

Advance Questions for Stephen Woolman Preston
Nominee to be the General Counsel of the Department of Defense

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 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?

I believe that Goldwater-Nichols and other reforms have significantly improved the Department of Defense. At this time, I am not aware of any need to amend Goldwater-Nichols. If am confirmed and become aware of a need, I will recommend any changes I believe to be warranted.

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

See answer above.

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

As the chief legal officer of the Department of Defense, the General Counsel is the principal legal advisor to the Secretary of Defense and, as such, advises on the full range of issues confronting the Department of Defense. If confirmed, I look forward to working very closely with the Secretary and his immediate staff on these issues.

The Under Secretaries of Defense

The General Counsel and attorneys reporting to the General Counsel are responsible for providing sound and timely legal advice to the five Under Secretaries of Defense and their respective offices.

The Assistant Secretaries of Defense

As with the Under Secretaries of Defense, the General Counsel and attorneys in the Office of General Counsel are responsible for providing sound and timely legal advice to the Assistant Secretaries of Defense and their staffs.

The Chairman of the Joint Chiefs of Staff

The Chairman has his own lawyer, the Legal Counsel to the Chairman of the Joint Chiefs of Staff, who is a judge advocate in the grade of brigadier general or rear admiral (lower half). The Chairman relies primarily on the Legal Counsel for legal advice. If confirmed, I expect to meet regularly and work closely with the Chairman's Legal Counsel on a wide variety of matters affecting the Department of Defense and would be available to the Chairman as appropriate.

The Geographic Combatant Commanders

The Geographic Combatant Commanders have their own Staff Judge Advocates, on whom they rely for legal advice. If confirmed, I expect to work with the Geographic Combatant Commanders and their Staff Judge Advocates through the Chairman of the Joint Chiefs of Staff and the Joint Staff, including the Legal Counsel to the Chairman as appropriate.

The Commander of the Joint Special Operations Command

The Commander of the Joint Special Operations Command (JSOC) has his own Staff Judge Advocate who provides legal advice to him, in conjunction with the Staff Judge Advocate of the U.S. Special Operations Command (SOCOM), as JSOC is a part of SOCOM. If confirmed, I expect to work with the Commander and the Staff Judge Advocate of JSOC, as well as the Commander and the Staff Judge Advocate of SOCOM, through the Chairman of the Joint Chiefs of Staff and the Joint Staff, including the Legal Counsel to the Chairman as appropriate.

The Judge Advocates General

The Judge Advocates General are responsible for providing legal advice, along with the General Counsels of the military departments, to the senior leadership of their respective military departments. Title 10 expressly directs 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. If confirmed, I expect to meet regularly and work closely with all of the Judge Advocates General, as well as the Staff Judge Advocate to the Commandant of the Marine Corps, and I aim to have the same productive and collegial relationship with the "TJAGs" and the JAG community as I enjoyed during my prior service at the Department of Defense.

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

As noted above, the Legal Counsel to the Chairman is responsible for providing legal advice to the Chairman of the Joint Chiefs of Staff. If confirmed, I expect to have a productive and collegial relationship with the Chairman's Legal Counsel, characterized by frequent meetings

and close collaboration, particularly with respect to military operations.

The Staff Judge Advocates to the Commanders of Combatant Commands

I understand that the relationship of the General Counsel to the Staff Judge Advocates of the Combatant Commands is primarily through the Chairman's Legal Counsel.

The General Counsels of the Military Departments

From my prior service as General Counsel of the Department of the Navy and as Principal Deputy General Counsel of the Department of Defense, I appreciate the close working relationships among the military department General Counsels and the DoD General Counsel. The General Counsels of the Army, Navy and Air Force serve as the chief legal officers of their respective departments and report to the Secretaries of their respective departments. At the same time, the DoD General Counsel is the chief legal officer of the entire Department of Defense. If confirmed, I expect to meet regularly and work closely with the military department General Counsels.

The Counsels for the Defense Agencies

The DoD General Counsel is also the Director of the Defense Legal Services Agency (DLSA), and the General Counsels of the defense agencies and DoD field activities are all part of DLSA. The General Counsels of the defense agencies and DoD field activities report the DoD General Counsel in his or her capacity as DLSA Director.

The Counsel to the Inspector General

Title 5 of the United States Code provides for a General Counsel to the Inspector General of the Department of Defense, who reports directly to and performs duties as assigned by the Inspector General. If confirmed, I expect to work closely with the General Counsel to the Inspector General.

The Joint Service Committee on Military Justice

I understand that the DoD General Counsel designates a non-voting representative to the Joint Service Committee on Military Justice, provides taskings to the Committee, and receives advice from it.

The Comptroller General

It is my understanding that the General Counsel, on behalf of the Secretary of Defense, may request advisory opinions from the Comptroller General on the obligation and disbursement of public funds. If confirmed, I expect to have a productive relationship with the Comptroller General and his or her staff with respect to matters involving fiscal law within the responsibility of the Comptroller General.

The United States Court of Appeals for the Armed Forces

By statute, the United States Court of Appeals for the Armed Forces is located, for administrative purposes only, within the Department of Defense. See 10 U.S.C. § 941. My understanding is that the DoD General Counsel has historically served as an informal DoD liaison with the Court. If confirmed, I expect to support the work of the Court while respecting its independence.

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

I understand that 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 General Counsel has no formal relationship to the Code Committee. However, the General Counsel may provide informal support to the Code Committee when requested and regularly communicates with 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. As General Counsel of the Central Intelligence Agency, I have worked closely with the Attorney General and his staff on a number of matters. If confirmed, I look forward to continuing the productive relationship that I have enjoyed with the leadership of the Department of Justice.

The Office of Legal Counsel at the Department of Justice

The Assistant Attorney General for the Office of Legal Counsel issues legal opinions that are binding on the Executive branch, including the Department of Defense, and regularly provides advice to attorneys throughout the Executive branch. As a result, the DoD General Counsel must work closely with the Office of Legal Counsel to ensure that the best possible legal advice is provided to officials of the Department of Defense. As General Counsel of the Central Intelligence Agency, I have had a very close and productive relationship with the Assistant Attorney General and the Office of Legal Counsel, and, if confirmed, I expect that relationship to continue.

The Office of Legal Adviser at the Department of State

Many national security matters require the Departments of State and Defense to work closely together and coordinate efforts. As a result, it is necessary for the DoD General Counsel and the Legal Adviser of the Department of State, and their respective staffs, to consult with each other on legal issues of mutual interest on a regular basis. As General Counsel of the Central Intelligence Agency, my relationship with the Legal Adviser and the Legal Adviser's office has

been a close and productive one, and, if confirmed, I look forward to continuing that relationship.

The General Counsel of the Central Intelligence Agency

My service as General Counsel of the Central Intelligence Agency provides me with special insight into the appropriate relationship between the incumbent of that position and the DoD General Counsel. The Central Intelligence Agency and the Department of Defense share many common interests in significant national security matters, intelligence activities and military operations, and it is therefore critically important for the General Counsel of the Central Intelligence Agency and the DoD General Counsel to work well together and communicate regularly. If confirmed, I am confident that I will have a very close and productive relationship with my successor at the Agency.

The Interagency Legal Advisors Working Group

Attorneys from the national security staff and departments and agencies with national security responsibilities meet as needed or directed to discuss legal issues of concern to multiple departments and agencies or about which there may be differences of opinion. As General Counsel of the Central Intelligence Agency, I have participated in these discussions and will continue to do so as DoD General Counsel, if confirmed.

Qualifications

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

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

If confirmed, I anticipate that the Secretary of Defense will rely on me for legal advice on the full range of issues that he and the Department must address and will expect me, as a member of his senior leadership team, to share with him the benefit of my experience generally.

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

I have spent most of my career, and the past 20 years straight, working at the juncture of law and national security, both in private practice and in government service.

I am currently General Counsel of the Central Intelligence Agency, appointed by the President with the advice and consent of the Senate a little more than four years ago. Before that, as a partner at WilmerHale in Washington, I was co-chair of the firm's Defense and National Security Practice Group, as well as a member of the firm's Regulatory and Litigation Departments. During the Clinton Administration, I served as Deputy General Counsel for Legal

Counsel, Principal Deputy General Counsel and, for an extended period, Acting General Counsel of the Department of Defense. I then joined the Department of Justice as the Deputy Assistant Attorney General responsible for civil appellate matters. Returning to the Department of Defense, I served as General Counsel of the Department of the Navy, a Presidential appointment requiring Senate confirmation.

These experiences have given me a deep understanding of legal and policy issues relating to national defense. I have also gained valuable insight into the critical role of the General Counsel in advising the Secretary of Defense and representing the Department. For the past four years, I have dealt extensively with the terrorist threat and other security challenges facing the United States. Perhaps most important, my experience over a professional lifetime has instilled in me a profound appreciation for the men and women who devote their lives to defending our country.

Client

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

The client of the General Counsel of the Department of Defense is the Department of Defense and, ultimately, the United States of America.

Duties and Challenges

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

The major challenges I will face, if confirmed, relate directly to the major challenges confronting the Department as a whole. Among them are the conflict with al-Qa'ida and transition in Afghanistan, as well as other national security challenges, and continuing efforts to ensure full compliance with all applicable law in addressing those challenges. Other priority areas with substantial legal aspects include military detention operations and the military commissions. There are also pressures caused by diminishing budgets and the effects of sequestration, and resulting challenges in both the acquisition and personnel areas. In the acquisition area, for example, bid protests and other contract litigation may be expected to increase as more companies compete for fewer contracts or decide to file contract claims. Furloughs and anticipated reductions in personnel are also likely to raise significant legal issues.

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

The Department is well served by a cadre of experienced attorneys who are experts in relevant areas of law, both in the Office of General Counsel and in the larger DoD legal community. If confirmed, my hope is to provide leadership and the support those attorneys need to provide the best possible legal advice to their component clients. For my part, I will do my utmost to assist the Secretary in meeting the various challenges confronting the Department.

What do you consider to be the most serious problems in the performance of the

functions of the General Counsel of the Department of Defense?

I expect that I will have a better sense of any needs relating to the performance of the DoD General Counsel's functions after spending some time in the position, if confirmed. I understand that current budget pressures, aging of the workforce, and difficulty in replacing attorneys who retire without others having similar expertise may pose significant problems.

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

If confirmed, I intend to treat my colleagues with the respect they so richly deserve, and to focus on resources, succession planning and recruitment with reference to the workforce of my office.

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

In addition to the challenges discussed above, one area that has received a great deal of attention recently, which I expect will draw continued attention in the coming year, would be intelligence activities conducted by the Department of Defense that potentially implicate privacy and civil liberties. DoD attorneys will, I expect, continue to assist their component clients in finding lawful paths to reach operational objectives, facilitating the national security mission while ensuring full compliance with all applicable law and, specifically, strict adherence to the standards and procedures protecting privacy and civil liberties. I also see sexual assault in the military as an urgent problem with substantial legal aspects that will require sustained attention in the coming year, as discussed in response to specific questions below.

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

I expect that I will have a better sense of any needs relating to Office of General Counsel resources after spending some time in the position, if confirmed. I understand that furloughs and anticipated reductions in personnel may pose significant challenges in this regard.

Legal Opinions

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

The DoD General Counsel is the chief legal officer of the Department of Defense. Accordingly, the legal opinions of the DoD Office of General Counsel are controlling throughout the Department of Defense. There is an exception for the lawyers in the Office of the Inspector General, as the General Counsel to the Inspector General is expressly exempted from the scope of 10 U.S.C. § 140 by virtue of Section 907 of the FY2009 NDAA A (5 U.S.C. App. Inspector General Act of 1978 § 8(h)). I note also that Title 10 prohibits any officer or employee of DoD from interfering with the ability of certain senior military lawyers to give independent legal advice to their respective principals.

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

Written opinions of the DoD Office of General Counsel are disseminated throughout the Department in the ordinary course of business, 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?

I am not aware of any specific categories of General Counsel legal opinions that are in need of reconsideration or revision. However, if confirmed and such a need arises, I would review those opinions in consultation with the appropriate attorneys and subject matter experts within the Department.

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?

While the Department of Justice is ultimately responsible for the legal opinions of the Office of Legal Counsel, if confirmed, I expect to work closely with the Office of Legal Counsel in the development and consideration of legal opinions that directly affect the Department of Defense. (I am not aware of any such opinions currently in effect that are in need of reconsideration.)

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?

I would not hesitate to inform the Office of Legal Counsel if I disagreed with one of its legal opinions. I would raise any unresolved concerns directly with the Assistant Attorney General. If necessary and as appropriate, I would be prepared to take the matter all the way up to the Attorney General. I recognize, however, 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.

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?

I believe that the ability of these senior military lawyers to provide independent legal advice to their principals is critically important. During my prior service as General Counsel of the Department of the Navy and as Principal Deputy General Counsel of the Department of Defense, long before any legislation in this regard, it was my firm expectation that the senior military lawyers with whom I worked would provide independent legal advice to their principals, entirely without hindrance. As a member of the 2005 Independent Review Panel to Study the Relationships between military department General Counsels and Judge Advocates General, I had an opportunity to reflect on these issues and to reaffirm the independence of the "TJAGs" in providing legal advice to the leadership of their respective military departments. In my experience, the best legal advice is often the product of consultation and, where possible, consensus. Accordingly, in my view, the advice given by senior military lawyers should be informed by consultation with other departmental lawyers as appropriate. If confirmed, I expect to benefit from, and will insist on, the independent views of the senior military lawyers with whom I will work.

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

Judge advocates within the Services and joint commands must provide military commanders timely legal advice that is independent of improper external influence. While exercising their best judgment, the advice given may be informed by consultation with other departmental lawyers, as circumstances permit, such as more senior judge advocates in the chain of command, and it should be governed by any relevant legal guidance from authoritative sources such as the Department of Justice or within the Department of Defense.

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

As I understand the current relationships, I would not propose any changes, if confirmed.

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?

I believe this prohibition to be in the best interest of the United States, consistent with the national security and 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?

The Detainee Treatment Act of 2005 and the Military Commissions Act of 2009 define “cruel, inhuman, or degrading treatment or punishment” as the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution. I think this is an adequate and appropriate definition.

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

The General Counsel should play a primary role in advising the Secretary of Defense and those who fall under his command on the standards governing the treatment of persons detained by the U.S. military, including regarding 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 and other military lawyers should play a prominent role in the interpretation of standards related to the treatment of detainees. I believe The Judge Advocates General and the lawyers they lead bring experience and an important perspective to these and many other matters, and they play a vital role in supporting the operating forces worldwide. Judge advocates must be depended on to provide timely day-to-day legal advice to military commanders in the field. If confirmed, and if called on to offer any guidance on this standard, I would expect to consult The Judge Advocates General and the Chairman’s Legal Counsel.

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

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

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

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

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

The federal courts have established clear procedures for a habeas petitioner to obtain extensive discovery from the government and for the petitioner to participate in his case (during unclassified proceedings). In the habeas litigation, the courts have provided detainees with a meaningful opportunity to contest the lawfulness of their detention, while protecting core national security interests, such as the protection of classified information and the continued detention of enemy belligerents who pose a threat to the United States.

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

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

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

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

The Military Commissions Act of 2009 provides appropriate standards and processes for the trial

of alien unprivileged enemy belligerents.

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

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

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

The Legal Advisor to the Convening Authority and Chief Prosecutor are supervised by the Deputy General Counsel (Legal Counsel). The Chief Defense Counsel is supervised by the Deputy General Counsel (Personnel & Health Policy). Both the Deputy General Counsel (Legal Counsel) and the Deputy General Counsel (Personnel & Health Policy) report to the General Counsel.

Coercive Interrogation Techniques

As discussed in a 2008 report of the Senate Armed Services Committee, Survival, Evasion, Resistance, and Escape (SERE) techniques used to train members of our military were never intended to be used by U.S. interrogators. Rather, the techniques – which are based on Communist Chinese interrogation techniques used during the Korean War to elicit confessions – were developed to expose U.S. soldiers to the abusive treatment they might be subjected to if captured by our enemies.

Do you believe interrogation techniques derived from SERE techniques are an effective way to acquire useful intelligence?

While I have no expertise in either SERE training or methods of interrogation, in my view, the fact that certain techniques have been used to train service members in withstanding abusive treatment if captured is not indicative of the effectiveness of those techniques in obtaining information from detainees, nor does it show such techniques to be superior to conventional interrogation techniques.

Under Executive Order 13491, issued January 22, 2009, departments and agencies of the U.S. Government are prohibited from using any interrogation technique that is not authorized by and listed in the Army Field Manual. My understanding is that none of the interrogation techniques contained in the Army Field Manual – FM 2-22.3, “Human Intelligence Collector Operations,” September 2006 – was derived from SERE techniques.

In your opinion, is there any comparability between a friendly trainer exposing our troops to SERE techniques, including waterboarding, for minutes to show what they

could face if captured and using these techniques on an enemy to in an effort to extract intelligence?

While I have no expertise in either SERE training or methods of interrogation, in my view, the two activities are significantly different for purposes of meaningful comparison. They are conducted for very different purposes, and they are carried out in very different contexts/environments. Notably, the person subjected to such techniques during SERE training is aware that he or she is participating in a training exercise and not in fact undergoing interrogation by hostile forces.

In your opinion, does waterboarding constitute torture?

Under current law, waterboarding constitutes torture. As waterboarding was banned by Executive Order in January 2009, I have had no occasion to independently examine the question with reference to any CIA activities during my tenure as General Counsel. However, I believe the law on this is now well settled: in addition to the President, Attorney General Holder has stated that waterboarding is torture. That is the law in my view, and I fully support the President's decision to ban waterboarding and the other "enhanced interrogation techniques."

At the time the waterboard was used in connection with the former detention and interrogation program, Agency personnel relied on then-authoritative legal opinions issued by the Department of Justice. Of course, those opinions have since been disavowed and withdrawn by the Department of Justice. However, the Attorney General has repeatedly made clear that anyone who acted in good faith and within the scope of the legal guidance given by the Justice Department would not be subject to prosecution.

Is waterboarding torture within the meaning of the Geneva Conventions?

See answer above. For purposes of defining torture under the Geneva Conventions, the U.S. military uses the definition of torture under U.S. domestic law. See U.S. Army Field Manual 2-22.3. So if an activity is torture under U.S. law, then it is torture for purposes of the Geneva Conventions. Inasmuch as waterboarding is torture under U.S. law, as noted above, waterboarding is torture within the meaning of the Geneva Conventions.

Military Commissions Act

In your view, do military commissions constituted pursuant to the Military Commissions Act of 2009 provide an effective forum for trying violations of the law of armed conflict?

Military commissions are an appropriate forum for trying offenses against the law of war and other offenses traditionally triable by military commission. The applicability of certain offenses to conduct occurring prior to 2006 is currently the subject of pending litigation in federal court.

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

The reforms of the Military Commissions Act of 2009 ensure that military commissions provide appropriate processes for the trial of alien unprivileged enemy belligerents. In addition, the Department of Defense has made many improvements to the transparency of the process, including closed-circuit transmission of all open proceedings to the general public. Nonetheless, legal challenges remain, particularly in light of the number of unsettled legal issues.

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

I am not aware of any need for changes to the 2009 Military Commissions Act.

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

Citizenship does not confer immunity on one who takes up arms against our country. However, it is critically important to respect the Constitutional rights of American citizens, even those who may be plotting against the United States. The requirements of Due Process and the circumstances in which the U.S. Government could lawfully target an enemy belligerent/terrorist operator known to be a U.S. person were outlined in the speech by the Attorney General in March of last year and are discussed in some detail in the Department of Justice white paper that has been released. In addition, the policy standards and procedures announced in May of this year require that if the United States considers an operation against a terrorist identified as a U.S. person, the Department of Justice will conduct an additional legal analysis to ensure that such action may be conducted against the individual consistent with the Constitution and laws of the United States.

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

It is a mission of the U.S. military to defend the United States from attack, and the performance of this mission could involve the use of military force to repel an armed attack launched against our homeland. In the conflict with al-Qa'ida and its militant allies, the U.S. military does not employ deadly force in the United States. As a policy matter, moreover, the use of military force is unnecessary because well-established law enforcement authorities in this country provide the best means for incapacitating a terrorist threat. The United States has a long history of using the criminal justice system to incapacitate individuals located in our country who pose a threat to the United States and its interests.

International Law

In a speech at Columbia Law School and a similar address at Harvard Law School, you discuss a “four-box matrix” which has been used to assist in the legal review of proposed actions by the Central Intelligence Agency. The second box in this matrix is designed to evaluate the “Authority to Act with reference to International Law Principles.”

If a proposed action by the Department of Defense is fully in compliance with US law but there is a question of whether the proposed action is permitted under international law, customary international law or international law principles, does this ambiguity effect, and if so to what extent, or negate the ability of the Department to carry out the proposed action?

As a threshold matter, all U.S. military operations must be authorized under U.S. domestic law. This authority could be conferred by statute or, in the absence of congressional authorization, under certain circumstances, the President may rely on his constitutional authority as Commander in Chief and Chief Executive, as well as his authority to conduct foreign relations, to authorize the use of military force. There are significant constitutional and statutory limitations on the scope and duration of military operations that the President may authorize.

When the United States uses military force in a foreign country, it complies with all applicable international law.

If confirmed, I would work closely with my colleagues, including the Chairman's Legal Counsel and interagency lawyers, to ensure that U.S. military operations abroad comply with both U.S. domestic and applicable international law.

In an address at Northwestern Law School in 2012, Attorney General Eric Holder stated that the Administration has implemented special procedures to afford a level of due process review before lethal force is taken pursuant to the Authorization for the Use of Military Force of 2001 against a U.S. citizen.

What is your understanding of the extent to which the Administration intends to provide similar procedural due process protections to potential targets outside areas of active armed conflict who are not U.S. citizens?

The policy standards and procedures announced in May of this year, which govern the United States' use of force in counterterrorism operations outside the United States and areas of active hostilities and are either already in place or will be transitioned into place, apply generally to all terrorist targets, regardless of whether they are American citizens. Particularly as relates to non-U.S. persons abroad, the standards and procedures were promulgated as a matter of policy rather than per requirements of due process.

During the Vietnam War some criticized the layers of bureaucracy which obstructed the timely authorization for an attack on legitimate military targets. In the current conflict, as in the Vietnam War, targets of opportunity can come and go in a moment's notice.

Are you concerned that the procedures cited by the Administration, as summarized in the Fact Sheet: *U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, for targeting terrorists outside active areas of armed conflict could similarly complicate and add to the length of time required to target an overseas, non-U.S.

citizen al Qaeda member?

I agree that agility and timeliness are important attributes in a decision-making process for approving military targets and authorizing military action against such targets. My understanding is that the policy standards and procedures announced in May of this year were developed in close consultation with the departments and agencies with national security responsibilities, including specifically civilian and military leaders responsible for military operations abroad, and with the objective of having a decision-making process that would be practically workable and yield timely decisions. In addition, the policy standards and procedures include a reservation by the President permitting action to be taken in extraordinary circumstances.

How do you assess the risk that the procedures could lead to targets of opportunity being missed or could unnecessarily obstruct our ability to fight the war?

As noted, the policy standards and procedures were developed with the objective of having a decision-making process that would be practically workable and yield timely decisions. In addition, risk in this regard should be mitigated by the reservation by the President permitting a departure from otherwise applicable standards and procedures in extraordinary circumstances.

Authority for Use of Military Force/Law of Armed Conflict

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

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

I understand that the General Counsel, as chief legal officer of the Department of Defense, is responsible for providing advice on legal matters involving the Department of Defense and for overseeing legal services provided within the Department of Defense. The interpretation and application of the 2001 Authorization for Use of Military Force to military activities is a legal matter on which the General Counsel would provide advice to the Secretary of Defense, the Deputy Secretary of Defense, Office of the Secretary of Defense organizations and, as appropriate, other Department of Defense components.

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

It is my understanding that the interpretation of the 2001 Authorization for Use of Military Force, a domestic law of the United States, is informed by principles of international law, specifically, by the law of armed conflict.

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

The 2001 Authorization for Use of Military Force provides broad legal authority for military operations against those responsible for the 9/11 attacks and those harboring them, which authority has been applied to al-Qa'ida, the Taliban, and associated forces. In addition, the President could order military action to stop further attacks against the United States pursuant to his constitutional authority as Commander in Chief and Chief Executive, even if the terrorist threat was unrelated to al-Qa'ida, the Taliban, or an associated force. My understanding is that the existing authorities are believed to be adequate and appropriate for military operations to counter the current and immediately foreseeable terrorist threat.

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

Current Department of Defense strategy calls for increasing reliance on foreign partners as opposed to large-scale deployments of U.S. forces to address new and emerging terrorism threats. If confirmed, I look forward to examining whether new or revised legal authority for the U.S. military to support the efforts of foreign partners to respond to new and emerging threats is appropriate.

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

The United States did in fact use military force against members of al-Qa'ida before the 2001 Authorization for Use of Military Force was enacted. If there were no 2001 Authorization for Use of Military Force, the President would have authority as Commander in Chief and Chief Executive to order military action against al-Qa'ida and associated forces if necessary to protect an important national interest, as with an imminent threat of violent attack. There are, however, significant constitutional and statutory limitations on the scope and duration of military operations that the President may order in the absence of congressional authorization.

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

The policy standards and procedures announced in May of this year, which govern the United States' use of force in counterterrorism operations outside the United States and areas of active hostilities, apply to military operations undertaken pursuant to the 2001 Authorization for Use of Military Force, although they do not apply to ongoing military operations in Afghanistan. Beyond the bedrock requirement of a legal basis – where the use of force is authorized under the

2001 Authorization for the Use of Military Force and hence would be legally permissible – the standards and procedures set forth additional requirements for when force should be used as a matter of policy, with particular emphasis on whether the action will protect American lives.

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

The use of military force may be appropriate when necessary to stop an imminent terrorist attack on the United States, U.S. persons or interests abroad, or a U.S. ally by a group that has not previously engaged in hostilities directly against the United States.

What impact will the end of combat operations in Afghanistan at the end of 2014 have on the application of the AUMF?

I understand that the U.S. and NATO roles in Afghanistan after 2014 are still being discussed within the U.S. Government and NATO and negotiated with the Government of Afghanistan. I also note that the President recently committed to engaging Congress and the American people in efforts to refine, and ultimately repeal, the 2001 Authorization for Use of Military Force. Thus, I do not think one can predict today whether or how the 2001 Authorization for Use of Military Force might be applied in Afghanistan after 2014.

What is your understanding of the current status of the DoD Law of War Manual and what steps will you take, if confirmed, to complete this important document?

I am advised that the DoD Law of War Manual is in the final revision process managed by the DoD Law of War Working Group. That group is chaired by a representative from the DoD Office of General Counsel and is composed of representatives of the Judge Advocates General and the General Counsels 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. I understand that significant progress has been made through the concerted efforts of dedicated military and civilian lawyers within DoD and with assistance from colleagues at the Departments of State and Justice. If confirmed, I will support these efforts with a view to completing this important manual as expeditiously as possible.

Unmanned Systems

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

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

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

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

Contractors on the Battlefield

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

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

I am not familiar with the referenced Department regulations in this area, but am prepared to review them, if confirmed.

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

See answer above.

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

I am not familiar with the referenced Department regulations in this area, but am prepared to review them, if confirmed.

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

See answer above.

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

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

I have not previously had any substantial involvement with this set of issues and am not familiar with how the concept of inherently governmental function has been defined and applied in this

context. I am advised that by incorporating the definition from the Federal Activities Inventory Reform Act (31 U.S.C. 501 note), section 2463 of title 10, United States Code, defines inherently governmental function as a function that is so intimately related to the public interest that it must be performed by government employees. If confirmed, I intend to look at the application of this provision with considerable care.

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

See answer above.

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 expect to be actively involved in addressing the legal issues relating to the proper role of contractors on the battlefield.

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

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

I understand the importance of appropriate accountability for all persons supporting our Armed Forces wherever located. I am generally aware of the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), but I am not familiar with the particular provisions and how well they have served to provide criminal jurisdiction over contractor employees in areas of combat operations.

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

I am not now in a position to propose any changes to MEJA. If confirmed, and if after further review I perceive a need, I will recommend any changes I believe to be warranted.

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

If confirmed, I expect to be actively involved in any effort to develop Administration recommendations for changes to MEJA.

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

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

I support the position that civilians serving with or accompanying our Armed Forces overseas who commit crimes should be held appropriately accountable. I do not now have an informed view as to whether the UCMJ currently provides the appropriate criminal jurisdiction over contractor employees in areas of combat operations.

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

I am aware generally that there are procedures to reconcile these responsibilities reflected in a Secretary of Defense memorandum of March 10, 2008. If confirmed, I am prepared to examine this memorandum and give thought to whether it reflects the appropriate balance.

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

I have no recommendations for any such changes to the UCMJ at this time. If confirmed, and if after further review I perceive a need, I will recommend any changes I believe to be warranted.

Military Justice Matters

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

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

I understand that the General Counsel has a limited role in military justice, and no direct role in any particular military justice cases. The Secretary of Defense may become involved in military justice in limited circumstances. In those situations, the General Counsel provides legal advice to the Secretary.

The General Counsel is also responsible for designating a non-voting representative to the Joint Service Committee on Military Justice and may serve as an informal DoD liaison with the U.S. Court of Appeals for the Armed Forces.

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

As with other senior civilian and military leaders within the Department, the General Counsel must avoid any action that may constitute, or may appear to constitute, unlawful command

influence.

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

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

I understand that the May 30, 2013 report of the Subcommittee on Military Justice in Combat Zones and the Defense Legal Policy Board's June 14, 2013 memorandum transmitting that report to the Secretary of Defense endorsed the preservation of the role of the military commander, including the joint force commander in deployed situations, in the disposition of military justice matters. As a general matter, I appreciate the central importance of the commander's role in the military justice system historically, but I am not sufficiently familiar with the Subcommittee's report and the Board's memorandum to express a view on any recommendations in this regard. I look forward to reviewing them, if confirmed.

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

I am not now prepared to offer specific assessments of the optimal command role in the disposition of allegations of crimes and other misconduct committed by service members. If confirmed, I intend to look at this issue with considerable care.

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

If confirmed, I expect to review the recommendations of the Subcommittee and the Board, advise the Secretary of Defense with reference to those recommendations, and assist in seeking appropriate changes in policy, regulations or statutes to implement such recommendations as the Secretary adopts.

Prevention of and Response to Sexual Assaults

In 2012, for the fourth year in a row, there were more than 3000 reported cases of sexual assault in the military, including 2558 unrestricted reports, and an additional 816 restricted reports (restricted, meaning that, in accordance with the victim's request, they were handled in a confidential manner and not investigated). Moreover, a recent survey conducted by the DOD indicates that the actual number of sexual offenses could be

considerably higher, as 6.1 percent of active duty women and 1.2 percent of active duty men surveyed reported having experienced an incident of unwanted sexual contact in the previous 12 months.

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

If confirmed, I expect to play an active role, as the Department's chief legal officer and as a member of the Secretary's senior leadership team, in the ongoing effort to eradicate this scourge from the military. I will oversee the attorneys currently advising the Under Secretary of Defense for Personnel and Readiness and the Sexual Assault Prevention and Response Office, assisting in the implementation of the 2013 DoD Sexual Assault Prevention and Response Strategic Plan, and supporting the important work of the Response Systems Panel. Beyond that, I hope to work with the Secretary and other Department leaders – and with this Committee – to make sure that solving this problem remains a top priority, that no effort is spared to get a demonstrably effective system in place, and that any legal impediments are promptly addressed.

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

If confirmed, I will look at the role of the DoD General Counsel in addressing the problem of sexual assault in the military to assess whether I or my office can do any more to assist.

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

As I understand it, sexual assault against Service members is a gravely serious problem and has been a longstanding one. The problem goes beyond the incidence of crimes involving sexual assault and includes concern about possible impediments to coming forward such as fear of retaliation and lack of confidence that action will be taken. The fact that the problem has persisted despite previous efforts directed at both prevention and response is disturbing and I expect deeply frustrating to those who have been working to end it. I am not sufficiently informed to express a personal view on the current DoD sexual assault prevention and response program. I understand that the program has undergone numerous changes, that several provisions from the past two authorization acts are being implemented, and that additional legislative proposals are under active consideration. If confirmed, I will do my level best working with DoD lawyers, Department leadership and Congress to rid the military of sexual assault.

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

While I am not now in a position to express a personal view, I am advised that an unrestricted report of sexual assault allows law enforcement involvement and investigation, while 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. 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 and to strike an appropriate 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.

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?

While I am not now in a position to express a personal view, it is my understanding that there is robust oversight of the Department policies for the prevention of and response to sexual assaults. I am advised that the Secretary of Defense has a weekly accountability and assessment meeting with senior Department leaders and that DoD participates in the White House Health of the Force Group meetings to discuss DoD actions to combat sexual assault. I am also aware that the Secretary issued a Strategic Plan directing the Services to align their programs with the Strategic Plan, and that the Director, Sexual Assault Prevention and Response Office hosts quarterly integrated product teams attended by senior leaders from the Services, National Guard Bureau, Office of Secretary of Defense, and Office of the DoD Inspector General. I also understand that the Joint Chiefs of Staff established a quarterly executive council to assess the effectiveness of sexual assault prevention and response across the joint force.

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

I am not now prepared to offer assessments with reference to the legal issues surrounding the investigation and prosecution of sexual assault cases. If confirmed, I will engage with the Judge Advocates General and other civilian and military leaders and subject matter experts to determine what issues, if any, need to be addressed.

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

I think the chain of command is instrumental in changing the military culture. Commanders are responsible for the good order and discipline of their units and are indispensable to creating a zero tolerance climate for sexual assaults. However, eradicating sexual assault cannot be limited to the chain of command – everyone has a role in changing military culture to ensure that service members can serve without fear of sexual assault.

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

I am not now in a position to express a personal view concerning the optimal roles of commanders and judge advocates in the disposition of sexual assault allegations. I understand that this is the subject of intense debate. If confirmed, I will examine the issue and hope to play a constructive role in the debate.

Article 60 of the Uniform Code of Military Justice requires the convening authority to take action on the sentence issued by a court-martial and authorizes a convening authority, in his sole discretion, to take action of the findings of a court-martial, including setting aside a finding of guilty or changing a finding of guilty to a finding of guilty of a lesser included offense.

What is your view about the authority of a convening authority to set aside or modify findings of guilt and authority to reduce a sentence imposed by court-martial?

I understand that the Department has proposed legislation that would modify Article 60 by allowing convening authorities to amend findings of guilt only in those cases where the Service member was acquitted of a more serious offense and the offense of which he was found guilty is a minor offense, not normally disposed of by court-martial. The Department's proposal would also require the convening authority to explain in writing any modifications made to the court-martial findings and sentence. I support this proposal. As to limiting the authority of the convening authority to modify a court-martial sentence, one would have to consider the consequences such a limitation would have on the ability to reach plea bargains in appropriate cases, such as where the victim wishes to avoid being called as a witness in a contested trial.

Religious Activity in the Armed Forces

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

I understand that the Department of Defense has a long history of supporting, to the extent possible, the free exercise of religion by those service members who choose to do so, while respecting the rights of those who do not.

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

I have not had the opportunity to study the Department's current policies in sufficient detail to allow me to make a judgment on the appropriateness of those policies. I understand that the current Department policy on religious accommodation is being revised. If confirmed, I intend to become involved in that revision process.

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

Again, I am unable to make a judgment regarding the Department's current policies. However, I believe this question correctly highlights the considerations that must be balanced when considering religious accommodation: the individual service member's free exercise of religion

or no religion, and the Department's requirement to maintain unit cohesion, good order and discipline, and the other elements that comprise military readiness.

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 believe that military chaplains perform a vital service not only for Service members and their families, but also for commanders as advisors. I also believe that military chaplains should be allowed to perform religious services in accordance with the tenets of their religions and without interference from the chain of command. While I am not in a position to opine on the existing policies and practices, I understand that the DoD policy governing the military chaplains' program is being revised, and, if confirmed, I intend to become involved in that revision process.

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?

All Department attorneys are under an obligation to faithfully comply with all applicable laws and regulations, including regulatory reporting requirements. DoD Directive 5505.06, "Investigations of Allegations Against Senior Officials of the Department of Defense," requires referral to the DoD Inspector General of suspected misconduct by senior DoD officials, while DoD regulation, DoD 5500.07-R (Joint Ethics Regulation), requires DoD personnel to report suspected violations of the criminal and administrative rules on ethics and conflicts of interest to appropriate DoD authorities, e.g., the Defense Criminal Investigative Service.

Generally, 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 appropriate authorities, usually his or her legal supervisor (or the senior attorney in the next higher level of his or her organization), for review and appropriate action by that higher level official. This is an appropriate way to escalate concerns to ensure that suitable 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?

In my judgment, participation in pro bono activities and professional legal associations contributes in a meaningful way to the continued professional development of the Federal legal workforce, and, if confirmed, I would encourage DoD attorneys to participate in pro bono activities consistent with the law. To my knowledge, the present limits on pro bono activities are appropriate. I understand that my predecessor issued a pro bono policy. If confirmed, I am prepared to review that policy to ensure it meets the current needs of DoD and the attorneys who

wish to contribute their services.

As you may know, two Federal statutes prohibit (with only minor exceptions) Federal personnel from representing clients before the Federal Government, including the Federal courts. That said, I am aware that there are a number of opportunities for DoD attorneys to participate in a variety of pro bono activities, including drafting wills and representing clients in domestic violence cases, landlord/tenant disputes, and personal injury cases, when those matters are before state rather than Federal courts.

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?

To my knowledge, the laws, regulations, and guidelines that establish rules of professional responsibility for DoD attorneys are appropriate. If confirmed, I am prepared to examine the adequacy of the professional responsibility rules for attorneys in the DoD Office of General Counsel and the Defense Legal Services Agency, and make appropriate modifications or issue supplemental guidance if warranted.

Law of the Sea

The United Nations Convention on the Law of the Sea (UNCLOS) is currently pending in the Senate.

What are your views whether or not the United States should accede to UNCLOS?

I support U.S. accession to the Law of the Sea Convention, and I know that the Administration including Secretary Hagel strongly supports accession. Although we have succeeded to date in preserving and protecting our navigational freedoms through reliance on customary international law, joining the Convention would place our national security on a firmer legal footing. Customary international law changes over time, subject to state practice. Treaty law remains the firmest legal foundation upon which to base our global presence.

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

I agree with Secretary Hagel that becoming a party to the Law of the Sea Convention would enhance the U.S. security posture around the globe in several significant ways. First, accession would enable the United States to reinforce all of the rights, freedoms, and uses of the sea and airspace codified in the Convention, including the navigational and over-flight rights that are critical to the global mobility of U.S. forces, as well as the right to submit extended continental shelf claims that would help us preserve the rights to potential resources. Additionally, accession would help the United States promote a common rules-based approach in the resolution of territorial and maritime disputes, particularly in East Asia, thereby reducing international tension. Further, accession would add to the Department's credibility in a large number of multilateral venues where Law of the Sea matters are often discussed. Lastly, accession would reassure some

nations that have expressed concerns over the legality of cooperative security efforts promoted by the United States, such as the Proliferation Security Initiative. The United States has longstanding interests in freedom of the seas and respect for international law, and our accession to the Convention would further demonstrate our commitment to those national interests.

I do not see national security disadvantages of being a party to the Convention. Although some have suggested that the treaty could subject our maritime forces to the jurisdiction of international tribunals, the Convention expressly permits a party to exclude from international dispute settlement those matters that concern "military activities." Thus, 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?

As noted above, accession would enable the United States to reinforce all of the rights, freedoms, and uses of the sea and airspace codified in the Convention, including the navigational and overflight rights that are critical to the global mobility of U.S. forces. Although we have succeeded to date in preserving and protecting our navigational freedoms through reliance on customary international law, joining the Convention would place our national security on a firmer legal footing. Customary international law changes over time, subject to state practice. Treaty law remains the firmest legal foundation upon which to base our global presence.

Processing the Annual Department of Defense Legislative Request

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

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

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

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

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

ensure that the Department provides Congress with timely views on proposed legislation.

Judicial Review

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

Judicial review of ongoing military operations would pose difficult constitutional and practical difficulties. Many of the military's other activities are appropriately subject to judicial review, though the courts often exercise "a healthy deference to legislative and executive judgments in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981).

Role in the Officer Promotion and Confirmation Process

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

It is essential that the integrity and independence of the promotion selection process be maintained. Based on my prior service at the Department of Defense, I know that the Secretary of each military department, in consultation with his or her 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. However, I am also aware that all reports of promotion selection boards are reviewed by the DoD Office of General Counsel prior to final action on the report by the Secretary of Defense or the Under Secretary of Defense for Personnel and Readiness.

If confirmed and I were to determine that a promotion selection board failed to conform to law or policy, it would be my duty to inform the Secretary of Defense or Under Secretary of Defense for Personnel and Readiness of the irregularities and to recommend appropriate corrective action. Further, in providing advice to the Secretary of Defense and the Under Secretary of Defense for Personnel and Readiness, I would ensure that officer promotion policies promulgated in DoD regulations fairly and accurately reflect the law.

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 DoD Office of General Counsel reviews all nomination packages pertaining to officers with attributed adverse information before the package is forwarded to the 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 General Counsel frequently provides specific advice to the Under Secretary of Defense for Personnel and Readiness and the Secretary of Defense concerning difficult or unusual cases.

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?

Although 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, Department of Defense attorneys often 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.

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

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

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 aware of the concerns about whether funds can be utilized that are appropriated but not authorized. In this regard, situations where funds have been appropriated but not authorized are often complex and may involve unique statutory language. The Department has always been sensitive to the concerns that exist whenever the amounts appropriated may exceed the amounts authorized and, even before the 2000 decision cited in the question, has worked closely with the authorizing and appropriating committees when such situations arise. 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.

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 Office of General Counsel

is very broad. The Office of General Counsel provides legal advice on policy issues pertaining to military personnel, working closely with the Office of the Under Secretary of Defense for Personnel and Readiness, which has responsibility for Department policy for the correction boards of the military departments. The Office of General Counsel performs a pre-publication legal sufficiency review of every DoD policy issuance pertaining to military personnel.

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.