presidents. It is also a statute that Congress has never repealed, much less repudiated. In this context, imagining that presidents have successfully amended the Constitution is folly.

There is an understandable temptation to suppose that when a president implements a worthy policy, we ought to praise him. If a president expends funds without any appropriation or refuses to enforce a statute, all in the name of an exceptionally just cause, we might wish to laud, rather than condemn, him. The same inclination applies with respect to wars. We have seen this tendency regarding Abraham Lincoln's stewardship of the nation during the American Civil War. Many can't bring themselves to criticize the Great Emancipator. Hence they suppose that everything he did must be constitutional.

But we should not sacrifice our Constitution, and its principles, at the altar of political expediency. We should not permit powerful policy preferences to trump sound legal judgments. Presidents cannot wage war at their own whim, and they cannot alter the Constitution through their repeated violations of it. And they cannot do either even when trying to deter a savage government from gassing its citizens. Just wars, unjust wars, speedy wars, protracted wars—the Constitution forbids the president from launching any of them.

Remarks by Jennifer Daskal*

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First, a huge thanks to ASIL for facilitating this timely and important conversation. I am honored to be part of this panel.

The focus of our discussion is the fifty-nine Tomahawk missiles launched on April 6 by U.S. forces and directed at a Syrian air base near Homs. These were a direct response to the Assad regime's chemical attack on a Syrian village earlier in the week—an attack that reportedly killed dozens of people and exposed hundreds more. The Syrian attack was reportedly launched from the air base that the United States targeted.

The attack was praised by leaders across the political spectrum as the right thing to do. It was, in the eyes of many, a just and proportional response to the Assad regime's actions. I too share that perspective, although I also think that any such short-term response needs to be coupled with a broader strategy as to what's next—a strategy that I don't believe has yet been adequately articulated.

But the fact that there is broad support for the action doesn't necessarily mean it was lawful. More importantly—and this is the issue that I want to focus on here—it doesn't justify the significant process failures, as well as the failure to articulate any credible international legal justification for the strike and little in the way of a domestic law justification.

So what do we know happened?

During the two-day period between the chemical attack and the strikes in response, there was no consultation with the United Nations, as required by the UN Charter. The secretary general of the United Nations was not told of the strikes in advance. There was also no consultation with Congress, as required by the War Powers Act. There was no attempt to get some sort of emergency joint resolution in support. There was not even notification to the Gang of Eight.

And while there are situations in which the need to avert an imminent threat is so urgent that there isn't the time to either engage with international and congressional partners or articulate a legal justification for failing to do so, this was not one of those cases.

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The chemical strikes, while horrendous, did not pose a direct threat to the United States or to U.S. forces. There was no reporting, as far as is known, that another chemical attack was imminent. And there was no direct or immediate threat to any of our key allies.

The absence of consultation, as well as the absence of a clearly articulated legal justification after the fact, is highly concerning. It suggests a presidency that deems itself unbounded by law or long-established process.

At this point, we can't go back in time and recreate a consultative process that never happened. But it is not too late to come up with a fuller legal justification, as a matter of both international and domestic law. The administration should do so.

For this audience of lawyers, jurists, and policy makers, the reasons why both consultation and legal justifications are so important probably seem obvious, but I also think they are worth emphasizing.

First, even if one thinks that the strikes were the right kind of response, next time it might not be so clear. Consultation with lawyers helps to ensure there is a solid legal justification for the use of force. Consultation with domestic and international partners helps to ensure the requisite level of political support and thus provides a critical checking function. This is absolutely essential when dealing with something as significant as the decision to use force in another nation and potentially embroil the United States and key allies in an escalating conflict.

Second, the failure to both consult with international partners and articulate a legal justification sets an extremely dangerous precedent internationally. It sets the preconditions for other countries to similarly say that the procedures envisioned by the Security Council can be dispensed with at will and that the legal constraints don't matter.

Even if the ultimate conclusion is that the action is unlawful, but nonetheless justified, the administration should be in a position of explaining why that is the case—and in setting the parameters on when such actions should and should not be permitted. Ideally, this would be coupled with an effort to push for international recognition of a circumscribed but evolving norm of when force might be justified in light of humanitarian catastrophe, UN Security Council gridlock, and other relevant parameters.

Third, as a matter of domestic law, failure to consult with Congress is damaging. The founders gave Congress the declare-war and the executive the wage-war powers for a reason. This separation of powers matters enormously as a means of preserving the possibility of democratic accountability and reining in excessive uses of force.

To be clear, I don't ascribe to the view that every single nondefensive use of force needs preauthorization by Congress. And certainly practice doesn't bear that out. But I also don't subscribe to the view that the president can engage in whatever uses of force or she deems to be in the national interest without going to Congress for authorization. As Professor Marty Lederman has laid out in a series of excellent posts on *Just Security*, historical practice supports a third way—the possibility of limited uses of nondefensive force in support of vital national security interests, without prior congressional authorization. But those limits are fairly constrained—and at a minimum ought to be articulated so that Congress and the public can have clarity as to what the executive deems the basis for acting.[1]

Here, the president has adopted a version of that third way. The administration asserts that the strikes were a legitimate exercise of the president's Article II authorities in order to preserve regional stability, avert a worsening humanitarian catastrophe, and deter the use and proliferation

[1] *See, e.g.*, Marty Lederman, *Why the Strikes Against Syria Probably Violate the UN Charter and (Therefore) the U.S. Constitution*, JUST SECURITY (Apr. 6, 2017), *at* https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/.

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of chemical weapons. But this goes further than such claims have in the past. The single-line justification should be coupled with an additional articulation of how to assess these factors, whether a single factor is enough to justify intervention or whether all three must be in existence, and the other considerations that bear on the decision.

This is particularly important in light of technological developments that enable the Pentagon to engage in sanitized, small-scale air strikes without putting troops in harm's way. This possibility of sanitized warfare makes it much easier for the executive to resort to limited uses of force of limited duration but also that much more critical for Congress to demand that it have a say in these decisions. Even small-scale uses of force risk escalation. And the absence of Congress in the decision making concentrates for too much power in the executive in ways that belie principles of democratic accountability.

Of course, Congress shares in the blame here as well. If the president is acting in ways with which members generally agree, it is easier simply to acquiesce than to try to generate agreement and vote on the contours of any force authorization. Then, if something goes wrong, the members are protected. This kind of passing the buck is not new. Congress's failure to update the 2001 AUMF, which authorizes the use of force against Al Qaeda and the Taliban, to reflect the reality of the conflict a decade and a half later is a case in point. The old 2001 AUMF is now being used to justify strikes against ISIS and other so-called "associated forces" of Al Qaeda that didn't even exist when the authorization was written.

All that said, it is not too late. Even now, the administration could do more to explain the international legal justification that it employed—and if appropriate, seek consensus on new international norms to address the situation that this and other humanitarian crises raise. The administration could do more to explain the kinds of vital national security interest that require and justify the use of the president's Article II authorities. And Congress can still demand more of a role in authorizing future uses of force.

None of this will reverse the process concerns of course. But it would help protect against other governments and future executives from simply saying anything goes. The administration also could fix the processes, engage the lawyers, and take the key consultative steps next time.

Remarks by Stephen Pomper*

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Overview

We are having this conversation now because of the April 7 strikes on the Shayrat Airfield in Syria, but the question of how one justifies forcible measures in the context of a humanitarian emergency, and in the face of a deadlocked Security Council, is one that deserves urgent attention beyond the context of any single event. Progress toward answering this question has, however, been mired in a long-standing debate between those who believe that there is no credible international law justification for humanitarian intervention—and that the U.S. government should instead justify interventions like those taken at Kosovo and Shayrat as morally "legitimate"—and those who believe a legal justification can and should be put forward. I am very much in the latter camp and will use my time now to explain how I arrived at this position as a policy and as a legal matter by looking at three questions: the first question is whether legal justification is the direction

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