

Advance Questions for Donald M. Remy
Nominee for the Position of General Counsel
of the Department of the Army

Defense Reforms

The Goldwater-Nichols Department of Defense Reorganization Act of 1986 and the Special Operations reforms have strengthened the warfighting readiness of our Armed Forces. They have enhanced civilian control and clearly delineated the operational chain of command and the responsibilities and authorities of the combatant commanders, and the role of the Chairman of the Joint Chiefs of Staff. They have also clarified the responsibility of the Military Departments to recruit, organize, train, equip, and maintain forces for assignment to the combatant commanders.

1. Do you see the need for modifications of any Goldwater-Nichols Act provisions?

The Goldwater-Nichols Act changed Department of Defense operations profoundly and positively. Although I believe that the framework established by Goldwater-Nichols has significantly improved inter-service and joint relationships and promoted the effective execution of responsibilities, the Department, working with the Congress, should continually assess the law in light of improving capabilities, evolving threats, and changing organizational dynamics. Although I am currently unaware of any reason to amend Goldwater-Nichols, if confirmed, I hope to have an opportunity to assess whether the challenges posed by today's security environment require amendments to the legislation.

2. If so, what areas do you believe might be appropriate to address in these modifications?

This milestone legislation is now more than 20 years old and has served our nation well. If confirmed, I believe it may be appropriate to consider with the Congress whether the Act should be revised, but at this time I have no specific proposals to amend any provisions of the Act.

Duties

3. What is your understanding of the duties and functions of the General Counsel of the Department of the Army?

Title 10, United States Code, section 3019 provides that the General Counsel of the Army shall perform such functions as the Secretary of the Army may prescribe. The Secretary

has done so through general orders, regulations, and memoranda. The General Counsel provides legal advice to the Secretary of the Army, the Under Secretary, the Assistant Secretaries, and other offices within the Army Secretariat. As the chief legal officer of the Department of the Army, the General Counsel determines the controlling legal positions of the Department of the Army. The General Counsel's responsibilities extend to any matter of law and to other matters as directed by the Secretary. I understand that a few examples of specific responsibilities currently assigned to the General Counsel include providing professional guidance to the Army's legal community, overseeing matters in which the Army is involved in litigation, serving as the Designated Agency Ethics Official, exercising the Secretary's oversight of intelligence and other sensitive activities and investigations, providing legal advice to the Army Acquisition Executive, and taking final action on certain claims filed against the Army.

4. What background and experience do you possess that you believe qualifies you to perform these duties?

The diversity and complexity of legal issues confronting the Department of the Army are such that no one lawyer can have in-depth experience in all of them. However, the General Counsel must possess absolute integrity, mature judgment, sound legal and analytical skills, and strong interpersonal and leadership abilities. I believe that my background and diverse legal experiences in both the public and private sectors have prepared me to meet the challenges of this office.

I received my undergraduate degree with honors from LSU in 1988, where I was a Distinguished Military Graduate and commissioned 2lt in the United States Army. Thereafter, I was awarded an educational delay and graduated cum laude and 3rd in my class from Howard University School of Law in 1991, having served as executive articles editor of law review. Immediately upon graduation from law school, I was selected into the Honors Program in the Army General Counsel's Office where I served as a Captain and Assistant to the General Counsel focusing on domestic and international research, development, and acquisition. I clerked for the Honorable Nathaniel R. Jones of the U.S. Court of Appeals for the Sixth Circuit. I have been in private practice at two law firms, presently a litigation partner at a prominent global firm. I served in a variety of significant capacities, legal and business, at a major U.S. corporation. And, at the United States Department of Justice I served as a Senior Counsel for Policy and Deputy Assistant Attorney General for Torts and Federal Programs in the Civil Division.

I believe that my extensive experience in the Army, at the Justice Department, in corporate America, and in private practice all have helped prepare me for the extraordinary challenge of serving as General Counsel of the Department of the Army and overseeing the delivery of legal services in the Army during a period of wartime and of continued Army transformation. Indeed, my familiarity with the Department of Defense and with broader governmental legal practice has well equipped me to address this important responsibility.

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

Based on my 18 years of the practice of law, most of which has been in public service with all three branches of government, I believe I have the requisite legal training and abilities and leadership skills to serve as the Army General Counsel. If I am confirmed, I will work to broaden my expertise and further my understanding and knowledge of the Army, its people and organization, the resources necessary to sustain and transform it, and the challenges it faces.

6. Assuming you are confirmed, what duties and functions do you expect that the Secretary of the Army would prescribe for you?

Although the Secretary of the Army has not discussed with me the duties and functions he will expect that I perform, I anticipate that he will rely on me to provide accurate and timely legal advice to help ensure that the Army complies with both the letter and spirit of the law. Presumably, the current enumeration of General Counsel responsibilities set forth in the General Order prescribing the duties of each principal official of the Headquarters, Department of the Army, will generally remain in effect. Apart from such formally prescribed duties, I believe the Secretary of the Army would expect me to continue a collegial and professional relationship with the General Counsels of the Department of Defense, the other Military Departments, and the Defense Agencies and the legal staffs of other federal agencies. I anticipate that the Secretary of the Army will expect me to continue the effective and professional working relationship that exists between the Office of the General Counsel and The Judge Advocate General and his staff. Finally, I anticipate that the Secretary of the Army will expect me to manage the General Counsel's office efficiently and effectively, and to ensure that the Army legal community is adequately resourced to perform its important mission.

7. In carrying out your duties, how will you work with the General Counsel of the Department of Defense?

The General Counsel of the Department of Defense is the Chief Legal Officer and final legal authority for the Department of Defense. Although there is no direct reporting relationship to the General Counsel of the Department of Defense, Mr. Jeh Johnson has made clear in his testimony before this Committee and his actions in the Department, that he intends to work closely with the Service General Counsels. If confirmed, I anticipate

having a close and professional relationship with Mr. Johnson, characterized by continuing consultation, communication, and cooperation on matters of mutual interest, in furtherance of the best interests of the Department of Defense.

Major Challenges

8. In your view, what are the major challenges that will confront the General Counsel of the Department of the Army?

In my opinion, one major challenge will be to continually provide responsive, accurate legal advice regarding the broad array of complex issues likely to arise in connection with the Army's role in support of Joint Operations while simultaneously adapting its aim toward a balanced Army for the 21st Century. Although the current environment makes it difficult to anticipate specific legal questions, I expect to confront issues relating to operational matters, acquisition reform, privatization initiatives, military and civilian personnel policies, compliance with environmental laws, and oversight of Department of the Army intelligence activities. At this time, I am not aware of any problems in the current delivery of legal services. However, if confirmed, I will work hard to ensure that the Army legal community is adequately staffed and resourced to provide the responsive, accurate and timely legal advice necessary to ensure success in all of the Army's endeavors.

9. Assuming you are confirmed, what plans do you have for addressing these challenges?

If confirmed, I will prioritize legal issues in the manner that best serves the Department of the Army. I will also ensure that the talented and dedicated lawyers comprising the Army legal community continue to provide timely value added legal advice of the highest possible quality in response to the Department of the Army's recurring legal responsibilities and the numerous issues that the Army confronts every day. I will endeavor to keep Army lawyers involved at all stages of the decision making process, because I believe that preventive law, practiced early in the formulation of departmental policies, will undoubtedly facilitate the Department's adaptation to the changing operational environment. And, if confirmed I will work diligently to adequately resource and expertly staff the Army legal community, in order to guarantee decision makers at all levels access to the best possible legal advice.

10. What broad priorities will you establish in terms of issues which must be addressed by the Office of the General Counsel of the Department of the Army?

If confirmed, I will focus foremost on the issues that directly impact Soldiers, their families, readiness, and the support of military operations. I anticipate that the other legal issues of highest priority will arise from the Army's operational readiness to meet the

challenges posed by today's dynamic security environment while simultaneously planning and executing broad strategic initiatives. I will ensure that expert advice is provided to those engaged in the Army's efforts to improve the acquisition process and eliminate fraud, waste, and abuse. I will also ensure that the Army legal community continues to provide timely legal advice of the highest possible quality, executing the Department's recurring legal responsibilities and anticipating and responding to the numerous issues the Army confronts every day.

Relationship with the Judge Advocate General

11. In carrying out your duties, how will you work with the Judge Advocate General of the Army?

As an Assistant to the General Counsel of the Army from 1991-1995 I believe that I worked in a collegial and collaborative fashion with the Judge Advocate General's Corps to deliver effective legal advice to the Army leadership. Indeed, I believe that close, professional cooperation between the civilian and uniformed members of the Army's legal community is absolutely essential to the effective delivery of legal services to the Department of the Army. If confirmed, I will seek to ensure that the Office of the General Counsel and The Judge Advocate General and his staff, as well as The Judge Advocate General and I, continue to work together to deliver the best possible legal services to the Department of the Army.

12. How are the legal responsibilities of the Department of the Army allocated between the General Counsel and The Judge Advocate General?

The Army General Counsel is the chief legal officer of the Department of the Army. The Office of the Army General Counsel is a component of the Army Secretariat, and provides legal advice to the Secretary of the Army and other Secretariat officials on all legal matters. The Judge Advocate General is the legal adviser of the Chief of Staff of the Army, members of the Army Staff, and members of the Army generally. In coordination with the Army General Counsel, The Judge Advocate General serves as military legal adviser to the Secretary of the Army. The law expressly prohibits interference with the ability of The Judge Advocate General to give independent legal advice to the Secretary of the Army. Even in the absence of that statutory requirement, I would always welcome the expression of independent views about any legal matter under consideration. The Judge Advocate General also directs the members of the Judge Advocate General's Corps in the performance of their duties. By law, he is primarily responsible for providing legal advice and services regarding the Uniform Code of Military Justice and the administration of military discipline. The Office of the Army General Counsel and the Office of The Judge Advocate General have developed and maintain a close and effective working relationship in performing their respective responsibilities. If confirmed, I will work to continue that synergistic partnership in providing legal services to the Army.

13. How will you ensure that legal opinions of your office will be available to Army attorneys, including Judge Advocates?

It is my understanding that the majority of legal opinions provided to Army attorneys and judge advocates are issued by the Office of The Judge Advocate General, and that many of these opinions are coordinated with the Office of the Army General Counsel. The close, professional cooperation between the civilian and uniformed members of the Army's legal community is absolutely essential to ensure legal opinions issued by the Office of the Army General Counsel will be available to all Army attorneys and Judge Advocates and vice versa. If confirmed, I will seek to ensure that the Office of the General Counsel appropriately makes available any legal opinions that it issues. .

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.

14. What is your view of the need for The Judge Advocate General of the Army to provide independent legal advice to the Secretary of the Army and the Chief of Staff of the Army?

The Judge Advocate General's statutory authority to provide independent legal advice has repeatedly been recognized as essential to the effective delivery of legal services. Uniformed attorneys bring another perspective and can provide insight and advice shaped by years of service throughout the Army. In today's environment, our senior leaders must have independent, honest advice from their lawyers. Recent history has clearly demonstrated why that independent advice is critical.

15. What is your view of the responsibility of Army Judge Advocates to provide independent legal advice to military commanders?

Army Judge Advocates in the field have a critical responsibility to provide independent legal advice to commanders given the missions they perform. Army commanders deserve the best legal advice available, and that is in part made possible when the Judge Advocates know they can operate independently with appropriate advice and guidance from supervising attorneys in their technical chain.

16. If confirmed, would you propose any changes to the current relationships between the Army's uniformed Judge Advocates and General Counsel?

Based upon my knowledge and understanding to date, I believe that uniformed Army Judge Advocates and the Army General Counsel have an excellent working relationship. If confirmed, I will continue to foster this professional and collaborative relationship to ensure the effective delivery of legal services to the Department of the Army. Yet, as all relationships are dynamic, I will continually assess whether any changes or improvements are needed.

Article 6 of the Uniform Code of Military Justice gives primary jurisdiction over military justice to The Judge Advocates General of the Army, Navy, and Air Force.

17. How do you view your responsibilities in the performance of military justice matters with regard to the Judge Advocate General of the Army?

The Judge Advocate General has the primary responsibility for providing legal advice and services regarding the Uniform Code of Military Justice and the administration of military discipline. Article 6 of the Uniform Code of Military Justice requires The Judge Advocate General or senior members of his staff to make "frequent inspections in the field" in furtherance of his responsibility to supervise the administration of military justice. I will, if confirmed, consult with The Judge Advocate General on matters of mutual interest or concern relating to military justice, recognizing his statutory duties and special expertise in this area. I will also work with The Judge Advocate General in safeguarding the integrity of the military justice system.

Attorney Recruiting and Retention Issues

18. How do you assess your ability to hire and retain top quality attorneys and provide sufficient opportunity for advancement?

I understand that the Army continues to recruit and retain top quality military and civilian attorneys. Through an extensive professional development program, Army military and civilian attorneys are ready to perform the full spectrum of demanding positions. I recall that the Judge Advocate General's Legal Center and School is the cornerstone of the successful continuing education of these attorneys. If confirmed, I will continue to monitor and assess recruitment, retention, and advancement programs for our military and civilian attorneys.

19. In your view, does the Department of the Army have a sufficient number of attorneys to perform its missions?

The Army's legal community has grown out of necessity in recent history, and may need to adjust because of new mission requirements. If confirmed, I will evaluate the adequacy of the numbers of attorneys in the Department of the Army to accomplish the Army's missions.

20. In your view, what incentives to successful recruiting and retention of attorneys, if any, need to be implemented or established?

I am not familiar with the full scope of the Army's programs for recruiting and retaining military and civilian attorneys, but if confirmed, with the Judge Advocate General I will look at this area very carefully and support initiatives that enhance the Army's ability to recruit and retain those critical skills that give it flexibility and ensure we have the right attorneys performing every mission. .

Detainee Issues

21. What role do you expect to play, if confirmed, in helping the Department of Defense and the Department of the Army address legal issues regarding detainees?

Addressing the legal issues regarding detainees is of vital importance to the Department of Defense and the nation as a whole. I understand that the Office of the General Counsel and the Office of The Judge Advocate General have representatives on a DoD General Counsel subgroup convened pursuant to the President's Executive Orders. If confirmed, I will work closely with the DoD General Counsel and this subgroup in executing the President's directives. Additionally, in coordination with The Judge Advocate General, I will provide advice to the Secretary of the Army in his role as the Department of Defense Executive Agent for the administration of detainee operations policy, with particular focus on our obligation to treat all detainees humanely.

Section 1403 of the National Defense Authorization Act for Fiscal Year 2006 provides that no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location shall be subject to cruel, inhuman, or degrading treatment or punishment.

22. In your view, is the foregoing prohibition in the best interest of the United States? Why or why not?

Yes, I firmly believe that this prohibition is in the best interest of the United States. This prohibition is consistent with the long-standing military tradition of applying the humanitarian provisions of the Law of War to those individuals who, for whatever reason, are no longer actively participating in hostilities and find themselves in custody. Moreover, this prohibition is consistent with international standards to which the United

States is a party. As President Obama recently noted, “[a] democracy as resilient as ours must reject the false choice between our security and our ideals.” Prohibiting the cruel, inhumane, or degrading treatment or punishment of individuals in our custody or under our physical control upholds our ideals and reinforces our moral authority around the world.

23. Do you believe that the phrase “cruel, inhuman, or degrading treatment or punishment” has been adequately and appropriately defined for the purpose of this provision?

Although the phrase “cruel, inhuman, or degrading treatment” is, on its face, susceptible to broad interpretation, the proscriptions on such conduct contained in the Department’s implementing directives, as well as the provisions of the Geneva Conventions that are embodied in those directives, make it clear to our Soldiers what conduct is prohibited. If confirmed I will ensure the Army’s implementation of this policy in doctrine, to include training manuals, is clearly understood.

24. What role do you believe the General Counsel of the Army should play in the interpretation of this standard?

The appropriate role of the General Counsel is to provide advice to the Secretary of the Army and his staff on detention and interrogation policies that implement this standard. If confirmed, I will ensure Army implementation is consistent with the law, the intent of the Administration, and the guidance issued by the Secretary of Defense.

25. What role do you believe the Judge Advocate General of the Army should play in the interpretation of this standard?

The appropriate role of The Judge Advocate General is to provide advice to the Chief of Staff of the Army and the Army staff on detention and interrogation policies that implement this standard. The Judge Advocate General should also continue to train and supervise the Judge Advocates in the field, who are so instrumental in attaining and maintaining this standard.

26. If confirmed, will you take steps to ensure that all relevant Army directives, regulations, policies, practices, and procedures fully comply with the requirements of section 1403 and with Common Article 3 of the Geneva Conventions?

I will. I believe the requirements of section 1403 and Common Article 3 of the Geneva Conventions continue to be essential to maintaining a disciplined Army, bound by the Rule of Law.

27. 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?

I do. These standards have been instrumental in restoring the confidence of the American people in the Army and will be important, in the future, in guiding our Soldiers in contingency operations.

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.

28. 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?

These sections of the War Crimes Act were necessary to define the “serious crimes,” or “grave breaches,” of Common Article 3 to the Geneva Conventions. Defining these felony-level offenses was important to complete international law obligations to define, with specificity, the grave breaches which must be prosecuted under the law of war. In addition, in order to complete the United States obligation to “take all measures necessary for the suppression” of all other violations of the law of war, other than grave breaches, I believe the Department must continue to hold Soldiers accountable for violations of these standards. I understand that these obligations will continue to be enforced through appropriate directives, training, and oversight.

Contractors on the Battlefield

U.S. military operations in Iraq 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.

29. Do you believe that current Department of Defense and Department of the Army regulations appropriately define and limit the scope of security

functions that may be performed by contractors in an area of combat operations?

It is my current understanding that Department of Defense Instructions currently define the limit and scope of security functions that may be performed by contractors in an area of combat operations; however, I have been advised that this instruction is currently under review. Accordingly, it would be premature for me to offer an opinion at this time regarding whether current Department of Defense and Department of the Army regulations on the subject are adequate, and if confirmed I will support this review as appropriate.

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

It would be premature for me to recommend any changes to Department of Defense or Department of the Army regulations until the review of Department of Defense Instruction 3020.41 is complete.

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

I understand that the current Department of Defense and Department of the Army regulations define and, if implemented properly, limit the scope of contractor participation in the interrogation of detainees

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

I have no basis to propose any changes at this time. If confirmed, I will review the applicable Department of Defense and Department of the Army regulations to determine what, if any, changes may be needed.

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

33. 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?

There are many factual data points that may have an impact on determining whether 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 is an inherently governmental function. For example, I understand that support services that require substantial discretion or prudent judgment are inherently governmental, and that the likelihood that an individual will be required to resort to force, especially deadly force, and the degree to which an individual may be required to exercise force in public are important factors to consider in assessing whether a particular security mission is inherently governmental. Therefore, if I am confirmed, I intend to examine this issue in greater depth to ensure the Army's assessment regarding this issue is fully considered in the ongoing review of its policies.

34. 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?

I understand that under Department of Defense policy the direction and control of intelligence interrogations—to include the approval, supervision and oversight of interrogations, as well as the execution of those aspects of an interrogation that entail substantial discretion—are inherently governmental activities. However, an issue may arise to the extent that properly trained and cleared contractors may be used to conduct government approved interrogations if they are supervised and closely monitored throughout the interrogation process by properly trained DoD military or civilian personnel. In my view the conduct of interrogations is a dynamic activity that could create circumstances that might cause a contractor to exercise discretion that could significantly affect the life, liberty or property of private persons. As a result, the Department should continue to assess the appropriateness of the contractors' role in an interrogation.

35. 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 will provide advice to the Secretary of the Army and the appropriate Assistant Secretaries regarding the functions that contractors may legally perform on the battlefield, and I will assist them in implementing policies regarding the use of contractors that are consistent with applicable statutory and regulatory constraints.

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.

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

I understand that MEJA was intended to address the jurisdictional gap in U.S. law regarding criminal sanctions, as applied to civilians employed by or accompanying the Armed Forces outside the United States, members of the Armed Forces, and former members of the Armed Forces, including their dependents. In my opinion, MEJA provides an effective means of exercising extraterritorial criminal jurisdiction over contractor employees in Iraq, Afghanistan, and other areas of combat operations who engage in conduct that would constitute a felony-level Federal crime in the United States.

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

I understand that legislation has been proposed in the past that would expand MEJA to cover individuals employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in an area, or in close proximity to an area (as designated by the Department of Defense), where the Armed Forces are conducting contingency operations. If confirmed, I will study this and assess whether this or any other change to MEJA may be appropriate.

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

The General Counsel is responsible for the administration of Army contracts and the supervision of Army civilian employees potentially subject to prosecution under MEJA. If confirmed, I would play an active role in the development of any proposals to change MEJA. I would also coordinate closely with The Judge Advocate General in the development of any such proposals given the complementary and sometimes competing availability of jurisdiction under the Uniform Code of Military Justice.

Section 552 of the National Defense Authorization Act for Fiscal Year 2007 extended criminal jurisdiction of military courts martial 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.

39. 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?

The UCMJ provides commanders the tools necessary to maintain good order and discipline and the morale, welfare and safety of all those under their jurisdiction during military operations. Because misconduct by contractors may undermine good order and discipline, Congress extended UCMJ jurisdiction over such individuals, and the Secretary of Defense, in turn, published guidance on the prudent exercise of such jurisdiction. This guidance ensures that the Department of Justice and the Department of Defense each play an appropriate role in resolving whether, and under which system, jurisdiction might be better exercised in each potential case.

40. 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 have not had an opportunity to review the procedures agreed upon by the Department of Defense and the Department of Justice to reconcile jurisdictional responsibilities under MEJA and the UCMJ. If confirmed, I will monitor cases in which MEJA and the UCMJ are employed in coordination with The Judge Advocate General to assess the effectiveness of the procedures and whether further refinements of these procedures are necessary.

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

At present, I am not aware of any specific provisions in need of change

Religious Guidelines

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

As a former soldier and attorney in the Army General Counsel's office and Civil Division of the Department of Justice, it always has been my understanding that the Army's policies support religious tolerance and respect. If confirmed, I would continue the Army's apparent commitment to upholding the Constitutional tenets of the "free exercise" and "establishment" clauses and review policies as necessary to assure continued compliance with the First Amendment.

43. In your view, do these policies accommodate the free exercise of religion and other beliefs without impinging on those who have different beliefs, including no religious belief?

I understand that, as they now stand, Army policies require chaplains to support all unit personnel, regardless of their beliefs. It is my view that these Army policies do accommodate free exercise of religion. If confirmed, I am willing to study this issue further to determine if changes in policy are necessary under the law.

44. 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 understand that, during mandatory official functions, chaplains are not compelled to offer prayers that are inconsistent with their faith, but are expected to remain sensitive to the pluralistic Army and society they serve. In my opinion, these policies strike an appropriate balance given the diversity of religious views in the Army. If confirmed, I am willing to study this issue further to determine if changes in policy are necessary under the law.

General and Flag Officer Nominations

Under DOD Instruction 1320.4, adverse and alleged adverse information pertaining to general and flag officers must be evaluated by senior leaders in the Services and in the Office of the Secretary of Defense prior to nomination.

45. If confirmed, what role, if any, would you play in the officer promotion system, particularly in reviewing general and flag officer nominations?

I understand that, for all officer promotions, including general officer promotions, the Office of the Army General Counsel, in coordination with the Office of The Judge Advocate General, reviews the following:

- a. Memoranda of Instruction that govern the conduct of promotion selection boards and subsequent promotion selection board reports.
- b. Adverse information that is not in an officer's official military personnel file that may be presented to the promotion selection board. I have been advised that this information is reviewed to ensure it is accurate and comports with the requirements of

Title 10 such that the information is “substantiated, relevant information that could reasonably affect the deliberations of the selection board.”

c. Adverse information related to general officers. In general officer cases, the standard for adverse information that must be presented to a promotion selection board is “any credible information of an adverse nature.” I have been advised that the Office of the Army General Counsel participates in a detailed screening process in which a panel of senior officials reviews all credible information related to officers whose records will be reviewed by a promotion selection board for promotion to a general officer grade. The panel ensures that all adverse information is properly identified for presentation to the promotion selection board.

d. Adverse information that becomes available after a promotion selection board makes its recommendations. I have been advised that the Office of the Army General Counsel and the Office of The Judge Advocate General coordinate in providing legal advice to the Secretary of the Army so that he may determine whether a promotion review board should be convened to consider whether to continue to support the promotion of the considered officer or take steps to remove the officer from the promotion list.

46. What is your understanding of the role of the General Counsel of the Department of the Army in ensuring the legal sufficiency of statutory selection board processes?

I understand that under Title 10 the Secretary of the Army is responsible for the proper functioning of the Department of the Army’s promotion selection process. Prior to approval by the Secretary of the Army, all Memoranda of Instructions for officer promotion selection boards are reviewed by the Office of the Army General Counsel, in coordination with the Office of The Judge Advocate General, to ensure the Secretary’s instructions conform to statutes and accurately reflect his guidance regarding attributes necessary for service in the next grade. All reports of promotion selection boards are processed through the Office of the Army General Counsel prior to final action on the report by the Secretary. The Army General Counsel must satisfy himself or herself that the Army has met applicable statutory standards and that individual selection board reports conform to the law. The Army General Counsel must advise the Secretary of the Army of any case in which a selection board report fails to adhere to the statutory standards, either generally or with regard to a particular officer being considered for promotion. In advising the Secretary of the Army and the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs), the General Counsel helps to ensure that Army promotion policies properly implement applicable laws and regulations and are fairly applied.

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

It is my understanding that under current Department of the Army practice, the General Counsel's office reviews each selection board report, as well as Departmental communications to the Committee, the President, and the Secretary of Defense concerning nominations, to ensure that the reports and communications comply in form and substance with law and regulation. The General Counsel's office gives special attention to cases of nominees with substantiated or potentially adverse information, in order to ensure that such information is reported to the Senate Armed Services Committee in a timely, accurate, and comprehensible manner.

Military Personnel Policy and Cases

48. In your view, what role, if any, should the General Counsel play in military personnel policy and individual cases, including cases before the Board for Correction of Military Records?

If confirmed, I will work closely with the Secretary of the Army, the Assistant Secretary of the Army (Manpower and Reserve Affairs), and other senior Department of the Army leaders to ensure that the Department of the Army's military personnel policies are formulated and applied uniformly, fairly, and in accordance with applicable laws and regulations. If I were to become aware of an individual case in which military personnel policies were not fairly and lawfully applied, I would take appropriate action to ensure that the case is properly resolved. I will coordinate with the Assistant Secretary of the Army (Manpower and Reserve Affairs), who exercises overall supervision of the Army Review Boards Agency, regarding the legal sufficiency of materials and recommendations that the Army Board for the Correction of Military Records is providing to senior Department of the Army leaders. In addition, I am aware of and fully respect the independent role that the Army Board for the Correction of Military Records plays in the correction of military records.

Sexual Assault Prevention and Response Policy

Numerous cases of sexual misconduct involving soldiers have been reported from Iraq, Kuwait, and Afghanistan over the last several years. Many victims and their advocates contend that they were victimized twice: first by attackers in their own ranks and then by unresponsive or inadequate military treatment. They asserted that the military failed to respond appropriately by providing basic services, including medical attention and criminal investigations of their charges.

49. What is your understanding of the resources and programs the Army has in place in deployed locations to offer victims of serious sexual assaults the medical, psychological, and legal help they need?

This is an extremely important issue for the Army and, if confirmed, I will focus significant attention on this area. While I am not fully aware of all Army initiatives or resources, I understand that the Army has taken significant steps to improve the assistance to victims of all sexual assaults, with enhanced recognition of the special circumstances that apply to deployments. If confirmed, I will study this matter in greater depth with a view to ensuring the Army continues to take appropriate steps to provide medical, psychological, and legal help to Soldiers who are victims of sexual assault, both in garrison and in deployed locations.

50. What is your view of the steps the Army has taken to prevent additional sexual assaults on female soldiers at their home stations and when they are deployed?

In my opinion, the Army has taken several extremely important steps in its campaign to prevent sexual assaults on female soldiers at their home stations and when they are deployed. I have been advised that the Army launched a new comprehensive sexual assault prevention campaign in 2008. If confirmed, I will ensure that the legal community fully supports this initiative and any others and will assess whether additional steps need to be taken. If confirmed, I look forward to working closely with Army leaders on this and other vital initiatives to prevent sexual assault.

51. What is your view of the adequacy of the training and resources the Army has in place to investigate and respond to allegations of sexual assault?

Presently, I am not familiar with all of the Army's training and resources to investigate and respond to allegations of sexual assault. If confirmed, I will assess whether additional steps should be taken to support victims and hold offenders accountable.

Whistleblower Protection

Section 1034, Title 10, United States Code, prohibits taking retaliatory personnel action against a member of the armed forces as reprisal for making a protected communication. By definition, protected communications include communications to certain individuals and organizations outside of the chain of command.

52. If confirmed, what actions will you take to ensure that senior military leaders understand the need to protect service members who report misconduct to appropriate authorities within or outside the chain of command?

If confirmed, I will work with The Judge Advocate General to ensure that military leaders are fully and accurately advised of the whistleblower protections accorded by law and regulation, and that they understand their legal responsibilities in this important area. In addition, I will ensure that any individual cases involving illegal reprisals that come to my attention are addressed in accordance with the law. Whistleblower protections for military personnel affirm that members of the Armed Forces shall be free from reprisal for making or preparing a protected communication to a Member of Congress; an Inspector General; a member of a DoD audit, inspection, investigation, or law enforcement organization; or any other person or organization (within or outside the chain of command) designated under regulations or established procedures to receive such communications. I believe that these protections are essential to the integrity of our process.

Support to Army Inspector General

53. What role, if any, do you think the General Counsel of the Army should have in reviewing the investigations and recommendations of the Army Inspector General?

If confirmed, as the chief legal officer of the Department of the Army and counsel to the Secretary and other Secretariat officials, I will establish and maintain a close, professional relationship with The Inspector General, and will communicate with him directly and candidly as he performs his prescribed duties. I will provide independent and objective legal advice with regard to all matters that relate to Inspector General programs, duties, functions, and responsibilities. I will oversee the provision of productive and effective legal guidance to the Office of the Inspector General in conducting investigations and delineating recommendations. Further, as part of my responsibility to review legal and policy issues arising from the Army's intelligence and counterintelligence activities, I will advise The Inspector General concerning proper reporting of the Army's intelligence oversight activities. Of course, given The Inspector General's mandate for independence and candor in advising the Secretary as to his investigative findings and recommendations, the Inspector General has final authority over matters within his functional purview.

Women in Combat

Section 541 of the National Defense Authorization Act for Fiscal Year 2006 required the Secretary of Defense to report to Congress on his review of the current and future implementation of the policy regarding assignment of women in combat. In conducting the review, the Secretary of Defense examined Army unit modularization efforts and associated personnel assignment policies to ensure their

compliance with the Department of Defense policy on women in combat that has been in effect since 1994.

- 54. What is your understanding of the conclusions and lessons that have been learned about the feasibility of current policies regarding women in combat from Operation Iraqi Freedom and Operation Enduring Freedom and what is your assessment of the Army's compliance with the requirements of law relating to women in combat?**

Although I have not reviewed the study in detail, it is my understanding that the study revealed that the Army is in compliance with the requirements of the law relating to women in combat. It is also my understanding that the Army's transformation to modular units took into account and is in compliance with the current assignment policy for women. Women have and will continue to be an integral part of the Army team, performing exceptionally well in all specialties and positions open to them.

- 55. In your view, should the current policy regarding assignment of women in combat be revised to reflect changing roles for female soldiers?**

At this point I do not believe that I have enough information to make an informed judgment about whether the policy should be changed. However, if I am confirmed and the Army determines after careful study and deliberation, that there is a need to seek a change to the policy, I will provide the Secretary with cogent legal advice regarding the changes sought and ensure that the Army complies with all of the notification requirements of the law.

Civilian Attorneys

Judge advocates in the armed forces benefit from an established career ladder, substantial training opportunities, and exposure to a broad spectrum of legal areas and problems. By contrast, civilian attorneys in the military departments normally do not have established career programs and may do the same work for many years, with promotion based solely upon longevity and vacancies.

- 56. In your opinion, does the personnel management of civilian attorneys need revision? If so, what do you see as the major problems and what changes would you suggest?**

There appears to be a growing need for a systemic civilian attorney professional development program that appropriately reflects the tenets by which we have historically developed judge advocates. I understand that there is a Working Group in the Army for the purpose of assessing and recommending programs for the professional development of civilian attorneys. If confirmed, I would work closely with all of the entities affected by this issue to support the continuing and important efforts of the Working Group and any other initiative deemed appropriate.

Client

57. In your opinion, who is the client of the General Counsel of the Department of the Army?

The client of the General Counsel of the Department of the Army is the Department of the Army, acting thorough its authorized officials.

Legal Ethics

57. What is your understanding of the action a Department of the Army attorney or an Army Judge Advocate should take if the attorney becomes aware of improper activities by a Department of the Army official who has sought the attorney's legal advice and the official is unwilling to follow the attorney's advice?

Army attorneys generally provide legal advice to Army officials in their capacity as representatives of the Department of the Army. The Department of the Army is the attorney's client, and no attorney-client privilege is established between the attorney and the Army official. When an Army attorney advises an Army official, the official may use that advice to exercise official functions. If an Army attorney suspects that the individual Army official, either in the exercise of functions or in the failure to exercise functions, violates a law or standard of conduct, I believe that he or she should report the potential violation. Potential violations of the conflict of interest laws may be reported to Army criminal investigators; potential violations of provisions of the Federal Acquisition Regulation may be reported to the appropriate contracting officer; and potential violations of the standards may be reported to an Army ethics counselor, the head of the Army command or organization, the individual's or attorney's supervisor, or the Army Inspector General (IG), as appropriate. At all times, Army personnel and attorneys may report any misconduct to the IG or criminal investigators, either in person or anonymously.

59. Do you believe that the present limits on pro bono activities of government attorneys are generally correct as a matter of policy or does the policy need to be reviewed and revised?

I understand that government attorneys may participate in pro bono activities so long as the representation is consistent with general governmental ethical rules and with

the rules of professional responsibility applicable to attorneys. I understand that Army civilian attorneys may, for instance, perform pro bono work with supervisory approval so long as the representation does not occur on Government time or at its expense, does not interfere with official duties, and does not create a conflict of interest or the appearance of a conflict of interest. I understand the Army also operates legal assistance program for Soldiers and Families, providing free services in areas such as family law, wills and estate planning, tax law, landlord/ tenant matters, contract disputes, consumer law, and assistance during the disability evaluation system. Although I am not aware of any need for revision of the present limits, it is important that government attorneys be able to participate in pro bono activities. If confirmed, I would review the current policy in coordination with The Judge Advocate General and recommend revisions, if appropriate.

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

The Army has a comprehensive regulations, based upon the American Bar Association Model Rules of Professional Conduct which govern the ethical conduct of Army lawyers, both military and civilian. All Army attorneys, military and civilian, must, at all times, be in good standing with the licensing authority of at least one state, territory of the United States, the District of Columbia, or the Commonwealth of Puerto Rico. This regulatory system would appear to provide adequate guidance; however, if confirmed, I would review the current policy in coordination with The Judge Advocate General and recommend revisions, if appropriate.

Acquisition Issues

61. What role should the General Counsel play in ensuring that Army procurement programs are executed in accordance with the law and DoD acquisition policy?

If confirmed, I will work closely with the Secretary of the Army, the Assistant Secretary of the Army (Acquisition, Logistics and Technology), and other senior Department of the Army leaders to ensure that the Department of the Army's acquisition and procurement programs are executed in accordance with applicable provisions of the United States Code, as well as higher-level regulations and policy. Today's acquisition professionals face the challenge of managing their programs' cost, schedule, and performance while remaining in compliance with a myriad of legal and policy requirements. I believe it is

the responsibility of Army lawyers to proactively assist their acquisition clients in meeting that challenge. From the earliest stages of program development, counsel should be involved in identifying potential issues and, where appropriate, legally-compliant alternative courses of action. In those rare situations, where an issue cannot be satisfactorily resolved, it is incumbent on counsel to promptly elevate their concerns in order to protect the Department's overarching interests.

62. What role should the General Counsel play in ensuring that ethics provisions on conflict of interest are followed both by Army personnel and by Army contractors?

Structuring Departmental business practices to avoid both personal and organizational conflicts of interest should be one of the Army's highest priorities. If confirmed, I will work closely with the Secretary of the Army, the Assistant Secretary (Acquisition, Logistics and Technology) and other senior Departmental officials to promote an organizational climate that is sensitive to the need to avoid conflicts of interest and that reacts appropriately when specific issues arise. I believe that Army lawyers can make a significant contribution to this endeavor through the provision of acquisition ethics training and through early and sustained involvement in the Department's acquisition programs and procurement activities.

63. Allegations of fraud and abuse during contingency contracting in Iraq and Afghanistan have been wide-spread. What role should the General Counsel play in ensuring that Army personnel are properly trained in contingency contracting and are supervised in the performance of their duties?

It is my understanding that the contracting workforce was understaffed and not fully equipped to handle the resultant surge of contracting actions in support of our nation's missions in Iraq and Afghanistan. This situation undoubtedly contributed to the widely publicized increase in allegations of fraud and abuse in connection with contracting in those theaters of operations. Secretary of the Army, Pete Geren, responded by appointing Dr. Jack Gansler to lead a special commission on contracting with the purpose of assessing current conditions and providing a long-term strategic view of the Army's acquisition and contracting system in support of expeditionary operations.

If confirmed, I will work closely with the Secretary of the Army, the Assistant Secretary of the Army (Acquisition, Logistics, and Technology), and other senior Department of the Army personnel to ensure that the legal community continues to fully support the initiatives recommended and currently being implemented as a result of the Gansler Commission's assessment. One of the Commission's recommendations was to provide training and tools for contracting activities that would equip contracting personnel to handle the complexities of a contingency contracting mission for our Warfighters, while assuring proper fiscal stewardship of taxpayer dollars. If confirmed, I will ensure the

legal community is proactive in providing timely legal advice and training of the highest possible quality to effect the recommended Gansler Commission changes in compliance with the letter and spirit of the law. I would also work closely with The Judge Advocate General and the other Army legal qualifying authorities to ensure that adequate legal resources are available to support the contingency contracting mission.

Role in the Officer Promotion and Confirmation Process

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

As addressed above, I understand that, under Title 10, United States Code, Chapter 36, the Secretary of the Army is responsible for the proper functioning of the Department of the Army's promotion selection process. In addition to the legal review of memoranda of instruction and selection board reports to ensure they comport with statutory standards, the Army General Counsel must also ensure the conduct of the board process conforms to all legal requirements. Additionally, the Army General Counsel must advise the Secretary of the Army of any case in which a selection board report or selection board process fails to adhere to the statutory standards, either generally or with regard to a particular officer being considered for promotion. In advising the Secretary of the Army and the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs), the General Counsel helps to ensure that Army promotion policies properly implement applicable laws and regulations and are fairly applied. Additionally, the Office of the Army General Counsel coordinates closely on these matters with The Office of the Judge Advocate General.

Litigation Involving the Department of the Army

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

The Department of Justice represents the Department of the Army in civil litigation. In general, my recollection is that coordination on every level is timely and consistent. If confirmed, I will work with The Judge Advocate General to ensure the continuation of a collaborative relationship with the Department of Justice with respect to litigation involving the Department of the Army.

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

The Army's interests in civil litigation are effectively protected and defended by the Department of Justice. If confirmed, I will work with The Judge Advocate General to ensure that adequate resources are available to ensure that the Army is able to provide the appropriate level of support to the Department of Justice and protect the Army's interests in civil litigation in which the department is involved.

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 the Army?

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

