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Was Trump's Syria Strike Illegal?

Explaining Presidential War Powers

By CHARLIE SAVAGE



WASHINGTON — President Trump ordered the military on Thursday to carry out a missile attack on Syrian forces for using chemical weapons against civilians. The unilateral attack lacked authorization from Congress or from the United Nations Security Council, raising the question of whether he had legal authority to commit the act of war.

Mr. Trump and top members of his administration initially justified the operation as a punishment for Syria's violating the ban on chemical weapons and an attempt at deterrence. But they did not make clear whether that was a legal argument or just a policy rationale.

The strike raises two sets of legal issues. One involves international law and when it is lawful for any nation to attack another. The other involves domestic law and who gets to decide — the president or Congress — whether the United States should attack another country.

Did Trump have clear authority under international law to attack Syria?

No. The United Nations Charter, a treaty the United States has ratified, recognizes two justifications for using force on another country's soil without its consent: the permission of the Security Council or a self-defense claim. In the case of Syria, the United Nations did not approve the strike, and the Defense Department justified it as “intended to deter the regime from using chemical weapons again,” which is not self-defense.

Secretary of State Rex W. Tillerson, in a briefing with reporters, invoked Syria's violation of the Chemical Weapons Convention and a related Security Council resolution from 2013, saying, “The use of prohibited chemical weapons, which violates a number of international norms and violates existing agreements, called for this type of a response, which is a kinetic military response.”

However, while the resolution said the Security Council would impose “measures” if anyone used chemical weapons in Syria in the future, it did not directly authorize force. The chemical weapons treaty does not provide an enforcement mechanism authorizing other parties to attack violators as punishment.

Mr. Trump's attack was different from the United States' bombings targeting the Islamic State in rebel-held areas of Syria. The United States has justified those airstrikes as part of the collective self-defense of Iraq, which asked for help against the group. But Syria did not use its chemical weapons against the United States or an ally like Iraq.

Could the strike be justified as a humanitarian intervention?

Some human rights advocates have argued that customary international law, which develops from the practices of states, also permits using force to stop an atrocity. Others worry that accepting such a doctrine could create a loophole that would be subject to misuse, eroding important constraints on war. The United States has not taken the position that humanitarian interventions are lawful absent Security Council authorization.

Still, in 1999, the United States participated in NATO's air war to stop the Serbian ethnic-cleansing campaign in Kosovo, even though the operation lacked a Security Council authorization. The Clinton administration never offered a clear explanation for why that operation complied with international law. Instead, it cited a list of “factors” — like the threat to peace and stability and the danger of a humanitarian disaster — without offering a theory for why those factors made that war lawful. In a seeming acknowledgment that this was dubious, the administration said the Kosovo intervention should not serve as a precedent.

Did Trump have domestic legal authority to attack Syria?

The answer is murky because of a split between the apparent intent of the Constitution and how the country has been governed in practice. Most legal scholars agree that the founders wanted Congress to decide whether to go to war, except when the country is under an attack. But presidents of both parties have a long history of carrying out military operations without authorization from Congress, especially since the end of World War II, when the United States maintained a large standing army instead of demobilizing.

In the modern era, executive branch lawyers have argued that the president, as commander in chief, may use military force unilaterally if he decides a strike would be in the national interest, at least when its anticipated nature, scope and duration fall short of “a ‘war’ in the constitutional sense,” as a Clinton administration lawyer wrote in the context of a contemplated intervention in Haiti.

On Thursday, Mr. Trump said, “It is in this vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.” He also invoked the Syrian refugee crisis and continuing regional instability.

Jack Goldsmith, a Harvard law professor who led the Office of Legal Counsel at the Justice Department in the Bush administration, wrote that this criteria for what is sufficient to constitute a national interest was even thinner than previous precedents and would seemingly justify almost any unilateral use of force.

“The interests invoked — protecting regional security and in upholding or enforcing important treaty norms — will always be present when the president is considering military intervention,” he wrote. “Taken alone — and they are all we have here — these interests provide no practical limitation on presidential power.”

Did Trump violate the War Powers Resolution?

In 1973, at the end of the Vietnam War, Congress tried to reclaim some of its eroding authority by enacting the War Powers Resolution, overriding President Richard M. Nixon’s veto of the law. It says a president may only introduce forces into hostilities with congressional authorization or if the United States has been attacked. But, confusingly, it also requires presidents to terminate deployments after 60 days if they lack authorization, which could suggest that one-off strikes and brief operations are allowed. Presidents of both parties have acted beyond the statute’s purported constraint about when they may launch an attack, seeing it as unconstitutionally narrow.

Just because other presidents have done it, does that make it legal?

Congress has repeatedly acquiesced to unilateral military deployments by presidents, and courts have generally stayed out of disputes about them, creating an ambiguous situation that has fueled recurring debates.

On Thursday, after news broke of Mr. Trump’s attack, Senator Rand Paul, Republican of Kentucky, wrote on Twitter, “The President needs Congressional authorization for military action as required by the Constitution.”

But earlier in the day, the Republican chairman of the Senate Armed Services Committee, Senator John McCain of Arizona, maintained on MSNBC that Mr. Trump would not need permission from Congress to strike Syria for using chemical weapons, citing as a precedent the Reagan administration’s 1986 airstrikes against Libya after it was linked to the bombing of a Berlin disco frequented by American soldiers.

Notably, in 2013, when President Barack Obama appeared to be on the verge of striking Syria for using chemical weapons, Mr. Trump embraced Mr. Paul’s view, writing on Twitter: “What will we get for bombing Syria besides more debt and a possible long term conflict? Obama needs Congressional approval.”

What did the Obama legal team think about the legality of a Syria strike?

After Mr. Obama had warned Syria in 2012 that using chemical weapons in its civil war would cross a “red line,” his legal team produced an unsigned, 17-page memo that worked through whether he would have legal authority to strike if that happened. I described that still-secret memo in my 2015 book, “Power Wars: Inside Obama’s Post-9/11 Presidency.”

In the memo, the Obama legal team struggled to come up with a rationale for why a strike against Syria in such a circumstance would be lawful. It suggested pointing to Kosovo as a precedent and came up with potential “factors” to invoke, such as assessments that using force would prevent further use of chemical weapons against civilians and that not taking action would lead to “unconscionable follow-on consequences.”

Still, while the legal team stopped short of saying it would be legally necessary, it urged Mr. Obama to seek authorization from Congress, a step he had not taken in 2011 before participating in NATO’s air war over Libya.

When Syria did cross Mr. Obama’s red line in 2013, the case his team had anticipated was weakened because NATO decided not to participate in any strike, as the earlier memo had

assumed it would do. Still, Mr. Obama's legal team said that a unilateral strike would be lawful.

In the end, Mr. Obama took its advice and asked Congress to authorize a punitive strike against Syria, even as he insisted that he had “the authority to carry out this military action without specific congressional authorization.” Congress did not act on his request, and the immediate crisis was instead resolved without strikes after Russia brokered a deal in which Syria agreed to join the Chemical Weapons Convention and give up all its stockpiles — a pledge it apparently broke.