

Lloyd N. Cutler Lecture on Rule of Law
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The Supreme Court

Law and the Use of Force: Challenges for the Next President

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I. Introduction

Justice Kennedy, ladies and gentlemen, it's a great privilege for me to be asked to give this lecture.

I want to thank Stephen Salyer, Heather Haaga, and the board of the Salzburg Global Seminar for inviting me.

I want to thank all of you for coming this evening. I am especially honored that Lloyd Cutler's daughter, Beverly, is here tonight.

I was very fortunate to be able to work closely with Lloyd when I was an associate at Wilmer Cutler & Pickering in the early 1990s. I had recently left the CIA where I had the privilege to serve as a young special assistant to CIA Director William Webster.

Lloyd recruited me to work on some of his more interesting government-related projects. Among other assignments, I helped Lloyd advise three former Republican Secretaries of

State -- Henry Kissinger, George Shultz, and James Baker -- each of whom had become the subject of a congressional or Independent Counsel investigation. My fellow associates were somewhat envious of this interesting work but questioned whether there was any future to a Republican Secretary of State practice. I am glad I was able to prove them wrong.

In 1994, while I was working with Lloyd, President Clinton recruited him to serve again as White House Counsel. Lloyd said at the time: "In government, as in other aspects of life, trust is the coin of the realm, and I pledge myself to do what I can to assure that trust is maintained." That is an important credo for all of us today.

When I moved to the White House myself in 2001, I continued to seek Lloyd's counsel. I would invite him over periodically to the White House Mess to pick his brain. Lloyd was especially interested in national security and intelligence issues and he always gave me good advice. I was amused to read later in Newsweek that my more conservative White House colleagues were appalled that I would regularly meet with a pillar of the Democratic establishment. But I didn't think of Lloyd as a partisan Democrat, but rather simply as a wise man.

When I worked with Lloyd, I knew he was the Chairman of the Salzburg Seminar, but I didn't know what it was. I have a vague recollection that I wrote a letter or sent an email to the Seminar in the early 1990s asking how I could participate. I have an equally vague recollection that I received a response saying "don't call us, we will call you." Whether that recollection is

accurate or not, I am very glad the Seminar did call me some years later.

It's been my great pleasure to participate in several Salzburg Seminars when I was Legal Adviser and since that time. Many people here tonight have enjoyed the stimulating discussions of international issues both inside and on the terrace outside the Schloss Leopoldskron.

And it has also been my great privilege to speak each year to the Salzburg Cutler Fellows, who are rising international lawyers from our nation's best law schools, some of whom are here tonight.

II. Domestic and International Rules on Use of Force

Because this is the Lloyd Cutler Rule of Law lecture, and we have just elected a new President, I have decided to speak tonight about some of the most important legal rules applicable to the next President -- the laws that govern his use of military force.

These were issues in which I was extensively involved both as Legal Adviser to the National Security Council and as Legal Adviser to the Department of State.

These laws were also of great personal interest to Lloyd Cutler.

One of the best known moments of his tenure as Counsel to President Carter was his advice in 1980 that the War Powers Resolution did not require the President to consult Congress

before ordering U.S. armed forces to attempt to rescue the American hostages in Iran. Lloyd wrote and spoke about this incident on a number of occasions, recalling that the operation was so secret that he was told he could consult with no one and that he did his own research in the White House library.

The United States has now been in a continuous state of armed conflict for over 15 years. Presidents Bush and Obama have ordered the use of military force in Afghanistan, Pakistan, Yemen, Iraq, Syria, Somalia, and Libya, and perhaps other countries as well.

President-elect Trump will become Commander-in-Chief when the United States continues to use military force in all of these countries, and he may find it necessary to order the use of force in other countries over the next four years.

It will be critical for President Trump, Vice President Pence, and their senior advisers to learn and follow domestic and international law governing the use of force.

Many previous Presidents, even those with government experience as state governors such as Presidents Reagan, Clinton, and George W Bush, were initially unfamiliar with these rules that limit their actions as Commander-in-Chief and head of state. They had to be schooled by their advisers and to learn the applicable law.

During Mr. Trump's Presidential campaign, I and many others were extremely troubled by his statements advocating counterterrorism policies that would violate domestic and

international law. Such statements may have appealed to some voters during a campaign, but they must be strongly repudiated by a President of the United States.

Any new President is likely to find it frustrating to try to comply with domestic, and especially international, laws governing the use of force. Some of the key governing rules are old and were not designed for contemporary problems. The War Powers Resolution was enacted by Congress in 1973 during the Vietnam War. The UN Charter was drafted in 1945 after World War II. The Geneva Conventions were adopted in 1949 and were intended to apply to conflicts between states. Even the two protocols to the Geneva Conventions negotiated in the 1970s after the Vietnam War were not negotiated with modern terrorists in mind.

But even if the rules are dated, a President is still required by the Constitution to comply with domestic law, and he should want to comply with international law as a matter of international obligation and for reasons of reciprocity and practicality.

This evening, I will discuss the applicable rules regarding the use of force and how the last two Presidents have tried to comply with them. I will draw some lessons from my own service in the Bush Administration and end with some recommendations for President-elect Trump and his advisers.

Because the subject area is broad, I plan to focus on the rules that govern the initiation of hostilities rather than the specific rules governing the conduct of hostilities.

A. Domestic Law

Under Article II of the Constitution, the President has broad -- but not unlimited -- powers as Commander-in-Chief and Chief Executive to authorize the use of the US military in self-defense or to serve important national security interests. Most Presidents prefer also to seek specific Congressional authorization in the form of an Authorization to Use Military Force, or AUMF, if possible. But Congress can be reluctant to vote to authorize the use of force, and a President must often push hard for congressional authorization. Congress has not voted on a new AUMF since authorizing the use of force against Iraq in October 2002.

Presidents must also take into account the War Powers Resolution of 1973, which purports to require the President to report the introduction of U.S. armed forces into hostilities or combat situations and to terminate any such use of US armed forces covered within 60 days unless Congress issues a specific authorization. I say “purports,” of course, because most Presidents have concluded that some parts of the War Powers Resolution are unconstitutional, though all Presidents have tried to act “consistent with” the Resolution’s provisions.

B. International Law

Executive branch lawyers also usually want to ensure that any US use of military force in another country is consistent with international law.

But international law rules can be even more challenging than domestic rules.

Article 2(4) of UN Charter prohibits the use of force against or in another UN member state unless authorized by the Security Council or the state itself consents.

Article 51, however, recognizes that every State has an inherent right to use force in individual or collective self-defense to respond to an armed attack. Most international lawyers agree that this includes a right to use force in anticipatory self-defense to prevent an imminent attack, although lawyers debate the definition of imminence.

These are the only bases for the use of force recognized in the UN Charter. The UN Charter does not specifically permit a state to intervene in another state for humanitarian purposes. The United Kingdom and a few other countries have asserted that international law permits the use of force to prevent a humanitarian catastrophe in limited circumstances, but the United States and the majority of other countries do not recognize a doctrine of humanitarian intervention.

III. Compliance in the Bush/Obama Administrations

Over the last fifteen years, Presidents Bush and Obama have struggled to comply with these domestic and international rules in U.S. military actions against Al Qaida and the Islamic State as well as in Iraq and Libya. President Trump will face the same challenges.

I want to briefly summarize these difficulties.

A. Al Qaida and Associated Groups

Presidents Bush and Obama have been using substantial military force against the Taliban, Al Qaida and associated groups since October 2001. As domestic law authority, they have relied on the Authorization to Use Military Force passed by Congress in September 2001, which authorizes the use of force against the persons and organizations that committed the 9-11 attacks. This has been the authority for the invasion of Afghanistan in 2001, more than 500 drone attacks in Afghanistan, Pakistan, Yemen, and Somalia, and the detention of thousands of suspected Al Qaida and Taliban members, including in Guantanamo.

In recent years, however, Administration lawyers have had to stretch to conclude that the 2001 AUMF authorizes the use of force against new terrorist groups loosely associated with Al Qaida that did not exist at the time of the 9-11 attacks, such as Boko Haram in Nigeria and Al Shabaab in Somalia.

With respect to international law, both the Bush and Obama Administrations have cited the right of self-defense to use force against Al Qaida and associated groups in multiple countries, including hundreds of drone strikes during the Obama Administration.

What has been more controversial has been the U.S. use of force against terror suspects in countries that have not themselves consented to the use of force in their territory. Both the Bush and Obama Administrations have asserted a right to use force

against terrorists in the territory of another country that is “unwilling or unable” to prevent the threat posed by terrorists, as the Obama Administration did in the raid in Pakistan that killed Bin Laden.

In short, although there was a clear domestic and international law basis to use military force to respond to the 9-11 attacks, it has been harder for Executive branch lawyers to argue that the 2001 AUMF and international law permit use of force against groups that did not exist 15 years ago, or that operate in countries that have not consented to the US use of force. There continues to be significant disagreement among legal experts inside and outside the United States regarding whether U.S. actions have been lawful.

B. Iraq (2003)

Let me now turn to the U.S. invasion of Iraq in 2003.

Although the war was controversial, it was clearly authorized as a matter of domestic law. In October 2002, Congress passed an AUMF authorizing the President to use force “to defend the national security of the United States against the continuing threat posed by Iraq; and enforce all relevant United Nations Security Council Resolutions regarding Iraq.”

The legal basis for the Iraq war was less clear under international law. The United States and United Kingdom tried to persuade the Security Council to adopt a new resolution authorizing the use of force against Iraq after Saddam Hussein failed to comply with weapons inspections mandated under

UNSCR 1441, but were unable to do so, so they and other members of the Iraq coalition relied instead on UNSCRs 678 and 687, which had been adopted by the Security Council in 1990 and 1991 at the time of the first Gulf War. The US and its allies concluded that the old resolutions continued to provide authority for the use of force against Saddam. Many critics of the Iraq war believe that it was legally wrong to rely on these decade-old Security Council resolutions.

C. Libya (2011)

Let me turn to the use of force by the Obama Administration. As a candidate, President Obama said “The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” But as President he was unable to secure new Congressional authorizations for his Administration’s conflicts in Libya and with ISIS in Iraq and Syria.

In Libya, the Obama Administration participated in an air campaign from March to October 2011 with a coalition of other countries in response to serious human rights violations by the Qaddafi regime.

The U.S. initial use of force was clearly permitted as a matter of international law after the U.N. Security Council adopted UNSCR 1973 in March 2011 authorizing Member states to use force “to protect civilians and civilian populated areas under threat of attack in Libya.” But many governments and legal

experts believe the US and its allies exceeded this authority when they went farther to overthrow the Qaddafi government.

Even if the use of force was permitted under international law, President Obama never pushed Congress to pass an AUMF to provide specific domestic authorization for the Libya war. He relied instead on his inherent Article II powers as Commander-in-Chief and Chief Executive.

As the conflict in Libya continued, President Obama confronted the requirement in the War Powers Resolution that the President terminate the use of U.S. Armed Forces after sixty days unless specifically authorized by Congress. Faced with a choice of scaling back US military operations or declaring the 60-day termination provision unconstitutional, the White House instead chose to interpret the provision not to apply. In June 2011, the White House notified Congress that the termination provision was not triggered because “U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve U.S. ground troops.” This highly unusual interpretation was widely criticized by Congress, the press, and legal experts, who accused President Obama of “undermining a key legal check on arbitrary presidential power.”

D. ISIS (2014-2016)

President Obama has confronted similar difficulties with domestic authorization for his military campaign against ISIS, which commenced in the summer of 2014. The President initially informed Congress that he was relying on his Article II powers. In September 2014, however, the President and his

lawyers again faced the War Powers Resolution's 60-day termination provision, as they had in Libya in 2011. Instead of continuing to rely on his Article II powers, the President notified Congress that the use of US Armed Forces against ISIS actually was specifically authorized by Congress in the 2001 AUMF against Al Qaida and 2002 AUMF against Iraq because ISIS, while not associated with Al Qaida, was a descendant of Al Qaida. This interpretation relieved Congress from having to vote on a new AUMF against ISIS before the 2014 mid-term elections, but the Administration's reliance on the 2001 and 2002 AUMFs as specific congressional authorization was widely viewed as a very strained legal interpretation.

After the election, at the urging of many members of Congress, especially Senator Tim Kaine, the White House asked Congress to pass a new AUMF specifically authorizing use of force against ISIS. But the White House draft was viewed by many Democrats as too permissive and by many Republicans as too restrictive. Despite urging by the President to "take a vote," both the House and Senate have been unable to agree on consensus language to authorize the use of US Armed Forces against ISIS.

The US use of force against ISIS in several countries has also raised difficult questions under international law. The governments of Iraq and Libya have consented to the use of force against ISIS in those countries, but the Syrian government has not agreed to the use of force against ISIS in Syria, and the US appears to be relying on a theory of self-defense on the basis that President Assad is unwilling or unable to stop the threat posed by ISIS.

IV. Conclusion/Recommendations

As you can see, it can be challenging for a President to comply with domestic and international rules regarding the use of force. President Trump and his lawyers will face similar challenges.

A major part of the problem is that the domestic and international rules were intended to address previous historical events and are not sufficiently flexible to address contemporary challenges such as terrorism by non-state groups and governments that abuse their populations.

When legislative institutions like Congress and the Security Council become gridlocked and refuse to act, the President and his lawyers are left with the choice of not acting, ignoring the law, or interpreting the law in strained ways. Clearly it would have been better for President Bush to have secured a new Security Council resolution for the Iraq war rather than rely on decade old resolutions, just as it would have been better for President Obama to have secured new congressional authorizations for the US air campaign in Libya and against ISIS, rather than interpreting the War Powers Resolution not to apply or relying on the 2001 and 2002 AUMFs. But the Security Council and the Congress had refused to act.

As long as the conflicts with Al Qaida, ISIS, and other terrorist groups continue, President Trump and his lawyers will have to deal with difficult questions of interpretation of the 2001 AUMF and of international law rules governing use of force against terrorists in other countries.

President Trump seems less likely than President Obama or Hillary Clinton to order the use of force in another country -- such as Syria -- for humanitarian purposes, but he could still confront a situation that would lead him to want to intervene in Syria or elsewhere to prevent a humanitarian catastrophe.

I want to end with some specific recommendations for President Trump and his Administration to address some of these challenges.

Let me begin with domestic law.

With respect to the conflicts with Al Qaida and with ISIS, President Trump should push hard Congress to enact a new AUMF early in 2017. Rather than go through the exercise twice, he should ask Congress to pass a comprehensive new authorization against terrorist groups that revises and updates the 2001 AUMF and also authorizes the use of force against ISIS. The authorization should be broad enough to authorize the use of force against groups that pose imminent threats to the United States. Congressional Democrats may be reluctant to give President Trump any additional war powers but he should agree to reasonable limits to avoid protracted ground wars.

More generally, President Trump should ask Congress in 2017 to revise and update the War Powers Resolution, which has increasingly been ignored by recent Presidents. The White House should study the recommendations of the National War Powers Commission, which was co-chaired by former Secretaries of State James Baker and Warren Christopher and

issued a report in 2008 that called the War Powers Resolution “impractical and ineffective.” The Commission stated that no President has treated the Resolution as mandatory and that “this does not promote the rule of law.” They recommended the Resolution be repealed and replaced with a mandatory consultation process. In 2013, Senators Tim Kaine and John McCain introduced the War Powers Consultation Act to implement the Commission’s recommendations. Any general reform of the War Powers Resolution must address contemporary conflicts and take into account increasing congressional reluctance to vote to authorize the use of force.

President Trump and his advisers may not view a new counterterrorism AUMF or reform of the War Powers Resolution as top legislative priorities, but they should undertake the effort anyway -- as a matter of good government. The 2001 AUMF has been stretched far beyond its original purpose, and the War Powers Resolution is close to becoming meaningless.

With respect to international law governing the use of force, the President and his White House advisers should resist any temptation to ignore them as “politically correct” or Lilliputian infringements on US sovereignty. If the United States violates or skirts international law regarding use of force, it encourages other countries -- like Russia or China -- to do the same and makes it difficult for the United States to criticize them when they do so. If the United States ignores international law, it also makes our friends and allies who respect international law -- such as the UK, Canada, Australia, and the EU countries -- less likely to work with us. Unlike Russia and China, the United

States has many friends and allies who share our values, including respect for the rule of law. But we lose our friends when we do not act consistent with law and our shared values.

More generally, President Trump should recognize that when he speaks as President, he speaks to multiple audiences. He must be cautious not to advocate policies that will provide cover for unlawful actions by other governments. Moreover, statements that are popular with some in the United States may be highly unpopular and stir up anti-American sentiments abroad. When I made this argument in the Bush Administration, some of my colleagues responded by saying “It doesn’t matter what other countries think; they don’t vote for us.” But other countries DO “vote for us” by deciding whether to cooperate with us on intelligence, law enforcement, diplomatic, and military matters. During the Bush Administration, many European governments became reluctant to share intelligence information with us because they believed our intelligence agencies might use the information to commit violations of law.

The Trump Administration must also recognize that foreign leaders face their own domestic political pressures and must respond to the views of their own populations. If the U.S. Government engages in unilateral actions or pushes foreign leaders to join in American actions that are unpopular or viewed as unlawful in their own countries, the U.S. loses the support of these governments and may cause them to fall.

President Trump will find that he will be most effective in his international actions if he works with our allies rather than alienating them. The Bush Administration learned this lesson

from its actions in its first term, including the Iraq war and some of its counterterrorism policies. In its second term, the Bush Administration found that it could be more successful through multilateral diplomacy. The United States achieves more, not less, through international cooperation.

To the extent that international law rules regarding use of force are outdated -- and they are -- the Trump Administration should work with other countries to update them, rather than condemn them or ignore them. Other governments are unlikely to agree to amend the UN Charter or to replace the Geneva Conventions, but the Trump Administration can still work with them to develop principles or additional rules so that international law can evolve to address contemporary international problems.

When I was Legal Adviser, I began a series of talks with our closest allies that produced principles for use of force against terrorist groups in countries that are unwilling or unable to prevent the threats. The new Administration should continue to refine these principles so that they are accepted by a broader group of states. The Administration should also work with other governments to develop new rules for detention of non-state actors, where even the International Committee for the Red Cross has acknowledged there are legal gaps that need to be filled.

And even if President Trump is initially disinclined to use military force for humanitarian purposes, his Administration should still continue discussions with U.S. allies regarding the appropriate circumstances for humanitarian intervention. Should President Trump decide to use force in another country

for a humanitarian purpose without approval of the Security Council, he should be prepared to explain when and why the use of force is legitimate under certain limited conditions, even if not clearly lawful under international law.

Closing

When Donald Trump becomes President, he will have the awesome responsibility of commanding the most powerful military in the world. He will immediately be responsible for the direction of our military in combat operations in at least seven countries in the Near East and North Africa. At some point over the next four years, he may have to make the very difficult decision to send US armed forces into action in or against another country either to defend the United States or U.S. interests.

Because they are likely not familiar with the domestic and international law rules that govern the use of military force and the conduct of military operations, President-elect Trump and Vice President-elect Pence should take time during the transition to be briefed on these rules and to understand why they are important. The President should appoint Secretaries of State and Defense and senior White House advisers who know the applicable law and have experience with the use of military force. Choosing a White House Counsel and Deputy Counsel with experience in national security issues will be vital. We must hope that President Trump will select advisers as wise as Lloyd Cutler to give him sound legal counsel, and that he will listen to their advice.