

**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?

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 Under Secretaries of Defense

The Assistant Secretaries of Defense

The Chairman of the Joint Chiefs of Staff

The Geographic Combatant Commanders

The Commander of the Joint Special Operations Command

The Judge Advocates General

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

The Staff Judge Advocates to the Commanders of Combatant Commands

The General Counsels of the Military Departments

The Counsels for the Defense Agencies

The Counsel to the Inspector General

The Joint Service Committee on Military Justice

The Comptroller General

The United States Court of Appeals for the Armed Forces

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

The Attorney General

The Office of Legal Counsel at the Department of Justice

The Office of Legal Adviser at the Department of State

The General Counsel of the Central Intelligence Agency

The Interagency Legal Advisors Working Group

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?

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

Client

In your opinion, who is the client 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?

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

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?

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

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

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

Legal Opinions

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

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

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

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?

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?

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 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?

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

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

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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

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

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?

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?

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?

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

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

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?

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?

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?

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?

What is your understanding of how the AUMF intersects with the international 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 9/1, against ISIL/ISIS, and against other forces who plan further attacks against the United States?

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?

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?

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

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?

Unmanned Systems

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

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

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?

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?

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

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

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

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

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?

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?

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

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

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?

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

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 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?

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?

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?

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?

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?

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?

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

program?

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

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

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

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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?

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

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

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?

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

Judicial Review

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

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?

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?

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?

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

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?

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

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?

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?

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?

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?

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

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?

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?

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?

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?