

Senate Armed Services Committee
Advance Policy Questions for Ms. Michele Pearce
Nominee to be General Counsel of the Department of the Army

Duties and Responsibilities

Section 7019 of title 10, U.S. Code, establishes the position of the Army General Counsel and provides that the General Counsel shall perform such functions as the Secretary of the Army may prescribe.

1. What is your understanding of the current duties and functions of the Army General Counsel?

Answer: Section 7019 of Title 10 provides that the General Counsel of the Army shall perform such functions as the Secretary of the Army may prescribe. Pursuant to this section of Title 10, the Secretary has prescribed the General Counsel's duties through various general orders, regulations, and memoranda. Under these authorities, the General Counsel serves as legal adviser to the Secretary of the Army and is the chief legal officer of the Department of the Army. As such, the General Counsel provides legal advice to the Secretary of the Army, the Under Secretary, the Assistant Secretaries, and other officials within the Army Secretariat; coordinates legal and policy advice for all other members of Army headquarters; and determines the controlling legal position of the Department. The General Counsel's responsibilities extend to any matter of law, and to other matters as directed by the Secretary, including: (1) providing professional guidance to the Army's legal community; (2) overseeing matters in which the Army is involved in litigation; (3) serving as the Designated Agency Ethics Official for the Department; (4) exercising the Secretary's oversight of intelligence and counterintelligence activities; (5) monitoring sensitive activities and investigations for legality and propriety; (6) taking final action on certain claims filed against the Army; and (7) working with The Judge Advocate General to oversee criminal and administrative investigations.

2. If confirmed, what additional duties and functions might you expect the Secretary of the Army to prescribe for you, particularly in light of the lines of effort comprising the 2018 National Defense Strategy (NDS)?

Answer: If confirmed, I anticipate that the Secretary of the Army will expect me to lead and manage the Office of the Army General Counsel efficiently and effectively to ensure that the office provides timely and accurate legal advice in support of the National Defense Strategy (NDS). In particular, I would be expected to ensure that NDS lines of effort of building a more lethal force, strengthening alliances with allies and partners, and streamlining Army operations comply with law, regulations, and policy. I am prepared to advise Army leadership and assist in their efforts to modernize the force to ensure a resilient and rapidly innovating force that will compete, deter, and win in the current national security environment. I anticipate that the Secretary would expect me to maintain strong, collaborative relationships with The Judge Advocate General of the Army and members of the Secretariat and Army staff, as well as the General Counsel of the Department of Defense and the General Counsels of the other military services, defense agencies, and other federal agencies, as appropriate.

3. If confirmed, specifically what would you do to ensure that your tenure as Army General Counsel epitomizes the fundamental requirement for civilian control of the Armed Forces embedded in the U.S. Constitution and other laws?

Answer: I would ensure that the final decision on all questions of law and policy are made by members of the civilian Secretariat after close cooperation and consultation with the uniformed Department of the Army staff. I would work to ensure that Headquarters, Army Senior Leaders know that OGC advises the Secretary of the Army and the Secretariat. I would also ensure that no confusion exists regarding the chains of command between the attorneys working for the Office of the General Counsel versus those working for The Judge Advocate General of the Army.

4. In your opinion, who is the “client” of the Army General Counsel?

Answer: The General Counsel’s client is the Department of the Army, acting through its authorized officials, including, but not limited to, the Secretary, the Under Secretary, the Assistant Secretaries, and other principal officers within the Army Secretariat and the Army Staff.

5. What is your view of the responsibility and authority associated with the Army General Counsel’s designation as the Chief Legal Officer of the Department of the Army?

Answer: The General Counsel and OGC’s subordinate attorneys serve as counsel for the Department of the Army, the Secretary, and other Secretariat officials. As a team, we coordinate legal and police advice for Headquarters, Department of the Army; determine the Army’s position on all legal questions and procedures; provide legal advice on Army acquisition, logistics, and technology programs; give final Army legal clearance on all legislative proposals and comments thereon of interest to the Department; establish and administer the Army’s policies concerning legal services; exercise technical supervision over, and professional guidance to, all Department of the Army attorneys and legal offices; oversee compliance with the Freedom of Information Act and the Privacy Act within the Department; oversee the Army Ethics Program and exercise final authority within the Army for all ethics matters; exercise the Secretary of the Army’s oversight of intelligence activities and monitor those activities for legality and propriety; serve as the point of contact for legal matters between the Department of the Army and other departments and agencies; and take final action on claims filed against the Army.

6. If confirmed, how would you order your relationship with the General Counsel of the Department of Defense (DOD) in his/her role as the DOD Chief Legal Officer?

Answer: The General Counsel of the Department of Defense is the chief legal officer and final legal authority for all legal issues facing the Department of Defense, to include the Department of the Army. I look forward to continuing the strong working relationship I have already established with the General Counsel of the Department of Defense in my role as the Principal Deputy General Counsel of the Army. I am committed to working collaboratively on matters of mutual interest to further the best interests of the Department of the Army and the Department of Defense.

7. Is there value in a General Counsel’s practice of “preventive law”, in your view? How, if at all, would you engage in the practice of preventive law, if confirmed to be the Army General Counsel? Specifically, what would you do to inculcate the practice of preventive law in the OGC (OGC) and in law offices throughout the Army?

Answer: Yes, there is value in a General Counsel’s practice of “preventive law.” All attorneys should practice preventive law, anticipating issues to prevent legal problems before they escalate into larger issues or litigation. I not only see value in the General Counsel taking lead in the practice of

“preventive law,” I see it as a critical responsibility of the General Counsel and OGC. If confirmed, it would be my duty to protect the Army from unnecessary legal issues and litigation to better shepherd Army resources – both people and money – to ensure the Army can focus on its primary mission without distraction. Conflict management and alternative dispute resolution (ADR) techniques, such as mediation and facilitation, are just some of the tools that I would ensure my team in OGC, and the rest of attorneys across the Army, seek to practice to prevent small legal problems from becoming large ones. In fact, the Army General Counsel is specifically tasked by the Secretary of the Army to develop and oversee policies and programs for the Army’s ADR program – a specific form of preventive law.

Alternate Dispute Resolution (ADR) programs encourage the use of dispute resolution and conflict management processes and techniques to assist parties to a dispute in coming to an agreement, short of litigation.

8. What is your view of the role of the Army General Counsel in facilitating the provision of ADR services to the Department of the Army?

Answer: The role of the General Counsel in facilitating the provision of ADR services to the Department of the Army is to develop and oversee policies and programs to remove the barriers to ADR practice. I see the General Counsel as encouraging the use of ADR at the earliest stage feasible to the maximum extent practicable and appropriate, while also facilitating training in mediation and negotiation skills, consistent with law, regulations, and policy.

9. Are there particular types of disputes in the context of Army activities, as to which you perceive ADR may be of particular utility?

Answer: Every dispute, regardless of subject matter, is a candidate for ADR. Workplace disputes, especially discrimination (EEO) claims and grievances, are particularly appropriate for ADR procedures like mediation.

10. In your view, what role, if any, should the Army General Counsel and attorneys assigned to OGC play in developing and reviewing Army military personnel policies and advising on the application of such policies in individual cases, including cases before a constituent board of the Army Review Boards Agency?

Answer: The Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA (M&RA)) is a primary client of Army OGC. The ASA (M&RA) is the proponent for all Army Regulations regarding Army Grade Determination Review Boards, the Army Clemency and Parole Board, the Army Discharge Review Board, and the Army Board for Correction of Military Records. The ASA (M&RA) regularly consults with Army OGC attorneys regarding military personnel policy questions. Army OGC attorneys have a breadth of experience and knowledge in military personnel law and policy.

The Deputy Assistant Secretary of the Army (Review Boards) (DASA (RB)) reports directly to the ASA (M&RA). Normally, the DASA (RB) makes discretionary grade determinations on behalf of the Secretary of the Army for officers below the grade of brigadier general involving service retirement, physical disability retirement, computation of retired pay, or other separation for physical disability. The DASA (RB) has a Senior Legal Advisor who works closely with Army OGC attorneys to ensure consistency in action with applicable Army and DoD policy.

11. If confirmed, what role would you assign to yourself in helping to expedite timely consideration of and decision on the vast backlog of “years old” cases pending before a

constituent board of the Army Review Boards Agency?

Answer: If confirmed, I will ensure that Army General Counsel attorneys prioritize these types of actions and continue to work closely with the counsel assigned to the DASA (RB). I will ensure OGC constantly evaluates the processes in place and looks for ways they can be improved.

Qualifications

12. What background and experience do you possess that qualify you to serve as the General Counsel of the Department of the Army?

Answer: I have served in the executive and legislative branches of government for more than 23 years. During this time, I served on active duty in the United States Air Force at the highest levels of Military Department leadership; worked as the permanent clerk of the Court of Appeals for the Armed Forces for Chief Judge Andrew Effron; and served as staff and counsel in the United States Senate and House of Representatives responsible for national security, homeland security, and veterans affairs matters and legislation.

In these leadership positions, I was responsible for managing teams tasked with interpreting, analyzing, and assessing the meaning of executive orders, statutes, and regulations. I also advised on appropriations matters related to the Defense, Homeland Security, Military Construction, and Veterans Affairs Subcommittees of the United States Senate Appropriations Committee.

I have facilitated joint, enterprise-wide strategic organizational transformation with respect to the following issues and programs: DoD's Sexual Harassment and Equal Employment Opportunity practices and procedures; military health care reform initiatives; personnel system design and implementation; and DoD Sexual Assault Prevention and Response policies and programs.

In each case, I solved complex legal and policy challenges while appropriately balancing significant public and congressional interests. If confirmed to serve as the Army's General Counsel, I will continue to look for ways to innovate and drive reform efforts to ensure the legal team is postured to successfully address current and future mission requirements effectively and efficiently.

13. Do you believe that there are any actions you need to take to enhance your ability to perform the duties of the Army General Counsel?

Answer: Based on my background and experiences, as well as having served as the Principal Deputy General Counsel since January, I believe I have the skills and knowledge to serve as the Army General Counsel.

Major Challenges and Priorities

14. If confirmed, what would be your vision for the OGC of today? For the OGC of the future?

Answer: If confirmed, my current vision for OGC is to continue (1) providing professional guidance to the Army's legal community, (2) overseeing matters in which the Army is involved in litigation, (3) serving as the Designated Agency Ethics Official for the Department, (4) exercising the Secretary's oversight of intelligence and counterintelligence activities, (5) monitoring sensitive activities and investigations for legality and propriety, and (6) taking final action on certain claims filed against the Army. For OGC's future, I envision lawyers supporting the modernization of the force by enhancing

OGC capacity in the fields of cyber security, information law, and intellectual property while supporting the Army's efforts to effectuate the 2018 National Defense Strategy's lines of effort.

15. What do you consider to be the most significant challenges you will face if confirmed as Army General Counsel?

Answer: To confront the significant challenges ahead, OGC attorneys must have the training and expertise required to provide timely and expert legal advice regarding modernization and business practice reforms while ensuring the vital focus on military readiness and lethality. The Army will require attorneys knowledgeable in cybersecurity, intellectual property, and the challenges posed by artificial intelligence. The legal and policy challenges I expect to confront at a minimum are: (1) the Army's ongoing efforts to insure diversity and promote fairness for all who serve the nation in the United States Army; (2) prevent and respond appropriately to incidents of domestic violence, sexual harassment, and sexual assault; (3) suicide prevention; (4) the continuing integration of women into previously closed combat positions and occupations; (5) the implementation of recent legislative reforms in military justice and health care; (6) compliance with environmental laws; (7) continued focus on senior leader accountability; (8) oversight of Army intelligence activities; (9) acquisition and modernization efforts; and (10) ethics reform.

16. What plans do you have for addressing each of these challenges, if confirmed?

Answer: I will work closely with the Secretary of the Army, members of the Secretariat, the Chief of Staff of the Army, the Army Staff, and The Office of the Judge Advocate General to provide legal support and advice to confront the challenges facing our Army. I will ensure the attorneys in the Office of General Counsel (OGC) have access to training and development opportunities necessary to gain any additional expertise required to confront these challenges. I will also work with The Judge Advocate General and other Army attorney qualifying authorities to identify resources as well as training and development opportunities for attorneys throughout the Army to develop the skills necessary to confront these challenges. Regarding the legal and policy challenges I have identified, I will ensure OGC attorneys – always standing point – are fully engaged with our clients and ready to provide legal advice and find the legal solutions necessary to facilitate mission success.

17. If confirmed, what broad parameters would you establish as to the types of legal and policy issues on which you and the OGC *must be consulted*?

Answer: If confirmed, I intend to support the Secretary, Under Secretary, and the Assistant Secretaries on all material and substantive matters being worked by the Secretariat of the Army. I believe that attorneys who are problem solvers are essential to shaping the legal and policy landscape. As an organization, I believe that the attorneys who comprise OGC must be participants in all stages of decision making. It would be my duty to ensure that these OGC attorneys have the training and professional skills necessary to provide sound legal advice, and are fully integrated into the Army's decision making process.

18. If confirmed, are there specific matters on which your predecessor Army General Counsels have issued legal opinions that you would expect to reconsider and possibly revise? If so, which opinions, in which practice areas, do you believe might merit reconsideration?

Answer: None at this time.

19. If confirmed, what innovative ideas would you consider providing to the Secretary of the Army to improve the organization and operations of Army OGC? To improve the

delivery of legal services Army-wide?

Answer: If confirmed, I would undertake a review of legal support to Army modernization efforts. In particular, I would review legal support related to cyber security, information law, and intellectual property.

20. If confirmed, how would you use organizational climate surveys to enhance your leadership and management of the OGC?

Answer: If confirmed, I would use organizational climate surveys to assess the priorities and views of the OGC staff, allowing me to make any necessary adjustments and improvements. I would meet with staff to assess progress and identify additional opportunities for improvement.

21. If confirmed, what actions would you take to sustain a productive and mutually beneficial relationship between Congress and the Department of the Army?

Answer: As a former staffer in the Senate and House of Representatives, I believe working to maintain collaborative relationships is essential to facilitating the Army's national security mission. If confirmed, I am committed to developing strong relationships and to facilitating the Army's national security mission. I am committed to and maintaining open lines of communication with Congress. I will work closely with Members of this Committee and Congress, as well as with the professional staff member, to focus on the challenges and opportunities currently facing the Army. I will also provide regular feedback on legislative reforms and potential legislation affecting the Army to ensure Congress is always informed.

Army Senior Counsels—Roles and Relationships

22. How are the responsibilities and authorities for providing legal services to the Department of the Army allocated between the General Counsel of the Army; The Judge Advocate General of the Army; the Command Counsel, U.S. Army Materiel Command; and the Chief Counsel, U.S. Army Corps of Engineers?

Answer: The primary responsibilities and authorities for providing legal services to the Department of the Army are allocated according to federal statute, Headquarters, Department of the Army General Orders, Army Regulation, and close coordination between all members of the Army legal community. Title 10, sec. 7019 establishes the position of General Counsel of the Department of the Army, and provides “[t]he General Counsel shall perform such functions as the Secretary may prescribe.” Title 10, sec. 7036 establishes the position of The Judge Advocate General of the Army (TJAG), and provides that officer “shall perform duties prescribed by the Secretary of the Army and by law.” Title 10, Sec. 7037 provides additional enumerated authority and responsibilities for TJAG, including the duty to “direct the members of the Judge Advocate General’s Corps in the performance of their duties.”

Headquarters, Department of the Army General Orders (GO) No. 2020-01 adds additional detail to HQDA legal responsibilities and authorities, identifying the General Counsel as the legal counsel to the Secretary of the Army and the chief legal officer of the Army. It further provides that the “GC’s responsibility extends to any legal question or procedure, coordinating legal and policy advice within HQDA, and to other matters as the Secretary of the Army directs.” By comparison, TJAG is the “military legal adviser to the SECARMY, CSA and all officers and agencies of DA,” according to GO No. 2020-01. Further, TJAG provides independent legal advice to the Secretary of the Army, the Chief of Staff of the Army, the Secretariat, and the Army Staff (ARSTAF), is the principal legal adviser to the SECARMY and CSA on military justice matters, and is the ARSTAF proponent for legal matters and services. GO No. 2020-01 enumerates additional responsibilities for both the GC and TJAG.

The U.S. Army Materiel Command (AMC) is a 4-STAR Army Command whereas the U.S. Army Corps of Engineers (USACE) is a 3-STAR Direct Reporting Unit of Headquarters, Department of the Army. AMC and USACE have separate legal offices with a principal legal counsel (career civilian appointed to the Senior Executive Service). The General Counsel is the qualifying authority for the AMC Command Counsel and the USACE Chief Counsel. By regulation, the AMC Command Counsel and the USACE Chief Counsel are responsible for keeping the General Counsel informed of significant legal actions and the General Counsel has technical supervision over the legal services they provide. The General Counsel provides input into the annual performance rating of the AMC Command Counsel and the USACE Chief Counsel.

23. What is the role of the Army General Counsel and other Army Senior Counsels in ensuring that attorneys under their supervision adhere to the Attorney Rules of Professional Conduct? If confirmed, how would you approach this critical supervisory duty with regard to Army OGC?

Answer: The Army General Counsel is the senior qualifying authority for all attorneys in the Department of the Army. While The Judge Advocate General, the Army Materiel Command, and the Chief of Engineers Command Counsel are all qualifying authorities for the attorneys that practice under their supervision, the Army GC has overall responsibility for the ethical practice of law and the adherence to the Attorney Rules of Professional Conduct for all attorneys in the Department of the

Army. If confirmed, I would work with Senior Army Ethics Counselors to review current Professional Conduct training for all Army attorneys, as well as current oversight protocols within the Army to ensure the Army attorneys are employing sound ethical practices. It would quickly address any lapses or concerns uncovered in such a review.

24. If confirmed, how would you employ the forum provided by the Department of the Army Professional Conduct Council?

Answer: All Army lawyers, and all non-Army lawyers who practice law in Army venues, such as courts-martial, must comply with AR 27-26, Army Rules of Professional Conduct for Lawyers. To ensure a common understanding and execution of These Rules of Professional Conduct, the Council provides authoritative uniform interpretations of the Army Rules in AR 27-26, consisting of the four Senior Legal Counsels in the Army: The General Counsel, The Judge Advocate General, the Command Counsel, Army Materiel Command, and the Chief Counsel, Army Corps of Engineers. The Council is not a standing council. It convenes only when the Council accepts a request for an authoritative interpretation of a specific Army rule. In addition to the training for all Army attorneys, I will employ this Council as necessary to carry out this critical supervisory duty.

25. What role, if any, does the Army General Counsel play in evaluating the performance of other Army Senior Counsel?

Answer: The Army General Counsel provides input to the supervisor of every Army Senior Counsel on their annual performance evaluation.

26. What is your understanding of the unique role and authority of The Judge Advocate General of the Army vis-a-vis the General Counsel of the Army?

Answer: The Judge Advocate General (TJAG) and the General Counsel of the Army are a team – both dedicated to the advancement of the Army mission and to the legal support of their respective clients – the Chief of Staff of the Army for TJAG and the Secretary of the Army for the General Counsel.

27. What is your view of the authority of The Judge Advocate General of the Army, particularly as regards the provision of independent legal advice to the Secretary of the Army and the Chief of Staff, Army?

Answer: Pursuant to title 10 section 7037, The Judge Advocate General, in addition to other duties prescribed by law, (1) is the legal adviser of the Secretary of the Army and of all officers and agencies of the Department of the Army; (2) shall direct the members of The Judge Advocate General's Corps in the performance of their duties; and (3) shall receive, revise, and have recorded the proceedings of courts of inquiry and military commissions. By statute, TJAG provides independent advice to both the Secretary of the Army and the Chief of Staff of the Army.

28. What is your view of the responsibility of Army judge advocates to provide independent legal advice to military commanders and other Army officials and employees?

Answer: My assessment, based on my active duty service and other experiences, and supported by multiple studies, is that proposals to remove case disposition authority from military commanders over felony violations of the UCMJ, including sexual assaults, would, if enacted, unnecessarily create a separate justice system that would disempower military commanders and erode command responsibility. These adverse consequences could be disastrous for the lethality and readiness of our force.

Soldier discipline is the foundation of any well-trained, lethal force. Discipline is built, shaped, and reinforced over a Soldier's career by commanders with disposition authority. Engaged, educated commanders are critical to prevention and response efforts for all forms of misconduct that occur in Army formations, to ensure continued readiness and provide for the Nation's security. Commanders must own accountability in their ranks, and to be effective, they must have the necessary tools to enforce this accountability. Likewise, commanders must dispassionately and effectively administer military justice, ensuring both respect for, and adherence to, the rule of law. Doing so safeguards the understanding by Soldiers and the public that the military justice system provides a just and effective means of addressing allegations of misconduct, and administering discipline, when appropriate. Commanders, advised by their judge advocates, ensure the UCMJ is the most progressive justice system in the world, with exceptional care for victims, protection of an accused's due process rights, and concern for the needs of the community. The commander's role in the military justice process, particularly for deployed units, is essential.

The FY20 NDAA requires DoD to undertake a current study of such proposals. While that study remains underway, enacting any such proposals would be premature. I look forward to reviewing the results of that study with this Committee and the rest of Congress when it is complete.

29. How do you view the role and responsibility of the Army General Counsel in the supervision and oversight of military justice matters vis-à-vis The Judge Advocate General of the Army?

Answer: The Army General Counsel works closely and collaboratively with The Judge Advocate General of the Army (TJAG). TJAG, however, is the principal legal adviser to the Secretary of the Army and the Chief of Staff of the Army on matters of military justice. TJAG is responsible for administering the Army military justice system and an independent trial and appellate judiciary.

30. What is your assessment of the potential impact, if any, of proposals to remove from military commanders, case disposition authority over felony violations of the UCMJ, including sexual assaults?

Answer: My assessment, based on my active duty service and other experiences, and supported by multiple studies, is that proposals to remove case disposition authority from military commanders over felony violations of the UCMJ, including sexual assaults, would, if enacted, unnecessarily create a separate justice system that would disempower military commanders and erode command responsibility. These adverse consequences could be disastrous for the lethality and readiness of our force.

Soldier discipline is the foundation of any well-trained, lethal force. Discipline is built, shaped, and reinforced over a Soldier's career by commanders with disposition authority. Engaged, educated commanders are critical to prevention and response efforts for all forms of misconduct that occur in Army formations, to ensure continued readiness and provide for the Nation's security. Commanders must own accountability in their ranks, and to be effective, they must have the necessary tools to enforce this accountability. Likewise, commanders must dispassionately and effectively administer military justice, ensuring both respect for, and adherence to, the rule of law. Doing so safeguards the understanding by Soldiers and the public that the military justice system provides a just and effective means of addressing allegations of misconduct, and administering discipline, when appropriate. Commanders, advised by their judge advocates, ensure the UCMJ is the most progressive justice system in the world, with exceptional care for victims, protection of an accused's due process rights, and concern for the needs of the community. The commander's role in the military justice process,

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The FY20 NDAA requires DoD to undertake a current study of such proposals. While that study remains underway, enacting any such proposals would be premature. I look forward to reviewing the results of that study with this Committee and the rest of Congress when it is complete.

31. If confirmed, would you propose any changes in the current relationships between the Army General Counsel and The Judge Advocate General of the Army?

Answer: I do not believe any changes are necessary at this time.

32. If confirmed, would you propose any changes to the current relationships and/or allocation of responsibilities between attorneys in the OGC and uniformed Army judge advocates?

Answer: I do not believe any changes are necessary at this time.

33. Are the legal opinions of the Army General Counsel binding on all Army attorneys?

Answer: Yes.

34. If confirmed, how would you ensure that controlling legal opinions of your office are available to all Army attorneys, including judge advocates?

Answer: I would ensure that opinions continue to be distributed across the legal community, working in close coordination with TJAG.

- Article 66(c) of the Uniform Code of Military Justice (UCMJ) mandates that military Criminal Courts of Appeal review the legal and factual sufficiency of the evidence underpinning certain courts-martial convictions and affirm only those findings of guilty that the appellate court finds correct in law and in fact. For the most part, state and federal civilian appellate courts apply only a legal sufficiency standard in their review of criminal convictions.

35. In your view, should the duty and power to review courts-martial convictions for factual sufficiency be retained in military appellate courts? Please explain your answer.

Answer: Yes. In the military justice system, the Courts of Criminal Appeals play a critical role in protecting the rights of the accused and the integrity of the system of justice itself. Factual sufficiency review offers an additional, though rarely employed, safeguard for a system that tries service members who have pledged their lives to defend the principles of due process of law.

36. In your view, how do unlawful command influence and the appearance of unlawful command influence jeopardize the credibility of, and public confidence in the military justice system?

Answer: Unlawful command influence erodes the trust placed in commanders to perform their statutory duty to safeguard the morale, physical well-being, and the general welfare of those under their command. Unlawful influence, and the appearance of unlawful influence, risks the credibility of the military justice system in the eyes of crime victims, those accused of offenses, the Soldiers subject to the system, and to the public at large.

37. What is your view of the changes to article 37 of the Uniform Code of Military Justice enacted in the NDAA for FY 2020?

Answer: The recent changes to article 37 were the most significant in 50 years and I applaud any

measure that strengthens command involvement and promotes educational efforts focused on the military justice system. These changes facilitate senior leaders' discussions with their subordinates concerning activities that harm good order and discipline, enhance senior leaders' ability to deter misconduct, and enable leaders to more effectively mentor their subordinates.

38. If confirmed, what factors would you weigh in advising and assisting a client in determining whether an order from a military or civilian superior is unlawful? How would you advise such a client to respond to an order of questionable legality? Please explain your answer.

Answer: Orders that are contrary to law or regulation are unlawful and must not be followed. If an official asked for my advice about the legality of an order, I would review the order consistent with applicable law or regulation and provide appropriate legal advice. If that review has not made the official feel comfortable about following the order, I would advise the official to seek clarification and provide the official with the information necessary to ask the right questions. Ultimately, it is up to the official whether to follow the order, and the official should consider the potential consequences of following or not following the order, including whether disobeying the order is a criminal offense. If I believed the result of the order was the commission of a criminal act, my Rules for Professional Responsibility require that I advise the official not to follow the order.

Section 548 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 provides that not later than December 1, 2020, the Secretary of Defense shall carry out a program to provide legal counsel to victims of domestic violence offenses who are otherwise eligible for military legal assistance.

39 In your view, how do the needs of victims of domestic violence offenses differ from the needs of victims of sexual assault? How would any such differences affect the parameters of a legal counsel program established for domestic violence victims?

Answer: All victims of sexual assault and domestic violence require care and services from leaders and providers in their community. While some care and services are the same, from a legal perspective, victims of domestic violence need services specifically focused on marital rights, annulment, separation, divorce, and financial nonsupport (spousal support).

Accordingly, I will work with The Judge Advocate General to establish a program in accordance with Section 548, which will become effective 1 December 2020.

40. If confirmed, what role would you establish for yourself in assisting the Secretary of Army and the Secretary of Defense in developing and implementing the program required by section 548?

Answer: If confirmed, I look forward to working with The Judge Advocate General to ensure that Section 548 is implemented to provide legal assistance and special victim counsel services to victims of domestic violence across the Army. I would advise the Secretary of the Army on any policy changes that would need to be enacted to fulfil the intent of the legislation and further advise on any resourcing shortfalls.

41. What changes, if any, would you recommend to the Army Special Victims' Counsel program, if confirmed?

Answer: If confirmed, I look forward to reviewing the Army Special Victims' Counsel program and working with The Judge Advocate General to implement any changes that may be needed.

42. In your view, how do the needs of military child victims of sexual abuse differ from the needs of adult victims of sexual assault and from those of domestic violence victims? How would any such differences affect the parameters of a legal counsel of guardian *ad litem* program established for military child victims of sexual abuse?

Answer: Children who are sexually abused or who suffer from physical or mental abuse require special care and services from the legal community.

The Army's current program provides such children with a Special Victim Counsel (SVC) in cases involved alleged abuse who is responsible for vigorous representation and ensuring that any legal action taken considers the best interests of the child, including the appointment of a guardian. .

Information Law and Practice

The Army General Counsel serves as the Army's appellate authority for appeals of denials of the release of information requested under the Freedom of Information Act (FOIA).

43. What is the current backlog of FOIA appeals in Army OGC?

Answer: As of June 20, 2020, Army OGC has 56 open FOIA appeals.

44. If confirmed, how would you undertake to reduce this backlog?

Answer: If confirmed, I would continue to leverage Army Reserve Judge Advocates who have been instrumental in reducing the backlog by more than 100 appeals.

45. If confirmed, what factors would you consider in determining whether or not to recommend the invocation of Executive Privilege in regard to a request from the Senate Armed Services Committee for information under the cognizance of the Department of the Army?

Answer: If confirmed, I would follow applicable laws and long-standing Department and Executive Branch practice regarding accommodation of Congressional oversight requests.

46. How does the Army address or mitigate privacy concerns associated with the Commander's Risk Reduction Dashboard? Given the sensitivity of the personal information aggregated in the Dashboard, should the Army's approach to compliance with privacy laws and regulations be adjusted in any way, in your view?

Answer: The Army mitigates privacy concerns by imposing extensive administrative and technical safeguards to protect the information on the Commander's Risk Reduction Dashboard. In addition, Dashboard users receive privacy training. Based on my current knowledge, I believe the Army's practices regarding the Dashboard comply with applicable privacy laws and policies, while enabling leaders to access information they require to care for and evaluate the wellbeing of their Soldiers.

47. How does the Army navigate the requirements of the Health Information Portability and Accountability Act and a Soldier's desire for confidentiality in determining what information about a Soldier's mental or behavioral health—including treatment for a mental or behavioral health condition—can and should be provided to the chain of command? Should the Army's approach to this matter be revised in any way, in your view?

Answer: The Army navigates the requirements of the Health Information Portability and Accountability Act by adhering to the Department of Defense's implementing regulation—Department

of Defense Instruction (DoDI) 6025.18. This regulation narrowly defines the circumstances under which a covered entity or business associate may disclose a Soldier's protected health information. The Army also complies with DoDI 6490.08, which narrowly defines the situations when a Soldier's mental and behavioral health information may and must be disclosed to the Soldier's chain of command. I am currently aware of no revisions that the Army should make in regard to its approach.

Criminal and Administrative Investigations and Intelligence Oversight

Per Army General Order 2019-01, *Assignment of Functions and Responsibilities Within Headquarters, Department of the Army*, the Army General Counsel is responsible for overseeing criminal and administrative investigations, in coordination with The Judge Advocate General.

48. If confirmed, what role would you establish for yourself in providing advice to the U.S. Army Criminal Investigation Command (CID), including acting on requests for consensual or nonconsensual interceptions of wire, electronic, and oral communications, and pen register operations?

Answer: The GC coordinates with the Judge Advocate General to provide advice to CID on the development and execution of criminal investigations policy, and has delegated approval authority to the Commanding General, CID for consensual interceptions of wire, electronic, and oral communications and pen register operations. The GC oversees the use of these sensitive investigative techniques through quarterly reports and is the approval authority for any exceptions to the policy for conducting them. The GC also approves or denies CID requests to seek Attorney General or judicial authorization for nonconsensual interception of wire, electronic, oral communications, and pen register operations. If confirmed I would ensure that the use of consensual or nonconsensual communications intercepts not only is consistent with the law, but also necessary to the conduct of law enforcement activities.

49. In light of the holding in *U.S. v. Dreyer*, what legal standard does Army CID apply in determining whether to authorize its special agents to participate in investigations of Internet Crimes Against Children (ICAC) in which the suspected perpetrator's military affiliation has not yet been established with certainty? If confirmed, would you recommend any changes to this standard?

Answer: Special agents have the authority to investigate Internet Protocol (IP) addresses reasonably likely to be attributable to online child sexual assault exploitation with a military nexus. The threshold for military criminal investigative action in online child sexual exploitation cases require a military nexus. CID has agents trained in ICAC processes and procedures related to this requirement, and have representatives on all regional ICAC near Army bases.

50. In your view, do Army CID special agents have adequate authority and resourcing to participate in multi-jurisdictional law enforcement task forces related to the investigation of ICAC offenses?

Answer: The Army continues to work a joint solution to provide adequate authority and resourcing to combat these crimes. The CID has representatives on all appropriate regional ICAC, which are multi-jurisdictional law enforcement task forces, and the authority it needs to address these offenses.

Recent reports by the Government Accountability Office and by private organizations

have raised significant questions about racial disparity in the military justice system—most notably at the investigation stage.

51. If confirmed, what steps would you take to address potential racial disparity in in the context of Army investigations—whether such investigations are criminal or administrative in nature?

Answer: In 99% of all criminal investigations, the victim or complaint identifies the alleged offender. Army investigators have little to no influence over who is identified as an alleged offender, and Army investigators have no discretion in whether to open an investigation or not, since they are required to investigate all criminal allegations in accordance with both DOD and Army policies.

When CID names an individual as a subject in a criminal investigation report, the individual is “titled”. The decision to “title” is operational only—not a legal or judicial decision—and titling does not mean an individual has been arrested, charged, or convicted of a crime. Yet, the name of an individual who has been titled is listed in the Defense Clearance and Investigations Index (DCII), a computerized registry that contains all DOD criminal investigations. More than 27 law enforcement and security agencies have access to the DCII, and information contained in the DCII may be used for a variety of purposes (e.g., civilian employment decisions, military assignment and promotion decisions, security determinations). Once an individual has been titled, it is almost impossible to remove that individual’s name from the DCII and other databases.

52. Does the Army have in place a fair and objective process to address individual requests to be removed from the “title” block and the databases in which titling information is recorded?

Answer: Yes. Titling is a DOD IG action required when credible information would lead a reasonable investigator to believe that an individual has committed a crime. Only information pertaining to a titled individual, when probable cause exists to believe that the individual committed a crime, is released to review boards, promotion boards, etc. Individuals who believe they have been unfairly titled can seek redress through the CID Commanding General, and if relief is not granted, may appeal to the Army Board for the Correction of Military Records. If the titling action is overturned, the individual’s name is removed from the Defense Clearance and Investigations Index (DCII), the computerized registry that contains all DOD criminal investigations.

53. How frequently is an individual requester successful in removing his or her name from the “title” block and associated databases—using the Army process?

Answer: Given the DODI 5505.07 definition of titling, requests to remove a name from a title block and associated data bases are approved infrequently.

Via a December 31, 2019, MARADMIN, the Marine Corps authorized the concealed carry of a personally owned weapon by active duty military police, criminal investigators, and Marine Corps law enforcement program police officers, while on a Marine Corps base in an off-duty status, subject to compliance with Department of Defense Directive (DODD) 5210.56, *Arming and the Use of Force*.

54. If confirmed, would you advise the Secretary of the Army to implement a similar rule for Army law enforcement personnel on Army installations? Please explain your answer.

Answer: The Army is currently reviewing the implementation of a similar policy, which, if adopted, would enable our credentialed law enforcement officers to carry their privately-owned firearms in an off-duty status on the Army installations where they currently serve as Army law enforcement officers.

55. Has the Defense Biometrics Identification System (DBIDS) been implemented at all Army installation gates and access control points to ensure personnel and visitors are properly vetted prior to entering the installation?

Answer: The Army has fielded DBIDS extensively to our overseas bases in Germany, Korea, Japan and the Middle East. In the United States, the Army has partially fielded DBIDS, or an equivalent physical security system, which vets against authoritative data bases as required by law and policy. Our fielding effort is fully funded and will be completed by early 2022.

Army General Order 2019-01 further provides that in coordination with The Judge Advocate General and the Deputy Chief of Staff, G-2, the Army General Counsel is responsible for developing and overseeing policies and programs for Army intelligence and counterintelligence. Further, together with The Judge Advocate General, the General Counsel is charged to oversee sensitive activities and counterintelligence investigations.

56. What is the role of the Army General Counsel in ensuring that Army sensitive activities—at all levels of classification—are consistently conducted in accordance with standards of legality and propriety?

Answer: The Army General Counsel, together with the Judge Advocate General and the Director of the Army Special Programs Directorate, identifies sensitive Army intelligence and other activities based on the potential for limited organizational oversight, and negative impacts to public confidence should the activities not be conducted consistent with law and policy. The SECARMY has established specific enhanced oversight requirements for these activities, especially those that are highly classified. The Army General Counsel is provided unfettered access to all sensitive activities and conducts in-depth reviews of them either prior to approval, or after approval and then quarterly or annually to ensure they are conducted consistent with law and policy. The Army General Counsel is also directed by the SECARMY to bring any sensitive activity to his attention if there is any doubt about the propriety of conducting it.

57. In your view, what limiting practices should guide Army intelligence organizations in determining the types and amount of information that can be collected about U.S. citizens?

Answer. Army Intelligence organizations may only collect U.S. person information (USPI) if the information sought is reasonably believed to be necessary for the performance of an authorized intelligence mission or function assigned to the Component. Executive Order 12333, DoD Manual 5240.01, and Army Regulation 381-10 place limits on USPI that Army Intelligence organizations may collect. These policies forbid the collection of USPI solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights guaranteed by the Constitution and laws of the United States. These policies balance civil liberties and privacy interests with the need to conduct lawfully authorized intelligence missions. Attorneys at all levels of Army Intelligence organizations review the collection of USPI to ensure it is consistent with law and policy.

58. If confirmed, what would be your approach to ensuring that senior Army leaders, including the Secretary of the Army, are fully informed of, and personally engaged in critical decisions associated with Army sensitive activities?

Answer. If confirmed, it is my intention to continue to promote the Army’s long-standing policy of having the SA review and approve the most sensitive activities and to withhold approval of other sensitive activities to the Under Secretary of the Army, or Deputy Chief of Staff for Intelligence. I also will continue to collaborate with The Judge Advocate General to exercise broad discretion in elevating the review or approval of any sensitive activity that I believe should have the attention of the SA to ensure that he and other Army senior leaders remain engaged in the command and control of these activities.

59. How does OGC fit into the established Army Intelligence Oversight structure, and how does OGC engage with the President’s Intelligence Oversight Board?

Answer. The SA has directed that the Army General Counsel exercise day-to-day oversight of Army intelligence activities on his behalf. A senior-level attorney in Army OGC office performs this mission in coordination with The Judge Advocate General and the Army Inspector General. One level of intelligence oversight at HQDA involves the requirement to report Questionable Intelligence Activities and Significant or Highly Sensitive Matters through the chain of command to the Army Inspector General. The Army General Counsel provides the final review of these reports prior to them being forwarded to the DoD Senior Intelligence Oversight Officer (SIOO) for action. The DoD SIOO is responsible for reporting relevant Questionable Intelligence Activities and Significant or Highly Sensitive Matters to the President’s Intelligence Oversight Board (PIOB). Army OGC engages with the PIOB through the DoD SIOO.

60. What is the role of Army OGC in reviewing requests for the provision of DOD physical protection and personal security services to retired DOD officials and the family members of certain DOD personnel, as contemplated by section 1074(b) of the NDAA for FY 2008? If confirmed, would you concur in the provision of DOD protective services to such persons in the absence of an imminent and credible threat to their safety?

Answer. Army OGC conducts legal reviews of such requests. If confirmed, I would continue to oversee these reviews to ensure that such requests comply with the law.

61. If confirmed, what would be your approach to ensuring that Army counterintelligence investigations—including investigations of cyber intrusions—properly take into account both law enforcement and national security interests?

Answer: All Army Counterintelligence (CI) investigations are conducted jointly with the FBI. The Army CI organizations and the FBI work together to balance law enforcement and national security interests. Army CI investigations seek to obtain relevant information to develop national security criminal cases that would either be prosecuted by the Army under the Uniform Code of Military Justice or handed off to the Department of Justice for prosecution in Federal court.

Comprehensive Review of Department of the Navy Uniformed Military Legal Communities

On January 10, 2020, the Department of the Navy released its *Comprehensive Review of the Navy and Marine Corps Uniformed Legal Communities*. In commenting on the importance of the review, the Vice Chief of Naval Operations stated, “[i]t is precisely because our legal communities provide vital services [that] are necessary to promote the readiness of the force and

successful mission accomplishment, that a review of this nature was warranted. . . . This comprehensive review was an opportunity for us . . . to reflect on how we conduct ourselves and do business, in terms of military justice and legal support to our Sailors, Marines, and their families.”

62. Have you reviewed the report of the Navy’s *Comprehensive Review*?

Answer: Yes. I am familiar with its findings and recommendations.

63. Did the Navy’s *Comprehensive Review* yield any findings or recommendations that you believe may be applicable and/or useful to the Army legal community? Please explain your answer.

Answer: The Review found that the Navy JAG Corps did not have processes in place or an organizational structure that fosters a culture of continuous self-assessment focused on professional performance and accountability. The review recommended the Navy JAG Corps implement changes to refocus its culture and put in places self-assessment mechanisms, rapid feedback of lessons learned, and accountability. These changes could also benefit the practice of law in the Army. If confirmed, I will work with TJAG to ensure we consider the review, its findings, and ways to incorporate lessons learned across the Army legal community.

COVID-19 Response –

64. What policies and procedures has the Army established to protect its soldiers, civilian employees, and family members from the coronavirus, and what role has the Office of the Army General Counsel played in generating and reviewing such policies?

Answer: The Army has implemented policies consistent with directives from OMB, OPM, DOD, and HQDA. All policies were carefully reviewed by the Army General Counsel’s Office in conjunction with the Office of The Judge Advocate General before publication and implementation. These policies have facilitated mission accomplishment while prioritizing the health, welfare, and safety of our Soldiers, civilians, and their families.

65. What role, if any, is the Army playing in providing support to civil authorities in responding to the national emergency created by the spread of the virus?

Answer: The Army is conducting medical research and testing and has supported civil authorities upon request by building medical capacity and providing medical support.

66. What steps has the Army taken to make sure that its contractors and grantees are able to continue work or are not unfairly penalized for being unable to work during the crisis?

Answer: Army agencies are working with the contractors’ employers to mitigate impacts of COVID-19.

67. What guidance has the Army given to commanders regarding precautions to limit the spread of COVID-19, and what role has the Office of the Army General Counsel played in generating and reviewing such guidance?

Answer: The Army has provided commanders with extensive guidance on their responsibility to ensure the health, welfare, and safety of members of their commands. For example, measures put in place across the Army incorporate social distancing guidelines and use of personal protective equipment, to prevent the spread of COVID-19. All directives were carefully reviewed by the Army

General Counsel's Office in conjunction with the Office of The Judge Advocate General before publication and implementation.

68. How will changes in training and exercises as a result of the virus affect overall Army readiness, in your view?

Answer: While COVID-19 has had some impact on readiness, the Army continues to conduct mission essential activities and training. If confirmed, I will continue to work with Army senior leaders to address any shortfalls.

Civilian Attorney Recruiting and Retention

69. In your view, does the Department of the Army have a sufficient number of military and civilian attorneys to perform its many missions?

Answer: Yes.

70. If confirmed, what specific actions would you take to recruit, hire, and retain high quality civilian attorneys, and provide sufficient opportunities for their development and advancement through positions of increasing responsibility and leadership in the career civilian component of the Army legal community?

Answer: If confirmed, I would make recruitment, hiring, and retention of highly qualified attorneys a top priority. I would also establish a formal professional development program in OGC.

71. Do you foresee that in the coming years, the Department of the Army's demand for civilian attorneys with certain technical-legal expertise (e.g., cyber, space, and intellectual property law) will increase, commensurate with the Department's evolving missions and the 2018 NDS? If so, in what technical-legal specialties would you expect the Army's requirements to increase, and why?

Answer: Yes. The Army legal community must be poised to respond to the rapid changes in technology and missions to ensure we continue to provide appropriate legal support to our clients, particularly in areas as such as cyber, space, and intellectual property law.

72. Do you believe the Army, including Army OGC, needs additional incentives and talent management tools to recruit, develop, sustain, and retain a 21st century career civilian attorney workforce? If so, what sort of incentives and tools do you perceive would be helpful?

Answer: No. The Army's incentive awards program and the Defense Performance Management and Appraisal Program provide sufficient authority to recognize and retain talented attorneys.

73. How is "Qualifying Authority" allocated among Army Senior Counsels?

Answer: The Army General Counsel has the authority to approve the qualifications of all civilian Army attorneys but has delegated the qualifying authority for GS-15 level attorneys and below to the Chief Counsel, U.S. Army Corps of Engineer, for all elements of that Command; the Command Counsel, Army Material Command, for all elements of that command; and The Judge Advocate General, for all other elements of the Department of the Army. While the authority is delegated to these senior attorney officials, the General Counsel maintains oversight responsibility.

74. If confirmed, would you make any adjustments to Army legal community Qualifying Authority designations or processes? Please explain your answer.

Answer: No. I am not aware of any need for changes or adjustments to qualifying authorities at this time.

The Army General Counsel serves as the qualifying authority for all Army civilian Senior Executive Service (SES) attorney positions.

75. What factors would you consider in determining whether to qualify a candidate for appointment to an attorney's position in the career SES?

Answer: When the Army seeks to hire an attorney for a career SES position, the Executive Resources Board (ERB) appoints a panel to review qualifications and interview qualified candidates. Important factors in this process include professional education, training, and work experience.

76. What do you view as the most important executive competencies of an SES attorney and how would you assess these in deciding whether to recommend a particular candidate for selection and appointment to an attorney's position in the career SES?

Answer: As the principal legal advisor to the Executive Resources Board (ERB), I am not a voting member, and therefore am not in a position to recommend particular candidates for selection or appointment. However, the Army OGC ensures that ERB members recommend candidates who are best qualified for the civilian senior executive position because they have demonstrated the ability to: 1) lead change; 2) lead people; 3) have demonstrated an ability to deliver results; 4) have a history of sound business acumen; and 5) have successfully built coalitions.

77. If confirmed, how would you hold Army SES attorneys accountable for both organizational performance and the rigorous performance management of their subordinates?

Answer: Every year, Army senior leadership convene a performance review board (PRB) focused on holding SES attorneys accountable for their work. Instructed by the Secretary of the Army, the PRB ensures each SES, to include attorneys, meet performance objectives. If confirmed, I would take appropriate corrective action in cases where individuals SES fail to meet performance objectives and standards.

78. What role does the Army General Counsel play in the Department of the Army Executive Resources Board (ERB)? Would you recommend any changes to the Charter of the ERB, if confirmed?

Answer: The Army GC provides independent legal advice and support to the ERB as a non-voting member. I am not aware of any changes that need to be made to the ERB Charter at this time.

79. What role does the Army General Counsel play in the Department of the Army SES Talent and Succession Management process? Would you recommend any changes to the process, if confirmed?

Answer: The Office of the Army General Counsel serves as an advisor to the ERB and the Talent and Succession Management Boards (TSMB). I am not aware of any changes that need to be made to the SES Talent and Succession Management process at this time.

80. What role do mobility and the objective of joint experience play in the Army SES program, including with regard to SES attorneys?

Answer: The Senior Executive Service is a national asset. Mobility is required of all SES. Mobility involves using a full range of assignment authorities to leverage the skills of executives for greater

mission accomplishment and to prepare them for higher levels of service, whether within the agency, or elsewhere in Government or society. Our nation is best served when agencies and executives work together strategically to field the strongest and most agile executive corps possible.

Mobility encompasses both temporary and permanent job assignments involving change from previous assignment patterns, (e.g., to different business lines, disciplines, program areas, components, regions, headquarters, or other divergent environments). The objective of joint experience is at play in the Army SES program, as the Army participates inside the DoD Enterprise allowing SES to maneuver into different environments inside DoD.

The American Bar Association’s *Standing Committee on Pro Bono and Public Service* asserts that “[w]hen society confers the privilege to practice law on an individual, he or she accepts the responsibility to promote justice and to make justice equally accessible to all people. Thus, all lawyers should aspire to render some legal services without fee or expectation of fee for the good of the public.”

81. If confirmed, would you favor the creation of a program to permit civilian attorneys in Army OGC to engage in *pro bono* work? If not, why not? If so, what would be the parameters of such a program?

Answer: Yes. I fully support the principles articulated by the ABA regarding pro bono services and if confirmed will explore the feasibility of such a program.

Secretary of Defense Esper and Army Chief of Staff, General McConville, have long prioritized initiatives to employ military spouses in Army civilian jobs. In 2014, the Army Judge Advocate General’s Corps created the Military Spouse Attorney Hiring Program.

82. What role can the Army General Counsel play in expanding the Military Spouse Attorney Hiring Program across the Army legal community?

Answer: The Army Judge Advocate General’s Corps’ Military Spouse Attorney Hiring Program has been very successful, appointing over 100 spouse attorneys since its inception in 2014. If confirmed, I would explore opportunities to implement this program in OGC.

83. Can the tenets of the Military Spouse Attorney Hiring Program be expanded to military spouses in other professions, in your view?

Answer: Yes. The benefits from excepted service hiring flexibilities, and the demonstrated success of the program, could inform efforts to support spouses in other professions as well.

Detention and Interrogation-

84. Do you support the standards for detainee treatment specified in the revised Army Field Manual on Interrogations, FM 2-22.3, issued in September 2006, and in DOD Directive 2310.01E, *The Department of Defense Detainee Program*, dated August 19, 2014?

Answer: Yes. I firmly believe that all detainees must be treated humanely and respectfully.

85. If confirmed, what role will you play in the ongoing triennial review and revision of FM 2-22.3 mandated by the NDAA for FY 2016?

Answer: Section 1045 places primary responsibility for reviewing FM 2-22.3 with the Secretary of Defense, in consultation with the Attorney General, the Director of the Federal Bureau of Investigation, and the Director of National Intelligence. However, to ensure the field manual complies with U.S. legal obligations, the Army General Counsel must provide an independent voice regarding the interpretation of the legal standards created by section 1045 of the FY16 NDAA. If confirmed, I would provide that independent voice and would work with the DoD General Counsel and The Judge Advocate General of the Army to ensure that the standards of treatment in the manual are in accordance with applicable law and policy.

Section 2441 of title 18, U.S. Code, defines grave breaches of common Article 3 of the Geneva Conventions, including torture and cruel and inhuman treatment.

86. In your view, does section 2441 define these terms in a way that provides U.S. detainees in the custody of other nations, as well as foreign detainees in U.S. custody, appropriate protections from abusive treatment?

Answer: Yes. The definitions of “torture” and “cruel and inhuman treatment” as codified in United State Code, title 18, section 2441, provide clear and appropriate guidance regarding the treatment of U.S. detainees in foreign custody and foreign detainees in U.S. custody. The articulated standards provide safeguards ensuring appropriate protection from abusive treatment for both populations.

Military Commissions Act

87. In your view, have military commissions constituted pursuant to the Military Commissions Act of 2009 provided an effective forum for trying violations of the law of armed conflict in the context of the global war on terrorism? Please explain your answer.

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

88. Does the extensive duration of pretrial procedures in ongoing commission cases give you any cause for concern that the commission system may not be effective? Please explain your answer.

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

89. What changes to the Military Commissions Act of 2009 would you propose, if confirmed, to improve the efficiency and effectiveness of the military commission system and process?

Answer: None.

90. In your view, could the Article III court system serve as a suitable, if not preferable alternative for the trial of persons charged with violations of the law of armed conflict in the context of the global war on terrorism? Please explain your answer.

Answer: The federal court system has successfully tried many terrorists. However, some cases are more appropriate for trial by military commission. Military commissions, as established by the Military Commissions Act of 2009 and associated rules and regulations, provide a just process for trying law of war offenses triable by military commission. This process complies with U.S. and international law.

Criminal Jurisdiction over Contractors on the Battlefield

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

91. In your view, does MEJA provide appropriate jurisdiction over the alleged criminal actions of private contractor employees in Iraq, Afghanistan, and other nations in which U.S. armed forces are engaged in operations?

Answer: Yes. While such prosecutions are uncommon, the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) provides appropriate criminal jurisdiction over contractor employees in areas of combat operations.

92. What changes, if any, would you recommend to MEJA?

Answer: It is my understanding that Department of the Army and Department of Justice attorneys are working on this issue and have identified potential gaps in jurisdiction that need to be addressed. If confirmed, I will work closely with TJAG to address this and any other issue requiring statutory change.

Section 552 of the NDAA for FY 2007 extended to military courts jurisdiction under the UCMJ over persons serving with, or accompanying an armed force in the field during time of declared war or a contingency operation.

93. In your view, is a military court applying the UCMJ an appropriate forum for the disposition of the alleged criminal acts of private contractor employees serving in Afghanistan or other areas in which U.S. armed forces are engaged in operations?

Answer: Yes. Article 2 of the UCMJ allows commanders to address the misconduct of civilians accompanying the force in areas of combat operations. It specifically provides commanders with appropriate jurisdiction for alleged criminal actions of contractor employees in Iraq, Afghanistan, and other areas of combat operations. Civilians serving with or accompanying our Armed Forces overseas who commit crimes can thereby be held appropriately accountable. As a deployable system that can function in remote locations with ample due process protections, including appellate review and the right to counsel, UCMJ jurisdiction over contractors offers a critical tool to ensure justice and discipline in deployed environments.

94. What is your view of the procedures to which DOD and the Department of Justice have agreed to reconcile their respective jurisdictional responsibilities under MEJA and the UCMJ?

Answer: It is my understanding that the relationship between the Department of Defense, to include the Department of the Army and Department of Justice, is sound and strong, especially relating to MEJA issues. If confirmed, I will review the current relationship between the Department of Justice

and the Department of the Army and examine whether the Army's equities are appropriately represented.

Army General Officers (GO)-

The FY17 NDAA reduced the number of General and Flag Officers across DOD by about 12%, consistent with plans provided to Congress by OSD.

95. What progress has the Army made in reducing the number of Army General Officers and restructuring its GO grade pyramid?

Answer: As reported in the Army's annual progress report submitted to Congress through the Office of the Secretary of Defense for Fiscal Years 2019 and 2020, the Army's plan to wait until 2022 before implementing reductions to its GO end strength is a deliberate leadership decision, intended to provide maximum flexibility to meet the increasing need to fill emergent requirements. These new requirements include the ongoing effort to support Army Futures Command as it matures to reform modernization in the Army, as well as the addition of GO leadership requirements in support of the Space warfighting domain. Further, the Army continues to support a steady demand for GO leadership in combat theaters such as Iraq and Afghanistan and, most recently, in support of Operation Warp Speed.

96. If confirmed, what role would you establish for yourself in ensuring that the Army is successful in meeting its GO reduction mandate?

Answer: If confirmed, in my role as chief legal officer of the Army I will be responsible for ensuring the Army is in compliance with all laws set forth by Congress, to include compliance with the GO reductions mandated by the FY17 NDAA.

97. In your view, are GO retired pay caps adversely affecting Army senior officer promotions, assignments, and retention at the 3- and 4-star grades? Please explain your answer.

Answer: In my view, general officers have dedicated their lives to service and sacrifice to our Nation. When asked to continue to serve, their inherent call to duty is overwhelmingly the driving force. I do not believe we should interpret that sense of duty and selfless service as acquiescence to the current pay caps. It is my understanding that any specific examples of GOs electing to retire in lieu of promotion because of these pay caps is anecdotal. This is not something that general officers publicize or disclose as reasons for electing retirement. However, when considering the level of responsibility and compensation of 3- and 4-star generals compared to the same levels of responsibility and compensation of their civilian counterparts in the private sector, there is no comparison. I believe it is important to consider these elements and the message it sends as we continue to try to retain the best talent to lead our Army.

Ethics –

98. If confirmed, what actions would you take to effectuate your duties as the Designated Agency Ethics Official for the Department of the Army?

Answer: If confirmed, as the Army's Designated Agency Ethics Official (DAEO), I will perform all duties required of me under Federal and DOD regulations. It is my understanding that these duties

include the following: ensure effective and open communication with the Office of Government Ethics; ensure accurate, timely advice and counseling; carry out an effective government ethics education program; and ensure appropriate action is taken to resolve conflicts of interest and the appearance of conflicts of interest.

99. How is responsibility for providing ethics advice to senior officials allocated among Army Senior Counsel?

Answer: It is my understanding that the Designated Agency Ethics Official (DAEO) provides express delegation of authority to oversee and administer ethics program requirements within their respective and assigned organizations to the Alternate DAEO (Deputy General Counsel for Ethics & Fiscal), and an additional 7 more Deputy Designated Agency Ethics Officials, to include Principal Deputy General Counsel, The Judge Advocate General, Deputy Judge Advocate General, Assistant Judge Advocate General for Military Law and Operations, Chief, Administrative Law Division, Chief Counsel, U.S. Army Corps of Engineers, & Command Counsel, U.S. Army Material Command. That oversight and administration includes advising senior Army officials on ethics matters for their respective clients in the field. For senior officials within Army HQ, ethics advice is issued generally in writing by the DAEO, ADAEO, or a senior Army OGC ethics official.

In the fallout of the Glenn Defense Marine Asia (GDMA) scandal, a significant number of Navy admirals and numerous other Navy personnel were investigated for bribery, corruption, and violations of criminal conflict of interest laws and executive branch ethics regulations. Some were prosecuted and convicted in federal or military courts, and many more were subject to public censure and forced into early retirement. Yet a number of Navy personnel initially implicated in the scandal were able to rely on the “safe harbor” of having consulted a Navy ethics attorney prior to accepting a gift from a prohibited source.

100. What actions has the Army taken over time to ensure that its military officers and other Army personnel are trained—throughout their careers—on objective ethics and the Army’s core values?

Answer: It is my understanding that the Army complies with all Department of the Army, Department of Defense, and Office of Government Ethics (OGE) ethics training requirements. This includes the requirement to provide new employees and new supervisors with initial agency ethics training. Additionally, the JAG School provides government ethics training to both legal and non-legal personnel. All future brigade-level commanders, and many future battalion-level commanders, are required to attend the Senior Officer Legal Orientation (SOLO) Course, which includes two hours of instruction specifically addressing government ethics issues such as the use of government resources, gifts, and relations with non-federal entities. The Judge Advocate General Legal Center and School (TJAGLCS) also provides government ethics training materials that are used throughout the Army for initial entry training, command courses, and other training courses throughout Soldiers’ careers in the Army. Department of the Army personnel who are required by the Code of Federal Regulations to file either confidential or public financial disclosure reports also receive interactive, or in-person ethics training each year.

101. What role does the Army General Counsel play in ensuring that Department of the Army personnel—military and civilian—timely identify and disclose potential personal and organizational conflicts of interest and take all appropriate steps to avoid or mitigate them?

Answer: It is my understanding that the Army GC ensures timely submission of the appropriate financial disclosure report for both new and annual filers. We do this by working closely with HR officials when new employees in-process, and providing each existing employee and his/her supervisor with notices of filing requirements. The cognizant ethics official provides advice and counsel to both the employee and his/her supervisor to navigate and/or remedy any actual or potential conflict of interest.

102. What training do Army lawyers receive to ensure they are competent to provide effective, accurate, and timely guidance to Army personnel in need of such counsel?

Answer: It is my understanding that Army lawyers receive specific instruction on government ethics throughout their career progression. In addition, all appointed Army Ethics Counselors are required to receive at least one ethics training annually to assist them with performing their duties. The JAG School includes five hours of government ethics training for all new Army judge advocates in the Basic Course and fourteen hours of government ethics training for all new majors at the Graduate Course. In addition to these resident courses that all Army JAGs attend, the JAG School also offers an annual one week Ethics Counselor Course for judge advocates and Army civilian attorneys who specifically focus on government ethics issues.

103. What resources has the Army made available to provide its GOs and SESs the legal advice, and assistance they need to adhere to ethical and legal standards in complying with travel regulations, and ensuring that government resources, including the official time of their military and civilian subordinates—are used only for official purposes?

Please explain your answer.

Answer: It is my understanding that the Army provides multiple resources to GOs and SESs to ensure they have access to legal advice regarding government ethics issues. The JAG School provides training directly to GOs, and new Army GOs are required to attend ASEP-Basic, ASEP-Command, or ASEP-Advanced courses that include ethics training. Additionally, the JAG School has a General Officer Legal Orientation Course (GOLO) that is optional for GOs (O-7 & O-8s), which includes a mandatory one-hour block of instruction on government ethics issues to include conflicts of interest, use of resources (e.g., use of subordinates' time), gifts, travel regulations, post-government employment restrictions, and relations with non-federal entities. In addition to these training requirements, GOs and SESs have access to trained ethics counselors who have been delegated the authority to advise on ethics issues from the General Counsel of the Army, the Army Designated Agency Ethics Official, through the Judge Advocate General of the Army. These ethics counselors provide direct support to GOs and SESs to assist them with identifying ethics issues and addressing them in accordance with all statutory and regulatory requirements. Finally, since all Army GOs and SESs are mandatory filers of Public Financial Disclosure reports as required by the Office of Government Ethics, these individuals are required by Federal regulation to receive annual ethics training. Topics covered in the annual training include financial conflicts of interest, impartiality, misuse of position, gifts, and any other agency regulations determined to be relevant by the Designated Agency Ethics Official. Those agency regulations would include the Joint Travel Regulation and the use of government resources in accordance with the Joint Ethics Regulation.

104. What is your understanding of the actions required of a Department of the Army civilian attorney or judge advocate who becomes aware of improper activities by a Department of the Army officer or official who has sought, but failed to follow that attorney's legal advice?

Answer: My understanding is informed by Rule 1.13 of the Rules of Professional Conduct for

Lawyers, found in Army Regulation 27-26. That rule explains that, except when representing an individual client, an Army lawyer represents the Department of the Army. If a lawyer for the Army knows that any person associated with the Army is engaged in action that is a violation of a legal obligation to the Army, adverse to the legal interests or obligations of the Army, or a violation of law that reasonably might be imputed to the Army, then that lawyer shall take appropriate action in furtherance of the best interests of the Army.

Such measures may include, among others: (1) asking for reconsideration of the matter by the acting official; (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the Army; (3) advising the acting official that the lawyer is ethically obligated to preserve the interests of the Army and must consider discussing the matter with supervisory lawyers within the Army lawyer's office or at a higher level within the Army; (4) referring the matter to, or seeking guidance from, higher authority in the technical chain of supervision, including, if warranted by the seriousness of the matter, referral to the supervisory lawyer assigned to the staff of the acting official's next superior in the chain of command; or (5) advising the acting official, or others who can act on behalf of the Army, up to and including the head of the organization, that his or her personal legal interests are at risk and that he or she should consult counsel as there may exist a conflict of interest based on the lawyer's responsibility to the Army.

If, despite the lawyer's efforts, the highest authority that can act concerning the matter insists upon or fails to address in a timely and appropriate manner an action, the lawyer may consult with senior Army lawyers at the same or higher levels of command, advise them of the lawyer's concerns, and discuss available alternatives to avoid any violation of legal interests or obligations, or of the law, by the Army.

105. What is your level of confidence that Army attorneys—both military and civilian—receive the appropriate training and technical guidance to advise GOs and members of the SES in determining that a particular event is *not subject* to the Army Conference Policy set forth in Army Regulation 1-50, and need not be tracked or otherwise documented?

Answer: I am very confident our attorneys receive appropriate training and technical guidance to advise GOs and members of the SES in determining that a particular event, such as participation in job fairs for the purposes of seeking employment; travel for the purpose of conducting investigations or audits; attendance at chaplain-led events; widely attended gatherings as determined by appropriate legal counsel; industry days and trade shows; participation in residency and fellowship programs; or enrollment in bachelor's, master's, or doctoral degree programs; is not subject to the Army Conference Policy. Our attorneys are well versed on applying the policy to the fact patterns they are presented by the GOs and members of the SES they advise. Additionally, the attorneys from the Army's Office of the General Counsel and Office of The Judge Advocate General work closely together to ensure consistency in advice given to our clients and to the field. Procedures are in place to ensure all our attorneys receive technical supervision, guidance, and training regarding conference actions. Finally, our attorneys regularly coordinate with the Office of the Administrative Assistant to the Secretary of the Army, the proponent of the Army Conference Policy, to guarantee our attorneys are up to date on the most recent developments regarding Department of Defense and Army level conference related information.

The Secretary of the Army serves as the DOD Executive Agent for operation of the Financial Disclosure Management (FDM) system, an automated, paperless system mandated for

use by all public and confidential financial disclosure filers across the DOD.

106. In your view, is Army OGC adequately resourced—in people, money, technology, and expertise—to execute its FDM-related duties on behalf of the Secretary of the Army?

Answer: Yes. It is my understanding that Army OGC is adequately resourced. The Army has proudly developed and continuously updated the Financial Management Disclosure (FDM) Program as the executive agent for DOD since 2009. The Army OGC has the substantive expertise and the requisite number of personnel to continue to support this mission.

In March 2016, the DOD Inspector General issued its report, *Section 847 Requirements for Senior Defense Officials Seeking Employment with Defense Contractors*. The report concluded that the After Government Employment Advice Repository (AGEAR), administered by Army OGC, was “unreliable.”

107. Have all of the AGEAR-related deficiencies identified in the DOD Inspector General’s report—including deficiencies under the purview of Army OGC, and those for which other DOD Components were responsible—been corrected? Please explain your answer.

Answer: It is my understanding that any AGEAR deficiencies identified in the 2016 DOD-IG report have since been resolved and/or corrected, as appropriate. Furthermore, in the 2019 DOD-IG report, there were no identified AGEAR deficiencies.

Anti-deficiency Act

On September 23, 2019, the Government Accountability Office (GAO) submitted to the Senate its compilation of the Anti-deficiency Act (ADA) reports submitted by federal agencies for FY 2018. Of the nine ADA reports from across the interagency, three derived from DOD—two of these from the Department of the Army. The two Army ADA violations were determined to have occurred over the period from 2011 through 2015.

108. What is your level of confidence that the Army has in place the policies and procedures to ensure the identification of all potential ADA violations across the Department?

Answer: Based on my understanding, I am confident the Army has the proper policies and procedures in place to identify potential ADA violations. Resource managers at all echelons are trained to identify potential funding incongruities associated with proposed contracting actions. Each command has assigned legal counsel to provide legal reviews regarding potential misuse or improper application of appropriated funds. In addition to reviews at the action officer level, Army business councils and contract review boards at all commands work to ensure that funds provided by Congress are properly obligated.

109. Why did it take so long to identify the potential ADA violation in the two cases included in the GAO report?

Answer: The underlying events and subsequent investigations of these ADA violations predate my tenure with the Department and it is my understanding that actions were taken to remedy the violations.

110. Why did it take so long to determine that an ADA violation had occurred in each

case?

Answer: The underlying events and subsequent investigations of these ADA violations predate my tenure with the Department.

111. What are your ideas for preventing Army ADA violations from occurring and for identifying potential violations earlier in time?

Answer: If confirmed, I would pursue a robust training program that continues to educate not only our resource managers and attorneys, but extends that training to requirement owners. It is my understanding that our resource managers and attorneys do great work to limit the number of ADA violations. By training and empowering requirement owners on the proper use of funds, we can put safeguards at all echelons, which reinforces the work currently underway in the Department.

112. What are your ideas for streamlining the investigative and review process attending a determination that an ADA violation has occurred?

Answer: One approach is to reduce the time allowed for preliminary reviews and formal investigations. However, I would caution against such a stance. Any attempt to streamline the process should not come at the expense of an accurate and thorough investigations; and ensuring that civilian employees and service members are provided all the rights afforded to them under law. If confirmed, in addition to focusing on more training and awareness, my office would continue to provide recommendations to DoD for potential changes to regulatory procedural requirements, as informed by ongoing assessments and any lessons learned from substantiated ADA reports.

The GAO report indicates that the Army did NOT pursue disciplinary action against most of the individuals determined to have been responsible for violations of the ADA. When individuals were held accountable, action was generally limited to the imposition of a letter of counseling or reprimand.

113. Why was disciplinary action *not* pursued against most of the persons determined to have been responsible for the ADA violations reported by the Army?

Answer: With respect to one case, an individual was found responsible, but not assigned any disciplinary action because the impact on the individual's promotion potential, future employment, and the stigma associated with the violations were determined to be sufficient specific and general deterrence so that further punishment was not necessary. In the second case, three of the four responsible individuals were no longer employed by the United States government and thus, the Department did not have the authority to take action.

114. In your view, how are the relatively minor accountability actions taken against the persons responsible for these ADA violations consistent with a commitment to accountability for breaches of fiscal law?

Answer: Punishment and accountability must be commensurate with the infraction. In both ADA violations reported by GAO, after a thorough investigation, determined that neither violation was willful or committed with any knowing intent to violate the ADA. In all cases where violations occur, any disciplinary actions must be supported by the facts revealed by the investigation and are warranted and appropriate based on the facts.

Base Realignment and Closure (BRAC)

The 2018 NDS provided that the “Department [would . . .] work to reduce excess property and infrastructure, providing Congress with options for a BRAC.”

115. In your view, how could DOD structure a future BRAC round to reduce excess infrastructure to the end of enhancing NDS implementation?

Answer: In my view, DOD could structure a BRAC round into two phases intended to optimize existing infrastructure. The first phase could focus on an installation capacity analysis with a dedicated BRAC source of funding used to simultaneously transform existing facilities into a denser, more efficient modernized footprint. The second phase could re-evaluate where defense functions are conducted and re-align them to where the best public or private technology and expertise are located. Again, in my view, closure of bases would only occur during this second phase.

116. Were Congress to authorize another BRAC round, what role would OGC play in advising Army officials charged to formulate BRAC recommendations? In advising Army officials charged to work with local communities with respect to property disposal? If confirmed, how would you undertake to lead Amy OGC in executing these responsibilities?

Answer: Upon authorization of a BRAC round, OGC would promptly integrate OGC BRAC expertise with OTJAG to assist Army Senior Leader direction on the formulation of recommendations, implementation of BRAC decisions, and disposal of excess property. As with past BRAC rounds, OGC would evaluate proposed BRAC recommendations to ensure the Army can demonstrate how each recommendation met the statutory criteria for the BRAC authorization. OGC will advise Army officials to ensure compliance with Army policy and applicable law during the implementation of BRAC decisions in a timely and cost effective manner. OGC will work with the Chief Counsel of the Corps of Engineers to educate Army officials about the wide range of property disposal authorities under BRAC and assist Army officials and local communities to implement redevelopment plans for former Army installations which are consistent with Federal, state, and local law.

Environmental Contaminants –

GAO advises that as of August 2017, the Army had identified known or suspected releases of perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA) in drinking water at or near 61 of its installations.

117. What “lessons learned” will OGC incorporate—going forward—in its practice relating to environmental remediation in support of the redevelopment of *military bases closed under BRAC*—including as regards the remediation of PFOS and PFOA?

Answer: Overall the Defense Environmental Restoration Program is a mature effort throughout the Army for both active and BRAC sites. Since most locations that would likely be involved in a future BRAC round have been remediated, it is anticipated that property disposal during a new BRAC round would not require significant environmental remediation. However, as the development of concerns with PFAS demonstrates, OGC needs to be proactive and responsive to Army leaders regarding the potential for emerging contaminants to impact property disposal of BRAC sites due to the risk to redevelopment by local communities. OGC would need to educate Army leaders and stakeholders about existing or proposed legal requirements for such contaminants and advise on mechanisms to address these contaminants. OGC will continue to advise leadership that environmental cleanup

requirements apply equally to all Army sites and remediation decisions must be consistent between active and BRAC sites.

118. To date, what has been the role of OGC in the Army's efforts to address environmental and Soldier and family health concerns associated with PFOS, PFOA, and other potentially harmful contaminants at active Army installations? If confirmed, what role would you establish for yourself in ongoing efforts in this regard?

Answer: If confirmed, I will work closely with DoD OGC in supporting the DoD's per- and poly-fluoroalkyl substances (PFAS) Task Force, established by Secretary Esper. The Army is fully engaged with the other Services to proactively and conscientiously address PFAS concerns and develop a coordinated and holistic DoD approach.

119. What factors would you consider in providing legal advice to Army officials regarding the role the Army should take in funding and overseeing PFOS and PFOA-related environmental cleanup and restoration activities at Reserve locations and in communities adjacent to or near military bases, installations, and operational platforms?

Answer: I am aware of the environmental challenges posed by the cleanup and restoration activities related to PFOS and PFOA contamination. If confirmed, I am committed to working transparently with all stakeholders to develop mutually acceptable solutions.

Energy Security and Resilience –

The range of threats against which Army installations must maintain resiliency is ever-growing.

120. If confirmed, specifically what role would you establish for OGC in inculcating energy security and resilience in mission assurance priorities for the Department of the Army?

Answer: It is my understanding that physical, natural, and cyber threats to installations are increasing. At the same time, installations are key to the Army's ability to project power. If confirmed, I will ensure that OGC assists the Army in utilizing all available authorities to include appropriated funding, third party financing, and private investment to enhance energy security and resilience.

121. How can OGC assist the Army in better integrating energy security and resilience as standard components of its Military Construction (MILCON) programs, in your view?

Answer: I have been informed that the Army has not been able to fully participate in the DOD centrally funded MILCON Energy Resilience and Conservation Investment Program (ERCIP) in the instance where the utility distribution systems at an Army installation have already been privatized. It is my understanding that a legislative action is underway with the SASC and DOD/Army staffs to rectify this issue. If confirmed, I will closely monitor progress on this issue.

A number of unique authorities enable the Army's pursuit of distributed energy projects that improve installation resilience, increase readiness and mission assurance, and offer long-term cost savings. These authorities include: Inter Governmental Support Agreements, Other Transaction Authority, Utility Privatization, Energy Savings Performance Contracts, Utility Energy Service Contracts, Enhanced Use Leases, and the Defense Community Infrastructure Program.

122. What is the role of the OGC in advising on the use of these authorities? Has the Army's use of one or more of these authorities yielded outcomes of particular promise?

Answer: OGC provides legal support for these programs. I am aware of one example of the Army's use of title 10 USC section 2667 (Leases) authority for a project developed by the Army Office of Energy Initiatives in Hawaii. During a contingency or grid outage, the plant will fully power Schofield Barracks, the Wheeler Airfield, and the Kunia Site. I am also aware of a similar project under development at Fort Sill.

Encroachment on Military Installations

Encroachment on military installations by commercial and residential development can negatively impact ongoing operations and significantly delay or halt the construction of new testing and training facilities vital to generating readiness.

123. What would be your role, if confirmed, in engaging with communities surrounding Active Army and Reserve Component training ranges, to address and resolve community concerns, while ensuring the resilience of range capabilities?

Answer: The Army, in conjunction with the Office of Economic Adjustment, conducts compatible use studies at our installations. These studies are co-sponsored by a community and includes input from surrounding counties and state officials to ensure all future plans are known and incorporated into the study. If confirmed, I will ensure my staff is engaged in the process to acquire compatible use buffers to protect Army training missions.

Environmental Stewardship and Conservation

124. If confirmed to be the Army General Counsel, how would you undertake to educate Army leaders and the force at large about the imperative of complying with environmental protection laws and regulations, as well as with guidance from the Environmental Protection Agency?

Answer: I am aware of some of the environmental challenges that the Army and the DoD face. If confirmed, I will work with the Army's subject matter experts to address these challenges in order to protect the environment, human health and safety, to ensure support of the Army's warfighters.

125. If confirmed, how would you work with the Department of the Interior and the U.S. Fish and Wildlife Service to promote environmental stewardship and conservation on and around Army installations, while ensuring military readiness?

Answer: If confirmed, I will ensure the Army continues to work closely and cooperatively with the Department of Interior and the U.S. Fish & Wildlife Service to remain stewards of our Nation's most valuable natural resources, while maintaining sufficient land to train for the Army's warfighting mission.

126. What are your ideas as to how the process associated with generating an Environmental Impact Statement (EIS) could be streamlined, with a view to completing any future EIS in two years or less, from start to finish?

Answer: If confirmed, I will work with the Army's subject matter experts to update and refine the Army's National Environmental Policy Act (NEPA) procedures and regulation to streamline NEPA requirements across the Army.

Military Housing Privatization Initiative (MHPI)

In the FY 1996 NDAA, Congress established the Military Housing Privatization Initiative (MHPI), providing DOD with the authority to obtain private-sector financing and management to repair, renovate, construct, and operate military housing. DOD has since privatized 99 percent of its domestic housing. In 2019, the Senate Armed Services Committee held three hearings to address concerns voiced by military families living in privatized housing that the program had been grossly mismanaged by certain of the private partners, that military and chain of command oversight were non-existent, and that in speaking out about the appalling condition of the homes in which they lived, they were opening themselves and their military sponsor to reprisal.

127. If confirmed as Army General Counsel, what would be your role in establishing accountability inside the Army for sustaining the high quality housing that Soldiers and their families deserve?

Answer: If confirmed, I would work closely with TJAG, AMC Command Counsel, and IMCOM senior leaders to ensure that MHPI Partners meet their legal obligations under the Army Privatized Housing Program to include ground leases, and operating and property management agreements. To date, the Army has created a number of Common Operating Pictures (COPs) to track key metrics and decisions, but I would continue to take all necessary legal action required to resolve issues and concerns

128. If confirmed, specifically what would you do to improve business operation constructs and vest accountability in MHPI “contractors” for strict compliance with the terms of their public-private partnership agreements with the Army?

Answer: The key is setting defined metrics and enforcing performance standards with the MPHPI partners. HQDA, AMC, and IMCOM have already created a number of Common Operating Pictures (COPs) to track key metrics and decisions. We have already developed COPs to track approval status on the partners' annual budget and non-real estate Major Decision Memorandums (MDMs). We have established installation-level "score cards" that track relevant housing data, financial information and key issues at the execution level. As we refine these tools collectively, it will allow leaders to assess the status of the portfolio from a service delivery perspective and ensure both partner and Army accountability for performance.

129. What progress has the Army made in creating a “Tenant Bill of Rights” and enumerating “Tenant Responsibilities” applicable to Soldier and military families who reside in privatized housing?

Answer: The Tenant Bill of Rights has been signed by the Secretary of Defense and the three Service Secretaries. Today, HQDA, AMC, and IMCOM have been addressing the FY20 NDAA housing reforms, where one of the main efforts has been implementation of the tenant bill of rights. The Army has developed briefings for Installation Commanders to inform tenants of their rights and responsibilities. One such right provides for the opportunity to consult with a legal assistance attorney in order to participate in a dispute resolution process. OTJAG is supporting that requirement by adding additional legal assistance authorizations in FY21 and FY22. The Army has been working closely with OSD and the other Military Departments to develop a standard uniform tenant lease that will incorporate the tenant bill of rights and make the rights afforded tenants legally enforceable.

The installation or regional commander in charge of the oversight of privatized housing units will serve as the “deciding authority” in the dispute resolution and payment-withholding processes established pursuant to section 2894 of the NDAA for FY 2020.

130. What role will OGC play in training commanders, their legal counsel, and other participants in the dispute resolution and payment withholding processes?

Answer: As the PDGC, I have had close interaction with TJAG and oversight of the AMC Command Counsel and his legal staff who are heavily involved in the day-to-day management and oversight of the Army Privatized Housing Program. There is constant education of the legal duties and roles/responsibilities of installation commanders on Privatized housing issues. The IMCOM Staff Judge Advocate participated last week in the latest Army Housing Summit chaired by the IMCOM Commanding General and I am confident that if confirmed as the Army GC, I would be able to build upon these established forums to better train our commanders.

Recently, the Air Force Inspector General undertook an assessment of actual progress in implementing MHPI reforms at a sampling of installations across the Department of the Air Force.

131. Has the Department of the Army implemented any like objective assessment? If so, what did that assessment find? If not, would you recommend that the Secretary of the Army direct such an assessment? In your view, are there other ways in which the Secretary can assess effectively whether the reports of progress he receives from Army officials responsible for MHPI are congruent with improvements on the ground?

Answer: The Secretary has placed Army Housing under the 4-Star AMC Commanding General who has driven change by implementing regular engagements such as biannual Housing Summits with the MHPI contractors and by the establishment of definable metrics measuring performance in all areas under the program. Recently, new incentive fee metrics have been introduced so that contractors have to truly merit receiving such fees. Legal reviews on all actions such as Major Decisions Documents and incentive fees have been established to ensure that all payments to MHPI contractors are warranted.

In the context of this Committee’s investigation into the privatized housing crisis, we learned that sustaining historic homes requires significant investment of funds on an ongoing basis.

132. Does the Army need relief from requirements to maintain these historic homes? If so, what legislative relief, if any, would be required? How would you balance the interest in historic preservation and the cost of same, with the imperative of maintaining *all* military housing to appropriate levels of habitability?

Answer: The Army is forthrightly addressing issues associated with a large inventory of historic housing. The Army has approximately 26,000 historic homes in its inventory. An Army Inspector General (IG) Report from March 2019 found that historic housing is more costly to operate, maintain, and renovate; requires special historic building materials and craftsmanship; and raise health and safety concerns such as lead paint and asbestos. The Army is addressing historic housing with smart solutions; for example with respect to our Inter-War Era Housing (1919-1940), we are replacing lead-based paint historic building materials with modern industry standard imitative building materials. This allows upgrades and improvements previously cut due to high cost historical materials and historical standards applied. The end result is it reduces costs, maintains historical character of

buildings, and most importantly, improves the quality of life, health and safety for our Soldiers and their families. If I assess that additional legislation is required to balance historical preservation and the overall health of military housing for Soldiers and families, OGC will submit proposed legislative changes for Congress' consideration.

Army Cemeteries –

133. If confirmed, how would you undertake to develop the unique expertise required to provide legal and policy advice to the Executive Director of the Army National Military Cemeteries (ANMC) regarding interment and inurnment policies at Arlington National Cemetery (ANC) and the Soldiers' and Airmen's Home National Cemetery, as well as on like issues related to the 38 other Army cemeteries?

Answer: Since June 2010, the Army General Counsel has provided a dedicated senior attorney to the Army Cemeteries mission. This attorney is on staff in OGC with ANC as his official duty station. This allows immediate and direct support to the ANC and broader Army Cemeteries program and, by being a member of OGC, ensures independence in providing legal and policy advice. If confirmed, I will rely on this counsel to assist me in the highly technical requirements and unique issues related to ANC and other Army Cemeteries.

134. Have the new rules for funeral escorts that took effect at ANC in January 2019 led to reductions in lengthy wait times for burials? If not, why not? What are your other ideas for decreasing wait times for burial at ANC?

Answer: I have been informed that the change in funeral escorts in Jan 2019 has not reduced the wait times significantly for those veterans and service members requesting burial at ANC with military funeral honors escort. Currently, the wait times for burial at ANC vary by branch of service and nature of remains. Casketed remains are scheduled for burial within two weeks of receipt of all eligibility documents. Families requesting military funeral honors and dependent honors wait half as long as those requesting military funeral honors with escort.

The new rules concerning those veterans and service members eligible for funeral escorts took effect at the same time ANC experienced a 36% increase in demand for burial. However, we believe the change has prevented the overall wait times from exceeding previous wait times despite the dramatic increase in demand.

If confirmed, I would support the ANC Superintendent and the Executive Director's efforts to reduce the wait times currently being experienced.

135. On September 25, 2019, then-Acting Army Secretary McCarthy initiated the formal rule making process by announcing proposed changes in eligibility for burial at ANC. (Not a question for answer)

136. If confirmed, what would be your approach to evaluating public comments on the proposed new burial eligibility criteria?

Answer: The public comments will first be reviewed by the subject matter experts from the Office of Army Cemeteries, and their draft answers will be thoroughly reviewed by OGC for completeness and legal sufficiency.

137. What factors would you consider in making a recommendation to the Secretary of

the Army to grant or deny a request for exception to established ANC interment or inurnment policies?

Answer: Per Army policy, each request for an exception to burial policy is considered on its own merit focusing expressly on the individual's life contributions as a uniformed member of the United States Military, lifetime Civilian contributions to the United States Military, all significant awards and achievements related to this criteria, and what potential precedent the exception would create and how it would impact the life of the cemetery. I believe the General Counsel's role is to provide the Secretary of the Army legal advice not only as to the legality of approving the request but also the long-term legal and policy precedent of granting or denying a request.

138. Has the Secretary of the Army followed the recommendations of the ANC Advisory Group in all significant matters relating to the administration of ANC? If not, in what matters has the Secretary's policy- or decision-making deviated from the recommendations of the Advisory Group and why?

Answer: I have been informed that the Secretary of the Army has fully accepted 12 and partially accepted two of the 14 total recommendations made by the Advisory Committee on Arlington National Cemetery since the Federal Advisory Committee was established in 2012.

One recommendation, due to a technicality in Federal Advisory Committee rules, was considered only a partial acceptance. However, the Secretary of the Army and ANC addressed the issue by authorizing a smaller tree monument adjacent to the living tree for the Vietnam Helicopter Pilots Association.

One recommendation only partially accepted was related to revised eligibility for burial at ANC. The Secretary took their recommendation under consideration and proposed criteria based upon their work but less restrictive than the Committee recommended. The Secretary's less restrictive proposal maintains the first interment capability of ANC as required by law.

In March 2019, the Executive Director, ANMC testified before the House Appropriations Committee Subcommittee on Military Construction, Veterans Affairs, and Related Agencies, that the long-planned expansion of ANC—an expansion that will add 37 acres of burial space and extend the cemetery's active life—was expected to begin in 2020.

139. Does the expansion of ANC remain on track to begin in 2020?

Answer: It is my understanding that Southern Expansion planning is well underway. Recent significant accomplishments include: in June 2020, DOJ filed the complaint to take the required property from the Commonwealth of Virginia and County of Arlington; in June 2020, the design of the expansion reached the 65% completion stage; earlier, in Dec 2019, the Finding of No Significant Impacts (FONSI) for the expansion was issued. Upon obtaining possession of the land via condemnation proceedings involving the Commonwealth of Virginia and Arlington County, the Defense Access Roads portion of the project will move forward beyond the planning and environmental stages.

140. What particular challenges do you envision will attend this critical expansion effort? If confirmed, what role would you establish for yourself in providing legal advice and assistance to Army officials regarding the resolution of these challenges?

Answer: At this time, we do not believe there are any further legal challenges, however, I stand ready to assist and address any legal challenges that arise. The only readily visible challenge is the project is

currently funded only to the 61% level. The remainder of the funding is required by FY2022.

The responsibilities of the Executive Director, ANMC, for ANC and the Soldiers' and Airmen's Home National Cemetery are codified at title 10, U.S. Code, section 7724. In November 2014, the Secretary of the Army vested in the Executive Director additional responsibility for the oversight of *all* Army cemeteries. Today, the Executive Director is charged to set the strategic direction and oversee the implementation of policies and programs for 38 cemeteries across the Army.

141. When will Army Regulations 210-190, *Post Cemeteries*, dated February 16, 2005, and 290-5, *Army National Cemeteries*, dated September 1, 1980, be updated to reflect the responsibilities of the Executive Director, ANMC and current Army cemetery policy?

What role will the Army General Counsel play in the development of these revisions?

Answer: Army General Counsel attorneys have been directly and substantially involved throughout the entire process. The first step was completed in 2019 with the publication of the Federal Regulation for the Army Cemeteries other than ANC that were previously only governed by the Army regulation on Post Cemeteries. The previous AR 290-5 and AR 210-190 have been consolidated into one regulation that it is currently undergoing final legal review prior to publication.

U.S. Army Corps of Engineers (USACE) –

Several Senators have expressed concerns that the border wall procurement process conducted by USACE has been egregiously slow, favors only the same small group of contractors, and fails to properly steward taxpayer dollars.

142. Is USACE on track to meet the President's goal of having constructed 450 miles of border wall by the end of 2020? What do you perceive as the most significant legal challenges to achieving this objective on time and to standard?

Answer: It is my general understanding that the U.S. Army Corps of Engineers has 623 miles of border barrier under contract and, barring any unforeseen impediments to construction, expects to complete 450 miles of border barrier by the end of calendar year 2020. There is ongoing litigation regarding the use of DOD authorities and funding for such construction, which may impact this timeline. I am not aware of any other legal challenges, at this time, to achieving the 450-mile objective.

143. How would you respond to concerns that in relying extensively on its two-phase design-build contracting process, USACE has failed to foster competition, particularly when it comes to price and schedule?

Answer: I am generally aware that the U.S. Army Corps of Engineers (Corps) used the two-phase design-build acquisition strategy authorized by Federal Acquisition Regulation (FAR) Part 36.3 in awarding contracts for the border wall. It is my understanding that this strategy, if used properly, can compress delivery schedules and times, and discourage disagreements between the designer and constructor over performance liability. The majority of these contracts, I am informed, were competed utilizing both price and technical evaluation factors. If confirmed, I will take seriously any allegation that the Corps' contracting procedures failed to comply with law and regulation. The integrity of the procurement process dictates transparency and accountability, particularly when it comes to concerns regarding the evaluation of bids and proposals.

144. How would you respond to concerns that in placing a high priority on “relevant and recent experience”—narrowly defined to encompass only border wall construction—the USACE procurement process disfavors new entrants and innovative contractors—many of whom have private sector experience in projects far more complex than what is required at the border?

Answer: If confirmed, I will take seriously any allegation that the Corps’ contracting procedures failed to comply with law and regulation. I am generally aware that the government should not impose unduly restrictive requirements in solicitations for bids and proposals. Such requirements can have a significant impact on the level of competition and can result in the rejection of an otherwise competitive bid or proposal. If confirmed, I will advocate that Army attorneys involved in the procurement process be vigilant in their reviews of contract actions to maintain a fair and level playing field for potential bidders and offerors.

145. How would you respond to concerns that USACE missed numerous opportunities to save taxpayer money and increase the longevity and utility of the border wall through its practice of praising certain bidders for their innovative ideas, while citing excessive “risk” as the basis for declining to award contracts to those same bidders?

Answer: If confirmed, I will take seriously any concern that the Corps’ contracting philosophy and procedures are overly “risk averse.” The nature of government contracting requires a strong commitment to fiduciary responsibilities and good stewardship over tax dollars. In my view, the Army should properly balance the inherent risks against potential benefits in many contractual transactions. If confirmed, I will work to ensure that Army clients and contracting officials understand the legal parameters in which they can operate and exercise the required balancing of risk vs. benefit.

On January 20, 2020, President Trump announced that he would direct USACE to withdraw its proposed rule pertaining to the use of Corps’ reservoirs for domestic, municipal, and industrial water supply—a rule that the President asserted would allow the Corps to restrict a state’s access to its own water flow.

146. Subsequent to withdrawal of the rule, what do you view as the logical “next steps” in developing a legal and practical ruleset—acceptable to the states—for the withdrawal of water from within the boundaries of USACE reservoirs?

Answer: It is my understanding that the U.S. Army Corps of Engineers (Corps), applying the feedback received from states and stakeholders, is working closely with the Assistant Secretary of the Army for Civil Works to address pressing water supply issues through methods other than rulemaking. The Assistant Secretary recently delegated to the Corps the authority to approve reallocation studies when major structural or operational changes are not involved, when authorized purposes are not seriously affected, and when there is no change proposed to the storage for flood management. If confirmed, I will seek out opportunities to work with key stakeholders and Congress in developing a long-term solution that fully recognizes State, Tribal and local water rights under applicable law.

147. In your view, how does withdrawal of the proposed rule affect the continued viability of the policies and procedures set forth in U.S. Army Corps of Engineers memorandum, subject: *Real Estate Policy Guidance Letter No. 26, Easements to Support Water Supply Storage Agreements and Surplus Water Agreements*, dated June 10, 2008?

Answer: I understand that Policy Guidance Letter No. 26 provides that when the Corps issues a real estate easement in connection with a water supply storage agreement or surplus water agreement, the easement and agreement are to be issued together, but the Policy Guidance Letter does not determine whether or when an agreement is required for a water withdrawal. To the extent that additional guidance becomes necessary to address the withdrawal of water from within the boundaries of Corps-operated reservoirs, I will, if confirmed, ensure that the Corps consults with States, Tribes, and key stakeholders before issuing that guidance.

Acquisition

In successive NDAs beginning in FY 2013 and culminating in FY 2019, Congress enacted sweeping reforms of the defense acquisition system and organizational structure. These reforms expanded the acquisition-related functions of the Service Chiefs and incorporated measures designed to reduce the cost and development timelines of major systems.

148. What is your understanding of the role of the Army General Counsel in ensuring that Army acquisition programs are executed in accordance with the law and DOD and Army acquisition policy?

Answer: The Army General Counsel directly advises the Assistant Secretary of the Army for Acquisition, Logistics and Technology (ASA(ALT)) in connection with all major defense acquisition programs and other efforts for which the ASA(ALT), in his capacity as Army Acquisition Executive, serves as the decision authority. The Army Office of General Counsel, working closely with ASA(ALT) staff and the responsible Program Executive Officer closely reviews each effort to ensure program decisions comply with the law and DoD and Army acquisition policies.

149. How does the Army General Counsel ensure that the acquisition-related responsibilities of the Chief of Staff of the Army are synchronized with those of the Secretary of the Army and the Assistant Secretary of the Army for Acquisition, Logistics and Technology (ASA(ALT))?

Answer: While The Judge Advocate General of the Army directly advises the Chief of Staff of the Army, the Army General Counsel advises the Assistant Secretary of the Army for Acquisition, Logistics and Technology and works closely with other stakeholders in the Acquisition process to ensure that all work in an integrated and synchronized manner to achieve Army Modernization objectives.

150. What are your views on the overall effects on the Army of defense acquisition reform to date?

Answer: Acquisition reform efforts thus far have been quite successful. It is my understanding that the Army has seen greater flexibility in requirements development, prototyping, and rapid systems development, without sacrificing acquisition rigor in the process. Leveraging middle tier acquisition particularly has enabled us to engage industry in novel ways while rapidly developing technology.

151. If confirmed, how would you ensure that Army acquisition officials understand and leverage the flexibilities provided by Congress in the context of acquisition reform?

Answer: If confirmed, I will ensure we are engaging early in review of acquisition strategies and programmatic approaches to take full advantage of authorities provided by Congress. We have been provided great flexibility and it is incumbent on senior leadership to ensure our programs have

comprehensively assessed options and applications of the many paths we have been provided.

152. Do you perceive benefit to the Army in establishing major acquisition programs under Section 804 authority? What are the risks of doing so? Please explain your answer.

Answer: Absolutely. Section 804 has not only increased the flexibility of approaching commercial industry but also provided greater flexibility in the types of solutions we are exploring. It is reducing program risk for us — we are finding that we can have more flexible and open requirements initially to allow prototype assessment and Soldier feedback to determine acceptable performance of a system before settling on a final acquisition solution. This does require greater exercise of judgment in program structure and execution; with fewer mandated requirements under Section 804 we must determine how to balance speed versus rigor. One of the roles of OGC in this process is to facilitate reaching that balance.

153. Do you believe the Army should exploit non-developmental or commercial off-the-shelf solutions to meet Army requirements? Would this put capabilities into the hands of Soldiers more quickly, in your view?

Answer: Yes. Where a commercial or non-developmental solution can meet military requirements it is almost always not only faster, but also less expensive, to put capability in Soldiers' hands. We must be cautious that we balance speed with capability. For example, we must ensure that commercial solutions of all types are ready to operate in a cyber-contested environment when deployed; luckily, this is an area with tremendous commercial expertise.

154. What is your assessment of the legal issues attendant on the identification, evaluation, and management of risk in the Army's organic and commercial defense industrial base, including the munitions industrial base?

Answer: The Army conducts its annual assessment of the commercial and organic industrial bases as required by law and submits its findings to the Office of the Secretary of Defense for inclusion in the Industrial Capabilities Report to Congress. For the 2019 Industrial Capabilities Report to Congress, the Army concentrated on risk-based sectors identified in the EO 13806 Report (“Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States”). The Army believes this is an effective methodology for identifying risk and opportunities within the Industrial Base.

In February 2019, the Congressionally-established Advisory Panel on Streamlining and Codifying Acquisition Regulations (the “809 Panel”) submitted its final report, detailing 98 recommendations to enhance DOD’s ability to acquire and deliver warfighting capability in a cost-effective and timely manner, better to address the concerns raised by the current international security environment.

155. Given the recommendations of the 809 panel, are there any additional acquisition reforms you would endorse for consideration by Congress?

Answer: Budgetary uncertainty and limited funding flexibility have hampered the Army’s ability to effectively execute sustainment plans, address emergent sustainment requirements and take advantage of opportunities from technological breakthroughs. One way budget flexibility can be improved is by increasing the Procurement and Research, Development, Test and Evaluation reprogramming thresholds, which will permit leadership to more easily move funding as needed within appropriations accounts.

On November 20, 2019, the Secretary of the Army promulgated Army Directive 2019-35, *Funding Flow for Future Force Modernization*, under the proponenty of the Army General Counsel.

156. If confirmed, how would you ensure compliance with Army Directive 2019-35?

Answer: The Army General Counsel is the proponent for Army Directive 2019-35 and is responsible for conducting legal reviews of relevant program document and budget submissions to ensure compliance.

157. How are the research and development functions that relate to military requirements, as well as developmental and operational testing and evaluation functions executed and overseen across the Army? What is the role of the Army General Counsel in providing advice in matters related to these functions?

Answer: The Commanding General (CG), U.S. Army Futures Command (AFC) leads and integrates the Army future force modernization enterprise and is the Army's chief futures modernization investment officer (CFMIO). The Assistant Secretary of the Army (Acquisition, Logistics and Technology) (ASA (ALT)) has responsibility to conduct the function of research and development. The CG, AFC has responsibility for the aspects of the function of research and development that relate to military requirements and test and evaluation. The CG, AFC will coordinate with the ASA (ALT) on all matters pertaining to research, development, and acquisition. In consultation with the ASA (ALT), the CG as the CFMIO will prioritize, direct, integrate, and synchronize the execution of science and technology efforts, operations, and organizations across the Army. The Army General Counsel is the proponent for the policy and is responsible for conducting legal reviews of relevant program document and budget submissions to ensure compliance with law and policy.

158. Who is responsible for directing, integrating, and synchronizing the execution of science and technology efforts, operations, and organizations across the Army? What is the role of the Army General Counsel in providing legal advice in matters related to these functions?

Answer: The Commanding General (CG), U.S. Army Futures Command (AFC) leads and integrates the Army future force modernization enterprise and is the Army's chief futures modernization investment officer (CFMIO). The CG, AFC has responsibility for the functions of research and development that relate to military requirements and test and evaluation. The Assistant Secretary of the Army (Acquisition, Logistics and Technology) (ASA (ALT)) has responsibility to conduct the function of research and development. The CG, AFC coordinates with the ASA (ALT) on all matters pertaining to research, development, and acquisition. In consultation with the ASA (ALT), the CG as the CFMIO prioritizes, directs, integrates, and synchronizes the execution of science and technology efforts, operations, and organizations across the Army. The Army General Counsel is the proponent for the policy and conducts legal reviews of relevant program document and budget submissions to ensure compliance with law and policy.

On September 4, 2019, the head of U.S. Army Futures Command told the Defense News Conference, “[t]here is a lack of trust [on the part of small businesses] that the government can sustain [a] small-business model. . . . The way we do budgeting, POM cycles and all that—a small business can’t survive. We’re going to have to prove to small businesses that we can adjust our POM cycles to meet their needs.”

159. If confirmed, how would you lead the OGC in providing the legal advice and assistance necessary to bridge the gap between the Army POM process and small business?

Answer: The vast majority of innovation and research being done to preserve our edge over Russia and China is being done by small business startups, but these companies are the most vulnerable and face the biggest challenges when a funding stream is fragmented or broken. In order to quickly capitalize on new breakthroughs we must bridge the “valley of death”, or the gap where funding dries up until a technology is taken up with a program of record. Utilizing flexible acquisition tools like other transaction authority and the Small Business Innovation Research funds have been successful in targeting technology development, but despite these improvement. The current POM process presents challenges for small companies. For a startup, the excitement of receiving development money from a prototype competition in FY 19 is quickly extinguished when told that requests for proposals will come out in FY 21. These processes leave a hole in their business plan, and create pressure from investors requesting that DoD work be dropped.

One recommendation is to develop greater flexibility in budgeting which would allow for PM’s and PEOs to be given wider flexibility for program spending in the early phases when they are still defining costs. The autonomy to move money across a broad range of programs and the ability to consolidate line items into portfolios organized around army modernization priorities would make it easier to reallocate funding without time consuming re-programming actions.

160. If confirmed, how would you ensure that the Army Contract Adjustment Board has access to expert legal advice?

Answer: The Office of the Army General Counsel provides legal advice to the Assistant Secretary of the Army for Acquisition, Logistics and Technology, who convenes the Army Contract Adjustment Board (ACAB), as required. If confirmed, I would ensure that any convened ACAB would have experienced legal advisors appointed to advise members to ensure that the Board’s deliberations and results are consistent with the law and policy.

161. What factors would you take into consideration in advising the Board whether or not to amend an existing contract or grant extraordinary contractual relief?

Answer: The U.S. Army Contract Adjustment Board (CAB) will take the facts and merits of the contractor’s claim (for contractual adjustment) along with the circumstances surrounding the proposed relief into account, including the contractor performance record, quality and timeliness; importance of the contractor to the national defense; forecast of future contracts; and market research indicating availability and capture cost of a different contractor.

162. If confirmed, how would you guide the Army’s implementation of section 544 of the NDAA for FY 2020?

Answer: If confirmed, I will ensure that the Office of the Army General Counsel reviews any directive promulgated by the Office of the Secretary of Defense that implements section 544 of the FY 2020 NDAA and the office will remain available to assist subordinate Army legal offices in interpreting the requirements of this provision, as required.

Security Assistance

The U.S. Army Security Assistance Command is the one-stop focal point for Army

Foreign Military Sales, providing materiel, training, education, and other services to more than 140 allies and friendly countries and multinational organizations—all designed to improve security cooperation and foster interoperability and preparedness.

163. In your view, is the current structure for the provision of legal services to U.S. Army Security Assistance Command, sufficiently expert, efficient, and effective? Please explain your answer.

Answer. The USASAC has legal services, paid for with Foreign Military Sales (FMS) funds, on-site as part of the USASAC organization. Contentious issues are sent with the USASAC legal opinion to the Deputy Assistant Secretary of the Army (Defense Exports and Cooperation) (DASA (DE&C)) for Headquarters, Department of the Army (HQDA) legal staff to review and provide an Army opinion to the Office of the Secretary of Defense (OSD). Both the USASAC and HQDA legal personnel are well versed in Security Assistance and have provided excellent support.

164. What progress has the Army made in standardizing security assistance reporting so as to leverage comparisons of security cooperation spending across countries, regions, and programs to enable informed future prioritization and resourcing decisions?

Answer. The Army has developed multiple databases and metrics to include a desktop Common Operating Picture that manages, tracks and reports on all Army FMS cases. FMS cases can be reviewed by country, regions, and programs to provide a holistic look at FMS cases in each country/region and includes the type of funding used for each FMS case.

165. What progress has the Army made in developing an expert and effective security cooperation workforce? What skill and competency gaps remain, in your view?

Answer. OSD has been charged with developing a certification program for the Security Cooperation workforce. The Army, specifically the DASA (DE&C) office, has been part of this development since the inception and has been an active voice in how the program has been developed. The certification program is based on specific competencies as developed by Defense Civilian Personnel Advisory Service. The DASA (DE&C) is managing the identification of Army positions and personnel included in this workforce and will be administering the certification of individuals.

Protecting Critical Technology

By memorandum of October 24, 2018, then-Secretary of Defense Mattis established the Protecting Critical Technology Task Force, reporting to the Deputy Secretary of Defense and the Vice Chairman of the Joint Chiefs of Staff. The Task Force was one component of DOD's response to Intelligence Community warnings that China and Russia are engaged in campaigns to steal trade secrets, proprietary information, and other forms of intellectual property from the United States, through infiltration of the software supply chain, acquisition of knowledge by foreign students at U.S. universities, and other nefarious means—all as part of a strategic technology acquisition program.

166. Specifically how has the Army undertaken to work with partners in the National Security Innovation Base and defense research enterprise to ensure the integrity and security of the Army's classified information, controlled unclassified information, and key data?

Answer: The Army recognizes the imperative to protect research, science, and technologies from our

adversaries. The Army has a tremendous partnership with the organization, jointly sponsored by the Under Secretary of Defense, Intelligence and Security and the FBI, designed to protect critical technologies. The Army's work focuses on integrating and synchronizing initiatives to protect those technologies most critical to the Army. In addition, the Army is undertaking Counter Intelligence Reform, and multiple lines of effort to address protection of technologies. The G2 has refocused the Army intelligence and security enterprises to identify, develop, and prioritize requirements that will focus resources and operations to defend the Army's most critical technologies at risk from peer adversaries, especially China and Russia.

Religious Accommodation-

167. In your view, do Army policies and processes appropriately accommodate the religious practices of individual service members—including the accommodation of religious practices that may require a waiver of Army uniform and/or grooming standards—as mandated by the Religious Freedom Restoration Act and the NDAsAs for FYs 2013 and 2014?

Answer: Yes. Army policies and procedures properly address the religious rights of our Soldiers. The Army's actions are in compliance with law and policy.

168. Under current law and policy, do you believe that individual Soldiers' expressions of religious belief are properly accommodated—including accommodations that may require a waiver of Army uniform and/or grooming standards—provided they do not impact unit cohesion and good order and discipline?

Answer: Yes. I believe that Soldiers have the ability to express their individual religious beliefs. We have a process in place, with the help of our Chaplain Corps, to assist Soldiers in understanding their religious rights and how to seek accommodations. In the end, health, safety, and unit discipline are paramount, but so are the rights of our Soldiers. Our people are our number one priority, and as much as possible, we ensure our Soldiers can practice their desired faith.

169. Do you support a policy that allows a prospective recruit to request and receive an accommodation of religious practices prior to enlisting or accepting a commission in the Army?

Answer: Yes. Consistent with our process for currently serving Soldiers, those Americans that volunteer to serve our Nation deserve to have their religious beliefs protected.

170. Do you support a policy that allows a Soldier's religious accommodation, once granted, to follow that Soldier throughout his/her military career—no matter where he/she is stationed or the nature of his/her specific duties—unless it can be demonstrated that the accommodation adversely affects military mission accomplishment?

Answer: Yes.

171. How many applicants for enlistment or commissioning in the Army and serving Soldiers have requested an accommodation of religious practices since October 2018? How many of these accommodation requests were granted?

Answer: From October 2018 through May 2020, the Army received 237 religious accommodation requests with 208 approved. Pre-accessions had a total of 45 requests with 40 approved (38 enlistment applicants and 2 pre-commissioning). Currently-serving Soldiers had a total of 192 requests with 168 approved (161 enlisted Soldiers and 7 Officers). All individual requests were evaluated on a case-by-

case basis, consistent with law and policy. Those disapproved were due to safety concerns, health hazards, or lack of a sincerely held religious belief.

172. Should the Army accommodate the request of a college or university affiliated with a particular religious faith, to appoint a military officer of that same faith as the Professor of Military Science, charged with leading the host institution's Senior Reserve Officers' Training Corps (ROTC) unit?

Answer: The Army values the contributions of our 274 Senior ROTC Host Universities, which have a long history of producing outstanding military officers who are committed to supporting our nation and their communities through self-sacrifice and service to others. Working with the Department of Defense, we believe that we are able to come to an agreement with any faith-based University that honors their particular faith traditions, while ensuring that the merit-based practices and non-discrimination policies essential to the Department of Defense's administration of military personnel are honored.

173. Has the Army's Equal Opportunity program been weaponized—that is, used improperly as the basis for allegations of unlawful discrimination against military chaplains whose faith tenets do not permit same sex marriage, and who thus decline to participate in official command “pride” celebrations or to counsel same sex military couples? This is the Question?

Answer: No, I do not believe the Army's Equal Opportunity program has been weaponized. The Army continues to strike the appropriate balance between the Free Exercise Clause, the Establishment Clause; and the laws and policies concerning the equal treatment of all Soldiers and DA Civilians. Army chaplains are encouraged, supported, and resourced to provide religious support to Soldiers, their Families and Army Civilians, while acting within the parameters of their ecclesiastical endorsing agent's tenets. The Army also takes all allegations of unlawful discrimination seriously. When allegations of an Equal Opportunity violation are made against any Soldier or Army civilian, to include an Army chaplain, the Army has in place comprehensive systems of due process to ensure all applicable laws and policies are carefully considered in each case.

Role in the Army Officer Promotion and Confirmation Process

174. What is your understanding of the role of the Army General Counsel in ensuring the integrity and propriety of the statutory officer promotion selection board process?

Answer: The Office of General Counsel, in coordination with the Office of The Judge Advocate General, reviews every aspect of the officer promotion board process and actions to ensure that promotions not only comply with statutory and policy requirements, but that officials involved in the process have the information necessary to make informed and appropriate decisions.

175. Do you perceive any need for change in this role? Please explain your answer.

Answer: No. The officer selection and promotion process is fundamental to the success of the Army. If confirmed I would ensure that the Office of General Counsel is actively involved in the selection and promotion process.

176. In your view, are the current policies and procedures governing review of the records of Army officers whose selection for promotion or assignment requires Presidential or Secretary of Defense approval or Senate confirmation, sufficient to enable informed decisions by the Secretary of the Army, the Secretary of Defense, the President, and the

Senate? Please explain your answer.

Answer: Yes. The Army has developed a thorough post-selection review process that encompasses our own command investigation data, the records of Criminal Investigation Command (CID), the records of the Department of the Army Inspector General, and our own individual officer personnel files. We ensure that officers identified with potentially adverse information, information that could affect their suitability to advance to higher responsibilities, are carefully evaluated and given all due process in ensuring that they meet the exemplary conduct standard required for advancement.

177. In your view, are these policies and procedures fair to the individual Army officers proceeding through the promotion or assignment processes?

Answer: Yes. We entrust great responsibility to those who lead our formations. It is imperative that such a trust is deserved, and our careful evaluations allow us to fairly evaluate our officers and make confident recommendations to the Secretary of the Army for those we nominate for advancement.

178. What is the role, if any, of the General Counsel of the Department of the Army in advising senior Army and DOD officials on the implications of adverse or reportable information pertaining to a military officer nominated for promotion to General Officer grades or for appointment to a position of “importance and responsibility.”

Answer: As with all officer personnel matters the Office of General Counsel, in coordination with the Office of The Judge Advocate General, is actively involved in ensuring every aspect of the process is done correctly and fairly and any adverse or reportable information is properly considered.

179. If confirmed, what will be your role in ensuring the Army’s strict compliance with section 502 of the NDAA for FY 2020 as regards the conduct of boards for the selection of officers for promotion to General Officer grades?

Answer: The Office of the General Counsel and the Office of the Judge Advocate General are instrumental in ensuring promotion selection boards properly review adverse information during the selection of officers for promotion to the general officer grades. The Office of the General Counsel and the Office of the Judge Advocate General, together, ensure strict compliance with the law, including Section 502 of the FY20 NDAA requiring promotion selection board consideration of adverse information at each stage of the selection board for promotion selection boards considering officers for promotion to general officer grades.

180. What is your level of confidence that adverse information derived from Army administrative investigations, including those conducted pursuant to Army Regulation 15-6, *Procedures for Administrative Investigations and Boards of Officers*, is recorded and tracked across an individual Soldier’s career, and properly considered by promotion selection boards?

Answer: I am confident that adverse information derived from Army administrative investigations under Army Regulation 15-6 are recorded and tracked across individual officers’ careers to be considered by promotion selection boards for general officers, as required by law. Our Army Adverse Information Program database consolidates adverse findings against all field grade officers and above. Currently, the Army awaits Department of Defense implementing guidance to expand promotion selection board review of adverse information regarding selection of officers to promotion below the grade of brigadier general.

181. In your view, how can the Army’s internal scrolling processes be restructured so as to improve the timeliness of Army appointments, including expediting the transfer of an officer from the Active Army to an Army Reserve Component?

Answer: The Army has taken action to improve the speed of scrolling internally. We have 13 separate commissioning sources and the interactions among those and the Department have been studied and improved several times over the past decade.

Non-Deployable Service members

In July 2018, DOD published Department of Defense Instruction (DODI) 1332.45, *Retention Determinations for Non-Deployable Service members*. DODI 1332.45 provides that the Secretaries of the Military Departments may “retain . . . those service members whose period of non-deployability exceeds the 12 consecutive month limit . . . if determined to be in the best interest of the Military Service.”

182. What factors would you consider in advising the Secretary of the Army that the retention of a Soldier who has been non-deployable for more than 12 months is “in the best interest of the Service”?

Answer: As with most standards, a Soldier may request an exception to policy. There are several instances where retaining a Soldier who has been non-deployable for more than 12 months might be in the best interest of the Army. For example, recovery from injuries may take more than 12 months. Other examples include compassionate stabilizations due to family member illness, adoption deferments, and Soldiers processing through the Integrated Disability Evaluation System to determine their fitness for duty. To ensure the best interests of the Army and the Soldier are met, if confirmed, I will ensure each Soldier is evaluated on a case-by-case basis to determine whether the Soldier may be granted a waiver to continue to serve.

183. In your view, what legal and legal policy parameters govern how this policy should be applied to Soldiers with HIV? To those who identify as transgender post-April April 2019?

Answer: The Army’s policy with respect to the deployability of Soldiers who have tested positive for HIV is covered in Army Regulation 600-110, “Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus.” Testing positive for HIV in the past does not render a Soldier permanently non-deployable, though each case is adjudicated based on the facts. The Army is a standards based organization that treats every Soldier with dignity and respect. DODI 1332.45 is the governing policy that is applied equally to all Soldiers who exceed the 12 consecutive month non-deployable limit. The Army has and will continue to follow DoD’s policy regarding service by Transgender individuals and individuals with gender dysphoria.

184. If confirmed, what recommendations might you make to the Secretary of the Army to improve the timeliness of the Army’s Disability Evaluation System process as applied to both Active and Reserve Component Soldiers—particularly as regards the due process accorded each Soldier?

Answer: Staffing at the PDA, particularly Doctors to conduct the reviews, is a challenge. I would work with DoD on changing practice and policy of only having medical doctors at the MEB and PEB stages. Physician Assistants and Nurse Practitioners perform similar functions and would be much easier to hire within current fiscal constraints. Will also work with the VA on the backlog created by

COVID.

Service of Transgender Persons –

In January of 2019, the Supreme Court issued an order allowing DOD to implement this Administration’s policy prohibiting some transgender persons from joining the military. The DOD policy took effect on April 12, 2019.

185. If confirmed, what factors would you consider in advising the Secretary of the Army or another Army official whether or not to grant an exception to policy to permit a transgender applicant for military service both to access into the Army and to serve in his or her preferred gender?

Answer: All waivers are considered on their own individual merit. They are evaluated based on physical and mental standards that are not based in gender. There are no set factors that apply to every case, each waiver is considered on a case-by-case basis taking into account the individual’s potential for service.

186. In your view, how does the U.S. Supreme Court decision in *Bostock v. Clayton County*, holding that prohibitions against discrimination on the basis of sex, as set forth in the Civil Rights Act of 1964, extend to transgender and homosexual persons, affect the legality and propriety of DOD’s transgender policy?

Answer: The Army will continue to work with DoD to determine the effect, if any, that *Bostock v. Clayton County* may have on DoD policy. The Army has and will continue to follow the law and DoD policy regarding service by transgender individuals and individuals with gender dysphoria.

Suicide Prevention –

The number of suicides in each of the Services continues to concern the Committee.

187. Mindful of the U.S. Constitution, Amendment II, and related statutes, what ideas would you offer to the Secretary of the Army for preventing suicides by curtailing the misuse of lethal means by Soldiers and their families?

Answer: The Army takes the issue of suicides by Soldiers and their family members very seriously. If confirmed, I would review and provide advice to the Secretary of the Army on policy proposals presented to address this issue to ensure such proposals were consistent with law, regulations, and policy.

Sexual Assault

Despite significant efforts by the Military Services to enhance their response to sexual assaults, including measures to care for victims and hold assailants accountable, the DOD Annual Report on Sexual Assault in the Military for FY 2018 documented a statistically significant increase in the past-year prevalence of sexual assault and unwanted sexual conduct, primarily for female service members in the 17 to 24 age group. These findings echoed earlier reports of alarming increases in the prevalence of sexual harassment and assault at the Military Service Academies, including the U.S. Military Academy (USMA).

188. If confirmed, specifically what would you do to increase the Army’s focus on the

prevention of sexual assault?

Answer: If confirmed, I will ensure the Army staff continues to provide Command Teams and leaders with the appropriate resourcing and tools to implement an effective prevention strategy in alignment with the Department of Defense’s Prevention Plan of Action (PPOA).

The Army recently developed its SHARP prevention approach, which was codified in the “Prevention of Sexual Harassment/Sexual Assault Annex to the U.S. Army People Strategy.” The annex explains how the Army will create the conditions necessary to accomplish its goal by describing the methods (ways) and resources/conditions (means) to achieve the intended outcomes (ends) with focus upon stopping perpetration of incidents and victimization before it occurs. Further, the Army is addressing sexual assault in a holistic manner through an approach that focuses on providing Soldiers with the knowledge needed to better understand sexual misconduct and the skills required to engage in healthy relationships. An example is by the Army collaborating with the other Military Services, the National Guard Bureau, colleges, universities, and military service academies to share evidenced-based practices in reducing sexual assault and sexual harassment at colleges, universities and service academies throughout America.

189. In your view, should the U.S. Air Force Academy’s *Safe to Report* policy be applied at USMA and/or in other units and organizations across the Army?

Answer: I fully support minimizing barriers to reporting. However, I am gravely concerned that providing wholesale immunity to certain individuals would have the effect of undermining the validity of a victim's allegations by exposing them to claims that their report was made to escape the consequences of their own conduct that could result in disciplinary action. Moreover, the academies are a unique disciplinary and academic environment, which is not entirely analogous to units in the field. Just as in the civilian criminal justice system, the decision to grant immunity is a discretionary prosecutorial decision that should be made on the individual facts and circumstances in a specific case.

U.S. Military Academy (USMA) -

In 2019, the Department reported that estimated rates of unwanted sexual contact (penetrating and contact sexual assault crime) at USMA had increased in 2018, compared to rates measured in 2014 and 2016. Further, the *Department of Defense Annual Report on Sexual Harassment and Violence at the Military Service Academies for Academic Program Year 2018-2019* documented another increase in the number of sexual assault reports by and against USMA cadets. Although the *Report* documented that USMA had implemented a variety of activities aimed at the prevention of sexual assault, it called out “little evidence of change in long-standing attitudes that deter reporting and help-seeking.”

190. What is your assessment of the efficacy of the policies and processes in place at the USMA to prevent sexual assault and sexual harassment, and to ensure that cadets who do report assault or harassment are not subject to retaliation—social ostracism and reputation damage, in particular?

Answer: West Point’s efforts have had a positive, noticeable impact, as demonstrated by Cadets’ increased willingness to come forward and report allegations of sexual assault and an increased level of trust in the system. Over the last year, West Point held a series of SHARP-related “Honorable Living” days where cadets, staff, and faculty discussed a range of issues, including 1) the importance of supporting those who report sexual assaults, 2) why cadets should not “choose sides” when someone makes an allegation, and 3) the importance of allowing the investigation and adjudication process to

work. These Honorable Living days complement the cadet-led Trust program which remains dedicated to cultural change within the Corps of Cadets to prevent all instances of sexual harassment and assault.

Throughout the calendar year, cadets, staff and faculty are provided Sexual Harassment/Sexual Response and Prevention (SHARP) training provided by a Department of Defense Sexual Assault Advocate Certification Program (D-SAACP) certified Sexual Assault Coordinator (SARC), Victim Advocate (VA), or Program Manager (PM). The training includes Academy SHARP program policy review, to include command engagement to prevent retaliation. When a cadet reports an instance of Sexual Assault or Harassment, their leaders work closely with the SARC to ensure protection from retaliation and when required, develop and execute a detailed protection plan based on the individual requirements of the cadet.

One instance of sexual assault or harassment is still one too many, but West Point's efforts are making a positive difference. Over the last year, West Point has brought in a Sexual Assault Medical Forensic Examiner, a Sexual Assault Investigator and a Special Victim Prosecutor, in addition to opening a SHARP Resource Center to consolidate resources, and enabling Cadets to own more of the prevention process.

191. If confirmed, what specific role would you play in addressing the findings and recommendations of the *Department of Defense Annual Report on Sexual Harassment and Violence at the Military Service Academies for Academic Program Year 2018-2019*?

Answer: The annual report is a valuable tool to allow the Services and the Service Academies to assess sexual assault and harassment within their ranks. If confirmed, I would work closely with Army leaders to carefully consider all findings and recommendations, and provide my best legal guidance to support the Secretary of the Army and USMA Superintendent on how to best implement those recommendations in order to continue to improve our prevention of and response to sexual assault at West Point.

Section 555 of the NDAA for FY 2020, requires the Secretary of the Army to establish regulations for the timely consideration of an application for transfer of a USMA cadet who is the victim of an alleged sexual assault, to another Military Service Academy or to a Senior ROTC program at a civilian institution of higher education.

192. In your view, how will such transfer options enhance USMA's sexual assault prevention and response program?

Answer: Having such transfer options enhances USMA's ability to respond to allegations of sexual assault. Currently, USMA cadets have the option to transfer to a different company or regiment within the USMA Corps of Cadets

193. What role will you play, if confirmed, in developing and implementing the section 555 regulations applicable to USMA?

Answer: If confirmed, I will advise the Secretary of the Army and the Assistant Secretary of the Army (Manpower & Reserve Affairs) as they develop regulations to implement section 555. My advice will focus on ensuring that requests submitted pursuant to section 555 receive timely consideration and action.

194. What is your assessment of the efficacy of the policies and processes in place at USMA to ensure each cadet’s free exercise of religion—including the right to hew to no religion at all—and to accommodate cadets’ religious practices?

Answer: The United States Military Academy effectively executes its responsibility to ensure cadets’ freedom of religious practice, regardless of faith or lack thereof. For the approximately 85% of the Corps who espouse religion, the Academy offers a wide array of opportunities to explore, question, and strengthen their faith. This is done under a multidisciplinary team of chaplains and volunteers who represent every major faith group in the United States. For others who have no faith declaration or interest, the cadets are offered the opportunity for development through the Humanist Club, Cadet Development Center, and Center for Enhanced Performance. These teams are also led by professionals and highly trained volunteers. In both instances, the opportunities are completely voluntary. Cadets are free to choose where to invest their time. Under USMA policy, there is no benefit accrued for participation and no demerit for non-participation in any religious or non-sectarian activity. For religious accommodation requests, the Academy follows established Army policies and procedures, ensuring each cadet is supported to the fullest extent possible.

195. In your view, do USMA cadet honor boards and cadet misconduct boards accord necessary and appropriate due process to the cadet whose actions are at issue, including, for example, according the cadet a right to legal counsel and the article 31(b) UCMJ right to remain silent?

Answer: The processes currently in place provide sufficient due process to Cadets facing honor or misconduct boards. For both boards, a cadet has the opportunity to consult with an attorney. This can be either a civilian attorney or a military attorney provided at no charge through the West Point Office of the Staff Judge Advocate. This attorney can help them prepare and present matters in defense, mitigation, or extenuation. For misconduct boards involving allegations of sexual assault, the cadet’s attorney is present with them in the hearing and may present an argument on their behalf. As someone subject to the Uniform Code of Military Justice, a Cadet always has the right to remain silent when being questioned about things that may incriminate them.

196. If confirmed, what would be your role in assisting senior Army officials charged to decide whether a USMA cadet precluded from graduating and commissioning because of a violation of the cadet honor code or other misconduct, will be ordered to active duty in an enlisted status or subject to recoupment of the costs of his/her USMA education?

What standards would you apply to your advice and recommendations in such cases?

Answer: If confirmed, I will oversee my staff’s review of actions that would separate USMA cadets. In deciding whether to recommend call to active duty or recoupment, I will apply law, Department of Defense and Army policy, and my own independent judgement based on my experience not only as an attorney but also as a former military officer.

Sexual Harassment

In responding to the 2018 DOD Civilian Employee Workplace and Gender Relations survey, 17.7 percent of female and 5.8 percent of male DOD employees indicated that they had experienced sexual harassment and/or gender discrimination by “someone at work” in the 12 months prior to completing the survey.

197. In your view, do Army policies and processes for tracking the submission and monitoring the resolution of informal complaints of harassment or discrimination provide leaders, supervisors, and managers, with an accurate picture of the systemic prevalence of these adverse behaviors in the Army?

Answer: Yes. Tracking and monitoring systems are in place for civilian employees and military personnel to file complaints covering harassment and discrimination.

198. Do the Army's policies and processes for recording the outcomes of informal complaints of harassment or discrimination provide leaders, supervisors, and managers, with a means of identifying repeat perpetrators?

Answer: Yes. The EEO Complaints data system can be queried for repeat perpetrators.

199. What actions has the Army taken to establish a modern, comprehensive harassment prevention and response policy and program for the Army's civilian workforces?

Answer: Army conducts annual mandatory training on this issue. Further, the Civilian Anti-Harassment Policy is contained in AR 690-12 and the Secretary of the Army signed a policy statement.

200. In your view, is civilian workforce harassment prevention and response training across the Army adequate and useful to employees? How does the Department confirm that civilian employees across the Army have completed such training at the required periodicity, and what metric does the Army apply to measure the efficacy of such training?

Answer: Yes, I believe the current training is adequate and useful. The Mandatory training EEO, Anti-harassment, and No FEAR ACT training is available on-line and annual face-to-face sexual harassment training is also mandatory for all. The metric is 90-100% of completed training and is reviewed and reported annually.

201. Do Army policies and processes for responding to complaints of harassment or discrimination in the civilian workforce provide appropriate care and services for victims?

Answer: EEO complainants filing discrimination are not referred to as victims; they are aggrieved. Yes, we provide appropriate care and services to the aggrieved; they receive contacts to assistance and services.

202. Do you believe that the establishment in the UCMJ of a punitive article on sexual harassment would be of value to efforts to prevent and respond to sexual harassment in the Army?

Answer: Sexual harassment is already punishable under the UCMJ. There are two articles that have been traditionally employed to punish sexual harassment either as a regulatory violation or as maltreatment of a subordinate. However, last year, the DOD-level Sexual Assault Accountability and Investigation Task Force recommended the addition of a specific offense of "sexual harassment" to the Manual for Courts-Martial. DOD proposed an Executive Order that would include a specific Article 134 offense of sexual harassment which would make a statutory change unnecessary.

Medical Malpractice Claims -

Section 731 of the NDAA for FY 2020 authorizes the Secretary of Defense to allow, settle,

and pay claims against the United States for personal injury or death incident to the service of a member of the uniformed services that was the result of medical malpractice caused by a DOD health care provider.

203. What do you envision as role of the Army General Counsel in implementing this new claims authority?

Answer: The Office of the Army General Counsel will support, advise, and assist the Department of Defense in the development of the rules and procedures to implement this statutory amendment. If confirmed, I will ensure that Army attorneys, both Uniformed and Civilian, are properly resourced and trained to support the implementation of the rules promulgated by the DOD.

204. In your view, what should be the role of the Army General Counsel in adjudicating and approving claims under section 731?

Answer: Currently, Army attorneys adjudicate claims under the Military Claims Act. Under the Army regulations to implement the statute, the Army General Counsel acts as final appellate authority. The Army General Counsel's role in adjudicating claims under section 731 should be to ensure that Army attorneys making the initial determinations are trained and resourced to apply uniform standards of law and render sound decisions. Once implementing rules are published, the Army General Counsel's Office will advise as to their implementation, best practices as appellate authority, and provide other support as requested.

District of Columbia National Guard (DCNG)

205. What is the role of the Secretary of the Army vis-à-vis the DCNG?

Answer: It is my understanding that the President has directed SecDef to supervise, administer, and control the DC National Guard while in militia status through Executive Order 11485. EO 11485 also provides that, through the Commanding General, SecDef commands the military operations of the DC National Guard while in militia status, including training, parades, and other duty, and that, subject to the direction of the President, the SecDef may order out the National Guard under Title 49 of the DC Code to aid the civil authorities of the District of Columbia. In 1969, the SecDef delegated this authority to the Secretary of the Army through Executive Order 11485, including directing the Secretary of the Army to command, through its Commanding General, the use of the DC National Guard in militia status to aid DC civil authorities.

206. How does the Army General Counsel assist the Secretary of the Army in executing this role, particularly as regards activating members of the DCNG in response to severe weather events, in support of National Security Special Events, and to address civil disturbances?

Answer: It is my understanding that the typical process for District of Columbia civil support requests is that the request from the civil authorities of DC, normally the District of Columbia Homeland Security Emergency Management Agency (DCHSEMA) is transmitted directly to the Commanding General of the DC National Guard. The DCNG conducts a mission analysis to determine whether it can provide the requested support. If they can, the CG, DCNG asks the SecArmy to approve the support. Army Office of the General Counsel attorneys work closely with DCNG legal advisors to determine the legality and parameters of the support requested. Army OGC attorneys also coordinate with DoD General Counsel attorneys and the office of the Deputy Attorney General (DAG) for the support requested because the DAG must concur with any requested civil support.

For National Security Special Events or other federal requests for support, it is my understanding that these are treated differently and typically are communicated from the federal agency requesting support directly to the Department of Defense and not the Secretary of the Army.

207. What is the role of the Secretary of the Army with respect to National Guard from other States in a Title 32 status who are called in to augment the DCNG?

Answer: It is my understanding that the NGB is involved in the coordination of any augmentation of support. The Secretary of the Army does not have any authority to command and control National Guard from other states in a Title 32 status. Title 32 Soldiers remain under the command and control of their respective Governors.

208. How does the Army General Counsel assist the Secretary of the Army in executing this role?

Answer: The Army General Counsel provides legal advice to the Secretary of the Army, working closely with attorneys from the Joint Staff, DoD OGC, and DoJ.

Juvenile Problematic Sexual Behavior -

A 2018 media expose asserted that the U.S. military frequently fails to “protect or provide justice to” the children of service members who are sexually assaulted by other children on a military installation.

209. What actions has the Army taken to regularize policies and programs for responding to, investigating, adjudicating, and documenting allegations of juvenile problematic sexual behavior on Army installations?

Answer: In March 2019, the Army published Army Directive 2019-13, which requires installation commanders to ensure the investigation of major juvenile misconduct, referral of such allegations of problematic sexual behavior of children and youth to Family Advocacy for assessment and treatment, and victim assistance. The most serious cases may warrant referral to the appropriate civilian authority for further investigation or determination of appropriate disposition.

I am aware that the Army is also in the process of publishing an Army Directive implementing DoD policy on problematic sexual behavior of children and youth. The policy, currently in staffing, will require Army installations to respond to each report of problematic sexual behavior of children and youth and establish multi-disciplinary teams to address safety, medical, and behavioral health of the children, youth, and families involved. Under the policy, these multi-disciplinary teams will consist of the installation’s Family Advocacy Program Manager, a Staff Judge Advocate representative, a U.S. Army CID Criminal Investigation Command representative, and other medical professionals.

210. How does the Army ensure that the victims of juvenile problematic sexual behavior receive the care, treatment, support, and advocacy services they need?

Answer: The Army is committed to ensuring the safety and well-being of children and families impacted by problematic sexual behavior in children and youth. The Army Family Advocacy Program (FAP) is designated by Army Policy to receive reports of problematic sexual behavior in children and youth and provide treatment, support, and advocacy services as needed. The Army uses a multi-disciplinary team approach to address incidents of problematic sexual behavior in children and youth in order to coordinate and address these incidents.

211. In your view, does the Army have a mechanism to hold accountable, as appropriate,

and provide treatment to juveniles who engage in problematic sexual behavior?

Answer: The Army does have the required mechanisms to hold a juvenile accountable who engages in serious juvenile misconduct, which may include problematic sexual behavior. Current Army policy requires the investigation of each case of major juvenile misconduct, which may be completed by military law enforcement or by the appropriate civilian authorities having jurisdiction. Installation commanders, who are responsible for the health and safety of military and civilian personnel on the installation, must determine appropriate action. Such command action could include barring juveniles from the installation, removing from on-post quarters, or an Early Return of Dependents (if living overseas)

212. In your view, is retrocession of jurisdiction over juvenile offenses committed on Army installations, to the State or territory in which that installation is located, the most effective way to ensure the accountability of juveniles who engage in acts of delinquency, including problematic sexual behavior? Please explain your answer.

Answer: The most effective way to ensure the accountability of juveniles who engage in acts of delinquency, which may include problematic sexual behavior of children and youth is to ensure that each allegation of major juvenile misconduct is investigated, reviewed by the command for appropriate administrative action, and if appropriate, referred to the appropriate civilian authority to determine disposition. Army policy currently recognizes that state authorities are best positioned to determine the appropriate disposition for juvenile misconduct as states often have juvenile court systems and juvenile-related programs aimed at rehabilitating juveniles and deterring future misconduct. This policy requires installations with areas of exclusive federal jurisdiction to seek to establish concurrent jurisdiction with the state over juvenile criminal offenses through the retrocession process. The retrocession process is an effective means for the state to establish jurisdiction over juvenile offenses occurring on military installations, but the process is lengthy. Moreover, the state may decline retrocession, or even after obtaining jurisdiction, decline to accept a referral.

213. Does the Army require any additional authorities to establish and maintain the centralized database on child and youth problematic sexual behavior required by section 1089 of the John S. McCain NDAA for FY 2019?

Answer: The Department of Defense has the lead for contracting for and fielding the centralized database on problematic sexual behavior for children and youth. The Army will support DoD's efforts to utilize the database when developed and fielded.

Military Childcare

On February 24, 2019, a seven-month-old military child died while in the care of an unlicensed military dependent day care provider in privatized military housing on an Army base in Hawaii. Both the State of Hawaii and the U.S. Army investigated the matter.

214. What was the outcome of the Army's investigation?

Answer: The criminal investigation into the death was immediately referred to the Honolulu police department and is being handled through the civilian court system. The command responsible for Aliamanu Military Reservation (location of death) did conduct an administrative investigation into the administration of the Family Child Care Program to discover any additional measures that could strengthen existing policies and practices to prevent unlicensed care.

215. Who (e.g., the unauthorized child care provider, the chain of command, others) was responsible for the death of this child? What actions were taken to hold them accountable?

Answer: According to open source information, Dixie D. Villa, a Navy spouse, has been charged with Manslaughter and has pleaded not guilty.

216. What steps should the Army take, in your view, to improve the administration of its home-based childcare program and ensure the sufficiency of policies regarding unlicensed providers?

Answer: The Army has taken steps to improve the administration of the home-based Family Child Care program and ensure the sufficiency of policies regarding unauthorized child care on its installations. Army policy prohibits unauthorized child care in Government-owned/leased housing and in privatized family housing located on the installation. Violations of this prohibition can result in lease termination, bars to the installation and, depending on the circumstances, criminal charges being brought by federal, military, or state authorities. In March of 2019, the Army published an order that directed Army Installations to assemble local subject matter experts in child care and representatives from the installation Office of the Staff Judge Advocate, Department of Public Works, government and privatized housing offices, and installation leadership to establish local procedures to clarify the rules and responsibilities governing the provision of child care in housing and how to address instances of unauthorized child care. The order required each Garrison to submit their locally developed procedures to the Army's Installation Management Command for verification and tracking. All Army Garrisons have complied with this order.

217. Did this case present jurisdictional concerns? If so, are such concerns common to the provision of child care services across the Army? In your view, does the Army need additional authorities to address these concerns and ensure the health and safety of military children?

Answer: No, this death investigation did not present any jurisdictional concerns. The Federal and State Law Enforcement Agencies have an extensive professional relationship to investigate crime both on and off installation property. I do not believe the Army needs additional authorities at this time.

Reserve Officers' Training Corps (ROTC)

Over the past years, a number of Army Senior ROTC units have failed repeatedly to meet annual commissioning production requirements. Notwithstanding, the FY 2020 Consolidated Appropriations Act includes a recurring provision that prohibits DOD from closing any Senior ROTC detachments.

218. If confirmed, what would be your role in ensuring that the Army complies fully with the provisions of DODI 1215.08, *Senior ROTC Programs*, dated January 2017—including the conduct of an annual assessment of each ROTC unit's efficiency, effectiveness, and performance, and communication of assessment results to senior leaders of the host educational institution and to OSD? Please explain your answer.

Answer: The Army has been, and remains, in full compliance with DoDI 1215.08 with regards to conducting annual assessments of its SROTC Host Units. The Army has been conducting annual assessments, or Program Viability Reviews, since 2014. The Army's Program Viability Review model was used as the template for OSD when they updated DoDI 1215.08; requiring all Services to completed annual assessments. We have provided OSD with the results of our annual Program

Viability Review since we started, and, if confirmed, I will ensure that we continue to do so in accordance with DoDI 1215.08.

Military Health System Reorganization –

Section 702 of the NDAA for FY 2017, as clarified by sections 711 and 712 of the John S. McCain NDAA for FY 2019, transferred the administration and management of military treatment facilities (MTFs) from the Military Services to the Defense Health Agency (DHA). Yet, the Department’s implementation of this transfer has been delayed.

219. If confirmed, specifically what would you do to promote the rapid and efficient transfer to DHA of responsibility and authority for the administration and management of Army MTFs?

Answer: If confirmed, I will ensure our leadership works closely with DHA to accomplish, where appropriate, the efficient transfer of Military Treatment Facilities (MTFs) and medical records. The Army has operationalized medical reform and integrated medical transformation initiatives into the Army Campaign Plan. Additionally, the Army has established a team within the Army Staff that is focused on the transition of the MTFs to DHA in accordance with a deliberate plan. As the Army continues to execute this transition, we are committed to ensuring the standard of care for Soldiers and Families is not reduced, and we will establish a clear delineation of responsibilities for healthcare delivery and readiness while reducing redundancy across the enterprise.

220. Would you see value in restructuring the DHA as a new combatant command—a Unified Medical Command?

Answer: I fully support the results of the report that was directed by Congress in NDAA 2019 to study the feasibility of the Defense Health Command. This report concluded that this was not the right time to restructure the Defense Health Agency (DHA) as a command. The report stated that a clear determination of a DHC feasibility is problematic at this point in time particularly given the large amount of transformation already underway. The impacts of the global pandemic re-emphasize the results of the report.

The Military Accessions Vital to the National Interest (MAVNI) Program and Lawful Permanent Residents (LPR) –

221. In your view, do the benefits of the MANVI and LPR accessions programs outweigh the demonstrated risks, and the costs to the Department associated with conducting security, suitability, and reliability screenings of applicants? Please explain your answer.

Answer: The Army has enlisted Lawful Permanent Residents (LPRs) since the 1950s. LPRs serve in all areas of the Army and are quality accessions who add to the diversity of the total force. With the implementation of OSD’s Expedited Screening Protocol (ESP), all accessions are screened against myriad databases prior to enlistment; ESP screening being the most in-depth screening tool ever deployed by the DoD for pre-accession applicants. We have full faith and confidence in the security and suitability screening that ESP provides. The MAVNI program has not been open to new recruits since 30 September 2016. Given the depth and breadth of the ESP screening, we feel confident that any applicant who passes the ESP screening, along with other Army required checks (local law

enforcement and fingerprint checks), that any applicants coming into the United States Army have been screened with the utmost attention and precaution.

222. If confirmed, would you recommend reactivation of the MAVNI program and the acceptance of new applicants? What changes would you recommend to strengthen the policies governing a “reactivated” MAVNI program?

Answer: In Section 521 of the FY19 NDAA, Congress legislated various requirements related to the MAVNI program. As Army General Counsel, I would ensure that, should DOD desire to reactivate a MAVNI Program, the Army would execute it consistent with this law and DOD policy.

223. In your view, should LPR applicants be subject to the same security, suitability, and reliability screenings as applicants under MAVNI? Please explain your answer.

Answer: In my view, the current policy in place, which screens lawful permanent residents the same as US citizen recruits, is appropriate. In accordance with DOD policy (DoDM 5022.02), all military applicants to the Department of Defense, including the Army, are required to receive a favorable Personal Security Investigation; this is achieved through, at a minimum, a Tier 3 investigation as well as being processed through the Expedited Screening Protocol (ESP). OSD personnel security policy ensures that all applicants are treated equally and subjected to the same background screening requirements. Should a MAVNI program be pursued again, soldiers entering the Army through the program will be subjected to the same personnel screening processes.

Whistleblower Protection

Section 1034 of title 10, U.S. Code, prohibits taking or threatening to take an unfavorable personnel action against a member of the armed forces in retaliation for making a protected communication. Section 2302 of title 5, U.S. Code, provides similar protections to Federal civilian employees.

224. If confirmed, what role would you establish for yourself in ensuring that Soldiers and civilian employees of the Department of the Army who report fraud, waste, and abuse, or gross mismanagement are protected from reprisal and retaliation, including from the very highest levels of the Army, DOD, and the Executive Branch?

Answer: Taking or threatening to take an unfavorable personnel action against such individual in retaliation for making a protected disclosure is prohibited by law and Army policy. For reprisal allegations from military personnel, the Department of Defense (DoD) Inspector General (IG) investigates or oversees such investigations within the DoD and the DoD Component IG investigations of such allegations, and forwards to the Service Secretaries investigation outcomes for appropriate action. I will advise the Secretary of the Army on these matters when requested to do so. In turn, relative to civilian employee allegations of whistleblower reprisal, if confirmed, I would monitor the Army’s program and investigation processes, including those that are referred to the Army from the Office of Special Counsel, the Inspector General Office, or from an employee raising it to their management chain. If confirmed, I would ensure that we have in place Army programs and processes to protect our military and civilian personnel from reprisal, provide for avenues for relief, and support taking appropriate corrective action to right the wrong.

225. What role does the Army General Counsel play in ensuring compliance with Office of Special Counsel requests to the Army for investigations, and in ensuring the legal sufficiency of any such investigation the Army conducts?

Answer: The Army General Counsel is responsible for providing overall guidance on all issues concerning cooperation with the Office of Special Counsel (OSC), including the investigation of alleged prohibited personnel practices and allegations of improper or illegal conduct. If confirmed, I would ensure that my office has a robust program in place, both within my office, to address the merits of such OSC referrals

Support to the Army Inspector General –

226. In your view, what role, if any, should the Army General Counsel have in reviewing and rendering opinions on the legal sufficiency of the investigations and recommendations of the Army Inspector General?

Answer: The appropriate role for the Army GC in reviewing and rendering opinions on the legal sufficiency for investigations and recommendations of the Army Inspector General is limited and restrained and only pertains to cases with substantiated findings regarding senior officials or brought to the attention of OGC in its supervisory attorney capacity. Army Inspector General attorneys provide legal sufficiency reviews for all investigations it (USAIGA) conducts involving senior officials, military and civilian. As these investigations can have significant impacts on senior members of the Army, the Army GC has an interest, on behalf of the SA, to ensure the sufficiency of the investigations. Consequently, it coordinates with the Army IG to review those investigations that result in substantiated findings.

227. Is the Department of the Army Inspector General in compliance with all requirements established by the DOD Inspector General for data entry in inspector general case management systems?

Answer: Based on the DoD Review conducted, the Army IG has implemented all required changes to its case management applications to ensure that only authorized individuals could view data within the data base according to assigned user roles and privacy concerns.

Litigation Involving the Department of the Army –

228. What is your understanding of the relationship between the Department of the Army and the Department of Justice with respect to litigation involving the Army?

Answer: By statute, Department of Justice (DOJ) attorneys handle Army cases involving litigation. However, the Army supports these cases and works closely with DOJ to ensure the Army's interests are represented.

229. In your view, should the Department of the Army have the independence and resources to conduct its own litigation?

Answer: In my view, the Army's interests are well-represented by the Department of Justice with respect to litigation involving the Army.

230. If confirmed, what factors would you consider in determining whether official Department of the Army information should be released in litigation? How would your

analysis of *Touhy* requests differ in cases in which the United States or the Army is a party as compared to cases in which the United States or the Army is not a party?

Answer: When the Department of the Army is a party to litigation, we comply with the Federal Rules of Civil Procedure and provide information in discovery, just like any other party. The Department of the Army *Touhy* regulation, 32 C.F.R. § 516, Subpart G (Army Regulation 27-40, Chapter 7), applies only to litigation in which the Army is not a party, yet official information is requested.

When the Army is not a party, but does have an interest in the litigation as that term is defined in 32 C.F.R. § 516 Appendix F (AR 27-40, Glossary), Army policy is one of impartial and equal access to official information and fact witnesses (but not expert or opinion witnesses).

The Army will undertake reasonable efforts to make official information available for use by the parties to the litigation. So long as *Touhy* requests comply with Army regulations, do not unduly interfere with mission accomplishment, do not request information that is classified, privileged, or otherwise not subject to disclosure, and does not violate any person's expectation of confidentiality or privacy, requests will be approved. (See AR 27-40, ¶ 7-5b).

231. How is the authority to waive attorney/client privilege allocated within the Department of the Army? If confirmed, would you make any changes to this allocation of authority or to policies governing the release of information potentially subject to the privilege?

Answer: In addition to their individual state bar guidelines, the ethical conduct of Army lawyers is governed by The Rules of Professional Conduct for Lawyers set forth in Army Regulation 27-26. With respect to the confidentiality of information in an attorney-client relationship, Rule 1.6 specifies that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation," or the disclosure is otherwise required or permitted under specified conditions.

Generally, the Department of the Army is the Army lawyer's client except in those circumstances in which an Army lawyer is assigned to represent an individual, such as when a lawyer serves as a defense counsel or legal assistance attorney. Generally, the waiver authority for the attorney-client privilege is the individual to whom the advice was provided, whether the individual client receiving legal assistance or the Department of the Army acting through its officers and commanders.

If confirmed, I would not make any changes to this allocation of authority, or to the policies governing the release of information potentially subject to privilege.

232. If confirmed, what factors would you consider in approving a request for the representation of an Army official or employee by Department of Justice attorneys or by private counsel furnished by the Department, in civil, criminal, or congressional proceedings in which an Army employee is sued, subpoenaed, or charged in their individual capacity?

Answer: Pursuant to 28 C.F.R. § 50.15, the authority to approve representation by the Department of Justice, or by private counsel furnished by the Department of Justice, is vested in the Attorney General alone. However, in making a recommendation to the Department of Justice regarding the representation of an Army employee or official, it is my understanding that Army attorneys use the factors outlined in 28 C.F.R. § 50.15 as the starting point for any analysis, namely: whether the official

or employee was acting within the scope of employment at the time of the incident and whether representation is in the best interest of the Army.

The Army Civilian Workforce

233. In your judgment, what is the biggest challenge facing the Army in effectively and efficiently managing its civilian workforce?

Answer: The biggest civilian workforce challenge facing the Army continues to be human capital recruitment and retention.

234. In your view, do Army supervisors have adequate authorities and ready access to the expert human resources and legal support required to address and remediate employee misconduct and poor duty performance? To divest of a civilian employee who fails to meet requisite standards of conduct and performance?

Answer: Supervisors have adequate authorities to address and remediate civilian employee misconduct and poor performance, and they have ample access to Army attorneys and human resources professionals who practice in this area.

235. Are Army attorneys adequately trained to advise and assist civilian and military supervisors in the appropriate exercise of such authorities? If not, what additional training do Army attorneys require?

Answer: I believe Army attorneys receive adequate training to advise and assist supervisors. New military attorneys receive introductory training on managing civilian employees in their basic course. The JAG School provides more extensive employment law training to judge advocates as they are promoted to major. Additionally, civilian and military attorneys who practice primarily in this area can receive specialty training annually at the Law of Federal Employment course. Finally, an advanced course will be offered this year for Army attorneys with the most expertise in Federal Employment law, who are a resource for all Army attorneys.

236. Would there be value, in your view, to establishing a unified DOD civilian workforce, as opposed to separate civilian workforces segregated by DOD Component? Please explain your answer.

Answer: While there may be some efficiencies found by establishing a unified DOD civilian workforce, in my view the value would be outweighed by the loss in value of service-specific knowledge and expertise. While healthy diversity of the workforce necessarily includes a variety of educational backgrounds, training opportunities, and professional experience, each service's and component's individual missions, processes, and cultures are best served and complimented by a civilian workforce armed with an expertise in those specific missions, processes and cultures.

It is not uncommon for contractor employees—particularly those contracted to provide knowledge-based or administrative services—to work in the same offices, serve on the same projects and task forces, and perform many of the same functions as Department of the Army military personnel and civilian employees.

237. In your view, does the Department of the Army have in place adequate processes to ensure that contractor employees do not perform inherently governmental functions and

that contractor performance of “closely associated” and critical government functions is minimized? Please explain your answer.

Answer: Yes, I believe the Department has adequate processes in place to ensure contractor employees are not performing inherently governmental functions, and that closely associated functions are minimized. Any requirement owner that seeks to award a service contract must scrupulously screen the Performance Work Statement to ensure there are no inherently governmental functions performed under the contract. Additionally, each service contract packet includes a Request for Services Contract Approval Form which forces the requirement owner to justify and delineate proposed contractor performance against lists of inherently governmental functions; closely aligned with inherently governmental functions; any grounds that would constitute an organizational conflicts of interest; and outsourcing/potential conversion of government employee functions.

Congressional Oversight -

In order to exercise legislative and oversight responsibilities, it is important that this committee, its subcommittees, and other appropriate committees of Congress receive timely testimony, briefings, reports, records—including documents and electronic communications, and other information from the executive branch.

238. Do you agree, without qualification, if confirmed, and on request, to appear and testify before this committee, its subcommittees, and other appropriate committees of Congress? Please answer yes or no.

Answer: Yes; in accordance with applicable laws and long-standing Department and Executive Branch practice.

239. Do you agree, without qualification, if confirmed, to provide this committee, its subcommittees, other appropriate committees of Congress, and their respective staffs such witnesses and briefers, briefings, reports, records—including documents and electronic communications, and other information, as may be requested of you, and to do so in a timely manner? Please answer yes or no.

Answer: Yes; in accordance with applicable laws and long-standing Department and Executive Branch practice.

240. Do you agree, without qualification, if confirmed, to consult with this committee, its subcommittees, other appropriate committees of Congress, and their respective staffs, regarding your basis for any delay or denial in providing testimony, briefings, reports, records—including documents and electronic communications, and other information requested of you? Please answer yes or no.

Answer: Yes; in accordance with applicable laws and long-standing Department and Executive Branch practice.

241. Do you agree, without qualification, if confirmed, to keep this committee, its subcommittees, other appropriate committees of Congress, and their respective staffs apprised of new information that materially impacts the accuracy of testimony, briefings, reports, records—including documents and electronic communications, and other information you or your organization previously provided? Please answer yes or no.

Answer: Yes; in accordance with applicable laws and long-standing Department and Executive Branch practice.

242. Do you agree, without qualification, if confirmed, and on request, to provide this committee and its subcommittees with records and other information within their oversight jurisdiction, even absent a formal Committee request? Please answer yes or no.

Answer: Yes; in accordance with applicable laws and long-standing Department and Executive Branch practice.

243. Do you agree, without qualification, if confirmed, to respond timely to letters to, and/or inquiries and other requests of you or your organization from individual Senators who are members of this committee? Please answer yes or no.

Answer: Yes; in accordance with applicable laws and long-standing Department and Executive Branch practice.

244. Do you agree, without qualification, if confirmed, to ensure that you and other members of your organization protect from retaliation any military member, federal employee, or contractor employee who testifies before, or communicates with this committee, its subcommittees, and any other appropriate committee of Congress? Please answer yes or no.

Answer: Yes; in accordance with applicable laws and long-standing Department and Executive Branch practice.