courts-martial that are not reviewable by the Courts of Criminal Appeals, *id.* § 869(a). Each Judge Advocate General is also responsible for issuing rules of professional conduct governing trial judges, appellate judges, and counsel in proceedings governed by the UCMJ and MCM, as well as exercising professional supervision and discipline over them. RCM 109. The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps make inspections in the field in supervision of the administration of military justice. 10 U.S.C. § 806(a). They also each make one appointment to the Military Justice Review Panel. 10 U.S.C. § 946(b)(2)(C). And each submits an annual report on military justice to, among others, the Senate and House Armed Services Committees and the Secretary of Defense. 10 U.S.C. § 946a. The UCMJ grants the Judge Advocates General the authority, after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps, to order certain cases reviewed by the USCAAF. *Id.* § 867(a)(2). But like the Secretary of Defense and the DoD General Counsel, they have no authority to remove the USCAAF judges or direct their decisions in any case.

### **9. The Chief Judge of the USCAAF**

Answer: The Chief Judge presides at court sessions and has a variety of administrative duties in leading the USCAAF. 10 U.S.C. § 143(b). The Chief Judge also makes a recommendation to the Secretary of Defense concerning appointment of members of the Military Justice Review Panel. 10 U.S.C. § 946(b)(3)(C). If confirmed, I anticipate having a collegial relationship with the current Chief Judge, whom I have known for many years, and his successors. In deliberating and voting on cases, however, like all judges on the USCAAF, I would exercise independent judgment.

### **10. Other judges on the USCAAF**

Answer: If confirmed, I anticipate having a collegial relationship with the other judges on the USCAAF, several of whom I know well and for all of whom I have great respect. While I would respect and seek to learn from my colleagues’ opinions, I would exercise independent judgment in reaching my conclusions.

### **11. The military courts of criminal appeals**

Answer: The USCAAF reviews decisions of the CCAs and may take action with respect to matters of law. 10 U.S.C. § 867(c). The USCAAF also shapes the development of the law by issuing case law that is binding on the CCAs. Accordingly, the USCAAF must state and explain its holdings clearly so that the CCAs can follow its decisions in future cases.

## **12. The Military Justice Review Panel**

Answer: The Chief Judge of USCAAF makes a recommendation concerning appointments to the Military Justice Review Panel. 10 U.S.C. § 946(b)(3)(B). If confirmed, I would closely scrutinize the Military Justice Review Panel's reports to enhance my understanding of the military justice system.

## **Legal Issues**

### **13. What do you anticipate would be among the most significant legal issues you could be called upon to address, if confirmed to be a USCAAF judge?**

Answer: If I am confirmed, my role would be to review cases to determine whether they are correct as a matter of law. 10 U.S.C. § 867(c). The USCAAF docket is comprised of criminal law cases, often involving lengthy terms of confinement and, sometimes, death sentences. In performing the inherently judicial role of a USCAAF judge, I would view any legal issue properly before the court as a "significant legal issue." Under Canon 3(A)(6) of the Code of Conduct for Federal Judges, I believe that it would be inappropriate for me to identify and comment on specific issues because they might come before me if I am fortunate enough to be confirmed as a USCAAF judge. The Code of Conduct provides guidance to both "judges and nominees for judicial office." Canon 1, Commentary.

### **14. In your view, what have been the effects on the military justice system writ large of the multiple successive changes to the punitive articles of the Uniform Code of Military Justice and military rules of evidence and procedure enacted over the past 10 years?**

Answer: I am aware of the many substantial UCMJ amendments that have been enacted over the past decade, including most significantly the enactment of the Military Justice Act of 2016, followed by an Executive Order reissuing and revising the Manual for Courts-Martial. Issues will inevitably come before the USCAAF concerning the scope, meaning, and constitutionality of those amendments. Therefore, under Canon 3(A)(6) of the Code of Conduct for Federal Judges, I believe that it would be inappropriate for me to identify and comment on specific effects of those changes, as issues involving them might come before me if I am fortunate enough to be confirmed as a USCAAF judge.

### **15. What challenges, if any, do you anticipate the military services and the USCAAF will encounter in implementing the changes to the Uniform Code of Military Justice enacted in the Military Justice Act of 2016?**

Answer: I understand that most provisions of the Military Justice Act of 2016 became effective on January 1, 2019. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5542, 130 Stat. 2000, 2967 (2016); Exec. Order No. 13825, § 3, 83 Fed. Reg.

9889, 9889 (March 1, 2018). Whenever new legislation is passed, questions may arise about its scope, meaning, and constitutionality. The Military Justice Act of 2016 will likely be no exception. Therefore, under Canon 3(A)(6) of the Code of Conduct for Federal Judges, I believe it would be inappropriate for me to identify and comment on specific challenges because issues involving them might come before me if I am fortunate enough to be confirmed as a USCAAF judge.

**Certain USCAAF decisions are subject to direct review by the Supreme Court of the United States. Other cases under the Uniform Code of Military Justice may obtain collateral review by the Supreme Court.**

**16. In your view, should service member access to Supreme Court review be expanded?**

Answer: The Supreme Court’s appellate jurisdiction is defined by statute. U.S. Const., art. III, § 2. Revision to that authority, therefore, is a matter left to Congress and the President in the exercise of their respective, constitutionally-mandated roles in the statutory enactment process. *Id.* art. I, § 7, cl. 2. I am aware that the first statutory authorization for the Supreme Court to exercise certiorari jurisdiction over certain decisions of what was then the United States Court of Military Appeals was the Military Justice Act of 1983, Pub. L. No. 97-1393, § 10, 97 Stat. 1393, 1406 (codified, as amended, at, *inter alia*, 28 U.S.C. § 1259). I am also aware that under that statutory framework, most court-martial cases that result in convictions never fall within the Supreme Court’s statutory certiorari jurisdiction. I am also aware that the report of the Military Justice Review Group, led by the Honorable Andrew S. Effron, former Chief Judge of the USCAAF, concluded, “The issue of whether servicemembers should be provided with the same level of access to the Supreme Court available to defendants in federal and state criminal proceedings, as well as in military commissions, is a matter that requires consultation among the legislative, executive, and judicial branches of government.” Military Justice Review Group, *Report of the Military Justice Review Group Part I: UCMJ Recommendations* 628 (Dec. 22, 2015). Without expressing any opinion as to what the outcome of such inter-Branch consultation should be, I believe such consultation would be salutary.

**The scope of review by military service courts of criminal appeals differs significantly from the review accorded by civilian federal appellate courts. Article 66 of the Uniform Code of Military Justice provides that the military service courts of criminal appeals may “affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”**

**17. In your view, what is the value, if any, in retaining in the service courts of criminal appeals the requirement to conduct such a “factual sufficiency” review?**

Answer: I am aware of arguments both in favor and against the CCAs’ continued exercise of factual sufficiency review, as well as proposals—such as that by the Military Justice Review Group—to retain a more limited form of factual sufficiency review. One argument in favor of factual sufficiency review by the CCAs is the provision of a safeguard against legally

sufficient but dubious convictions rendered by the only criminal justice system in the United States that does not require lay members to reach a unanimous verdict. But an argument against factual sufficiency review is the reversal of potentially meritorious convictions by a panel of appellate judges working from a cold record without the benefit of seeing the witnesses actually testify and whose factual insufficiency determination is not subject to further review by the USCAAF. The appropriate balance of such costs and benefits is a matter committed to Congress and the President in their respective, constitutionally-mandated roles in the statutory enactment process.

### **Jurisdiction of the USCAAF**

#### **18. In your view, has the USCAAF fulfilled the expectations that led Congress to establish the Court in 1951?**

Answer: The House Armed Services Committee's 1949 report on the Uniform Code of Military Justice characterized Article 67's provisions creating what was then known as the Court of Military Appeals as "the most revolutionary changes which have ever been incorporated in our military law." H.R. Rep. No. 81-491, at 6 (1949). The Committee's report also indicated that creating a court comprised of civilian judges to sit atop the military justice system was an important counterweight to command control and was expressly contemplated as a means to provide legitimacy to a military justice system whose performance during World War II was viewed with considerable skepticism. *Id.* at 6–7. In my view, the USCAAF has fulfilled those goals. In 1957, the Supreme Court described military justice as "a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties." *Reid v. Covert*, 354 U.S. 1, 35 (1957). At that time, the Court believed that military law "emphasize[d] the iron hand of discipline more than it does the even scales of justice." *Id.* at 38. Today, the Supreme Court's view of the military justice system has significantly improved. As recognized by the Court's recent decision in *Ortiz v. United States*, the modern military justice system's essential character is "judicial." 138 S. Ct. 2165, 2174 (2018). The USCAAF functions much like any other American appellate court reviewing criminal convictions, without any suggestion that it is beholden to or under the influence of the military. Accordingly, the USCAAF appears to be satisfying the central concerns that led to its creation.

#### **19. In your view, should the role, responsibilities, or jurisdiction of the USCAAF be changed or clarified in any way?**

Answer: The role, responsibilities, and jurisdiction of the USCAAF are established by statute. Revision of the existing statutory framework is, therefore, a matter left to Congress and the President in the exercise of their respective, constitutionally-mandated roles in the statutory enactment process.

### **Decisions of the USCAAF**

#### **20. Please describe three decisions rendered by the USCAAF in the past 10 years that, in your view, have been among most significant.**

Answer: The USCAAF decision that has perhaps had the greatest impact on military justice practice over the past decade is *LRM v. Kastenberg*, 72 M.J. 364 (C.A.A.F. 2013), which

was the first USCAAF decision to address the role of Special Victims' Counsel. By expressly recognizing the right of the victim of an alleged offense to be heard through counsel in the rape shield and psychotherapist-patient contexts, *LRM* influenced the subsequent development of the Military Services' Special Victims' Counsel/Victims' Legal Counsel programs.

In *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017), the USCAAF provided an important doctrinal analysis of the concept of apparent unlawful command influence. Given the frequency with which unlawful command influence issues are raised and the USCAAF's oft-repeated characterization of it as "the mortal enemy of military justice," *id.* at 246 (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)), *Boyce* provides important guidance for both military trial judges and CCA judges resolving a core military justice concept.

*United States v. Hennis*, 79 M.J. 370 (C.A.A.F. 2020), was a capital case featuring a significant and recurring jurisdictional issue: the extent to which a retired member of an active component of a military service is subject to trial by court-martial. The USCAAF rejected the jurisdictional challenge to the appellant's court-martial in a decision that has important implications for the military justice system's ability to address alleged misconduct discovered only after a Service member retires, as well as alleged misconduct arising while a former member of an active component is in a retired status.

**21. What is your view of the principle of *stare decisis* in terms of prior decisions of the USCAAF?**

Answer: The USCAAF applies *stare decisis* principles in a manner similar to other federal appellate courts. Under the USCAAF's well-established formula, adherence to precedent is preferred to promote the evenhanded, predictable, and consistent development of the law. *See, e.g., United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018). A party asking the USCAAF to overturn precedent, therefore, must present a "special justification" for precedent to be overturned. *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018). But applying *stare decisis* "is not an inexorable command." *Id.* The USCAAF has identified the following factors to be considered when deciding whether to overturn its own case law: (1) whether the prior decision is unworkable or poorly reasoned; (2) any intervening events; (3) the reasonable expectations of Service members; and (4) the risk of undermining public confidence in the law. *Id.* Intervening events that might make it appropriate to revisit earlier case law include relevant Supreme Court decisions and amendments to the UCMJ or MCM.

**22. What is your view of the hierarchy of sources of law that must be applied by the USCAAF in addressing rules of evidence and procedure in the administration of the military justice system, given the prescription of article 36 of the Uniform Code of Military Justice?**

Answer: The United States Constitution occupies the highest place in the hierarchy of authority in any American legal system, including the military justice system. Article 36 of the UCMJ expressly provides that the pretrial, trial, and post-trial procedures prescribed by the President, including rules of evidence, may not be contrary to or inconsistent with the UCMJ. Thus, the UCMJ is above the MCM in the military justice hierarchy of authority. Implementing regulations issued by the Military Departments or, in the case of the Coast Guard, the Department of Homeland Security, fall below the MCM in the hierarchy of authority.



**23. In your view, what is the appropriate standard for determining when the USCAAF should apply a Rule for Courts-Martial or Military Rule of Evidence that is different from the rule generally applied in the trial of criminal cases in Federal district courts?**

Answer: Article 36 of the UCMJ authorizes the President to make procedural rules for courts-martial. Those rules shall, so far as the President “considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” The Supreme Court has assumed that “complete deference is owed” to the President’s determination whether it is practicable to adhere to a particular procedural or evidentiary rule that applies in trials of criminal cases in United States district courts. *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006). The presidentially prescribed rules must adhere to the Constitution, as it applies to the military justice system, and the UCMJ.

### **Military Justice System**

**24. In your view, what are the major strengths and weaknesses of the military justice system?**

Answer: The two central pillars of the military justice system are the legal framework that governs it and the people who operate it. Congress and the President have continuously updated and improved that legal framework to address new challenges as they arise. The system has proved its ability to deploy with the Service members it governs to a variety of settings around the world—a key aspect of any military justice system. Another strength of the system is the collection of skilled military justice practitioners and jurists who make it function. In my experience, they are overwhelmingly highly competent, earnest professionals who are deeply committed to both principles of justice and our Nation’s defense. If I am confirmed, my role as a judge would be to apply faithfully the governing statutes and regulations to the extent they are consistent with the United States Constitution.

**25. In your opinion, does the military justice system afford a fair and just system for military personnel accused of violations of the Uniform Code of Military Justice?**

Answer: I believe the military justice system affords a fair and just system for those accused of violating the UCMJ. Of course, any criminal justice system will, on occasion, produce unfair results in particular cases. Significantly, the UCMJ provides means to address such unfair results, including its establishment of the USCAAF. If I am confirmed, my role as a judge would be to apply faithfully the governing statutes and regulations to the extent they are consistent with the United States Constitution.

**26. In your view, does the military justice system appropriately address the rights of victims of offenses prosecuted in courts-martial?**

Answer: I am aware that the military justice system has greatly enhanced victims’ rights over the past decade, including the enactment of Article 6b of the UCMJ, 10 U.S.C. § 806b, in 2013 codifying victims’ rights in the system, the establishment of the Special Victims’ Counsel/Victims’ Legal Counsel programs, and the amendment of certain Military Rules of

Evidence to better protect privileged information of victims of alleged offenses. If I am confirmed, my role as a judge would be to apply faithfully the governing statutes and regulations to the extent they are consistent with the United States Constitution.

**27. What has been the impact on the military justice system of the right of certain victims to be represented by “Special Victim’s Counsel” throughout the court-martial process?**

Answer: I am aware that after the Air Force launched its Special Victims’ Counsel program, the Secretary of Defense issued a memorandum on August 14, 2013, requiring all the Military Departments to establish comparable programs. I am also aware that the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1716, 127 Stat. 672, 966 (2013), codified the requirement to operate such programs at 10 U.S.C. § 1044e. I understand that the programs have greatly assisted eligible victims of alleged sex-related offenses to exercise their rights within the military justice system. I also understand that the Marine Corps has made its VLC program available to represent some victims of alleged non-sex-related offenses.

**28. What is your view of the relationship between the rights of service members and the disciplinary role of commanders?**

Answer: Commanders have the duty to maintain discipline and have authority to do so in part by referring cases to courts-martial or imposing non-judicial punishment. When exercising this authority, commanders must respect the rights of Service members granted by the Constitution, the UCMJ, and the MCM.

**29. What is your view of the role of the Joint Force Commander in the administration of military justice, particularly with regard to offenses that occur in the context of a military deployment or contingency operation?**

Answer: I understand that Joint Force Commanders typically have comparable court-martial convening authority as do other commanders of comparable grades. *See* RCM 201(e)(2).

**30. Do you believe that changes to the military justice system are called for in light of the combat and combat support experiences of service members in Iraq and Afghanistan?**

Answer: Assessing the performance of the military justice system in theaters of operation and identifying any necessary changes to the system are roles for Congress and the President. If I am confirmed, my role as a judge would be to apply faithfully the governing statutes and regulations to the extent they are consistent with the United States Constitution.

**Recent reports by the Government Accountability Office and by private organizations have raised significant questions about racial disparity in the military justice system.**

**31. What are your views on racial disparity in State and Federal criminal justice systems, other than the military justice system?**

Answer: Racial bias is antithetical to the core American principle of equal justice under law, and it has no place in any American legal system. Judges in every criminal justice system must remain vigilant to ensure that justice is being administered in a color-blind manner.

**32. What are your views on racial disparity in the military justice system?**

Answer: I agree with the USCAAF's emphatic statement that "Racial discrimination is anathema to the military justice system. It ought not—and it will not—be tolerated in any form." *United States v. Witham*, 47 M.J. 297, 303 (C.A.A.F. 2007) (quoting *United States v. Greene*, 36 M.J. 274, 282 (C.M.A. 1993) (Wiss, J., concurring)).

**33. What role do you believe the USCAAF will have in addressing racial disparity in the military justice system?**

Answer: One of the USCAAF's most important functions is to ensure that each individual case is handled and decided free of racial discrimination or other forms of invidious discrimination.

**34. In your view, are changes to the military justice system called for in light of changes in U.S. criminal jurisprudence?**

Answer: I understand that litigants in cases before the USCAAF often make arguments that a jurisprudential development in the Article III courts should be applied to the military justice system. Therefore, under Canon 3(A)(6) of the Code of Conduct for Federal Judges, I believe that it would be inappropriate for me to discuss particular issues in U.S. criminal jurisprudence, as such issues might come before me if I am fortunate enough to be confirmed as a USCAAF judge.

**Capital Cases in the Armed Forces**

**The ability of the military justice system to provide the qualified personnel and resources necessary to capably defend and prosecute death penalty cases and meet the constitutional requirements associated with such cases has come under scrutiny.**

**35. What is your understanding of the constitutional requirements for the defense of a capital case?**

Answer: The Supreme Court has held that the Sixth Amendment guarantees defendants in criminal cases a right to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Counsel is constitutionally ineffective if "counsel's conduct so undermine[s] the proper functioning of the adversarial process that [a] trial cannot be relied on as having produced a just result." *Id.* The Supreme Court has said that the "same principle applies to a capital sentencing proceeding." *Id.* The constitutional standards set a floor for the defense in capital cases. Individual jurisdictions are free to offer protections above that floor, as I understand the military justice system does, particularly since the enactment of the Military Justice Act of 2016.

**36. Based on your review of military jurisprudence regarding death penalty cases since the U.S. Supreme Court ruling in *Furman v. Georgia*, what are the issues or errors that have most frequently resulted in the reversal or commutation of military death sentences on appeal?**

Answer: I understand that since the current military death system was promulgated in 1984, 10 military death sentences have been reversed on appeal. Four of those 10 cases were reversed in whole or in part due to ineffective assistance of counsel. Two were reversed due to the military judge's erroneous instruction on how the court-martial members were to vote during their sentencing deliberations.

**37. What do you consider to be the essential elements in preparing court-martial practitioners to perform the prosecution and defense functions in capital cases?**

Answer: Judges of the court to which I have been nominated do not have a role in preparing court-martial practitioners for the prosecution or defense of capital cases. I understand that the Military Justice Act of 2106 adopted a requirement that, "[t]o the greatest extent practicable, in any capital case, at least one defense counsel shall, as determined by the Judge Advocate General, be learned in the law applicable to such cases. If necessary, this counsel may be a civilian and, if so, may be compensated in accordance with regulations prescribed by the Secretary of Defense." 10 U.S.C. § 827(d).

### **Command Influence**

**The problem of command influence, including instances involving judge advocates as well as commanders, is a constant threat to the military justice system.**

**38. What is your view as to the role, if any, of the USCAAF in addressing this problem?**

Answer: The UCMJ prohibits unlawful command influence. 10 U.S.C. § 837. Although all judges in the military justice system must enforce this provision, it is especially important for USCAAF judges to guard against the threat of unlawful command influence. By design, the civilian judges of the USCAAF have the institutional independence to address unlawful command influence without any specter of themselves being subject to command control.

**39. What is your view of the changes to article 37 of the Uniform Code of Military Justice enacted in the National Defense Authorization Act for Fiscal Year 2020, and how will these changes affect court-martial practice, in your view?**

Answer: I am aware that section 532 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198, 1359 (2019), amended article 37 of the UCMJ. That amendment will almost certainly be the subject of litigation within the military justice system that could reach the USCAAF. Under Canon 3(A)(6) of the Code of Conduct for Federal Judges, I believe that it would be inappropriate for me to discuss the impact of legislation that might come before me if I am fortunate enough to be confirmed as a USCAAF judge.

## **Objectivity**

**40. Is there any reason that you might not be able to remain objective in your role as a USCAAF judge, if confirmed?**

Answer: I am unaware of any factor that would preclude me from remaining objective if I were fortunate enough to be confirmed as a USCAAF judge. That said, it is essential for judges to remain ever vigilant to the threat of both actual bias and the appearance of bias. If confirmed, I would, therefore, assess for each case before me whether there might be any factor that would interfere with my objectivity or appearance of objectivity.