

**Advance Questions for Jeh Charles Johnson**  
**Nominee to be the General Counsel of the Department of Defense**

**1. 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 the chain of command by clearly delineating the combatant commanders' responsibilities and authorities and the role of the Joint Chiefs of Staff. These reforms have also vastly improved cooperation between the services and the combatant commanders in the strategic planning process, in the development of requirements, in joint training and education, and in the execution of military operations.**

**Do you see the need for modifications of any Goldwater-Nichols Act provisions based on your experience in the Department of Defense?**

At this time I have no proposals to amend any provision of the Goldwater-Nichols Act. If I am confirmed and if I identify possible changes that I think would be beneficial, I will propose those changes through the established process.

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

See my prior answer.

**2. 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 General Counsel is the Secretary's principal advisor on the wide variety of legal issues facing by the Department of Defense. I hope and expect to consult with the Secretary and his personal staff on these issues on a regular basis.

**The Under Secretaries of Defense**

The General Counsel should work closely with the Under Secretaries, both personally and through the General Counsel's staff, to provide them and their respective offices with timely and quality legal advice.

### **The Assistant Secretaries of Defense**

Likewise, the General Counsel should work closely with the Assistant Secretaries, both personally and through the General Counsel's staff, to provide them and their respective offices with timely and quality legal advice.

### **The Chairman of the Joint Chiefs of Staff**

I am aware that the Chairman of the Joint Chiefs has his own dedicated Legal Counsel, and that a provision in the Fiscal Year 2008 National Defense Authorization Act (FY 2008 NDAA) codified the existence of this position through a new Section 156 in Title 10, United States Code (U.S.C.), and that this provision in law also provided that the Legal Counsel be a one-star officer. *See* "National Defense Authorization Act for Fiscal Year 2008," Pub. L. No. 110-181, § 543, 122 Stat. 3, 115 (2008). While the Chairman relies primarily upon his Legal Counsel for legal advice, the Legal Counsel and the DoD General Counsel should work together on the broad range of matters that affect the Department of Defense.

### **The Judge Advocates General**

As General Counsel of the Air Force from October 1998 to January 2001, I believe I worked in a collegial and collaborative fashion with The Judge Advocate General of the Air Force and his staff to deliver effective legal service and advice to Air Force leaders. If confirmed as General Counsel of the Defense Department, I hope and expect to resume that positive working relationship with all Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps.

I am aware that The Judge Advocates General are responsible for the administration of military justice within their respective services, and that senior leaders within the Department of Defense should be mindful of the principles and restraints of unlawful command influence. Finally, I am aware that in 2004, Title 10 was amended to direct that "[n]o officer or employee of the Department of Defense interfere with the ability of the Judge Advocate[s] General to give independent legal advice to" the leadership of their respective military departments. *See* 10 U.S.C. §§3037, 5148, 8037 (2003), as amended by the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 574, 118 Stat. 1811, 1921 (2004).

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

See my answer above concerning the Chairman of the Joint Chiefs. In addition, I am aware that in 2008, Title 10 was amended to direct that "[n]o officer or employee of the Department of Defense may interfere with the ability of the Legal Counsel to give independent legal advice to the Chairman of the Joint Chiefs of Staff and to the Joint Chiefs of Staff." *See* Duncan Hunter National Defense Authorization Act for Fiscal Year

2009, Pub. L. No. 110-417, § 591, 122 Stat. 4356, 4474 (2008). I understand that current practice is for the DoD General Counsel and the Chairman's Legal Counsel to meet frequently to discuss issues of mutual concern and to exchange information. If confirmed, I hope and expect to continue that practice.

### **The Staff Judge Advocates to the Commanders of Combatant Commands**

It is my understanding that the DoD General Counsel's relationship to the staff judge advocates of the Combatant Commands is, for the most part, through the Chairman's Legal Counsel.

### **The General Counsels of the Military Departments**

As a former General Counsel of the Department of the Air Force, I am familiar with this relationship. The General Counsels of the Army, Navy and Air Force serve as the chief legal officers of their respective departments, and each report to the Secretary of their respective departments. There is no direct reporting relationship to the DoD General Counsel, but the DoD General Counsel is the chief legal officer of the Department of Defense. The DoD General Counsel should meet regularly and work closely with the Army, Navy, and Air Force General Counsels. If confirmed, I will ensure that we work together closely.

### **The Counsels for the Defense Agencies**

As I understand it, the DoD General Counsel is the Director of the Defense Legal Services Agency (DLSA), and the General Counsels of the defense agencies and DoD field activities are part of DLSA, and thus, report to the DoD General Counsel in his or her capacity as DLSA Director.

### **The Counsel to the Inspector General**

I am aware that a provision in the FY 2009 NDAA amended the Inspector General Act of 1978 to establish a "General Counsel to the Inspector General of the Department of Defense." *See* Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 907, 122 Stat. 4356, 4569 (2008). This new law, in substance, changed the relationship between the DoD General Counsel and the DoD Inspector General's legal advisor, who reports directly to the DoD IG and performs duties assigned by the DoD IG. If confirmed, I hope and expect to work closely with the IG's General Counsel to provide timely and quality legal advice to our respective clients.

### **The Joint Service Committee on Military Justice**

The DoD General Counsel designates a non-voting representative to the Joint Service Committee on Military Justice.

### **The Comptroller General**

As I understand it, an agency head may request an opinion from the Comptroller General on the obligation and disbursement of public funds, and the DoD General Counsel may submit such questions to the Comptroller General on behalf of the Secretary of Defense. I understand that, on an informal basis, DoD General Counsel's office enjoys a very good relationship with the Comptroller General's office, which includes informal consultation. If confirmed, I intend to continue that relationship.

### **The United States Court of Appeals for the Armed Forces**

The law states that the Court of Appeals for the Armed Forces "is located for administrative purposes only in the Department of Defense," which emphasizes the Court's judicial independence from the Department of Defense. See 10 U.S.C. § 941. I understand that, traditionally, the DoD General Counsel serves as an informal DoD liaison with the Court, and may be asked by the President to recommend candidates for appointment to the Court.

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

As I understand it, the Code Committee consists of the Judges of the United States Court of Appeals for the Armed Forces, The Judge Advocates General of the Military Departments, the Judge Advocate General and Chief Counsel of the Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and two recognized authorities on military justice appointed by the Secretary of Defense from public life. The DoD General Counsel has no formal relationship to the Code Committee. However, I am told that the General Counsel may provide informal support as the Code Committee desires, and informs the Code Committee with respect to the activities and recommendations of the Joint Service Committee on Military Justice.

### **The Attorney General**

The Attorney General is the chief legal officer and law enforcement authority of the United States. The DoD General Counsel must work closely with the Attorney General and his staff to fulfill their respective duties.

### **The Office of Legal Counsel at the Department of Justice**

The Office of Legal Counsel issues formal legal opinions that can and do affect the operations and policies of the various agencies of the Executive Branch. The DoD General Counsel must, therefore, work closely with the Office of Legal Counsel to ensure the best possible legal advice is provided to officials of the Department of Defense.

## **The Office of Legal Adviser at the Department of State**

The Departments of State and Defense must work together on many matters in furtherance of the national security of the United States. Therefore, it is necessary for the DoD General Counsel and the Legal Advisor at the Department of State, and their staffs, to consult with each other on legal issues of mutual interest.

### **3. 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.**

**What background and expertise do you possess that you believe qualifies you to perform these duties**

I am a lawyer in good standing at the Bar of the State of New York and the District of Columbia. I am admitted to practice in a variety of federal courts around the country, including the U.S. Supreme Court. I am a trial lawyer and litigator at Paul, Weiss, Rifkind, Wharton & Garrison, LLP in New York City. I am a Fellow in the American College of Trial Lawyers.

I have served in public office twice. From January 1989 to December 1991, I was an Assistant United States Attorney in the Southern District of New York, where I prosecuted public corruption cases. From October 1998 to January 2001, I served as General Counsel of the Department of the Air Force, following nomination by the President and confirmation by the Senate. In that position, I worked in a professional and collaborative fashion with the more than 1,000 JAG and civilian lawyers in the Air Force to accomplish many things for our common client. This also included working closely with the DoD General Counsel and attorneys within that office. In 2007, I was nominated by the New York State Commission on Judicial Nomination to be Chief Judge of the State of New York. The incumbent, Judith Kaye, was reappointed by the Governor.

While in private law practice, I am active in civic and professional affairs. I was a member of the Ethics Committee and chair of the Judiciary Committee of the New York City Bar Association. I am also a member of the Council on Foreign Relations.

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

If I am confirmed, I hope and expect that Secretary Gates and his senior staff will call upon me for legal advice and guidance on the wide variety of matters that cross his desk.

#### **4. Legal Opinions**

**If you are confirmed, would the legal opinions of your office be binding on all lawyers within the Department of Defense?**

The DoD General Counsel is the chief legal officer of the Department of Defense. Consequently, the legal opinions of the Office of the DoD General Counsel are the controlling legal opinions of the Department of Defense, with the exception of lawyers in the Office of the DoD IG General Counsel, who are explicitly exempted from the scope of 10 U.S.C. § 140, by virtue of Section 907 of the FY2009 NDAA. As stated before, I am also mindful of the recent changes in law that prohibit any officer or employee of DoD from interfering with the ability of The Judge Advocates General to give independent legal advice to the leadership of their respective military departments.

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

Opinions of the Office of the DoD General Counsel are disseminated throughout the Department of Defense in the ordinary course of business, both electronically and in hardcopy format using normal Departmental distribution processes. If confirmed, I expect to continue this practice.

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

If confirmed, one of my objectives is to assess whether the DoD General Counsel's legal opinions currently in effect need to be reconsidered or revised.

**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 with the Office of Legal Counsel in the development, consideration and reconsideration of OLC legal opinions, while recognizing that the ultimate responsibility for the development of those opinions resides with the Department of Justice.

**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?**

If OLC issued an opinion with which I materially disagreed, I would not hesitate to inform OLC of the extent and nature of my disagreement, mindful, again, that the Attorney General is the chief legal officer of the United States and that his or her legal opinions are controlling throughout the Executive Branch.

## **5. 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?**

This is my view: I respect and admire the role our nation's military lawyers play for the Department of Defense. I appreciate that military lawyers, given their training and experience, may have a perspective that civilian lawyers do not have, particularly in matters of military operations, military personnel, and military justice. Further, as General Counsel of the Air Force from 1998 to 2001, I believe I worked in a collegial and collaborative fashion with The Judge Advocate General of the Air Force and his staff, and greatly respected his role and the advice he had to offer to the leadership of the Air Force.

I believe that 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?**

It is the responsibility of judge advocates within the Services and joint commands to provide legal advice to military commanders that is independent of improper external influence. Also, as a practical matter, judge advocates must be depended upon 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 for that advice. However, the DoD General Counsel is the senior legal officer of the Department. Therefore, judge advocates' 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 at this time of any changes that I would propose to the current relationships between the uniformed Judge Advocates and General Counsels.

## **6. Detainee Issues**

**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.**

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

In my view, this prohibition is in the best interest of the United States, the national security interests of the United States, and is consistent with fundamental American values.

**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?**

I am not fully informed to provide an adequate response to this question. If I am confirmed, this is something I expect to review carefully.

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

I believe the General Counsel should play a primary role in advising on the standards governing the treatment of persons detained by the U.S. military, including in any interpretation, if necessary, of the standard quoted above.

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

The Judge Advocates General of the Military Departments should play a prominent role in the interpretation of this standard and other matters related to the treatment of detainees. I believe The Judge Advocates General and the military lawyers they lead bring an important and essential perspective to these and many other matters, and they play a vital role in supporting the operating forces worldwide. As I stated before, judge

advocates must be depended upon to provide timely and effective day-to-day legal advice to military commanders in the field. If confirmed, and if called upon to offer any guidance on this standard, I hope and expect to consult The Judge Advocates General and the Chairman's Legal Counsel for this guidance.

**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 1403 and with Common Article 3 of the Geneva Conventions?**

Yes.

**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.

**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?**

Yes. If I am confirmed, I expect to review this issue closely.

**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. As a general matter, the United States is authorized to detain those individuals determined to be enemy combatants. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and the Authorization for Use of Military Force, 115 Stat. 224. I cannot comment, legally or factually, on the circumstances of the detention of specific individuals, which, in many cases, is the subject of pending litigation.

**Do you believe that the Combatant Status Review Tribunals convened by the Department of Defense to provide Guantanamo detainees an opportunity to contest designation as enemy combatants provide detainees with appropriate legal standards and processes?**

If I am confirmed, I expect to examine this issue carefully.

**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?**

I am familiar with the Supreme Court's decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008). It is also my understanding that the exact procedures that will apply in the habeas cases that follow the *Boumediene* decision are still being considered by the District Court for the District of Columbia. I do not now have a personal belief about this issue. If confirmed, I will work closely with the Department of Justice to propose enhancements to current procedures and capabilities that may be necessary.

**What role would you expect to play, if confirmed, in reviewing the status of Guantanamo detainees and determining whether the United States should continue to hold such detainees?**

If confirmed, I expect to provide legal advice to the Secretary of Defense on the status of the Guantanamo detainees and determinations whether the United States should continue to hold such detainees.

**The Military Commissions Act of 2006 authorized the trial of "alien unlawful enemy combatants" by military commission and established the procedures for such trials.**

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

If confirmed, I intend to carefully review whether the Military Commissions Act strikes the right balance between protecting U.S. national security interests and providing appropriate legal standards and processes for a fair and adequate hearing.

**Under what circumstances, if any, do you believe that it would be appropriate to use coerced testimony in the criminal trial of a detainee?**

If confirmed, I anticipate looking carefully at whether use of coerced testimony is ever appropriate in the criminal trial of a detainee.

**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?**

Under the current structure, the General Counsel has no role in determining whether any particular Guantanamo detainee should be tried for war crimes. Rather, the Convening Authority makes the decision on which cases are referred to a military commission. If confirmed, I anticipate reviewing the current process to determine whether to recommend any changes to it.

**What role would you expect to play, if confirmed, in reviewing the Military Commissions Act and developing Administration recommendations for any changes that may be needed to that Act?**

If confirmed, I anticipate reviewing the Military Commissions Act to determine whether to recommend any legislative proposals to change it.

**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?**

It is my understanding that, for reporting purposes, these individuals are all under the cognizance of the Office of the General Counsel. The legal advisor to the convening authority reports to the Deputy General Counsel (Legal Counsel). Consistent with the Regulation for Trial by Military Commissions, the chief prosecutor reports to the legal advisor. The chief defense counsel reports to the Deputy General Counsel (Personnel & Health Policy).

## **7. 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.**

**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?**

I know that both President-elect Obama and Secretary Gates are concerned about the oversight and accountability of private contractors in areas of combat operations. I am not now familiar with the specific provisions of the Department's regulations in this area, but I recognize that this is an important issue. If confirmed, I will make review of the regulations one of my priorities.

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

If confirmed, I will review these regulations and, if appropriate, make recommendations for changes.

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

As stated above, I am not now familiar with the specific provisions of the Department's regulations in this area, but I recognize that this is an important issue. If confirmed, I will make review of these regulations one of my priorities.

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

If confirmed, I will review these regulations that would pertain to this matter and, if appropriate, make recommendations for changes.

**In October 2008, the Department of Defense announced a plan to award contracts in excess of \$300 million to U.S. contractors to conduct "information operations" through the Iraqi media.**

**In your view, is DOD's use of private contractors to conduct information operations through the Iraqi media appropriate?**

I am not fully familiar with the Department's use of private contractors to conduct information operations. If confirmed, I will review this issue. I recognize that this issue requires close scrutiny.

**Under what circumstances do you believe that it is appropriate for the Department of Defense to conduct information operations in a sovereign country without the knowledge and support of the host country?**

I do not have enough information about information operations at this point to comment on when it would be appropriate for DoD to conduct such operations in a sovereign country without the knowledge and support of that country. If confirmed, I will study these matters carefully and ensure that DoD directives and policy on information operations are compliant with U.S. law. Again, I recognize that this is an issue that requires close scrutiny. I note also that in dealing with the media, DoD Public Affairs has an obligation to disseminate truthful and accurate information about military activities, consistent with security guidelines, to both domestic and international audiences.

**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?**

From my prior experience as General Counsel of the Air Force, I am generally familiar with OMB Circular A-76. I am also familiar with Section 832 of the FY 2009 NDAA which provides the sense of Congress, regarding performance by private security

contractors of certain functions in areas of combat operations. This is a sensitive and controversial area, which, if confirmed, I will study carefully.

**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 am not now in a position to provide an informed view on this subject. I am generally familiar with OMB Budget Circular A-76 and am familiar with Section 1057 of FY 2009 NDAA, which reflects the sense of Congress regarding the interrogation of detainees by contractor personnel. Again, if confirmed, I will study this issue carefully.

**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 intend to study this issue carefully and provide the appropriate legal advice and guidance.

**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?**

I am generally aware of the provisions of the “Military Extraterritorial Jurisdiction Act of 2000 (MEJA),” Pub. L. No. 106-523, 114 Stat. 2488 (2000), as amended. *See* 18 U.S.C. §§ 3261-67. I am also aware that there have been legislative initiatives, including a bill introduced by then-Senator Barack Obama in February 2007, to explicitly cover MEJA’s jurisdiction over contractors for federal agencies other than the Department of Defense. I expect this legislative proposal will become a position of the new Administration. I understand and appreciate the importance of appropriate accountability over all persons in support of our armed forces wherever located. If confirmed, I will give high priority to achieve that objective.

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

I am not now in a position to offer specific legislative changes to MEJA. If confirmed, I will give high priority to the Department’s role in supporting this important law and provide advice when and where improvements are needed.

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

If confirmed, to the extent that the Department of Defense develops recommendations for changes to MEJA to improve upon this law and its implementing procedures, I hope and

expect to provide that necessary support. It is my understanding that the Office of the DoD General Counsel has been, since the enactment of MEJA, an integral player in implementing the Act itself, and the processing of cases to the Department of Justice for consideration.

**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?**

I strongly support the position that civilians serving with or accompanying our armed forces overseas who commit crimes should be appropriately held accountable. I do not now have an informed view about whether the UCMJ currently provides the appropriate jurisdictional reach.

**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 a Secretary of Defense memorandum of March 10, 2008. If confirmed, I intend to examine whether this memorandum strikes the appropriate balance in 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?**

I am not now prepared to offer specific suggestions or recommendations. If confirmed, I will examine this issue.

## **8. Military Justice Matters**

**Article 6 of the Uniformed Code of Military Justice gives primary jurisdiction over 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 has no direct role to play in specific military justice cases, or cases that may have military justice implications. Decisions in military justice

cases are made by the commander of the accused, the convening authority, the military judge, and court members. The Service 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 only in military justice 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. I share the courts' oft-stated view that unlawful command influence is the "mortal enemy" of military justice.

See also my answers above concerning the Joint Service Committee on Military Justice and the Code Committee.

**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?**

See my answers above to the preceding question concerning the role of the General Counsel.

## **9. Prevention of and Response to Sexual Assaults**

**As required by Section 577 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, the Department of Defense issued a new policy for the prevention of and response to sexual assaults involving members of the Armed Forces.**

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

I believe this is a very important issue and I intend to review it carefully if I am confirmed as General Counsel. I am aware of a Victim Witness Assistance Program to help victims of sexual assault navigate the military justice process.

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

I dealt with this issue to some extent as General Counsel of the Air Force. Unrestricted reporting means law enforcement involvement and investigation that will ensue upon a report of sexual assault; restricted reporting allows a victim to disclose the details of the assault to specific individuals and receive medical treatment and counseling without involving law enforcement or triggering an automatic investigation. As I understand it, the goal of restricted reporting is to give the victim the support and confidence eventually to come forward with an unrestricted report so the offender can be held accountable. In

all, there must be a balance between the need for the prosecution of sexual offenders on the one hand and the privacy and physical and mental well-being of the victim on the other. Finding the right balance is a delicate task. I do not now have a view about whether DoD has found that right balance.

**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?**

I am currently unfamiliar with the adequacy of DoD oversight.

#### **10. 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?**

My understanding is that the Secretary of Defense and his staff provide overall policy guidance, and the Secretaries of the Army, Navy and Air Force provide supplemental guidance.

**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 have not been in the Department of Defense for eight years and, at this time, am not in a position to evaluate whether the current policies accommodate these important interests imbedded in our Constitution. I appreciate the importance of this issue. If confirmed, I hope and expect to review this issue in detail.

**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?**

See my answer to the prior question.

#### **11. 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 on accession by the United States to UNCLOS?**

Like the President-Elect and the current Administration, I support U.S. accession to the United Nations Convention on the Law of the Sea. My understanding is that there are important national security interests that are to be furthered by U.S. accession. If confirmed, I look forward to working within the new Administration and with the Senate towards favorable action on the Convention during the 111th Congress.

**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 I understand it, the Convention secures important freedom of navigation rights upon which our maritime forces must be able to rely without question. By not being a party to the Convention, the United States has had to rely on customary international law, which is not universally accepted and can change over time in ways that may not be in the best interests of the country. Being a party to the Convention places these important navigational rights on the strongest legal footing as treaty rights, and gives the United States a seat at the table in treaty-based institutions.

I do not see national security disadvantages of being a party to the Convention. Some suggest that being a party could subject our maritime forces to the jurisdiction of international tribunals. The Convention, however, expressly permits a party to exclude from international dispute settlement those matters that concern "military activities," and the United States could assert the exclusive right to determine what constitutes a military activity.

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

No. See my prior answer.

**12. 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 mark up of the National Defense Authorization Act?**

I understand that over the past three years the Office of General Counsel has restructured the Department's Legislative Program specifically to ensure that the Department transmits the annual National Defense Authorization Bill to Congress immediately after the President transmits his budget to Congress. If confirmed as DoD General Counsel, I

will personally monitor this progress, and assess whether improvements in the process can be made.

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

When I was General Counsel of the Air Force, I was appalled at the slow turn-around time in responding to many letters from Congress. I recall one that took almost a year.

I am told that, over the past two years, 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 improve the Department's responses to requests for views on Congressional bills. If confirmed, I will work to ensure that the Department provides Congress with timely views on proposed legislation.

**13. Judicial Review**

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

The role of Article III courts in review of military activities has been addressed repeatedly by the Supreme Court and lower federal courts. Historically, the courts have afforded great deference to the military in the conduct of its affairs. *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). However, that deference is not without limits, and since September 11, 2001, the Supreme Court has found it necessary to assert itself in matters of national security and the conduct of military affairs. For example, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 535-36 (2004), Justice O'Connor stated "[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."

**14. Client**

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

The Department of Defense is the client.

**15. 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?**

Every DoD attorney is under an obligation to faithfully comply with all applicable laws and regulations. One such regulation, DoD Directive 5505.06, "Investigations of Allegations Against Senior Officials of the Department of Defense," requires referral to the DoD Inspector General of senior official misconduct, including allegations of a violation of criminal law or conflict of interest law. If a DoD attorney learns of improper activities by an official who has sought his or her legal advice but is unwilling to follow it, the attorney should immediately notify his or her legal supervisor (or the senior lawyer in the next higher level of his or her organization) for review and appropriate action by that higher level attorney. This is the appropriate avenue to escalate concerns to ensure that corrective action is promptly taken.

**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?**

To my knowledge, the present limits on *pro bono* activities are appropriate. That said, I am aware that there are a number of opportunities for DoD attorneys to be involved in many types of *pro bono* activities. If confirmed, for example, I intend to encourage DoD attorneys to participate in bar association activity. I believe that involvement by DoD attorneys in professional legal associations contributes to professional development.

**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?**

With respect to professional responsibility rules in DoD, I am aware that all DoD attorneys are required to be licensed to practice in a state, the District of Columbia, or a United States commonwealth or territory. DoD attorneys must also adhere to the highest standards of professional conduct, including compliance with the rules of professional conduct of their state bar(s) and any supplemental requirements imposed by their DoD component. If confirmed, I will examine the adequacy of the professional responsibility rules for lawyers in the Office of the DoD General Counsel and the Defense Legal Services Agency, and make appropriate modifications or issue supplemental guidance if warranted.

## **16. Role in the Officer Promotion 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 essential that the integrity and independence of the promotion selection process be maintained. Based on my prior experience as General Counsel of the Air Force, I know that the secretary of each service, 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 is in compliance 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 or Deputy Secretary of Defense. If the DoD General Counsel determines that a promotion selection board fails to conform to law or policy, it would be the duty of the General Counsel to inform the Secretary or Deputy Secretary of Defense of the irregularities and to recommend appropriate corrective action. Further, in providing advice to the Office of the Under Secretary of Defense for Personnel and Readiness, the General Counsel should ensure that officer promotion policies promulgated in DoD regulations fairly and accurately reflect provisions of law set out 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?**

It is my understanding that the Office of the DoD General Counsel reviews all nomination packages pertaining to general and flag officers with attributed adverse information before the package is forwarded to the Secretary or Deputy Secretary of Defense for approval. The General Counsel ensures that any adverse information attributed to such officers is supported by evidence in the associated reports of investigation. I am informed that the DoD General Counsel frequently provides specific advice to the Under Secretary of Defense for Personnel and Readiness, the Deputy Secretary of Defense and the Secretary of Defense concerning difficult or unusual cases. The General Counsel also shares responsibility for ensuring that adverse information communicated to the Armed Services Committee is provided in an accurate, comprehensive and timely manner. Further, I am advised that the DoD Office of General Counsel is actively involved in ensuring that the Armed Services Committee is notified in a timely manner about recently initiated investigations involving officers pending confirmation.

**17. 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?**

The Department of Justice has statutory responsibility to represent the United States, its agencies, and its officers, including the Department of Defense, in all litigation matters. *See* 28 U.S.C. § 516. However, Department of Defense attorneys work directly with counsel at the Department of Justice in cases in which DoD, or one or more of its components or officials, is a party or has an interest. DoD attorneys review pleadings before they are filed with the courts, conduct and direct discovery, participate in making major litigation decisions, and in some cases serve as members of trial teams.

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

If confirmed, I am sure I will review this issue.

**18. Court of Appeals Decision**

**On January 4, 2000, the United States Court of Appeals for the District of Columbia Circuit decided the case of *National Center for Manufacturing Sciences v. Department of Defense*, 199 F. 3d 507 (D.C. Cir. 2000). The court concluded that “Because of the existence of 10 U.S.C. Section 114, it is clear that any monies appropriated for NCMS by Congress for research must be authorized before they can be appropriated and distributed”; and “Because 10 U.S.C. Section 114(a)(2) requires authorization of these funds before they become available, appropriation alone is insufficient.”**

**What is your view of the court’s decision in this case and its implications regarding the obligation of funds that are appropriated, but not authorized?**

I am generally aware of this case. It was decided while I was General Counsel of the Air Force. In addition, I am aware that there is doubt about whether funds can be utilized that are appropriated but not authorized. In my experience, situations where funds have been appropriated but not authorized are often complex and may involve unique statutory language. As a result, if confirmed I hope and expect that the Department, and the DoD General Counsel, will continue its practice of working closely with our oversight committees whenever this situation appears to be presented.

**19. 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 potential range of issues that might require legal advice from the DoD General Counsel’s office is very broad. The Office of General Counsel provides legal advice with respect to policy issues pertaining to military personnel, working closely with the Office of the Under Secretary of Defense for Personnel and Readiness, which has overall responsibility for Departmental Guidance for the correction boards.

**20. Major Challenges**

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

Regardless of the substantive issues facing the Department, the military and civilian attorneys in the Department must work collaboratively to provide the highest quality, timely service to the Department and its leadership.

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

If confirmed, I plan to work closely with both the senior civilian and military attorneys across the Department to build the critical relationships necessary to successfully serve our clients in the highest traditional of public service.

**21. Most Serious Problems**

**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?**

There is always room for improvement, but I believe the DoD General Counsel's office is one of the finest law offices I have encountered, with many talented, dedicated and extraordinary career professionals. Since I last worked in the Pentagon, the challenges facing DoD General Counsel have become far more complex in the post-September 11th world. It will be the highest honor of my professional career to lead this fine group of men and women in meeting those challenges.

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

If confirmed, I will encourage the Department's senior civilian and military attorneys to work collaboratively to provide timely legal advice of the highest quality to our clients.

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

The world has changed since I last worked in the Pentagon in January 2001, and my single greatest reason for wanting to return to public service is to help combat international terrorism. I was a personal witness to the events of September 11, 2001. We must imagine, prepare for and try to prevent the next attack, not the last one, and the greatest challenge of the DoD General Counsel going forward will be to find legal solutions and the best legal advice to promote our national security while safeguarding our individual liberties and American values.

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

If confirmed, I will assess whether the resources available to the DoD General Counsel are sufficient to perform the tasks described above.

## **22. 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.