

SPEECH

DOD General Counsel Remarks at BYU Law School

MARCH 4, 2020

Remarks entitled "Legal Considerations Related to the U.S. Air Strike Against Qassem Soleimani" presented by Hon. Paul C. Ney, Jr., General Counsel of the Department of Defense, at the Brigham Young University Law School in Provo, Utah.

Thank you very much for inviting me to BYU Law School. I am especially grateful to Dean Gordon Smith, Professor Eric Talbot Jensen, and the rest of the BYU law faculty, staff, and students for the gracious hospitality you've shown during my visit to Provo.

Professor Jensen, as most of you know, had a long and distinguished career in the U.S. Army both as a cavalry officer and as a judge advocate. He also served at the Department of Defense as Special Counsel. He has encouraged me to talk to you today about the role of lawyers in national security and international affairs. I understand that more than half of you have spent significant time in foreign countries. Your understanding of other cultures and language mastery are tremendous assets, and I hope that you will consider careers in public service to contribute those assets and the legal skills you are currently learning to the greater good of our Nation. The Department of Defense, or DoD, in particular, has more than 12,000 military and civilian lawyers supporting our warfighters; we would be happy to put your talents and commitment to good use.

The subject of my speech today is something that most of you have probably read a lot about online and in the papers, or otherwise heard about in the media. On January 2, 2020, at the direction of the President of the United States, the U.S. military conducted an air strike in Iraq targeting Qassem Soleimani, a major general in the Islamic Revolutionary Guard Corps of Iran, and the commander of an expeditionary Revolutionary Guards unit called the Qods Force. Among others also killed in the strike was Abu Mahdi al-Muhandis, the leader of Kata'ib Hezbollah, also known as KH, a Qods Force-backed Shia militia in Iraq.

President Trump directed the strike on Soleimani in response to an escalating series of attacks in preceding months by Iran and Iran-backed militias, including KH, against U.S. forces and interests in the Middle East region. The strike was ordered to protect U.S. personnel; to deter

Iran from conducting or supporting further attacks on U.S. forces and interests; to degrade Iran's and Qods Force-backed militias' ability to conduct attacks; and to end Iran's strategic escalation of attacks on U.S. interests.

My aim today is to explain the international and domestic law underpinnings of the January 2nd air strike. Much of what I will explain is reflected in publicly available documents that the U.S. Government has already provided to the United Nations Security Council and to Congress. The key legal conclusions are already a matter of record.

In the Pentagon, we always begin with the Bottom Line Up Front or B-L-U-F. Here's the BLUF for my remarks today. First, with respect to international law, the President directed the January 2, 2020, air strike against Soleimani as an exercise of the United States' inherent right to act in self-defense, consistent with Article 51 of the Charter of the United Nations and customary international law. Second, as to U.S. domestic law, the President had legal authority to order the strike against Soleimani pursuant to his Article II constitutional power as Commander-in Chief to use armed force to protect U.S. personnel and property in Iraq and U.S. interests in the Middle East, and also pursuant to statutory authority under the 2002 Authorization for Use of Military Force (AUMF) to "defend the national security of the United States against the continuing threat posed by Iraq."

I hope that by explaining how international law and U.S. domestic law applied to the facts surrounding that operation, you will understand better why the strike on Soleimani was lawful.

To understand the legal conclusions, it is first necessary to know some background information about the situation in Iraq, Qassem Soleimani, the Qods Force, and Iranian and Iran-backed militias' hostile actions before the January 2, 2020 U.S. air strike. Legal analysis isn't that different whether you're a law school student or the DoD General Counsel: you start with the facts. Then, I'll move into discussions about the legal bases for the strike, starting with international law and then proceeding to domestic law.

A. Background

In October 2002, Congress enacted a statute authorizing the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq." The specific concerns at the time included Iraq's support for international terrorist groups and its

suspected development of weapons of mass destruction. Acting under this 2002 Authorization for Use of Military Force or “AUMF,” President George W. Bush directed combat operations against Iraq in March 2003 that led to Saddam Hussein’s downfall.

Although the threat posed by Saddam Hussein’s regime was the initial focus of the statute, the United States has relied upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq, even after Saddam Hussein’s demise.

Additionally, from 2003 to 2008, as sectarian violence erupted with the fall of the former Ba’athist regime, President Bush directed a campaign against al-Qa’ida in Iraq pursuant to the 2001 Authorization for Use of Military Force or “2001 AUMF,” authorizing the use of force against groups like al-Qa’ida—the “organization” responsible for the terrorist attacks of September 11, 2001. In 2014, al-Qa’ida’s Iraq faction split from al-Qa’ida’s core leadership and became the Islamic State of Iraq and Syria, or ISIS.

As Iraq became more stable, the United States and Iraq signed a cooperation agreement in November 2008 that included defense and security related commitments and a recognition of the importance of cooperation to “improve and strengthen security and stability in Iraq and the region.” The two countries also signed an agreement providing for the withdrawal of U.S. military personnel from Iraq by the end of 2011.

But, after U.S. forces withdrew from Iraq in 2011, sectarian divisions again exploded into violence, and ISIS arose. From late 2013 through mid-2014, ISIS and its allies captured the Iraqi cities of Ramadi, Fallujah, and Mosul—Iraq’s second largest city, and reached the outskirts of Baghdad and Erbil. ISIS used extremely brutal tactics—mass executions, kidnapping and raping women and children, displacing hundreds of thousands of Iraqis—raising U.S. and international alarm and outcry about the prospect of ISIS conquest of Iraq. In 2014, President Obama declared ISIS “a threat to the Iraqi people, to the region, and to U.S. interests.” Upon the invitation of the Iraqi Government and pursuant to the 2001 AUMF, he directed the deployment of U.S. forces to Iraq as well as air strikes to defeat ISIS.

U.S. forces, Iraqi Security Forces, and forces from countries participating in the Global Coalition to Defeat ISIS (or D-ISIS) together fought to reverse ISIS’s conquests in Iraq and helped liberate the Iraqi people from ISIS’s brutal control. Today, 100 percent of the territory ISIS once held in Iraq has been returned to Iraqi government control. But despite the defeat of ISIS’s control of

territory in Iraq, ISIS remains a threat, and so U.S. forces have remained in Iraq to support Iraqi forces and ensure the enduring defeat of ISIS. There are presently more than 5,000 U.S. military personnel in Iraq.

As the United States has sought to establish stability in Iraq and to address terrorist threats in and emanating from Iraq, Iran has remained a malign presence there and throughout the Middle East. According to the Defense Intelligence Agency, Iran remains “implacably opposed” to the United States, the U.S. presence in the Middle East, and U.S. support for certain governments in the region, all of which Iran views as threats to its goals of regime survival and regional dominance.

To achieve these goals, Iran typically uses “unconventional warfare elements and asymmetric capabilities,” including “a complex network of State and non-State partners and militant proxies” in the Middle East. The Islamic Revolutionary Guard Corps Qods Force is Iran’s “primary tool” for conducting unconventional warfare and providing support to its foreign partners and proxies like Hizballah, Hamas, and the Houthis.

The Qods Force was established as a unit in 1990, shortly after the Iran-Iraq War, and has become Iranian leaders’ favored all-purpose expeditionary mission force “to conduct operations outside Iran, provide support for Islamic militants, and collect intelligence against Iran’s enemies.” The Qods Force funds, trains, supplies, and supports partners and proxies throughout the Middle East, including Shia militia groups operating in Iraq, such as the Badr Organization and KH. According to the Defense Intelligence Agency, “Iran-supported . . . Shia militias remain the primary threat to US personnel” in Iraq. Using Iranian-provided weapons such as improvised explosive devices (or “IEDs”), explosively formed penetrators (or “EFPs”), anti-tank guided missiles, rockets, and unmanned aerial vehicles, Qods Force-backed militias are estimated to have killed more than 600 U.S. personnel serving in Iraq between 2003 and 2011.

Qassem Soleimani had commanded the Qods Force beginning in the late 1990s and orchestrated the group’s ascendance. He was the lead architect behind Iran’s campaign of terrorism, assassinations, arms-smuggling, and violence throughout the Middle East, including against U.S. personnel in Iraq. Soleimani’s malign activities have not been limited to the Middle East. In 2011, Soleimani supervised a Qods Force plot to assassinate Saudi Arabia’s Ambassador to the United States with explosives at a Washington, D.C. restaurant. Secretary of State Pompeo recently summed it up: “There is no terrorist except Usama bin Ladin who has more American blood on his hands than . . . Qassem Soleimani.” In April 2019, the United States

designated the Islamic Revolutionary Guard Corps, “including the Qods Force,” as a foreign terrorist organization, citing, among other things, the Qods Force’s support for terrorist groups and plots in the United States, Europe, Africa, and the Middle East.

In the months preceding the January 2nd air strike against Soleimani, Iran and Iran-supported militias had engaged in a series of attacks against U.S. personnel and property in Iraq and against U.S. interests and Allies and partners in the Middle East. In June 2019, an Iranian surface-to-air missile destroyed an unmanned U.S. Navy surveillance aircraft while it was on a routine mission in international airspace monitoring the Strait of Hormuz.

The U.S. response to the attack at that time was measured and muted, but Iran continued its pattern of aggression against U.S. interests in the region. In July 2019, USS Boxer, an amphibious assault ship, came under threat from Iranian unmanned aerial systems while conducting a planned transit of the Strait of Hormuz. Iran has also attacked and seized commercial ships in the area, threatening freedom of navigation. And, Iran-backed Houthi rebels in Yemen shot down two U.S. unmanned surveillance aircraft in Yemeni airspace and conducted multiple missile and other attacks in Saudi Arabia targeting airports and other civilian facilities. Moreover, on September 14, 2019, Iran launched a devastating air attack on a gas plant and an oil refinery in Saudi Arabia.

In the weeks preceding the air strike against Soleimani, provocations against the United States intensified with a series of attacks by Iran-supported militias on U.S. personnel and property in Iraq. KH, the Qods Force-backed Shia militia group, fired rockets at bases in Iraq where U.S. forces are located. Between November 9 and December 9, 2019, Qods Force-backed militia groups fired rockets at the Qayyarah West Air Base, Al Asad Air Base, and the Baghdad Embassy complex. Then, on December 27, KH attacked the K-1 Air Base in Kirkuk, killing a U.S. contractor and injuring U.S. and Iraqi military personnel. In response, U.S. forces struck a number of KH installations in Iraq and Syria to degrade the group’s ability to launch additional attacks. Then, on December 31, KH and other Iran-backed militia groups organized a demonstration that turned violent at the U.S. Embassy in Baghdad, inflicting significant damage to U.S. property and imperiling U.S. lives.

Those are the facts, and that is where events stood at year’s end, 2019. Let me turn now to applying the law to these facts to assess the legal bases for the U.S. air strike on Soleimani two days later.

B. International Law

First, let's talk about international law.

The U.N. Charter generally prohibits States from resorting to the use of force against another State without a legal basis. This rule is part of the law governing the resort to force, or, to use the Latin term, *jus ad bellum*. The United States recognizes three circumstances in which a resort to force in a foreign country is not generally prohibited under international law: (1) use of force authorized by the U.N. Security Council acting under the authority of Chapter VII of the U.N. Charter; (2) use of force in the exercise of the inherent right of self-defense; and (3) use of force in an otherwise lawful manner with the consent of the territorial State.

The strike targeting Soleimani in Iraq was taken under the second justification I mentioned – in U.S. self-defense – consistent with Article 51 of the U.N. Charter. Article 51 provides in relevant part that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”

Article 51 thus recognizes the inherent right of States to resort to force in individual or collective self-defense against an armed attack. In accordance with Article 51, the United States reported the air strike to the UN Security Council on January 8, 2020, in written correspondence from the U.S. Ambassador to the United Nations, Kelly Craft, to the other members of the Security Council, through the President of the Security Council.

The use of force in self-defense is subject to the customary international law requirements of necessity and proportionality.

As the DoD Law of War Manual explains, “[t]he *jus ad bellum* condition of necessity requires that no reasonable alternative means of redress are available. For example, in exercising the right of self-defense, diplomatic means must be exhausted or provide no reasonable prospect of stopping the armed attack or threat thereof.”

Applying this legal standard to the facts which I just described, the United States had been subject to an escalating series of armed attacks by Iran and by Iran-supported militias in the Middle East, including Iraq. This included the threat to USS Boxer by Iranian unmanned aerial systems and an armed attack by an Iranian surface-to-air missile on an unmanned U.S. Navy MQ-4 surveillance aircraft in international airspace in the Persian Gulf region. And the strike against Soleimani occurred in the larger context of continuing armed attacks by Iran that

endangered international peace and security, attacks on commercial vessels in the Gulf of Oman, attacks on the territory of Saudi Arabia, and attacks by Qods Force-backed militias against U.S. forces in the previous several months. Although I cannot speak to the classified information that senior leaders reviewed, I hope you can see, based simply on these facts that are publicly known, why our senior leaders and the President were reasonable in believing that the use of force was necessary. Attacks against U.S. forces and interests were assessed to be highly likely to continue in the absence of a military response in self-defense to restore deterrence.

Moreover, the strike on January 2d was also consistent with the international law requirement that our measures in self-defense be “proportionate to the nature of the threat being addressed.” As DoD communicated to the public at the time, “General Soleimani was actively developing plans to attack American diplomats and service members in Iraq and throughout the region.” “He had orchestrated attacks on coalition bases in Iraq over the last several months,” and he also approved the demonstration that turned violent at the U.S. Embassy in Baghdad just two days earlier on December 31. Targeting the Iranian commander responsible for orchestrating, planning, and supporting recent attacks against the United States and planning new attacks was a proportionate response to the threat of such attacks.

Some have questioned whether another Iranian armed attack against the United States was “imminent” at the time of the strike targeting Soleimani. This is a red herring, as the saying goes. Under international law, an imminent attack is not a necessary condition for resort to force in self-defense in this circumstance because armed attacks by Iran already had occurred and were expected to occur again.

Of course, although such analysis was not necessary in this case given this recent history of past attacks, the threat of an imminent armed attack can also justify a resort to force under international law. That is, although Article 51 refers explicitly to self-defense only in response to an actual armed attack, the United States maintains that international law also includes the right to use force where an armed attack is imminent. This view of the United States is widely known and also shared by many like-minded states in the international community.

In addition to regulating the resort to force, international law also regulates the conduct of hostilities. The law of war requires, for example, that attacks be directed against military objectives, that precautions be taken to reduce the likelihood of civilian casualties, and that any damage caused be proportionate to the military objective. The law of war does not prohibit targeting specifically identified leaders of adversary militaries—they may be made the object of attack as enemy combatants.

As the leader of the Qods Force, Soleimani was a legitimate military target in Iraq under the international law governing the conduct of hostilities. The others killed in the U.S. strike were the leader and members of KH, an Iran-backed militia. As such, they, too, were “military objectives” who could be made the object of attack under the law of war.

To sum up, the January 2, 2020, air strike against Soleimani in Iraq was lawful as a matter of international law as an exercise of the inherent right of self-defense recognized by Article 51 of the U.N. Charter. An imminent attack is not a necessary condition for use of force in self-defense under Article 51 when an armed attack has already been perpetrated and the response is necessary and proportionate.

C. U.S. Domestic Law

Let me turn now to a discussion of the legal basis for the strike under U.S. domestic law.

The use of military force requires a basis in domestic law. The President may rely on congressional authorizations for the use of force – such as the 2001 AUMF and the 2002 AUMF – and the President may rely on Article II constitutional authority. In the absence of statutory authorization, the President’s constitutional authority to direct military action can be distilled into two inquiries. First, whether the President could reasonably determine that the action serves important national interests. Second, whether the “anticipated nature, scope and duration” of the conflict might rise to the level of a war under the Constitution.

Applying this domestic law framework to the circumstances of the strike targeting Soleimani, the President had a sufficient legal basis both under his constitutional authority and pursuant to the statutory authority of the 2002 AUMF.

First, with respect to the question of the President’s constitutional authority to order the strike, the important national interest to prevent or respond to attacks on U.S. personnel and property is at the very heart of his constitutional power as Chief Executive and Commander-in-Chief. Past Presidents have used force specifically in response to attacks on U.S. embassies and personnel, including by State actors abroad. For instance, in April 1986, President Reagan directed air strikes against the Libyan leader Qaddafi and his intelligence services in Libya following terrorist attacks that killed and wounded American soldiers and civilians at a discotheque in Germany. And in June 1993, President Clinton ordered the launch of cruise missiles on Iraqi Intelligence Headquarters based on “compelling evidence” that Iraqi intelligence had tried to assassinate former President George H.W. Bush in Kuwait. President Clinton also ordered air strikes in

August 1998 against Usama bin Laden and al-Qa'ida in Afghanistan and Sudan, in response to al-Qa'ida bombings of the U.S. Embassies in Nairobi and Dar es Salaam, which had killed more than 250 persons.

Let's turn now to the second constitutional law inquiry: whether the air strike on Soleimani presented a sufficient risk of broadened conflict with Iran such that pre-approval by Congress may have been required. Although the Constitution vests in the President independent authority to use force, it reserves to Congress the power to "declare War" and the authority to fund military operations. This was a deliberate choice of the Founders. In the Federalist Papers, for example, Alexander Hamilton noted that the President lacks the authority of the British King, which "extends to the declaring of war and ... the raising and regulating of fleets and armies."

For that reason, the President's decision to use armed force cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war. The Department of Justice's Office of Legal Counsel (OLC) has similarly recognized that the President should seek congressional approval prior to initiating military action that would bring the Nation into the kind of protracted conflict that would rise to the level of a "war" in the constitutional sense.

So what does a "war" in the constitutional sense mean? The relevant Department of Justice OLC opinions say that we must engage in a "fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations." Under this standard, military operations may rise to the level of "war" in the constitutional sense when the actions are likely to lead to "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period." Some of the most relevant facts in this analysis would include the numbers of additional forces to be deployed, the quantity of munitions expended, estimates regarding U.S. and enemy casualties, and whether ground forces are to be deployed into a war zone. Making an assessment of the anticipated nature, scope, and duration of planned military operations is one of those judgments that are, as Justice Jackson described, "delicate, complex, and involve large elements of prophecy," which have traditionally been committed to the Executive branch, given its military, diplomatic, and intelligence resources.

The strike against Soleimani did not involve a substantial military engagement, the deployment of additional U.S. forces, or the risk of significant casualties. The operation was circumscribed: it consisted of one targeted air strike in Iraq, executed by an unmanned aerial vehicle, designed to avoid civilian casualties or substantial collateral damage, and intended to prevent future attacks

against U.S. persons and interests in Iraq and throughout the region. It was not “aim[ed] at the conquest or occupation of territory nor . . . at imposing through military means a change in the character of a political régime.”

At the same time, there existed risk that the operation could escalate into a broader conflict. Although Soleimani and the Qods Force were not a conventional military formation, the Qods Forces is a part of the military of Iran, which has significant armed forces and military assets that could respond with armed force.

However, the President decided based upon available intelligence that the targeted operation would be unlikely to escalate into a full-scale war, and that, by restoring deterrence of further attacks orchestrated by the Qods Force, the strike could in fact result in a de-escalation of the conflict between the United States and Iran. As the President himself said, the strike on Soleimani was taken to stop a war, not to start one. Indeed, the United States government made clear immediately after the January 2d air strike—as it had planned to do before launching the operation—that the strike reflected a limited engagement and that the United States did not seek a broader war with Iran.

Subsequent events appear to have confirmed the reasonableness of the assessment that the strike would not provoke an uncontrolled escalation. On January 7, 2020, Iran responded to the strike on Soleimani by firing ballistic missiles at U.S. military and coalition forces at two bases in Iraq. But the United States did not itself respond to this new attack with further air strikes, although it took precautions to minimize casualties and damages. Immediately after the missile attacks, Iran’s foreign minister, Javad Zarif, asserted that his country “took and concluded proportionate measures” in response to the targeting of Soleimani, adding that Iran “do[es] not seek escalation or war.”

In sum, given the narrow scope of the mission, the available intelligence, and the efforts to avoid escalation, it was reasonable for the President to have determined that the nature, scope, and duration of hostilities directly resulting from the strike against Soleimani in Iraq would not rise to the level of war with Iran for constitutional purposes.

Although the President had constitutional authority under Article II to direct the January 2nd air strike, he also had statutory authority under the 2002 AUMF. Pursuant to the 2002 AUMF, Congress has authorized the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq.” As I mentioned earlier, although the threat posed by Saddam Hussein’s regime was the initial focus of the 2002 AUMF, the United

States has relied consistently upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq under the George W. Bush, Obama, and Trump Administrations. Such uses of force need not only address threats from the Iraqi Government apparatus but may also address threats to the United States posed by militias, terrorist groups, or other armed groups in Iraq. For example, the Obama Administration invoked the 2002 AUMF (along with the 2001 AUMF) as domestic legal authority for conducting military operations against ISIS in Iraq and also operations in Syria to address threats emanating from Iraq.

The air strike against Soleimani in Iraq is consistent with this longstanding interpretation of the President's authority under the 2002 AUMF. The use of force was tailored narrowly to Soleimani's presence in Iraq and his support to – including in some cases the direction of – militias that attacked U.S. personnel and bases in Iraq. U.S. national security officials believed that Soleimani was actively planning additional attacks on U.S. personnel in Iraq and in the region. Soleimani, as the leader of the Qods Force directly orchestrating hostilities against U.S. personnel and property in Iraq, was a necessary and appropriate target for the President to use force against under the 2002 AUMF.

In conclusion, I hope that I've given you a good sense of what it's like to practice national security law in the Department of Defense. The issues we work on are of significant national importance. They are challenging. They routinely land on the front pages of national newspapers. And judge advocates—our uniformed lawyers—do important work like this and many other varieties at all echelons of the U.S. military, often relatively early in their legal careers. I encourage all of you to consider careers in public service, and I heartily commend to you service in the Department of Defense legal community.

Thank you again to Dean Smith and Professor Jensen for your kind invitation.
