

**Advance Questions for Jennifer M. O'Connor,
Nominee to be the General Counsel of the Department of Defense**

Defense Reforms

The Committee has recently held a series of hearings on defense reform.

What modifications of Goldwater-Nichols Department of Defense Reorganization Act of 1986 provisions, if any, do you believe would be appropriate?

The operational successes of the Armed Forces over the last 30 years demonstrates that, overall the reforms in the Goldwater-Nichols Act have served the Department well. I have not had the opportunity to observe the Department in sufficient detail to form an opinion regarding whether any modifications to Goldwater-Nichols provisions may be appropriate at this time. I understand that the Secretary and the SASC are currently looking at these issues. While defense reform efforts are more policy issues than legal issues, if confirmed I will keep an open mind and review and or make recommendations for change if warranted.

Relationships

What is your understanding of both the formal and informal relationship between the General Counsel of the Department of Defense and the following offices?

The Secretary of Defense

The Secretary of Defense is the head of the Department of Defense, and the General Counsel of the Department of Defense is the senior legal advisor to the Secretary and by law (10 U.S.C. § 140(b)) the chief legal officer of the Department. If confirmed, I expect to regularly provide legal advice to the Secretary and his staff on the continuum of issues faced by the Department.

The Under Secretaries of Defense

There are five Under Secretaries of Defense in the Office of the Secretary of Defense. The General Counsel and the attorneys in the Office of the General Counsel of the Department of Defense work very closely with each of the Under Secretaries of Defense, their Principal Deputies, and their respective staffs, on a daily basis to provide timely and accurate legal and policy advice.

The Assistant Secretaries of Defense

Under 10 U.S.C. § 138, there are fourteen Assistant Secretaries of Defense, some of whom report directly to the Secretary of Defense, while others report to an Under Secretary of Defense. The General Counsel and the attorneys in the Department of Defense Office of the General Counsel work very closely with each of the Assistant Secretaries of Defense, their Principal Deputies, and their respective staffs, on a daily basis to provide timely and accurate legal and policy advice, in a manner similar to that

between the General Counsel and the Under Secretaries described above.

The Chairman of the Joint Chiefs of Staff

The Chairman of the Joint Chiefs is primarily advised by a military lawyer known as the Legal Counsel to the Chairman of the Joint Chiefs of Staff. The Chairman's Legal Counsel, and the attorneys in his or her office, work regularly with the General Counsel of the Department of Defense and the attorneys in that Office, on a myriad of issues that the Department must address.

The Geographic Combatant Commanders

Each of the Combatant Commanders has his own dedicated military lawyer, known as the Staff Judge Advocate for that Combatant Command, who serves as the primary legal advisor for that Combatant Commander. If I am confirmed, my staff and I will work with the Chairman of the Joint Chiefs of Staff and the Joint Staff, including the Chairman's Legal Counsel, to assist each of the Combatant Command Staff Judge Advocates in providing timely and accurate legal advice.

The Commander of the Joint Special Operations Command

As noted above, each of the Combatant Commands has his own Staff Judge Advocate who, along with their staffs, is responsible for providing legal advice to each of the Combatant Commanders. If confirmed, I expect that my staff and I will work with the Staff Judge Advocate of the U.S. Special Operations Command (SOCOM), normally through the Chairman of the Joint Chiefs of Staff and the Chairman's Legal Counsel, to assist him in providing timely and accurate legal advice to the Joint Special Operations Command, since it is part of SOCOM.

The Judge Advocates General

The senior leadership of the three military departments and the four military services primarily get their legal advice from their respective military department General Counsels and Judge Advocates General. In 2004, sections 3037, 5148, 8037 of title 10, United States Code were each amended to state explicitly that "[n]o officer or employee of the Department of Defense may interfere with...the ability of the Judge Advocate[s] General to give independent legal advice to" the leadership of their respective military departments. If confirmed as General Counsel, my staff and I will work with all of the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps to assist them in providing timely and accurate legal advice to the leadership of their respective military department or military service.

The Legal Advisor to the Chairman of the Joint Chiefs of Staff

If confirmed, I expect to work closely with the Legal Counsel to the Chairman of the Joint Chiefs of Staff on a regular and recurring basis to assist him in providing timely and accurate legal advice to the Chairman and the Joint Staff, as well as the Combatant Commanders. The Department of Defense General Counsel and the Legal Counsel to the Chairman of the Joint Chiefs of Staff usually meet at least weekly to discuss current issues and I believe that is a practice that should be continued.

The Staff Judge Advocates to the Commanders of Combatant Commands

As noted above, the General Counsel of the Department of Defense and his staff primarily work with the Staff Judge Advocates of the Combatant Commands through the Chairman's Legal Counsel and his staff.

The General Counsels of the Military Departments

If confirmed, I expect to work closely with the General Counsels of the military departments to assist them in providing timely and accurate legal advice to the senior leadership of their respective military departments.

The Counsels for the Defense Agencies

The General Counsel of the Department of Defense is dual-hatted as the Director of the Defense Legal Services Agency (DLSA). The General Counsels of the defense agencies and DoD field activities are all part of DLSA, and, as such, if confirmed, I will oversee and have responsibility for the General Counsels of the defense agencies and DoD field activities.

The Counsel to the Inspector General

Section 8(h) of the Inspector General Act of 1978, as amended, provides for a General Counsel to the Inspector General of the Department of Defense who is the chief legal officer in the Office of the Inspector General and is independent from the Department of Defense General Counsel (notwithstanding the status of the Department of Defense General Counsel as the chief legal officer of the Department of Defense). If confirmed, I plan to work regularly in a cooperative and collegial manner with the General Counsel to the Inspector General and his staff to provide timely and accurate legal advice to our respective clients.

The Joint Service Committee on Military Justice

The General Counsel of the Department of Defense provides tasks to the Joint Service Committee on Military Justice, and in turn, receives helpful advice from it. The General Counsel of the Department of Defense is responsible for designating a non-voting representative to the Joint Service Committee on Military Justice. If confirmed, I look forward to working closely with the Joint Service Committee on Military Justice on matters within its purview.

The Comptroller General

The Comptroller General is an official within the Legislative Branch. If confirmed, I plan to work with the Comptroller General and his staff in a cooperative and collegial manner on matters within the responsibility of the Comptroller General, such as fiscal law issues.

The United States Court of Appeals for the Armed Forces

Pursuant to section 941 of title 10, United States Code, the United States Court of Appeals for the Armed Forces is located within the Department of Defense for administrative purposes only. The General Counsel of the Department of Defense historically functions as an informal liaison between the Department of Defense and the Court. If confirmed, I plan to continue this relationship with the Court, in particular by

respecting its independence.

The Code Committee established under Article 146 of the Uniform Code of Military Justice

I have been informed that the General Counsel of the Department of Defense has no formal relationship to the Code Committee, but that, as a historical practice, the General Counsel has provided informal support, upon request. If confirmed as the General Counsel of the Department of Defense, I expect to continue this practice, and will communicate with the Code Committee on a regular basis with respect to its activities.

The Attorney General

The Attorney General, as the head of the Department of Justice, is the top lawyer in the executive branch. She is the chief legal officer and law enforcement authority of the United States. If confirmed, I expect to work closely with the Attorney General and her staff to ensure that I am positioned to provide timely and accurate legal advice to senior leadership within the Department of Defense.

The Office of Legal Counsel at the Department of Justice

As the chief legal officer of the United States, the Attorney General and the Department of Justice are sometimes called upon to issue legal opinions that are binding on the entire executive branch, including the Department of Defense. The Attorney General has empowered the Assistant Attorney General in charge of the Office of Legal Counsel at the Department of Justice to issue these legal opinions when appropriate. I have been advised that, as a historical practice, the Department of Defense Office of the General Counsel works in a collegial and collaborative manner with the Office of Legal Counsel at the Department of Justice, to assist the General Counsel of the Department of Defense and his or her staff in the provision of timely and accurate legal advice to senior leadership of the Department of Defense. If confirmed, I expect to continue to work regularly with the Department of Justice Office of Legal Counsel on the most complicated legal issues faced by the Department of Defense.

The Office of Legal Adviser at the Department of State

National security requires the Department of Defense to work closely with the Department of State on many matters. As such, the General Counsel of the Department of Defense and his or her staff must regularly work with the Office of Legal Adviser at the Department of State on matters of mutual interest. It is my understanding that the Office of the General Counsel for the Department of Defense and the Office of Legal Adviser at the Department of State historically have worked together in a collaborative and collegial fashion on matters of mutual interest, and if confirmed, I expect to continue this practice.

The General Counsel of the Central Intelligence Agency

Similar to the relationship between the Office of the General Counsel of the Department of Defense and the Office of Legal Adviser at the Department of State, the General Counsel of the Department of Defense and the General Counsel of the Central Intelligence Agency, as well as their respective staffs, must regularly work together on

matters of national security in which both agencies have equities. It is my understanding that the General Counsel of the Department of Defense and the General Counsel of the Central Intelligence Agency have historically worked together in a collaborative and collegial fashion on matters of mutual interest, and if confirmed, I expect to continue this practice.

The Interagency Legal Advisors Working Group

It is my understanding that the General Counsel of the Department of Defense regularly participates in meetings of the Interagency Legal Advisors Working Group. If confirmed, I expect to continue this practice to facilitate communication and cooperation among attorneys from agencies involved in national security.

Qualifications

Section 140 of title 10, United States Code, provides that the General Counsel is the chief legal officer of the Department of Defense and that the General Counsel shall perform such functions as the Secretary of Defense may prescribe.

Assuming you are confirmed, what duties do you expect that the Secretary of Defense will prescribe for you?

The General Counsel, as the chief legal officer of the Department of Defense, is the primary legal advisor to the Secretary of Defense and other senior Department of Defense leaders. The Defense Department carries out unique military and national security functions, as well as a wide variety of activities from health care and cutting-edge research to education and everything in between. If confirmed, I expect that I will be responsible for overseeing the provision of timely and accurate legal advice on the myriad of activities that DoD performs. I eagerly anticipate the challenge, if I am confirmed, of providing legal advice on a wide portfolio of subject areas.

What background and experience do you have that you believe qualifies you for this position?

Since graduating from Georgetown Law School and serving as a Law Clerk for the U.S. Court of Appeals for the District of Columbia Circuit, I have nearly two decades of legal experience in the federal government and the private sector. I am currently serving in the Office of the General Counsel for the Department of Defense as a Deputy General Counsel, and this experience provides great insight into the mission of the Department of Defense and the challenges it faces. I have worked at the White House in as a Deputy Assistant to the President and Deputy White House Counsel for President Obama and in that capacity worked with lawyers at the Department of Defense as well as other federal agencies on a wide variety of issues facing those agencies. I also have experience as a senior attorney in other federal agencies, specifically as a Senior Counsel in the Department of Health and Human Services and as a Counselor to the Acting Commissioner at the Internal Revenue Service. In addition to this variety of federal experience, I spent fifteen years practicing law in the private sector including as a partner

in one of the most well-regarded defense and national security law practices in the country.

I believe that these experiences provide an excellent foundation for me to serve as the next General Counsel of the Department of Defense, if confirmed.

Client

In your opinion, who is the client of the General Counsel of the Department of Defense?

The Department of Defense and the senior leaders of the Department of Defense in their official capacities are the clients of the General Counsel of the Department of Defense.

Duties and Challenges

In your view, what are the major challenges confronting the next General Counsel of the Department of Defense?

The major challenges I will face, if confirmed, are directly related to the major challenges confronting the Department. These include supporting the Department's efforts to weaken and defeat al-Qa'ida and the Islamic State of Iraq and the Levant and ensuring compliance with the laws in all of the Department's operations and activities, including in its continuing military detention and military commissions operations. The Department's wide-ranging missions and activities also present substantive legal issues including on fiscal matters, environment and installation matters, personnel matters, intelligence matters, and acquisition matters. Major challenges confronting the next General Counsel will likely include legal issues arising from personnel initiatives, including implementation of the modernized retirement system for members of the uniformed Services, enacted by the National Defense Authorization Act for Fiscal Year 2016.

If confirmed, what plans do you have for addressing these challenges?

The Department has experienced attorneys who are experts in relevant areas of law, both in the Department of Defense Office of General Counsel and in the larger DoD legal community. If confirmed, I hope to lead those attorneys in their efforts to provide the best possible legal advice to decision makers throughout the Department of Defense. If confirmed, I would also endeavor to assist the Secretary of Defense by providing the legal advice he needs to lead the Department.

What do you consider to be the most serious problems in the performance of the functions of the General Counsel of the Department of Defense?

If confirmed, I will develop a better sense of any problems related to the performance of the General Counsel's functions, but at this point I think that recruiting, developing, and retaining Office of General Counsel personnel with the requisite expertise are

increasingly challenging in an environment of budget uncertainty, recent and impending personnel reductions, and recent retirements of highly qualified personnel.

What management actions and time lines would you establish to address these problems?

If confirmed, I will work closely with my colleagues to address these matters, including through succession planning, outreach and recruiting, and professional development opportunities.

What do you see as the greatest legal problems facing the Department in the coming year?

The Department will continue to work to weaken and defeat al-Qa'ida and the Islamic State of Iraq and the Levant, and those campaigns present continuing legal issues to be evaluated and resolved as expeditiously as possible. Similarly, the Department faces significant ongoing litigation and legal issues associated with military detention and military commissions operations. Over the coming year, the Department will also continue to develop and refine its efforts to prevent and respond to sexual assault in the armed forces and to prevent and respond to retaliation against victims of offenses, those who report offenses, and third party responders. Congress has specifically highlighted the need to improve prevention of and response to sexual assaults in which the victim is a male service member and to develop a comprehensive strategy to prevent retaliation carried out by service members against other service members who report or otherwise intervene on behalf of the victim of an alleged sex-related offense. The development and implementation of such plans will require sustained attention over the coming year. I also think that working with Congress to respond to the recommendations of the Military Justice Review Group will be an area of particular emphasis in the coming year.

Does the Office of the General Counsel have the resources to deal with these problems and do its everyday work?

If confirmed, I will be able to develop a better sense of the Office of the General Counsel's resource needs. However, I understand that budget uncertainty and recent and impending personnel reductions and retirements of seasoned professionals are likely to create challenges.

Legal Opinions

Are legal opinions of the Office of the General Counsel binding on all lawyers within the Department of Defense?

The legal opinions of the DoD Office of General Counsel are generally binding throughout the Department of Defense.

There is an exception for the lawyers in the Office of the Inspector General, as the

General Counsel to the Inspector General is expressly exempted from the scope of 10 U.S.C. § 140 by virtue of Section 907 of the FY2009 NDAA (5 U.S.C. App. Inspector General Act of 1978 § 8(h)). I note also that Title 10 prohibits any officer or employee of DoD from interfering with the ability of certain senior military lawyers to give independent legal advice to their respective principals.

How will you ensure that such legal opinions are available to lawyers in the various components of the Department of Defense?

If confirmed, I will meet regularly with senior lawyers throughout the Department, to keep them informed of relevant opinions and decisions of the Office of the General Counsel of the Department of Defense, and will circulate legal opinions to those affected by them.

If confirmed, are there specific categories of General Counsel legal opinions that you expect to reconsider and possibly revise? If so, what categories?

At this time, I am not aware of any current legal opinions of the Office of the General Counsel of the Department of Defense that I expect to reconsider and revise, if confirmed.

What role do you expect to play, if confirmed, in the development and consideration (or reconsideration) of legal opinions by the Office of Legal Counsel (OLC) of the Department of Justice that directly affect the Department of Defense?

If confirmed, I expect to work regularly with the Office of Legal Counsel at the Department of Justice in a collegial and collaborative fashion on the most complicated legal issues faced by the Department of Defense.

What actions would you take in response to an opinion issued by OLC with which you disagreed as a matter of proper interpretation of the law?

The Attorney General, usually acting through the Assistant Attorney General in charge of OLC, is sometimes called upon to issue legal opinions that are binding on the entire executive branch, including the Department of Defense. If I am confirmed, should OLC issue an opinion with which I disagreed as a matter of law, I would express my opinion to the Assistant Attorney General in charge of OLC, if necessary and appropriate, and the Attorney General and ask for reconsideration of the OLC opinion.

Independent Legal Advice

In response to attempts within the Department of Defense to subordinate legal functions and authorities of the Judge Advocates General to the General Counsels of the Department of Defense and the military services, Congress enacted legislation prohibiting any officer or employee of the Department of Defense from interfering with the ability of the Judge Advocates General of the military services and the legal

advisor to the Chairman of the Joint Chiefs of Staff to provide independent legal advice to the Chairman, service secretaries, and service chiefs. Congress also required a study and review by outside experts of the relationships between the legal elements of each of the military departments.

What is your view of the need for the Judge Advocates General of the services, the Staff Judge Advocate to the Commandant of the Marine Corps, and the legal advisor to the Chairman of the Joint Chiefs of Staff to provide independent legal advice to Service Secretaries, Chairman of the Joint Chiefs, Chiefs of Staff of the Army and Air Force, and the Chief of Naval Operations?

Our nation's military lawyers play an important role for the Department of Defense. I appreciate that these lawyers, given their military training and experience, may have a perspective that civilian lawyers do not have, especially in matters of military operations, military personnel, and military justice.

The Judge Advocates General of the Military Departments, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff should provide their best independent legal advice to the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the Service Chiefs, as appropriate. That advice should be informed by the views of the Department of Justice, the DoD General Counsel, and the Military Department General Counsel concerned.

What is your view of the responsibility of judge advocates within the services and joint commands to provide independent legal advice to military commanders?

Judge advocates within the Services and joint commands have a responsibility to provide legal advice to military commanders that is independent of improper external influence. While these judge advocates must be able to provide timely and effective day-to-day legal advice to military commanders in the field without seeking the approval and input of the DoD General Counsel, their advice should be informed by the views of the Department of Justice, the DoD General Counsel, the General Counsel of the Military Department concerned, and the Judge Advocate General concerned.

If confirmed, would you propose any changes to the current relationships between the uniformed judge advocates and General Counsels?

I am not aware of any change that I would propose to the current relationships between the uniformed judge advocates and the General Counsels, if I am confirmed.

Detainee Issues

Section 1032 of the National Defense Authorization Act for Fiscal Year 2016 prohibits the use of appropriated funds to construct or modify any facility in the United States, its territories, or possessions to house any individual detained at

Guantanamo for the purposes of detention or imprisonment in the custody or under the control of the Department of Defense unless authorized by Congress.

In your view, does the President of the United States have authority under the law or the United States Constitution to direct the construction or modification of any facility in the United States, its territories, or possessions to house any individual detained at Guantanamo for the purposes of detention or imprisonment in the custody or under the control of the Department of Defense without authorization by Congress?

The National Defense Authorization Act for fiscal year 2016 prohibits the use of the Department of Defense funds to “construct or modify any facility in the United States, its territories, or possessions to house any individual detained at Guantanamo for the purposes of detention or imprisonment in the custody or under the control of the Department of Defense unless authorized by Congress” until December 31, 2016. There is a similar provision in the DoD Appropriations Act, 2016. These provisions restrict the Department from using funds to construct a facility to house Guantanamo detainees inside the United States.

In your view, would any officer of the United States be authorized to execute the construction or modification of any facility in the United States, its territories, or possessions to house any individual detained at Guantanamo for the purposes of detention or imprisonment in the custody or under the control of the Department of Defense on the order of the President, and without authorization by Congress?

The National Defense Authorization Act for fiscal year 2016 prohibits the use of Department funds to “construct or modify any facility in the United States, its territories, or possessions to house any individual detained at Guantanamo for the purposes of detention or imprisonment in the custody or under the control of the Department of Defense unless authorized by Congress” until December 31, 2016. There is a similar provision in the Department of Defense Appropriations Act, 2016. These provisions restrict the Department from using funds to construct a facility to house Guantanamo detainees inside the United States.

If confirmed, what role do you believe the General Counsel of the Department of Defense should play in the interpretation of this provision of law?

If confirmed, I would provide legal advice regarding compliance with the law.

Coercive Interrogation Techniques

Section 2441 of title 18, United States Code, as amended by the Military Commissions Act of 2006, defines grave breaches of common Article 3 of the Geneva Conventions, including torture and cruel and inhuman treatment.

In your view, does section 2441 define these terms in a manner that provides appropriate protection from abusive treatment to U.S. detainees in foreign custody

and to foreign detainees in U.S. custody?

I believe the standard as defined in U.S. domestic law is appropriate for purposes of protection from abusive treatment when applied to detention at home and abroad.

Do you believe that the United States has the legal authority to continue holding alleged members and supporters of al Qaeda and the Taliban as enemy combatants?

Yes. Congress and the federal courts have recognized the Executive branch's authority to detain individuals who were part of, or substantially supported, al-Qa'ida or Taliban forces, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.

Do you believe that the federal courts have the procedures and capabilities needed to fairly and appropriately review the detention of enemy combatants, pursuant to habeas corpus petitions?

The federal courts have established clear procedures to review the detention of enemy combatants, pursuant to habeas corpus petitions. In the habeas litigation, the courts have provided detainees with meaningful opportunities to contest the lawfulness of their detentions, while protecting core national security interests, such as the protection of classified information and the continued detention of enemy belligerents who pose a threat to the United States.

What role would you expect to play, if confirmed, under the Periodic Review Board procedures for reviewing the status of Guantanamo detainees and determining whether the United States should continue to hold such detainees?

If confirmed, I would expect to provide legal advice to the Secretary of Defense on the status of the Guantanamo detainees and determinations regarding whether such detainees should continue to be held. In addition, the General Counsel appoints the legal advisor to the Periodic Review Board and is in the legal advisor's supervisory chain.

The Military Commissions Act of 2009 revised the 2006 procedures for military commission trials of "alien unlawful enemy combatants".

In your view, does the Military Commissions Act of 2009 provide appropriate legal standards and processes for the trial of alien unlawful enemy combatants?

The Military Commissions Act of 2009 has provided appropriate standards and processes for the trial of alien unprivileged enemy belligerents. Processes such as these should regularly be reviewed for possible improvements.

What role would you expect to play, if confirmed, in determining whether Guantanamo detainees should be tried for war crimes, and if so, in what forum?

The Convening Authority has the responsibility for determining whether to refer charges to a military commission. The General Counsel does not have a role in the referral of charges. If confirmed, I would expect to provide legal advice, as necessary, to the Secretary of Defense on these matters.

What is your understanding of the relationship between the General Counsel of the Department of Defense and the legal advisor to the convening authority, the chief prosecutor, and the chief defense counsel for the military commissions?

The General Counsel is the chief legal officer of the Department. These specified lawyers play important roles in the military commissions process, requiring them to exercise independent legal judgment.

By section 1045 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92), Congress established that an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in the Army Field Manual 2–22.3.

Do you believe interrogation techniques derived from Survival, Evasion, Resistance and Escape (SERE) techniques are a lawful and effective way to acquire useful intelligence?

No. SERE techniques are used to train U.S. military personnel how to resist interrogation by captors who do not comply with the Geneva Convention Relative to the Treatment of Prisoners of War. SERE techniques were never intended to be used by U.S. military interrogators nor are they authorized by or listed in Army Field Manual 2-22.3. Consequently, their use by U.S. interrogators would violate section 3(b) of Executive Order 13491, section 1002 of the Detainee Treatment Act of 2005, and section 1045(a)(2)(A) of the National Defense Authorization Act for Fiscal Year 2016, both of which provide that an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3. Furthermore, paragraph 5 of Enclosure 4 to DoD Directive 3115.09, “DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning,” provides that “Use of SERE techniques against a person in the custody or effective control of the DoD or detained in a DoD facility is prohibited.

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 September 5, 2006?

Yes. I understand that section 1045 of the National Defense Authorization Act for Fiscal Year 2016 requires the Army Field Manual 2-22.3 to be reviewed every three years and revised as appropriate to ensure that it complies with the legal obligations of the United States and the practices for interrogation described in the section.

What role do you believe the General Counsel of the Department of Defense should play in the interpretation of this provision of law?

In DoD Directive 5245.01, “General Counsel of the Department of Defense (GC DoD),” the Secretary of Defense designated the GC DoD as the chief legal officer of the Department of Defense and assigned to the GC DoD the responsibility to advise the Secretary of Defense and Deputy Secretary of Defense regarding all legal matters within or involving the Department. The GC DoD also is responsible for establishing DoD policy on general legal issues, determining the DoD position on specific legal problems, and resolving disagreements within the Department on such matters. Among other things, the GC DoD provides guidance on, and coordination of, significant legal issues in international law, including those presented by military operations requiring the approval of the Secretary of Defense, and the DoD Law of War Program.

What role do you believe the Judge Advocates General of the military services should play in the interpretation of this provision of law?

By law, the Judge Advocates General, in addition to other duties prescribed by law, are the legal advisers of the Secretaries and of all officers and agencies of their respective military departments.

The Judge Advocates General and other military lawyers should play a prominent role in the interpretation of standards related to the treatment of detainees. The Judge Advocates General and the lawyers they lead bring experience and an important perspective to these and many other matters, and they play a vital role in supporting the operating forces worldwide. Judge advocates must be depended on to provide timely day-to-day legal advice to military commanders in the field. If confirmed, and if called on to offer any guidance on the above standards, I would expect to consult The Judge Advocates General and the Chairman’s Legal Counsel.

If confirmed, will you take steps to ensure that all relevant Department of Defense directives, regulations, policies, practices, and procedures fully comply with the requirements of section 1045 and with Common Article 3 of the Geneva Conventions?

Yes.

Military Commissions Act

In your view, do military commissions constituted pursuant to the Military

Commissions Act of 2009 provide an effective forum for trying violations of the law of armed conflict?

Military commissions are an appropriate forum for trying offenses against the law of war and other offenses traditionally triable by military commission.

What do you see as the advantages and disadvantages of military commissions as a forum for trying detainees for terrorism-related offenses?

The reforms of the Military Commissions Act of 2009 include reforms to a number of processes for the trial of alien unprivileged enemy belligerents. In addition, the Department of Defense has made many improvements to the transparency of the process, including closed-circuit transmission of all open proceedings to the general public, and public posting of the litigants' filings. Nonetheless, legal and procedural challenges remain, particularly in light of the number of unsettled legal and procedural issues.

Do you see the need for any changes to the Military Commissions Act of 2009?

If confirmed, I will evaluate the need for changes to the 2009 Military Commissions Act.

Under current law, are there charges that could be brought against a detainee in an Article III federal court that are not available or may not be available to the prosecution in military commissions?

Because military commission jurisdiction is limited to those offenses included in the MCA, Articles 104, and 106 of the UCMJ, and violations of the law of war, there are necessarily more charging options available in federal court. In addition, although the MCA makes providing material support to terrorism cognizable by military commissions, the federal courts have ruled that for conduct pre-dating enactment of the MCA, that charge is not available. It is conceivable that facts may exist such that a detainee, who could not be charged with this offense before a military commission, could still be tried for the analogous offense under Title 18.

Authority for Use of Military Force/Law of Armed Conflict

Under what circumstances, if any, do you believe it would be appropriate for the U.S. military to use force, including deadly force, against United States citizens?

It is an unfortunate but undeniable fact that some of the threats we face from international terrorism involve plots by U.S. citizens. As then-Attorney General Holder observed in March 2012, it is clear that U.S. citizenship alone does not make such individuals immune from being targeted in the course of military counterterrorism operations conducted abroad. But a terrorist's U.S. citizenship does mean that the government must take into account all relevant constitutional considerations with respect to U.S. citizens. Of these, the most relevant is the Fifth Amendment's Due Process Clause, which provides that the government may not deprive a citizen of his or her life without due

process of law. Due process takes into account the realities of combat.

Under what circumstances, if any, do you believe it would be appropriate for the U.S. military to use force, including deadly force, inside the United States?

Protecting the U.S. homeland from armed attack is the most important mission of the Department of Defense, and the use of U.S. military force could be appropriate in the drastic circumstances of an armed attack on the United States. I believe that domestic threats or acts of violence short of armed attack are appropriately addressed by local, State, and Federal law enforcement agencies.

On September 18, 2001, Congress passed the Authorization for the Use of Military Force (Public Law 107-40), which provides that “the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” This AUMF remains in effect and provides the legal authority for certain U.S. military actions.

What is your understanding of the role of the General Counsel in interpreting the AUMF and in the application of the AUMF to military activities?

I understand that the DoD General Counsel is responsible for advising the Secretary of Defense, the Office of the Secretary of Defense, and, as appropriate, other personnel of the Department of Defense on the interpretation and application of the AUMF to military operations.

What is your understanding of how the AUMF intersects with the international law of armed conflict?

I understand that the domestic interpretation of the AUMF is informed by the international law of armed conflict, and that military operations pursuant to the AUMF are conducted consistent with the law of armed conflict.

In your view, does the Department of Defense have the legal authorities it needs to conduct military operations against entities responsible for 9/11, against ISIL/ISIS, and against other forces who plan further attacks against the United States?

Yes. The existing statutory authorizations for the use of military force, together with the President’s legal authority to direct military action under limited circumstances in the absence of a prior congressional authorization, provide adequate authority for military operations necessary to counter current and foreseeable terrorist threats. Although current legal authority is adequate, I support the Administration’s proposal for a specific statutory authorization to use military force against ISIL.

In your view, do existing legal authorities provide the U.S. military the legal flexibility it needs to respond to new and emerging terrorism threats?

The existing statutory authorizations for the use of military force, together with the President's constitutional authorities, provide adequate authority for military operations necessary to counter foreseeable new or emerging terrorist threats.

Without the AUMF, would the U.S. military have the legal authority to use force, including deadly force against members of al Qaeda, the Taliban, ISIS/ISIL and associated forces? If so, under what circumstances?

In the absence of congressional authorization, the President may order the use of military force to protect an important national interest, subject to important constitutional and statutory limitations on the scope and duration of those military operations. Where a sustained military campaign is called for, Congress has an essential role in authorizing the military action and providing the necessary resources.

What is the impact of the President's Policy Guidance on Counterterrorism on legal application of the AUMF with respect to counterterrorism operations?

The President's May 2013 policy guidance on counterterrorism does not change the President's legal authority for military counterterrorism operations, which includes the authority provided by the AUMF. That Presidential guidance is, however, binding on the Department of Defense as a lawful order from the Commander in Chief.

In your view, would it be appropriate for the United States to use military force against terrorist groups that have not engaged in hostilities directly against the United States, but merely shown an intent to do so? If so, under what circumstances?

The use of military force against a terrorist group that has not directly attacked the United States may be appropriate, for example, to respond to terrorist attacks on an ally of the United States or to respond to a threat of imminent terrorist attack on the United States or U.S. interests abroad.

Unmanned Systems

What are your views on whether the Department of Defense should assume greater responsibility for the operation of unmanned aerial systems (drones)?

The U.S. military has used remotely piloted aircraft since they were first developed to conduct intelligence, surveillance, and reconnaissance, as well as direct action during armed conflict. I support the Administration's policy as it relates to the responsibility of the Department of Defense for the operation of such aircraft.

What legal benefits or risks to national security would be implicated if the Department were to take the lead role in operating unmanned systems?

The role of the Department of Defense in operating remotely piloted aircraft, and associated benefits and risks, are chiefly policy considerations. If confirmed, my focus with respect to military operations using remotely piloted aircraft will be on the legal basis for such operations and compliance with applicable law in conducting such operations.

In your view, what is the appropriate legal standard for determining the appropriate use of civilian personnel, including civilian contractor personnel, in the operation of unmanned systems, including both armed and unarmed ISR systems, during military operations?

I have not been involved with this issue. If confirmed, I will examine this matter carefully.

Contractors on the Battlefield

U.S. military operations in Iraq and Afghanistan have relied on contractor support to a greater degree than any previous U.S. military operations. The extensive involvement of contractor employees in a broad array of activities – including security functions – has raised questions about the legal accountability of contractor employees for their actions.

Do you believe that current Department of Defense regulations appropriately define and limit the scope of security functions that may be performed by contractors in an area of combat operations?

In my present position, I do not work with the Department of Defense regulations in this area. I am advised that the Department of Defense Federal Acquisition Regulations Supplement provides guidance in this area for contractors whose civilian personnel are performing in support of U.S. Armed Forces deployed outside the United States during contingency operations or humanitarian or peacekeeping operations, or during other military operations or exercises. If confirmed, I am prepared to review these Departmental regulations carefully and to advise on whether any amendments are needed.

What changes, if any, would you recommend to such regulations?

See the above answer.

Do you believe that current Department of Defense regulations appropriately define and limit the scope of contractor participation in the interrogation of detainees?

I do not work with the Department of Defense regulations in this area. If confirmed, I am prepared to review them.

What changes, if any, would you recommend to such regulations?

See the answer above.

OMB Circular A-76 defines “inherently governmental functions” to include “discretionary functions” that could “significantly affect the life, liberty, or property of private persons”.

In your view, is the performance of security functions that may reasonably be expected to require the use of deadly force in highly hazardous public areas in an area of combat operations an inherently governmental function?

In my present position, I have not been involved with this issue. I am advised that Office of Federal Procurement Policy (OFPP) Policy Letter 11-01 provides guidance on managing the performance of inherently governmental and critical functions, including guidance on security operations. If confirmed, I would evaluate the specific functions in light of this guidance.

In your view, is the interrogation of enemy prisoners of war and other detainees during and in the aftermath of hostilities an inherently governmental function?

See the answer above. If confirmed, I would examine carefully the OFPP policy, applicable statutes, and Department policy to advise on this issue.

What role do you expect to play, if confirmed, in addressing the issue of what functions may appropriately be performed by contractors on the battlefield?

If confirmed, I would expect to provide guidance to the Secretary and other senior officials regarding functions that may be lawfully performed by contractors on the battlefield.

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

In your view, does MEJA provide appropriate jurisdiction for alleged criminal actions of contractor employees in Iraq, Afghanistan, and other areas of combat operations?

It is important to maintain appropriate accountability for all persons supporting our Armed Forces, wherever they are located. I am generally aware of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), but I am not familiar with how well it has provided criminal jurisdiction over contractor employees in areas of combat operations.

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

I am not currently in a position to recommend any amendments to MEJA. If confirmed, I will review MEJA and, if I believe that any amendments are necessary, I will make recommendations at that time.

What role would you expect to play, if confirmed, in developing Administration recommendations for changes to MEJA?

If confirmed, I anticipate being actively involved in any efforts to develop Administration recommendations regarding amending MEJA.

Section 552 of the National Defense Authorization Act for Fiscal Year 2007 extended criminal jurisdiction of the military courts under the Uniform Code of Military Justice to persons serving with or accompanying an armed force in the field during time of declared war or a contingency operation, such as our current operations in Iraq and Afghanistan.

In your view, does the UCMJ provide appropriate jurisdiction for alleged criminal actions of contractor employees in Iraq, Afghanistan, and other areas of combat operations?

My view is that civilians serving with or accompanying our Armed Forces overseas who commit crimes should be held appropriately accountable. At this time, I do not have an informed view regarding whether the UCMJ provides the appropriate criminal jurisdiction over contractor employees in areas of combat operations.

What is your view of the procedures agreed upon by the Department of Defense and the Department of Justice to reconcile jurisdictional responsibilities under MEJA and the UCMJ?

I am aware generally that there are procedures to reconcile these responsibilities reflected in Department of Defense Instruction 5525.07, "Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes" (June 18, 2007). If confirmed, I intend to examine whether the MOU between the Departments of Justice and Defense strikes the appropriate balance for the exercise of criminal jurisdiction.

What changes, if any, would you recommend to the UCMJ to ensure appropriate jurisdiction for alleged criminal actions of contractor employees?

At this time, I have no such recommendations for amendments to the UCMJ. If confirmed, I will review the UCMJ's jurisdictional provisions regarding alleged criminal actions of contractor employees and, if I believe that any amendments are necessary, I will make recommendations at that time.

Military Justice Matters

Article 6 of the Uniform Code of Military Justice gives primary responsibility for legal advice concerning military justice to the Judge Advocates General.

What is your understanding of the General Counsel's functions with regard to military justice and the Judge Advocates General?

In general, the DoD General Counsel plays no direct role in specific military justice cases. Decisions in military justice cases are made by the commander of the accused, the convening authority, the military judge, and court members. The Military Departments' Courts of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces provide appellate review of cases arising under the UCMJ, as does the U.S. Supreme Court through writs of certiorari. The Secretary of Defense becomes involved in military justice only in limited circumstances, and the General Counsel provides legal advice to the Secretary in those circumstances. The General Counsel, like the Secretary of Defense and other senior civilian and military officials in the Department, must avoid any action that may constitute unlawful command influence or create an appearance of unlawful command influence.

I also understand that the General Counsel plays a role in the development of military justice policy, including by reviewing recommendations of the Joint Service Committee for Military Justice for amendments to the Manual for Courts-Martial and the Uniform Code of Military Justice and offering advice to the appropriate policy makers concerning those recommendations. I also understand that, traditionally, the DoD General Counsel has served as an informal DoD liaison to the U.S. Court of Appeals for the Armed Forces.

In your view, how should the General Counsel approach military justice matters – both in terms of specific cases and general policy issues to provide useful advice without generating problems of unlawful command influence?

Please see my previous answer concerning the role of the General Counsel.

The May 30, 2013 Defense Legal Policy Board (DLPB) report on military justice in combat zones recommended a change in joint doctrine to specify that discipline is the responsibility of joint force commanders at all levels. The report recommended that this proposal should be presented to the DoD General Counsel and Secretary of Defense to be integrated into DoD and joint policy, and when appropriate, reviewed by the Joint Service Committee on Military Justice to be uniformly implemented by the Services.

In your view, is it essential to preserve the role of the military commander, including the joint force commander in deployed situations, for disposition of military justice matters?

The May 30, 2013, report of the Subcommittee on Military Justice in Combat Zones and the Defense Legal Policy Board's June 14, 2013, memorandum transmitting that report to the Secretary of Defense endorsed the preservation of the role of the military commander, including the joint force commander in deployed situations, in the disposition of military justice matters. If confirmed, I will study the Subcommittee's report and the Board's memorandum.

What are your views on whether it would be appropriate to preserve the role of the commander as disposition authority, for the entire spectrum of military operations, from deployment to redeployment, in combat areas as well as in garrison?

I am not now prepared to offer specific assessments of the optimal command role in the disposition of allegations of crimes and other misconduct. If confirmed, I will examine this issue.

If confirmed, what action will you take to ensure that the recommendations of the DLPB with respect to military justice in combat zones are implemented by DoD and the services?

If confirmed, I will study the recommendations of the Subcommittee and the Board. I understand that a number of the DLPB's recommendations have already been implemented. For example, Executive Order 13696 of June 17, 2015, amended Rule for Courts-Martial 601 to allow convening authorities to transfer control over the disposition of charges, including charges that have already been referred to a court-martial, to a parallel convening authority. I understand that the DLPB recommended such an amendment to facilitate trial of cases in deployed environments when the accused's command redeploys and is replaced by a new command. I further understand that, consistent with another DLPB recommendation, the same Executive Order increased the maximum authorized court-martial punishment for derelictions of duty that result in death or grievous bodily harm. Finally, I understand that consistent with another DLPB recommendation, on July 8, 2015, the Department of Defense amended the discussion accompanying Rule for Courts-Martial 906(b)(9) to remove language stating that a request for severance "should be liberally considered in a common trial."

Prevention of and Response to Sexual Assaults

What is your understanding of the role of the DOD General Counsel in addressing the problem of sexual assault in the military?

The DoD General Counsel provides legal advice on proposed policies, DoD issuances, legislative proposals, and exceptions to policy relating to the problem of sexual assault and on sexual assault-related changes to the UCMJ.

As a whole, I see the Office of General Counsel working with the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps to ensure the military justice is a fair and equitable system of

appropriate accountability that promotes justice, efficiency, and effectiveness in the military establishment, thereby strengthening the national security of the United States.

Do you believe the DOD General Counsel's role in addressing the problem of sexual assault in the military is appropriate, and, if not, how should it be modified?

If confirmed, I will examine the role of the General Counsel in addressing the problem of sexual assault and determine whether any modifications are necessary.

What is your assessment of the DOD sexual assault prevention and response program?

I understand that the Department has made significant strides to address this problem and is implementing many recommendations and improvements. It is my understanding that the Department is also confronting the issue of retaliation against victims and witnesses who report a sexual assault. This is an important challenge we need to address to eliminate the fear of retaliation, which can discourage victims and witnesses from coming forward to report a crime, receiving the support they need, and holding offenders appropriately accountable. If confirmed, I will conduct a thorough assessment of the program and work with my colleagues in DoD and the Congress regarding the sexual assault prevention and response program.

What is your view of the provision for restricted and unrestricted reporting of sexual assaults?

As I understand it, unrestricted reports of sexual assault must be referred to law enforcement for investigation and commanders are notified of the allegations, including personally identifiable information (PII) of the victim and alleged offender, if known. In contrast, a restricted report allows a victim to disclose the details of the assault to specific individuals and receive medical treatment and counseling without triggering an automatic investigation or command notification. In a restricted report, the PII of neither the victim nor alleged offender is disclosed to commanders. The goal of restricted reporting is to give the victim support and medical care, and, potentially, the confidence eventually to come forward with an unrestricted report that would allow the Department to hold the alleged offender appropriately accountable. I see merit in providing both reporting options to victims, to encourage even those victims who desire privacy to come forward and have access to medical care. I would support further study on the effectiveness of both options in addressing sexual assaults.

What is your understanding of the adequacy of DOD oversight of military service implementation of the DOD and service policies for the prevention of and response to sexual assaults?

It is my understanding that there is robust oversight of Department policies for the prevention of and response to sexual assaults. I also understand that the Director, Sexual

Assault Prevention and Response Office hosts quarterly integrated product team meetings attended by senior leaders from the Services, National Guard Bureau, Office of Secretary of Defense, and Office of the DoD Inspector General, which also serves as a forum for information sharing and updates. A representative of the Office of the General Counsel also attends.

What is your assessment of current DOD policy as it pertains to the legal issues surrounding the investigation and prosecution of sexual assault cases?

I understand that sexual assault is a serious problem in the military. I am not now prepared to offer assessments of the legal issues surrounding the investigation and prosecution of sexual assault cases. If confirmed, I will engage with the Judge Advocates General and other civilian and military leaders and subject matter experts to determine what issues, if any, need to be addressed. I expect the Department's policies will be informed by the promising work done by the Response Systems to Adult Sexual Assault Panel, and the ongoing work of the Judicial Proceedings Panel. Additionally, the work of another congressionally mandated federal advisory committee, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, may inform DoD policies in this regard.

What is your view about the role of the chain of command in changing the military culture in which these sexual assaults have occurred?

I think the chain of command has a critical role to play in changing military culture. Commanders are responsible for the good order and discipline of their units and are indispensable to creating a zero-tolerance climate for sexual assaults as well as a zero-tolerance climate for those who retaliate against victims. Leaders at every level must maintain a professional and respectful culture.

In your view, what would be the impact of requiring judge advocates outside the chain of command, rather than commanders, to determine whether allegations of sexual assault should be prosecuted by the military?

I am not now prepared to offer specific assessments of the optimal roles of commanders and judge advocates in the disposition of sexual assault allegations. If confirmed, I will closely examine this issue.

Religious Activity in the Armed Forces

What is your understanding of current policies and programs of the Department of Defense and the military services regarding religious practices in the military?

I understand that the policies of the Department place a high value on the rights of members of the Military Services to observe the tenets of their respective religions.

In your view, do policies concerning religious accommodation in the military appropriately accommodate the free exercise of religion and other beliefs, including individual expressions of belief, without impinging on those who have different beliefs, including no religious belief?

I have not yet had the opportunity to sufficiently review current Department policies to express an opinion on their appropriateness. It is my understanding that Department policies strive to accommodate the free exercise of religion by all Service members, and that the Department respects the rights of individuals to express their own religious beliefs, including the right to hold no beliefs.

In your view, do requirements for individuals being accessed into the military, to first comply with military grooming and appearance standards that conflict with their sincerely held religious beliefs before being considered for a waiver of those military standards, constitute a constitutionally valid restraint on religious expression?

I have not yet had the opportunity to study the Department's current policies in sufficient detail to provide an opinion on their appropriateness in this regard. I understand that the current Department policy on religious accommodation is undergoing a periodic review; if confirmed I anticipate being personally involved in that review process.

Under current law and policy, are individual expressions of belief accommodated so long as they do not impact unit cohesion and good order and discipline?

It is my understanding that current Department policy is to accommodate individual expressions of belief, unless they could have an adverse impact on military readiness, unit cohesion, and good order and discipline. In addition, the Religious Freedom Restoration Act applies to the military Services, and I understand the DoD Instruction on religious accommodation adopts the RFRA standard of review of requests for religious accommodation.

In your opinion, do existing policies and practices regarding public prayers offered by military chaplains in a variety of formal and informal settings strike the proper balance between a chaplain's ability to pray in accordance with his or her religious beliefs and the rights of other service members with different beliefs, including no religious belief?

I have not yet had the opportunity to study the Department's current policies in sufficient detail to provide an opinion on their proper balance. I understand that Department policies allow Military Chaplains to perform religious services in accordance with the tenets of their respective religions, and provide guidance to chaplains concerning the respectful incorporation of religious beliefs in a pluralistic setting. Military chaplains are an integral part of the fabric of the armed forces and play an important role in furthering the well-being and readiness of our Service members and their families.

The Religious Freedom Restoration Act provides very broad protection for religious liberty, and provides that the Government [which includes the military] may not substantially burden a person's exercise of religion unless it furthers a compelling government interest, and that any such burden must be the least restrictive means of furthering that interest.

Do you believe that uniformity of appearance in the military constitutes a compelling government interest?

It is my understanding that this is a matter currently under litigation. As such I believe it is not appropriate for me to answer this question at this time.

If so, do you believe that denying certain faith groups the ability to deviate from uniform and grooming standards, e.g., in maintaining an unshorn beard, in observation of their sincerely held religious belief, is the least restrictive means of furthering that interest?

It is my understanding that this is a matter currently under litigation. As such I believe it is not appropriate for me to answer this question at this time.

How does the practice of allowing waivers for tattoos, including for religious themed tattoos, and medical shaving profiles for service members both home and deployed, affect your analysis?

It is my understanding that this is a matter currently under litigation. As such I believe it is not appropriate for me to answer this question at this time.

Selective Service Act

On December 3, 2015 Secretary of Defense Carter announced that the Department will open all military combat positions to women.

In your view, in light of Secretary Carter's decision, is the Selective Service Act constitutional? In your view, does this change in policy require the Selective Service Act to be amended to be gender neutral? If so, what changes would you recommend?

The Department provided a legal opinion to Congress on December 3, 2015 that explained that the factual backdrop to the body of Supreme Court cases in this area has been changed over time by the opening of combat position to women. Thus, it is appropriate for the executive and legislative branches to engage in a policy dialogue regarding these issues.

Legal Ethics

What is your understanding of the action a Department of Defense attorney should

take if the attorney becomes aware of improper activities by a Department of Defense official who has sought the attorney's legal advice and the official is unwilling to follow the attorney's advice?

DoD attorneys have an obligation to report improper activities by a DoD official. If an attorney believes that a DoD Official will act contrary to his or her advice and this behavior will violate or has violated law or regulation, the attorney must take appropriate action. If the allegation is against a Senior DoD Official, this must be reported to the DoD Inspector General within five working days, in accordance with DoD Directive 5505.06, "Investigations of Allegations Against Senior Officials of the Department of Defense." If an allegation involves any other DoD Official (non-senior), the attorney should immediately report up through his or her attorney supervisory chain, including a supervising attorney, General Counsel, or Staff Judge Advocate, for appropriate action.

In your view, do the laws, regulations and guidelines that establish the rules of professional responsibility for attorneys in the Department of Defense provide adequate guidance?

DoD attorneys must adhere to the highest standards of professional conduct, including compliance with the rules of professional conduct of the licensing authority of the jurisdiction(s) in which they are members of the bar. Under DoD Instruction, 1442.02, "Personnel Actions Involving Civilian Attorneys," each DoD civilian attorney must have a current license to practice law from at least one State, the District of Columbia, or a U.S. commonwealth or U.S. territory. These rules, along with the standards for military attorneys established by the Judge Advocates General of the Military Departments, have effectively maintained a high standard of conduct among DoD attorneys. If confirmed, I will monitor the adequacy of these rules and the procedures for administering inquiries regarding professional conduct to ensure the highest degree of professionalism in the provision of legal services throughout the Department.

Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) is currently pending in the Senate. What are your views whether or not the United States should accede to UNCLOS?

The Administration including Secretary Carter strongly supports accession, and although this is not an issue I have worked with, I support the Administration position.

From a national security standpoint, what do you see as the legal advantages and disadvantages of the United States being a party to UNCLOS?

As noted above, this is not an issue I have worked with. However, I understand that becoming a party to the Law of the Sea Convention would enhance the U.S. security posture around the globe in significant ways, including by enabling the United States to reinforce all of the rights, freedoms, and uses of the sea and airspace codified in the

Convention.

I am not aware of national security disadvantages of being a party to the Convention.

In your view, is customary international law alone sufficient to safeguard U.S. navigational and overflight rights and freedoms worldwide?

As noted above, accession would enable the United States to reinforce all of the rights, freedoms, and uses of the sea and airspace codified in the Convention, including the navigational and overflight rights that are critical to the global mobility of U.S. forces. Although we have succeeded to date in preserving and protecting our navigational freedoms through reliance on customary international law, joining the Convention would place our national security on a firmer legal footing.

Processing the Annual Department of Defense Legislative Request

One of the current responsibilities of the General Counsel of the Department of Defense is to coordinate the Department's legislative program and to provide the Department's views on legislative proposals initiated from outside the Department.

If confirmed, what actions will you take to ensure that the Department's legislative proposals are submitted in a timely manner to ensure ample opportunity for consideration by Congress before markup of the annual National Defense Authorization Act?

I understand that the Office of General Counsel and the Office of the Assistant Secretary of Defense for Legislative Affairs have worked, and continue to work, closely together on improvements to the Department's Legislative Program – in consultation with the Office of Management and Budget – to transmit the Department's legislative proposals to Congress in a timely manner. If confirmed, I will monitor these efforts and look for any ways in which the process can be improved.

What actions would you take, if confirmed, to ensure the Congress receives the Department's views on other proposed legislation in a timely manner?

I understand that the Office of General Counsel has worked closely with the Office of the Assistant Secretary of Defense for Legislative Affairs and the Office of Management and Budget to respond to request for views on Congressional bills expeditiously. If confirmed, I will work to ensure that the Department provides Congress with timely views on proposed legislation

Judicial Review

What is your understanding of the appropriate role of the Article III courts in the review of military activities?

The Supreme Court and lower Federal courts have frequently addressed the role of Article III courts in reviewing military activities. These courts have historically afforded great deference to the military in the conduct of its activities. *See, e.g., Loving v. United States*, 517 U.S. 748, 767 (1996); *Gilligan v. Morgan*, 413 U.S. 1, 4, 10 (1973); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). But that deference is not unlimited, and since September 11, 2001, the Supreme Court has asserted itself in matters of national security and the conduct of military activities. For example, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004), Justice O'Connor stated that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

Role in the Officer Promotion and Confirmation Process

In your view, what is the role of the General Counsel of the Department of Defense in ensuring the integrity and proper functioning of the officer promotion process?

It is my understanding that the Secretary of each Military Department, in consultation with his or her own General Counsel and Judge Advocate General, has the initial responsibility to ensure that the promotion selection process for both regular and reserve officers complies with law and DoD policy. I am also aware that all reports of promotion selection boards are reviewed by the Office of the DoD General Counsel prior to final action on the report by the Secretary of Defense or Under Secretary of Defense for Personnel and Readiness. If the DoD General Counsel determines that a promotion selection board did not conform to law or policy, it would be the duty of the General Counsel to inform the Secretary of Defense or Under Secretary of Defense for Personnel and Readiness of the irregularities and to recommend appropriate corrective action. The Office of the General Counsel also has a role in ensuring that officer promotion policies promulgated in DoD regulations accurately reflect provisions of law in Title 10.

What is the role of the General Counsel of the Department of Defense, if any, in reviewing and providing potentially adverse information pertaining to a nomination to the Senate Armed Services Committee?

I know that the Office of the DoD General Counsel reviews all nomination packages that include adverse information before they are forwarded to the Secretary of Defense for action, ensuring that any adverse information attributed to an officer is supported by evidence in the accompanying reports of investigation. I understand that the DoD General Counsel and the General Counsel's staff often provide specific advice to the Under Secretary of Defense for Personnel and Readiness and the Secretary of Defense concerning difficult or unusual cases. I also understand that the Office of the General Counsel helps ensure that adverse information is communicated to the Armed Services Committee in an accurate, comprehensive, and timely manner and that the Committee is notified in a timely manner about recently initiated investigations involving officers pending confirmation.

Risk Aversion

Many attempts at Pentagon management reform, to include personnel reform and acquisition reform, involve allowing senior and local leadership to make maximum use of authorized flexibilities and exceptions to standard practices. It is generally believed that a risk averse culture has stifled this type of initiative within the leadership and workforce and thus trapped the Department in a set of antiquated and burdensome bureaucratic practices and oversight processes.

What role will you play to support efforts to allow DOD organizations to make maximum use of existing flexible management, acquisition, and personnel authorities so as to enable risk-taking and innovation in Pentagon processes?

My role, should I be confirmed as the DoD General Counsel, will be to ensure that attorneys within the DoD Office of the General Counsel understand the flexibilities as well as the limits provided in law and regulation, and advise their respective clients accordingly. DoD's attorneys should make sure that their clients are aware of any legal risks associated with various options, but they also should make it part of their jobs to think of ways to mitigate the risks. Ultimately, it is up to the decision-maker to determine how best to proceed, after fully understanding the range of options available. I believe that providing legal advice in this manner will enhance appropriate risk-taking and innovation within the Department, while still adhering to the law.

How will you work to have your office combat the culture of bureaucratic risk aversion?

I believe that decision-makers within the Department will be more willing to take risk if they trust that their attorneys have the ability and expertise to identify accurately the range of possible options legally available and any associated legal pros and cons. Should I be confirmed, I would strive to enhance attorney training and professionalism within the organization, and to strengthen the important bond between attorney and client.

Litigation Involving the Department of Defense

In your opinion, what is the relationship between the Department of Defense and the Department of Justice with respect to litigation involving the Department of Defense?

By statute, the Department of Justice is responsible for representing the United States, its officers and its agencies, including the Department of Defense, in litigation matters. In support of that responsibility, attorneys from the Department of Defense regularly work directly with counsel at the Department of Justice in cases and other litigation-related matters in which DoD, or one or more of its components or officials, is a party or has an interest.

In your view, does the Department need more independence and resources to conduct its own litigation or to improve upon its current supporting role?

My understanding is that the Department's lawyers have exceptionally strong relationships with their counterparts at the Department of Justice and that the current arrangement serves the Department well. Accordingly, I am not aware of any changes that need to be made at this time.

Role in Military Personnel Policy Matters

What role, if any, should the General Counsel play in military personnel policy and individual cases, including cases before the service boards for the correction of military records?

The Office of the DoD General Counsel may be required to provide legal advice on a very broad range of issues. Working closely with the Office of the Under Secretary of Defense for Personnel and Readiness, which has responsibility for Departmental policy for the Military Department boards for the correction of military/naval records, the Office of the General Counsel provides legal advice on policy issues affecting military personnel and performs a pre-publication legal sufficiency review of every DoD military personnel policy issuance.

Role in Whistleblower Enforcement

What role, if any, does the General Counsel play in ensuring the legal sufficiency and consistent execution of Department of Defense Inspector General whistleblower investigations?

It is my understanding that the position of General Counsel to the DoD IG is established by law in the Inspector General Act. The General Counsel to the IG is appointed by the Inspector General of the Department of Defense and acts as the chief legal officer of the Office of the Inspector General; this position is not under the supervision of the General Counsel of the Department of Defense. It is my understanding that the Department General Counsel does not review the legal sufficiency of Inspector General investigations, including whistleblower investigations. However, if confirmed, I would assist the Office of the Inspector General as requested and appropriate, and would provide appropriate legal advice to the Department in conjunction with actions stemming from an investigation.

What role does or should the General Counsel play in ensuring consistency of application and interpretation of whistleblower protections across the military services and the Department?

While I have not yet had the opportunity to study the Department's current policies in

sufficient detail to provide an opinion on this matter, if confirmed, I would work to ensure consistency while providing legal advice on such matters.

Defense Department Civilian Vacancies

Recently, the President appointed two individuals to serve in acting positions in violation of the Federal Vacancies Reform Act of 1998 (FVRA). Under title 5, United States Code section 3348(d), an action taken by any person whose appointment is not in compliance with FVRA shall have no force or effect and may not be ratified.

What role, if any, did you have in advising the President or the Secretary of Defense concerning the prospective acting appointment of these individuals?

I played no role in advising either of them concerning the designation of these individuals to serve in an acting capacity.

What action, if any, would you expect to take if confirmed, in identifying any actions taken by these individuals that could be without legal authority or effect?

If confirmed, I will work to determine if any corrective actions are appropriate.

If confirmed, what actions would you take if it were brought to your attention that a civilian appointment was potentially in violation of the FVRA?

The Vacancies Act requires that each case be evaluated on its own particular facts. If confirmed, I will be sensitive to the requirements of the Act and, together with the Department of Justice, will endeavor to provide legal advice that is responsive to the facts and the law.

Congressional Oversight

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

Do you agree, if confirmed for this high position, to appear before this Committee and other appropriate committees of the Congress?

Yes

Do you agree, if confirmed, to appear before this Committee, or designated members of this Committee, and provide information, subject to appropriate and necessary security protection, with respect to your responsibilities as the General Counsel of the Department of Defense?

Yes

Do you agree to ensure that testimony, briefings and other communications of information are provided to this Committee and its staff and other appropriate Committees?

Yes

Do you agree to provide documents, including copies of electronic forms of communication, in a timely manner when requested by a duly constituted Committee, or to consult with the Committee regarding the basis for any good faith delay or denial in providing such documents?

Yes