

PARALLEL PROCESSING: AUMF ASSAD SPANKING AND THEN ARTICLE II REGIME CHANGE

There's a fundamental dishonesty in the debate about Syria derived from treating the authorization to punish Bashar al-Assad for chemical weapons use in isolation from the Administration's acknowledged covert operations to support the rebels. It results in non-discussions like this one, in which Markos Moulitsas refutes Nicholas Kristof's call for bombing Bashar al-Assad based on the latter's claim we are currently pursuing "peaceful acquiescence."

And war opponents don't have to deal with arguments like [this one](#), from the *New York Times*'s Nicholas Kristof:

So far, we've tried peaceful acquiescence, and it hasn't worked very well. The longer the war drags on in Syria, the more Al Qaeda elements gain strength, the more Lebanon and Jordan are destabilized, and the more people die.

The administration has gone to great lengths to stress just how limited air strikes will be, and to great pain to reiterate that regime destabilization is not the goal. So I'm not sure where Kristoff gets the idea that such attacks will have any effect on the growing influence of Islamists in the region. But let's say that by some miracle, the air strikes *do* weaken the Assad government, it is the "Al Qaeda elements" that stand most to gain, as they are best placed to pick up the

pieces.

Markos is right: the Administration has gone to great lengths to claim this authorization to use force is only about limited bomb strikes, will involve no boots on the ground, and isn't about regime change. Here's how the President described it:

I have decided that the United States should take military action against Syrian regime targets. This would not be an open-ended intervention. We would not put boots on the ground. Instead, our action would be designed to be limited in duration and scope.

But both are ignoring that at the same time, the Administration is pursuing publicly acknowledged (!) covert operations with the intent of either overthrowing Assad and replacing him with moderate, secular Syrians (based on assurances from the "Custodian of the Two Mosques" about who is and who is not secular), or at least weakening Assad sufficiently to force concessions in a negotiated deal that includes the Russians.

Yet here's how the President's National Security team discussed the other strand of this – lethal support for vetted rebels – from the very beginning of Tuesday's hearing before the Senate Foreign Relations Committee.

SEN. CORKER: What I'm unaware of is why it is so slow in actually helping them with lethal support – why has that been so slow?

SEC. KERRY: I think – I think, Senator, we need to have that discussion tomorrow in classified session. We can talk about some components of that. Suffice it to say, I want to General Dempsey to speak to this, maybe Secretary Hagel. That is increasing significantly. It has increased in its competency. I think

it's made leaps and bounds over the course of the last few months.

Secretary Hagel, do you – or General, do you want to –

SEN. HAGEL: I would only add that it was June of this year that the president made a decision to support lethal assistance to the opposition, as you all know. We have been very supportive with hundreds of millions of dollars of nonlethal assistance. The vetting process, as Secretary Kerry noted, has been significant. But – I'll ask General Dempsey if he wants to add anything – but we, Department of Defense, have not been directly involved in this. This is, as you know, a covert action, and as Secretary Kerry noted, probably to go into much more detail would require a closed or classified hearing.

General Dempsey?

SEN. CORKER: As he's answering that, and if you could be fairly brief, is there anything about the authorization that you're asking that in any way takes away from our stated strategy of empowering the vetted opposition to have the capacity over time to join in with a transition government, as we have stated from the beginning?

Is there anything about this authorization that in any way supplements that?

GEN. DEMPSEY: To your question about the opposition, moderate opposition, the path to the resolution of the Syrian conflict is through a developed, capable, moderate opposition. And we know how to do that.

Secondly, there's nothing in this resolution that would limit what we're doing now, but we're very focused on the

response to the chemical weapons. I think that subsequent to that, we would probably return to have a discussion about what we might do with the moderate opposition in a – in a more overt way. [my emphasis]

The President, as part of covert action (that is, authorized under Article II authority), decided to lethally arm vetted rebels in June. Those efforts were already increasing significantly, independent of the spanking we're discussing for Assad. Nothing related to the spanking will limit those efforts to arm the rebels (no one comments on it here, but elsewhere they do admit that spanking Assad will degrade his defenses, so the opposite will occur). And General Dempsey, at least, is forthright that the Administration plans to return to Congress after the spanking to talk about increased, overt support for the rebels.

So there's the spanking.

And then there's the lethal arming of rebels which is not a part of the spanking, but will coincidentally benefit from it and has been accelerating of late.

Spanking without regime change. And regime change (or at least a negotiated solution).

Which returns us to the content of the AUMF. The White House AUMF was so broad it might have supported a regional war. After members of Congress complained that the President promised no boots on the ground but asked for something far broader, the Senate rolled out an AUMF that still gave the President broad discretion (including to use non-combat boots on the ground), but also recognized the President's authority to act on his own (those same Article II powers now authorizing covert arming of rebels) in this area.

Jack Goldsmith explains the significance of this clause:

The draft AUMF enhances, through congressional recognition, the President's claims of independent constitutional authority to use force in Syria. Here is why. The draft acknowledges in its last "Whereas" clause that the President "has authority under the Constitution to use force in order to defend the national security interests of the United States." This broad and unqualified congressional acknowledgment of independent presidential constitutional power takes on special significance when combined with other "Whereas" findings, especially Congress's recognition that (a) "Syria's acquisition of weapons of mass destruction threatens . . . *the national security interests of the United States*; and (b) "Syria's use of weapons of mass destruction and its conduct and actions constitute a grave threat to . . . *the national security interests of the United States*. (My emphases.)

I think these provisions together constitute congressional acknowledgement that the President has constitutional authority, independent of the AUMF, to use military force to defend against the acknowledged threat to U.S. national security interests posed by the Syrian acquisition and use of WMD. (In legal jargon, this is not a Jackson category 1 approval of such force, but it is an acknowledgment that the President has "inherent" constitutional power under Jackson category 2 to use force in these circumstances.) Note that this very broad congressional acknowledgment of presidential power does not suggest any geographical limitation.

The last "Whereas" clause is the broadest such clause I have ever seen. I believe that the notion of a

congressional “whereas” acknowledgment of independent presidential power in an AUMF is a Bush-era innovation. (I have not seen such clauses in pre-Bush-era AUMFs.) But the Senate’s draft “Whereas” clause is much broader than the analogous ones during the Bush era.

[snip]

The “Whereas” language in the draft AUMF gives significant support to the position that the President has some (uncertain) independent constitutional authority to use force in Syria, regardless of what Congress authorizes, and (perhaps) beyond what Congress authorizes. Since I believe that a unilateral presidential use of force in Syria would go beyond all past OLC precedents, the “Whereas” clause as currently drafted is especially important to the President’s novel constitutional position.

I’ve described this AUMF as telling the President, “Here are some limits we’d like you to abide by, but if you don’t like those, go ahead and operate under your own authority.”

To the extent that the White House can tie its acknowledged covert plans to back the rebels to the other whereas clauses in the AUMF, then it also authorizes that part of the equation.

Then, in yesterday’s markup, John McCain succeeded in adding one more whereas, explicitly stating that regime change was the goal of all this (he also added non-binding policy language later in the AUMF to the same effect).

Whereas on May 21, 2013, the Senate Foreign Relations Committee passed by a 15-3 vote the Syria Transition Support Act (S.960), which found that the President’s goals of Assad leaving power, an end to the violence, and a negotiated political settlement in Syria

are prerequisites for a stable, democratic future for Syria and regional peace and security, but absent decisive changes to the present military balance of power on the ground in Syria, sufficient incentives do not yet exist for the achievement of such goals;

That is, there is the AUMF authorizing the limited spanking, and then the whereas language that not only recognizes the President's authority to do more under Article II, but explicitly lists regime change (and accelerating the arming of rebels, implicitly) among the goals here.

And yet the Administration still claims the AUMF – the limited spanking that coincidentally includes recognition that the President can take other actions on his own – supports very limited action.