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Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader

MACBETH. If it were done, when 'tis done, then 'twere well,
It were done quickly: If th'Assassination
Could trammell up the Consequence, and catch
With his surcease, Successe: that but this blow
Might be the be all, and the end all, heere,
But heere, upon this Banke and Schoole of time,
Wee'd jumpe the life to come. But in these Cases,
We still have judgement heere, that we but teach
Bloody Instructions, which being taught, returne
To plague th'Inventer. This even-handed Justice
Commends th'Ingredience of our poyson'd Challice
To our owne lips.¹

In the early fall of 1990, Air Force Chief of Staff General Michael Dugan boasted that if war actually erupted between the United States and Saddam Hussein's Iraq, American planes would probably target Saddam, his family, and his mistress. When Secretary of Defense Richard Cheney learned of Dugan's boasting, he immediately fired him, explaining to reporters that Dugan's comments constituted a potential violation of the U.S. ban on assassinations.² Despite their impropriety, General Dugan's comments raised a recurring question: Can the President order the assassination of a foreign leader?

Any discussion of assassination raises serious moral questions. Any aversion to condoning assassination must be tempered by the realization that in certain instances assassination can save lives. For example, President Abraham Lincoln concluded that assassinating a leader is morally justified when a people has suffered under a tyrant for an extended period of time and has exhausted all legal and peaceful means of ouster.³ German officials cited this "justifiable tyrannicide" rationale to

1. WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 7, l. 1-12 (Jay L. Halio ed., 1972) [hereinafter *MACBETH*].

2. George J. Church, *Saddam in the Cross Hairs*, *TIME*, Oct. 8, 1990, at 29.

3. Ernest W. LeFever, *Death to Saddam Hussein? Let His Own People Decide*, *L.A. TIMES*, Feb. 28, 1991, at B7.

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defend a plot to assassinate Hitler during World War II.⁴ Commentators have argued that if the plot had succeeded, millions of lives would have been saved.⁵

Questions about assassination's legitimacy have played an integral part in the political history of other nations, but Americans have acutely felt the shadow of assassination both domestically and internationally. Domestic assassinations, such as those of Abraham Lincoln, John F. Kennedy, and Martin Luther King, as well as plots to assassinate foreign leaders, such as Patrice Lumumba, Rafael Trujillo, and Ngo Dinh Diem, have tainted the American political landscape for over two centuries.

Although many scholars have discussed assassination, few have agreed upon a comprehensive definition of the term.⁶ Nevertheless, while no comprehensive definition of the term "assassination" exists today, most would probably recognize an assassination when they see one.⁷ Central Intelligence Agency plots to eliminate Cuba's Fidel Castro and the recent efforts to bomb the personal compound of Libya's Colonel Muammar el-Qaddafi graphically exemplify the term "assassination."

Though American awareness of assassination abroad may have existed for hundreds of years, U.S. acknowledgment and condemnation of such activities represents a recent development. Before any official U.S. ban on assassinations existed, the United States supported a small number of plots to kill foreign leaders. A Senate committee investigating and documenting these efforts concluded U.S. government officials had perceived assassination as a permissible course of action.⁸ Responding to information provided by the Senate committee, Presi-

4. *Id.*

5. *Id.*

6. The first reference to the word "assassination" in a Western language occurred in Dante's *Inferno*—"lo perfido assassin," explained by a contemporary commentator to mean "one who kills others for money." BERNARD LEWIS, *THE ASSASSINS: A RADICAL SECT IN ISLAM* 2 (1968). Modern definitions of "assassination" have varied widely. See BLACK'S LAW DICTIONARY 105 (5th ed. 1979) ("Murder committed, usually, though not necessarily, for hire, without direct provocation or cause of resentment given to the murderer by the person upon whom the crime is committed; though an assassination of a public figure might be done by one acting alone for personal, social or political reasons."). See also RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 124 (2d ed. 1976) (defining "assassinate" as "to kill suddenly, esp. a politically prominent person, murder premeditatedly and treacherously"). Some scholars have declined to offer a definition, claiming "assassination" can never comprehensively be defined. See, e.g., FRANKLIN L. FORD, *POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM* 1, 46, 196, 301-307 (1985).

7. For purposes of this Note, the author adopts the following definition of assassination: "The premeditated and intentional killing of a public figure accomplished violently and treacherously for political means." This definition is presented with the understanding that "assassination" cannot be comprehensively defined. For a discussion of the definition of assassination during wartime see, *infra* notes 105-19 and accompanying text.

8. SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, U.S. SENATE, *ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS* 7 (1976) [hereinafter *ALLEGED ASSASSINATION PLOTS*].

dent Gerald Ford issued a 1976 executive order prohibiting any government agency or employee from participating in or planning any assassination.⁹ In subsequent years, Presidents Jimmy Carter, Ronald Reagan, and George Bush have affirmed the order.¹⁰ The prohibition on assassination is currently enshrined in Executive Order 12,333: "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."¹¹

Although the ban on assassination contained in Executive Order 12,333 has the force and effect of a congressional statute,¹² the President can evade the order's mandate and legally carry out the assassination of a foreign leader in four ways. He could:

- (1) Ask Congress to declare war, in which case a foreign leader exercising command responsibility would become a legitimate target;¹³
- (2) Construe Article 51 of the United Nations Charter to permit the assassination of a foreign leader based on either a right to self-defense or a right to respond to criminal activities;¹⁴
- (3) Narrowly interpret the order as not restricting the President as long as he does not approve specific plans for the killing of individuals;¹⁵ or
- (4) Overrule the order, create an exception to it, or permit the Congress to do the same.¹⁶

By using any of these methods, a president could theoretically order the assassination of a foreign leader without violating Executive Order 12,333.

This Note argues that the presence of these loopholes demands effective correction and that Congress should pass a comprehensive statute banning all assassinations. Part I of this Note will trace the evolution of the U.S. policy behind the ban on assassinations in Executive Order 12,333 and will briefly examine congressional attempts to enact legislation. In detailing the history of the prohibition on assassination, the section will describe the conflict and cooperation between the executive and legislative branches in this area of government policy. Part II will discuss the constitutionality and legal effect of Executive Order 12,333. Part III will analyze the four loopholes that enable a president to circumvent the ban imposed by the order. Part IV will analyze the four loop-

9. Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

10. See Exec. Order No. 12,036, 3 C.F.R. 112 (1978); Exec. Order No. 12,333, 3 C.F.R. 200 (1981). President Bush has not taken any action to alter or to rescind Exec. Order No. 12,333.

11. Exec. Order No. 12,333, 3 C.F.R. 200 (1981).

12. *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967), cert. denied, 387 U.S. 977 (1967) (explaining that where Congress delegates to the executive the authority to effectuate the provisions of a statute, such executive orders issued pursuant to statutory authority have the force and effect of law); see *infra* notes 77-79 and accompanying text.

13. See *infra* notes 105-19 and accompanying text.

14. See *infra* notes 120-40 and accompanying text.

15. See *infra* notes 141-59 and accompanying text.

16. See *infra* notes 160-66 and accompanying text.

holes in light of the Persian Gulf War, examining the legality of an American assassination of Saddam Hussein at various stages of the conflict. Part V will discuss the need for comprehensive congressional legislation to prohibit assassination as a presidential policy option.

I. Background

A. The Early Assassination Efforts of the Executive Branch (1950-1972)

1. *The Senate Committee: U.S. Entanglement and Plausible Denial*

In 1975, the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities ("Committee") convened to investigate alleged U.S. involvement in assassination plots during the 1950s and 1960s. The Committee's investigative efforts focused on five leaders in five separate foreign countries: Patrice Lumumba of the Congo (currently Zaire), Fidel Castro of Cuba, Rafael Trujillo of the Dominican Republic, Ngo Dinh Diem of South Vietnam, and General Rene Schneider of Chile.¹⁷ At the conclusion of its investigation, the Committee directly implicated U.S. officials in attempted assassinations of Castro and the assassination of Trujillo. In the three other incidents, the Committee linked U.S. officials to events that occurred, but found no direct evidence that U.S. officials had carried out assassinations or had attempted assassinations.¹⁸

In an introduction to its findings, the Committee made two initial points: (1) the United States opposed the leaders in question and (2) ambiguity about authorization for attempted assassinations existed due to either a system of deniability or serious shortcomings in the authorization scheme.¹⁹ As to the second point, the Committee surmised either "plausible denial" had been accomplished or government officials had engaged in assassination activity without proper authorization.²⁰

The Committee defined "plausible denial" as a scheme where presidential authorization is issued but intentionally obscured to shield the President in the event of disclosure.²¹ According to the Committee, the original purpose of the "plausible denial" doctrine was to be able to deny U.S. involvement in covert operations.²² The Committee explained that the doctrine was expanded to mask decisions of the President and senior staff members. As a result of the expansion, subordinates failed fully to inform their superiors about their operations. In addition, "plausible denial" encouraged the use of circumlocutions and

17. ALLEGED ASSASSINATION PLOTS, *supra* note 8, at 4-5.

18. *Id.*

19. *Id.* at 6-7.

20. *Id.*

21. *Id.* at 11-12.

22. *Id.*

euphemism in instructions.²³ While these techniques were designed to enable the President and senior officials to deny knowledge of an operation should it be discovered, they also generated confusion regarding the exact nature of the order given and of the action ultimately taken.²⁴ Such confusion was present in both incidents the Committee described as directly involving U.S. officials.

2. *The Attempted Assassination of Fidel Castro*

The Committee directly linked U.S. officials to numerous attempts to assassinate Cuba's Fidel Castro. The Committee found solid evidence of at least eight C.I.A. plots to assassinate Castro from 1960 to 1965. Though some plots stalled at the planning stage, one scheme involving underworld figures twice progressed to the point of sending poison pills and assassination teams to Cuba.²⁵ The proposed assassination devices for these eight plots included high-powered rifles, deadly bacterial powders, poisoned cigars, poisoned pens, and "other devices which strain the imagination."²⁶ Castro's evasive efforts and the C.I.A.'s inability to recruit effective Cuban secret agents contributed to the failure of every attempted assassination.²⁷ Although C.I.A. officials contacted underworld figures in connection with assassination attempts on Castro,²⁸ the Committee concluded, perhaps on the basis of testimony designed for "plausible denial" purposes, that neither President Eisenhower, President Kennedy, nor President Johnson was directly involved in any attempt on Castro's life.

3. *The Assassination of Rafael Trujillo*

The Committee also directly linked U.S. officials to the assassination of Rafael Trujillo, dictator of the Dominican Republic. On May 30, 1961, a group of prominent Dominican dissidents, some of high rank in national life, assassinated Trujillo.²⁹ According to the Committee, both the Eisenhower and Kennedy Administrations encouraged the overthrow of the brutal Trujillo regime by Dominican dissidents. Specifically, C.I.A.

23. *Id.* For example, the President or senior White House staffers might instruct C.I.A. officials to address the insurrection in a certain country in "whatever manner deemed appropriate." If the C.I.A. subsequently attempted to assassinate the insurrection's leader, and the press reported the attempt, the President and his or her senior staff could effectively deny any knowledge of the particular methods used by the C.I.A. and argue that such methods were unauthorized.

24. *See id.*

25. *Id.* at 71. Ironically, C.I.A. operatives and a Cuban official planned one of the plots on November 22, 1963, the day on which President Kennedy was killed. *Id.* at 72.

26. *Id.* at 71. One such device was an "exotic seashell," rigged to explode and deposited where Castro frequently went diving. *Id.* at 85. Another device was a diving suit dusted inside with a fungus that would produce a chronic skin disease. *Id.* at 86.

27. *See id.* at 72-89.

28. *See* WARREN HINCKLE & WILLIAM W. TURNER, *THE FISH IS RED: THE STORY OF THE SECRET WAR AGAINST CASTRO* 23-25 (1981).

29. MURRAY HAVENS ET AL., *THE POLITICS OF ASSASSINATION* 137 (1970).

officials supplied three pistols and three carbines to the dissidents prior to 1961.³⁰ Although the United States knew the dissidents intended to use the weapons to assassinate Trujillo, evidence failed to demonstrate that the pistols and carbines supplied by the C.I.A. were actually used in the assassination.³¹ Moreover, the Committee did not directly implicate either Presidents Eisenhower or Kennedy in the ultimate assassination of Trujillo.

The Committee's findings of direct U.S. involvement in assassination attempts on foreign leaders in the 1950s and 1960s generated significant controversy. On Capitol Hill, distaste for the C.I.A.'s activities began to grow. Commenting on the U.S. involvement in the assassination of South Vietnam's President Ngo Dinh Diem in 1963, and the efforts of the executive branch to purge itself of primary responsibility, Senator Daniel Moynihan recently echoed the understanding of many critics:

We did not order it. We certainly did not do it. But we were around. I was not then involved in foreign affairs, but I had friends who were. These friends were sick at what we had done. Diem was an innocent man; an ally. We had decided we needed a better one. Get out of the truck; say your prayers. Something like that. I don't even want to look it up.³²

30. ALLEGED ASSASSINATION PLOTS, *supra* note 8, at 191.

31. *Id.*

32. Daniel P. Moynihan, *Assassinations: Can't We Learn?*, N.Y. TIMES, Oct. 20, 1989, at A35 (editorial). Although the Committee believed that Diem's assassination was a spontaneous act by Vietnamese generals angered by his refusal to resign during a coup, it found prior U.S. involvement in discussions regarding an assassination attempt. ALLEGED ASSASSINATION PLOTS, *supra* note 8, at 217. At one point, the Saigon Chief of Station recommended that the United States "not set ourselves irrevocably against the assassination plot." *Id.* After setting the fatal coup in motion and offering aid to the dissident generals despite the possibility of assassination, the United States attempted to distance itself from the affair with cables and conversations condemning harm to Diem. Although the Committee eventually absolved U.S. officials of direct responsibility for Diem's death, one could perceive the sudden change of heart by the United States regarding harm to Diem as one more effort at "plausible denial." *Id.* at xxvi-xxvii.

The Committee found indirect involvement of U.S. officials in the assassinations of both Patrice Lumumba of the Congo and Chilean General Rene Schneider. Regarding the assassination of Lumumba, the Committee discovered that in the summer of 1960, the C.I.A. Deputy Director of Plans, Richard Bissell, asked the Chief of the African Division, Bronson Tweedy, to explore the feasibility of assassinating Lumumba, Congo's prime minister. Bissell also asked a C.I.A. scientist, Joseph Scheider, to prepare to assassinate or incapacitate an unidentified "African leader." Scheider testified that Bissell said that the assignment had the "highest authority." In late September, Scheider delivered a lethal toxin to the Station Officer and ordered him to assassinate Lumumba. After being assured that President Dwight Eisenhower had ordered the assassination, the Station Officer took "exploratory steps" pursuant to the assassination plot. Both before and after these steps were taken, cables urging the "elimination" of Lumumba were sent to the Congo through an extraordinarily restricted "eyes only" channel, two of which C.I.A. Director Allen Dulles personally signed. *Id.* at 19. Ultimately, the Congo central government turned against Lumumba and transported him directly into the hands of his enemies who killed him. *Id.* at 48. Although the C.I.A. Congo Station knew of the central

B. The Response of the Executive Branch to the Public Disclosure of Past Assassination Efforts (1972-1975)

After press reports that the C.I.A. had engaged in assassinations of foreign leaders—allegations later confirmed by the Committee's investigations—C.I.A. Director Richard Helms issued the first of several agency directives prohibiting assassination activities in the intelligence community. In a memorandum to his deputy directors on March 6, 1972, Helms stated:

It has recently again been alleged in the press that the C.I.A. engages in assassination. As you are well aware, this is not the case, and Agency policy has long been clear on this issue. To underline it, however, I direct that no such activity or operations be undertaken, assisted or suggested by any of our personnel.³³

Helms's successor, William Colby, reaffirmed the C.I.A. ban on assassinations on August 29, 1973 in one of a series of orders generated from an internal review of prior "questionable activities."³⁴ The order stated, "the C.I.A. will not engage in assassination nor induce, assist or suggest to others that assassination be employed."³⁵ Colby's ban was expressly endorsed by the Secretary of Defense, James R. Schlesinger, who had uncovered more detailed information regarding several alleged assassination plots occurring in the late 1950s and early 1960s.³⁶

Presidents did not become involved in the controversy over an assassination ban until February 1975. At that time, President Ford, commenting on the Senate Committee's recently initiated investigations into the alleged assassination plots by the C.I.A., warned associates that if the investigations went too far they could expose several assassina-

government's plan to transport Lumumba to his death, the Committee concluded no basis existed for linking the United States to the fatal transport. *Id.* at 49.

The Committee's final revelation involved the attempted kidnapping and allegedly accidental assassination of Chilean General Rene Schneider. On September 15, 1970, President Richard Nixon told C.I.A. Director Richard Helms that the new government in Chile headed by Dr. Salvadore Allende Gossens was unacceptable to the United States. Nixon ordered Helms to take a direct role in organizing a military coup d'etat in Chile. The Chilean commander-in-chief, General Rene Schneider, became a major obstacle to the coup plans when he insisted that the constitutional electoral process be followed. *Id.* at xxv. After two abduction attempts of Schneider had failed, the C.I.A., acting under instructions from President Nixon and fully aware that lives, including Schneider's, might be risked, supplied Chilean coup leaders with three submachine guns and ammunition. In a third kidnap attempt, kidnappers accidentally shot and killed Schneider. *Id.* at 226. Although the Committee concluded that the third set of kidnappers was not made up of the same individuals to whom the C.I.A. had supplied the weapons, it did not clarify whether or not these killers were either supported or encouraged by anyone connected with the C.I.A. While Henry Kissinger and General Alexander Haig denied that the White House had any knowledge of the activities in Chile after October 15, 1970, C.I.A. officials insisted that they were acting on Presidential authority. *Id.* at xxv.

33. ALLEGED ASSASSINATION PLOTS, *supra* note 8, at 282.

34. *Id.*

35. *Id.*

36. *Ford Said to Fear Baring of C.I.A. Role in Assassinations Abroad*, N.Y. TIMES, Mar. 1, 1975, at A30.

tions of foreign officials in which intelligence agencies were involved. President Ford referred to the occurrence of these assassinations, the *New York Times* reported, as a "reason for extreme caution and security in the investigations of the C.I.A. by the Administration and Congress."³⁷

President Ford publicly condemned assassination efforts by the C.I.A. on many occasions. At a March 17, 1975 news conference, Ford stated, "let me say at the outset that this Administration does not condone, under any circumstances, any assassination attempts. We in this Administration will not participate under any circumstances in activities of that sort."³⁸ In a November 26, 1975 news conference at the White House, Ford further stated, "I have issued specific instructions to the U.S. intelligence agencies that under no circumstances should any agency in this Government, while I am President, participate in or plan for any assassination of a foreign leader."³⁹

While President Ford publicly expressed outrage over the alleged C.I.A. assassination plots and called for thorough investigations, the views he expressed to Congress were seemingly different. In a letter to the Senate Committee investigating the assassination allegations, Ford urged the members not to make public the report of their findings. While reiterating his abhorrence of assassination as a policy option, Ford pleaded with the Committee's members to seal their report, saying:

Public release of these official materials and information will do grievous damage to our country. It would likely be exploited by foreign nations and groups hostile to the United States in a manner designed to do maximum damage to the reputation and foreign policy of the United States. It would seriously impair our ability to exercise a positive leading role in world affairs.⁴⁰

Ford's final word on assassination was to impose the first presidential ban on assassination activities within the government. In January 1976, Congress became shrouded in controversy when the Committee's report was leaked to the press.⁴¹ Reacting to public disclosure in February of 1976, President Ford handed down Executive Order 11,905.⁴² The order included a prohibition against assassination, stating: "No

37. *Id.*

38. President's News Conference at South Bend, Indiana, 1975 PUB. PAPERS 361, 363 (Mar. 17, 1975).

39. President's News Conference at the White House, 1975 PUB. PAPERS 1902, 1905, 1914 (Nov. 26, 1975).

40. Letter to the Chairman and Members of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities, 1975 PUB. PAPERS 1805, 1805-1807 (Oct. 31, 1975).

41. Leslie Gelb, *Spy Inquiries Begun Amid Public Outrage, End in Indifference*, N.Y. TIMES, May 12, 1976, at A20.

42. Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, LAW & CONTEMP. PROBS., Summer 1976, at 1, 38-39. Although Executive Order No. 11,905 included the ban on assassination, it did not contain language describing either the purpose or the scope of the ban.

employee of the United States Government shall engage in, or conspire to engage in, political assassination.”⁴³

Subsequent presidents have affirmed President Ford’s ban on assassination. In January 1978, President Carter expanded the ban to prohibit assassinations conducted by individuals working for the United States. “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”⁴⁴ In December 1981, President Reagan adopted the same language used by President Carter.⁴⁵ President George Bush has seemingly affirmed Reagan’s prohibition by allowing Executive Order 12,333 to remain in effect.

C. The Failure of Congress to Legislate a Ban on Assassinations (1975-present)

At the conclusion of its investigations, the Senate Committee examining alleged C.I.A. assassination plots condemned assassination and rejected it as an instrument of American policy. Citing moral and practical considerations,⁴⁶ the Committee concluded that “a flat ban against assassination should be written into law.”⁴⁷ It expressed surprise that no statute had outlawed assassinating a foreign official⁴⁸ and strongly recommended the “prompt enactment of a statute making it a federal crime to commit or attempt an assassination, or to conspire to do so.”⁴⁹ The Committee argued that a statute, as opposed to an executive order or a C.I.A. directive, was needed because “[l]aws express our nation’s values; they deter those who might be tempted to ignore those values and stiffen the will of those who want to resist the temptation.”⁵⁰ Moreover, a statute would be less vulnerable to rapid policy transitions caused by wholesale changes in the executive branch.⁵¹

Despite the Committee’s clear directive, Congress has repeatedly failed to enact a ban on assassinations. In September 1976, Republican Representative Robert N. McClory introduced a bill in the House of Representatives providing, “[w]hoever, except in time of war, while engaged in the duties of an intelligence operation of the Government of the United States, willfully kills any person shall be imprisoned for not

43. Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

44. Exec. Order No. 12,036, 3 C.F.R. 112 (1978).

45. Exec. Order No. 12,333, 3 C.F.R. 200 (1981).

46. The Committee cited numerous witnesses who denounced assassination as an immoral tactic for any nation. Moreover, the Committee cited former C.I.A. Director Richard Helms’s contentions that the inability to keep attempted assassinations secret in a democracy and the uncertainty over who will replace an assassinated leader make assassination an ineffective tactic. ALLEGED ASSASSINATION PLOTS, *supra* note 8, at 281-82.

47. *Id.* at 281.

48. *Id.*

49. *Id.*

50. *Id.* at 282-83.

51. *Id.*

less than one year.”⁵² Although the House referred the bill jointly to the Committees on Armed Services and the Judiciary, Congress did not enact it into law.

In May of 1977, the Senate Select Committee on Intelligence further fueled the congressional initiative towards legislating a ban on assassinations by calling for stringent legislative measures to avoid the repetition of the “widespread abuses of the past.”⁵³ The Select Committee indicated it was considering prohibition of some clandestine activities, including assassination.⁵⁴

Encouraged by the Select Committee’s enthusiasm for a legislative ban against assassination, twenty senators introduced a bill containing an expansive prohibition against assassinations.⁵⁵ The bill prohibited any individual from conspiring to assassinate any foreign official and levied a punishment of “imprisonment for any term of years or life.”⁵⁶ In addition, any officer or employee of the United States, while outside U.S. territory, who conspired, attempted to assassinate, or assassinated a foreign official would be punished by imprisonment for any term of years or life.⁵⁷ Although the Senate referred the bill to the Select Com-

52. H.R. 15542, 94th Cong., 2nd Sess., § 9(1) (1976).

53. Anthony Marro, *Intelligence Abuses Curbed, Panel Says*, N.Y. TIMES, May 19, 1977, at A17.

54. *Id.*

55. S. 2525, 95th Cong., 2nd Sess. (1978). The sponsors of the bill included, inter alia: Sens. Goldwater, Byrd, Baker, Biden, Hart, Lugar, Moynihan, and Cranston.

56. *Id.* § 134(5). Officers or employees found guilty of first-degree murder would be sentenced to life imprisonment automatically. *Id.*

57.

Whoever being an officer or employee of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, conspires with any other person or persons to kill any foreign official, because of such official’s office or position, or because of such official’s political views, actions, or statements, while such official is outside the United States and such jurisdiction, and one or more such officers, employees, or other persons do any overt act to effect the object of the conspiracy, shall be punished by imprisonment for any term of years or life.

Id.

Whoever being an officer or employee of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, attempts to kill any foreign official, because of such official’s office or position, or because of such official’s political views, actions, or statements, while such official is outside the United States and such jurisdiction, shall be punished by imprisonment for any term of years or life.

Id.

Whoever being an officer or employee of the United States, while outside the United States and the special maritime and territorial jurisdiction of the United States, kills any foreign official, because of such official’s office or position, or because of such official’s political views, actions, or statements, while such official is outside the United States and such jurisdiction, shall be punished by imprisonment for any term of years or life, except that any such officer or employee who is found guilty of murder in the first degree shall be sentenced to imprisonment for life.

Id.

mittee on Intelligence, Congress failed to enact it into law.

A final congressional effort to prohibit assassinations occurred in February of 1980. Members of both the House and Senate introduced bills copying the prohibitive language in President Carter's executive order: "No person employed by or acting on behalf of the United States Government shall engage or conspire to engage in assassination."⁵⁸ The House and the Senate referred the bills to their respective Select Committees on Intelligence. Although Congress initially appeared to favor the bills, interest dissipated in late spring 1980. Ultimately, the Senate bill's proposed code of reform, which included a prohibition on assassinations, was abandoned in favor of a shorter version giving the C.I.A. more latitude to undertake covert operations.⁵⁹ Critics cited the Iran hostage crisis, the Afghanistan situation after intervention by the Soviet Union, and President Carter's "luke-warm support" of the Senate measure as reasons that Congress did not pass the proposed ban on assassination.⁶⁰

Commentators have offered four explanations for Congress's failure to legislate a ban on assassinations. First, the public never fully supported a ban.⁶¹ Congressmen reported that from the beginning of the Committee's investigation, the issue of C.I.A. political assassinations "never caught fire among their constituents."⁶² Without pressure from constituents, members of Congress had little impetus to act.⁶³ Representative Otis G. Pike, the chairman of the House Select Committee on Intelligence, offered a similar explanation, "It all lasted too long, and the media, the Congress, and the people lost interest."⁶⁴

Second, commentators suggest that the Senate Committee may have allowed public interest in the assassination issue to wane.⁶⁵ One commentator argued, "[t]he Committee was unwilling from the beginning to operate in public or to confront and do battle with intelligence agencies that were reluctant to supply full and complete information."⁶⁶ By deliberately trying to avert public attention from intelligence agencies, the Committee may have contributed to the failure of legislative

58. H.R. 6588, 96th Cong., 2d Sess., § 131 (1980); S. 2284, 96th Cong., 2d Sess., § 131 (1980).

59. Charles Hohr, *Effort to Enact Intelligence Charter Is Abandoned by Senate Advocates*, N.Y. TIMES, May 2, 1980, at A1. The shorter legislation failed to address two issues other than assassination that were of concern to critics: (1) The legislation did not mention the use of journalists, clergymen, and professors or the use of their institutions as "cover" for C.I.A. agents; (2) The legislation inhibited scrutiny of the intelligence community by making it a crime, punishable by jail sentences of five to ten years and fines of up to \$50,000, for an official or former official of the Government to disclose the identity of an intelligence agent. *Id.*

60. *Id.*

61. Nicholas M. Horrock, *The Meaning of Congressional Intelligence Inquiries*, N.Y. TIMES, Apr. 30, 1976, at A20.

62. *Id.*

63. *Id.*

64. Gelb, *supra* note 41, at A20.

65. Horrock, *supra* note 61, at A20.

66. *Id.*

reform efforts.⁶⁷ In addition, the Committee's unintentional disclosure of classified information resulting in a lead C.I.A. officer's assassination put Congress on the defensive in late 1975 and early 1976.⁶⁸ Thus, Congress grew increasingly reluctant to draw attention to intelligence activities by attempting reform.

Third, the House and Senate Committees to Study Governmental Operations with Respect to Intelligence Activities approached their investigations differently.⁶⁹ While the House Committee angered House colleagues by operating openly, the Senate Committee made numerous deals with the White House, the *New York Times* reported.⁷⁰ These divergent approaches fostered negative reactions to the idea of a legislative ban on assassinations in both chambers of Congress. Senate leaders were angered by the House Committee's overt investigation strategy, and House members were upset by the Senate Committee's secret interactions with the White House.⁷¹ Ultimately, these negative reactions prevented establishment of a unified coalition supporting a ban.⁷²

Finally, the difficulties of securing information about the intelligence community's inner workings hampered the congressional investigations of the mid-1970s.⁷³ Members of the executive branch perpetuated such difficulties. For example, according to the *New York Times*, Vice President Nelson A. Rockefeller lectured C.I.A. Director William Colby for giving too much information to an investigative commission that Rockefeller himself chaired.⁷⁴

Although the Senate Committee recommended that Congress enact "a flat ban against assassinations" into law, Congress has repeatedly failed to carry out that recommendation. Low constituent interest in an assassination ban, intense wrangling within Congress, and blunt White House and C.I.A. refusals to provide necessary information have contributed to Congress's failure. Because of Congress's inability to legislate a detailed prohibition on assassination, the vague and simplistic language of Executive Order 12,333 persists as the only legal bar to a recurrence of the executive branch's assassination exploits of the 1950s and 1960s.

67. *Id.*

68. Gelb, *supra* note 41, at A20. News reports alleged that Daniel Schorr, a CBS reporter, obtained and arranged for publication of the classified report of the House Committee's investigation of the alleged assassination plots. After a magazine published a portion of the report identifying Richard S. Welch as the head of the C.I.A. office in Greece, unknown individuals assassinated Welch. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.*

73. *Id.*

74. *Id.*

II. Constitutionality and Legal Effect of Executive Order 12,333

Although congressional efforts to ban assassination have failed, the presidential prohibition still exists in Executive Order 12,333. However, executive orders may raise issues about the legitimacy of presidential lawmaking, because lawmaking is essentially a legislative function. Consequently, the current ban on assassination raises numerous questions regarding the constitutionality and legal effect of executive orders.

By merely prohibiting assassinations via executive order, a president is essentially performing a legislative function. He is creating "presidential legislation" that may be unconstitutional.⁷⁵ In *Youngstown Co. v. Sawyer*, the Supreme Court delineated a clear test to assess the constitutionality of an executive order: "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."⁷⁶ Unless the President can cite either statutory or constitutional authority for his actions, the order will be held unconstitutional.

In applying the *Youngstown* test, courts have upheld most executive orders as constitutional exercises of delegated congressional authority.⁷⁷ For example, in *Farkas v. Texas Instruments, Inc.*, the court concluded that because the provisions of the executive order in question were *related* to the purposes of the congressional statute authorizing presidential action, "[t]hat Order . . . is to be accorded the force and effect given to a statute enacted by Congress."⁷⁸ Similar deference has been given to presidents issuing executive orders in other cases.⁷⁹ Nev-

75. John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 (1981).

76. *Youngstown Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (holding that, when neither Article II of the Constitution nor the Taft-Hartley Act of 1947 authorized the President to direct the seizure of steel mills, an executive order authorizing such seizure by Secretary of Commerce was unconstitutional). In *Youngstown*, the President's executive order directing the Secretary of Commerce to seize and operate most of the striking steel mills was not based upon any specific statutory authority but rather based generally upon all powers vested in the President by the Constitution and by laws of the United States. After the President promptly reported to Congress that the Secretary had issued an order seizing the steel mills and directing their presidents to operate them as operating managers for the U.S. in accordance with his regulations and directions, Congress took no action. Congress had provided other methods of dealing with such situations and refused to authorize governmental seizures of property to settle labor disputes. Based on the clear and intentional absence of congressional authorization for the order, the Supreme Court held the order unconstitutional. *Id.* at 579.

77. Fleishman & Aufses, *supra* note 42, at 5.

78. *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967) (while rejecting claim of former employee of government contractor against employer for violation of employee's rights under executive order forbidding discrimination because of national origin, court held that executive order of the President, where constitutional, is given the force and effect of a congressional statute).

79. *See, e.g., Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3 (3rd Cir. 1964) (executive orders requiring non-discrimination provisions in government contracts have the force of law); *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928) (Tariff

ertheless, some commentators have criticized this judicial deference to the President.⁸⁰ One critic has asserted that when executive orders have lacked statutory authority, courts have manufactured it for presidents.⁸¹ Other critics maintain that when Congress delegates broad power to the executive branch, presidents lack adequate standards to govern their conduct.⁸² As a result, presidents may issue executive orders without a clear statutory basis and, therefore, do violence to the principle of separation of powers in the American constitutional framework.⁸³ Such abuses can be remedied only through heightened judicial scrutiny of executive order legality.

Despite the calls for heightened judicial scrutiny of executive orders,⁸⁴ the Supreme Court has shown broad deference to the President by actively seeking congressional authorization for executive orders pertaining to national security. In *Dames & Moore v. Regan*,⁸⁵ for example, the Court acknowledged the absence of explicit congressional authorization for an executive order dealing with national security, but the Court nevertheless declared it constitutionally valid:

Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility."⁸⁶

Presidents Ford, Carter, and Reagan cited the President's constitutional power as sufficient authority for executive orders banning assassinations.⁸⁷ Commentators have pointed out four sections generally used to

Act empowering President to increase or decrease duties according to certain criteria not unconstitutional delegation of power).

80. See, e.g., Noyes, *supra* note 75, at 843.

81. *Id.*

82. Fleishman & Aufses, *supra* note 42, at 5-6.

83. *Id.*

84. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131-34 (1980); Paul Gerwitz, *The Courts, Congress and Executive Policy Making: Notes on Three Doctrines*, *LAW & CONTEMP. PROBS.*, Summer 1976, at 46.

85. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

86. *Id.* at 678 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981), and *Youngstown Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

87. "By virtue of the authority vested in me by the Constitution and statutes of the United States, including the National Security Act of 1947 . . . and as President of the United States of America, it is hereby ordered, . . ." Exec. Order No. 11,905, 3 C.F.R. 90 (1976) (preamble); "By virtue of the authority vested in me by the Constitution and statutes of the United States of America including the National Security Act of 1947 . . . and as President of the United States of America, in order to provide for the organization and control of United States foreign intelligence activities, it is hereby ordered, . . ." Exec. Order No. 12,036, 3 C.F.R. 112 (1978) (preamble); "[B]y virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the National Security Act of 1947 . . . and as President of the United States of America, in order to provide for the effective conduct of United

authorize executive orders:⁸⁸ (1) Article II, Section 1, vesting executive power in the President;⁸⁹ (2) Article II, Section 2, Clause 1, the Commander-in-Chief Clause;⁹⁰ (3) Article II, Section 3, the Faithful Execution or "Take Care" Clause;⁹¹ and (4) the designation of the President as "exclusively responsible for the conduct of diplomatic and foreign affairs."⁹² Courts have expressly recognized these sections as providing sufficient constitutional authorization for executive orders.⁹³

In addition to constitutional authority, the executive orders banning assassination have cited the National Security Act of 1947 as congressional authorization for the prohibition.⁹⁴ The National Security Act of

States intelligence activities and the protection of constitutional rights, it is hereby ordered, . . ." Exec. Order No. 12,333, 3 C.F.R. 200 (1981) (preamble).

88. Fleishman & Aufses, *supra* note 42, at 11-13.

89. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1, cl. 1.

90. The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

U.S. CONST. art. II, § 2, cl. 1.

91. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers, he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. CONST. art. II, § 3.

92. See Fleishman & Aufses, *supra* note 42, at 11-13. See also *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936).

93. Article II, section 1, has been successfully cited by presidents to justify executive orders without congressional authorization as well as executive privilege. See *Youngstown Co. v. Sawyer*, 343 U.S. 579, 587 (1952); Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 104 (1965). The Commander-in-Chief Clause was used to legitimate constitutionally President Franklin Roosevelt's internment of Japanese Americans. See *Hirabayashi v. United States*, 320 U.S. 81, 85-86 (1943). Repeated judicial recognition of the legitimate authorization provided to the President by the "Take Care" Clause encouraged the Solicitor General in *Youngstown* to argue that the clause provided authority for the presidential seizure of the steel mills. Fleishman & Aufses, *supra* note 42, at 12 n.83. Finally, the fact that the President is exclusively responsible for diplomatic and foreign affairs was held sufficient authorization for Franklin Roosevelt's order forbidding arms shipments to Paraguay and Bolivia in 1932. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936).

94. "By virtue of the authority vested in me . . . including the National Security Act of 1947, as amended . . ." Exec. Order No. 11,905, 3 C.F.R. 90 (1976). "By virtue of the authority vested in me . . . including the National Security Act of 1947, as amended . . ." Exec. Order No. 12,036, 3 C.F.R. 112 (1978). "[B]y virtue of the authority vested in me . . . including the National Security Act of 1947, as amended . . ." Exec. Order No. 12,333, 3 C.F.R. 200 (1981).

1947 ("Act")⁹⁵ establishes the President as the head of the National Security Council (NSC).⁹⁶ The NSC's function is "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security."⁹⁷ The Act gives the President authority to direct the NSC "for the purpose of more effectively coordinating the policies and functions of the departments and agencies of the Government relating to the national security" and allows the NSC, under the direction of the President, "to consider policies on matters of common interest to the departments and agencies of the Government concerned with the national security."⁹⁸ By giving the President the authority to direct the NSC, the Act appears to be legislation "closely related to the question of the President's authority . . . which evinces legislative intent to accord the President broad discretion" under *Dames & Moore*.⁹⁹ The broad deference generally given to executive orders, in conjunction with the constitutional provisions and statutory authority cited by the three presidents, suggests that sufficient authority exists to satisfy the *Youngstown* test. Thus, although the courts have not explicitly spoken on this authority's constitutional sufficiency, it is likely the executive orders banning assassination would survive a constitutional challenge.¹⁰⁰

Besides the challenge posed by judicial scrutiny, executive orders are vulnerable to two other direct attacks. First, Congress may invalidate or repeal executive orders when it believes that the executive branch has incorrectly interpreted its statutes.¹⁰¹ Second, the President may alter the order by issuing a new one.¹⁰²

As long as executive orders pass constitutional muster and are not repealed or amended by Congress or the President, they have the force and effect of law.¹⁰³ Executive Order 12,333 does not pose constitutional problems under *Youngstown* or its progeny,¹⁰⁴ and it has not been repealed or amended by Congress or the President. Therefore, Execu-

95. National Security Act of 1947, as amended, 50 U.S.C.S. §§ 401-432 (1992).

96. *Id.* § 402(a).

97. *Id.*

98. *Id.* § 402(b).

99. *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981).

100. Although a court would probably uphold the order under the minimal scrutiny applied under the *Youngstown* test, there is still strong reason to question the legitimacy of such a holding. Since executive orders do not require the approval of Congress, they are effective presidential tools for producing legislation that evades the bicameral Constitutional process. Executive orders can be issued in far less time and are subject to far less public scrutiny than Congressional legislation. Noyes, *supra* note 75, at 839. The Court's application of limited scrutiny to presidential lawmaking threatens the Constitutional notion of separation of powers and, as a result, is troubling.

101. Noyes, *supra* note 75, at 846.

102. *Fleishman & Aufses*, *supra* note 42, at 38.

103. *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632 (5th Cir. 1967).

104. See *supra* notes 76-100 and accompanying text.

tive Order 12,333 should have the force and effect of law. Nevertheless, the President might circumvent the Order's ban and assassinate a foreign leader as a result of certain "loopholes" in the Order, described in the next Section of this Note.

III. Analysis: Four Methods Available to Circumvent the Ban on Assassinations

A president can evade the ban on assassinations posed by Executive Order 12,333 through four loopholes. He may: (1) declare open war; (2) broadly construe Article 51 of the United Nations Charter and interpret certain criminal acts as legitimating self-defense; (3) narrowly construe Executive Order 12,333; and (4) repeal or amend the order, or permit Congress to do the same.

A. Declaration of War

Kind-hearted people might of course think there was some ingenious way to disarm or defeat an enemy without too much bloodshed, and might imagine this is the true goal of the art of war. Pleasant as it sounds, it is a fallacy that must be exposed: war is such a dangerous business that the mistakes which come from kindness are the very worst.

Carl Von Clausewitz¹⁰⁵

During peacetime, citizens of a nation are entitled to immunity from international acts of violence by citizens or military forces of other nations under the United Nations Charter. Article 2(4) of the Charter provides:

All Member States 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.¹⁰⁶

During wartime, however, the same protection does not exist. Throughout history, the law of war has recognized killing the enemy, whether lawful combatants or unprivileged belligerents, as legitimate. In 1625, for example, Grotius recognized that "just as anyone is permitted to seize the property of an enemy, so also . . . it is permissible to kill an enemy."¹⁰⁷

In the mid-twentieth century, Oppenheim echoed Grotius and went even further to condone assassination itself:

Every combatant may be killed or wounded, whether a private soldier or an officer, or even the monarch or a member of his family. Some writers

105. CARL VON CLAUSEWITZ, *ON WAR* 75 (1976).

106. U.N. CHARTER art. 2(4), para. 4.

107. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 788 (Francis W. Kelsey trans., 1925) (book III, chap. XVIII, § I(2) (1646)). Proposed bill S. 2525 also recognized the legality of assassination during times of war by establishing an exception to its proposed ban "during any period of war declared by the Congress against another country. . . ." S. 2525, 95th Cong., 2d Sess. (1978).

assert that it is a usage of warfare not to aim at a sovereign or a member of his family. There is in strict law no rule preventing the killing and wounding of such persons.¹⁰⁸

When war breaks out, as a result of congressional declaration or presidential initiative, both sides usually acknowledge as legitimate the killing of enemy combatants. Nevertheless, the President's ability to assassinate foreign officials is limited. Such a limit was first delineated in 1863 in the U.S. Army's General Orders:

Assassination. 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.¹⁰⁹

This limit on wartime assassinations was extended internationally by the Hague Convention of 1907. "The rights of belligerents to adopt means of injuring the enemy is not unlimited. . . [I]t is especially forbidden . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army."¹¹⁰ More recently, a 1956 U.S. Army *Field Manual* construed these two articles as "prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'"¹¹¹

While the military's interpretation of the Hague Convention substantially curtails the availability of wartime assassination, some commentators argue for a less restrictive construction. For example, Spaight writes:

Treachery must be clearly distinguished from "dashes made at a ruler or commander by an individual or a little band of individuals who come as open enemies." The latter do no wrong under the laws of war . . . [T]reachery "must not be confounded with surprises, stratagems, or ambushes, which are allowable."¹¹²

The recent revision to the U.S. Army *Field Manual*, Section 27-10, reflects a similar interpretation: "[The Hague Convention's prohibition on assassination] does not . . . preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere."¹¹³ This section's annotations state that the revision's purpose was "not to foreclose activity by resistance movements,

108. 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 338 (H. Lauterpacht ed., 7th ed. 1952).

109. U.S. Army General Orders No. 100, ¶ 148, reprinted in W. Hays Parks, *Memo-randum of Law: Executive Order 12,333 and Assassination*, ARMY LAWYER, Dec. 1989 (Dept. of the Army Pamphlet 27-50-204), at 5.

110. Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, Oct. 18, 1917, 36 Stat. 2277, 205 Consol. T.S. 277, Annex to the Hague Regulations, arts. 22 and 23(b) [hereinafter Hague Convention of 1907].

111. DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE, FIELD MANUAL* 27-10, para. 31 (1956) [hereinafter *FIELD MANUAL* 27-10].

112. J. M. SPAIGHT, *WAR RIGHTS ON LAND* 87 (1911).

113. Parks, *supra* note 109, at 5.

paratroops, and other belligerents who may attack individual persons.”¹¹⁴

A recent military legal analysis of wartime assassination interpreted “treacherous” in relation to specific wartime killings. The author concluded that none of the following acts constituted assassination under Executive Order 12,333: (1) the November 18, 1941 raid by Scottish commandos at Bedda Littoria, Libya to kill German Field Marshal Erwin Rommel; (2) the April 18, 1943 interception and downing of a Japanese aircraft carrying Admiral Osoruku Yamamoto by a U.S. Air Force jet fighter; and (3) the October 30, 1951 airstrike by the U.S. Navy that killed 500 senior Chinese and North Korean military officers and security forces at a military planning conference at Kapsan, North Korea.¹¹⁵ Thus, while “treacherous” attacks on foreign leaders are prohibited, U.S. military law apparently permits a wide range of wartime killings of foreign military officials.

Although U.S. military interpretations of the Hague Convention appear to permit wartime assassination of military leaders, the legality of killing civilian leaders is less clear. Some commentators conclude that a civilian death “ancillary to the lawful attack of a military objective is neither assassination nor otherwise unlawful.”¹¹⁶ Under this view, civilians “in close proximity to a military objective assume a certain risk through their mere proximity.”¹¹⁷ Moreover, although war experts also agree that civilians who participate in hostilities can be treated as combatants, there is no consensus on what degree of participation makes an individual civilian a combatant. Experts do agree, however, that a civilian head of state serving as commander-in-chief of the armed forces during wartime may be assassinated.¹¹⁸

Current U.S. military interpretations of the Hague Convention limit wartime killing. Military law prohibits both the killing of non-participant civilians and putting a price on an enemy’s head.¹¹⁹ Yet the descriptions of these restrictions on wartime assassination are far from precise. The term “assassination” is never defined, and the prohibitions against “putting a price upon an enemy’s head” and “offering a reward for an enemy ‘dead or alive’” are underinclusive in covering the breadth of wartime activities. The inadequacy of the delineation of parameters of possible wartime assassinations renders exceptions to the ban on assassination both morally and legally suspect. Without a sufficient explanation of the scope and nature of exceptions, military officials may abusively interpret them, justifying a plethora of assassination efforts.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 6 n.4.

119. *See supra* note 112 and accompanying text.

B. Right of Self-Defense Short of War: Broad Construction of Article 51 of the United Nations Charter

No matter how high the aims predicated by terrorists (and often there are no such justifications), their activities are always criminal, always destructive, throwing humankind back to a time of lawlessness and chaos, provoking (perhaps with the help of the secret services of foreign governments) internal and international complications, contradicting the goals of peace and progress.

André Sakharov¹²⁰

Under Executive Order 12,333, it may be permissible for the United States to assassinate a foreign leader in certain situations falling short of actual war.¹²¹ Article 51 of the U.N. Charter suggests the possibility of justified peacetime assassinations. Recognizing the inherent right of nations to defend themselves, Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security.¹²²

The U.S. interpretation of Article 51 recognizes three general forms of self-defense: (1) self-defense against an actual use of force or hostile act; (2) preemptive self-defense against an imminent use of force; and (3) self-defense against a continuing threat.¹²³ Presidents use these forms of self-defense to authorize assassination in two situations: (1) when another nation breaches its international duty to protect Americans from acts of violence originating in or launched from its sovereign territory and (2) when a nation aids and abets international criminal activities, including terrorism.¹²⁴

Recently, the United States justified an assassination attempt on the life of Colonel Muammar el-Qaddafi of Libya by citing Qaddafi's international criminal activity.¹²⁵ Just before the 1986 assassination attempt, the Reagan Administration articulated a possible exception to Executive Order 12,333's ban on assassination in the context of legitimate responses to international terrorism.¹²⁶ Specifically, the Reagan

120. *Sakharov Speaks Out From Exile*, WASH. POST, Mar. 9, 1980, at C1.

121. Exec. Order No. 12,333, 3 C.F.R. 200 (1981).

122. U.N. CHARTER art. 51.

123. Parks, *supra* note 109, at 7.

124. *Id.* Examples of these two applications are as follows: (1) 1804-1805, when Marine First Lieutenant Presley O'Bannon led an expedition into Libya to capture or kill the Barbary pirates; (2) 1916, when General "Blackjack" Pershing led a year-long effort into Mexico to capture or kill Pancho Villa, a Mexican bandit who had recently attacked Columbus, New Mexico; (3) 1928-1932, when U.S. Marines tried to capture or kill the Nicaraguan bandit leader Augusto Cesar Sandino; and (4) 1967, when U.S. Army personnel assisted the Bolivian army in its efforts to capture or kill Ernesto "Che" Guevara. *Id.*

125. *See infra* notes 132-33.

126. Doyle McManus, *Assassination Ban May Not Apply in Anti-Terror Raids*, L.A. TIMES, July 13, 1985, at A1.

Administration publicly considered "whether to exempt punitive raids against terrorists from its policy against assassinations."¹²⁷ In seemingly circular rhetoric, the Administration described the proposed "clarification" of the ban on assassination as "not intended as a prelude to sending U.S. 'hit teams' in pursuit of suspected [terrorists]," but rather "aimed largely at eliminating the argument that any military action against terrorist leaders would violate the presidential ban on assassinations."¹²⁸ While most Reagan Administration officials downplayed the proposed exception to the assassination ban, Secretary of State George Schultz called for an expansive loophole and complained publicly that the United States was becoming "the Hamlet of nations, worrying endlessly over whether and how to respond."¹²⁹

Any uncertainty connected with the Reagan Administration's possible exception was eliminated, however, by the 1986 bombing of Qaddafi's personal quarters in Libya. According to reporter Seymour M. Hersh, nine of the eighteen American fighter jets that flew to Tripoli on April 14, 1986 had a specific mission to target Qaddafi and his family.¹³⁰ After three months of interviewing more than seventy current and former officials in the White House, the State Department, the C.I.A., the National Security Agency, and the Pentagon, Hersh concluded that Qaddafi's assassination was the primary goal of the Libyan bombing.¹³¹ One well-informed Air Force intelligence officer stated, "[t]here's no question they were looking for Qaddafi. It was briefed that way. They were going to kill him."¹³²

127. *Id.*

128. *Id.* at A14.

129. *Id.*

130. Seymour M. Hersh, *Target Qaddafi*, N.Y. TIMES, Feb. 22, 1987 (magazine), at 17.

131. *Id.* at 17-19.

132. *Id.* at 20. Although U.S. intelligence planners resolved to assassinate Qaddafi early on, President Reagan was reluctant to act until he had conclusive evidence linking Qaddafi to terrorist activities. On April 5, 1986, the National Security Agency intercepted messages from Tripoli to East Germany which appeared to link Libya with the 1986 bombing of the La Belle discotheque in West Germany. Although the messages appeared to provide a link, many Reagan Administration officials doubted the reliability of the message and the connection to Qaddafi. The hurried delivery of the information to President Reagan by his close advisors without sufficient intelligence analysis buttressed these fears. *Id.* at 74. In fact, the White House's reliance on these messages as "irrefutable" evidence that Libya was behind the bombing was immediately challenged by allied nations, especially West Germany. *Id.* at 19. Subsequently, National Security Agency officials continued to express doubts about the credibility of the White House's claims. *Id.*

Undaunted by these concerns, President Reagan quickly perceived the messages as sufficient authorization for a U.S. attack on Qaddafi. After rejecting a scheme proposed by Colonel Oliver North in which a covert Navy S.E.A.L. team would surface on the beach near Qaddafi's personal tent and set up a laser beam to guide American bombs directly at the main targets, President Reagan authorized the use of a team of Air Force F-111's. *Id.* at 84. On April 14, 1986, the United States, assisted by Israeli intelligence, attacked Qaddafi's personal quarters. In the hours immediately following the raid, false optimism about the success of the assassination attempt prompted a high-ranking intelligence official to exclaim that if the Air Force had killed Qaddafi,

In a nationally televised speech, Reagan attempted to justify the attack by linking the Libyan leader to the La Belle discotheque bombing in Berlin, which resulted in three deaths and 230 injuries.¹³³ Omitting a bracketed section of the speech to be read only if the U.S. could confirm that the Air Force had killed Qaddafi, Reagan downplayed the sudden nature of the American action:

We Americans are slow to anger. We always seek peaceful avenues before resorting to the use of force, and we did. We tried quiet diplomacy, public condemnation, economic sanctions and demonstrations of military force—and none succeeded.¹³⁴

The bracketed language of the speech echoed a legal analysis prepared by Abraham D. Sofaer, White House legal counsel, which claimed that under Article 51 of the U.N. Charter the United States had the legal right to "strike back to prevent future attacks" by Qaddafi. His death, therefore, would not have been unlawful under Executive Order 12,333.¹³⁵ Sofaer's analysis was subsequently confirmed by other Administration lawyers. These lawyers justified the strike against Qaddafi as a "self-defensive and preemptive military attack" and concluded that any resulting deaths, even Qaddafi's, could not be considered illegal assassinations.¹³⁶

Members of Congress, responding to debate over the Libyan attack's legality vis-à-vis the presidential ban on assassination, introduced a bill on April 17, 1986, authorizing the President to apply force in response to foreign terrorism without consulting Congress in advance.¹³⁷ According to the *New York Times*, Senator Jeremiah Denton stated that in the case of state-sponsored terrorism, the Senate bill would authorize the assassination of a head of state personally involved in terrorist actions.¹³⁸ Where the President could link a foreign leader to acts of terrorism against Americans, the bill stated the assassination ban "would be superceded." Section 4(b) of the proposed bill gave the President blanket authority to attack a foreign leader connected with ter-

"'I'll buy everybody lunch, and not at the Exchange,' an inexpensive Friday night staff hangout." *Id.* at 22.

The Air Force's failure to assassinate Qaddafi was perceived by the military as a fluke. A four-star general offered the only explanation: "He [Qaddafi] must have been in the head." *Id.* Although the Air Force failed to kill Qaddafi, they succeeded in killing his fifteen-month-old daughter, Hana. *Id.* at 19.

133. *Id.* at 84.

134. *Id.*

135. *Id.*

136. Bob Woodward & Patrick E. Tyler, *U.S. Targeted Qaddafi Compound After Tracing Terror Message*, WASH. POST, Apr. 16, 1986, at A1. Libyan citizens, however, had a different notion about the legality of President Reagan's efforts to target Qaddafi. In the aftermath of the attack, hundreds of young men roamed Tripoli's streets shouting: "Down with America! Assassins, assassins!" *Qaddafi's Family "In Terror,"* WASH. POST, Apr. 16, 1986, at A1.

137. Linda Greenhouse, *Bill Would Give Reagan a Free Hand on Terror*, N.Y. TIMES, Apr. 18, 1986, at A9.

138. *Id.*

rorism against Americans, such as the terrorist attack of the LaBelle night club, stating, "the President is authorized to undertake actions to protect United States persons against terrorists and terrorist activity through the use of all such anti-terrorism and counter-terrorism measures as he deems necessary."¹³⁹ Ultimately, Congress failed to enact the bill, forcing future presidents to rely on a broad construction of Article 51 to justify assassinations of foreign leaders.¹⁴⁰

By recognizing rights of Member States to self-defense against aggressor nations, Article 51 of the U.N. Charter arguably permits the assassination of a foreign leader in non-war situations. Although Article 51 does not expressly permit assassination, it does allow states to use force in self-defense. Historically, presidents have cited this permissive force to authorize assassinations against leaders who place American lives at risk or engage in international criminal activities. Because Executive Order 12,333 fails to define either the precise dimensions of the assassination ban or the ban's relationship to Article 51 of the U.N. Charter, presidents can cite Article 51 as authority for a purported act of "self-defense," which in reality is the assassination of a foreign leader. The Reagan Administration's justification of its assassination attempt on Qaddafi as "self-defense" reveals the ease with which presidents can shroud assassination under the cloak of Article 51 self-defense.

C. Narrow Construction of Executive Order 12,333

Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text. Conclusions which are in the spirit though not in the letter of the text. . . . In the most general adaptation of the term, construction signifies the representing of an entire whole from given elements by just conclusions. Thus, it is said, a few actions may sometimes suffice to construe the whole character of a man.

J.G. Sutherland.¹⁴¹

A third loophole the President could use to evade the assassination ban is to construe Executive Order 12,333 narrowly. Although the language of the Order directly bans governmental employees from "engaging in, or conspiring to engage in, assassination," it does not delineate specific actions constituting such "engaging" or "conspiring." This imprecision leaves room for a narrow construction of the order that would curtail the restrictions placed on the President.

In 1989, the Justice Department examined the possibility of narrowly construing the ban in the context of U.S.-supported coups, *Time* magazine reported.¹⁴² Although the results of the inquiry are secret, former C.I.A. Counsel Bruemmer publicly concluded the ban "does not prohibit U.S. officials from encouraging and supporting a coup, even

139. *Id.*

140. *Id.*

141. J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 311 n.8 (1891).

142. See Church, *supra* note 2, at 29.

where there is a likelihood of violence and a high probability that there will be casualties among opponents of the coup."¹⁴³ So long as U.S. officials do not approve specific plans for the killing of individuals, Bruemmer found the "prohibition against assassination has not been violated."¹⁴⁴

The C.I.A.'s legal conclusions on narrowly construing the ban in the context of U.S.-supported coup attempts may have contributed to President Bush's decision to launch Operation Just Cause in 1989. The events leading up to the actual invasion of Panama, during the regime of Manuel Noriega, on December 19, 1989 were instigated by a failed coup attempt on October 3, 1989.¹⁴⁵ Noriega crushed the attempted coup by Panamanian dissidents. While American forces stationed in Panama took steps to block pro-Noriega reinforcements from attacking the rebels, President Bush declined to do anything more.¹⁴⁶ American efforts to instigate a coup against Noriega had previously been stifled in 1988, when sharp objections from the Senate Intelligence Committee persuaded President Reagan to abandon a plan to overthrow the Panamanian dictator.¹⁴⁷ During the first year of his administration, President Bush openly expressed concern about the tension between the Senate and the Reagan Administration as well as about the stifling effect it had on coup attempts against Noriega.¹⁴⁸

Immediately following the failed coup attempt of October 3, 1989, C.I.A. Director William H. Webster publicly articulated President Bush's concerns. Encouraged by the C.I.A.'s legal conclusions, Webster argued for a "relaxation" of the past interpretation of Executive Order 12,333 that prohibited American assistance to any coup that could lead to the death of a country's leader.¹⁴⁹ Assuring critics that the United States would not engage in "selective, individual assassination," Webster contended that "the United States has other important overriding concerns about security and protecting democracy in areas of the world . . . and when despots take over, there has to be a means to deal with that."¹⁵⁰ The Director called for rules clearly defining the C.I.A.

143. *Id.*

144. *Id.*

145. *Panama in Disorder: The 1980s*, N.Y. TIMES, Jan. 5, 1990, at A11.

146. *Id.*

147. In 1987, the Reagan Administration contacted the Panamanian ambassador to Israel, Eduardo Herrera Hassan, for assistance in carrying out a coup against Noriega. Stephen Engelberg, *Panamanian's Tale: '87 Plan for a Coup*, N.Y. TIMES, Oct. 29, 1989, § 1, at 18. Mr. Herrera travelled to the U.S. and met with the C.I.A., the White House, and the Pentagon. As he went from office to office, Herrera was struck by the disagreement among the agencies regarding the legality of carrying out a coup under the ban on assassinations. *Id.* Eventually, the Senate Intelligence Committee's opposition to a proposed Reagan Administration plan to topple Noriega resulted in the President completely abandoning any coup effort. *Id.*

148. Stephen Engelberg, *Reagan Agreed to Prevent Noriega Death*, N.Y. TIMES, Oct. 23, 1989, § 1, at 10.

149. Stephen Engelberg, *C.I.A. Seeks Looser Rules on Killings During Coups*, N.Y. TIMES, Oct. 17, 1989, at A1.

150. *Id.*

officers' authority so that "they can go right up to the edge of that authority and not worry if they or their agency is going to get into trouble."¹⁵¹ Webster perceived a willingness in the Bush Administration and Congress to reinterpret the assassination ban to give the C.I.A. greater freedom to deal with coup planners in Panama and other places, the *New York Times* reported. Revealing his conclusion, Webster commented, "I think Noriega's days are numbered."¹⁵²

As Noriega's stranglehold on Panama increased and along with it his profits from drug trafficking, President Bush became increasingly frustrated.¹⁵³ The December 15 Panamanian declaration of war against the United States and Panama's intentional killing of a U.S. Marine lieutenant the next day further incited the President.¹⁵⁴ President Bush acted on December 19, 1989 by ordering American military forces into the streets of Panama in a major operation designed to topple the Noriega government.¹⁵⁵

In the days immediately following the launch of Operation Just Cause, the Bush Administration discussed the legal authority for its actions. In a formal statement, Secretary of State James Baker cited the inherent right of the United States "to take measures necessary to defend our military personnel, our United States nationals and U.S. installations" as legal support for Operation Just Cause.¹⁵⁶ In addition, Baker cited the Panamanian declaration of war and the killing of the U.S. Marine lieutenant as providing further legal basis for the attack. In a prior press conference, however, President Bush justified the U.S. action by focusing on Noriega's status as an "indicted narcotics dealer."¹⁵⁷ In

151. *Id.*

152. *Id.*

153. R.W. Apple, Jr., *Bush's Obsession: President Says Noriega's Hold on Power Has Left Him "Extraordinarily Frustrated,"* N.Y. TIMES, Dec. 26, 1989, at A11.

154. See *Panama in Disorder: The 1980s*, *supra* note 145, at A11.

155. After swearing in a new president of Panama, the Bush Administration applied force designed to restore democracy, to protect American lives, and to "capture" General Noriega and bring him to the U.S. for prosecution on drug-trafficking charges. Michael R. Gordon, *U.S. Troops Move in Panama in Effort to Seize Noriega; Gunfire Is Heard in Capital*, N.Y. TIMES, Dec. 20, 1989, § 1, at 1. At the outset of the operation, Noriega's military headquarters was attacked, but Noriega had fled to safe hiding. Andrew Rosenthal, *U.S. Troops Gain Wide Control in Panama: New Leaders Put in, But Noriega Gets Away, 16 Americans Dead*, N.Y. TIMES, Dec. 21, 1989, at A1. After several days of Operation Just Cause, the American forces still had not captured Noriega. In an effort to enhance their chances of finding the dictator, the Bush Administration announced a \$1 million reward for the capture of the Panamanian leader. Eventually, Noriega took refuge in the Vatican Embassy in Panama. Following several days of negotiations between American and Vatican officials, Noriega surrendered to American drug agents. Commenting on the ramifications of the capture of the dictator, President Bush stated, "his apprehension and return to the United States should send a clear signal that the United States is serious in its determination that those charged with promoting the distribution of drugs cannot escape the scrutiny of justice." Andrew Rosenthal, *Noriega Gives Himself Up to U.S. Military; Is Flown to Florida to Face Drug Charges: U.S. Goal Achieved*, N.Y. TIMES, Jan. 4, 1990, at A1.

156. See Rosenthal, *U.S. Troops Gain Wide Control in Panama*, *supra* note 155, at A19.

157. *Id.* Noriega was convicted of cocaine trafficking, racketeering, and money laundering after a seven-month trial in April 1992. Larry Rohter, *U.S. Jury Convicts*

another press conference, President Bush dismissed the dictator's declaration of war as ineffectual: "That's technical . . . [B]ut I've taken note of the statement."¹⁵⁸

President Bush's publicly expressed desire to relax restrictions placed on him by the assassination ban in Noriega's case and the fact that the President never declared Operation Just Cause an actual war raise serious questions about the legitimacy of the raid on Panama. Even if one labeled the operation a "war," the one million dollar bounty that President Bush placed on Noriega's head may have violated the limited military prohibition against "putting a price on an enemy's head."¹⁵⁹

In addition, the attack included a direct frontal assault on Noriega's headquarters, an assault that could easily have resulted in the Panamanian dictator's death. Nevertheless, because Executive Order 12,333 fails to define the scope of the assassination ban, President Bush could have argued that Operation Just Cause did not violate the ban on assassinations. The attack on Noriega's headquarters could be explained as not including "specific plans for the killing of individuals," particularly Noriega himself. The reward could be characterized as falling short of "putting a price on an enemy's head" and rather as a reasonable means of securing information about the whereabouts of an international drug trafficker. In sum, the President could say Operation Just Cause involved not an attempted "assassination" but an attempt to address the international drug trafficking problem, especially inasmuch as Noriega was never harmed.

D. Presidential or Congressional Repeal or Amendment

Among the substantial objections to the great powers of the President, that of his negative upon the laws, is one of the most inconsiderable . . . For, if he be a bold enterprising fellow, there is little fear of his ever having to exercise it . . . [I]f, however, I say, he should not be a man of an enterprising spirit, in that case he will be a minion of the aristocrats, doing according to their will and pleasure, and confirming every law they may think proper to make.

Antifederalist Philadelphians¹⁶⁰

Both Congress and the President have the power either to repeal or to amend an executive order, and Congress has repealed executive orders on many occasions.¹⁶¹ Thus, if the three previously discussed loopholes in the assassination prohibition were unavailable, the President could

Noriega, Panama's Former Dictator, in Cocaine-Trafficking Case, N.Y. TIMES, April 10, 1992, at A1.

158. *Fighting in Panama: Prelude to Invasion*, N.Y. TIMES, Dec. 21, 1989, at A19.

159. See *supra* notes 110-12 and accompanying text.

160. 3 HERBERT J. STORING, *THE COMPLETE ANTI-FEDERALIST* 129 (1981).

161. See Noyes, *supra* note 75, at 846 n.38 (stating that Congress has repealed executive orders dealing with the Canal Zone, veterans' pensions, and veterans' salaries, among other things).

repeal or amend Executive Order 12,333 or permit Congress to do the same.

The President can repeal or amend an executive order simply by writing a new one. The President would merely have to draft a new executive order either narrowing or contradicting Executive Order 12,333, thereby overruling it by inconsistency.¹⁶² Commentators argue that such a presidential fiat provides an effective yet uncomplicated substitute for executive inability to mobilize Congress.¹⁶³

The President may legitimately conceal a complete or partial repeal of the executive ban on assassinations from the public. Although most executive orders must be published in the Federal Register, executive orders "not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof" do not have to be published by the President.¹⁶⁴ Because an order repealing the assassination ban would deal only with the ability of U.S. employees or officials to engage in assassinations, the President might not have to publish it. Moreover, one commentator has argued that an executive order repealing Executive Order 12,333's ban on assassinations might also be deemed classified information because it concerns "intelligence activities . . . or intelligence sources and methods" pursuant to Executive Order 12,356.¹⁶⁵

If the President believes the particular situation he is confronting is legally insufficient to support the assassination of a foreign leader, whether by war, self-defense, or narrow construction of the assassination ban, he may create a temporary exception to the ban by partially repealing Executive Order 12,333. Because the assassination prohibition is presidential legislation in the intelligence area, a president has the exclusive power to dismiss the ban secretly whenever he believes a dismissal is warranted.¹⁶⁶

IV. Application: The Persian Gulf War

Although Executive Order 12,333 states that "[n]o person employed by or acting on behalf of the United States government shall engage in, or conspire to engage in, assassination," the prohibition is far from absolute. Applying the four loopholes to the events of the Persian Gulf War reveals the dimensions of these loopholes. By exploiting the loopholes, President Bush could have legally justified Saddam Hussein's assassination at any point in the conflict, from the Iraqi invasion of Kuwait on August 2, 1990, to the U.S. attack on Baghdad on January 16, 1991.

162. Fleishman & Aufses, *supra* note 42, at 38.

163. *Id.*

164. 44 U.S.C. § 1505(a)(1) (1988).

165. Bert Brandenburg, *Legality of Assassination*, 27 VA. J. INT'L L. 687 n.203 (1987) (discussing section 1.3(a)(4) of Executive Order 12,356).

166. *Id.*

A. Invasion of Kuwait: August 1990

On Thursday, August 2, 1990, Iraqi troops crossed the Kuwaiti border and penetrated Kuwait's capital city.¹⁶⁷ Kuwaiti officials quickly rebuffed initial statements by Iraq's leader Saddam Hussein that his troops were assisting Kuwaiti revolutionaries in overthrowing the Kuwaiti Government.¹⁶⁸ The United States condemned the invasion, and the White House called for "the immediate and unconditional withdrawal of all Iraqi forces."¹⁶⁹ The U.N. Security Council immediately met to draft a resolution condemning the Iraqi invasion.¹⁷⁰ Raising the possibility of economic or military action in a news conference with Prime Minister Margaret Thatcher of Britain, President Bush called the invasion an exercise of "naked aggression" and sought to enlist world leaders in collective action against Iraq.¹⁷¹ Both leaders cited Article 51 of the U.N. Charter as legal authority for such action.¹⁷² Previously, the Bush Administration revealed a less specific commitment to defend Kuwait under Article 51 when the President stated, "[w]e remain strongly committed to supporting the individual and collective self-defense of our friends in the Gulf, with whom we have deep and longstanding ties."¹⁷³

Although the United States did not formally declare war on Iraq upon the August invasion of Kuwait, commentators argue that the U.S. assassination of Saddam Hussein immediately after the invasion would not have violated Executive Order 12,333.¹⁷⁴ Abraham Sofaer and other analysts argue that a broad reading of Article 51 could legitimate such an assassination.¹⁷⁵ According to Sofaer, Article 51 recognizes the right of self-defense against armed attack not only for the victim nation but also for others coming to its aid.¹⁷⁶ Based on Kuwait's repeated pleas to the United States for help, the U.S., buttressed by the U.N. Security Council's resolution condemning Iraq's invasion, could legitimately attack Iraq and seek to kill the commander-in-chief, Saddam Hussein.¹⁷⁷

As this Note has argued in Section III, this interpretation of the U.N. Charter is tenable. By labelling Saddam's assassination as one facet of a self-defense effort on behalf of the victim nation Kuwait, President Bush could have rendered the conflict sufficiently war-like to justify attacking one of the enemy, namely the military leader.¹⁷⁸ Moreover, by

167. Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1.

168. *Id.*

169. *Id.*

170. *Id.*

171. R.W. Apple, Jr., *Invading Iraqis Seize Kuwait and Its Oil; U.S. Condemns Attack, Urges United Action, "Naked Aggression"*, N.Y. TIMES, Aug. 3, 1990, at A1.

172. *Id.*

173. See Gordon, *supra* note 167, at A8.

174. See Church, *supra* note 2, at 29.

175. *Id.*

176. *Id.*

177. *Id.*

178. See *supra* notes 105-19 and accompanying text.

narrowly construing Executive Order 12,333, President Bush could have authorized killing Saddam and claimed that the leader was not specifically targeted, but in the wrong place at the wrong time.¹⁷⁹ Finally, Iraq's invasion of Kuwait could have compelled President Bush secretly to amend or repeal the assassination prohibition.¹⁸⁰ Thus, though no American hostages were formally taken, and the United States was more than three months away from taking military action against Iraq, the de minimus legal restrictions of Executive Order 12,333 would not have prohibited President Bush from ordering Saddam Hussein's assassination on August 2, 1990.

B. The Taking of American Hostages: October 1990

A week after the invasion of Kuwait, Saddam Hussein told foreign governments that embassies in occupied Kuwait City must close by August 24. At the same time, Saddam prevented 3500 Americans, and thousands of other foreigners, from leaving either Kuwait or Iraq. Despite Saddam's initial refusal to label the 3500 Americans "hostages,"¹⁸¹ the United States quickly discovered that these individuals were held against their will. Although Saddam subsequently permitted Western women and children to leave, about 1000 Western men were located around Iraqi military bases and other strategic sites as "human shields" against any attack by the anti-Iraq allies.¹⁸² Assessing the plight of these "human shields," President François Mitterand of France commented, "[w]hat's going on here is gangsterism, plain and simple."¹⁸³ Just over a week after Mitterand's statement, Saddam released all the French hostages.¹⁸⁴ After his release, one French hostage reported that American hostages were being treated especially poorly. "They were only allowed out two hours a day. We couldn't count them or approach them. Plainclothes police controlled everything."¹⁸⁵ Labeling this treatment "unconscionable," Secretary of State Baker cited the cutting of food rations and the filthiness of concrete floors on which Americans slept as further indications of Saddam's mistreatment of the hostages.¹⁸⁶

Saddam Hussein's taking of American hostages would have provided further legal justification for the assassination of the Iraqi leader. With American hostages in Iraq, President Bush could have justified

179. See *supra* notes 141-59 and accompanying text.

180. See *supra* notes 160-66 and accompanying text.

181. Clifford Krauss, *Iraq Orders the Closing of Embassies in Kuwait*, N.Y. TIMES, Aug. 11, 1990, § 1, at 9.

182. John F. Burns, *Baghdad's U.S. Hostages: Escape Plans and Anger*, N.Y. TIMES, Oct. 7, 1990, at A1.

183. *Id.*

184. Michael Wines, *Hussein Speaks of Freeing Hostages*, N.Y. TIMES, Oct. 23, 1990, at A10.

185. Alan Riding, *Americans and British Worst Off Under Iraqis, Freed French Say*, N.Y. TIMES, Oct. 31, 1990, at A1.

186. Andrew Boroweic & Warren Strobel, *U.S. Strategy Edging Closer to War; Diplomacy Falls Short of Goals*, WASH. TIMES, Oct. 31, 1990, at A1.

Saddam's assassination as both an attempt to defend Kuwait and an effort to protect innocent Americans held against their will.¹⁸⁷ The detention of American hostages in Iraq would also demonstrate the war-like nature of the conflict between Iraq and the United States, thereby justifying an attack on the enemy's commander-in-chief.¹⁸⁸ In addition, President Bush could again employ a narrow construction of Executive Order 12,333 or a secret repeal or amendment of it to legalize Saddam Hussein's assassination.¹⁸⁹ Regardless of available diplomatic measures to secure the release of American hostages, and despite the absence of a declaration of war on Iraq, Executive Order 12,333 would not have restricted President Bush from ordering the assassination of Saddam in October 1990.

C. The U.N. Security Council and Congressional Resolutions Authorizing the Use of Force: November-December 1990

While Saddam Hussein ultimately decided to release all foreign hostages, tensions between the United States and its allies and Iraq continued to build. As one diplomat stated, "[t]he release of the hostages doesn't alter the fact that the stage is still set for a bloody showdown . . . Iraq has given no sign it is prepared to leave Kuwait; quite the opposite."¹⁹⁰ Despite Saddam's decision to release all hostages, the Bush Administration began courting U.N. Security Council Members regarding a proposed resolution authorizing the use of force by Member Nations if Iraq did not withdraw from Kuwait by January 15, 1991. After a whirlwind international diplomatic mission by Secretary of State Baker, the U.N. Security Council passed U.N. Resolution 678 authorizing the use of force against Iraq if Saddam did not withdraw by January 15.¹⁹¹ Responding to discontent surrounding an apparently inevitable war, President Bush assured Americans,

I will do my level best to bring those kids home without one single shot being fired in anger . . . [A]nd if a shot is fired in anger, I want to guarantee each person that their kid whose life is in harm's way will have the maximum support, will have the best chance to come home alive, and will be backed up to the hilt.¹⁹²

Despite an initial reluctance to pass a resolution similar to U.N. Resolution 678, Congress eventually accepted the President's guarantee and on January 14 authorized the President to make use of American forces pursuant to U.N. resolutions if he determined that military force was

187. See *supra* notes 120-40 and accompanying text.

188. See *supra* notes 105-19 and accompanying text.

189. See *supra* notes 141-66 and accompanying text.

190. Colin Nickerson, *Iraq Votes to Release All Hostages*, BOSTON GLOBE, Dec. 8, 1990, at A1.

191. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990). See also Ian Glover-James & John Cassidy, *Alarm Over Iraq Agenda for Talks*, SUNDAY TIMES, Dec. 2, 1990, available in LEXIS, Nexis Library, Currnt File.

192. John Cassidy, *U.S. Plays Peace Poker as War Machine Nears Fighting Pitch*, SUNDAY TIMES, Dec. 2, 1992, available in LEXIS, Nexis Library, Currnt File.

necessary.¹⁹³

The resolutions passed by the U.N. Security Council and the U.S. Congress further legitimized an American assassination attempt against Saddam Hussein. By sanctioning the use of military force after January 15, the U.N. Security Council resolution effectively permitted the United States and other allied nations to attack Iraq. The resolutions passed by Congress served a similar purpose, giving congressional authorization for military action. By allowing the United States to enter into a military conflict with Iraq subsequent to January 15, these two resolutions permitted President Bush to consider Iraqis, including Saddam Hussein, the commander-in-chief, belligerents susceptible to intentional killing. Without putting a single allied serviceman directly at risk by formally declaring war, these resolutions removed any legal obstacle that Executive Order 12,333 placed on Saddam's assassination.

D. Authorizing Military Action Against Iraq: January 1991

On January 16, 1991, President Bush proclaimed that military action would begin against Iraq.¹⁹⁴ After the announcement, congressional leaders united behind the President. House Speaker Thomas Foley, who had opposed a resolution authorizing military action, declared, "[w]e must now pray for a conflict that ends quickly . . . [W]e must now stand united in support of our armed forces in the Gulf."¹⁹⁵ Senator David Boren, a staunch opponent of a war resolution, commented, "[y]ou'll see Congress come together and offer virtually unanimous support for the troops and give them the resources that are necessary to keep the war as short as possible and the casualties at a minimum."¹⁹⁶

By effectively declaring war against Iraq, President Bush enhanced the legality of assassinating Saddam Hussein. As the commander-in-chief of the Iraqi armed forces, Saddam could be considered a belligerent whose assassination was permitted by military law.¹⁹⁷ As long as President Bush did not "put a price" on Saddam's head, he could carry out a wartime assassination without violating Executive Order 12,333.¹⁹⁸ Representative Dana Rohrabacher apparently reached the same conclusion when he said,

Saddam is getting exactly what he asked for . . . I hope that we find out where Saddam Hussein is early on in the conflict, and, if we do, it will be a much shorter conflict. It's clear our fight isn't with the people of Iraq; it's with this megalomaniac who has forced this fight upon us.¹⁹⁹

193. Authorization for Use of Military Force Against Iraq, Pub. L. 102-01, 105 Stat. 3 (1991).

194. *News, The Gulf War*, *NEWSDAY*, Jan. 17, 1991, at 14.

195. *Id.*

196. Karen Tumulty & William J. Eaton, *Lawmakers Back Bush - For Now*, *L.A. TIMES*, Jan. 17, 1991, at A10.

197. See *supra* notes 105-15 and accompanying text.

198. See *FIELD MANUAL* 27-10, *supra* note 111.

199. Tumulty & Eaton, *supra* note 196.

Thus, at each of these four stages in the American-Iraqi conflict, President Bush could have ordered Saddam Hussein's assassination without violating Executive Order 12,333. By broadly construing Article 51, narrowly construing the assassinations ban, and commencing war against Iraq, President Bush could have legally justified Saddam's assassination. Regardless of the number of American lives at stake, the presence of American troops in the region, and the existence of a congressional authorization to wage war against Iraq, President Bush could legally have ordered Saddam's assassination at any time after the invasion of Kuwait. It is disturbing that assassination might have accomplished the President's four goals in the conflict with Iraq: freeing the hostages, securing complete and unconditional Iraqi withdrawal from Kuwait, restoring Kuwait's government, and stabilizing the gulf region.²⁰⁰ Saddam Hussein, who ironically participated himself in an assassination plot against a previous Iraqi dictator,²⁰¹ was a legal target for an American assassination throughout his confrontation with the United States. American law would have permitted President Bush to use the same tactic that Saddam Hussein employed at the beginning of his brutal political career.²⁰²

V. A Call for Comprehensive Congressional Action

Although Executive Order 12,333 bans assassination, the prohibition's practical effect is to place minimal restrictions on a president bent on assassinating a foreign leader. Comprehensive congressional legislation is needed to address the ban's loopholes.

In light of the political realities dominating congressional attempts to adopt a comprehensive ban on assassination, a political pragmatist might be inclined to argue for a congressional ban with certain exceptions. For example, a ban containing military exceptions that allow assassinations with a military objective might be more palatable to reluctant members of Congress. A ban with exceptions, however, would

200. Terry Atlas, *Hostages May Be Coming Home, But Bush Faces a Risky Period*, CHICAGO TRIBUNE, Dec. 9, 1990, at 12.

201. After the assassination attempt failed, Saddam escaped by cutting a bullet out of his leg with a penknife and fleeing 300 miles across the desert on a donkey. Elaine Sciolino, *Arab of Vast Ambition, Saddam Hussein*, N.Y. TIMES, Aug. 5, 1990, § 1, at 14.

202. Some American lawmakers were apparently unaware of the four loopholes in Executive Order 12,333 at the time of the Gulf War. On January 17, 1991, Representative McEwen introduced a resolution that expressed congressional support for the suspension of the prohibition against assassination in Executive Order 12,333 until Iraq had fully complied with all applicable U.N. Security Council resolutions. Justifying his resolution, Representative McEwen explained, "[t]here is an executive order that prevents us from targeting the sources of the attack upon the American forces. Mr. Speaker, that might make sense at the Kennedy School of Government, but to the average common sense of the taxpayer of southern Ohio it is foolish. . . . In this trying time, those military planners, those secretaries of defense, those commanders in chief, that pilot who is flying into Baghdad, should not have to be faced with the possibility of having violated an executive order. This should be removed." 137 CONG. REC. H536, (daily ed. Jan. 17, 1991).

allow American officials to use assassination as a policy device. Inevitably, such a ban would be vulnerable to the same abuses that Executive Order 12,333 currently encourages.

Only comprehensive congressional legislation can effectively remove the loopholes piercing Executive Order 12,333. First, such legislation could preclude "assassination" at all times, including wartime, thereby preventing a declaration of war legitimating a premeditated killing of a foreign leader. Second, the legislation could clarify the relationship between the ban and the privilege of self-defense articulated in Article 51 of the United Nations Charter. In particular, the statute could provide that an international right to self-defense is not sufficient to legalize assassination of a foreign leader. Third, in debating the statute, Congress could generate legislative history sufficient to prevent any presidential attempts narrowly to construe the ban. Congress could articulate in the committee reports, for example, that the ban covers assassination attempts shrouded under the cloak of legitimate military maneuvers. Finally, because congressional action would be statutory, a president would be unable to repeal or amend the prohibition. Any alterations to the comprehensive ban would require Congress's approval and subsequently the President's authorization.

Conclusion

In 1976, President Gerald Ford outlined the first official American ban on assassinations in Executive Order 11,905.²⁰³ While three successive presidents have affirmed the prohibition against government involvement in assassination, Congress has failed numerous times to legislate a ban on such activities.²⁰⁴ Without congressional action, the sole obstacle to a U.S. assassination of a foreign leader is the current presidential prohibition enshrined in Executive Order 12,333. As presidential legislation, however, Executive Order 12,333 is more of a nuisance than a barrier to a president bent on assassinating a foreign leader.

Because the ban on assassinations is articulated in an executive order rather than an act of Congress, numerous methods circumventing the prohibition exist. Besides the four methods enumerated in this Note, many more legal arguments may be available to avid administration lawyers seeking to justify a foreign official's slaying. Without congressional action comprehensively outlawing assassination and specifying the nature of restraints placed on a president, assassination will remain a policy option for future administrations.

Any assassination involves serious moral questions. One could argue that assassinating Manuel Noriega, Muammar el-Qaddafi, and Saddam Hussein would be justified because the assassination would save

203. Exec. Order No. 11,905, 3 C.F.R. 90 (1971-1975). "[§ 5(g)] No employee of the United States government shall engage in, or conspire in, political assassination." *Id.* at 101.

204. *See supra* notes 46-74 and accompanying text.

lives. Utilitarian analysis, however, cannot avoid the reality that assassination is a brutal, cowardly, and inhuman act. Noble ends cannot justify the brutality of assassination. Shakespeare understood the horror of such means and forced Macbeth to face the assassinated Banquo. Realizing the atrocity he committed, Macbeth cried,

If Charnell houses, and our Graves must send
Those that we bury, backe; our Monuments
Shall be the Mawes of Kytes.²⁰⁵

The recent Gulf War highlights the grave inadequacy of the U.S. ban on assassination. Although President Bush assured the international community that the United States never targeted Saddam Hussein,²⁰⁶ a careful analysis of Executive Order 12,333's application reveals the President had the legal authority to assassinate Saddam at every stage in the conflict. President Bush justified the war with Iraq as an effort to ensure that the Middle East be governed by the "rule of law," not by the "law of the jungle."²⁰⁷ Any system operating under the "rule of law," however, should not permit assassination of foreign officials under any circumstances.

Even under a pragmatic view, a policy condoning assassination is unsound. Any assassination effort creates the risk of retaliation from the targeted individual and his supporters. An American initiative to assassinate a foreign leader could result in similar initiatives by the targeted leader's nation against American officials. Moreover, given the world's delicate diplomatic balance, other nations might perceive any American assassination effort as an illegitimate act warranting retaliation.

Notwithstanding the pragmatic ramifications of assassination, the United States must not adopt the tactics of barbarians and terrorists. It is for terrorists alone to justify their brutal means with allegedly legitimate ends, and not for a nation founded on equality and democracy. The current executive order prohibiting U.S. assassinations is ill-advised because it fails to deny the President the policy option of assassination.

Executive Order 12,333's prohibition against assassination leaves too many questions unanswered and too many loopholes available. Congressional legislation must solve these pressing problems. In 1975, the Senate Committee investigating assassination plots of the 1950s and 1960s had similar sentiments, but expressed a continued faith in the strength of deep-rooted American ideals:

205. See *MACBETH*, *supra* note 1, Act III, scene iv, l. 82-84.

206. Eric L. Chase, *Should We Kill Saddam*, *NEWSWEEK*, Feb. 18, 1991, at 16. President Bush stated, "[w]e're not in the business of targeting Saddam Hussein, [but] no one will weep when he's gone . . . There would be no sorrow if he's not there." *Id.* Defense officials also stated that they would be pleased if Saddam were killed by an attack on an "appropriately anonymous objective," such as a command-and-communications bunker. *Id.*

207. *War in the Gulf: The President; Transcript of the Comments by Bush on the Air Strikes Against the Iraqis*, *N.Y. TIMES*, Jan. 17, 1991, at A14.

The United States must not adopt the tactics of the enemy. Means are as important as ends. Crisis makes it tempting to ignore the wise restraints that make men free. But each time we do so, each time the means we use are wrong, our inner strength, the strength which makes us free, is lessened. Despite our distaste for what we have seen, we have great faith in this country. The story is sad, but this country has the strength to hear the story and to learn from it. We must remain a people who confront our mistakes and resolve not to repeat them. If we do not, we will decline; but, if we do, our future will be worthy of the best of our past.²⁰⁸

While the embarrassment of over fifteen years of congressional silence on the issue of assassination may dampen the "great faith" a person has in this country, Americans must press their representatives to legitimize America's conflicts with dictators, drug traffickers, and terrorists by comprehensively outlawing the illegitimate means used by enemies of the United States.

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208. ALLEGED ASSASSINATION PLOTS, *supra* note 8, at 285.

