REFLECTIONS OF A WARTIME GENERAL COUNSEL

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I. INTRODUCTION

I cannot tell you what a great pleasure it is for me to deliver the annual lecture named in honor of my old friend Walt Huffman. When we served together at the Pentagon in the 1990s (he in uniform, I as a civilian), I came to know Walt as a man of deep-seated and unwavering integrity. I also realized that he could always be counted on for his candor—his honest opinion, plainly stated—candor that was quite refreshing inside the Beltway, sometimes fierce, never unwelcome.

But what I remember most about Walt Huffman from our time together, and from what I know of his career in the Army, is that he always stood up for the soldier, whether the JAG officers who worked for him or rank-and-file infantrymen in the field. Three examples:

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I learned this from someone who was a young JAG captain in then-Colonel Huffman's chain when he was the Staff Judge Advocate for VII Corps in the late 1980s. It was well known that Walt judged officers by their capability, not their gender. As VII Corps prepared to deploy for Operation Desert Storm, he submitted his battle roster. When he received a call asking whether he really wanted to include women on his roster, Walt replied simply, "I included my best officers," and that was the end of the discussion. In ensuring that battle rosters reflected all of the talent available, regardless of gender, Colonel Huffman stood up for the soldiers in his charge. By the way, that former JAG captain who told me of this: She is now a lieutenant general and The Judge Advocate General of the Army (TJAG).

I observed this quality in then-Brigadier General Huffman during a contentious congressional hearing in the early 1990s, following the federal law enforcement raid at the Branch Davidian compound. The presence of Special Operations forces in Waco at the time of the raid was under scrutiny, and a couple of enlisted soldiers and a lieutenant were called to account for it. As they were being treated to aggressive—and, to be frank, unfair—questioning, Walt stepped in and, in the course of explaining *Posse Comitatus* principles, respectfully but firmly backed the questioners off of these soldiers. Stepping into a politicized fray, Brigadier General Huffman stood up for the soldiers in his Army.

One more example, this time as Major General Huffman and out-going TJAG: The soldier in question was not a subordinate judge advocate or other junior service member; it was the Chief of Staff of the Army, a decorated Vietnam War veteran who rose to the rank of general and served as Walt's client and boss. The Chief had been subjected to what could be described as shabby treatment, in a very public way, at the hands of the incoming Secretary of Defense. In his farewell address at his own retirement ceremony, Walt, shall we say, gave the Secretary what-for. Not one to let an injustice go unremarked upon, Major General Huffman stood up for the soldier leading him.

I said I was greatly pleased to be delivering a lecture in Walt Huffman's honor. Ladies and Gentlemen, I am deeply honored to have this opportunity. And, Walt, I am honored by your presence here today.

II. REMARKS

My remarks this afternoon are titled *Reflections of a Wartime General Counsel*. Drawing on my experience as CIA General Counsel and then DoD General Counsel in a time of war, I would like to discuss four subjects of possible interest: first, differences between CIA and DoD and between the Pentagon of the 1990s and the Pentagon of today; second, the role of the general counsel of an operational department or agency; third, some significant projects undertaken by my Defense Department colleagues and

others in recent years; and fourth, a few thoughts on my personal experience in office since 2009.

A. Differences Between Institutions and Over Time

I have been in national security most of my legal career, for the past twenty-plus years straight, in the government and in private practice. I had the privilege of serving at both the Central Intelligence Agency and the Department of Defense, at the latter both in the 1990s and very recently. And, at gatherings such as this, I am often asked, "What's the biggest difference between the Defense Department and the Agency," and "what's the biggest difference between the Pentagon twenty years ago and the Pentagon now?"

The short answer is that there are many differences between the two institutions, and there have been many changes over time.

People talk of the culture of secrecy at CIA versus the command culture of the military. But, in my view, the most immediately obvious and profound difference is simply scale. There are close to three million people who work for the Defense Department—active duty, Guard and Reserve, and civilian—that's one percent of the U.S. population. The number of people working at the Agency is—well, I cannot say without committing a felony—let's just say it's orders of magnitude smaller.

As for the Pentagon when I took my first job there in 1993 versus today, the world has changed dramatically in my professional lifetime and, more to the point, the defense of the nation was profoundly altered by the attacks on 9/11. Indeed, the most striking change at the Defense Department from twenty years ago is the dramatically greater operational orientation of the entire enterprise today—the focus on imminent threats to the United States and the use of military force abroad—hardly surprising after more than fourteen years at war.

So, yes, there are many big differences, to be sure. Perhaps more important, there are a few constants between the agencies and over the years.

One is the people. Whether intelligence officers, military personnel, career civil servants, political appointees, flag officer or enlisted, I have found at both agencies, at times twenty years apart, the same cadre of dedicated Americans, motivated by a powerful sense of service and deep love of country to devote their careers and, for many, risk their lives to protect you and me and our families.

The other constant, for us lawyers, is commitment to the rule of law. Ours is a nation of laws, and an abiding respect for the rule of law is one of our country's greatest strengths, even against an enemy with only contempt for the law. This is so for CIA and DoD no less than other American institutions. And it is so no less today than it was before 9/11.

B. Role of the General Counsel

This commitment to the rule of law brings us to my second topic: the role of the general counsel of a department or agency with national security responsibilities, and specifically those such as DoD and CIA with operational roles.

The general counsel is the "chief legal officer" of the department or agency. In the case of the Defense Department, this is expressly provided for by statute. Among other things, it means that the legal opinions of the general counsel are authoritative and binding throughout the department. But this, of course, barely begins to describe the general counsel's role.

The general counsel serves as the senior legal advisor to the head of the department or agency—the Secretary of Defense or the Director of the CIA, for example. This is typically regarded by most incumbents as their highest priority—personally ensuring that the boss is well advised as to the law. It is one of the ways in which the general counsel contributes to the interagency process supporting presidential decision making in matters of national security—that is, in advising his or her client in connection with National Security Council (NSC) deliberations.

The general counsel also serves as head of an Office of General Counsel. As such, he or she is responsible for ensuring the provision of quality, independent, and timely legal services to organizational clients throughout the department or agency, relating to policy and operations, acquisition and technology, personnel, fiscal and budget, security, government ethics, congressional relations, and public affairs. This is not just a matter of reviewing legal work; it entails managing a workforce.

In addition, in the case of DoD, the general counsel is head of a legal community much larger and broader than the immediate Office of General Counsel. After all, the Defense Department has over 10,000 lawyers—civilian and military—including those in the military departments and Services, as well as the various defense agencies.

The general counsel represents the department or agency within the Executive Branch—for instance, as the Department of Justice's "client" in litigation involving the agency or agency officials. This is another of the means by which the general counsel participates in the interagency process in matters of national security—that is, working with counterparts at other agencies and NSC staff lawyers in formulating the legal advice that informs NSC deliberations and presidential decision making.

The general counsel also represents the department or agency with respect to law-related matters before Congress. Indeed, the Office of General Counsel typically has the lead or a substantial supporting role in reviewing legislative proposals, advising with respect to required congressional notifications, and responding to oversight committee investigations. So it was my practice to maintain a good rapport and open channel with each of

the majority and minority counsel of the Senate and House committees of jurisdiction.

Finally, the general counsel's representational role may extend to foreign governments, whether in formal negotiations or informal consultations. Again, I made a practice of maintaining a good rapport and open channel with my counterparts in the security/intelligence services and ministries of defense of our principal allies and partners in counterterrorism.

C. Significant Projects

Let's turn now to my third topic. Having left government only recently, I would like to use this occasion to report, if you will, on a number of significant projects that Pentagon lawyers pursued to good effect, often with our colleagues in the interagency, during my tenure at DoD.

1. Sexual Assault Prevention and Response

Eradicating the scourge of sexual assault in the military has been a top priority of the Defense Department's senior-most civilian and military leadership for several years. And the Office of General Counsel has played a substantial part in concerted and sustained efforts to improve both prevention and response throughout the department.

Notably, the office supported the work of the Response Systems Panel—a federal advisory committee mandated by statute—in its twelve-month review and assessment of the systems used to investigate, prosecute, and adjudicate adult sexual assault crimes in the military. Chaired by former U.S. District Judge Barbara Jones, the Panel issued its report in June 2014, offering numerous recommendations to enhance the effectiveness of these response systems.

That same month we launched the follow-on advisory committee mandated by statute—known as the Judicial Proceedings Panel—to review military judicial proceedings for sexual assault offenses since 2012 for the purpose of assessing the effectiveness of recent reforms and otherwise developing recommendations for improvement. The Panel, chaired by former Congresswoman Elizabeth Holtzman, issued its first report in February 2015 and will continue its review through September 2017.

2. Review of Military Justice System

The last time our system of military justice underwent a complete and thorough review was in 1984. That was before passage of the Goldwater-Nichols Act of 1986, which resulted in fundamental changes to the organization of the Defense Department and the operation of U.S.

military forces. It was also before the terrorist attacks of 9/11, years of ensuing armed conflict, and the current security environment. Indeed, much has changed over the past 30 years, from advancements in information and communications technologies to efforts to address issues related to gender, sexual orientation, and sexual assault. While there have been numerous amendments to the Uniform Code of Military Justice (UCMJ) in response to discrete challenges, it has been a very long time since the department has undertaken to examine and update the Code in a systematic fashion.

In October 2013, on the recommendation of the Chairman of the Joint Chiefs and the General Counsel, the Secretary of Defense directed the General Counsel to conduct a comprehensive review of the military justice system focused on the structure and operation of the UCMJ and its implementation through the Manual for Courts-Martial. To carry out this project, we established a Military Justice Review Group consisting of military justice experts drawn from each of the Services, including the Coast Guard, and led by Andrew Effron, former Chief Judge of the U.S. Court of Appeals for the Armed Forces.

In March 2015, Judge Effron and the Review Group completed the first phase of their work, with a report analyzing the entire UCMJ, including its historical background, current practice, and comparison to federal civilian law. A range of proposed substantive changes to the Code have undergone extensive review and comment within the Department, and the resulting legislative proposal is under consideration in the interagency. The goal: achieving a more modern, more efficient system that continues to provide for the fair administration of justice and to provide commanders with the necessary tools to accomplish their missions.

3. Authority for U.S. Military Operations Abroad

During my time at DoD, we confronted two sets of very challenging issues relating to the legal authority for U.S. military operations abroad. The first set of issues was easily foreseeable, and we were able to tackle them with the luxury of time. The second set of issues arose largely unforeseen and had to be resolved with greater dispatch.

Operations Post 2014. When I started at the Defense Department in the fall of 2013, it had already been determined that the then-current U.S. combat mission in Afghanistan, Operation Enduring Freedom, would end by the end of 2014. As President Obama later put it, "Our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion." It was apparent to me at the time that we would need to address the impact of the end of the U.S. combat mission in Afghanistan on the legal bases for continuing the use of military force in Afghanistan (and elsewhere) after 2014. To that end, I asked the international and operational law experts in the Office of General Counsel and on the Joint

Staff to focus on identifying the issues, under the Authorization for Use of Military Force (AUMF) enacted by Congress in 2001 and under international law, with reference to both kinetic operations and military detention. This work was shared with our colleagues in the interagency, and there ensued a lengthy and deliberate effort to resolve the issues raised, reach firm legal determinations, and ensure that senior policy makers were well advised long before Operation Enduring Freedom came to an end.

I had an opportunity to explain the Administration's position on these issues in remarks delivered in April 2015 at the annual meeting of the American Society of International Law (ASIL). I summed it up this way:

> Because the Taliban continues to threaten U.S. and coalition forces in Afghanistan, and because al-Qa'ida and associated forces continue to target U.S. persons and interests actively, the United States will use military force against them as necessary. . . . There is no doubt that we remain in a state of armed conflict against the Taliban, al-Qa'ida and associated forces as a matter of international law. And the 2001 AUMF continues to provide the President with domestic legal authority to defend against these ongoing threats.

Operations Against ISIL. As for the second set of legal issues I mentioned, we did not have a year to work through the issues and formulate conclusions. The group previously known as al-Qa'ida in Iraq, and now variously known as ISIL, ISIS, the Islamic State and Daesh, seized the attention of the United States and the rest of the world in the summer of 2014, with its abhorrent displays of brutality, including the gruesome murder of captive U.S. citizens in Syria, and with large swaths of territory rapidly falling to ISIL in Iraq. The President ordered a series of military actions in response, expressly invoking his authority under Article II of the Constitution. It fell to the lawyers to address whether, in addition, one or more existing statutes constituted congressional authorization to use military force against ISIL in Iraq and Syria. This was the subject of intensive discussions among the lawyers in the interagency—including DoD, of course—and the position of the Administration was made public in September 2014.

Again, my appearance at the ASIL annual meeting in April 2015 provided an opportunity to lay out our position. In short:

> The 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004, when bin Laden and al-Zarqawi brought their groups together. . . . The name may have changed, but the group we call ISIL today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004. A power struggle may have broken out within bin Laden's jihadist movement, but this same enemy

> of the United States continues to plot and carry out violent attacks against us to this day.

In addition, as I explained at ASIL, the President's authority to fight ISIL is reinforced by another statute, the 2002 Authorization for Use of Military Force Against Iraq.

4. DoD Law of War Manual

If we had a year or so to sort out the post-2014 issues, and considerably less time for the ISIL issues, the next project I want to mention had a very different horizon by comparison.

The United States has a long tradition of leadership in the law of war, including the promulgation of instructions on the law of war for its Armed Forces, dating back to the Lieber Code approved by Abraham Lincoln for U.S. Army forces in the field during the Civil War. Since that time, all of the Services have previously published respected works on the law of war, notably including Army Field Manual 27-10 issued in 1956.

On June 12, 2015, the Department of Defense issued the first-ever DoD-wide Law of War Manual—the culmination of a decades-long effort by military and civilian lawyers from across the department to develop a comprehensive resource on the international law principles governing armed conflict, for the use of operational lawyers and others throughout the organization. Weighing in at some 1,200 pages, the Manual was published electronically and, as such, is accessible at headquarters and in the field, alike. As an electronic document, it is also subject to updating more frequently than with the old print manuals, which is key given the rapid development of the law in this area.

Work on the Manual went on for so very long, many wondered whether it would ever see the light of day, and some complained. In remarks at Duke Law School shortly after my arrival at the Defense Department, I said, "Getting this [long-awaited] manual published is a challenge I inherited, but I have embraced it as one of my priorities as General Counsel. The effort has been reset and redoubled, and I believe we are on track." Well, it was down to the wire, but we managed to get it out with eighteen days to spare before I left office.

5. Transparency in Matters of National Security

Finally, DoD lawyers and others have promoted better public understanding of the law and legal analysis underpinning U.S. counterterrorism operations abroad.

President Obama has made clear from the beginning of his presidency that he is deeply committed to transparency in government because it

strengthens our democracy and promotes accountability. While a certain degree of secrecy is of course required to protect our country, the Administration has demonstrated its commitment to greater transparency where possible in matters of national security. We have seen this in the President's own speeches, for example, at the National Archives in May 2009, at National Defense University in May 2013, and at West Point in May 2014.

Senior Administration lawyers have been instrumental in fulfilling this commitment in a series of public addresses, explaining the bases, under domestic and international law, for the United States' use of force overseas. This started with a speech by the State Department's Legal Adviser before the ASIL in March 2010 and continued in speeches by the Attorney General at Northwestern in March 2012 and by my predecessor as DoD General Counsel at Yale and at Oxford, both in 2012. There was even a small contribution by the CIA General Counsel in remarks at Harvard Law School in April 2012. The latest in the series were the remarks I delivered before ASIL in April 2015, which I mentioned earlier in discussing the post-2014 and ISIL issues.

As a result of these efforts, I submit, the lawfulness of our government's efforts to counter foreign terrorist threats is now better understood, and more widely accepted, at home and abroad.

D. Personal Experience

As my fourth topic, with your indulgence, I would like to share some personal impressions drawn from my service as a wartime general counsel. These have been interesting, and very challenging, times for our country and for national security lawyers, which made my time in government unbelievably rewarding. For me, it was six years of highs and lows.

I had the once-in-a-generation experience of being part of the team that did the "find, fix and finish" on Usama bin Laden in 2011—a very modest role, I should say—and I shared in the satisfaction of ending the threat bin Laden posed and bringing that mass murderer to justice. But I also shared in the grief that followed the 2009 suicide bombing at a forward operating base in Eastern Afghanistan in which seven Agency officers—brave and good Americans—lost their lives. I had met one of the seven that fall, when in Kabul with Director Panetta. I can't say I knew her. But for me, after Khost, the fight became more real, more immediate, and more personal.

As the chief U.S. negotiator in secret talks overseas, I had the satisfaction of helping to secure the release, after more than five years in captivity, of the only American soldier held by hostile forces in the Afghanistan War—Army Sergeant Bowe Bergdahl—making good on our solemn promise to all American service members that no one will be left behind. But I and others also suffered the wrath of those who disagreed with the President's judgment, and that of his entire national security team, that

the exchange was in the national security interests of the United States and with the Administration's decision not to inform Congress until the time of the transfer.

People used to ask me all the time, "Are you having fun?" "Your job must be so much fun," they would say. Well, the jobs I had were not fun. During my time in government and since, the country has been at war. People are killing and getting killed, and there can be no fun in that.

That brings us to an important, if obvious, lesson for those of you soon to embark on careers in the law and perhaps in national security: The practice of national security law during armed conflict involves killing. The lawyer is not the decision maker or the operator, but you take part in a process bringing about the death of others—some identified individuals, others not; most quite intentionally, others unfortunately not. In addition, the lawyer is not the President, the Secretary of Defense, or the Combatant Commander, but you participate in decisions whereby good men and women are put at risk and some are sent to their deaths.

I raise this not to invite a discussion of the morality of war. I raise this to underscore the terrible gravity of the work of the national security lawyer in a time of war. This business is, literally, deadly serious. And there is an imperative—call it a moral imperative—for the lawyers to get it right.

III. CONCLUSION

I would like to return for a moment to the efforts I described earlier—efforts to provide transparency to the extent possible in matters of law and national security—for I believe such efforts are critical to fulfilling the responsibilities of the national security lawyer during armed conflict.

As noted, transparency strengthens our democracy and promotes accountability. In a realm in which deliberations are conducted in secret and judicial review is very limited, explaining the legal framework on which we rely to the American people, their elected representatives in Congress, and our foreign partners is essential to achieve clarity, permit scrutiny, and ultimately ensure the lawfulness of our government's actions. In other words, transparency is critical to meeting that imperative to get it right.

There is another aspect to this. Transparency is important to help inoculate, against legal exposure or misguided recriminations, the fine men and women who are put at risk to defend our country. Agency counsel all serve the same client, the United States of America, and each answers to the head of their respective agencies. But their highest calling, in my personal view, is to serve those who serve us. The opportunity I had in office these past six years to help protect those who protect us was the greatest privilege of my professional life.

Although I did not realize it at the time, it has occurred to me that I was merely following General Huffman's example, always standing up for the

soldiers, protecting those with whom he served. Ladies and Gentlemen—and especially those soon embarking on their legal careers—I commend to you Walter E. Huffman as the example you would do well to follow, as I have.

Again, I am grateful for this opportunity, and I thank you for listening.