

Senate Armed Services Committee
Advance Policy Questions for Ms. Tia Johnson
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?

As the Supreme Court has observed, “CAAF is a permanent ‘court of record’ created by Congress; it stands at the acme of a firmly entrenched judicial system that exercises broad jurisdiction with established rules and procedures; and its own decisions are final (except if we review and reverse them).” *Ortiz v. United States*, 1138 S. Ct. 2165, 2100 (2018). Because USCAAF is an Article I court, its duties and functions are governed by statute. The most relevant statutes are Articles, 48, 67, 73, and 141 of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. §§ 848, 867, 873, and 941). The Court’s most significant duties are to review cases in which a Court of Criminal Appeals affirmed a death sentence, to review cases that a Judge Advocate General has certified to the Court, to review petitions for grant of review, and to review cases in which it chooses to exercise its discretionary jurisdiction. The Court provides civilian judicial review in those cases listed above.

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

My service in the Executive Branch (both in uniform and as a civilian), as well as in academia has prepared me to perform the duties of a CAAF judge.

Even before active duty, while in law school, I had the privilege of working for Judge A. Leon Higginbotham of the U.S. Court of Appeals for the Third Circuit on his research team gaining invaluable insight into the appellate decision-making process.

Most significantly, I spent thirty years on active duty as a judge advocate. In my early years, I amassed significant litigation experience. During my first and second tours, I served as a prosecutor, trying cases before courts-martial, as well as in U.S. Magistrate and District Court. I also have significant civil litigation experience, having tried dozens of labor-employment cases before multiple federal entities (the Merit Systems Protection Board, Equal Employment Opportunity Commission, Federal Labor Relations Authority, and the U.S. Army Civilian Appellate Review Agency). Once administrative remedies were exhausted, these cases were also tried in U.S. District Court.

I also have experience handling complex civil litigation. During my first tour, I represented the command in the “school litigation” case. This involved nationwide challenges to the U.S. Impact Aid Program and was being litigated in multiple U.S. District Courts. Our case was ultimately settled after the USG prevailed in a similar challenge in the 4th Circuit.

Both the criminal prosecutions and civil litigation covered the full-range of pre-through-post trial practice.

Outside of litigation, I also served as the senior lawyer in multiple commands. As a Staff Judge Advocate, I was responsible for the administration of military justice. This includes providing logistical and other support to all involved in courts-martial (judges, defense, and trial counsels), as well as performing the statutory requirements contained in the Uniform Code of Military Justice, specifically providing pre-and-post trial advice to the General Court-Martial Convening Authority, pursuant to Articles 34 and 60.

Lastly, I have seven years of J.D./LL.M teaching experience, having been on the faculty of the U.S. Army Judge Advocate General’s School (now TJAGCLS), where I also taught at UVA Law School. I just completed five years on faculty at Georgetown Univ. Law Center. I have taught courses in National Security Law, the Law of Armed Conflict, and Congressional Oversight. My time in academia has honed my research and writing skills, and because I had prepared to teach Legislation this semester, it has also deepened my understanding of judicial philosophies and statutory interpretation.

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?

Throughout my combined legal experiences, I have addressed complex issues falling within each of these areas. By education and experience, I am an international/national security law specialist. I earned a LL.M from the U.S. Army Judge Advocate Generals’ School in Military Law with a specialty in International/Operational Law. I was subsequently awarded the Skill Identifier of “3N.” I then earned an LL.M in International/National Security Law from the University of VA School of Law. I have advised on national security issues at the tactical, operational, and strategic level.

At Georgetown, I previously served as the Director, National Security Law LL.M Program. My duties included a curriculum review and reviewing proposed course additions. My own courses fall within the Constitutional Law and Governance (J.D.) and National Security Law (LL.M) areas. My scholarship has also been in these areas, particularly focusing on statutory analysis.

Administrative Law. As a career judge advocate, I started my career doing administrative law. I focused on labor/employment law, but I also handled regulatory matters. Administrative Law is a functional area that one continues to practice, particularly as a senior judge advocate in leadership positions (see below).

Criminal Procedure/Evidence. I served as a prosecutor twice, trying criminal cases in both the military and civilian context. In the military context, this required familiarity with the Rules for Courts-Martial and the Military Rules of Evidence. In the civilian context, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

Ethics. Judge Advocates are expected to be the standard-bearers for ethics and their integrity should be impeccable. From a practice perspective, in the military, ethics falls within the functional area of Administrative Law. Notably, as a Senior Supervisory Judge Advocate (position as either a Staff Judge Advocate or Senior Legal Advisor to a command), I was responsible for the professional conduct and fitness of all military and civilian lawyers, as well as support personnel who were subject to the professional responsibility disciplinary authority of The Judge Advocate General pursuant to RCM 109, MCM (this is similar to, but more expansive to the Supervisory Attorney responsibilities under Rule 5.1, ABA Rules of Professional Conduct). Also, in these capacities, I was responsible for administering portions of the Ethics in Government Act of 1978.

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

Every aspect of my career has required me to interpret and apply statutes. Having served as a Trial Counsel twice and a Staff Judge Advocate multiple times, I have specific experience applying both the black letter law of the UCMJ, as well as decisions from the appellate courts. As a National Security Law specialist, I've focused on the interplay among the coordinate branches of government, which includes a focus on statutory interpretation.

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

As explained above, my combined experiences as a career judge advocate, and seven years in academia have prepared me well to serve as a CAAF judge. After I was nominated, I took steps to concretely prepare myself, which included attending multiple programs on military justice, and ordering one of the seminal casebooks on the subject, Eugene Fidell's "Military Justice: Cases and Materials," along with the Teacher's Manual. Further, I attended former Chief Judge Efron's Georgetown Law course on "Judicial Review of Military Justice Proceedings: Current Issues and Constitutional Perspectives." Combined, these have updated me on USCAAF jurisprudence and would prepare me to sit on the court, if confirmed.

If confirmed, I will continue to seek out formal training opportunities, and work to quickly understand the current rules of the court. I will continue to take every opportunity to learn from current and former judges of CAAF.

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

The Secretary of Defense exercises numerous roles with respect to the military justice system. For example, section 532 of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81 (2021), requires the Secretary of Defense to establish policies governing the special trial counsel who will prosecute certain prescribed offenses. Section 539E of that same act requires the Secretary of Defense to designate the Chair and Vice Chair of the Military Sentencing Parameters and Criteria Board and gives the Secretary the discretionary authority to appoint a non-voting member of that board. Section 547 of the same act requires the Secretary of Defense, in consultation with the Secretary of Homeland Security, to develop a plan to establish a single document management system for use by each Armed Force to collect and present information on matters within the military justice system, including information collected and maintained for purposes of article 140a of the UCMJ, 10 U.S.C. § 940a. Those and other responsibilities prescribed by the National Defense Authorization Act for Fiscal Year 2022 are in addition to the Secretary's already extensive roles in the military justice system. Those include the Secretary's status as a court-martial convening authority, the Secretary's responsibility in consultation with the Secretary of Homeland Security to issue non-binding disposition guidance, and the Secretary's role in appointing seven of the thirteen members of the Military Justice Review Panel as well as designating that panel's chair. The Secretary also has a formally prescribed role in forwarding a court-martial case with a finally approved death sentence to the President. *See* Rule for Courts-Martial 1204(c)(2)(B), Manual for Courts-Martial, United States (2019 ed.) (MCM).

USCAAF is located in the Department of Defense for administrative purposes only. 10 U.S.C. § 941. While the Secretary of Defense and the Secretary's subordinates provide administrative support to USCAAF, the Court is substantively independent of the Secretary and the rest of the Department of Defense.

7. The General Counsel of the Department of Defense

The General Counsel of the Department of Defense is, by statute and regulation, the chief legal officer of the Department of Defense. 10 U.S.C. § 140; DoD Directive 5145.01, section 3, General Counsel of the Department of Defense (GC DoD) (Dec. 2, 2013). The General Counsel plays an extensive role in the development of substantive military law through oversight of the Joint Service Committee on Military Justice, which operates under the cognizance of the General Counsel. That Committee conducts an annual review of the military justice system and proposes any appropriate changes to the UCMJ and MCM. Any such proposals are transmitted to and considered by the General Counsel. *See generally* DoD Instruction 5500.17, Role and Responsibilities of the Joint Service Committee on Military Justice (JSC) (Feb. 21, 2018). Additionally, the General Counsel plays an important role in determining when a request should be made to the Office of the Solicitor General to seek Supreme Court review of a decision by USCAAF. *See generally* DoD Instruction 5030.7, Coordination of Significant Litigation and Other Matters Involving the Department of Justice (Aug. 22, 1988).

The General Counsel has no direct relationship with USCAAF other than carrying out the Department of Defense's statutory obligation to provide administrative support to the Court. USCAAF is substantively independent of the General Counsel and the rest of the Department of Defense.

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

The Judge Advocates General of the Military Departments, as well as the Judge Advocate General of the Coast Guard, play a role in shaping USCAAF's docket. By statute, following review by a Court of Criminal Appeals, the applicable Judge Advocate General—after appropriate notification to the other Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps—may order a case sent to USCAAF. Where that occurs, USCAAF must review the record in the case. *See generally* 10 U.S.C. § 867(a)(2). The Judge Advocates General also provide the military appellate counsel who represent the government and the defense before USCAAF. *See generally* 10 U.S.C. § 870(a). In some instances, the Judge Advocates General are responsible for forwarding petitions for new trial to USCAAF. *See generally* 10 U.S.C. § 873.

Those authorities represent only a small portion the roles of the Judge Advocates General and Staff Judge Advocate to the Commandant of the Marine Corps in the military justice system. For example, each Judge Advocate General issues rules of professional conduct governing trial judges, appellate judges, and counsel in proceedings under the UCMJ and MCM. Each Judge Advocate General also operates a professional disciplinary system. The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps are statutorily required to make inspections in the field in supervision of the administration of military justice. 10 U.S.C. § 806(a). The Judge Advocates General are responsible for designating military trial and appellate judges. The Judge Advocates General also themselves serve as appellate authorities for some court-martial cases under Article 69, UCMJ. The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps each make one appointment to the Military Justice Review Panel. 10 U.S.C. § 946(b)(2)(C).

9. The Chief Judge of the USCAAF

By statute, the Chief Judge of USCAAF “shall have precedence and preside at any session that he attends.” 10 U.S.C. § 143(b). The Chief Judge also fulfills a number of additional responsibilities, one of the most important of which is taking steps to fill the USCAAF bench when there is a vacancy or a judge in regular service has recused himself or herself. 10 U.S.C. § 942. 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 and his successors. In deliberating and voting on cases, like all USCAAF judges, if confirmed I would exercise independent judgment.

10. Other judges on the USCAAF

I am confident that, if confirmed, I would establish collegial relationship with all of the USCAAF judges. I am familiar with their jurisprudence and have great respect for their views. Nevertheless, if confirmed I would exercise independent judgment in reaching my own conclusions and would not hesitate to respectfully disagree with my colleagues as necessary.

11. The military courts of criminal appeals

USCAAF exercises mandatory appellate jurisdiction over some cases decided by the Courts of Criminal Appeals and exercises discretionary appellate jurisdiction over the remainder. Under the doctrine of vertical stare decisis, USCAAF's precedent is binding on the Courts of Criminal Appeals.

12. The Military Justice Review Panel

USCAAF's Chief Judge makes a non-binding recommendation to the Secretary of Defense regarding appointments to the Military Justice Review Panel. If confirmed, I will carefully review any reports issued by the Military Justice Review Panel.

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?

USCAAF's docket is comprised of criminal cases, often involving punitive discharges, terms of confinement and, sometimes, death sentences. Under Canon 3(A)(6) of the Code of Conduct for Federal Judges, 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. The Code of Conduct's guidance applies 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?

I am familiar with the substantial UCMJ amendments that have been enacted over the past decade, including most significantly those included in the National Defense Authorization Act for Fiscal Year 2022 and the Military Justice Act of 2016, as well as the extensive changes incorporated in the 2019 edition of the MCM. Issues will certainly come before USCAAF concerning those changes to the UCMJ and the MCM, as well as further MCM changes to implement the military justice reforms enacted by the National Defense Authorization Act for Fiscal Year 2022. Canon 3(A)(6) of the Code of Conduct for Federal Judges precludes me from commenting on those changes because issues involving them might come before me if I am fortunate enough to be confirmed.

15. What challenges, if any, do you anticipate the military services and the Department of Defense will encounter in implementing the changes to the Uniform Code of Military Justice enacted in the FY2022 NDAA?

I understand that the most significant military justice reforms enacted by the National Defense Authorization Act for Fiscal Year 2022 will apply to offenses that occur after December 27, 2023, and that Act's sentencing reform will apply in cases in which all findings of guilty are for offenses that occur after that same date. Questions concerning implementation of those provisions are certain to arise before USCAAF. Canon 3(A)(6) of the Code of Conduct for Federal Judges precludes me from commenting on such implementation challenges because issues involving them might come before me if I am fortunate enough to be confirmed.

16. What are the legal risks that could arise if the military services and the Department of Defense are not given adequate time to implement the changes to the Uniform Code of Military Justice enacted in the FY2022 NDAA?

For the same reason as those noted in my response to question 15, Canon 3(A)(6) of the Code of Conduct for Federal Judges precludes me from commenting on the effect of the time period over which the recently enacted military justice reforms will be implemented because issues involving them might come before me if I am fortunate enough to be confirmed.

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.

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

The scope of the Supreme Court's statutory certiorari jurisdiction is a policy matter committed to Congress and the President in their respective constitutionally prescribed roles in the lawmaking process. I am aware that, currently, USCAAF plays a large role in determining which military justice cases will become eligible for Supreme Court review through its exercise of discretionary jurisdiction; cases over which USCAAF declines to exercise discretionary jurisdiction are not eligible for Supreme Court review. See Article 67, UCMJ, 10 U.S.C. § 867a; 28 U.S.C. § 1259. Because the scope of service members' access to the Supreme Court is, in part, a function of USCAAF's exercise of its judicial discretion, it would be inappropriate for me to comment on that matter.

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."

18. 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?

Congress amended the factual sufficiency standard quoted above in section 542(b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283 (2021). That amendment applies with respect to cases in which every finding of guilty entered in the entry of judgment is for an offense occurring on or after January 1, 2021. Because issues involving that amended scope will likely come before USCAAF, it would be inappropriate for me to comment on it.

Jurisdiction of the USCAAF

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

Congress intended what it originally named the Court of Military Appeals to enhance the legitimacy of the military justice system in the wake of World War II, when the operation of the military justice system was widely viewed as problematic. *See, e.g.*, H.R. Rep. No. 81-491, at 6 (1949). Congress considered it particularly significant that it was creating a court consisting of civilian judges atop the court-martial and board of review structure. The Supreme Court’s 2018 decision in *Ortiz v. United States*, 138 U.S. 2165 (2018), suggests that Congress’s goal for the Court of Military Appeals (now USCAAF) has been fulfilled. In *Ortiz*, the Supreme Court emphasized that the essential character of the court-martial system is judicial and that the system operates much like state judicial systems. That is a markedly different conception of the military justice system than existed upon the enactment in 1950 of the legislation creating the Court of Military Appeals.

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

Because USCAAF is an Article I court, its role, responsibilities, and jurisdiction are governed by statute. Revision of the existing statutory framework is a matter left to Congress and the President in the exercise of their respective constitutionally prescribed roles in the statutory enactment process.

Decisions of the USCAAF

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

One of the most significant USCAAF decision from the last decade was *LRM v. Kastenber*, 72 M.J. 364 (C.A.A.F. 2013). That decision helped to establish the legal parameters of Special Victims’ Counsels’ representation of their clients during court-martial proceedings. It thereby influenced the subsequent development of the military services’ Special Victims’ Counsel/Victims’ Legal Counsel programs.

Another significant USCAAF decision was last term's ruling in *United States v. Begani*, 81 M.J. 273 (C.A.A.F.), *cert. denied*, 142 S. Ct. 711 (2021). *Begani* was a major constitutional ruling upholding the susceptibility of members of the Fleet Reserve (essentially a retired status for enlisted members of the U.S. Navy with 20 or more but less than 30 years of active duty service) to court-martial jurisdiction. A similar issue is currently pending before the United States Court of Appeals for the District of Columbia in the case of *Larrabee v. Del Toro*, 19-00654.

United States v. Briggs, 78 M.J. 289 (C.A.A.F. 2019), *rev'd*, 141 S. Ct. 467 (2020), is a third significant case. *Briggs* concerned the statute of limitations governing rape cases during a certain period. *Briggs* followed USCAAF's earlier ruling in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018), in narrowly construing the statute of limitations, thereby reversing Lieutenant Colonel Briggs' rape conviction. Upon petition by the Solicitor General, the Supreme Court granted review and reversed USCAAF's ruling. The legal question in that case is not only important in its own right—a point that the Supreme Court itself emphasized, (141 S. Ct. at 469), but also serves as an important reminder that USCAAF decisions are subject to further review at the highest level of the United States' judicial system.

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

The USCAAF applies the principle of horizontal *stare decisis* similarly to other federal appellate courts. Horizontal *stare decisis* is defined by *Black's Law Dictionary* as: "The doctrine that a court, esp. an appellate court, must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself." (There is an additional component of the horizontal *stare decisis* doctrine in the Article III federal courts of appeals distinguishing between *en banc* decisions and panel decisions; that portion of the doctrine is inapplicable to USCAAF, which always sits *en banc*.) Under USCAAF's case law, 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 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.*

23. 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?

The same hierarchy of authority that generally applies throughout the federal civilian legal system also applies in the military justice system. The Constitution is atop the system and is the primary source of authority. Below the Constitution are statutes and

treaties. Whether statutes and treaties are on the same rung of the hierarchy or whether statutes are above treaties is the subject of disagreement. *See, e.g., Vasan Kesavan, The Three Tiers of Federal Law*, 100 NW. U.L. REV. 1479 (2006); *Igartúa v. Trump*, 868 F.3d 24, 25 (1st Cir. 2017) (Torruella, J., dissenting from denial of rehearing en banc). Below statutes and treaties are presidentially prescribed regulations, such as the Rules for Courts-Martial and the Military Rules of Evidence. Below such presidentially prescribed regulations are regulations issued by relevant Cabinet-level officials, such as the Secretary of Defense and the Secretary of Homeland Security. Below those are regulations prescribed by subordinates of those officials, including the Secretaries of the Military Departments. Regulations prescribed by lower-level subordinates assume the same role in the legal hierarchy that their proponents assume in the chain-of-command.

24. 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?

Without regard to any case that may come before the USCAAF if I am fortunate enough to be confirmed, a Rule for Courts-Martial or Military Rule of Evidence prescribed by the President is applicable unless inconsistent with a superior source of authority—the Constitution, a statute, or a treaty. In *Hamdan v. Rumsfeld*, the Supreme Court assumed that “complete deference is owed” to the President’s determination of whether it is practicable to adhere to a particular procedural or evidentiary rule that applies in federal civilian trials. 548 U.S. 557, 623 (2006).

Military Justice System

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

One of the major strengths of the military justice system is its provision of counsel to those involved in the system. For example, the military justice system makes counsel available free of charge and regardless of indigence to every accused at a special or general court-martial, as well as before the military justice system’s appellate courts. Counsel are also provided to many victims of alleged offenses under the military services’ Special Victims’ Counsel/Victims’ Legal Counsel programs. From my experience in the system, I know that the uniformed personnel in the military justice system are overwhelmingly highly motivated attorneys who are committed to executing their roles in the system to the best of their abilities. Historically, one of the weaknesses in the system has been the relatively brief period of time most of those highly motivated attorneys have served in particular military justice billets. I am aware that Congress took steps in the National Defense Authorization Act for Fiscal Year 2022 to address that concern. Another historic weakness of the military justice system has been the perception by some that the system is vulnerable to being “stacked” to promote a desired outcome. Again, reforms to the system enacted by the National Defense Authorization Act for Fiscal Year 2022 may help to address that perceived weakness.

26. 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?

Both individual and systemic challenges to the fairness and justness of the court-martial system to military personnel accused of UCMJ offenses are currently under litigation at both the trial and appellate levels. It would, therefore, be inappropriate for me to express an opinion concerning those matters.

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

I am aware that the military justice system has made great strides in protecting victims' rights over the past decade, particularly with the enactment of Article 6b, UCMJ, 10 U.S.C. § 806b—the military's victims' rights statute—and the development of the military services' Special Victims' Counsel/Victims' Legal Counsel programs. I am also aware that section 541 of the National Defense Authorization Act for Fiscal Year 2022 further expanded victims' rights in the system. Whether additional protections should be provided is a matter committed to Congress and the President in their respective roles in the establishment of the military justice system's framework.

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

Commanders are responsible for maintaining good order and discipline in their units. They have many tools at their disposal. But once a case enters the special or general court-martial realm, the essence of the case is, as the Supreme Court has emphasized, "judicial." *United States v. Ortiz*, 138 S. Ct. 2165, 2174 (2018). Courts-martial operate "as instruments of military justice." *Id.* at 2175. As the "Powell Report" noted in 1960:

Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.

Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army, Report to Honorable Wilber M. Brucker 12 (18 January 1960).

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

I understand that Combatant Commanders typically have court-martial convening authority comparable to that of other commanders of comparable grades. I also understand that Combatant Commanders often allow their subordinate service component commanders to exercise military justice authority over members of their respective

military services. Such matters are committed to the discretion of Combatant Commanders.

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

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

I am deeply concerned by reports of racial disparity in the State, Federal, and military justice systems. Though the law is almost always facially neutral, disparities can appear in the application of the law, disadvantaging some groups and denying them constitutional rights. Racial disparities in any criminal justice system should be studied carefully to identify their causes and address them.

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

I am deeply concerned by reports of racial disparity in the State, Federal, and military justice systems. Though the law is almost always facially neutral, disparities can appear in the application of the law, disadvantaging some groups and denying them constitutional rights. As in any other criminal justice system, racial disparities in the military justice system should be carefully studied to identify their causes and address them.

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

USCAAF does not have a role in addressing racial disparity *per se*. On the other hand, USCAAF does have a role in addressing racial discrimination. As the Court has stated, “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. In your view, are there other changes to the military justice system called for in light of changes in U.S. criminal jurisprudence?

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 and that numerous such arguments are currently pending before military trial-level and appellate courts. Therefore, under Canon 3(A)(6) of the Code of Conduct for Federal Judges, 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.

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.

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

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.* USCAAF has applied that standard in its own capital jurisprudence. *E.g.*, *United States v. Murphy*, 50 M.J. 4, 8 (C.A.A.F. 1998).

35. 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?

I understand that after *Furman v. Georgia* was decided, seven military death sentences were set aside on appeal based on a determination that the military death penalty system under which those sentences were imposed was not compliant with *Furman*. *See generally United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983). I also understand that since the current military death system was promulgated in 1984, ten military death sentences have been reversed on appeal (Walker, Kreutzer, Murphy, Thomas, Dock, Curtis, Simoy, Quintanilla, Parker, and Witt) and one has been presidentially commuted (Loving). In four of the ten cases that were reversed on appeal, the reversal was based in whole or in part on ineffective assistance of counsel (Kreutzer, Murphy, Curtis, and Witt). Two were reversed due to the military judge’s erroneous instruction on how the court-martial members were to vote during their sentencing deliberations (Thomas and Simoy).

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

Experience and specialized training are necessary to prepare military justice practitioners for any form of complex litigation. That is especially true in a capital context.

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.

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

Article 37 of the Uniform Code of Military Justice prohibits unlawful command influence. 10 U.S.C. § 837. Rule for Courts-Martial 103 provides additional guidance concerning unlawful command influence. The Fifth Amendment's Due Process Clause is another source of legal authority that must be applied in an unlawful command influence context. It is the role of a USCAAF judge to faithfully and objectively apply those sources of law.

Objectivity

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

A judge must always be vigilant to guard against allowing anything to impinge on the judge's objectivity or appearance of objectivity. Where that is not possible, it is appropriate for the judge to recuse himself or herself from a particular case. I am aware of no current challenge to my objectivity. Judges on USCAAF do periodically recuse themselves from specific cases for reasons specific to those cases. If I were confirmed, I would carefully assess on a case-by-case basis whether there is any reason why it would not be appropriate for me to sit on an individual case. For example, in a case raising categorical issues about military retirees, it may be appropriate for me, as an active component retiree, to recuse myself if I were fortunate enough to be confirmed.