American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo

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Abstract: Suspending the ban on assassinations—as established in Executive Order 12333—serves no practical purpose. The Executive Order is not an obstacle to effective prosecution of the War on Terrorism; in fact, its reach is very limited. Although common sense might suggest that “assassination” equates with the targeted killing of a specific individual, the term is in fact a legal term of art with a very narrow definition derived from the Law of War. As a result, Executive Order 12333 only prohibits a very narrow spectrum of attacks in wartime or against clear threats to national security. As the United States has not typically engaged such means to attack “leadership targets” for several decades, publicly rescinding the offer now would grant no more freedom to act and only would serve to undermine the United States' public diplomacy abroad.

INTRODUCTION

In the rush to vengeance after the September 11 attacks, it has been seriously suggested by a number of advocates, including scholars, journalists, and politicians, that the government remove all legal limitations on its use of assassination.¹ They contend that the ability to eliminate key targets will be a necessary tool for our nation to prosecute its new war against terrorism.

No standing Federal law criminalizes the assassination of a foreign official outside the boundaries of the United States. In the ab-

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sence of such a statute, only Executive Order 12333 prohibits the act of state-sponsored killing.² This Order, which was drafted in the mid-1970s in the wake of revelations of government involvement in plots to kill several foreign leaders, has been maintained by every administration since President Ford. In recent years, however, there have been several attempts by Congress to override Executive Order 12333. The most recent of these initiatives is H.R. 19, the “Terrorist Elimination Act of 2001,” proposed in January of this year by Representative Barr of Georgia.³ The findings section of this bill states:

Past Presidents have issued Executive orders which severely limit the use of the military when dealing with potential threats against the United States of America; . . . these Executive orders limit the swift, sure, and precise action needed by the United States to protect our national security; present strategy allows the military to bomb large targets hoping to eliminate a terrorist leader, but prevents our country from designing a limited action which would specifically accomplish that purpose . . . .⁴

This paper will argue that any such legislation or other public revocation of the assassination ban would serve no practical purpose and will only injure the United States' ability to pursue its interests overseas during a time of international crisis. There is little utility to be found in retracting Executive Order 12333, as neither it nor international law pose any serious obstacle to the use of assassination in the scenarios in which the United States would typically employ it. As with any Executive Order, it may be revised, revoked, or temporarily suspended by the President. Furthermore, each successive administration has carved out exceptions to Executive Order 12333 that have narrowed the scope of its restrictions.

The international legal prohibitions against assassination also do not present a significant obstacle to the use of assassination by the U.S. Government. International customary and treaty law does not prohibit the sort of open attacks generally employed by the United States when it strikes directly at foreign leaders. The United States has limited its use of deadly force in recent years to cases of international armed conflict or situations where there was a clear threat to national

⁴ Id.
security that required action in self-defense. The laws of war control in both cases, giving the government much more legal freedom to apply deadly force than the body of law which regulates assassination during peacetime. Only in a narrow class of scenarios during times of conflict—such as attacks accomplished through treachery or by the placing of a price upon a target's head—would a killing be prohibited as an assassination under international law.

A public retraction of the assassination ban also makes little sense from a policy perspective. The United States is straining to hold together a worldwide coalition against terrorism that includes moderate Islamic states and other nations with sizeable fundamentalist populations. Revoking Executive Order 12333 would only undermine the United States' moral position and damage the credibility of its public diplomacy at a time when both are critical to the pursuit of its national interests. Such a change would only further alienate the United States from these already suspicious, and even hostile, populaces that can directly affect the pursuit of American policy objectives. Retracting Executive Order 12333 at such a sensitive time is especially pointless considering that it is essentially symbolic in nature, serving mostly as a useful symbol of American moral policy, while doing little to actually restrict the use of force.

In order to prove that a revocation of Executive Order 12333 would cost the United States a great deal but result in virtually no gain, this article will first examine the treaties and conventions that form the international law regarding assassination in both peace and war times. Although common sense might suggest otherwise, the exact meaning of the term "assassination"—especially during peacetime—is open to considerable interpretative latitude, and there is little legal agreement on a precise definition. This article will therefore try to define those circumstances in which a state-sanctioned killing would be considered a prohibited assassination. Finally, it will examine the nature and scope of the domestic ban on the practice from its initial development in the Ford Administration. This will be followed by a brief analysis of situations in which the United States has struck at foreign leaders in order to determine if the United States' typical

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strategies for the use of force are likely to run afoul of the current ban.

It is important to note that the debate over the practicality and morality of assassination as a tool of national policy is beyond the scope of this analysis. Both are provocative and timely issues, with compelling arguments to be made on both sides. However, the weighing of those complex moral issues and political judgments are best left as an exercise for the conscience of the reader.

I. INTERNATIONAL LAW ON ASSASSINATIONS IN WARTIME

A. Definitions and History

One of the primary challenges of any analysis of assassination is reaching a clear definition of the term. There is a remarkable lack of legal uniformity in its use, as different studies employ different interpretations.\(^6\) For example, one leading law review article lists 11 separate definitions in an effort to be comprehensive.\(^7\) This lack of shared meaning is especially evident in an analysis of assassination during wartime, for it is here that a common sense understanding is the most misleading. The media’s continuing misuse of the word could easily lead one to the conclusion that the specific, deliberate, and premeditated killing of one particular person during wartime would qualify as assassination. However, as explained below, such an act fails to qualify as assassination because it is perfectly legal under the laws of war.\(^8\) In the context of armed conflict, the term applies only to a relatively narrow spectrum of killings where the death of one person is accomplished by means expressly prohibited by the international conventions that regulate war.\(^9\)

The acceptability of assassination as a wartime strategy has persisted for hundreds of years, but the formulation of a body of law dedicated to it only began during the seventeenth and eighteenth centuries.\(^10\) Earlier rules for the conduct of warfare had been based mostly on Christian theology and focused on the requirements of a just war—\textit{jus ad bellum}—in which Christians could participate with a


\(^{7}\) Parks, \textit{supra} note 5, at 8.

\(^{8}\) Id. at 5.

\(^{9}\) Schmitt, \textit{supra} note 5, at 632.

clear conscience.\textsuperscript{11} Beginning in the early modern period, however, these principles were to take a more secular shift. War began to be viewed and accepted as a natural tool of international politics, and the custom of waging it became more responsive to practical, rather than religious, requirements.\textsuperscript{12} The law of armed conflict developed from the study of \textit{jus ad bellum} to the formulation of a utilitarian customary law of war, \textit{jus in bello}.\textsuperscript{13} Although these principles were not codified in any international treaties, they were widely recognized, and most combatants observed them as best they could unless military necessity dictated otherwise.\textsuperscript{14} Under these customary rules, an unprovoked killing in peacetime was considered immoral, but the assassination of a military leader during times of conflict was accepted as entirely legitimate, and even praised as exemplary.\textsuperscript{15} Some observers remarked on this apparent disparity; Voltaire was known to have quipped that "killing a man is murder unless you do it to the sound of trumpets."\textsuperscript{16}

As the customary practice of the seventeenth and eighteenth centuries clearly limited assassination to times of war, study of the subject focused not on when a leader could be killed, but instead on the manner in which it could be done. Great scholarly emphasis was placed on preserving the "honor of arms," a tradition that maintained that the death of an enemy commander could be engineered in any manner that was not treacherous.\textsuperscript{17} The studies of Hugo Grotius in 1625 were characteristic of the developing utilitarian approach to the conduct of war, and his definition of treachery serves as one of the major influences on the historical precedent.\textsuperscript{18} He wrote that a lord could be attacked at any time and place, so long as the assassin breached no trust.\textsuperscript{19}

\textsuperscript{11} Michael Howard et al., \textit{The Laws of War: Constraints on Warfare in the Modern World} 2–3 (1994).
\textsuperscript{12} Id. at 3.
\textsuperscript{13} Id. at 87.
\textsuperscript{14} Id.
\textsuperscript{15} Schmitt, \textit{supra} note 5, at 613–14.
\textsuperscript{16} Id. at 610.
\textsuperscript{17} Zengel, \textit{supra} note 10, at 126–27.
\textsuperscript{18} Beres, \textit{supra} note 5, at 231 (1991).
\textsuperscript{19} Schmitt, \textit{supra} note 5, at 616.
He also condemned the practice of offering a reward for the head of an enemy, or other means of "purchasing" victory, as such tactics encouraged treachery within the ranks. Held out as an example of a legitimate killing was the act of Charlemagne’s father, Pepin the Short, who swam across the Rhine to kill an enemy commander as he slept in his camp. In Grotius’s opinion, this attack was not treacherous because the enemy prince did not know Pepin, and did not extend to him any trust or faith.

Grotius also held that the waging of war was a natural right of kings, and suggested that the legal protections that shielded lords from treachery extended only as far as the sovereignty of the state. In contrast, using treachery to kill robbers and pirates, who were without the protections of sovereignty, was more acceptable. Although not entirely free of moral blame, the practice went “unpunished among nations by reason of hatred of those against whom it is practiced.”

B. Development and Application of the Modern Wartime Rule

The development of a formal legal ban on assassination began with the codification of the international laws of war during the late nineteenth and early twentieth centuries. Up until this time, the laws of armed combat remained mostly customary in nature, based upon broad principles of conduct suggested by theology and each nation’s laws and military training.

The U.S. government was the first to formulate a legal code of military conduct that was to be issued to the troops in the field. During the Civil War, Secretary of War Edwin Stanton solicited guidance and suggestions from a variety of scholars as to what form these regulations should take, but left the task of writing them to Doctor Francis Lieber, a professor at Columbia University. Lieber’s code was reviewed, amended, and finally issued by President Abraham Lincoln in

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20 Wingfield, supra note 6, at 300.
21 See id. at 300–01; Zengel, supra note 10, at 127.
22 Zengel, supra note 10, at 126–27.
23 Id. at 127.
24 Id. at 127 (quoting H. Grotius, De Jure Belli ac Pacis Libri Tres (rev. ed. 1646), reprinted in 3(2) The Classics of International Law 653 (F. Kelsey trans. 1925)).
25 Schmitt, supra note 5, at 628.
26 Howard, supra note 11, at 119.
28 Id. at xi.
1863 as The U.S. Army's General Orders #100. Five thousand copies were printed and distributed to the officers of the armies of both the Union and the Confederacy. Article 148 of the Order states:

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

General Orders #100 further provided that soldiers may be killed as long as they are not individually singled out, or their deaths achieved as a result of a bounty placed upon their head. The most important difference of the code, however, was the substitution of outlawry for treachery as the definition of assassination. Within ten years, however, this concept was widely adopted, making the Lieber Code a model for the rules of war of other nations.

The formulation of a body of international treaty law that restricts the practice of assassination began with the Brussels Conference of 1874. Although it was never ratified as a valid legal instrument by the United States, the declaration produced by this conference adopted a traditional view of the historical standard, denouncing any "treacherous attempt on the life of an enemy." The declaration did not explicitly connect the practice of treachery with assassination, however.

The Hague Peace Conferences of 1899 and 1907 produced a number of major international instruments, including the Convention on the Law and Customs of War on Land. Although modeled on earlier works, this treaty was the first multinational codification of

29 Id. at xiii.
31 Wells, supra note 27, at 99.
32 See Zengel, supra note 10, at 131.
33 Wells, supra note 27, at 6.
34 Schmitt, supra note 5, at 629 (quoting The Laws of War on Land (1880) (U.K.)).
35 Wells, supra note 27, at 7.
the laws of land combat to be adopted. Article 23(b) of the annex to this convention stated that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited, it is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army." This article is now held to embody the customary rule of treachery, and is widely interpreted to re-link the practice of treachery with the act of assassination.

Both the Hague IV Convention and the laws of war permit attacks upon valid military targets at any time or place. What is included in the category of "targets," however, is broader than just troops in the field. Noncombatants and civilians can be designated a valid target if they are sufficiently involved in the war effort. For example, any civilian who directly participates in hostilities would be equivalent, for targeting purposes, to a combatant. Although the exact level of involvement necessary for a civilian to become a valid target has not been fully defined legally, it is usually viewed as being a decision in practice based on context. Civilians who work directly to conduct the war, or occupy a role normally held by a soldier, are valid targets. There is also a legal consensus that a civilian head of state who serves as commander-in-chief of the armed forces falls within this category. Other civilians who occupy positions of special importance or significance—such as weapons development—that are more valuable to their government in their current role than any contribution they could have made on the front lines, are similarly subject to attack.

It is important to note that the Article 23(b) ban on treachery does not preclude the use of either stealth or surprise, and does nothing to change the basic rule that combatants are still legally subject to attack at any time or place. Modern revisions to the U.S. Army's field manual state that "[Article 23(b)] does not preclude attacks on indi-

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36 Howard, supra note 11, at 121.
38 Zengel, supra note 10, at 132 n.32.
39 Parks, supra note 5, at 5.
40 Id. at 6.
41 Id.
43 Parks, supra note 5, at 6.
44 Id. at 5.
vidual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.\textsuperscript{45} The annotations to the manual also suggest that the most recent revisions to the principle are also "not [intended] to foreclose activity by resistance movements, paratroops, and other belligerents who may attack individual persons."\textsuperscript{46} Scholars such as JM Spaight echo these conclusions, pointing out that "treachery must clearly be distinguished from dashes made at a ruler or commander by an individual or a little band of individuals who come as open enemies."\textsuperscript{47} It must not, he continues, "be confounded with surprises, stratagems, or ambushes, which are allowable."\textsuperscript{48}

Later conventions on the law of war have further defined and expanded modern treachery-based interpretations. The International Committee of the Red Cross's Protocols Additional to the Geneva Conventions of 12 August 1949, states in Article 37 of Protocol I:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.\textsuperscript{49}

This additional rule takes the protections against assassination in Article 23(b) of the Hague IV Annex and expands them by adding perfidy as an entirely new component of prohibited treachery.\textsuperscript{50} Perfidy is the act of convincing the enemy he is protected under the laws of war, with the intent of later betraying his confidences.\textsuperscript{51} Examples include a false indication of willingness to negotiate under truce or surrender flag, playing incapacity to fight by wounds, faking non-combatant status, or falsifying other protected status by signs, emblems or uniforms—such as U.N. blue helmets.\textsuperscript{52}

\textsuperscript{45} Johnson, \textit{supra} note 42, at 418 n.118.
\textsuperscript{46} \textit{Id.} at 419 n.114.
\textsuperscript{47} \textit{Id.} at 418 n.112.
\textsuperscript{48} \textit{Id.}
\textsuperscript{50} Zengel, \textit{supra} note 10, at 139–40.
\textsuperscript{52} See \textit{id.} at art. 37(a)-(d).
The United States has not ratified the Geneva Protocols, although it recognizes many of the Protocol I declarations as either non-binding customary international law or otherwise generally acceptable practice. The United States military has instead built its modern codes of military conduct at least in part upon earlier precedents. It retained a Lieber-style ban on assassination as outlawry in the first revision of General Orders #100 in 1914, but listed it immediately after the prohibition of treachery as if they were identical—a dual approach which persisted into the 1934 revision. The Army's most recent draft of the manual, 1956's *The Law of Land Warfare*, incorporates both definitions into a single heading, and includes verbatim Hague IV's restriction on "kill[ing] or wound[ing] treacherously." The military's accompanying operational law handbooks also reflect the Lieber rule of assassination, stating that "hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy 'dead or alive'" is prohibited. The handbook continues, however, by noting that this principle does not preclude singling out enemy commanders for attack.

From the above, a number of conclusions can be drawn about what attacks against specific individuals during wartime are assassinations, and thus prohibited under the laws of armed conflict. First, the applicable law, as established in the treaty and customary law that regulates the use of force, primarily serves to narrow the methods by which individuals can be attacked. Combatants may engage any valid target at any place and time, but assassinations are only those killings of targets that are accomplished by "treacherous" means—as defined by Article 23(b) of the Annex to the Hague IV Convention—or alternatively accomplished through "outlawry," as first defined by the Lieber Code.

It is important to note, however, that killings that are not assassinations may be illegal for other reasons. The laws of war place a number of restrictions upon the use of force generally, such as the re-

54 Wells, supra note 27, at 100–01.
55 Id. at 101.
56 Id.
57 Id.
58 WORKSHOP MANUAL, supra note 53, at 7–33.
59 Id.; Parks, supra note 5, at 4.
60 See Parks, supra note 5, at 5; WORKSHOP MANUAL, supra note 53, at 7–32.
quirement that every attack must reflect the basic requirements of military necessity, proportionality, and discrimination. Furthermore, the combat death of a noncombatant, if not an assassination, could still be illegal under other laws prohibiting the unnecessary infliction of civilian casualties.

II. INTERNATIONAL LAW ON ASSASSINATIONS IN PEACETIME

A. Definitions and Principle

Assassination during peacetime has been generally interpreted to mean the killing of a particular individual for political reasons. As a formal crime, however, it is still difficult to define precisely. Many scholars believe it to be a subset of murder, with the choice to kill motivated by politics, and the particular target selected because of his identity, prominence, or public status. Other observers, such as Major Schmitt, also differentiate assassination from murder, but base the distinction on the international protection accorded to the victim and the usually transnational character of the act. Senior military lawyers have drawn a slightly different conclusion, suggesting that the distinction between assassination and murder lies not only in the motive, but also in the covert nature of the attack.

If there is one characteristic generally included in the definition, it is assassination's political nature. An application of this as a legal requirement is problematic, however, as political motive is not an absolute and is based largely on perception and context. Those who employ state-sponsored killing will deny they were motivated by politics, while those who are victimized will argue the opposite. It is inevitable that states will characterize their actions to meet their own purposes, as the line between violent political activism and wanton bloodshed can be exceptionally narrow at times. As Major Schmitt suggests, "[O]ne man's terrorist is another man's freedom fighter."

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61 Workshop Manual, supra note 53, at 7-4, 7-5; Schmitt, supra note 5, at 640-41.
62 See Parks, supra note 5, at 4-5.
63 Parks, supra note 5, at 4; Schmitt, supra note 5, at 625.
64 Murray Clark Havens et al., The Politics of Assassination 3 (1970); see also Franklin L. Ford, Political Murder: From Tyrannicide to Terrorism 1-3 (1985).
65 Schmitt, supra note 5, at 627-28.
66 Parks, supra note 5, at 4.
67 See Wingfield, supra note 6, at 306.
68 Id.
69 Schmitt, supra note 5, at 625.
The principle of assassination as political activity is also no longer applicable once war begins. As Carl von Clausewitz suggested: "War is a continuation of political activity by other means"—a theory that leads one to believe that in war, every killing is a political one. A strict application of the peacetime political requirement would then render every wartime death an assassination, a conclusion not reflected either by the laws of war or the common understanding of the word. To further complicate matters, the line between wartime and peacetime legal standards for assassination blur together in the face of conflicts less than war, such as self-defense, preemptive self-defense, and counterterrorist operations. Because the peacetime and wartime bodies of law are so dramatically different in effect and application, any analysis of assassination must concentrate on how to determine which applies.

B. The U.N. and the Use of Force in Peacetime

At least in principle, there is manifest evidence to suggest that peacetime assassination has been illegal since the Middle Ages. A vast body of domestic and international law clearly states that the killing of any person is prohibited, regardless of underlying political motivations. Murder has been criminalized in all of the world's major domestic legal systems, and a sea of human rights accords speak to the value and sanctity accorded to human life in international law. The severity of murder as a criminal offence is especially evident in its inclusion as a prominent offense in each of the major international extradition treaties.

Although the indications are overwhelming that international law condemns the practice of assassination in principle, beyond the domestic criminalization of murder, there is little concrete international law that specifically forbids it. Only the Organization of African Unity (OAU) Charter outlaws assassination by name, while the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (New York Convention) protects against it under limited circumstances. This

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70 Id. at 639.
71 Id.
72 Id. at 613–14.
73 See id. at 621–23.
74 Schmitt, supra note 5, at 618 n.37.
Convention, which was ratified by nearly half the world’s nations and most major powers, criminalizes "the international commission of . . . murder, kidnapping, or other attack upon the person or liberty of an internationally protected person." 76 However, it only accords protection to figures traveling abroad, and not in their home states. 77

In a more general sense, Article 4 of the U.N. Charter establishes a right to be free from aggression and the use of international armed force, and has been interpreted to provide that citizens of a nation have a right to be immune from international acts of violence by citizens or military forces of other nations. 78 "Article 2(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 Purposes of the United Nations." 79 This statement of high moral principle has been accepted as customary international law, as suggested by the International Court of Justice in Nicaragua v. United States. The court found, quoting from the work of the International Law Commission, that Article 2(4) is a "conspicuous example of a rule in international law having the character of jus cogens." 80 The assassination of a foreign leader in peacetime with no provocation would therefore be a prima facie violation of basic international law, as well as murder under the applicable domestic criminal statute.

There are, however, two established scenarios in which the Article 2(4) protections against the use of force would be suspended. The first is a military action sanctioned by the U.N. Security Council under Chapter VII of the U.N. Charter, and the second is an attack made by a victim state in self-defense. 81 The right to self-defense is provided to all states in Article 51 of the Charter: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations,

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76 Id. at art. 2, § 1.
77 Schmitt, supra note 5, at 619 n.44.
78 Parks, supra note 5, at 4; U.N. CHARTER art. 2, para. 4.
79 U.N. CHARTER art. 2, para. 4.
until the Security Council has taken the measures necessary to main­
tain international peace and security."82

When a nation employs Article 51 to justify a use of force in its
own defense, or the defense of another state, the laws of war control
as they would in any formally declared conflict. Therefore, under an
Article 51 action, any state-sanctioned killing by a victim state would
not be an assassination so long as it is not accomplished by treachery
or outlawry, as described earlier.

C. The Boundaries of "The Inherent Right to Self-Defense"

Although Article 51 has been accorded the status of customary
law, the exact breadth of what is included in the "inherent right [of
individual nations to] . . . self-defence"83 remains controversial and
subject to multiple interpretations. No specific definition of "self-
defense" or "armed attack" is provided in the text, forcing legal schol-
ars to look elsewhere for guidance on how the term should be inter-
preted. The only evidence customary international law provides as to
its scope arises from a little-known international dispute between the
United States and Great Britain.84 Known as the Caroline Case, this
precedent arose from an 1837 incident in which British troops
launched an attack into the United States to destroy a ship, the Caro-
line, that had been moving arms and volunteers to Canadian seces-
sionists.85 U.S. Secretary of State Daniel Webster rebuffed British
claims that the attack was justified, responding with a description of
the circumstances when a right to self-defense could be recognized:

It will be for [the British] to show a necessity of self-defence,
instant, overwhelming, leaving no choice of means, and no
moment for deliberation. It will be for it to shew [sic], also,
that the local authorities of Canada, even supposing the ne-
cessity of the moment authorized them to enter the territo-
ries of the United States at all, did nothing unreasonable or
excessive; since the act, justified by the necessity of self-

82 U.N. Charter art. 51.
83 Id.
84 Robert F. Teplitz, Taking Assassination Seriously: Did the United States Violate Interna-
tional Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?, 28 CORNELL INT'L L.J.
85 See id. at 575–76.
defence, must be limited by that necessity and kept clearly within it.86

Over time, Caroline's requirements—an imminent threat, a necessary action, a proportionate response, and the exhaustion of peaceful means87—came to define the customary standard for anticipatory self-defense, a status which was further reinforced with its use by the International Military Tribunal at Nuremberg in 1946.88

Caroline does provide some guidance as to the scope of Article 51, but the breadth of its three factors still remains subject to the same range of different interpretations. Scholars such as Major Schmitt suggested that the imminence requirement is a "relative criterion";89 in judging whether it is met, a state should weigh the severity of the threat before taking any preemptive action.90 The greater the threat, the more legally acceptable an anticipatory strike becomes.91 However, the author notes that this "sliding scale" analysis may fail with terrorism due to the difficulty of tracking and locating these groups before they attack.92 Terrorists who "go to ground" may be impossible to locate and eliminate until it is too late; missing an opportunity to remove a threat could prevent the victim state from responding until after the attack has been carried out.93 With September 11 fresh on the minds of the world's governments, however, and the threat of weapons of mass destruction looming large, in practice most states will likely err toward striking earlier in order to preserve their own security rather than waiting until later in order to secure more legal justification.

Even though the historical events that precipitated Caroline involved a preemptive strike to defuse an imminent threat of a direct armed attack, some observers—including a minority of nations and the United Nations itself—continue to assert that Article 51 does not allow states to act in self-defense until an actual attack occurs.94 They insist that the Article’s requirement of an “armed attack” should be interpreted to mean that a state could only respond to a threat in the

86 Id. at 577.
87 Id.
88 Johnson, supra note 42, at 578–79.
90 Id.
91 Id. at 647.
92 Id. at 648.
93 Id.
94 Operational Law, supra note 81, at 3.
case of an actual physical invasion by one state into the territory of another. Construing the right more liberally, they argue, would run counter to the clear language in the Charter and would be counterproductive to the United Nations’ goal of peaceful resolution of disputes and the maintenance of international order.

The specter of terrorism poses the most serious challenge to this narrow interpretation of Article 51. Most major governments assert that they can employ the requirements of Caroline to justify an attack against threats to their security, including actions inside the states that harbor or encourage such organized groups. A close reading of the Caroline requirements does not contradict this proposition, especially since that case involved an anticipatory attack into the territory of another state which was harboring insurgents. Although academics who support the more limited view continue to dispute the legitimacy of this viewpoint, it seems naïve to suggest that when nuclear, biological, or chemical (NBC) weapons are available to terrorist groups, a potential victim state must wait until an attack occurs before it can respond to a threat. Waiting for an actual strike could cost a victim nation hundreds or perhaps thousands of lives, or even eliminate the capacity of the victim state to respond at all.

Advocates of a broader view, which include the majority of nations and the United States, counter that a limited interpretation does not adequately reflect the nature of modern warfare and terrorism. They insist this narrow view of Article 51 ignores the historical weaknesses of the Security Council and the practical reality that no state will accept being forced to wait until it is attacked before it is allowed to protect itself. Requiring states to strictly comply with a narrow interpretation would effectively “impose paralysis” on them. The majority view, in contrast, only requires that the customary rule, as defined in Caroline, be satisfied before a state may legitimately act to eliminate a threat. Such an approach would not limit a state to responding only to an “armed attack,” and would allow preemptive de-

95 Id.
96 Id.
97 Id. at 3–4.
98 Beres, supra note 5, at 239.
99 Id.
101 Id. at 238–39.
offensive measures against an imminent or continuing threat that has not yet resulted in an attack.102

Supporters of the broad Article 51 view also point to the vast body of other law that justifies an anticipatory attack against a third-party nation who is harboring a threat. Various sources indicate that a state has a duty to prevent its territory from being used as a base for hostile acts of third parties against another nation.103 The U.S. Supreme Court established a “due diligence” standard in United States v. Arjona104 in 1887, stating that “[t]he law of nations requires every national government to use due diligence to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof.”105 Other secondary sources, such as Vattels’ Law of Nations, further indicate that states which support terrorists who threaten other states may lawfully be targeted:

If, then, there is anywhere a nation of restless and mischievous disposition, ever ready to injure others, to traverse their designs, and to excite domestic disturbances in their dominions . . . it is not doubted that all the others have a right to form a coalition in order to repress and chastise that nation, and to put it for ever after out of her power to injure them.106

These views seem incompatible with the United Nations’ strict interpretation of Article 51 and Caroline, and add further credence to the suggestion that the weight of international law supports a more flexible definition.

Two other approaches suggest alternatives to relying solely on Article 51 to define what level of violence is needed to activate the right to self-defense. The first of these relies upon the U.N. Charter’s definition of “aggression” to replace its lack of guidance on the meaning of “armed attack.”107 Under this theory, the two terms are regarded as roughly synonymous, with any use of aggression against a member of the United Nations invoking the victim’s Article 51 right to employ armed force in self-defense:

102 Johnson, supra note 42, at 420 n.123.
104 United States v. Arjona, 120 U.S. 479, 484 (1887).
105 Sofaer, supra note 103, at 103 n.35.
106 Beres, supra note 5, at 248 n.73.
107 Teplitz, supra note 84, at 614.
The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.\textsuperscript{108}

The Charter provides that any first use of violence is \textit{prima facie} evidence of aggression. It also provides a non-exhaustive list of specific examples, which includes the use of any kind of weapon to attack the territory of another state, blockading the ports or coasts of another state, attacking the armed forces of another state, allowing its territory to be used by a third state to commit acts of aggression against another state, or sending armed groups to attack another state.\textsuperscript{109} These examples suggest that aggression includes all "direct and indirect" methods of attack or any other complicit involvement which incites international conflict.\textsuperscript{110} Under this approach, a state who was a victim of an act of aggression would be permitted by Article 51 in acting in self-defense, regardless of whether the conditions for such defense had been met.

The International Court of Justice has also proposed that there may be acceptable defensive measures that fall below the threshold of Article 51. In \textit{Nicaragua v. United States}, the court acknowledged that activities that do not rise to the level of an armed attack could still "constitute a breach of the principle of the non-use of force . . . that is, a form of conduct that is certainly wrongful, but is lesser gravity than an armed attack."\textsuperscript{111} The Court implies that a lesser use of provocative force could justify "proportionate counter measures" by the victim state.\textsuperscript{112} This suggests that a nation facing some threat that does not rise to the level of an armed attack could still respond with a lesser, but undefined, degree of force.


\textsuperscript{109} Teplitz, \textit{supra} note 84, at 615.

\textsuperscript{110} Sofaer, \textit{supra} note 103, at 93.

\textsuperscript{111} Nicaragua, 1986 I.C.J. 14 at para. 249.

\textsuperscript{112} Teplitz, \textit{supra} note 84, at 616 n.397.
III. Assassination in American Policy and Law

A. The Cold War and the Church Committee

In order to understand the nature and scope of the U.S. Federal ban on assassinations and the degree to which it restricts the military options of the President, it is necessary to examine the circumstances of its origin. Reading the language of the rule—now in effect as Executive Order 12333\textsuperscript{113}—one could easily conclude that it prevents the United States from employing deadly force against foreign leaders. However, a legal and historical analysis of this document suggests that it is far less prohibitive than it might at first appear. It fails to actually bar state-sponsored assassination for two major reasons. First, in recent years the Order has been interpreted to allow the types of attacks against foreign leaders that the United States has typically favored. Second, an executive order does not have the force and immutability of law, and is subject to change by the President. As a result, Executive Order 12333 is not an effective legal obstacle to assassination, but rather is only a visible symbol of policy and a mechanism to ensure that the authority to initiate an assassination attempt resides with the President alone.\textsuperscript{114}

Executive Order 12333 and its predecessors indirectly arose from the November 1975 investigation by the Select Committee to Study Governmental Operations. Led by Senator Frank Church, the committee was charged with uncovering government operations that were "illegal, improper, or unethical."\textsuperscript{115} Responding to continued allegations that the U.S. intelligence committee had plotted to end the lives of several foreign leaders during the 1950s and 1960s, the Church Committee launched an extensive investigation that culminated in sixty days of formal hearings and more than 8,000 pages of sworn testimony.\textsuperscript{116} In its 346-page report, the committee concluded that the United States was indeed involved in five different assassination plots.\textsuperscript{117} In the two most serious cases, CIA officials were found to have actively worked to kill Patrice Lumumba, the Premier of the Congo,

\textsuperscript{113} Exec. Order No. 12,333, supra note 2, at § 200.
\textsuperscript{114} Parks, supra note 5, at 8; Zengel, supra note 10, at 146–47.
\textsuperscript{116} Id. at 2.
\textsuperscript{117} Id. at 4 n.1.
and Cuban Leader Fidel Castro.\textsuperscript{118} In three other incidents—involving Rafael Trujillo of the Dominican Republic, Ngo Dihn Diem of South Vietnam, and Rene Schneider of Chile—the U.S. government was not held directly responsible for the actual killings, but did support the coups that brought about their deaths.\textsuperscript{119}

Especially disturbing to the Church Committee were the internal machinations that produced these plots. On several occasions its members were unable to determine where the authorization to begin an operation had actually originated. Government officials maintained "plausible deniability" against internal investigations by using ambiguous and often evasive language to discuss sensitive operational matters and by employing broad imprecision in the wording of their orders. The Committee concluded that these sorts of practices led to confusion about the original intent behind the mission goals and created a breakdown in the accountability of elected government and appointed officials.\textsuperscript{120} This deliberate obfuscation of the evidence, they continued, was detrimental to the legitimate process of authorization and undermined principles of democratic accountability.\textsuperscript{121} In the intelligence community, the problem was serious enough that an assassination plot could be proposed, developed, and carried out without ever receiving presidential authorization.

In their findings, the Church Committee stated that in the absence of war, assassination should be rejected as a tool of American foreign policy. The practice was "incompatible with American principle, international order, and morality,"\textsuperscript{122} it reasoned, and violated the "moral precepts fundamental to our way of life."\textsuperscript{123} The Committee also suggested that it was probably inevitable that any plot hatched by U.S. officials would eventually be revealed because of the demonstrated inability of a democratic government to keep secrets.\textsuperscript{124} Regardless of the success of the actual plot, such a disclosure would seriously harm U.S. foreign relations and incite retaliatory attempts on the lives of U.S. officials.\textsuperscript{125} The Committee concluded that the dam-


\textsuperscript{119} See CHURCH REPORT, supra note 115, at 4–5.

\textsuperscript{120} Id.

\textsuperscript{121} Id. at 6–7.

\textsuperscript{122} Id. at 1.

\textsuperscript{123} Id. at 257.

\textsuperscript{124} CHURCH REPORT, supra note 115, at 281–82.

\textsuperscript{125} Id. at 282.
age from such revelations "to American foreign policy, to the good name and reputation of the United States abroad, to the American people's faith and support of its foreign government and its foreign policy, is incalculable."\(^{126}\) The Committee hinted, however, that in cases of imminent danger threatening the nation, assassination could still be considered a viable option.\(^{127}\) The Committee found that of all the targets plotted against by the CIA, only Castro ever posed such a threat, and only then, during the Cuban missile crisis.\(^{128}\)

The Church Committee also remarked on the difficulty of killing any foreign leader and on the difficulty of reliably generating a productive result from such a plot.\(^{129}\) A leader eliminated for his anti-U.S. bias could potentially be replaced by a successor even less accommodating to American interests. In addition, the instability and political upheaval resulting from a foreign official’s death could prove to be even more detrimental to the United States then the original leader ever was.\(^{130}\)

In order to prevent similar abuses in the future, the Committee recommended that a statute be enacted "which would make it a criminal offense for persons subject to the jurisdiction of the United States (1) to conspire, within or outside the United States, to assassinate a foreign official; (2) to attempt to assassinate a foreign official; or (3) to assassinate a foreign official."\(^{131}\) By the time the Committee had come to this conclusion, two successive Directors of Central Intelligence—Helms in 1972, and Colby in 1973—had already circulated memos instructing Agency personnel not to undertake or support such plots.\(^{132}\) With remarkable foresight, the Committee predicted why these measures were not sufficient and why legislation would be necessary:

Commendable and welcome as they are, these CIA directives are not sufficient. Administrations change, CIA directors change, and someday in the future what was tried in the past may once again be a temptation. . . . Laws express our nation's values; they deter those who might be tempted to ig-

\(^{126}\) _Id._ at 258.

\(^{127}\) Schmitt, _supra_ note 5, at 658.

\(^{128}\) _Church Report_, _supra_ note 115, at 258.

\(^{129}\) _Id._ at 281–82.

\(^{130}\) _Id._

\(^{131}\) _Id._ at 283.

\(^{132}\) Johnson, _supra_ note 42, at 407 nn. 33–35.
nore those values and stiffen the will of those who want to resist . . . . 133

Several subsequent efforts to enact such a law—in 1976, 1977, and 1980—have all failed. 134

Even by the time the Church Committee had completed its investigation, political forces had begun to mobilize to address the problem. In 1976, after first making several public statements which affirmed his commitment not to use assassination, President Gerald Ford issued Executive Order 11905, in which section 5 provided: “[N]o employee of the United States shall engage in, or conspire to engage in political assassination.” 135 The Order contained no definitions section, as would be expected in a legislative act, or any other elaboration of what constituted assassination. Executive Order 11905 also did not address the permissibility of other types of potentially lethal activities, such as support to coup attempts or paramilitary operations, although it did state that the Order did “not authorize any activity not previously authorized and not provide exemption from any restriction otherwise applicable.” 136 Despite these shortcomings, the Order was widely interpreted as prohibiting the types of activities revealed by the Church report—specifically, peacetime efforts by U.S. intelligence agency officials to cause the deaths of foreign heads of states whose activities were considered detrimental to the interests of the United States. 137

Within two years, Executive Order 11905 was revised. 138 In 1978, President Carter broadened the scope of the ban, newly numbered Executive Order 12306, 139 by adding the phrase “those acting on behalf of the United States,” to the text and deleting the word “political.” 140 The “acting” language in the new Order was interpreted to correct the lack of guidance on the permissibility of coup plotting. President Carter’s National Security Advisor, Zbigniew Brzezinski, however, in recent years has publicly stated that this interpretation was

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133 Church Report, supra note 115, at 282–83.
134 See Johnson, supra note 42, at 409–11.
136 Id.
137 See Zengel, supra note 10, at 145.
138 Fredman, supra note 119, at 2.
140 Fredman, supra note 119, at 2.
not what the President had intended. President Carter reportedly did not mean to prevent the United States from supporting a coup if the prospect of the leader's death could not be ruled out, but instead wanted only to remove any requirement that planners should affirmatively know beforehand whether the leader's death would result.

B. The Advantages of Using an Executive Order to Prohibit Assassinations

In reality, contemporary critics have suggested Executive Order 11905 likely prohibited assassination in general terms primarily in order to resolve political pressure to correct the problem and to serve as a visible symbol of policy. Others suspect that the Order may have preempted actual legislation that would have been much more specific and prohibitive—and thus harmful to the military and intelligence capabilities of the United States.

Part of the advantage of employing an executive order to prohibit assassinations is its inherent flexibility. Although each order has the effect of law, they are not immutable, and allow the President a variety of ways to circumvent them. The President has the authority to overrule the order, make an exception to it, or ask Congress to legislate its removal. Additionally, the President may designate any of these changes as classified if he considers them "intelligence activities . . . or intelligence sources and methods," effectively preventing them from ever reaching public view.

The executive order ban on assassinations may also be bypassed through a number of other executive actions. First, the President may ask Congress to declare war. As stated above, during wartime, a different body of law is used to define assassination, under which the President has much greater legal latitude to strike at foreign leaders as combatants. Second, the President may invoke the United States' Article 51 rights to self-defense, an act which authorizes the use of force equivalent to a declaration of war. Finally, the President could exercise his executive discretion to interpret the order narrowly, free-

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141 Schmitt, supra note 5, at 663.
142 Id.
143 Zengel, supra note 10, at 145.
144 See id.
145 Johnson, supra note 42, at 403.
146 Id. at 427 n.165.
147 Id. at 403 n.13.
148 Id. at 403 n.14.
ing him to authorize activities which potentially could result in a leader's death, but do not explicitly call for it.\textsuperscript{149} 

So many options exist to get around the ban that many observers have suggested that Executive Order 11905 and its successors are mostly symbolic in function, doing little to actually restrict the use of force.\textsuperscript{150} In a public memorandum of law, senior military lawyers came to a similar conclusion, finding that Executive Order 12333 does not limit action in wartime or restrict self-defense action during peacetime against legitimate threats to the national security of the United States.\textsuperscript{151} Therefore, the Order should not be viewed as a practical ban, but instead as a preventive measure to stop unilateral actions by officials within the government and a guarantee that the authority to order assassinations lies with the President alone.\textsuperscript{152}

C. Executive Order 12333 and Schultz's "Active Defense"

In 1981, President Reagan issued the most recent version of the ban, Executive Order 12333. This new Order, which remains in effect today, retained President Carter's wording, but added a section that prohibits indirect assassination by members of the intelligence community.\textsuperscript{153} It was the Reagan administration's use of force in response to terrorism, however, not the minor revisions in the Order itself, that proved to be more significant. On April 15, 1986, U.S. Air Force F-111 fighter-bombers struck three targets in Libya in retaliation for a Libyan-plotted terrorist attack at a Berlin nightclub that had killed a U.S. servicemen and wounded over two hundred others. One of these targets, the El Azziziya Barracks, was reportedly known by American intelligence to be the home and headquarters of Libyan leader Colonel Muammar Qadhafi. Although he was not present at the time of the attack, his wife and two sons were injured, and his young adopted daughter was killed.\textsuperscript{154} 

Press scrutiny of the raid revealed considerable evidence suggesting that the attack was intended to kill Qadhafi.\textsuperscript{155} The strike targets were close to his tent—which was in the corner of a very large open

\textsuperscript{149} See id. at 403 n.15.  
\textsuperscript{150} Johnson, supra note 42, at 40; Parks, supra note 5, at 8; Zengel, supra note 10, at 146.  
\textsuperscript{151} Parks, supra note 5, at 8.  
\textsuperscript{152} Id.  
\textsuperscript{153} See Schmitt, supra note 5, at 662 n.232.  
\textsuperscript{154} Id. at 666.  
\textsuperscript{155} Brandenburg, supra note 100, at 690–92.
and the United States supposedly sought intelligence on his location right up until the night of the attack.\textsuperscript{157} According to reporter Seymour Hersh, nine of the eighteen bombers employed in the raid had a specific mission to target Qadhafi and his family.\textsuperscript{158} As one Air Force intelligence officer put it: "There's no question they were looking for Qadhafi. It was briefed that way. They were going to kill him."\textsuperscript{159} Additionally, administration officials were instructed before the raid to prepare briefs that distinguished how Qadhafi's hypothetical death in the pending attack was not an assassination.\textsuperscript{160} Furthermore, language announcing his demise was reportedly prepared for the President's speech that evening.\textsuperscript{161}

In response to these accusations, the Reagan administration argued that the raid did not violate Executive Order 12333, and strenuously denied that Qadhafi was even a target. "We weren't out to kill anybody," said the President, although he doubted that "any of us would have shed tears" if Qadhafi had indeed died.\textsuperscript{162} Meanwhile, senior administration officials hastily categorized the raid as a legitimate Article 51 self-defense operation to the United Nations, sharing U.S. intelligence which conclusively linked Libya to the Berlin attack and revealed that as many as thirty more attacks were being planned.\textsuperscript{163}

While the State Department invoked Article 51 to satisfy international law, White House legal counsel Abraham D. Sofaer argued that the strike fell within a loophole in Executive Order 12333. Qadhafi was not a target of the raids, Sofaer reasoned, but if he merely happened to be present at one of the facilities that was bombed, his death would not be an assassination—just a consequence of the raid.\textsuperscript{164} A leader's position, Sofaer opined, does not legally immunize him from the effects of being present at a valid military target that is being attacked.\textsuperscript{165} Effectively, this reasoning reflected the law of armed conflict as it applies to non-combatants\textsuperscript{166}—a legitimate defense if

\begin{flushleft}
\textsuperscript{156} Id. at 690. \\
\textsuperscript{157} Id. at 690 n.230. \\
\textsuperscript{158} Johnson, \textit{supra} note 42, at 421. \\
\textsuperscript{159} Id. \\
\textsuperscript{160} Brandenburg, \textit{supra} note 100, at 690–91. \\
\textsuperscript{161} Id. at 690. \\
\textsuperscript{163} Schmitt, \textit{supra} note 5, at 667–68. \\
\textsuperscript{164} Id. at 668–69. \\
\textsuperscript{165} Id. at 668. \\
\textsuperscript{166} Id. 
\end{flushleft}
there was indeed a state of armed conflict or a continuing threat against the United States that merited a preemptive act of self-defense.

Secretary of State George Schultz, who had openly complained that the United States had responded to terrorism by becoming "the Hamlet of nations, worrying endlessly over whether and how to respond," strongly supported this argument. In a public address, he asserted the U.S. government would have to prepare an "active defense" to counter the rise in terrorism the future would bring. His statements were more than mere rhetoric—they were a glimpse of a persistent policy trend that would remain through the next three presidential administrations. Secretary Schultz predicted, "We can expect more terrorism directed at our strategic interests around the world in the years ahead. To combat it, we must be willing to use military force." What is needed to undermine the growing threat of terrorism, Secretary Schultz proposed, was a doctrine of active interventions:

We must reach a consensus in this country that our responses should go beyond passive defense to consider means of active prevention, pre-emption, and retaliation. Our goal must be to prevent and deter future terrorist acts, and experience has taught us over the years that one of the best deterrents of terrorism is the certainty that swift and sure measures will be taken against those who engage in it. We should take steps towards carrying out those measures. There should be no moral confusion on the issue. Our aim is not to seek revenge but to put an end to violent attacks against innocent people, to make the world a safer place to live for all of us. Clearly the democracies have a moral right, indeed a duty, to defend themselves.

In his remarks, Secretary Schultz also stated that there were cases where international rules and traditional practices did not apply, and that the free nations cannot afford to let the "Orwellian corruption of language hamper our efforts to defend ourselves, our interests, and our friends."
D. Post Cold War: From Saddam to September 11

Although the Cold War was not yet over, the Libyan raid became the model military action and legal precedent upon which many post-cold war attacks would be based. The lines between formal war and peace were no longer clear—the United States had indicated its intent to use deadly force against foreign leaders, even in peacetime, should they pose a threat to the nation. The use of more overt methods such as an airstrike, however, marked a shift away from the cloak-and-dagger schemes of the Cold War. Instead of covertly working to end a leader’s life, America would strike openly, with gun camera footage visible to all on CNN the next day.

This strategy was to be employed against Iraqi dictator Saddam Hussein during the 1991 Gulf War. As part of the air campaign leading up to the ground war, coalition strike aircraft hit 580 command and control sites from which Saddam might control his forces and another 260 “leadership targets” that included his palaces and other buildings he was known to frequent.\(^{172}\) Publicly, senior American leaders continued to deny that Saddam was an official target of the campaign. General Norman Schwartzkopf stated repeatedly that the United States does not “have a policy of trying to kill any particular individual,”\(^{173}\) but President George Bush was more ambivalent: “We’re not in the position of targeting Saddam Hussein,” he commented, “but no one will weep for him when he is gone.”\(^{174}\) Administration officials were so sensitive to the suggestion that they were targeting Saddam that Secretary of Defense Richard Cheney fired Air Force Chief of Staff Michael Dugan, who had the poor judgment to boast that the United States would “‘decapitate’ Iraqi leadership by targeting Saddam, his family, and even his mistress.”\(^{175}\)

After the war, however, individual generals were more forthcoming. General Charles Horner, the Commander of the U.S. Ninth Air Force and one of the major engineers of the air war, was quoted as saying, “As a matter of policy we were not trying to assassinate [Saddam] but we dropped bombs on every place that he should have been at work ... that’s ... getting kind of fancy with words but in reality

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\(^{173}\) Schmitt, *supra* note 5, at 673.

\(^{174}\) Schorr, *supra* note 162, at 2.

that's the truth of the matter."176 The General continued by explain­
ing that U.S. aircraft were actively hunting down the Winnebagos the
Iraqi dictator was using as mobile command posts.177 On one occa­
sion, one of Hussein’s groups of Winnebagos was reportedly attacked
by U.S. A-10 strike aircraft, which destroyed several vehicles but nar­
rowly missed the dictator himself.178 Although Horner’s comments
belie his lack of understanding of the laws of war as they apply to as­
sassination, these attacks were nonetheless perfectly legal. Open
strikes by cruise missiles and bombers against Saddam, a combatant in
his role as the Commander in Chief of the Iraqi Army, were neither
treacherous nor outlawry, and thus were valid. Furthermore, under
international law, the coalition’s UN Security Council resolution
authorizing the use of force, the Iraqi armed invasion of Kuwait, and
the Iraqi abduction of over 3,500 American hostages, add more legal
legitimacy to the United States’ claims that the war was a valid self­
defense action on behalf of Kuwait. Additionally, even if Saddam had
been killed by one of these raids, it would not be an assassination un­
der Executive Order 12333, as the attacks fell under President
Reagan’s exception for strikes against valid military targets.

The Clinton administration employed airstrikes and cruise mis­
siles more frequently than its predecessors to strike directly at foreign
leaders. President Clinton used force against Saddam several times,
first in 1993, when he employed a barrage of Tomahawk missiles to
destroy Iraqi intelligence headquarters in retaliation for a plot to kill
former President George Bush.179 Then, in 1998, Clinton struck at the
dictator with air raids for forcing weapons inspectors out of Iraq. Ad­
ministration officials commented at the time that the “candles” their
predecessors had supposedly lit during the Gulf War in hopes that
Saddam Hussein would be killed would be lit again.180 As one official
put it, “command and control sites will be targeted and we hope Sad­
dam Hussein is in one of them.”181 A year later, the U.S. Air Force also
bombed the home of Yugoslavian President Slobodan Milosevic—des­

176 The Gulf War: Interview with General Charles Horner, Commander of the Ninth
gulf/oral/horner/2.html.
177 Id.
178 Id.
179 See generally Teplitz, supra note 84, at 575.
180 Pincus, supra note 172, at A36.
181 Id.
designated a “command and control” target by NATO—during the 1999 Kosovo campaign.182

However, certainly the greatest effort to kill a specific individual has been directed toward Usama bin Laden. This former Saudi national has been on the United States’ “most wanted” list since 1996 when information linked him to the 1993 attack on the World Trade Center in New York. A fatwa, or religious edict, issued by bin Laden in 1998 which urged all Muslims to kill Americans, and his subsequent involvement in the attacks on U.S. embassies in Africa in August of 1998, the attack against the U.S.S. Cole in Yemen in 2000, and the September 11, 2001 attacks at the World Trade Center and the Pentagon have made him the target of a wide range of lethal operations.

The Clinton administration struck out at bin Laden and his organization several times, and amended Executive Order 12333 to make this task easier. First, in 1998 President Clinton removed from the Order’s scope the death of a foreign leader that results from a counterterror operation.183 He then authorized the use of deadly force against bin Laden and his al-Qa’ida organization—with the understanding that bin Laden might not survive the campaign.184 Clinton opted not to strike directly at bin Laden’s camps in Afghanistan with a risky helicopter raid, choosing instead to bombard them with some 60 cruise missiles.185 However, the Tomahawks reportedly missed bin Laden by perhaps as little as two to three hours.186 By the end of his term, Clinton’s initial timidity had hardened into a greater dedicated resolve, and he became more willing to take more risks to eliminate bin Laden. In 1999, press reports suggest he authorized the CIA to train and equip some 60 Pakistani commandos to enter Afghanistan and either capture or kill bin Laden.187 However, the over-

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182 Jonathan Karl & Brent Sadler, Milosevic Home a Legitimate Target, British Say, CNN.com (Apr. 22, 1999), at http://www.cnn.com/WORLD/europe/9904/22/kosovo.02 (Oct. 29, 2001); see also Scharff, supra note 175, at 974 n.266.
183 See Schorr, supra note 162, at 2.
184 Id.
186 Id.
throw of Pakistani President Nawaz Sharif by a military coup in 1999 reportedly forced an indefinite suspension of the operation.\textsuperscript{188}

The newly elected George W. Bush administration added dramatically to its predecessors’ efforts to eliminate bin Laden as a threat to national security and adopted his elimination as a consuming goal of the new Bush presidency after September 11th. In Mid-September of 2001, President Bush, supported by a Joint Resolution of Congress authorizing him to employ “all necessary and appropriate force,”\textsuperscript{189} issued an intelligence finding—an order dictating the use of funds appropriated for covert actions.\textsuperscript{190} The finding further authorized the CIA to attack bin Laden’s al-Qa’ida organization. The President specifically directed that al-Qa’ida communications, security apparatus, and infrastructure be targeted with the assistance of covert action teams from the U.S. military.\textsuperscript{191} The President’s intelligence finding authorized the CIA to employ deadly force to achieve these objectives, and as one senior Bush official put it, “The gloves are off. . . . [L]ethal operations that were unthinkable pre-September 11 are now underway.”\textsuperscript{192} Although the finding does not specifically exempt the government from complying with Executive Order 12333, the Clinton exception for counterterror operations would no longer categorize bin Laden’s death, should it arise from these covert actions, as an assassination under Executive Order 12333. Targeting bin Laden, the head of al-Qa’ida’s chain of command and the engineer of a string of terrorist attacks, would be legal as an Article 51 self-defense action against an imminent threat to the United States’ national security. His death would not therefore be an assassination unless it resulted from one of the methods expressly prohibited by the laws of war. Only Bush’s own suggestion that bin Laden was “wanted, dead or alive,” strays dangerously close to those prohibited means of killing. Were the statement more than just a figure of speech, it would constitute outlawry, rendering any resulting deaths as assassination under international law.


\textsuperscript{190} Id.

\textsuperscript{191} Woodward, \textit{supra} note 188, at A1.

\textsuperscript{192} Id.
Since the drafting of Executive Order 12333 in the 1970s, the United States has refrained from applying deadly force against foreign leadership except in times of war, near war, or imminent threat against the nation. And even when such force was applied, the United States has typically employed direct and overt means, such as airstrikes or cruise missile attacks. Whether America’s new determination to eliminate threats by more unconventional means is merely a unique response to September 11 or marks a return toward the Cold War practices that gave rise to Executive Order 12333 remains to be seen. Although such covert attacks might be illegal in the absence of provocation, in the light of the continuing terrorist threat a state-sponsored killing of Usama bin Laden or other terrorist figures would be justifiable as an Article 51 action, as well as permissible under established exceptions to Executive Order 12333.

IV. POLICY CONSIDERATIONS

Any suggestion that the United States’ formal ban on state-sponsored assassinations should be revoked must address the potential policy ramifications that such change would bring. The United States presents itself to the world as a “nation of laws, not men,” and actively promotes the democratic process both at home and abroad. American society cherishes the sanctity of life and punishes the use of violence to resolve disputes. Assassination, in contrast, was found by the Church Committee to be a brutal tool for projecting force that was incompatible with the basic democratic values upon which our country is built. The practice is also widely held by the world community to be immoral and dangerous to the greater international order. A public repudiation of the assassination ban—despite its mostly symbolic nature—would be latched onto by the world press and would carry the clear message that the methods of the United States are not as noble as the democratic principles it purports to advance.

This adverse reaction would impair the United States’ ability to engage in coalition building. In many of the conflict scenarios examined in this paper, the United States engaged in extensive diplomatic campaigns before initiating any military action. Such efforts are a crucial foundation for any war-fighting effort—without international acceptance and the direct support of other nations in the area of the

193 Church Report, supra note 115, at 1.
conflict, the ability of our military forces to secure their objectives would be greatly diminished.

In recent years, the State Department has been very successful in forging and maintaining international coalitions from even the most unlikely partners. For example, before the Persian Gulf War, the United States engaged in a three-month diplomatic blitz that recruited a number of Arab states, including some sympathetic to Saddam's regime, to provide support or even troops. Continued diplomatic efforts held the alliance together when Iraqi missiles struck at Israel, and Arab partners began worrying that an Israeli entrance into the war would remake the conflict into a clash of cultures between the West and Islam. In retrospect, the participation and cooperation of these states were critical to the success of the war, giving the coalition vital international legitimacy and providing military bases from which U.S. forces could operate. Maintaining a moral high ground was an important factor in recruiting these allies, and this made it easier to gain the support of states with whom relations had been tenuous in the past. Had the United States repudiated the ban on assassinations before this conflict, it is entirely possible that some states, already reluctant to enter the war, might have doubted American intentions or have been more reluctant to associate with a nation that was willing to publicly announce it would adopt such brutal tactics.

Diplomacy will be especially important in the coming years of President Bush's "war on terrorism." In order to pursue its objective of bringing Usama bin Laden and his associates to justice, the United States is seeking to create influence in a region that has historically been very suspicious of its motives. Maintaining the support of states such as Pakistan, that has previously supported the Taliban, and is a natural location from which to launch troops into Afghanistan, will be crucial in accomplishing that goal. Pakistani President Musharraf has proven supportive thus far, but his grip on power is shaky. Fundamentalist elements within his nation threaten its stability, and much of the populace is opposed to U.S. efforts to find bin Laden, and is deeply suspicious that the operation is part of a wider war against Islam. Similar sentiments are not uncommon in other strategically important states, including Saudi Arabia, Yemen, and Egypt. Government and media officials alike continue to cite a failure of U.S. "public diplomacy" as the reason of this deep mistrust because the United States has neither made any effort to explain its actions, nor sold the validity
of the campaign to those who can affect it directly.\textsuperscript{194} Initiating this public relations effort by renouncing the ban would be effectively shooting it in the foot: regardless of the reality of the American counterterror strategy, publicly stating assassination would be the best way to deal with a man whom 82\% of Pakistanis think is a "holy warrior"\textsuperscript{195} would only feed their suspicions of a western "crusade" against Islam.

\textbf{CONCLUSION}

The removal of Executive Order 12333 is not a practical option because the Order does not pose any substantive legal restrictions to the military options of the United States, and its repeal would publicly damage the reputation of the United States abroad for little gain. Executive Order 12333 effectively allows the United States "to have its cake, and eat it too," giving the nation a symbol of its intent to wage a \textit{jus ad bellum}, but also effectively giving the President the flexibility to employ the most brutal of tactics should he deem them necessary. Critics who suggest the United States should revoke the Order—presumably because of their belief that it unduly restricts the government's options in countering threats to national security—miss the reality that there are in fact very few legal impediments to the use of assassination. Neither Executive Order 12333 nor customary international and treaty law are likely to forbid the use of state-sanctioned killing in most of the scenarios that the United States would consider using it.

As an Executive Order, the implementation and enforcement of Executive Order 12333 is left entirely to the pleasure of the President. Should he determine that the Order restricts his ability to uphold his oath to "preserve, protect, and defend the Constitution of the United States," he could at any time amend, revoke, or temporarily suspend Executive Order 12333 so as to allow whatever use of force he sees fit. Even when it remains in effect, the two exceptions created by Presidents Reagan and Clinton have narrowed its scope by excluding deaths resulting from strikes on valid military targets or counterterror operations. Furthermore, should the President wish to keep an alteration of Executive Order 12333 away from the eyes of the enemy

and the American public for tactical reasons, he could conceal it under the shroud of the classification regime.

Similarly, international law supplies little in the way of barriers in all but a very limited number of circumstances. During wartime, combatants may validly strike at any combatant or member of the military chain of command, provided no treachery or outlawry is used. Although in theory the peacetime restrictions prohibiting all state-sponsored political killings are much stricter, in practice there are several major loopholes. First, is the continuing difficulty in overcoming the ambiguity and relativism of the term "political" which allows states to characterize their actions as they see fit. Second, there are a number of specific situations in which the law of war controls, even if no formal state of war exists. States may act in self-defense when they are attacked, and under the Caroline standard and broad interpretations of Article 51 of the UN Charter, states can probably also act preemptively to eliminate threats to their national security before any actual attack occurs.

After examining the United States' recent history of military action, it seems that the typical strategy of our government during the past twenty-five years rarely, if ever, is prohibited by either domestic or international law. When dealing with rogue dictators or terrorists such as Saddam Hussein or Usama bin Laden, the United States has consistently employed aerial bombardment and cruise missile attacks to strike at them directly. As each was an attack against a military target or a counterterror operation, any resulting deaths would not be considered assassinations under the Clinton and Reagan exceptions to Executive Order 12333. Under international law, missiles and bombs are not deemed treacherous, and their use does not constitute outlawry. Although the United States did not strike under a formal declaration of war, in each case it responded either to a threat of attack or an actual attack against it or another state. Both of these situations would justify the use of force as a matter of self-defense under Article 51 of the U.N. Charter.