A CONSTITUTIONAL ANALYSIS OF PRESIDENT TRUMP'S ATTACK AGAINST SYRIA

by

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INTRODUCTION

A serious case can be made that the United States Navy's attack with some fifty-nine "Tomahawk" missiles which President Trump ordered against a Syrian military airfield on 6 April 2017 was not simply an "act of war" in fact, but indeed an act of blatant *aggression* in both fact *and law*—with potentially most serious consequences, not only for this country, but also for Mr. Trump's own position and person.

I. THE EVIDENCE AMASSED TO DATE SUPPORTS THE CONCLUSION THAT THE ATTACK ON SYRIA WAS A PREMEDITATED ACT OF AGGRESSION.

A. Whatever may be the true particulars of the supposed release of what was reported to be poisonous "sarin" gas in Idlib Province, Syria, on 4 April 2017, no one has claimed that the government of Syria perpetrated, or posed an imminent threat of perpetrating, an actual act of war against the territory or possessions of the United States, or against any citizen or the property of any citizen of the United States, or against any personnel or equipment of the Armed Forces of the United States either within Syria or anywhere else, whether on that particular date or at any other closely related time.[1] Whatever happened in Idlib Province occurred entirely within Syria, and affected only Syrian nationals (or possibly some nationals of other countries not including the United States). Indeed, in his letter of 8 April 2017 to the Speaker of the House of Representatives and the President *Pro Tempore* of the Senate,[2] President Trump reported that "United States intelligence indicates that Syrian military forces operating from th[e Shayrat military airfield in Syria] were responsible for the chemical weapons attack on Syrian civilians in southern Idlib Province, Syria".

Moreover, as he stated in that letter, the purpose of the missile strikes was "to degrade the Syrian military's ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons, thereby promoting the stability *of the region* and averting a worsening *of*

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[1] For that reason, this paper need not attempt to determine what actually happened in that place on that date, and who was responsible, in the face of the numerous complex and conflicting interpretations, along with claims of apparent misinterpretation, suppression, and even fabrication of evidence extant in the "mainstream" as well as the alternative media. *Contrast, e.g.,* the White House's report on the situation (11 April 2017), at <https://assets.documentcloud.org/documents/3553049/Syria-Chemical-Weapons-Report-White-House.pdf>, *with MIT Professotr says White House claims of Syrian chemical attack "cannot be true"* (14 April 2017), at <https://off-guardian.org>, *and with Video Evidence of False Claims Made in the White House Intelligence Report of April 11, 2017* (14 April 2017, at <www.washingtonsblog.com>.

[2] *See* <https://twitter.com/ABC/status/850781738070659072/photo/1>.

the region's current humanitarian catastrophe"[3]—*not* to protect any territory or possession *of the United States*, any citizen or the property of any citizen *of the United States*, or even any personnel or equipment of the Armed Forces *of the United States* legitimately stationed or positioned in the Middle East.

Inasmuch as the President's letter is an official report required of him pursuant to the so-called "War Powers Resolution",[4] it must be taken to be a *conclusive admission* as to these and all of the other material points it addresses.[5]

B. The missile strikes resulted neither from an unfortunate accident, nor from the unforeseeable piratical misbehavior of some rogue United States Naval officers. Rather, as the President reported in his letter, the missiles were launched "at my [*i.e.*, the President's own] direction" against a single, very specific target, "the Shayrat military airfield in Syria". That is, the attack was knowing, willful, and intentional on his part—that is, premeditated..

Although everything happened within a very narrow time-frame—the event in Idlib Province having occurred on 4 April and the Naval attack on 6 April—the missile strike was not simply a blind, spontaneous, impulsive, reflexive, or robotic response to what "United States intelligence indicate[d]" to the President had supposedly occurred in Idlib Province. Rather, it was carefully calculated to achieve particular purposes. As the President's letter stated: "I directed this action in order to degrade the Syrian military's ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons".

Obviously, too, the President did not act alone. He could never have personally commanded the men-of-war involved, selected the target, programmed the missiles' flight paths, and performed the various other mechanical tasks necessary to launch the attack. Rather, he sought and acceded to the advice and accepted the assistance of numerous others who, to the extent the time allowed, carefully planned and prepared every step necessary for the attack, and put it all into operation through the chain of command linking the White House and the Pentagon to the bridges of the warships. Whether or not this should be characterized and condemned as an outright "conspiracy to commit aggression", it was certainly concerted activity knowingly, willfully, and intentionally aimed at that specific end by all of the participants. None of them could have imagined that he was not engaged in an act of aggression against Syria, except as the result of his own

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[3] Emphases supplied.

[4] JOINT RESOLUTION Concerning the war powers of Congress and the President ("War Powers Resolution"), H.J. Res. 542, 7 November 1973, Pub. L. 93-148, §§ 4 and 5(a), 87 Stat. 555, 555-556, *now codified at* 50 U.S.C. §§ 1543 and 1544(a). *See post,* at 31-35.

[5] Although the War Powers Resolution sets out no penalty for a report intentionally falsified in whole or in part, presumably the delivery of such a screed would constitute an "high Crime[or] Misdemeanor[ ]" for which the President could be "removed from Office on Impeachment * * * and Conviction", and thereafter prosecuted under 18 U.S.C. § 1001. *See* U.S. Const. art. II, § 4; art. I, § 2, cl. 5; *and* art. I, § 3, cls. 6 and 7. *See post,* at 45-53.

willful blindness towards or reckless disregard of the facts—or as the result of his being the victim of a calculated deception.[6]

C. Although "the Shayrat military airfield in Syria" was the sole target of the attack under consideration here, Syria has been and remains the victim of a much more extensive and elaborate scheme of aggression with antecedents traceable at least to and through the Administrations of William J. Clinton and George W. Bush, and the residence in the White House of Barack Obama. For years, Syria has been a cockpit of irregular warfare and terrorism aimed at "régime change" at the hands of various proxy forces fronting for the minor regional powers Saudi Arabia, Turkey, and Israel, and for the major *neo-*imperial powers the United States, Great Britain, and France. Indeed, in 2007 General Wesley Clark exposed the Pentagon's plans "to take out" seven Middle Eastern and African countries in the course of five years: namely, Iraq, Syria, Lebanon, Somalia, Sudan, and Iran.[7] To this list, by dint of hindsight he could have added Afghanistan, and with a little foresight might well have included Libya and Yemen as well. (After all, during his occupation of the White House from 2008 through 2016, Mr. Obama oversaw the bombing by the United States and "coalition forces" of Afghanistan, Pakistan, Yemen, Somalia, Libya, and Iraq, as well as Syria.)

To be sure, until his accession to the Presidency Mr. Trump was almost surely not a participant in, or likely even privy to the details of, the plans General Clark brought to light. Once in the Oval Office, however, he could and should have made himself aware of them—indeed, perforce of his "Oath or Affirmation" to "'faithfully execute the Office of President of the United States, and * * * to the best of [his] Ability, preserve, protect and defend the Constitution of the United States'",[8] and of his responsibility to "take Care that the Laws be faithfully executed",[9] he was bound by the highest legal duty to do so. Furthermore, to the extent that the attack against Syria which he admitted was launched "at [his] direction" was the latest manifestation of those plans—and thus another step in a continuing course of action redolent of "conspiracy"—Mr. Trump has made himself legally responsible, not only for that attack, but also for all that has come before, or will come after, it as part of the same overarching operation.

II. President Trump's act of aggression against Syria was utterly lawless.

The extent and seriousness of President Trump's legal liability for his attack

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[6] On the latter possibility, *see post,* at 53-64.

[7] *See, e.g., Global Warfare: "We're going to take out 7 countries in 5 years: Iraq, Syria, Lebanon, Somalia, Sudan & Iran"* (30 January 2017), at <www.globalresearch.ca>.

[8] U.S. Const. art. II, § 1, cl. 7.

[9] U.S. Const. art. II, § 3.

on Syria can be gauged by consideration of four sources of law applicable to this type of situation: to wit, the International Military Tribunal convened at Nuremberg after World War II, the Charter of the United Nations, "th[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof",[10] and the Declaration of Independence. Perforce of each of these, President Trump's missile strike must be condemned as lawless.

A. The International Military Tribunal

1. The Charter of the International Military Tribunal created in 1945 and convened at Nuremberg, Germany, provided (in pertinent part) that:

> *Article 6.* The Tribunal * * * shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> > *(a)* CRIMES AGAINST PEACE: namely, planning, preparation, or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]
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> * * * * *
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> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.
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> *Article 7.* The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.
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> *Article 8.* The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.
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> *Article 9.* At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or

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[10] *See* U.S. Const. art. VI, cl. 2.

organization of which the individual was a member was a criminal organization.[11]

In its Judgment of 1 October 1946, the Tribunal observed that

> [t]he charges in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.
>
> *To initiate a war of aggression, therefore, is not only an international crime;* ***it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole***.[12]

Going into specifics, the Tribunal recalled that

> the first war of aggression charged in the indictment is the war against Poland begun on the 1st September 1939.
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> * * * The war against Poland did not come suddenly out of an otherwise clear sky; * * * this war of aggression * * * was premeditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the preordained scheme and plan.
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> For the aggressive designs of the Nazi Government were not accidents arising out of the immediate political situation in Europe and the world; they were a deliberate and essential part of Nazi foreign policy.[13]

Whatever one may think of what some have criticized as the *ex post facto* nature of the Nuremberg trials and judgments, the United States is estopped to deny their specific legality at that time, or the general applicability in the present of the principles they enforced. Moreover, as one Republic within the Union of Soviet Socialist Republics which was a Signatory to the Agreement establishing the

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[11] Chapter II, Part II, Jurisdiction and General Principles, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1946), at 5-6.

[12] Part III, The Common Plan of Conspiracy and Aggressive War, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, Opinion and Judgment, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1947), at 16 (emphasis supplied).

[13] *Id.*

International Military Tribunal,[14] the contemporary Russian Federation—an ally of Syria—can insist upon the continued authority of the principles the Tribunal employed.

"Employed" as opposed to "established" is the correct verb, because the Tribunal itself rebutted the charge that its proceedings were to any degree *ex post facto* in character:

> The Charter is not an arbitrary exercise of power on the part of the victorious nations, but * * * is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.[15]

And at least one principle of the Charter applied against the Germans—that aggression and especially territorial aggrandizement by means of aggression had long theretofore been recognized as unlawful—was taken to be part of American constitutional jurisprudence almost a century before the Tribunal came into existence:

> [T]he genius and character of our institutions are peaceful, and the power to declare war[16] was not conferred upon Congress for the purposes of aggression and aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.
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> A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country.[17]

The applicability of this principle today should be broad, indeed. After all, one can easily imagine various modern means for "subjugating [a foreign] country" in addition, and far preferable, to an aggressor's outright invasion, conquest, and annexation of the victim's territory. As an example, for an aggressor to foment

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[14] *See* Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1946), Chapter I, Agreement, at 1-3.

[15] Judgment, Part IV, Violations of International Treaties, Section (E) The Law of the Charter, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, Opinion and Judgment, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1947), at 48. This section goes on to support in detail the statement quoted above. *Id.* at 48-54.

[16] U.S. Const. art. I, § 8, cl. 11.

[17] Fleming v. Page, 50 U.S. (9 Howard) 603, 614 (1850).

armed rebellion within a targeted country through the use of proxy puppet forces, leading to the target's dissolution into several smaller political units, each more or less at odds with the others and therefore manipulable by outside influences, is as sure a means of practical political conquest as overrunning and occupying the entire country with the aggressor's own troops, and far less costly in the aggressor's own blood and treasure. Everyone knows that a situation of this kind is precisely what has bedeviled Syria for quite some time now.

2. As described above, Syria's present-day circumstances fit the Nuremberg pattern of premeditated aggression rather closely. Indeed, the Tribunal's findings as to Germany's aggression against Poland in 1939 provide a perfect verbal template for the contemporary aggression various states have unleashed against Syria:

> The war [of violent régime change] against [Syria] did not come suddenly out of an otherwise clear sky; * * * this war of aggression * * * was premeditated and carefully prepared, and was not undertaken until the moment was thought opportune for it to be carried through as a definite part of the preordained scheme and plan.
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> For the aggressive designs of [Syria's enemies] were not accidents arising out of the immediate political situation in [the Middle East] and the world; they were a deliberate and essential part of [those enemies'] foreign policy.

Against the background of this comparison, President Trump's letter offers only puerile evasions of responsibility for his attack on "the Shayrat military airfield in Syria", not even arguably plausible exonerations. In his letter he stated that he "acted in the vital national security and foreign policy interests of the United States". The Tribunal, however, invoked "the power to try and punish persons who" committed aggression (among other crimes), even though they were "acting in [what they perceived to be] the interests of the[ir own] countries, whether as individuals or as members of organizations". That "the aggressive designs of the Nazi Government * * * were a deliberate and essential part of Nazi foreign policy" immunized neither that government nor those individuals from legal condemnation.

In addition, the supposed "national security * * * interests" of the United States *cannot to any degree* require, permit, include, or excuse the commission of aggression. For the Preamble to the Constitution sets out this country's *true and exclusive* "national security * * * interest[ ]" as being "to * * * provide for the common *defence*",[18] *not* to engage in international aggression or allied criminality. Furthermore, the Constitution delegates to Congress the "Power To lay and collect

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[18] Emphasis supplied.

Taxes, Duties, Imposts and Excises to * * * provide for the common *Defence*",[19] *not* to subsidize international warmongering. Indeed, it is impossible to lend even a scintilla of credence to an alleged "national interest" of the United States as to which the collection and expenditure of public funds are constitutionally disallowed.

Finally, even if true, President Trump's claim that he acted "in order to degrade the Syrian military's ability to conduct further chemical attacks and to dissuade the Syrian regime from using or proliferating chemical weapons, thereby promoting the stability of the region and averting a worsening of the region's current humanitarian catastrophe" lacks legal support. For, even leaving aside the obvious problem that the jury remains undecided as to whether Syria even possesses chemical weapons at this time, let alone actually intends "to conduct further chemical weapons attacks" and to "us[e] or proliferat[e] chemical weapons",[20] the Constitution delegates to the President no authority, on his own initiative, to "promot[e] the stability of [any] region" outside of the territory or possessions of United States, or to "avert[ ] a worsening of [any such] region's current humanitarian catastrophe". The Constitution simply does not invest the President with the powers of an armed and belligerent international social-worker. And whether the President could take such action as the result of the exercise of his "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur", or as the consequence of some statute enacted pursuant to the "legislative Powers * * * vested in" Congress, is a moot point.[21] For the President's letter identifies no such "Treat[y]" or statute.

Admittedly, inasmuch as the International Military Tribunal no longer exists, the principles embodied in its judgments would need to be enforced against President Trump by some other establishment operating under some law of its own. But such enforcement is not beyond the realm of possibility.

B. The Charter of the United Nations

> The Charter [of the International Military Tribunal] define[d] as a crime the planning of war that is a war of aggression or a war in violation of international treaties. The Tribunal * * * decided that certain of the defendants planned and waged aggressive wars against 10 nations, and were therefore guilty of this series of crimes. This ma[de] it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these

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[19] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

[20] *See, e.g.,* William Craddick, *Evidence Calls Western Narrative About Syrian Chemical Attack Into Question* (6 April 2017), at <disobedientmedia.com>.

[21] *See* U.S. Const. art. II, § 2, cl. 2 *and* art. I, § 1.

> aggressive wars were also "wars in violation of international treaties, agreements, or assurances."[22]

So, for the purpose of applying the principles of the Tribunal, there is no need to investigate any treaties which the President's aggression against Syria may have violated. Yet it would not be amiss, for the sake of completeness, to consider the Charter of the United Nations, to which the United States subscribe.

1. In 1946, the United Nations—of which both the United States and Russia were members (the latter as a component of the Union of Soviet Socialist Republics)—"[*a*]*ffirm*[*ed*] the principles of international law recognized by the *Charter of the Nurnberg Tribunal* and the judgment of the Tribunal".[23] And in 1947 it defined "aggression" as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations", and provided that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression".[24]

2. With respect to "Purposes and Principles", the Charter mandates that—

> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of the United Nations.[25]

Self-evidently, assuming *arguendo* that the United States are embroiled in a legitimate "international dispute[ ]" with Syria (as opposed to a trumped-up controversy being staged as an apology for aggression), President Trump's attack on that country falls afoul of these provisions.

3. Going further, with respect to "Pacific Settlement of Disputes" the UN Charter requires that, whenever an international dispute arises—

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[22] Judgment, Part IV, Violations of International Treaties, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, Opinion and Judgment, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1947), at 46.

[23] United Nations General Assembly, Resolution Adopted by the General Assembly, 95(I). Affirmation of the Principles of International Law recognized by the Charter of Nurnberg Tribunal (11 December 1946).

[24] United Nations General Assembly, Resolution Adopted by the General Assembly, 3314(XXIX). Definition of Aggression, Annex, arts. 1 and 5.

[25] Chapter I, Article 2.

> 1. The parties to [such a] dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
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> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.[26]

> 1. Should the parties to a dispute * * * fail to settle it * * * they shall refer it to the Security Council.
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> 2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action * * * or to recommend such terms of settlement as it may consider appropriate.[27]

> The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.[28]

Again assuming *arguendo* that the United States have a legitimate "dispute" with Syria concerning the latter's alleged use of chemical weapons, President Trump's attack does not merely "endanger the maintenance of international peace and security" but radically imperils it—raising the specter of a head-to-head confrontation between the United States and Russia, *both of them armed to the teeth with nuclear weapons,* in the most politically and socially unstable region on earth.

Before launching the fifty-nine "Tomahawk" missiles, President Trump did not "first of all" (or at any time) seek to resolve the "dispute" "by negotiation, enquiry, * * * or other peaceful means". Unless one is sufficiently naïve to accept at face value what his letter claims "United States intelligence indicates", no competent and unbiased forensic "enquiry" of any sort was had, let alone an opportunity for the Security Council to "investigate" the matter and "recommend * * * terms of settlement". The procedure President Trump applied was, not even "to shoot first *and ask questions later*", but instead "to shoot first *and ask no questions*

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[26] Chapter VI, Article 33.

[27] *Id.*, Article 37.

[28] *Id.*, Article 34. The Security Council "may, at any stage of a dispute * * * or of a situation of like nature, recommend appropriate procedures or methods of adjustment." *Id.,* Article 36, ¶ 1.

at all".

4. Going further yet, in regard to "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" the UN Charter prescribes that—

> Nothing * * * shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council * * * to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[29]

Yet, even on the assumption that a legitimate "dispute" exists between the United States and Syria concerning the latter's alleged use of chemical weapons, the possibility that the United States can assert a plausible claim of "*self-*defense" is excluded by the admissions in President Trump's letter that those weapons were deployed only against "*Syrian* civilians in southern Idlib Province, *Syria*," and that the United States' subsequent missile strikes were intended to "promot[e] the stability of *the region* and [to] avert[ ] a worsening of *the region's* current humanitarian catastrophe"[30]—"the region" being *the Middle East*, not the United States or any territory or possession thereof.

That being the case, other provisions of the Charter should have come into play—

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken * * * to maintain or restore international peace and security.[31]

> In order to prevent an aggravation of the situation, the Security Council may * * * call upon the parties concerned to comply with such provisional measure as it deems necessary or desirable. * * * The Security Council shall duly take account of

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[29] Chapter VII, Article 51.

[30] Emphasis supplied.

[31] Chapter VII, Article 39.

failure to comply with such provisional measures.[32]

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures * * * .[33]

> Should the Security Council consider that measures [not involving the use of armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.[34]

Perforce of these provisions, as the result of President Trump's attack on Syria the United States could rightly be deemed to be a rogue or outlaw state, and as such would be exposed to all sorts of punitive measures at the hands of the remaining Members of the United Nations.

5. Although it appears indisputable that President Trump's missile attack against Syria violated the UN Charter, it is also true that, except in the title of Dostoevsky's novel, punishment does not always follow crime. The likelihood that the United Nations will even formally condemn, let alone take effective punitive action as the result of, President Trump's aggression is next to nil.

This is not because the UN lacks formal authority over the United States with respect to this matter. For the Charter announces that "[i]n order to ensure prompt and effective actions by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out is duties under this responsibility the Security Council acts on their behalf."[35] Moreover, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[36]

The United States, of course, enjoy a permanent seat in the Security Council,[37] along with a veto on some of its operations.[38] This power of veto

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[32] *Id.*, Article 40.

[33] *Id.*, Article 41.

[34] *Id.*, Article 42.

[35] Chapter V, The Security Council, Functions and Powers, Article 24, ¶ 1.

[36] *Id.,* Article 25.

[37] Chapter V, The Security Council, Composition, Article 23, ¶ 1.

[38] Chapter V, The Security Council, Functions and Powers, Article 27, ¶ 3.

apparently applies to a case in which the United States are charged with causing a "threat to the peace, breach of the peace, or act of aggression".[39] So it would seem that the authority of "[t]he Security Council [to] determine the existence of and [to] make recommendations, or decide what measures shall be taken * * * to maintain or restore international peace and security"[40] would prove unavailing where aggression by the world's most powerful aggressor-nation were involved. (One would also anticipate that, if for political reasons the United States chose to abstain from the use of its veto against a proposal that the Security Council should take measures in response to President Trump's attack on Syria, then Great Britain or France would supply the necessary negative vote.)

C. The Constitution and Other Laws of the United States

The lesson the International Military Tribunal teaches is that Americans should control their own leaders, not wait for foreigners to do so after those leaders have run amuck on the world stage. And Americans have a ready and effective means to assert that control: namely, "[t]h[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof".[41] For although the Charter of the International Military Tribunal has lapsed, and although the UN Charter apparently licenses the government of the United States to frustrate the workings of the UN Security Council in its efforts "to maintain or restore international peace and security" (the principles of the International Military Tribunal be damned), rogue public officials within the government of the United States cannot "veto" their own Constitution. Rather, the Constitution can and does "veto" many actions which such rogue officials might take—including, especially, international aggression.

In his letter to Congress, President Trump declared that he "acted in the vital national security and foreign policy interests of the United States, pursuant to [his] constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive". He did *not* claim, however, that his attack on Syria constituted an act of national self-defense—because clearly it could not possibly be cloaked in that vestment. His assertion of a license to attack Syria in pursuit of "the vital national security and foreign policy interests of the United States" has already been sufficiently rebutted.[42] So what remains to be considered are his claims of supposed "constitutional authority": (i) "to conduct foreign relations"; and (ii)

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[39] *Compare id. with* Chapter VII, Action with Respect of Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39.

[40] Chapter VII, Action with Respect of Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39.

[41] U.S. Const. art. VI, cl. 2.

[42] *See ante,* at 7-8.

"as Commander in Chief and Chief Executive". Analysis exposes both of these contentions as baseless.

1. The Constitution sets out specific powers of the President with respect to "foreign relations": namely, that "[h]e shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls";[43] and that "he shall receive Ambassadors and other public Ministers".[44] No conceivable construction of any one of these powers, or all of them together, could license the President to launch an act of aggression against a foreign country, however. Even the power "to make Treaties" would be unavailing for that purpose, because a President conniving with rogue Senators could not approve a supposed "Treat[y]" which purported to invest the President with fictitious "war powers" beyond those the Constitution sanctions. Inasmuch as no "Treat[y]" can override the Constitution,[45] such a supposed "Treat[y]" would not be "made * * * under the Authority of the United States".[46]

Certain general powers of the President could involve "foreign relations". *First,* the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient"[47]—which could include *ad hoc* reports on international affairs. Yet, although the President's letter would fall within this authority even had it not been required by Congressional statute,[48] providing "Information" about some event is not the same as enjoying the authority to cause such an event to take place in the first instance; and in this case the President did not "*recommend* to the[ ] Consideration [of Congress] such Measures as he * * * judge[d] necessary and expedient", to be undertaken at some later date after appropriate Congressional "Consideration", but simply announced his action as a *fait accompli*. *Second,* the President "shall take Care that the Laws be faithfully

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[43] U.S. Const. art. II, § 2, cl. 2.

[44] U.S. Const. art. II, § 3.

[45] *See, e.g.*, Doe v. Braden, 57 U.S. (16 Howard) 635, 657 (1854); The Cherokee Tobacco, 78 U.S. (11 Wallace) 616, 620-621 (1871); Holden v. Joy, 84 U.S. (17 Wallace) 211, 242-243 (1872); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); United States v. Minnesota, 270 U.S. 181, 208 (1926); Reid v. Covert, 354 U.S. 1, 16-18 (1957) (opinion of Black, J., announcing the judgment of the Court).

[46] *See* U.S. Const. art. VI, cl. 2.

[47] U.S. Const. art. II, § 3.

[48] JOINT RESOLUTION Concerning the war powers of Congress and the President ("War Powers Resolution"), H.J. Res. 542, 7 November 1973, Pub. L. 93-148, 87 Stat. 555, *now codified as amended at* 50 U.S.C. §§ 1541 through 1548.

executed"[49]—which could include the prosecution against a foreign nation of hostilities which "the Laws" have authorized. Here, however, Congress has not "declare[d] War" against Syria;[50] and no statute has authorized any, or could constitutionally have authorized an aggressive, attack against that country.[51]

2. President Trump's claim to have "acted * * * pursuant to [his] constitutional authority * * * as Commander in Chief and Chief Executive" raises numerous red flags.[52] Indeed, one must approach any such overly general assertions of Presidential power with skepticism (if not incredulity), keeping in the forefront of his mind that the very first rules of constitutional interpretation with respect to the President are that he "possess[es] no power not derived from the Constitution",[53] and that "[t]he burden of establishing a[ny] delegation of power to [any official of] the United States * * * is upon those making the claim".[54]

a. The Constitution makes no reference to a "Chief Executive" *in haec verba*. And although it does mandate that "[t]he executive Power shall be vested in a President of the United States",[55] it does not specifically define the term "executive Power"—except implicitly, as inclusive of the powers set out in Article II, together with whatever powers Congress could provide to the President pursuant to its authority in Article I. So some construction of the Constitution is necessary.

(1) As usual in such an endeavor, *pre*-constitutional legal history must be consulted first. For inasmuch as "[w]e are bound to interpret the Constitution in the light of the law as it existed at the time [the Constitution] was adopted",[56] "our inquiry concerns the [legal] standard[s] prevailing at the time of the adoption of the Constitution, not * * * years later".[57] During the Founding Era, WE THE PEOPLE

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[49] U.S. Const. art. II, § 3.

[50] *See* U.S. Const. art. I, § 8, cl. 11.

[51] *See post,* at 31-40.

[52] What follows is largely taken from my book *Constitutional "Homeland Security", Volume Three, By Tyranny Out of Necessity: The Bastardy of "Martial Law"* (Ashland, Ohio: Bookmasters, Inc., Revised & Expanded Second Edition, 2014, 2016), at 451-469.

[53] *Ex parte* Quirin, 317 U.S. 1, 25 (1942). *Accord, Ex parte* Milligan, 71 U.S. (4 Wallace) 136-137 (1866) (opinion of Chase, C.J.).

[54] Bute v. Illinois, 333 U.S. 640, 653 (1948).

[55] U.S. Const. art. II, § 1, cl. 1.

[56] Mattox v. United States, 156 U.S. 237, 243 (1895).

[57] United States v. Barnett, 376 U.S. 681, 693 (1964). "The scope and effect of * * * many * * * provisions of the Constitution[ ] are best ascertained by bearing in mind what the law was before." *Ex parte* Wilson, 114 U.S. 417, 422 (1885). *E.g.,* United States v. Palmer, 16 U.S. (3 Wheaton) 610, 630 (1818); Smith v. Alabama, 124 U.S. 465, 478 (1888); Thompson v. Utah, 170 U.S. 343, 344, 349-350 (1898); South Carolina v. United States, 199 U.S. 437, 449-450 (1905); Kansas v. Colorado, 206 U.S. 46, 94-95 (1907); *Ex parte* Grossman, 267 U.S. 87, 108-109 (1925); Patton v. United States, 281 U.S. 276, 287, 290 (1930); Dimick v. Schiedt, 293 U.S. 474, 476 (1935).

who "ordain[ed] and establish[ed] th[e] Constitution"[58] were doubtlessly familiar with Blackstone's "principle" in regard to the King's "executive power",

> that in the exertion of lawful prerogative, the king is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him * * * unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring, that thus far the prerogative shall go and no farther. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where it's jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law: I say, in the *ordinary* course of law; for I do not * * * speak of those *extraordinary* recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defence against the violence of fraud or oppression.[59]

On the one hand, Americans of that time were far too politically astute and practical to deny that the delegation to public officials of *some* "executive power" "[ ]sufficient for the ends of government" would always be necessary "in the *ordinary* course of law".[60] On the other hand, though, they had just experienced the necessity for "*extraordinary* recourses to first principles" against King George III's serial abuses and misuses of "executive power", which the Declaration of Independence had denounced at length. So, in the light of this dolorous experience, paid for with an extensive effusion of blood and treasure, WE THE PEOPLE set out to *define, by those definitions to limit, and by means of those limitations to control* "executive power" as much as practicable, so that such misbehavior would never again recur. The question was then, and remains today, "Where should, and does, the Constitution 'expressly, or by evident consequence, lay down some exception or boundary' to 'executive power'?"

A focus on what Blackstone called "some exception or boundary" is

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[58] U.S. Const. preamble.

[59] William Blackstone, *Commentaries on the Laws of England* (Philadelphia, Pennsylvania: Robert Bell, American Edition, 4 Volumes & Appendix, 1771-1773), Volume 1, at 250-251. Blackstone was the preëminent mentor of America's Founding Fathers on the *pre*-constitutional laws of England. *See, e.g.,* Schick v. United States, 195 U.S. 65, 69 (1904); *and* Alden v. Maine, 527 U.S. 706, 715 (1999). And he has been consulted as a primary authority on that law ever since. *See, e.g.,* Calder v. Bull, 3 U.S. (3 Dallas) 386, 396 (1798) (opinion of Patterson, J.); *Ex parte* Wilson, 114 U.S. 417, 423 (1885); *Ex parte* Grossman, 267 U.S. 87, 111 (1925); Ingraham v. Wright, 430 U.S. 651, 661, 664 (1977).

[60] *See, e.g., The Federalist* No. 70 (Alexander Hamilton).

particularly fitting, because the very division of authority within the Constitution, in comparison with *pre*-constitutional English law, evidences the Founders' concern with circumscribing "executive power" to the greatest degree still "[ ]sufficient for the ends of government", as well as with following Blackstone's *dictum* that "all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end".[61] Indeed, any intelligent construction of "[t]he executive Power" must be informed by the observations that:

(i) The plenary power of the King to reject Parliamentary legislation the Constitution transformed into the President's veto, which Congress can always override.[62]

(ii) Some preëxisting "executive powers" of the King the Constitution divided between the President and the Senate—including the powers to "appoint Ambassadors",[63] "to make Treaties",[64] and to "appoint * * * [certain] Officers of the United States".[65]

(iii) Other preëxisting "executive powers" of the King the Constitution transferred entirely to Congress—including the powers to regulate foreign and domestic "Commerce" in certain ways;[66] to "fix the Standard of Weights and Measures";[67] "[t]o coin Money, regulate the Value thereof, and of foreign Coin";[68] "[t]o constitute [judicial] Tribunals";[69] to establish certain necessary public facilities;[70] as well as almost all of the powers relating to "War", "the land and naval Forces", and "the Militia of the several States".[71] And,

(iv) A few of the preëxisting "executive powers" of the King the Constitution eliminated entirely—including the power to grant "Title[s] of

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[61] *Commentaries on the Laws of England,* ante note 59, Volume 1, at 49.

[62] *Compare id.*, Volume 1, at 154 and 261, *with* U.S. Const. art. I, § 7, cl. 1.

[63] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 253, *with* U.S. Const. art. II, § 2, cl. 2.

[64] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 257-258, *with* U.S. Const. art. II, § 2, cl. 2.

[65] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 272, *with* U.S. Const. art. II, § 2, cl. 2.

[66] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 263-264, 265-266, and 273-274, *with* U.S. Const. art. I, § 8, cl. 3.

[67] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 274-276, *with* U.S. Const. art. I, § 8, cl. 5.

[68] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 276-278, *with* U.S. Const. art. I, § 8, cl. 5.

[69] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 266-267, *with* U.S. Const. art. I, § 8, cl. 9 *and* art. III, § 1.

[70] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 264-265, *with* U.S. Const. art. I, § 8, cl. 17.

[71] *See post*, at 19-28.

Nobility"[72] and all of the powers associated with his position as "the head and supreme governor of the national church".[73]

(2) Besides the examples of these particular enumerated powers and disabilities, the manner in which the Constitution invests the President with authority demonstrates the limited nature of "[t]he executive Power" in general. *First,* the President obviously can claim no power to set aside or disregard the Constitution. How could any rational and honest President ever consider himself justified in acting above or outside of, let alone against, the Constitution, when what the Constitution calls "the Office of President"[74] is entirely a construct of the Constitution, and when "[b]efore he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation:—'I do solemnly swear (or affirm) that I will *faithfully* execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States'"?[75] Self-evidently, he could not, because the constitutional duty to which he has thus bound himself is to "take Care that the Laws be *faithfully* executed"[76]—just and only as the Constitution requires, and as Congress has prescribed. *Second*, the President lacks any power to enact, or otherwise purport to make, any "Laws" on his own, because "[*a*]*ll* legislative Powers * * * granted" in the Constitution are "vested" exclusively in Congress.[77] *Third,* the President lacks any power to adjudicate the application of the laws to particular parties in specific "Cases" or "Controversies".[78] *Fourth*, he enjoys no power to repeal, revoke, annul, overrule, set aside, suspend, or disregard any laws—unless those laws themselves so provide, or are not really "laws" at all because they are unconstitutional.[79] *Fifth and last,* the President cannot plausibly assert that "[t]he executive Power" embraces every theoretical power which might be imagined to be "executive" in nature:

> If the framers of the Constitution had intended "the

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[72] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 271-272, *with* U.S. Const. art. I, § 9, cl. 8.

[73] *Compare* W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 278-280, *with* U.S. Const. art. VI, cl. 3 ("no religious Test"), *and with* amend. I.

[74] U.S. Const. art. II, § 1, cls. 4 and 7.

[75] U.S. Const. art. II, § 1, cl. 7 (emphasis supplied). Significantly, this "Oath or Affirmation" employs the oracular prophetic and imperative phrase "I will" rather than the phrase more common in the idiomatic English of the time, "I shall".

[76] U.S. Const. art. II, § 3 (emphasis supplied).

[77] *Contrast* U.S. Const. art. I, § 1 (emphasis supplied) *with* art. II, § 1, cl. 1.

[78] *Contrast* U.S. Const. art. II, § 1 *with* art. III, §§ 1 and 2, cls. 1 and 2.

[79] *See, e.g.,* Huntington v. Worthen, 120 U.S. 97, 101-102 (1887); Norton v. Shelby County, 118 U.S. 425, 442 (1886); Poindexter v. Greenhow, 114 U.S. 270, 288 (1885).

> executive [P]ower" in [Article II, Section 1, Clause 1] to include all power of an executive nature, they would not have added the carefully defined grants of [Article II, Section 2]. They were scholarly men, and it exceeds belief "that the known advocates in the [Federal] Convention [of 1787] for a jealous grant and cautious definition of federal powers should have silently permitted the introduction of words and phrases in a sense rendering fruitless the restrictions and definitions elaborated by them." Why say, the President shall be commander-in-chief; may require opinions in writing of the principal officers in each of the executive departments; shall have power to grant reprieves and pardons; shall give information to Congress concerning the state of the union; shall receive ambassadors; shall take care that the laws be faithfully executed—if all of these things and more had already been vested in him by the general words? The Constitution is exact in statement. * * * That the general words of a grant are limited when followed by those of special import is an established canon; and an accurate writer would hardly think of emphasizing a general grant by adding special and narrower ones without explanation. "An affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended."[80]

(3) So, applying "[*t*]*he rule of construction * * * that affirmative words in the Constitution * * * must be construed negatively as to all other cases*"[81] compels the conclusion that "[t]he executive Power" encompasses all of the powers explicitly defined in Article II of the Constitution, plus every power which Congress may be authorized to delegate to the President by statute,[82] plus the power to enforce the laws of the United States pursuant to and in fulfillment of his duty to "take Care that the Laws be faithfully executed".[83] *But nothing else.* "[T]he Laws [to] be faithfully executed" include "the supreme Law of the Land", consisting of the Constitution, "the Laws of the United States which shall be made *in Pursuance* [*of the Constitution*]", "and all Treaties * * * made[ ] *under the Authority of the United States*" (which is another way of saying "in Pursuance [of the Constitution]",

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[80] Myers v. United States, 272 U.S. 228-229 (1926) (McReynolds, J., dissenting).

[81] *Ex parte* Vallandigham, 68 U.S. (1 Wallace) 243, 252 (1864) (emphasis in the original) (footnote omitted). *Accord,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803); *and* Cohens v. Virginia, 19 U.S. (6 Wheaton) 264, 394-395 (1821).

[82] *See* U.S. Const. art. I, § 8. This under the proviso that Congress must devise sufficient standards to guide the President's actions. *See, e.g.,* Panama Refining Company v. Ryan, 293 U.S. 388, 414-430 (1935).

[83] *Compare* Myers v. United States, 272 U.S. 233-238 (1926) (McReynolds, J., dissenting), *with* U.S. Const. art. II, § 3; *and* art. I, § 8, cl. 18.

because "the Authority of the United States" is coextensive with the Constitution).[84]

b. Of course, the Constitution does employ the term "Commander in Chief" with respect to the President. But fully to understand the *limited* power inherent in that status, one must recognize that the term "Commander in Chief" does not denote a separate, independent, and expansive authority to the boundaries of which no clear limits can be assigned, other than the will of the President himself. That the term "Commander in Chief" is followed by the phrases "of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States" belies any such theory. For those are phrases of definition, delineation, *and therefore delimitation*. And, as shall be explained below, the nature and extent of that delimitation depends entirely upon the powers of Congress. The President's right (and duty) is to *be* "Commander in Chief", *but only of those forces and subject to those rules that Congress provides and decrees. And perforce of his duty to "take Care that the Laws be faithfully executed"*[85] *he must conform his every action as "Commander in Chief" to whatever constitutional policy Congress prescribes*.

Now,

> in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide.[86]

So, an analogy to the powers of the King in *pre-*constitutional times is always improper as an argument aimed at attributing to the President some power he otherwise would not enjoy. But always cogent are a comparison *and contrast* which demonstrate that the Constitution has not only denied to the President, but also delegated to Congress, some power with which the King was invested at the time the Constitution was ratified. Thus, a review of the President's authority as "Commander in Chief", of the relevant powers of Congress, and of the analogous

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[84] U.S. Const. art. VI, cl. 2 (emphasis supplied). *See In re* Neagle, 135 U.S. 1, 63-68 (1890).

[85] U.S. Const. art. II, § 3.

[86] Fleming v. Page, 50 U.S. (9 Howard) 603, 618 (1850). "[W]e have no person in this government who * * * performs the public duties of a sovereign". United States v. Lee, 106 U.S. (16 Otto) 196, 206 (1882).

powers of the King proves highly informative.

(1) Under *pre*-constitutional British imperial law (which applied in full force to the American Colonies), the King—not Parliament—enjoyed "the sole prerogative of making war and peace"; acted "as the generalissimo, or the first in military command, within the kingdom"; exercised in his "capacity * * * of general of the kingdom" "the sole power of raising and regulating fleets and armies", and "the sole supreme government and command of the militia"; and enjoyed "the sole prerogative, as well of erecting, as manning and governing" "forts, and other places of strength, within the realm", and "the sole supreme government and command * * * of all forts and places of strength". All of this "martial" authority "ever was * * * the undoubted right of his majesty * * * ; and * * * both or either house of parliament cannot, nor ought to, pretend to the same".[87] Thus, had the term then been current, the King would have been considered the "Commander in Chief" in every conceivable respect, with nothing left in that domain for Parliament to supervise, let alone control. *All* of it would have lain exclusively within the English "executive power".

(2) In stark contrast, other than the office of "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States",[88] the original Constitution explicitly withheld from the President—the executive in the American Republic analogous to the King in the British Monarchy—*all* of this "executive" authority, and assigned it instead exclusively to Congress:

• "[T]he [King's] sole prerogative of making war" became the *Congressional* power "[t]o declare War"[89]—so that "[t]he Constitution * * * invests the President, as Commander in Chief, with the power to wage war *which Congress has declared*" and nothing else.[90] The Constitution delegates no true "war power" to the President. He is to exercise the authority of "Commander in Chief" *in* a "War"—which "amount[s] to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of th[is country]"[91]—but only if and when Congress actually "declare[s] War", and then only under the conditions Congress attaches to that "declar[ation]". The reason for

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[87] W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 1, at 257, 262-263. Curtly and contemptuously, Blackstone dismissed the events leading up to and the interregnum of Oliver Cromwell by observing that "the [King's] prerogative of enlisting and of governing [fleets and armies] * * * indeed was disputed and claimed *contrary to all reason and precedent*, by the long parliament of king Charles I; but upon the restoration of his son [Charles II], was solemnly declared by * * * statute * * * to be in the king alone". *Id.* at 262 (emphasis supplied).

[88] U.S. Const. art. II, § 2, cl. 1.

[89] U.S. Const. art. I, § 8, cl. 11.

[90] *Ex parte* Quirin, 317 U.S. 1, 26 (1942) (emphasis supplied).

[91] *The Federalist* No. 69 (Alexander Hamilton).

this should be self-evident: WE THE PEOPLE refused to empower a single individual to hurl their country into "War".

> [T]he power of declaring war is not only the highest sovereign prerogative, but * * * it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burdensome taxes, and personal sufferings. * * * Nay, it always involves the prosperity, and not infrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow wherever a successful commander will lead; and in a republic, whose institutions are essentially founded on the basis of peace, there is infinite danger that war will find it both imbecile in defence, and eager for contest. Indeed, the history of republics has but too fatally proved, that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride, and betray their interests. It should therefore be difficult in a republic to declare war; but not to make peace.[92]

In keeping with these admonitions, America's Founders sought to insure that the determination for or against "War"—on which decision the lives, or deaths, of countless citizens and even of the Nation as a whole might depend—should always remain in the hands of a large, diverse body of legislators who would serve as "checks and balances" on each other, not in the hands of a single executive officer who could even prove to be psychologically unbalanced.[93]

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[92] Joseph Story, *Commentaries on the Constitution of the United States* (Boston, Massachusetts: Little, Brown, and Company, Fifth Edition, 1905), Volume 2, § 1171, at 92. With the present-day Congress's abdication of war-making power to the President, the opposite has become true.

[93] Interestingly enough, the Constitution does not heed Blackstone's *dictum* that "wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace". *Commentaries on the Laws of England,* ante note 59, Volume 1, at 258. Instead, it divides "the power of making peace" (at least in a formal sense through "Treaties") between the President and the Senate. U.S. Const. art. II, § 2, cl. 2. Nonetheless, through exercises of its plenary powers over the Armed Forces, public revenues, and public expenditures, Congress as a whole could compel a recalcitrant President to "mak[e] peace". *See* U.S. Const. art. I, § 8, cls. 1, 2, 12, 13, and 14; *and* § 9, cl. 7. By statute Congress could determine for peace, declare for peace, and then so disarm the President of troops, armaments, and other requisites that he would be compelled to accede to Congress's desires. If he refused to "take Care that the Laws" Congress enacted in that regard were "faithfully executed", he could be "removed from Office on Impeachment and

Of course, the Founders well knew that the danger of "War" would lie not just in a precipitous "*declar*[*ation* of] War". "War" also could be imposed upon the country through a *fait accompli* perpetrated by an unscrupulous President who had time on his hands to plan aggression (or to goad some foreign power into hostilities), a large "standing army" in his hands, and no compunction against getting blood all over his hands. So the Founders established further "checks and balances" on the "martial" authority of, and resources available to, the President:

•"[T]he [King's] sole power of raising and regulating fleets and armies" became the *Congressional* powers "[t]o raise and support Armies", "[t]o provide and maintain a Navy", and "[t]o make Rules for the Government and Regulation of the land and naval Forces".[94] So Congress might provide the President with *no* "Armies" or "Navy" over which he could posture as "Commander in Chief" to any degree, and might circumscribe his ability to command those it did provide.

•"[T]he [King's] sole supreme government * * * of the militia" became the *Congressional* powers "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions", and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States".[95] By dint of this authority, Congress might provide for "calling forth the Militia" on terms so unusual, narrow, and strict that they would hardly ever "be employed in the Service of the United States" (as opposed to performing services for their own States or for the United States through the agency of the States)—and, when they were, they might be "call[ed] forth" only upon the request of someone other than the President.[96] Moreover, in keeping with the character of the Militia as "the Militia *of the several States*",[97] all other powers with respect to the Militia the Constitution reserved to the States[98]—(i) for "organizing, arming, and disciplining" their Militia

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Conviction of * * * high Crimes and Misdemeanors". U.S. Const. art. II, § 4; art. I, § 2, cl. 5; *and* art. I, § 3, cls. 6 and 7.

[94] U.S. Const. art. I, § 8, cls. 12, 13, and 14.

[95] U.S. Const. art. I, § 8, cls. 15 and 16.

[96] Even as staunch a proponent of Presidential power as Alexander Hamilton recognized that "[t]he President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and the governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this * * * , therefore, the power of the President would be inferior to that of either the monarch or the governor." *The Federalist* No. 69. *See* Opinion of the Justices, 8 Mass. 548 (1812).

[97] U.S. Const. art. II, § 2, cl. 1 (emphasis supplied).

[98] *See* U.S. Const. amend. X.

as to every subject not within the ken of Congress (and even for those within the authority of Congress should it default on its duties in that particular);[99] (ii) for "calling forth" their Militia for all purposes not within Congress's authority (and for those within the authority of Congress, too, if it should default on its duties in that regard);[100] (iii) for "governing" their Militia when not "employed in the Service of the United States";[101] (iv) for "the Appointment of the Officers" in their Militia (other than the President himself as "Commander in Chief");[102] and (v) for "training their Militia according to the discipline prescribed by Congress" for the three purposes for which Congress may "provide for calling forth the Militia", as well as for whatever additional purposes the States determine may be necessary.[103] Finally,

• The King's "sole prerogative, as well of erecting, as manning and governing" "forts, and other places of strength, within the realm", and "sole supreme government and command * * * of all forts and places of strength", became the *Congressional* power "[t]o exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, Arsenals, [and] dock-Yards".[104]

Thus, rather than constituting an all-embracing authority which elevates the President to the level of a *Führer* over the United States as a whole, but absolves him of responsibility to anyone other than himself—and somehow renders irrelevant Congress's powers "[t]o declare War" and so on—the position of "Commander in Chief" amounts to merely the thinnest residue of the prerogatives the King enjoyed:

• The President is "Commander in Chief of the Army and Navy of the United States"[105]—but is always subject to the power of Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces".[106] (And Congress, of course, can make no such "Rules" that violate the Constitution.)

• The President is "Commander in Chief * * * of the Militia of the several

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[99] *See* U.S. Const. art. I, § 8, cl. 16.

[100] *See* U.S. Const. art. I, § 8, cl. 15.

[101] *See* U.S. Const. art. I, § 8, cl. 16; *and* amend X.

[102] U.S. Const. art. I, § 8, cl. 16.

[103] U.S. Const. art. I, § 8, cl. 16; *and* amend. X.

[104] U.S. Const. art. I, § 8, cl. 17.

[105] U.S. Const. art. II, § 2, cl. 1.

[106] U.S. Const. art. I, § 8, cls. 14 and 18.

States, when called into the actual Service of the United States"[107]—but even upon that contingency is always subject to the power of Congress "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States".[108] And the President may take up his authority with respect to the Militia (such as it may be) only after Congress has exercised its power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions",[109] and only on the terms which Congress sets out in its exercise of that power. Otherwise, each of the States controls her own Militia (presumably with their own Governors as commanders in chief).

• The President is "Commander in Chief" *of nothing else, for any purpose and to any degree whatsoever—for the unquestionable reason that the Constitution says so.* After all, the "powers actually granted [by the Constitution to any branch of the General Government] must be such as are expressly given, or given by necessary implication".[110] "[T]he President * * * possess[es] no power not derived from the Constitution."[111] Consequently, "powers not granted [to the President] are *prohibited*".[112] Or, *inclusio unius exclusio alterius*: Beyond the powers actually granted, no powers exist—no matter what anyone in the apparatus of the General Government, in the big "mainstream media", and in influential and subversive pressure-groups (both domestic and foreign) may claim to the contrary.

• Furthermore, even if Congress does provide "Armies" and "a Navy" at all times, and does provide for "calling forth the Militia" on more than an extremely rare basis, the rules Congress promulgates for the governance of those institutions will determine—and therefore limit—not just the authority of the President as "Commander in Chief" in principle, but also his ability to function in that capacity in practice. Thus Congress by statute can control the President as "Commander in Chief"—and, in fact, has done so in certain circumstances throughout American history.[113] And no one in the Army, Navy, or Militia may comply with any

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[107] U.S. Const. art. II, § 2, cl. 1.

[108] U.S. Const. art. I, § 8, cls. 16 and 18.

[109] U.S. Const. art. I, § 8, cls. 15 and 18.

[110] Martin v. Hunter's Lessee, 14 U.S. (1 Wheaton) 304, 326 (1816). *Accord*, McCulloch v. Maryland, 17 U.S. (4 Wheaton) 316, 405 (1819).

[111] *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

[112] United States v. Butler, 297 U.S. 1, 68 (1936) (emphasis supplied).

[113] *See, e.g., An Act for the protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers,* Act of 6 February 1802, CHAP. IV, 2 Stat. 129; JOINT RESOLUTION Concerning the war powers of Congress and the President ("War Powers Resolution"), H.J. Res. 542, 7 November 1973, Pub. L. 93-148, 87 Stat. 555, *now codified as amended at* 50 U.S.C. §§ 1541

purported "order" of the President which contravenes the very rules upon which the Army and Navy are founded, and upon which the Militia operate when in "the actual Service of the United States". So the President will in fact have no forces over which to posture as "Commander in Chief" *unless he commands them precisely as Congress directs*. And, overall,

•In fulfillment of his "Oath or Affirmation" "'that [he] will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States'",[114] and as part of his duty to "take Care that the Laws be faithfully executed",[115] the President must conform to each and every one of the foregoing limitations on his office. Or else.[116]

Moreover, another critical distinction exists between the President and the *pre-*constitutional English Monarch. According to Blackstone, the Mother Country's "constitution"

> attribute[d] to the king, in his political capacity, absolute *perfection*. The king can do no wrong. Which antient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people * * * . And, secondly, that the prerogative of the crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.[117]

Clearly, the latter point of law remains true with respect to the President, as well. But not the former. A President *can* "do wrong" and *can* be made "answerable for it *personally* to his people". If (say) a rogue President should misuse a "standing army" ostensibly at his command for the base purpose of "levying War against the[United States]"—for example, by attempting to impose "martial law" through force of arms against American *résistants* across the country—he could first "be

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through 1548.

[114] U.S. Const. art. II, § 1, cl. 7.

[115] U.S. Const. art. II, § 3.

[116] *See* U.S. Const. art. II, § 4.

[117] *Commentaries on the Laws of England,* ante note 59, Volume 1, at 246 (footnote omitted).

removed from Office on Impeachment for, and Conviction of, Treason",[118] *and thereafter personally tried for that crime*.[119] So, rather than immunizing the person of a renegade President from the heady charge of "Treason", his very position as "Commander in Chief" with access to a rogue "standing army" willing to shoot down ordinary Americans at his behest would render him vulnerable to that charge should ambition and an appetite for abusive powers entice him to step out of line. Similarly, if a renegade President violated the statutory limitations Congress had established for the exercise of his authority as "Commander in Chief",[120] his misbehavior would constitute at least a "high * * * Misdemeanor[ ]" punishable by "remov[al] from Office".[121] For, as Blackstone pointed out, under *pre-*constitutional English law "[t]he first and principal [*high misdemesnor*] is the mal-administration of * * * high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment".[122] In certain circumstances, such misbehavior could also constitute a "high Crime[ ]" other than "Treason", if it amounted, not simply to some degree of negligence on the President's part, but instead to his willful attempt effectively to usurp such of Congress's powers as those "[t]o declare War" and "[t]o make Rules for the Government of the land and naval Forces".[123] For that would implicate an intentional violation of the President's constitutional duty to "take Care that the Laws be faithfully executed", and therefore of his constitutional "Oath or Affirmation" that he "'will faithfully execute the Office of President of the United States, and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States'".[124]

Self-evidently, the Founding Fathers did not engage in this radical departure from Anglo-American legal tradition simply for the sake of novelty or sport. For "[i]t cannot be presumed that any clause in the constitution is intended to be without effect".[125] Rather, they sought to control the President by shifting from him

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[118] *See* U.S. Const. art. II, § 4; art. I, § 2, cl. 5; *and* art. I, § 3, cls. 6 and 7.

[119] *See* U.S. Const. art. I, § 3, cl. 7; *and* art. III, § 3. *See* 18 U.S.C. § 2381. *See also* 18 U.S.C. §§ 241 and 242.

[120] *See, e.g.,* JOINT RESOLUTION Concerning the war powers of Congress and the President ("War Powers Resolution"), H.J. Res. 542, Pub. L. 93-148, 87 Stat. 555, *now codified as amended at* 50 U.S.C. §§ 1541 through 1548.

[121] *See* U.S. Const. art. II, § 4.

[122] *Commentaries on the Laws of England,* ante note 59, Volume 4, at 121.

[123] U.S. Const. art. I, § 8, cls. 11 and 14.

[124] U.S. Const. art. II, § 3 *and* § 1, cl. 7.

[125] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

to Congress the mass of "martial" authority which had theretofore been treated as "executive" in nature under the English "constitution". To put the matter into a modern context, the Founders wanted to forestall as much as possible the appearance of some *Größter Feldherr aller Zeiten,*[126] operating under the principles of *das Führerprinzip* ("the Leader Principle") which now seem to have insinuated themselves within this country's highest political and even legal councils. Rightly recognizing George Washington as a *rarissima avis*—an eagle among flightless men—the Founders foresaw that the day could, and probably would, come when some vulture would sit upon the Presidential perch. Then this country would be safer with Congress largely in control of all "martial" matters.

That being so, Congress may not delegate, let alone abdicate, to the President any part (let alone the entirety) of its powers "[t]o declare War"; "[t]o raise and support Armies"; "[t]o provide and maintain a Navy"; "[t]o make Rules for the Government and Regulation of the land and naval Forces"; "[t]o provide for calling forth the Militia"; "[t]o provide for organizing, arming, and disciplining, the Militia";"[t]o provide * * * for governing such Part of the[Militia] as may be employed in the Service of the United States"; or "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers".[127] *First*, in general, by their very placement in the Constitution these are now "*legislative* Powers * * * vested in * * * Congress", not "*executive* Power * * * vested in [the] President" (whatever their character might have been once upon a time under the old English "constitution").[128] And "[t]hat Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution".[129] *Second*, and even more decisively, Congress may not delegate any of those particular powers to the President, because that would reverse WE THE PEOPLE'S specific determination—consciously made in the face of and directly contrary to centuries of *pre*-constitutional law—to remove these powers from "executive" jurisdiction and transfer them to the "legislative" domain.

If the Founders can be faulted in any respect as to this matter, it is not because the constraints they imposed on the President's "martial" authority were ever insufficient in principle, but instead because their confidence in the willingness

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[126] "Greatest warlord of all time"—the fawning tribute paid to Adolf Hitler by his sycophantic chief of staff, Wilhelm Keitel, in the summer of 1940 after the fall of France.

[127] U.S. Const. art. I, § 8, cls. 12 through 16, and 18.

[128] *Compare and contrast* U.S. Const. art. I, §§ 1 and 8 *with* art. II, § 1, cl. 1 (emphases supplied).

[129] Marshall Field & Company v. Clark, 143 U.S. 649, 692 (1892). *Accord,* Panama Refining Company v. Ryan, 293 U.S. 388, 421 (1935).

of Congress to enforce those limitations appears to have been overly optimistic. Congress has always enjoyed the plenary power to keep a rogue President on a very short constitutional leash as far as so-called "war powers" go.[130] The foresight and courage to do so to the required degree, however, have been chronically lacking.[131]

3. So, as "Commander in Chief", what "war powers"—whether constitutional or statutory—could have justified President Trump's attack on Syria? The answer is: *none.*

a. At one time (indeed, as late as World Wars I and II), the outbreak of war was usually accompanied by a formal declaration of war. Indeed, ideally as a matter of international law, "hostilities * * * must not commence without previous and explicit warning, in the form of a reasoned declaration of war or of an ultimatum with conditional declaration of war".[132]

Nonetheless, a constitutional "War" may sometimes arise with legal informality—as when one of the several States "engage[s] in War" as a matter of fact, but "without the Consent of Congress" as a matter of law, if she is "actually invaded, or in such imminent Danger as will not admit of delay".[133] As the Constitution attaches no conditions to this right to "engage in War" under such dire circumstances, a State may act prior to and ultimately without a "declar[ation of] War" by Congress.[134] Presumably, because this ability to "engage in War" is an explicitly reserved constitutional authority the exercise of which does *not* depend upon "the Consent of Congress", a State caught up in that situation may even continue to fight off an alien invader notwithstanding that Congress has failed or even has refused "[t]o declare War".[135]

The United States, too, may in fact "engage in War" under such circumstances, if Congress has authorized the regular Armed Forces, the "Troops, or Ships of War" which the States may "keep * * * in time of Peace" "with the

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[130] *See* U.S. Const. art. I, § 8, cls. 11 through 16, and 18; *and* art. II, § 4.

[131] *See* Louis Fisher, *Presidential War Power* (Lawrence, Kansas: University of Kansas Press, Second Edition, Revised, 2004).

[132] Hague Convention No. III Relative to the Opening of Hostilities (18 October 1907), art. 1.

[133] U.S. Const. art. I, § 10, cl. 3.

[134] *See* U.S. Const. art. I, § 8, cl. 11.

[135] For instance, Congress might desire an invasion of limited scope to be repelled by a measured application of defensive force on the part of the State being invaded, but nonetheless might eschew a formal "declar[ation of] War" so as to avoid the complications that course of action might entail thereafter. One can easily imagine a situation of this kind occurring in one or more of the States having common borders with Mexico, if Mexican troops or *para-*military police in sizeable numbers infiltrated those States in order to provide armed assistance for the international traffic in illegal aliens and illicit drugs being staged through Mexico.

Consent of Congress" (the National Guard and the Naval Militia), the Militia of the several States, or any combination thereof, under the command of the President, to repel sudden or imminent attacks before it has had the opportunity "[t]o declare War" formally.[136]

Situations also may arise in which the President—on his own initiative and without a "declar[ation of] War" by (or perhaps other specific authorization from) Congress, under color of his status as "Commander in Chief of the Army and Navy of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States",[137] and with the various armed establishments of the United States and the several States already provided to him by Congress—may be compelled to deploy those establishments to repel a sudden or imminent attack by some foreign aggressor. As the Supreme Court held in *The Prize Cases*,

> [b]y the Constitution, Congress alone has the power to declare a * * * foreign war. * * * The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war against * * * a foreign nation * * * . But by [certain] Act of Congress [in force at the time of the Supreme Court's decision], he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations * * * .
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> If a war be made by invasion of a foreign state, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.[138]

Situations of this nature, though, in which a so-called "state of war" in fact precedes a "declar[ation of] War" in law, plainly involve the exigency of community self-

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[136] *See* U.S. Const. art. I, § 8, cls. 11, 14, 15, and 16, and § 10, cl. 3; *and* art. II, § 2, cl. 1 and § 3.

[137] U.S. Const. art. II, § 2, cl. 1.

[138] 67 U.S. (2 Black) 635, 668 (1863). *See generally, e.g.,* Clarence A. Berdahl, *War Powers of the Executive in the United States*, University of Illinois Studies in the Social Sciences, Volume IX, Nos. 1 and 2 (Urbana, Illinois: University of Illinois, 1920), Chapter IV.

defense, which needs no explicit constitutional sanction. For Americans retain "among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them";[139] and "[s]elf-defence * * * is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society".[140]

The circumstances surrounding President Trump's attack on Syria did not satisfy any of these conditions, however.

b. Although his letter is somewhat opaque on this point, President Trump seems to rely upon the War Powers Resolution of 1973 as the sole statutory authority for his actions.[141] Unfortunately, such reliance is unjustifiable.

(1) The War Powers Resolution is not an open-ended Congressional grant of a license for the President to engage in "war" as he sees fit, but instead a restatement of the constitutional *limitations* on the President's powers in that domain, coupled with a procedure for enforcement of those constraints.

(2) The Resolution declares its purpose to be "to fulfill the intent of the framers of the Constitution of the United States and to insure that *the collective judgment of both the Congress and the President* will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[142] No one doubts, however, that President Trump's attack on Syria did *not* involve "the introduction of United States Armed Forces into hostilities [between the United States and Syria], or into situations where imminent involvement in [such] hostilities [wa]s clearly indicated by the circumstances". Neither did the President's action result from "the *collective* judgment of *both* the Congress *and* the President" arrived at *before* the fact. The President did report to Congress, as the War Powers Resolution requires[143]—but only *after* the fact.

(3) The Resolution further provides that "[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised *only* pursuant to (1) a declaration of

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[139] Declaration of Independence.

[140] W. Blackstone, *Commentaries on the Laws of England,* ante note 59, Volume 3, at 4.

[141] JOINT RESOLUTION Concerning the war powers of Congress and the President ("War Powers Resolution"), H.J. Res. 542, 7 November 1973, Pub. L. 93-148, 87 Stat. 555, *now codified as amended at* 50 U.S.C. §§ 1541 through 1548.

[142] § 2(a), 87 Stat. at 555, *now codified at* 50 U.S.C. 1541(a) (emphasis supplied).

[143] *See* §§ 4(a) and 5(a), 87 Stat. at 555-556, *now codified at* 1543(a) and 1544(a).

war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[144] As the prelude to the President's attack on Syria, though, there was *no* "declaration of war", *no* "specific statutory authorization" for the President's action,[145] and *no* "national emergency created by [a Syrian] attack upon the United States, its territories or possessions, or its armed forces". And nothing in the Resolution suggests that the President may exercise his authority as Commander in Chief "to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," when he unilaterally decides to "promot[e] the stability of [some foreign] region" or "to avert[ ] a worsening of th[at] region's current humanitarian catastrophe" (as President Trump's letter recites).

(4) The Resolution mandates that "[t]he President in *every* possible instance shall consult with Congress *before* introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances".[146] The circumstances surrounding the missile strikes against Syria certainly provided a "possible instance" in which the President *could safely* have "consult[ed] with Congress before introducing United States Forces into hostilities". For, in the absence of evidence that the Syrian government intended to conduct an operation employing chemical weapons in the very near term, the President's purpose—"to degrade the Syrian military's ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons"—could have been achieved even had the Navy's missile strike been postponed for just a few days so as to allow for emergency "consult[ation] with Congress". Yet the President refused to follow this obvious prudent course.

(5) The Resolution requires that,

> [i]n the absence of a declaration of war, in any case in which United States Armed Forces are introduced—
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> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances
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> * * * * *
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> the President shall submit within 48 hours * * * a report, in writing,

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[144] § 2(c), 87 Stat. at 555, *now codified at* 50 U.S.C. § 1541(c) (emphasis supplied).

[145] *See post, at* 31-40.

[146] § 3, 87 Stat. at 555, *now codified at* 50 U.S.C. § 1542 (emphasis supplied).

setting forth—

> (A) the circumstances necessitating the introduction of United States Armed Forces;
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> (B) the constitutional and legislative authority under which such introduction took place; and
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> (C) the estimated scope and duration of the hostilities or involvement.[147]

Although the President's letter does outline "the circumstances" preceding and rationalizing the missile strikes, its reliance simply on what "United States intelligence indicates" raises more questions than it answers. Worse yet, the letter provides no citation of "legislative authority" for the President's actions; and (as explained above) its bare invocation of his "constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive" holds no more water than a sieve. Worst of all, the letter fails to address "the estimated scope and duration of the hostilities or involvement", announcing only that "[t]he United States will take additional action, as necessary and appropriate, to further its important national interests"—which could entail anything from no action at all to further missile strikes on Syrian airfields, the carpet-bombing of Damascus, or even a full-scale invasion of Syria by United States ground forces.

(6) The Resolution provides that,

> [w]ithin sixty calendar days after a report is submitted or is required to be submitted * * * , whichever is earlier, the President shall terminate any use of United States Armed Forces * * * unless the Congress (1) has declared war or has enacted a specific authorization for such use * * * , (2) has extended by law such sixty-day period, or (3) is physically unable to meet as the result of an armed attack upon the United States.[148]

This provides Congress with time to consider whether "a[ ] use of United States Armed Forces" is justifiable *vel non*. While it extends to the President a rebuttable presumption that his actions may be licit, it certainly does not imply that a military operation *illegal in its inception* must be deemed legitimate unless and until Congress formally repudiates it, let alone because it continues for a "sixty-day period" or some extension thereof while Congress looks into the matter. Indeed, absent one or more

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[147] § 4(a), 87 Stat. at 555-556, *now codified at* 50 U.S.C. § 1543(a).

[148] § 5(b), 87 Stat. at 556, *now codified at* 50 U.S.C. § 1544(b).

of the three specified circumstances, *even a military operation somehow sanctioned by "th*[*e*] *Constitution, and the Laws of the United States * * * made in Pursuance thereof*"[149] "shall terminate". Thus, this section of the Resolution enables Congress to exercise its undoubted constitutional authority to control a President's exercise of what he claims to be his authority as "Commander in Chief", *whether proper or improper*, by "terminat[ing] *any* use of United States Armed Forces".

(7) The Resolution directs that "at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution."[150] Once again, this enables Congress to exercise its undoubted constitutional authority to control a President's exercise of what he claims to be his authority as "Commander in Chief", *whether proper or improper*, by ordering that "United States Armed Forces" be "removed" from the scene. Inasmuch as the "Commander in Chief" cannot command forces in some location from which "forces shall be removed", this assertion of overarching Congressional authority demolishes the theory advanced by some people that a President's mere status as "Commander in Chief" immunizes him from Congressional control over his deployment of the Armed Forces. In this case, unfortunately, the missiles have been launched, and people have been killed—*without* "a declaration of war or specific statutory authorization". So not only has Congress been deprived of the opportunity to control the situation *ex ante* in the White House and the Pentagon as the result of the President's dereliction of duty under the Resolution, but also it has been rendered impotent to correct the situation *ex post* on the ground in Syria as the result of the President's infliction of fatalities.

(8) Finally, the Resolution specifies that

> [a]uthority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—
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> * * * * *
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> * * * from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that ir is intended to constitute specific

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[149] U.S. Const. art. VI, cl. 2.

[150] § 5(c), 87 Stat. at 557-558, *now codified at* 50 U.S.C. § 1544(c).

statutory authorization within the meaning of this joint resolution.[151]

This ensures that rogue President and a cabal of conniving Senators, in league with some foreign power or *multi*-national organization, cannot purport to expand the President's power to engage in military operations by dint of some "Treat[y]",[152] unless Congress as a whole concurs through legislation explicitly tailored to a situation covered by that very "Treat[y]". The President's letter, of course, refers to no "Treat[y]" as providing supposed international approval for his attack on Syria.

c. Although his letter makes no reference to it, President Trump might now attempt to rationalize his attack on Syria under color of the Authorization for Use of Military Force Resolution ("the AUMF Resolution") enacted by Congress in 2001.[153]

This Resolution provides that

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[154]

Notwithstanding its garbled syntax—which confines the reach of this mandate to *those particular "nations, organizations, or persons" which or who perpetrated certain specific crimes in the past*, thus arming the President with no authority to interdict "future acts of international terrorism" by *any other* "nations, organizations, or persons"—today the AUMF Resolution is widely assumed to

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[151] § 8(a)(2), 87 Stat. at 558, *now codified at* 50 U.S.C. § 1547(a)(2).

[152] *See* U.S. Const. art. II, § 2, cl. 2.

[153] Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States ("Authorization for Use of Military Force"), S.J. Resolution 23, 18 September 2001, Pub. L. 107-40, 115 Stat. 224. What follows on this subject is largely drawn from my book *Constitutional "Homeland Security", Volume Two, The Sword and Sovereignty: The Constitutional Principles of "the Militia of the Several States"* (Front Royal, Virginia: CD-ROM Edition, 2012), at 1580-1583.

[154] § 2(a), 115 Stat. at 224. *See* § 2(b)(1), 115 Stat. and 224, which states that § 2(a) "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."

delegate to the President the power effectively to wage war on his own initiative without a specific "declar[ation of] War" from Congress, by deploying "all necessary and appropriate force" against *any* foreign nation or non-state "terrorists" in order "to prevent any future acts of international terrorism" that he imagines, on whatever questionable evidence, speculation, or even personal whim, might occur. Inasmuch as prior to September of 2001 the Constitution already empowered the President, as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States",[155] to employ such of those forces as Congress made available to him to defend this country from an imminent attack, the Resolution's license "*to prevent* any *future* acts of international terrorism" must (according to the popular misconception) be intended to go beyond national self-defense to what is called "preëmptive" or "preventive" war—or, more accurately put, *aggression*.[156]

Now, even if the AUMF Resolution were misconstrued in that fashion, it could not apply to the President's attack against *Syria*, because no one has ever plausibly alleged that *Syria* was among "those nations" which "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored" the actual perpetrators of those attacks, or that *Syria* is planning or preparing for "any future acts of international terrorism against the United States". Indeed, if one believes the official story that "the terrorist attacks that occurred on September 11, 2001" were conducted by "al-Qaeda" or some other equally shadowy Islamic terrorist organization with headquarters supposedly in caves in Afghanistan, Syria now appears to be the victim of an on-going attempt at "régime change" by that very organization or even-more-radical groups derived from it. That being so, the Resolution should authorize "the President", not to attack Syria, but instead "to use all necessary and appropriate force against" that organization and its derivative groups *in Syria's favor*.

In any event, one would expect that, after the verdicts of the International Military Tribunal at Nuremberg, the principles of which were later incorporated in the Charter of United Nations, the black art of "preëmptive" or "preventive" war would find neither defenders nor apologists, let alone practitioners, among high officials of the United States. Surely, the evidence is more persuasive that Adolf

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[155] U.S. Const. art. II, § 2, cl. 1.

[156] Some people attempt to differentiate between "preëmptive" and "preventive" war on the grounds that a "preëmptive" war is one launched against an aggressive attack which is undoubtedly *imminent*, whereas a "preventive" war is one undertaken to forestall an aggressive attack which is merely *predictable* at some indeterminate future time. If an aggressive attack is actually imminent, however, immediate self-defense is always justified. There is nothing peculiarly "preëmptive" about it.

Hitler had sound military and political reasons (though certainly not legal or moral justifications) for launching a "preëmptive" or "preventive" war against Josef Stalin in 1941 than that any such reason existed for any *ersatz* "war" which rogue officials of the General Government have launched in the Caribbean, the Balkans, the Middle East, and Africa since the end of this country's military misadventures in Vietnam in 1973.[157] Yet Nazi Germany's attack on the Soviet Union was charged at Nuremberg, and is still almost universally condemned today, as an example of the Third Reich's unbridled aggression[158]—while the United States' multiple militaristic forays aimed at "régime change" in various countries are shrugged off as unfortunately heavy-handed foreign policy which actually merits applause, because it aims at spreading American "democracy" amongst, securing "human rights" for, and otherwise bringing "progress" to the benighted natives of those regions.

Even more consequential, long before the Nuremberg trials or the Charter of the United Nations, the Constitution plainly proscribed "preëmptive" or "preventive" war. The Preamble—the purposes stated in which must be construed as limitations on, or at least standards for interpretation of, all that follows in the rest of the document[159]—lists as the goal relevant here "to * * * provide for the common *defence*".[160] Then, in its very first delegation of specific substantive

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[157] *See, e.g.,* Victor Suvorov, *The Chief Culprit: Stalin's Grand Design to Start World War II* (Annapolis, Maryland: Naval Institute press, 2013); Joachim Hoffmann, *Stalin's War of Extermination, 1941-1945: Planning, Realization and Documentation* (Capshaw, Alabama: Theses & Dissertations Press, 2001); John Mosier, *Deathride—Hitler vs. Stalin: The Eastern Front, 1941-1945* (New York, New York: Simon & Schuster, 2010), at 80-81 & the authorities cited in note 49, and at 99-100. Basically, Hitler's attack on Stalin amounted to "a falling out among thieves", as the two dictators were equally guilty for the initial aggression against Poland which precipitated World War II, and for almost two years thereafter coöperated economically while Hitler waged war against France, England, and numerous other countries in Western Europe and the Balkans, and Stalin absorbed Latvia, Lithuania, and Estonia into the Soviet Union and seized territory from Finland and Romania. *See, e.g.,* John Kolasky, *Partners in Tyranny: The Nazi-Soviet Nonaggression Pact, August 23, 1939* (Toronto, Canada: The Mackenzie Institute for the Study of Terrorism, Revolution and Propaganda, 1990).

[158] *See* Judgment, Part III, The Common Plan of Conspiracy and Aggressive War, Section (J), The Aggressive War Against the Soviet Union, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1946), at 43-45. The Tribunal mentioned the defendants' contention "that the attack upon the USSR was justified because the Soviet Union was contemplating an attack upon Germany, and making preparations to that end", but dismissed this argument on the grounds that "[i]t is impossible to believe that this view was ever honestly entertained." *Id.* at 45. No doubt this myopic view was focused through the lens of the Soviet Union's participation in the trials as prosecutor and judge, not as a defendant.

[159] *See, e.g.,* William W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago, Illinois: The University of Chicago Press, 1953), Volume 1, at 374-379.

[160] Emphasis supplied.

authority to Congress, the Constitution grants the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common *Defence* and general Welfare of the United States".[161] How in the exercise of legal logic Congress could "provide for the common *Defence*" by "declar[ing a] War [of *aggression*]"—or how, in the face of the practical rule that "in warfare everything depends upon logistics", it could even hope to conduct such a "War" when it lacked the authority to "lay and collect Taxes, Duties, Imposts and Excises" "[t]o raise and support Armies" and "[t]o provide and maintain a Navy" for such a nefarious purpose[162]—passes understanding. Rather, the obvious conclusion must be that "the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression and aggrandizement".[163] Similarly for Congress's power "[t]o provide for calling forth the Militia", which may be "employed in the Service of the United States", only "to execute the Laws of the Union, suppress Insurrections and repel Invasions"[164], but never to attack foreign nations at all, let alone in violation of the Constitution or other "Laws of the Union". Just so for the States, too, which the Constitution prohibits from "engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay".[165]

To be sure, the Constitution does delegate to Congress, in general terms, the powers "[t]o raise and support Armies" and "[t]o provide and maintain a Navy".[166] But these must be construed consistently with the Preamble,[167] which excludes aggression as a purpose for deploying these forces. In addition, Congress's power "[t]o raise and support Armies" is subject to the specific constraint that "no Appropriation of Money to that use shall be for a longer Term than two Years".[168] This requirement enables each newly elected House of Representatives, the House of Congress most closely identified with WE THE PEOPLE, to act as a fiscal "check and balance" on a "standing army".[169] Now, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law".[170] But no "Money"

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[161] U.S. Const. art. I, § 8, cl. 1 (emphasis supplied).

[162] *See* U.S. Const. art. I, § 8, cls. 12 and 13.

[163] Fleming v. Page, 50 U.S. (9 Howard) 603, 614 (1850).

[164] U.S. Const. art. I, § 8, cls. 15 and 16.

[165] U.S. Const. art. I, § 10, cl. 3.

[166] U.S. Const. art. I, § 8, cls. 12 and 13.

[167] *See* Rhode Island v. Massachusetts, 37 U.S. (12 Peters) 657, 730-731 (1838).

[168] U.S. Const. art. I, § 8, cl. 12.

[169] *See* U.S. Const. art. I, § 2, cl. 1.

[170] U.S. Const. art. I, § 9, cl. 7.

is to be found in the Treasury, save in consequence of some legislation which provides for raising revenue. "All Bills for raising Revenue", however, "shall originate in the House of Representatives".[171] And the House of Representatives is limited in its ability to "rais[e] Revenue" through exercise of the "Power To lay and collect Taxes, Duties, Imposts and Excises" by the restriction that such revenue can be raised, and once raised expended, only "to pay the Debts and provide for the common *Defence* and general Welfare of the United States".[172] So "Money" already deposited in the Treasury may not be paid out for an "Appropriation to th[e] Use" of "rais[ing] and support[ing] Armies" (or of "provid[ing] and maintain[ing] a Navy") in aid of aggression. And no new "Taxes, Duties, Imposts and Excises" may be imposed or collected for that purpose, either.

Congress, moreover, lacks the discretion to delegate to the President even the license "[t]o declare [a] War [for the common Defence]". Under *pre*-constitutional Anglo-American imperial law, the King (Britain's chief executive)—not Parliament (Britain's supreme legislature)—enjoyed "the sole prerogative of making war and peace".[173] By explicitly lodging among the legislative powers of Congress what had long been the exclusive executive power "[t]o declare War", WE THE PEOPLE not only denied that power to the President outright, but also withheld from Congress any privilege to delegate it back to him in any way, shape, or form. Congress can claim no authority whatsoever to resurrect and impose on Americans the *pre*-constitutional British allocation of authority between the legislative and executive branches of government which WE THE PEOPLE have explicitly rejected in their own fundamental law. *A fortiori*, because Congress lacks the power "[t]o declare [a] War [of aggression]", it is doubly disabled from purporting to delegate such a nonexistent authority to the President. And a President conniving with rogue Senators could not circumvent Congress's disability on this score by approving a supposed "Treat[y]" which purported to invest the President with fictitious "war powers" beyond those the Constitution sanctions.[174] For no "Treat[y]" can override the Constitution.[175]

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[171] U.S. Const. art. I, § 7, cl. 1.

[172] U.S. Const. art. I § 8, cl. 1 (emphasis supplied).

[173] W. Blackstone, *Commentaries on the Laws of England*, ante note 59, Volume 1, at 257.

[174] Under color of U.S. Const. art. II, § 2, cl. 2.

[175] *See, e.g.*, Doe v. Braden, 57 U.S. (16 Howard) 635, 657 (1854); The Cherokee Tobacco, 78 U.S. (11 Wallace) 616, 620-621 (1871); Holden v. Joy, 84 U.S. (17 Wallace) 211, 242-243 (1872); Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924); United States v. Minnesota, 270 U.S. 181, 208 (1926); Reid v. Covert, 354 U.S. 1, 16-18 (1957) (opinion of Black, J., announcing the judgment of the Court).

In sum, not only does nothing in "th[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof"[176] justify President Trump's attack on Syria, but every relevant provision therein condemns it as utterly *lawless*.

D. The Declaration of Independence

Yet even with the ostensible support of Congress in some statute, the President could not engage in acts of aggression, for a reason which transcends the particular governmental powers the Constitution delegates to Congress and the President.

The Preamble to the Constitution provides that

> WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

In large measure, these are *extra-* and even *supra-*constitutional concepts, because they control the interpretation and constrain the exercise of *all* government powers—*including those of the sovereigns themselves* ("WE THE PEOPLE of the United States"). For example, no matter who exercises it, sovereignty is legitimate only to the extent that it serves *the common good* of the people within the ambit of its authority. So even We the People can do nothing in their capacity as sovereigns that openly denies or disrespects, or that fails, neglects, or refuses to serve, the common good—which limitation the Preamble itself recognizes in its promise to "promote the general Welfare". For that reason, it cannot be the province of Congress, the President, or the Judiciary—even of WE THE PEOPLE themselves—to define the terms in the Preamble in any way any of them may whimsically see fit. If it were, the Constitution could be ripped to rhetorical shreds in a manner even more destructive than the deconstruction rogue judges are now imposing on it through such false doctrines as "the living Constitution" and "balancing individual rights against governmental powers". But, if so, where are proper definitions to be found?

To answer that question requires taking close account of the historical and

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[176] U.S. Const. art. VI, cl. 2.

legal contexts in which the Constitution arose. When that is done, it becomes apparent that the Declaration of Independence is the historical source *and the legal foundation* of the original States' constitutions; of the Articles of Confederation; of the Constitution, the Bill of Rights, and all subsequent Amendments; and of all "Laws of the United States which [have] be[en] made in Pursuance of the Constitution]; and all Treaties made, or which shall be made, under the Authority of the United States" since the Founding Era.

Everyone is aware that the Declaration

> in the Name, and by the Authority of the good People of the[ ] Colonies, solemnly publish[ed] and declare[d], That these United Colonies are, and of Right ought to be FREE AND INDEPENDENT STATES; that they are Absolved from all Allegiance to the British Crown, and that all political connection between the and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.

Nonetheless, many continue to pretend that the Declaration is not *the still fully enforceable* supreme organic law of each of the several States and of the United States as a whole. This is perverse, to say the least. For, if the Declaration were not such, then neither WE THE PEOPLE, nor any of the States individually, nor the United States collectively could have claimed since 1776 an independent sovereignty on the basis of which to enact any other laws, such as the States' constitutions, the Articles of Confederation, or "th[e] Constitution, and the Laws of the United States * * * made in Pursuance thereof".

Yet, plainly, the Declaration established, not only when an individual living in the *pre-*constitutional era became an American citizen, independent of Britain as a matter of law as well as fact, but also when all American citizens, in their collective political capacity as "the good People of these Colonies", became independent sovereigns, no less as a matter of law.[177] After all, the Declaration of Independence was "[t]he first official action of this nation", which "declared the foundation of [a new] government" on the basis of the most fundamental of all legal

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[177] *See* Inglis v. Trustees of Sailor's Snug Harbor, 28 U.S. (3 Peters) 99, 120-121 (1830); McIlvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209, 212 (1808); Harcourt v. Gaillard, 25 U.S. (12 Wheaton) 523, 526-528 (1827).

principles derived from "the Laws of Nature and of Nature's God".[178] As such, the Declaration must have had, and must perpetually have, the full force of organic law in America. For if "[t]he first official action of this nation" had amounted merely to the penning of lines for a chorus in a scene of "political theater" —that is, if immediately upon its publication the Declaration had failed to secure for "the good People of these Colonies" the *legal* status it asserted for them of "Free and Independent States" with "full Power * * * to do all * * * Acts and Things which Independent States may of right do"—no one then or thereafter could rationally have contended that the patriots' revolt against the Crown and its loyal subjects had ever rested upon any legal foundation whatsoever.[179] Therefore, the original State constitutions, the Articles of Confederation, the original Constitution, the Bill of Rights, and all else that followed thereupon qualify as proper "laws" only because of the Declaration's legal efficacy—and *only to the extent that they confirm and conform to what the Declaration set out as the "self-evident" "truths" of political life which justified it.*

Thus, far from having no force of law itself, the Declaration is *the* source of WE THE PEOPLE'S sovereignty; and, through delegation from them, not only of such governmental powers as the several States individually and the United States collectively may exercise, but also of such disabilities—that is, *absences* of power—as constrain the several States and the United States. Therefore, at all times, those powers and disabilities in all of their particulars must be predicated and conditioned upon, and applied according to, the principles of law that the Declaration explicitly invoked as the bases for attesting that the "Free and Independent [American] States * * * have full Power * * * to do all * * * Acts and Things which Independent States may of right do".

Now, the Declaration identified three legal principles upon which the authority of the newly independent States would rest: (i) What "Independent States may *of right* do" finds its genesis in the permanent "Laws of Nature and of Nature's God", not in any merely transient human law. (ii) "[T]he governed" can "consent" to delegate to any "Form of Government" ***only*** "*just* powers" for the ***sole*** purpose of "secur[ing]" "certain unalienable Rights". And (iii) no "Form of Government [which] becomes destructive of these ends" can deny the ultimate "Right of the People to alter or to abolish it", and therefore to determine, in the first

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[178] Gulf, Colorado and Santa Fé Railway Company v. Ellis, 165 U.S. 150, 159 (1897).

[179] *See* Williams v. Bruffy, 96 U.S. 176, 186 (1878). That is, the Colonists would have been "traitors" whether they had lost, or won, the War of Independence. Had they lost, the British would have condemned and punished them as such. And had they won, they could have fallen back for justification only on the wry observation of the Elizabethan courtier Sir John Harington: "Treason doth never prosper: what's the reason? Why if it prosper, none dare call it treason."

instance and with finality, when, why, and to what degree that "Form of Government" has "become[so] destructive", and what recourse should be had towards its correction or supersession—which "Right" necessarily entails "the People['s]" independent and complete control over *both* the interpretation as judges of the constitution or other organic law of that "Form of Government" *and* the determination as jurors of the underlying facts of the situation to which that juridical interpretation applies.[180]

The Preamble is correct, then, to link its promise to "provide for the common defence" with its promise to "establish Justice". And perforce of that linkage, Congress's power "[t]o declare War"[181] must be taken as the power "[t]o declare [a *just*] War", and no other sort of "war"; while the President must exercise his authority as "Commander in Chief of the Army and Navy of the United States"[182] only in a manner consistent with the principles of a "*just* war".

These principles long antedate both the Constitution and the Declaration of Independence.[183] And they establish that President Trump's attack on Syria cannot be justified:[184]

> • In the absence of an actual attack by Syria upon the United States, or any imminent danger thereof, that could not be effectively prevented by an action short of a military strike.[185] (The President did not claim, and no evidence has been produced by anyone else, of such an actual attack or imminent danger.)
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> • Simply to weaken Syria militarily, or to prevent her from becoming stronger than she then was, and thereby a possible threat to the United States, based on the mere fear that her leaders' future intentions might be

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[180] *See by way of analogy* Ohio Valley Water Company v. Ben Avon Borough, 253 U.S. 287, 289 (1920); Crowell v. Benson, 285 U.S. 22, 60 (1932); Saint Joseph Stock Yards Company v. United States, 298 U.S. 38, 51-52 (1936).

[181] U.S. Const. art. I, § 8, cl. 11.

[182] U.S. Const. art. II, § 2, cl. 1.

[183] *See*, *e.g.*, Hugo Grotius, *The Law of War and Peace* [*De Jure Belli ac Pacis Libri Tres* (1646)] (Indianapolis, Indiana: The Bobbs-Merrill Company; Reprint from *The Classics of International Law*, by The Carnegie Endowment for International Peace, 1925). The Founding Fathers, however, were well aware of Grotius's work. *See*, *e.g*, *The Federalist* No. 84 note [4].

[184] What follows in the text can be no more than indicative of the problems in this area. For the literature on the justice *vel non* of the United States' military incursions into the Middle East is vast. As representative of one perspective, *see* D.L. O'Huallachain & J. Forrest Sharpe, Editors, *Neo-Conned! Just War Principles: A Condemnation of War in Iraq* (Vienna, Virginia: Light in the Darkness Publications, IHS Press, 2005).

[185] *See* H. Grotius, *The Law of War and Peace*, *ante* note 183, Book II, Chapter I, §§ IV and V, at 173-175.

aggressive.[186] (The President's letter rationalized the attack as an attempt "to degrade the Syrian military's ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons"—which is basically nonsensical if, as the Syrian government asserts, Syria possesses no chemical weapons.)

• To assist armed rebels in bringing about "régime change" in Syria, even if this were imagined actually to be of benefit to Syrian people, as opposed merely to the advantage of the United States and their allies.[187] (The President's letter referred to "promoting the stability of the region", as if an attack on the legitimate government of Syria in the course of a civil war in that country would not materially and morally aid the rebels in their quest for "régime change", and thus necessarily undermine the country's "stability".)

• As part of a scheme to impose a *neo-*imperialistic agenda on the Middle East, or to establish some sort of global New World Order.[188] (It is widely understood that, even before the Administration of George W. Bush, what President Trump's letter called "the vital national security and foreign policy interests of the United States" were being aligned with such purposes.[189]) And especially,

• To take sides in regional conflicts among different religions, within the same religion, or between religious and secular forces competing for political influence.[190]

Moreover, all other considerations aside, even had President Trump believed in good faith that his premeditated attack against Syria was consistent with the principles of a "just war", *a prior declaration of war by the sovereign power remained the necessary prerequisite for his action*.[191] WE THE PEOPLE are America's earthly sovereigns. Congress is their representative, exercising the exclusive constitutional power "[t]o declare War".[192] Therefore, absent a Congressional "declar[ation of]

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[186] *See id.,* Book II, Chapter I, § XVII, at 184, *and* Chapter XXII, § V, at 549.

[187] *See id*., Book II, Chapter XXII, § XII, at 551.

[188] *See id*., Book II, Chapter XXII, § XIII, at 551-552.

[189] *See, e.g., Neo-Conned!, ante* note 184, Chapter 2. As to Syria in particular, *see, e.g.,* Aaron Kesel, *CIA Documents Reveal Plans To Oust Syrian President Assad And Destroy Syria For Oil Pipeline* (13 April 2017), at <https://wearechange.org>.

[190] *Compare* H. Grotius, *The Law of War and Peace*, *ante* note 183, Book II, Chapter XXII, § XV, at 555, *with* U.S. Const. amend. I.

[191] *See* H. Grotius, *The Law of War and Peace*, *ante* note 183, Book III, Chapter III, § V, at 633-634.

[192] U.S. Const. art. I, § 8, cl. 11.

War", no premeditated attack on Syria by the President on his own initiative could constitute part of a "just war", because it would lack the primary indicium of *jus ad bellum* (justice in the approach to war): namely, an announcement of hostilities by the sovereign or the sovereign's representative.

III. PRESIDENT TRUMP'S ATTACK ON SYRIA HAS EXPOSED HIM TO IMPEACHMENT, CONVICTION, AND EVEN CRIMINAL PROSECUTION.

President Trump's attack on Syria was not only politically but also legally imprudent in the extreme, because it has rendered him liable to impeachment, conviction, and even criminal prosecution.

A. The Constitution provides that "[t]he President * * * shall be removed from Office for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors",[193] and that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law".[194] Application of these provisions to President Trump's attack on Syria is straightforward—and from his point of view devastating.

1. Because the Constitution does not define the terms "other high Crimes and Misdemeanors", recourse must be had to the *pre-*constitutional laws of England.[195] Blackstone explained that

> [M]ISPRISIONS * * * are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon * * * . Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought not to be done.[196]

> * * * MISPRISIONS, which are merely positive, are generally denominated *contempts* or *high misdemesnors*; of which
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> * * * [T]HE first and principal is the *mal-administration* of

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[193] U.S. Const. art. II, § 4.

[194] U.S. Const. art. I, § 3, cl. 7.

[195] *See ante*, at 15-16 & notes 56-59.

[196] *Commentaries on the Laws of England,* ante note 59, Volume 4, at 119.

> such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted as to the wisdom of the house of peers shall seem proper; consisting usually of * * * perpetual disability.[197]

In addition, "disobedience to any act of parliament, where no particular penalty is assigned" constituted "a high misprision".[198]

One form of "the *mal-administration* of such high officers, as are in public trust and employment" well known in *pre*-constitutional times was "usurpation". Samuel Johnson defined "usurp" as "[t]o * * * seize or possess without right", "usurpation" as "illegal seizure or possession", and "usurper" as "[o]ne who seizes or possesses that to which he has no right".[199] John Locke understood "Usurpation [a]s the exercise of Power, which another hath a Right to";[200] whereas, according to Algernon Sidney's more exacting treatment, "usurpation" raised its ugly head "when he or they who are rightly called [to public office], do assume a power * * * that the law does not give; or turn that which the law does give, to an end different and contrary to that which is intended by it."[201] (Modern-day lay and legal usages of these terms concur.[202])

2. Plainly enough, usurpation on the part of a contemporary President would amount to multiple *"mal-administration"* of his "public trust and employment". *First,* if he purported to "exercise [a] Power, which another has a Right to", or to "assume a power * * * that the law does not give", he would

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[197] *Id.,* Volume 4, at 121.

[198] *Id.*, Volume 4, at 122.

[199] A *Dictionary of the English Language*, First Edition (London, England: W. Strahan, 1755), *and* Fourth Edition (London, England: W. Strahan, 1773). (Neither edition serially numbered its pages.)

[200] *Two Treatises of Government* (London, England: Awnsham & John Churchill, 1698), Book II, Chapter XVIII, § 199.

[201] *Discourses Concerning Government* [written in 1681-1683, published posthumously in 1698], Thomas G. West, Editor (Indianapolis, Indiana: Liberty Fund, Revised Edition, 1996), at 220. No less astute an observer than Thomas Jefferson himself ranked Locke and Sidney as the two principal well-springs from which Americans in his era drew their political inspirations. *See* Thomas G. West, Foreword, *in id.* at xv. *See also* Caroline Robbins, *The Eighteenth-Century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (Cambridge, Massachusetts: Harvard University Press, 1959), at 46.

[202] *See, e.g., Webster's Revised Unabridged Dictionary* (Springfield, Massachusetts: G. & C. Merriam Company, 1913), at 2807-2808, and *Webster's Third New International Dictionary of the English Language* (Springfield, Massachusetts: G. & C. Merriam Company, 1971), at 2525; *Black's Law Dictionary* (St. Paul, Minnesota: Thomson Reuters, 10th Edition, 2009, 2014), at 1178.

improperly enlarge "the Office of President" in derogation of his "Oath or Affirmation" "'that [he] will faithfully execute the Office of President of the United States, and will be the best of [his] Ability, preserve, protect and defend the Constitution of the United States.'"[203] *Second,* if the President "turn[ed] that which the law does give, to an end different and contrary to that which is intended by it", he would violate not only his "Oath or Affirmation", but also his duty to "take Care that the Laws be faithfully executed".[204] For the President's "Oath or Affirmation" stands first and foremost among the "Laws" which he must "faithfully execute[ ]"; and he cannot "preserve, protect and defend the Constitution" by refusing to "take Care that [*it*] be faithfully executed". *Third,* if the President "turn[ed] that which the law does give, to an end different and contrary to that which is intended by it", simply by disobedience to that law, he would default on his duty to "take Care that the Laws be faithfully executed", and thereby would transgress his "Oath of Affirmation" as well.

3. President Trump's aggression against Syria is the product of a veritable complex of interrelated usurpations.

a. Absent some restriction imposed by Congress (and an unequivocal and exceedingly specific restriction it would have to be), as "Commander in Chief" the President is constitutionally authorized to repel an attack upon the United States by deploying for that purpose whatever forces from "the Army and Navy of the United States", the States' "Troops, or Ships of War", and "the Militia of the several States" Congress has put at his disposal.[205] As the War Powers Resolution recognizes, "[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised * * * pursuant to * * * a national emergency created by attack upon the United States, its territories or possession, or its armed forces."[206] By attacking Syria, however, President Trump has perverted the power of national self-defense into a power of international aggression against a country which not only has not attacked the United States but also has neither the intention nor the capability of doing so.[207]

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[203] U.S. Const. art. II, § 1, cl. 7.

[204] U.S. Const. art. II, § 3.

[205] *See ante*, at 29-31.

[206] § 2(c)(3), 87 Stat. at 555, *now codified at* 50 U.S.C. § 1541(c)(3).

[207] The present of level of turmoil in the Middle East renders it conceivable that, sometime in the not-so-distant future, Syria (or her allies) might have occasion to shoot at United States military aircraft infringing on her airspace, to fire on United States warships engaging in hostile acts within her waters, or to repel United States ground forces invading her territory. These, however, would be instances of *self-defense*, not aggression, on Syria's part, inasmuch as the legitimate government of

Thus, he has usurped authority by "turn[ing] that which the [Constitution actually] does give [to him], to an end different and contrary to that which is intended by it".

b. As explained above, President Trump's attack against Syria violated the War Powers Resolution is several particulars.[208]

(1) The Resolution imposes no penalty for disobedience to its mandates. So the President's default comes within that class of "high misprision[s] and contempt[s]" arising out of "disobedience to any act of parliament, where no punishment is assigned".[209] Thus, it constitutes an usurpation, in that "he * * * who [is] rightly called [to public office], do[es] assume a power * * * that the law does not give", *but instead actually withholds*.

(2) As explained above, Syria's lack of involvement in the acts on which the the Authorization for the Use of Force Resolution is predicated renders that Resolution useless as a license for the President's attack.[210]

To be sure, the War Powers Resolution recognizes "[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised * * * pursuant to * * * specific statutory authorization".[211] This presupposes, though, that the "specific statutory authorization" put forward is itself constitutional. For a fundamental principle of constitutional jurisprudence is that "[a]n unconstitutional act is not a law; it confers no rights; * * * it affords no protection; * * * it is, in legal contemplation, as inoperative as though it had never been passed."[212]

The AUMF Resolution provides that

> the President is authorized to use all necessary and appropriate force against those *nations*, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such *nations*, organizations or

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Syria has never invited any United States armed forces to operate within her borders.

[208] *See ante*, at 31-35.

[209] *See* W. Blackstone, *Commentaries on the Laws of England, ante* note 59, Volume 4, at 122.

[210] *See ante*, at 35-40.

[211] § 2(c)(2), 87 Stat. at 555, *now codified at* 50 U.S.C. § 1541(c)(2).

[212] Norton v. Shelby County, 118 U.S. 425, 442 (1886).

persons.[213]

In effect, this amounts to an open-ended delegation to the President of Congress's power "[t]o declare War"[214] *de facto* against whatever "nations" he sees fit to attack with whatever "necessary and appropriate force" he chooses to unleash. He is licensed to act as the complainant, the investigator, the prosecutor, the judge, the jury, and the executioner. Congress plays *no* part in his deliberations, his decision, or his deployment of United States Armed Forces, other than the equivalent of the "dummy" in a game of bridge.

Such a delegation is *constitutionally impossible*, not only because, in general, "Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is * * * vested",[215] but especially because, in particular, Congress is powerless to delegate back to the President—whether for inclusion within his "executive Power",[216] or even within his status as "Commander in Chief of the Army and Navy of the United States",[217] and whether *de jure* or *de facto*—the power "to declare War" which WE THE PEOPLE transferred from the executive domain under *pre-*constitutional English law to the legislative domain under the Constitution.[218]

After all, it cannot be repeated too often, or emphasized too strongly, that

> the power of declaring war is not only the highest sovereign prerogative, but * * * it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burdensome taxes, and personal sufferings. * * * Nay, it always involves the prosperity, and not infrequently the existence, of a nation. It is

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[213] § 2(a), 115 Stat. at 224 (emphasis supplied). *See* § 2(b)(1), 115 Stat. and 224, which states that § 2(a) "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."

[214] U.S. Const. art. I, § 8, cl. 11.

[215] Panama Refining Company v. Ryan, 293 U.S. 388, 421 (1935).

[216] U.S. Const. art. II, § 1, cl. 1.

[217] U.S. Const. art. II, § 2, cl. 1. The President's further status of "Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States" can avail him nothing, either. For the Militia may be "call[ed] forth to * * * repel Invasions" of the United States, not to participate in invasions of foreign lands at the President's behest. U.S. Const. art. I, § 8, cl. 15.

[218] *See ante*, at 14-29.

> sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow wherever a successful commander will lead; and in a republic, whose institutions are essentially founded on the basis of peace, there is infinite danger that war will find it both imbecile in defence, and eager for contest. Indeed, the history of republics has but too fatally proved, that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride, and betray their interests. It should therefore be difficult in a republic to declare war; but not to make peace.[219]

Moreover, even if the AUMF is arguably not unconstitutional as to *some* "nations", it is plainly inapplicable to *Syria*.[220]

c. President Trump's attack against Syria is also an usurpation because it involved "the exercise of Power, which another hath a Right to".

(1) The War Powers Resolution declares that "[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised * * * pursuant to * * * a declaration of war, * * * [or] specific statutory authority";[221] and that "Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof".[222] The President enjoys no constitutional prerogative "[t]o declare War" whether *de jure* or *de facto*,[223] to adopt on his own initiative whatever *ersatz* "laws of war" suit his foreign policy,[224] or to decide at whim what "laws" not sanctioned by Congress are "necessary and proper for carrying into Execution the * * * Powers [the Constitution] vest[s]" in him.[225] All such Presidential pretensions offend the authority of Congress.

(2) The adherence of the United States to the Charter of the United

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[219] J. Story, *Commentaries on the Constitution*, ante note 92, Volume 2, § 1171, at 92.

[220] *See ante*, at 36.

[221] § 2(c)(1) and (2), 87 Stat. at 555, *now codified at* 50 U.S.C. § 1541(c)(1) and (2).

[222] § 2(b), 87 Stat. at 555, *now codified at* 50 U.S.C. § 1541(b), *referring to* U.S. Const. art. I, § 8, cl. 18.

[223] In contradiction of U.S. Const. art. I, § 8, cl. 11.

[224] In contradiction of U.S. Const. art. I, § 1.

[225] In contradiction of U.S. Const. art. I, § 8, cl. 18.

Nations is a matter of "Treat[y]",[226] by the constitutional terms of which every President is bound.[227] Pursuant to that Charter, the Security Council has been assigned wide-ranging authority to maintain international peace and security, which the President has flouted by attacking Syria without first invoking the procedures provided in the Security Council for resolving international disputes.[228]

Beyond question is that nothing in the UN Charter by itself can excuse the President's act of aggression, because, under the War Powers Resolution,

> [a]uthority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—
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> * * * * *
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> * * * from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that ir is intended to constitute specific statutory authorization within the meaning of this joint resolution.[229]

And *no* "specific statutory authorization" licenses the President to "implement[ ]", let alone circumvent entirely, the "treaty" by which the United States adheres to the UN Charter, through an act of aggression against Syria (or any other country).

d. Worst of all, President Trump's attack against Syria is an usurpation because he "assume[d] a power * * * that the law does not give"—or *could conceivably* give—to *anyone*, whether the President, Congress, "WE THE PEOPLE of the United States",[230] or the United Nations.

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[226] *See* U.S. Const. art. II, § 2, cl. 2.

[227] Some provisions of the UN Charter, as well as some practices of the organization, arguably violate the Constitution, and therefore are unenforceable against the United States. To attempt to sort them all out, however, would be both tedious and unnecessary for the purposes of this study. The ones under consideration here are sufficiently innocuous to be taken as presumptively valid.

To be sure, the United Nations is not without culpability for much of the violent "régime change", terrorism, and related insanity now raging across the Middle East and parts of Africa. Indeed, to no little extent it has participated, by acts of commission as well as omission, in wars of aggression launched, and war crimes committed, by some of its most powerful member-nations. Yet no matter how many or how egregious its derelictions of duty in the past, the United Nations should have been afforded the opportunity to perform its mission in Syria, before President Trump attacked that country.

[228] *See ante*, at 8-13.

[229] § 8(a)(2), 87 Stat. at 558, *now codified at* 50 U.S.C. § 1547(a)(2).

[230] U.S. Const. preamble.

As noted above,[231] The International Military Tribunal ruled that

> [w]ar is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world.
>
> *To initiate a war of aggression, therefore, is not only an international crime;* ***it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole***.[232]

Self-evidently, *no* public official can claim authority under any legitimate political system to commit "the supreme international crime", if only because the commission of that crime renders illegitimate to that extent the political system responsible for it. Any such claim amounts to arguably the supreme usurpation of all possible usurpations.

The Charter of the International Military Tribunal rejected every defense of "impunity" or "immunity" for public officials, when it announced that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit [a war of aggression, or a war in violation of individual treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] are responsible for all acts performed by any persons in execution of such plan"; and that "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".[233]

Therefore, the President's usurpation of a nonexistent power "[t]o initiate a war of aggression" against Syria (which is also "a war in violation of individual treaties, agreements or assurances" under the UN Charter) constitutes, not simply a "high * * * Misdemeanor[ ]" (in Blackstone's sense of that term), but the quintessence of a "high Crime[ ]"—arguably the very "high[est] Crime[ ]" indictable—under the Constitution,[234] which Congress can so determine pursuant

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[231] *See ante*, at 4-6.

[232] Judgment, Part III, The Common Plan of Conspiracy and Aggressive War, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, Opinion and Judgment, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1947), at 16 (emphasis supplied).

[233] Chapter II, Part II, Jurisdiction and General Principles, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, Articles 6 and 7, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1946), at 5-6.

[234] See U.S. Const. art. II, § 4, *and* art. I, § 3, cl. 7.

to its power "[t]o define and punish * * * Offences against the Law of Nations".[235] This is even a "high[er] Crime[ ]" than "Treason" itself, because "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort",[236] and thereby involves only the United States as its victims; whereas the "consequences [of a war of aggression] are not confined to the belligerent states alone, but affect the whole world".[237] *And once the President's personal responsibility for this "high Crime[ ]" has been established—as his own letter to Congress appears to establish it—he can interpose no defense whatsoever.*

B. His act of aggression against Syria has painted President Trump into a tight corner. Indeed, he finds himself in a situation potentially even more perilous than that which forced President Nixon to resign his office.

Many of the people who, even before his inauguration, vociferously called for Mr. Trump's impeachment were long theretofore no less vocal in their demands for *hyper*-aggressive American military involvement of one sort or another in the Middle East. Now, almost to a man, they are loud in praise of President Trump's attack on Syria, pressing for further, even more extensive intervention there and elsewhere. But whether others have proposed it *ex ante*, or become outspoken in approving it *ex post*, *they* did not do it. *President Trump* did. *He* is the most visible perpetrator of "the supreme international crime" against Syria. And (to recall President Truman's observation) "the buck stops" in the Oval Office.

Thus, President Trump has rendered himself a hostage to his political enemies' strategy and tactics. If he refuses to toe their line on the matters of domestic and foreign policy most important to them, they are fully capable of orchestrating what appears to be a justified call for his impeachment, bogging down his Administration in interminable contentious proceedings in Congress and the kangaroo courts, besides vilifying him personally to no end in "the mainstream media". To be sure, for his enemies to defend his attack against Syria today, but to demand his impeachment tomorrow on account of it, would rank as the acme of hypocrisy. But even the rankest hypocrisy is not illegal. And they are notorious for revising their opinions about constitutional, international, and even moral law almost as often, and always as easily, as they blink their eyes, in order to suit the ever-changing fashions of domestic political controversy. Which they surely will do,

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[235] U.S. Const. art. I, § 8, cl. 10.

[236] U.S. Const. art. III, § 3, cl. 1.

[237] It could amount to "Treason", too, if the evidence demonstrated that the President had launched his "war of aggression" in order to give "Aid and Comfort" to some foreign power which was intent upon embroiling the United States in a major Middle Eastern (or even wider) conflict for its own selfish purposes, and to that extent was an "Enem[y]" of the United States.

if President Trump engages, with predictably calamitous results, in further aggressive military misadventures in the Middle East (or elsewhere).[238]

President Trump, of course, prides himself on being a shrewd "deal-maker". But that skill, so valuable in the realm of legitimate business which he understands, would prove to be of little avail to him in the underworld of political monkey-business which seems to confound him at every turn. It was not uncommon for one of Mr. Trump's private business-ventures to suffer bankruptcy, without personal disaster thereby befalling him. But if his wrongdoing caused his Administration to founder, he would sink with it into the depths of infamy. So, first and foremost, Mr. Trump would find himself under intense psychological pressure to make a deal *to save himself* by being allowed either to serve out the remainder of his term of office as an impotent "puppet President" with the strings of ever-threatening impeachment-proceedings tugging him this way or that; or to resign the Office of President and retire in disgrace, albeit perhaps shielded by a grant of immunity from any future criminal prosecution.[239] And as the condition *sine qua non* of either deal, his enemies would surely demand, *and see to it*, that he would renege on every promise to "make America great again" he had extended to "the Deplorables" during his campaign for the Presidency. Though the Trump Administration would survive, America would suffer for it—the substance sacrificed for the shadow.

So a Sword of Damocles hangs over his Presidency, unless somehow he can manage to cut it down.

C. How would that be possible? On the face of things, President Trump has committed a blatant act of aggression against Syria, which cannot be undone. To avoid impeachment, his must prove that he was not personally responsible for it to the degree necessary to make out a "high Crime[or] Misdemeanor". What might his argument be?

1. Although it seems to be an iron law of political history that "whom the gods would destroy they first make mad", President Trump can hardly proffer some variant of "the insanity defense"—to wit, that he suffers from a debilitating mental disease or defect. For, in that event, although he would be found "not guilty by reason of insanity", he would nonetheless be subject to removal from office as a consequence of that very plea.[240]

2. Neither can he plead excusable, because invincible, ignorance. For he

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[238] How these results would *not* be calamitous—with Iraq, Afghanistan, Libya, and now Syria as examples of the imprudence, incompetence, and illegality of United States foreign policy in the region—is difficult to image.

[239] *Compare* U.S. Const. art. I, § 3, cl. 7 *with* art. II, § 2, cl. 1.

[240] *See* U.S. Const. amend. XXV.

knew or should have known what constitutes an act of international aggression, and that both United States and international law ban such misbehavior. Simple stupidity, incompetence, gross negligence, willful blindness, or a reckless disregard for the facts on his part provide no defense. But what if the dominant fault were not on *his* part, but instead attributable to others?

3. As a matter of law, under the circumstances this is more than a merely conceivable defense.

a. Once again, a review of *pre-*constitutional English law proves useful. As Blackstone recounted of his day, "MISPRISIONS, which are merely positive, are generally denominated *contempts* or *high misdemesnors*", among which are

> contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are
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> * * * CONTEMPTS against the king's *prerogative*. As, by refusing to assist him for the good of the public * * * in his councils, by advice, if called upon * * * . Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, by doing * * * any thing that may create an undue influence in favour of such extrinsic power * * * .
>
> * * * CONTEMPTS and misprisions against the king's *person* and *government*, may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people.[241]

To this list, Blackstone could have added "by refusing to assist [the executive magistrate] for the good of the public" by only pretending to aid him, but instead intending to entangle him in misadventures which would necessarily redound to "the [ill] of the public". For, as Joseph Story observed,

> [i]n examining the parliamentary history of impeachments, it will be found that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors * * * . Thus, lord chancellors and judges and other magistrates have been impeached * * * for misleading their

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[241] *Commentaries on the Laws of England, ante* note 59, Volume 4, at 121-123.

> sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power. So, where * * * a privy councillor [has been thought] to have propounded or supported pernicious and dishonorable measures * * * these have all been deemed impeachable offences. Some of the offences, indeed, for which persons were impeached * * * would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favoritism and court intrigue. Thus, persons have been impeached for giving bad counsel to the king, * * * enticing the king to act against the advice of Parliament, * * * [and] preventing other persons from giving counsel to the king except in their presence * * * .[242]

If President Trump could identify particular individuals in public office who intentionally deceived, pressured, or manipulated him in such malignant fashion with respect to the attack on Syria, then *they* should be impeached and otherwise punished, not he.

b. As a matter of fact, President Trump may be able to assign the burden of guilt in this affair to others, on the basis of the elementary legal principle that an individual who induces another individual to commit an unlawful act is as responsible for that act as if he had committed it himself, and may indeed be held *solely* accountable if the inducement was effectuated by coercion, fraud, or other undue influence.

(1) Even before Mr. Trump's inauguration, it became notorious that members of the so-called "Deep State"—particularly those lurking within "the intelligence community" and "the military-industrial complex"—intended to do him serious harm. These people have long arrogated to themselves the authority of "a state not simply within the state but actually above the state"—performing official duties on behalf of the government *pro forma*, yet constantly attempting to twist into conformity with their own clandestine purposes such of the government's policies as might prove malleable, while thwarting whatever policies threatened to frustrate the Deep State's goals. From some of Mr. Trump's campaign oratory, the Deep State concluded that, if elected, he might pose a distinct danger to its hidden hegemony, unknown since the days of John F. Kennedy. This, of course, was intolerable. The Deep State could neither play down this threat, nor take the risk lying down; so it determined to put Mr. Trump down, one way or another.

An harbinger of Mr. Trump's peril appeared on 3 January 2017 in the form

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[242] *Commentaries on the Constitution, ante* note 92, § 800, at 584-585 (footnotes omitted).

of a statement in "the mainstream media" by Senator Charles Schumer (Democrat of New York): "Let me tell you, you take on the intelligence community, they have six ways from Sunday at getting back at you. So even for a practical, supposedly hard-nosed businessman, he's being really dumb to do this."[243] One need not have been suffering from acute paranoia to have drawn from these words then (and to consider them now), not a mere observation, but instead a warning that if President Trump crossed "the intelligence community" it would retaliate by fair means or foul, and with impunity. That is, Mr. Trump was being reminded of the lesson drilled into President Kennedy's head in Dealey Plaza: namely, that the Deep State considers itself more powerful than even the President of the United States.[244]

(2) In the public realm, the Deep State has set about "getting back at" Mr. Trump, by brokering ruthless and relentless assaults of libel and slander. He continues to be the target of "scandalous stories", fueled by "leaks" from the Deep State and broadcast by its mouthpieces in "the mainstream media", that have been intended to "lessen him in the esteem of [common Americans]", to "weaken his government", and to "raise jealousies between him and his people". Indeed, this flood of defamation has reached such an high tide of vilification, vituperation, and vehemence that it could be characterized as the propaganda-arm of a campaign of outright sedition.[245]

The Deep State's demonstrated ability to generate a cacophony of criticism—undermining confidence, promoting uncertainty, and sowing confusion among "the Deplorables" upon whose unwavering and staunch support President Trump depends—threatens the political viability of his Administration. Aware of this problem even before his inauguration, President Trump might himself have concluded, or might have been convinced by his closest advisors, that in order to reduce such pressure to a manageable level it would be prudent and expedient to placate the Deep State to some degree. Thus not beyond the realm of possibility is that his attack on Syria represents merely a sop President Trump has thrown to the pack of hounds baying and snapping at his heels, in reliance on the folk wisdom that a dog with a bone its mouth can neither bark nor bite. Indeed, that the Deep State's megaphones in "the mainstream media" now loudly praise the attack provides support for such speculation.

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[243] *Quoted by* Mallory Shelbourne, *Schumer: Trump "really dumb" for attacking intelligence agencies"* (3 January 2017), at <http://thehill.com>.

[244] *See, e.g., JFK and the Unspeakable. Why He Died and Why It Matters* (Maryknoll, New York: Orbis Books, 2008; reprinted, New York, New York: Touchstone, 2010). Apparently the Deep State is not concerned about the possible criminal consequences of sending such a message. *See* 18 U.S.C. § 871.

[245] *See* 18 U.S.C. §§ 2383 through 2385.

(3) Within the governmental apparatus, the Deep State's machinations pose an even more difficult problem—well beyond the "arrogant and undutiful behaviour towards [*every* President] and government" characteristic of the know-it-all types who populate "the intelligence community" and "the military-industrial complex".[246] Doubtlessly, not just a few career civil servants adherent to the Deep State have access to, or are otherwise capable of penetrating in one manner or another, the Trump Administration's innermost councils. Thus directly or indirectly—

- Through standard, and what appear to be reliable, bureaucratic channels they can feed President Trump seemingly plausible, but actually misleading, "intelligence" on all sorts of subjects. (He himself, of course, is devoid of the technical expertise and practical experience necessary to investigate, challenge, or discredit such misinformation. And he has no alternative sources of "intelligence", already organized and experienced, equivalent to the ones which his enemies may use against him.)
- In some instances, they may be able to "prevent[ ] other persons from giving counsel to the [President] except in their presence", or even at all.
- In other instances, they may reckon on the President's loyal advisors' "refusing to assist him for the good of the public * * * in his councils, * * * if called upon", because of their fears of being publicly savaged, personally as well as politically, in "the mainstream media" as the result of defamatory "leaks" from purportedly official sources.

So, overall, these disloyal individuals can take advantage of innumerable opportunities to "giv[e] bad counsel to the [President]"; to "propound[ ] or support[ ] pernicious and dishonorable measures"; to "prefer[ ] the interests of a foreign potentate to those of our own, by doing * * * any thing that may create an undue influence in favour of such extrinsic power"; to "entic[e] the [President] to

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[246] This "arrogant * * * behaviour" is fostered by a "cult of intelligence" within the media, whether "mainstream" or alternative", which treat as singularly qualified to opine on current affairs individuals who claim to have experience in "intelligence" work—as if this descriptor somehow guaranteed that they were supremely intelligent no matter what nonsense they spouted, and that their analyses and opinions were pellucidly intelligible no matter their opacity. This deference to someone's mere credentials in "intelligence" work is, of course, ridiculous on its face. For if even a minority of the people active in the General Government's "intelligence" agencies ever actually possessed the characteristics of *super*-human mentation rashly conceded to the genre, this country would not have suffered the series of "intelligence" calamities which have befallen it during recent decades. Rather than basking in arrogance predicated on their assumed abilities, these people need to be reminded of their personal shortcomings, and encouraged to become apologetic for their failures.

act against the advice of [Congress]"; to "mislead[ ] the[President] by unconstitutional opinions"; and otherwise to "attempt[ ] to subvert the fundamental laws, and introduce arbitrary power".

Indeed, everyone who proposed, promoted, praised, or otherwise supported the attack against Syria is guilty of every one of these derelictions. For, "[t]o initiate a war of aggression * * * is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[247] Thus, the promotion of international aggression indisputably constitutes "giving bad counsel to the [President]" and "propound[ing] or support[ing] pernicious and dishonorable measures". It entails "enticing the [President] to act against", not just "the advice of [Congress]", but the plain peremptory directives of Congress in the War Powers Resolution. It advances "unconstitutional opinions" as to the authority of the General Government to engage in aggression[248]—which amounts to an "attempt[ ] to subvert the fundamental laws" and thereby "introduce arbitrary power". And it could even be accounted "Treason", if it derived to any degree from "preferring the interests of [certain] foreign [states] to those of our own", when the interests of those states were sufficiently inimical to those of the United States to rank those countries as "Enemies".[249]

(4) Manifestly, therefore, President Trump could conceivably defend himself as the outraged victim of other persons' intentional wrongdoing—namely, the fabrication of false and the suppression of valid evidence, fraud, deceit, and duplicity by various sources of "intelligence" in the General Government as to whose participation in the process of decision-making he had no personal knowledge at all, no opportunity either to approve or disapprove, and in any event no practical alternative but to go along with it.

Presumably, *he* did not develop whatever phony "intelligence" assessments initially blamed the Syrian government for the poison gas attack, *they* did. *He* did not suggest the attack against Syria, *they* did. *He* did not plan the attack, *they* did. *He* did not invent the explanation for the attack set out in his letter to Congress,

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[247] Judgment, Part III, The Common Plan of Conspiracy and Aggressive War, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, Opinion and Judgment, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1947), at 16.

[248] *See ante*, at 6.

[249] *See* U.S. Const. art. III, § 3, cl. 1. Presumably, their interests in embroiling the United States in an act of aggression against Syria through the assistance of their agents of influence in the Deep State should suffice to condemn those foreign states as "Enemies", because it could hardly be considered the act of "friends" to inveigle the United States into perpetrating "the supreme international crime".

they did. And *he* did not concoct the official reports later put out to rationalize the attack, *they* did. So *they* should be forced to resign, impeached if they refuse, and in either event prosecuted! And he should be held harmless.

4. Nonetheless, a defense predicated on proving malfeasance by some disloyal individuals among President Trump's advisors—whether those operating in the light of day or maneuvering within the shadows of the Deep State—might appear to be weaker than the excuse rejected at Nuremberg: to wit, "that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if * * * justice so requires".[250] For President Trump did not attack Syria "pursuant to *order* of his Government or of a *superior*", but instead as the highest executive officer of "his Government" and on the basis of advice he solicited, or at least accepted, from political *inferiors* subject to *his* "order[s]". He labored under no legal duty to believe what operatives in "the intelligence community" told him about Syria, let alone to act according to their recommendations simply because they so advised him. Had he been to any degree suspicious of or dissatisfied with the "intelligence" and other advice submitted to him concerning Syria, he could have ordered reassessments, or refused to take any action at all. (Indeed, he had no little reason to suspect "the intelligence community", if only because of the flow of patently fraudulent "leaks" from that source about supposed interference by Russia in the 2016 Presidential election.)

a. In the real world of Washington, D.C., however, these concerns should carry little weight.

(1) No President can conceivably be a "know-it-all", let alone a "do-it-all". To perform his functions, every President *must* rely to a significant extent on advisors and various other sources of information, many if not most of whom are career civil servants in whose selection he did not participate, and even of whose existence he has no personal knowledge, only indirect evidence in the form of reports, studies, and other documents which in one way or another percolate into the Oval Office, but which the President and his immediate entourage cannot possibly check on the spot, at the moment, or sometimes even at all. So, in particular, the very sizes and complexities of the "intelligence" and "military-industrial" bureaucracies render it utterly unrealistic and unjust to assign direct and undivided responsibility to the President for every last thing he does in reliance on

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[250] Chapter II, Charter of the International Military Tribunal, Part II, Jurisdiction and General Principles, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, Articles 8, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1946), at 6.

information he derives from those sources.

(2) The relationship between the Office of President and the bureaucracies in the Executive Branch of the General Government is the familiar one of "principal" (the President) and "agents" (the bureaucrats). In fundamental legal principle, every agent labors under a duty of loyalty to his principal. This entails *inter alia* a general duty of good conduct, a specific duty of obedience, and a particular duty to apprise his principal of whatever knowledge the agent possesses that may be relevant to the performance of his work on the principal's behalf. Overall, the agent cannot have a personal interest adverse to the principal which he refuses to disclose, let alone on the basis of which he secretly operates to the principal's detriment while merely pretending to serve the principal's interests.

In contemporary political practice, however, it is relatively easy for agents in the Executive Branch to evade these duties, whenever they are inclined to do so. Prototypical "nameless, faceless bureaucrats" are uniquely well-positioned to foist misinformation or disinformation on overly trusting higher-ups, for those higher-ups to pass along to higher and even less suspicious higher-ups, and so on—with next to none of the links in the chains of distribution bothering (or being able) to investigate whether the material appearing on their desks is reliable. Under these circumstances, assignment of personal accountability for blunders that later occur, and the enforcement of responsibility through some sort of punishment, become very difficult, if not impossible. After all, searching within an "intelligence agency" for an adept espionage agent who is revealing secrets to a foreign power is notoriously tedious, although proving such treachery is usually a straightforward matter when the evidence is finally uncovered. Even more taxing is to ferret out a subtle agent of influence—because the muddled "intelligence" or other bad advice he supplies can typically be whitewashed with a plausible claim of "ignorance", "insufficient data", "error of interpretation", "difference of opinion", "playing the devil's advocate", and so on.

(3) True enough, in the ordinary course of events, a typical principal would be vicariously liable for following to a bad end the advice a loyal agent, acting within the scope of his employment, had supplied to him in good faith but which ultimately turned out to be erroneous. President Trump should not be held responsible, however, for some *disloyal* bureaucrats' *intentional and secret* acts of sabotage against his Administration. *De jure*, as their principal President Trump does have a right *personally* to supervise, assess the work of, and even direct every bureaucrat who supplies him with "intelligence" on which he bases his decisions. *De facto*, however, this right is essentially meaningless. For, faced with the extent and complexity of the Executive Branch of the General Government, he has no way either to enforce that right himself or to ensure that others supposedly enforcing it

on his behalf him are not themselves malign agents of influence or otherwise disloyal subordinates.

(4) Also true enough, in order to avoid vicarious liability President Trump must establish that the bureaucrats who supplied him with faulty "intelligence" and other bad advice in favor of the attack on Syria were not simply negligent, but instead were acting knowingly and intentionally outside the scope of their authority—essentially as private law-breakers—for the purpose of duping him into launching that attack, whether to advance the interests of some foreign power, to harm him and his Administration, or to secure some other nefarious end. That should not be particularly difficult, though. For proof that a wayward agent's act was *criminal* in nature supports the conclusion that he intended to serve only his own interests, not those of his principal—and intentionally deceiving the President into perpetrating "the supreme international crime" of aggression is misbehavior self-evidently criminal in character.

(5) Nonetheless, even if President Trump established that he was inundated with false information and otherwise severely pressured by others into launching the attack on Syria against his better judgment, he could not exonerate himself totally. He was, after all, not a completely witless dupe, unaware of what constitutes "aggression", and that aggression is "the supreme international crime". Thus, he must bear *some* personal responsibility, even if *all* of his advisors, whether stupidly or deceitfully, argued in favor of the attack. That burden of responsibility would not necessarily have to result in his impeachment, however. For, as the International Military Tribunal ruled, "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, *but may be considered in mitigation of punishment if * * * justice so requires*".[251]

Impeachment is as much a political as a legal process. As Joseph Story observed,

> [t]here is * * * much force in the remark that an impeachment is a proceeding purely of a political nature. It is not so much designed to punish the offender as to secure the state against gross official misdemeanors.[252]

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[251] Chapter II, Charter of the International Military Tribunal, Part II, Jurisdiction and General Principles, Article 8, *in* Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (Washington, D.C.: United States Government Printing Office, 1946), at 6 (emphasis supplied).

[252] *Commentaries on the Constitution, ante* note 92, § 803, at 586-587.

That being so, the House of Representatives, which exercises "the sole Power of Impeachment",[253] might well decide that, under the circumstances, impeachment of President Trump should not be had at all. For, although he bears *some* personal responsibility for the attack against Syria, his removal from office upon conviction by the Senate would be an excessive punishment;[254] whereas a simple censure by the House short of impeachment would suffice.

The House of Representatives could explain this mitigation of punishment on the grounds that impeachment and conviction of Mr. Trump would actually perfect the Deep State's conspiracy by effecting, *in the Deep State's interest*, his "removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States",[255] along with imposing life-long personal disgrace upon him. Censure by the House would entail embarrassment enough for what Mr. Trump did—for his misdemeanor was basically to suffer himself to be bamboozled as the result more of political inexperience coupled with egotism than of malicious intent, foolish rather than felonious. Of far greater consequence, allowing him to retain his office would acknowledge that the truly "gross official misdemeanors" which warranted the most serious punishment had been committed by the Deep State—and thus not only would thwart the conspiracy against Mr. Trump in particular, but also would deter the Deep State from future attempts of that sort against either him or any other President.

After all, this conspiracy was aimed not simply at Mr. Trump *in propria persona* (although doubtlessly much of the Deep State detests him), but at "the Office of President" itself as an institution. The conspirators' ultimate goal was to demonstrate—as with President Kennedy in Dealey Plaza and President Nixon in the Watergate affair—the Deep State's ability to dictate "the Execution of [that] Office" in defiance of any and every President's "Oath or Affirmation" to "preserve, protect and defend the Constitution of the United States".[256] *The real, permanent, irreconcilable conflict is* ***not*** *between Mr. Trump and various Members of Congress as individuals, or between the President and Congress as institutions, but instead between, on the one side, Congress and the President as branches of the* ***legitimate*** *government of the United States, and, on the other side, the Deep State as a* ***wholly illegitimate*** *"state within the state" intent on pursuing a strategy of "divide and conquer", "rule or ruin" against that government and ultimately against the American people whom that government serves and the Deep State despises.*

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[253] U.S. Const. art. I, § 2, cl. 5.

[254] *See* U.S. Const. art. I, § 3, cls. 6 and 7, *and* art. II, § 4.

[255] *See* U.S. Const. art. I, § 3, cl. 7.

[256] U.S. Const. art. II, § 1, cl. 7.

b. In any event, if President Trump intends ever to invoke this defense *in an effective manner* he had better admit, *and then prove*, that he *was* duped into ordering the attack against Syria. He must initiate wide-ranging investigations of everyone who played any part in the fiasco—demanding the resignations from public office of *all* of the mere "useful idiots", while relentlessly, ruthlessly, and remorselessly indicting, prosecuting, and convicting the conscious conspirators.

Moreover, President Trump must act *immediately*, for two reasons. *First,* to preserve the evidence of wrongdoing: The targets of his investigations must not be afforded time to concoct mutually supporting self-serving excuses for their misbehavior; to destroy, sequester, and fabricate documents; and to intimidate or eliminate witnesses. *Second,* to establish his own good faith: He needs to come clean *on his own*, and *well before*, not after, he is threatened with impeachment. If he dithers and dilly-dallies until he finds himself caught in the toils of a full-blown hysterical campaign aimed at his ouster from office, any attempt to blame his disloyal advisors—no matter how guilty they actually may be—will likely be dismissed as a desperate effort to shift responsibility from himself to some convenient scapegoats.

c. Yet another, even more important, reason exists for President Trump to assert this defense as soon as possible. The Deep State is not only his own personal enemy, but also the enemy of the General Government, the governments of the several States, and the American people as a whole. If he does not use this Syrian misadventure to expose and crush the Deep State *now*, *once and for all,* it will pull him by a ring in his nose from one disaster to another. And not only him, but also every future President who will learn from his sorry example that the Office of President disposes of merely the shadow of power, while the Deep State controls its substance. To be sure, this crisis poses a potentially fatal danger to both Mr. Trump and the Presidency itself. But it also presents him with a golden opportunity to deal the Deep State a blow from which it will never recover. In setting him up, the Deep State has set itself up, too, and in a most insecure position. For the Constitution provides no means for the Deep State to assume the powers of the President; but it invests the President with every means necessary to crush the Deep State.[257]

Conclusion

Neither President Trump nor his loyal advisors thought through the adverse consequences of an aggressive attack against Syria. But neither did the Deep State.

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[257] *See, e.g.*, U.S. Const. art. I, § 8, cl. 15 and art. II, § 2, cl. 1, *implemented through* 10 U.S.C. §§ 252 and 253.

What has already transpired cannot be undone. But the *next* moves by both sides will prove decisive. President Trump *can* seize the initiative and snatch final victory from temporary defeat. But he needs to enlist a team of lawyers and political strategists far more astute and tough-minded than the dolts who allowed him to stumble into this Middle Eastern rat's nest in the first place. *The destiny of the United States cannot be left in the hands of amateurs*.

— *finis* —