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San Francisco Chronicle Interviews Joshua Kastenberg About President Trump's Missile Strike on Syrian Airfield (Experts see Trump strike as illegal unless U.S. under threat or U.N. authorizes)

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Experts see Trump strike as illegal unless U.S. under threat or U.N. authorizes

By Bob Egelko

San Francisco Chronicle
April 11, 2017



In this Friday, April 7, 2017 file image provided by the U.S. Navy, the guided-missile destroyer USS Porter (DDG 78) launches a tomahawk land attack missile in the Mediterranean Sea. Photo: Ford Williams, Associated Press

President Trump ordered a missile strike on a Syrian airfield without seeking congressional approval, and his aides say he might do it again if Bashar Assad's government launches another chemical weapons attack. But a Bay Area congresswoman says Trump acted illegally, and some experts in military law agree with her.

Trump ordered the air strike Thursday and told Congress afterward that he had complied with the War Powers Act, a 1973 law whose limitations have been disputed by every president since it was enacted over Richard Nixon's veto. The law allows U.S. military action only if Congress has declared war, the U.S. or its troops are under attack, or Congress has granted specific authority, as it did for attacks on al Qaeda terrorists and their supporters after the September 2001 hijacking attacks on New York and Washington.

In a speech defending the strike, Trump said he had acted "in the vital national security interest of the U.S. to prevent and deter the use of deadly chemical weapons." But Rep. Barbara Lee, D-Oakland, the only member of Congress who

voted against the 2001 use-of-force authorization, said the president had defied the law.

“By illegally bombing a sovereign nation, President Trump has intensified an already dangerous and unstable conflict without a long-term strategy or an appropriate authorization from Congress,” Lee said after U.S. warships on Thursday launched 59 missiles at a Syrian airfield, the apparent source of an in-country chemical weapons air strike three days earlier.

In an opinion piece in Tuesday’s Chronicle, Lee said it’s the United Nations’ job to hold Assad, the Syrian president, accountable “for his heinous crimes against humanity.”

In the days since, administration officials have not ruled out future retaliatory strikes if Assad were to commit similar acts against his people.

“If you gas a baby ... I think you will see a response from this president,” White House press secretary Sean Spicer said Monday. Secretary of State Rex Tillerson, laying a wreath at the site of a Nazi massacre in Italy, said Americans would be “holding to account any and all who commit crimes against the innocents anywhere in the world.”

Interviews with legal scholars found diverse opinions on the lawfulness of the missile strike, but a predominant view emerged that neither domestic nor international law authorizes military action in response to a chemical weapons attack abroad that does not threaten the U.S.

The missile attack was “clearly an act of war,” which Congress must authorize in advance, said Eugene Fidell, former president of the National Institute of Military Justice, who teaches law at Yale. He said no law gives the president “carte blanche to use military force in the absence of an attack on our country.”

A contrasting view came from Joshua Kastenberg, a former military lawyer and Department of Defense adviser who now teaches law at the University of New Mexico. He said Trump could probably justify the action, under both domestic and international law, as a way to deter a second chemical weapons attack.

“Using guided missiles to send a message ... may be an absolutely dumb and wrongheaded thing to do as a matter of policy,” and as a matter of respect should have been discussed first with Congress, Kastenberg said. But he said the law permits a single, unilateral missile strike “to prevent a human rights violation.”

Not so, said Stephen Zunes, chairman of the Middle Eastern Studies program at the University of San Francisco and a longtime critic of U.S. Mideast policy. The law, he said, does not authorize bombings “to prevent something that might happen in the

future.” And, he said, the U.N. charter authorizes the Security Council, not individual nations, to respond militarily to the use of chemical weapons against others.

Other legal scholars also disagreed with the administration’s view of the War Powers Act.

“The president does not have inherent constitutional authority to attack a foreign nation in order to punish or deter crimes, even serious international crimes, committed against its own people,” said John Dehn, a former U.S. Army lawyer and co-director of the National Security and Civil Rights Program at Loyola Law School in Chicago.

Rachel VanLandingham, a law professor at Southwestern University in Los Angeles and former legal adviser to the U.S. Central Command in Afghanistan and Iraq, questioned the action under international law, which allows nations to use military force only in self-defense or with authorization from the U.N. Security Council.

“If the world community was too paralyzed to prevent military catastrophe (against civilians in Syria), I believe it (the missile strike) was legitimate, but it’s not the law,” she said. “There was no imminent attack on the U.S. or U.S. nationals.”

As Zunes and others observed, however, the Security Council is effectively paralyzed on the issue: Both Russia, Assad’s chief ally, and the U.S. have veto power over any resolution. And any U.S. laws that Trump may have violated could not be enforced in a lawsuit by private citizens or even individual members of Congress — an approach rejected by the Supreme Court in a 1973 case over the U.S. bombing of Cambodia — but only by the Republican-controlled Congress as a whole.

Congressional responses to presidential lawbreaking, said Dehn, the Loyola law professor, could include a resolution of disapproval “or, I would argue, censure or impeachment” and removal from office.

As a practical matter, said VanLandingham, the Southwestern University professor, future missile strikes and other military action could be halted only “if Congress stopped supporting it ... the power of the purse.”