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Legal Basis For US War In Iraq And Syria Is Thin

By Ivan Eland

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U.S. government officials recently began hyping the threat from a very small and little-known terrorist group called Khorasan and then striking it in Syria. Several of President Obama's aides told the media that airstrikes were launched to foil an "imminent" terrorist attack, possibly using hidden explosives to blow up aircraft. Yet other government officials seemed to pour cold water on that assessment. According to the New York Times, one anonymous senior official described the Khorasan plot as only "aspirational" and said that the group had not seemed to have established a concrete plan. Other officials, at least one of who was a senior counterterrorism official, said that the plot was far from mature and that no sign existed that the group had decided on the method of attack or the time and target of it.

These divergent stories should alert us to the possibility that the old saying–the first casualty of war is truth–is operating again (remember all the falsehoods surrounding then-President George W. Bush's invasion of Iraq?). The Times then cited some experts as explaining this divergence by saying that the Obama administration may have developed specific intelligence about the location of the group's leader, Muhsin al-Fadhli, and was trying to take advantage of it to kill him.

While this explanation may or may not be true, targeting the group also conveniently provides a rather lame excuse under international law and the U.S. Constitution for launching airstrikes Syria without congressional approval. The administration had a marginally better legal excuse for striking targets of the Islamic State (IS) group, its main adversary, in Iraq than it did in Syria. The legal reasoning for attacking in Syria has been thin indeed. Under international law, several reasons can exist for legally taking military action within another country's borders–a United Nations Security Council resolution approving an attack on the country, a request for help by that country, or self defense on the attacking country's part.

No U.N. Security Council resolution approving the war exists, but the Iraqi government has requested help in beating back the IS group. Syria, although secretly loving that the powerful

United States attacking its armed opposition, doesn't get along with the United States and has not formally requested that its territory be attacked.

One convoluted line of reasoning used by the administration is not accepted my many international legal scholars–that the United States is responding to a request to defend Iraq and that Syria is "unable or unwilling" to stanch the threat of fighters flowing into Iraq, thus allowing U.S. air strikes against Syria.

That's where the third excuse comes in. The United States needs to find some self-defense rationale to attack Syria. Yet no one is alleging that IS is about ready to attack the United States. In fact, many experts note that IS, despite its clever anti-U.S. bluster to lure the United States into attacking it, is more of a threat to the Middle East and neighboring countries than it is to U.S. territory. IS is focused primarily on establishing an Islamic state in Iraq and Syria rather than attacking the United States. That's where Khorasan comes in. The very small group, like the much larger IS, is an offshoot of al Qaeda, but seems to be more interested in attacking U.S. targets.

However, a self-defense justification would require an imminent threat to justify a pre-emptive attack to thwart any such strike. If no imminent threat existed, any U.S. attack would be "preventive"; preventive war can be abused (for example, Bush's unprovoked invasion of Iraq) and is frowned on by the international community.

Many conservatives, who purport to defend the original meaning of the U.S. Constitution (but often abandon that ship when "patriotic" military action is afoot), might correctly say that international law is less important than following America's governing document. However, even here an imminent threat is also needed for the president to attack Syria. Although President Obama has cited the congressionally passed Authorization of the Use of Military Force (AUMF) of 2001 to attack the perpetrators of the 9/11 attacks and the congressionally approved authorization to use military force against Iraq in 2002 as justifications for its current attacks on IS in Iraq and Syria, this argument at best could justify strikes in Iraq, but not Syria.

As it is, even those justifications are thin indeed. Contrary to what is rather casually reported in the American media, the AUMF of 2001 does not authorize military action against al Qaeda affiliates or former affiliates, such as Khorasan and IS, respectively. The resolution authorizes military attacks only on the perpetrators, enablers, and hosts of the executors of the 9/11 attacks–that is, the main al Qaeda group and the Taliban in Afghanistan. Most al Qaeda affiliates originated long after 9/11 and had nothing to do with those attacks. Administration officials have alleged that Khorasan leader Muhsin al-Fadhli was a confident of Osama bin Laden and probably knew about the 9/11 attacks in advance. Thus, the administration could claim that it was trying to assassinate an enabler of the 9/11 attacks, but attacking the entire Khorasan and IS groups under that rationale is highly suspect. And the administration has said that its revised policy on targeted

assassinations, which allows such killings only if a person poses a "continuing and imminent threat" of attacks on Americans, does not apply to the conflict in Iraq and Syria.

As for attacks on IS in Iraq, using the long outdated congressional authorization to attack Saddam Hussein's government (passed in 2002) to again attack Iraq for entirely different purposes 12 years later is very questionable. The Constitution's framers would have frowned on the use of one congressional vote to endorse perpetual war.

The debates at the American Constitutional convention in 1787 seem to indicate only one exception to the requirement for congressional approval of any presidential military action–large or small: an imminent attack on the United States that the president must counter immediately. Even then, the intention was that when it was possible for Congress to convene, they should approve continued military action by the president. Thus, the U. S. government has little legal justification to attack Syria (and really Iraq too) without fresh congressional authorization, unless an imminent threat is afoot. In Iraq, Obama might have been justified in very limited air strikes to protect U.S. diplomatic facilities (technically they are U.S. soil), but those American attacks have gone way beyond that and need congressional approval.

Thus, we see the administration's need to find an imminent threat in Syria to bolster the thin legal case for attacking that country. However, according to the framers' original intent, as indicated by the proceedings at the Constitutional Convention, even after the alleged imminent threat–al-Fadhli and Khorasan–was neutralized, Congress would need to authorize further strikes in Syria.

But one cannot blame the legal and constitutional shenanigans of Obama–just the latest in a long line of presidents since Harry Truman to usurp Congress's constitutional war power–for the entire problem. Instead of doing their constitutional duty and going on record with a dangerous vote on the latest war before an election, the cowardly Congress left town to campaign. This atrocious behavior on the most important function that the nation's founders gave Congress–taking the nation to war–is typical and is an indication that Congress's war power has been severely eroded by abdication as well as by presidential usurpation. At a bare minimum, Congress needs vote on this war after the election–and hopefully stop what is an internationally illegal and counterproductive war, which just fires more Islamic radicalism and causes that movement to put the United States needlessly in its crosshairs.

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