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Trump Had Power to Attack Syria Without Congress, Justice Dept. Memo Says



By Charlie Savage

WASHINGTON — More than a year after President Trump first ordered the American military to bomb Syrian government forces as punishment for using chemical weapons, the Justice Department has claimed that he wields broad constitutional power to order such limited acts of warfare without congressional approval.

In a 22-page legal opinion disclosed late Thursday, the Justice Department’s Office of Legal Counsel declared that Mr. Trump could lawfully and unilaterally direct airstrikes targeting Syria installations because he determined that doing so would be in the national interest, and because the attack would carry little risk of escalation.

“Given the absence of ground troops, the limited mission and time frame and the efforts to avoid escalation, the anticipated nature, scope and duration of these airstrikes did not rise to the level of a ‘war’ for constitutional purposes,” wrote Steven A. Engel, the assistant attorney general for the Office of Legal Counsel.

That claim was rejected by Senator Tim Kaine, Democrat of Virginia, who has regularly argued that Congress is failing to live up to its constitutional role in making decisions about war and peace. He called the argument that firing missiles at a foreign nation was not “war” nonsense.

“Is there any doubt that America would view a foreign nation firing missiles at targets on American soil as an act of war?” Mr. Kaine said. “The ludicrous claim that this

president can magically assert ‘national interest’ and redefine war to exclude missile attacks and thereby bypass Congress should alarm us all. This is further proof that Congress must finally take back its authority when it comes to war.”

Mr. Engel signed his memo on Thursday, but it said he had earlier orally given the same advice to Donald F. McGahn II, Mr. Trump’s White House counsel, before [airstrikes on Syrian chemical weapons facilities in April 2018](#).

The memo does not say whether the Office of Legal Counsel was consulted in April 2017, the [first time Mr. Trump attacked Syria for having used chemical weapons](#). After those strikes, the administration made no public rationale for what legal authority it had to carry out that attack.

Under both the Obama and the Trump administrations, the executive branch has justified its main military operations in Syria — targeting the Islamic State — as falling under Congress’s 2001 and 2002 authorizations to use military force against Al Qaeda and for the Iraq war. (The Islamic State grew out of an affiliate of Al Qaeda that fought the insurgency in Iraq.)

But that authority does not cover the April 2017 and April 2018 airstrikes targeting forces of the Syrian president, Bashar al-Assad, as punishment for chemical weapons. Those operations have been [legally disputed](#) because neither Congress nor the United Nations Security Council authorized them, and there was no self-defense rationale.

Mr. Trump’s step — which President Barack Obama had flirted with in 2013, but eventually did not undertake — was unprecedented. While treaties ban the use of chemical weapons, they do not authorize signatories to attack other countries for violating them. Moreover, in 2017, the United States acted without a multilateral alliance like NATO. (France and Britain participated in the April 2018 strikes.)

Eventually, after being [sued under the Freedom of Information Act](#) by a government watchdog group, Protect Democracy, the Trump administration disclosed that its legal team did draft and internally circulate a seven-page, unsigned memo analyzing a legal basis for potential military action against Syria. While the memo is undated, Justice Department lawyers said [it was probably produced on April 6, 2017](#), the day of the first strikes.

But the administration has continued to keep the contents of that memo a secret. As a result, its completion and disclosure of the new memo, explaining why the Office of Legal Counsel blessed the April 2018 strikes, amounts to its most comprehensive discussion of its understanding of the scope of Mr. Trump’s war powers.

Still, Mr. Engel’s memo was solely devoted to the domestic law question of whether Mr. Trump could order such strikes without congressional permission. He did not acknowledge or address the separate international law question of whether the strike put the United States in breach of the United Nations Charter, a treaty it has ratified

that permits one country to attack another only in self-defense or with Security Council authorization, and if so, why Mr. Trump could do that.

As a matter of domestic constitutional law, the scope of a president's power to order limited attacks without congressional authorization is murky. Although the Constitution says Congress, not the president, has the power to declare war, many presidents of both parties have used force abroad without congressional authorization. Mr. Engel's memo cited many such historical episodes and earlier memos as precedent.

For example, his formulation that presidents can unilaterally deploy troops into military operations whose limited nature, scope and duration mean they fall short of "war" in the constitutional sense, so long as doing so is in the national interest, was articulated in memos written during the Clinton administration by Walter Dellinger, who then ran the Office of Legal Counsel, in the context of interventions in [Haiti](#) and [Bosnia](#).

Martin Lederman, a Georgetown law professor who worked in the Office of Legal Counsel in the Obama administration, praised Mr. Engel for emphasizing assessments that the airstrikes were unlikely to escalate into a broader conflict. Still, he noted a "tension" in the memo: Mr. Engel also cited as a precedent President Harry S. Truman's decision to go into the Korean War — a major conflict — without congressional authorization.

Mr. Engel's memo also identified various national interests that Mr. Trump was advancing through the strikes, including promoting regional stability, mitigating the humanitarian catastrophe in Syria, and preventing and deterring further use of chemical weapons.

"In sum, the president here was faced with a grave risk to regional stability, a serious and growing humanitarian disaster, and the use of weapons repeatedly condemned by the United States and other members of the international community," Mr. Engel wrote. "In such circumstances, the president could reasonably conclude that these interests provided a basis for airstrikes on facilities that support the regime's use of chemical weapons."