AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

*Steven A. Engel*, **Airstrikes against Syrian Chemical-Weapons Facilities** (2018)[[1]](#footnote-1)

*In 2011, an insurgency against the regime of Bashar al-Assad in Syria developed and soon grew into a full-blown civil war. Syria shares a border with Iraq, where the United States was defending the American-backed government against its own insurgency. The Islamic State of Iraq and Syria (ISIS) bridged across the insurgencies in the two countries. Over the course of the civil war, the Syrian government was repeatedly accused of using chemical weapons against opponents of the regime. In 2013, the United States threatened a military response to the Syrian government’s use of chemical weapons that kills more than 1500 people, but eventually backed down when Russia claimed to have removed chemical weapons from Syria. Nonetheless, there were a series of additional chemical weapons attacks. In April 2017, the Trump administration responded with a missile attack on a Syrian air base that was said to be a delivery point for chemical weapons attacks. In April 2018, the United States, along with France and Great Britain, bombed alleged chemical weapons manufacturing plants in Syria.*

*American military operations against ISIS had been justified under two congressionally passed authorizations for the use of military force (AUMF), one focused on Afghanistan and Al-Qaida from 2001 and one focused on Iraq from 2002. Congress had never authorized the use of military force in Syria or against the Syrian government. In 2018, the Office of Legal Counsel provided an opinion with a legal justification for the Trump administration’s reprisals against the Assad regime.*

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When it comes to the war powers of the President, we do not write on a blank slate. The legal opinions of executive advisers and the still weightier precedents of history have established that the President, as Commander in Chief and Chief Executive, has the constitutional authority to deploy the military to protect American persons and interests without seeking prior authorization from Congress. The President’s authority in this area has been elucidated by dozens of occasions over the course of 230 years, quite literally running from the halls of Montezuma to the shores of Tripoli and beyond. Many of those actions were approved by opinions of this Office of the Attorney General, and many involved engagements considerably broader than the April 2018 Syrian strikes. The Constitution reserves to Congress the authority to “declare War” and thereby to decide whether to commit the Nation to a sustained, full-scale conflict with another Nation. Yet Presidents have repeatedly engaged in more limited hostilities to advance the Nation’s interests without first seeking congressional authorization.

The President’s authority to direct U.S. military forces arises from Article II of the Constitution, which makes the President the “Commander in Chief of the Army and Navy of the United States,” and vests in him the Executive Power. These powers allow him “to direct the movements of the naval and military forces placed by law at his command.” . . . The Supreme Court has recognized that the President holds the “vast share of responsibility for the conduct of our foreign relations,” and holds “independent authority in the areas of foreign policy and national security.” By its terms, Article II provides the President with the authority to direct U.S. military forces in engagements necessary to advance American national interests abroad.

In evaluating the division of authority between the President and Congress, the Supreme Court has placed “significant weight” on “accepted understandings and practice.” *Zivotofsky v. Kerry* (2015). . . .

And that history points strongly in one direction. While our Nation has sometimes debated the scope of the President’s war powers under the Constitution, his authority to direct U.S. forces in hostilities without prior congressional authorization is supported by a “long continued practice on the part of the Executive, acquiesced in by the Congress.” . . .

Presidents have exercised their authority to direct military operations without congressional authorization since the earliest days of the Republic. President Washington directed offensive operations against the Wabash Indians in 1790. . . . These past deployments have included President Truman’s defense of South Korea; President Kennedy’s introduction of U.S. forces into Vietnam; President Reagan’s retaliatory strikes on Libya following the Beirut bombing; President George H.W. Bush’s introduction of U.S. troops into Somalia; President Clinton’s actions in Bosnia, Haiti, Kosovo, Sudan, and Afghanistan; President George W. Bush’s intervention in Haiti; and President Obama’s airstrikes in Libya and in Houthi-controlled territory in Yemen.

While the precise counting varies, by the middle of the twentieth century, scholars had identified well over 100 instances of military deployments without prior congressional authorization. . . . In the forty-five years since the 1973 enactment of the War Powers Resolution, Presidents have submitted more than eighty reports of hostilities to Congress that did not rely upon statutory authorization. . . .

As Assistant Attorney General Rehnquist observed, “[i]t is too plain” in view of this record “to admit of denial that the Executive, under his power as Commander in Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior congressional approval.” That historical record has only expanded in the decades since Vietnam. Since then, in light of “repeated past practice under many Presidents,” this Office has repeatedly advised that “the President has the power to commit United States troops abroad for the purpose of protecting important national interests.” . . .

. . . . The Constitution reserves to Congress the power to “declare War,” and the authority to fund military operations. This was a deliberate choice of the Founders, who sought to prevent the President from bringing the Nation into a full-scale war with-out the authorization of Congress. . . . These legislative powers ensure that the use of 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 or a police action.” These powers further oblige the President to seek congressional approval prior to contemplating military action that would bring the Nation into a war.

Not every military operation, however, rises to the level of a war. Rather, “the historical practice of military action without congressional approval precludes any suggestion that Congress’s authority to declare war covers every military engagement, however limited, that the President initiates.” . . .

. . . . We have therefore considered the scale of the expected hostilities in analyzing whether a pro-posed engagement would constitute a war for constitutional purposes.

We now explain our analysis of the April 13, 2018 Syrian strikes in light of our precedents. In evaluating whether a proposed military action falls within the President’s authority under Article II of the Constitution, we have distilled our precedents into two inquiries. First, we consider whether the President could reasonably determine that the action serves important national interests. “Authority to Use United States Military Forces in Somalia,” 16 *Op. O.L.C*. 11 (1992). Second, we consider whether the “anticipated nature, scope and duration” of the conflict might rise to the level of a war under the Constitution.” “Authority to Use Military Force in Libya,” 35 *Op. O.L.C*. 1 (2011). Prior to the Syrian strikes, we applied this framework to conclude that the pro-posed Syrian operation would fall within the President’s constitutional authority.

This Office has recognized that a broad set of interests would justify use of the President’s Article II authority to direct military force. These interests understandably grant the President a great deal of discretion. The scope of U.S. involvement in the world, the presence of U.S. citizens across the globe, and U.S. leadership in times of conflict, crisis, and strife require that the President have wide latitude to protect American interests by responding to regional conflagrations and humanitarian catastrophes as he believes appropriate. The Commander in Chief bears great responsibility for the use of the armed forces and for putting U.S. forces in harm’s way. We would not expect that any President would use this power without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation. . . .

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The President identified three interests in support of the April 2018 Syria strikes: the promotion of regional stability, the prevention of a worsening of the region’s humanitarian catastrophe, and the deterrence of the use and proliferation of chemical weapons. Prior to the attack, we advised that the President could reasonably rely on these national interests to authorize air strikes against particular facilities associated with Syria’s chemical-weapons program without congressional authorization.

As discussed above, Presidents have deployed U.S. troops on multiple occasions in the interest of promoting regional stability and preventing the spread of an ongoing conflict. While the United States is not the world’s policeman, as its power has grown, the breadth of its regional interests has expanded and threats to national interests posed by foreign disorder have increased. “Authority of the President to Repel the Attack in Korea, 23 *Dept. of State Bull*. 173 (1950). . . .

Here, the President could reasonably determine that Syria’s use of chemical weapons in the ongoing civil war threatens to undermine further peace and security of the Near East, a region that remains critically important to our national security. Syria’s possession and use of chemical weapons have increased the risk that others will gain access to them. . . . The proliferation of such weapons to other countries with fragile governments or to terrorist groups could further spread conflict and disorder within the region. . . . The United States has a direct interest in ensuring that others in the region not look to Syria’s use of chemical weapons as a successful precedent for twenty-first-century conflict.

Moreover, the regime’s use of chemical weapons is a particularly egregious part of a broader destabilizing conflict. The civil war in Syria directly empowered the growth of the Islamic State of Iraq and Syria (“ISIS”), a terrorist threat that has required the deployment of over 2,000 U.S. troops. . . .

The Syrian regime’s continued attacks on civilians have also contributed to the displacement of civilians and thus deepened the instability in the region. . . .

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In some cases, humanitarian concerns have been a significant, or even the primary, interest served by U.S. military operations. In 1992, when President George H.W. Bush announced that he had ordered the deployment of “a substantial American force” to Somalia during a widespread famine, he described it as “a mission that can ease suffering and save lives.” . . . Similarly, military intervention in Bosnia included the establishment of a no-fly zone, maintained for roughly two-and-a-half years, in support of a humanitarian air drop. . . .

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In carrying out these strikes, the President also relied on the national interest in deterring the use and proliferation of chemical weapons. The President previously relied upon this interest in ordering the April 2017 airstrike in response to the attack on Khan Shaykhun. While we are unaware of prior Presidents justifying U.S. military actions based on this interest as a matter of domestic law, we believe that it is consistent with those that have justified previous uses of force. The United States has long and consistently objected to the use and proliferation of chemical weapons. For nearly thirty years, Presidents have repeatedly declared the proliferation of chemical weapons to be a national emergency. . . .

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We have found that previous military deployments did not rise to the level of a war even where the deployment was substantial. For example, the United States spent two years enforcing a no-fly zone, protecting United Nations (“UN”) peacekeeping forces, and securing safe areas for civilians in Bosnia, all without congressional authorization. . . . Similarly, in 1994, we approved a plan to deploy as many as 20,000 troops to Haiti. We also approved a U.S.-led air campaign in Libya in 2011 that lasted for over a week and involved the use of over 600 missiles and precision-guided munitions. In none of these cases did we conclude that prior congressional authorization was necessary.

In reviewing these deployments, we considered whether U.S. forces were likely to encounter significant armed resistance and whether they were likely to “suffer or inflict substantial casualties as a result of the deployment.” In this regard, we have looked closely at whether an operation will require the introduction of U.S. forces directly into the hostilities, particularly with respect to the deployment of ground troops. The deployment of ground troops “is an essentially different and more problematic, type of intervention,” given “the difficulties of disengaging ground forces from situations of conflict, and the attendant risk that hostilities will escalate.” . . .

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With these precedents in mind, we concluded that the proposed Syrian operation, in its nature, scope, and duration, fell far short of the kinds of engagements approved by prior Presidents under Article II. First, in contrast with some prior deployments, the United States did not plan to employ any U.S. ground troops, and in fact, no U.S. airplanes crossed into Syrian airspace. Where, as here, the operation would proceed without the introduction of U.S. troops into harm’s way, we were unlikely to be “confronted with circumstances in which the exercise of [Congress’s] power to declare war is effectively foreclosed.”

Second, the mission was sharply circumscribed. This was not a case where the military operation served an open-ended goal. Rather, the President selected three military targets with the aim of degrading and destroying the Syrian regime’s ability to produce and use chemical weapons. . . . And the strikes were planned to minimize casualties, further demonstrating the limited nature of the operation. Those aspects both underscored the “limited mission” and the fact that the operation was not “aim[ed] at the conquest or occupation of territory nor even, as did the planned Haitian intervention, at imposing through military means a change in the character of a political régime.”

Third, the duration of the planned operation was expected to be very short. In fact, the entire operation lasted several hours, and the actual attack lasted only a few minutes.

Standing on its own, the attack on three Syrian chemical-weapons facilities was not the kind of “prolonged and substantial military engagement” that would amount to a war. . . .

We were advised that escalation was unlikely . . . and we took note of several measures that had been taken to reduce the risk of escalation by Syria or Russia. The targets were selected because of their particular connections to the chemical-weapons program, underscoring that the strikes sought to address the extraordinary threat posed by the use of chemical weapons and did not seek to precipitate a regime change. . . .

For the foregoing reasons, we concluded that the President had the constitutional authority to carry out the proposed airstrikes on three Syrian chemical-weapons facilities. The President reasonably determined that this operation would further important national interests in promoting regional stability, preventing the worsening of the region’s humanitarian catastrophe, and deterring the use and proliferation of chemical weapons. Further, the anticipated nature, scope, and duration of the operations were sufficiently limited that they did not amount to war in the constitutional sense and there-fore did not require prior congressional approval.

1. Excerpt taken from Steven A. Engel, “Airstrikes against Syrian Chemical-Weapons Facilities” (2018). [↑](#footnote-ref-1)