

3-2003

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Recommended Citation

William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. Rich. L. Rev. 667 (2002).
Available at: <https://scholarship.richmond.edu/lawreview/vol37/iss3/4>

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TARGETED KILLING AND ASSASSINATION: THE U.S. LEGAL FRAMEWORK

*William C. Banks **
*Peter Raven-Hansen ***

“Why not just kill him?”

Stuart Taylor, Jr.¹

“Why doesn’t Bush just ‘take him out?’”

John Dean²

“[A]ssassination, poison, perjury All of these were legitimate principles in the dark ages . . . but exploded and held in just horror in the 18th century.”

Thomas Jefferson³

I. INTRODUCTION

The September 11 terrorist attacks on the United States renewed calls for this country to adopt assassination as an instrument of national security policy. Some editorialists urged assassination not only of Osama bin Laden and other heads of the al-Qaida terrorist network but also the “fingers” of the network,⁴ including the “Gucci guys” who financed the network, landlords

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1. Stuart Taylor Jr., *Should We Just Kill Saddam?*, LEGAL TIMES, Feb. 4, 1991, at 23.

2. John Dean, *Examining the President’s Powers to Fight Terrorism* (Sept. 14, 2001), at <http://writ.news.findlaw.com/dean/20010914.html> (referring to Osama bin Laden).

3. Letter from Thomas Jefferson to James Madison (Aug. 28, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 367 (Julian P. Boyd ed., 1958).

4. Lawrence J. Siskind, *Our Killer Instinct*, LEGAL TIMES, Oct. 8, 2001, at 61.

who knowingly harbored them, and others who aided and abetted their terrorist acts.⁵ Before September 11, editorialists had also advocated the U.S. assassination of Libyan strongman Moammar Quaddafi⁶ and Iraqi president Saddam Hussein.⁷ Earlier, in 1988, the Reagan administration proposed covert U.S. support for a coup in which Panamanian leader Manuel Noriega could be killed, which some members of the congressional intelligence committees reportedly characterized as assassination.⁸ In all these cases, proponents of assassination argued that any existing executive policy of self-denial was obsolete and unwise and should be changed to meet the challenges posed by evil men.

Even if they are right, however, it is never sufficient under the rule of law that a government policy be merely wise. It must also be supported by law—or at least by a colorable public argument for legal authority—in order to preserve the myth that we are governed by laws, not men. Not only must such a policy not violate any applicable law; it must also assert positive legal authority. Moreover, these basic principles of the rule of law apply with special force to the extreme policy of intentional, premeditated killing by a government. Intuitively, such killing without legal authority is murder. Legal authority is what differentiates murder from lawful policy.

We therefore intend to analyze here the *domestic* U.S. legal framework for targeted killing by government, including assassination. Confining the analysis to domestic law is admittedly arbitrary because U.S. law impliedly or expressly incorporates conventional international law (e.g., treaties to which the U.S. is a party) and, most scholars contend, customary international law (as part of our common law), includes the law of armed conflict. Nevertheless, we draw the line at domestic law and therefore do our own incorporating by reference to the companion articles treating international law in this symposium volume. We focus on domestic law partly to save trees, but also because, under the

5. Barton Gellman, *CIA Weighs "Targeted Killing" Missions*, WASH. POST, Oct. 28, 2001, at A1.

6. See, e.g., Brian Jenkins, *Assassination: Should We Stay the Good Guys?* L.A. TIMES, Nov. 16, 1986, at V2 (noting public advocacy of killing Moammar Quaddafi).

7. See, e.g., Taylor, *supra* note 1, at 23; Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1.

8. See David B. Ottaway, *CIA Aides Call Hill Rules No Hindrance*, WASH. POST, Oct. 18, 1989, at A14.

last-in-time theory,⁹ it may supersede incorporated international law (unless, perhaps, such law rises to the level of *jus cogens*),¹⁰ as we discuss below. Domestic law is therefore not only the starting point for legal analysis of killing by the U.S. government but also often the end point, notwithstanding some interesting international law issues in between (which we also leave to our symposium co-contributors).

We are hardly the first writers to address the domestic law.¹¹ But most of the existing analyses are dominated by Executive Order No. 12,333.¹² One writer even dismisses everything else as “the virtually nonexistent domestic authorities beyond Executive Order 12333.”¹³ This dismissal not only ignores the rule-of-law mandate that we must find some positive legal authority for such acts by the government, but it also disparages a range of “virtually existing” domestic legal authorities which inform the otherwise ambiguous executive order (and its progeny), authorize and regulate targeted killing by the government, and arguably forbid some kinds of targeted killings.

But we have now used “targeted killing” and “assassination” several times already without defining the terms. The difficulty is that there are no consensus definitions in the literature, laws, or cases. Some commentators assert that all assassination is murder and therefore unlawful.¹⁴ Our federal criminal law reflects the

9. See *infra* Part VIII.

10. See STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVENHANSEN, NATIONAL SECURITY LAW 239–41 (3d ed. 2002).

11. See, e.g., Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLIN J. PUB. L. & POL'Y 291 (1992); Jonathan M. Fredman, *Covert Action, Loss of Life, and the Prohibition on Assassination*, 1 STUD. IN INTELLIGENCE 16 (1997); David Newman & Tyll Van Geel, *Executive Order 12,333: The Risks of a Clear Declaration of Intent*, 12 HARVARD J.L. & PUB. POL'Y 433 (1989); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609 (1992); Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287 (1989); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615 (1992); Jami Melissa Jackson, Comment, *The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications*, 24 N.C. J. INT'L L. & COM. REG. 669 (1999); Boyd M. Johnson, III, Note, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L. J. 401 (1992).

12. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), reprinted in 50 U.S.C. § 401 (2000).

13. Wingfield, *supra* note 11, at 307.

14. See Anderson, *supra* note 11, at 295; Fredman, *supra* note 11, at 17; Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 117 (1989) (“Under no circumstances, however, should assassination be defined to include any lawful homicide.”); Wingfield, *supra* note 11, at 295.

same assumption by using “assassination” in the title of the provision making it a crime to kill a member of Congress, head of an executive department, Justice of the Supreme Court, Director or Deputy Director of Central Intelligence, or persons nominated or elected for such positions.¹⁵ Defining assassination as murder, however, makes short work of analyzing its legality. It also contains an element of circularity because it renders lawful killings simply as “non-assassination.” Other scholars assert that assassination is not always murder.¹⁶ A few of these seemingly have it both ways, defining assassination as murder in one place, but carving out oxymoronic categories of “lawful assassination” in another.¹⁷ Yet other scholars seem to use the term “assassination” neutrally, explaining it without legal characterization as the intentional killing of individuals by the state for “political” purposes (although they disagree whether the victim must be in the political elite and whether the form of the killing or the existence of a state of war matters).¹⁸ Yet when a definition uses “assassination” to include a lawful killing or uses it neutrally, it collides with colloquial understanding by which “assassination” pejoratively conjures up the murders of Julius Caesar, Abraham Lincoln, and John F. Kennedy. No wonder another scholar throws up his hands, asserting simply that we know assassination when we see it, before belying his own assertion by citing as his example the

15. 18 U.S.C. § 351 (2000).

16. See Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 332 (1991); Zengel, *supra* note 11, at 636.

17. Compare Zengel, *supra* note 11, at 617 (asserting that “assassination . . . should be considered permissible [in some] circumstances”), *with id.* at 636 (stating that “assassination . . . must incorporate the idea of an illegal killing: what is not murder cannot be assassination”). See also Anderson, *supra* note 11, at 314; Jackson, *supra* note 11, at 697.

18. Compare Newman & Van Geel, *supra* note 11, at 434 (defining “assassination” as “intentional killing of a high-level political figure, whether in power or not. [It must] be authorized or condoned by a responsible official of a sovereign state as an intentional state action expected to influence the policies of another nation.”) (citation omitted) and Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, 30 GA. J. INT’L & COMP. L. 1, 9–10 (2001) (defining it as “targeted killing of an individual, by an official agent of a nation, regardless of whether a state of war exists,” but not heads of state) (citations omitted), *with* Johnson, *supra* note 11, at 402 n.7 (“The premeditated and intentional killing of a public figure accomplished violently and treacherously for political means”). Of course, not all of these definitions are internally coherent. How, for example, can a public figure be intentionally killed without violence, and what does it mean to kill “for political means”? Johnson, *supra* note 11, at 402 n.7 (emphasis added).

1986 raid on Quaddafi's compound in Libya,¹⁹ which many other scholars do not see as an assassination attempt.²⁰

We believe that the term "assassination" should be reserved for unlawful killing in accord with the colloquial usage. The issue is then when premeditated killing of an individual by a government or its agents—which we will call "targeted killing"—is *lawful* under U.S. law, and when it is *assassination*. The answer depends upon which legal framework applies. When the United States is at war, the framework is the law of armed conflict. Under it much killing is lawful, but targeted killing of individuals by treacherous means is not. This is often called "assassination." In peacetime, a different legal framework applies. For judicial killings—capital punishment in execution of a criminal sentence—the framework is criminal law. When the requirements of criminal law—including constitutional procedures—have been satisfied, such killings are lawful.²¹ An extra-judicial killing by a government official or agent in peacetime, however, would be lawful only if undertaken in self-defense or defense of others,²² which is presumably inconsistent with the premeditation of targeted killing.

The astute reader, however, will balk at the simplicity of the wartime/peacetime distinction and ask what legal framework applies when the United States is under terrorist attack? When is targeted killing lawful in this twilight zone between war and peace, and when is it unlawful and therefore assassination? Thus refined, these are the questions we seek to answer in this article.

We begin in Part II by briefly describing the constitutional framework. We show that this framework vests in the President as commander in chief the authority to order killing in defense of the United States and does not protect aliens unconnected with the United States from targeted killing by U.S. officials. It also incorporates into our law self-executing conventional interna-

19. Johnson, *supra* note 11, at 402.

20. See, e.g., Guy B. Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INTL. L. 243, 286–88 (1987).

21. See Anderson, *supra* note 11, at 300–06; Schmitt, *supra* note 11, at 641–42. As we note above, we leave the analysis of the law of armed conflict, as international law, to other symposium writers.

22. See, e.g., MODEL PENAL CODE § 3.02 (1980); Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974); John F. Wagner, Jr., Annotation, *Standard for Determination of Reasonableness of Criminal Defendant's Belief, for Purposes of Self-Defense Claim, That Physical Force Is Necessary*, 73 A.L.R. 4th 993 (1989).

tional law, and arguably some customary international law, which it then subordinates to later-in-time domestic legislation and executive acts. The Constitution, then, mainly remits us to domestic legislation and executive orders for authority for and restrictions on targeted killing.

In Part III, we briefly explore the traditional criminal law prohibitions of murder at the time the CIA—our most probable agent for targeted killing—was established. We conclude that, with one possible exception, these prohibitions did not have extraterritorial reach. The exception is the Neutrality Act which—*absent superseding legislation*—may prohibit targeted killings of the political leaders of nations with whom we are at peace.

In Part IV, we then consider the first and arguably central piece of superseding legislation—the National Security Act of 1947’s grant to the CIA of authority to conduct “other functions.” While this grant may not initially have included targeted killing, we show in Part V that it was intended as a dynamic authority to be shaped by practice and necessity, and that the practice fitfully came to include the plotting of targeted killings, including assassinations. We cite a rare judicial opinion which also finds that until 1981, the date of the first executive order banning assassination, the CIA was authorized to violate criminal laws by the vestiture of “other function” authority by the National Security Act.

By the same date, the Congressional Church Committee had learned and disapproved of assassination and the plotting of assassination by the CIA or its agents and proposed a bill to prohibit it. President Ford preempted that prohibition, however, by issuing his own prohibition of “political assassination” in an executive order.

In Part VI, we trace the origins of this prohibition and interpret it by reference to the bill which it preempted and to the Church Committee findings which led to the bill. We conclude that the executive prohibition was intended only to prohibit killing of foreign political leaders—who would not include freelance terrorists such as Osama bin Laden—and then only when the United States was not in hostilities authorized consistently with the War Powers Resolution, such as the Gulf War or the “war” on those responsible for the September 11 attacks. We examine subsequent refinements of the executive prohibition and conclude

that they did not substantially enlarge its application. Furthermore, we show that the executive prohibition can be (and has been) secretly waived by the President for particular cases. The executive order's prohibition, in short, was never absolute and is best viewed as a management control for insuring that the President alone makes the decision for peacetime targeted killing.

Part VII then analyzes additional management controls—including written presidential findings and reports to Congress—imposed on the decisionmaking process by intelligence oversight legislation. While the latest incarnation of such legislation—the Intelligence Authorization Act of 1991—effectively prohibits covert actions that would violate the Constitution or any statute of the United States, this prohibition only directs us back to the legal framework we have already explored and therefore adds no new prohibitions on targeted killing.

But do any other more recently enacted laws prohibit targeted killing? In Part VIII, we show that legislation implementing the Convention on Internationally Protected Persons would prohibit targeted killing of foreign political leaders while they are traveling outside their own country, but also that even this prohibition must give way to subsequent particularized grants of authority to use force. The targeted killing of terrorists is therefore not unlawful and would not constitute assassination as we have used the term, and neither would the targeted killing of Saddam Hussein during the 1991 Gulf War.

If Parts II–VIII establish a U.S. legal framework authorizing U.S. officials to conduct targeted killing in certain circumstances subject to certain procedural requirements, can that authority be delegated outside the U.S. government? In other words, can the CIA employ local “dirty assets” to carry out a targeted killing? In Part IX, we conclude that the United States may support a coup where the death of a leader is likely, so long as U.S. officials do not approve the targeted killing plan. We also argue that any doubt of the delegability of authority for targeted killing of terrorists involved in the September 11 attacks was lessened by post-September 11 legislation.

We conclude in Part X by addressing the implications of our analysis for proposed legislation both to authorize and to prohibit assassination. We find that neither is wise or necessary, as long

as the President keeps tight management control on this controversial and last-resort tool of national security.

II. THE CONSTITUTIONAL FRAMEWORK

We begin our analysis of the constitutional framework for targeted killing with the Fifth Amendment's Due Process Clause and the intuition that such killing is unlawful. We then consider whether the constitutional framework applies to aliens abroad or applies in wartime. Next, we consider whether a consistent executive practice in which Congress acquiesces can ripen into customary constitutional authority for targeted killing. Finally, we turn briefly to the question whether international law that is incorporated into our own law affects the analysis.

A. *The Fifth Amendment*

Most persons share the intuition that the Constitution prohibits targeted killing of U.S. citizens in the United States. But why? The only crime actually defined by the Constitution is treason.²³ One answer lies in the Due Process Clause's protection of "any person" from being "deprived of life . . . without due process of law."²⁴ Capital punishment is not unlawful because it is imposed with the full judicial process of criminal law. Extra-judicial killing ordinarily lacks such process. Another answer lies in the Fourth Amendment's protection against unreasonable seizures.²⁵ Killing a suspect when apprehension is impossible or possible only at risk of serious harm to the arresting officers or others is reasonable as a last resort.²⁶ Killing when apprehension is possible without risk of serious harm to self or others is not, and violates

23. See U.S. CONST. art. III, § 3, cl. 1.

24. U.S. CONST. amend. V; see also U.S. CONST. amend. XIV, § 1.

25. U.S. CONST. amend. IV. The Fourth Amendment provides that people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Id.* (emphasis added).

26. See, e.g., *Idaho v. Horiuchi*, 253 F.3d 359, 367 (9th Cir. 2001), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001). The court stated that

[l]aw enforcement agents may use deadly force only if they reasonably believe that killing a suspect is necessary to prevent him from causing immediate physical harm to the agents or others, or to keep him from escaping to an area where he is likely to cause physical harm in the future.

Id. at 367; see also *Harris v. Roderick*, 126 F.3d 1189, 1201-02 (9th Cir. 1997).

the Fourth Amendment.²⁷ Thus, a pre-planned killing under “shoot-to-kill” rules of engagement, occurring before such a necessity arises, is unreasonable under the Fourth Amendment.²⁸ As a federal court said in reviewing the Federal Bureau of Investigation’s shoot-to-kill rules of engagement at Ruby Ridge, “[s]uch wartime rules are patently unconstitutional for a police action.”²⁹ It follows that the premeditated killing of a U.S. citizen in the United States—an assassination, as we have used the term—would be unlawful.

B. *Applicability to Aliens Abroad?*

But advocates of targeted killing typically urge its direction against aliens abroad.³⁰ How does this change the constitutional framework, if at all? Does it apply to aliens abroad?

Writing for the Supreme Court in *Reid v. Covert*,³¹ Justice Black asserted that “[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”³² *Reid* suggests that government agents cannot escape constitutional strictures against targeted killing by going abroad after foreign nationals because the Constitution would go with them.³³

Subsequent cases, however, raise some doubt as to whether, or how much, the Constitution travels. In *United States v. Verdugo-Urquidez*,³⁴ the Court held that “the people” protected by the Fourth Amendment do not include aliens outside the United States who lack “substantial connections with this country.”³⁵ Thus, the Fourth Amendment’s protection against unreasonable

27. *Horiuchi*, 253 F.3d at 367.

28. *Id.* at 377.

29. *Id.*

30. *See, e.g.*, Johnson, *supra* note 11.

31. 354 U.S. 1 (1957).

32. *Id.* at 5–6 (citations omitted).

33. *Cf. id.* (rejecting the proposition that the provisions of Article III and Amendments V and VI did not “protect an American citizen” tried by the United States in a foreign country).

34. 494 U.S. 259 (1990).

35. *Id.* at 271.

seizure would apparently pose no barrier to the targeted killing of an "unconnected" foreign national abroad.

The Fifth Amendment, however, protects "any person," and not just "the people," from the deprivation of life without due process.³⁶ Concurring in *Verdugo-Urquidez*, Justice Kennedy therefore distinguished Fifth Amendment rights of aliens abroad, speculating that "[a]ll would agree . . . that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant," a Mexican national residing abroad.³⁷ If so, then the Fifth Amendment also protects against targeted killing abroad, as one appellate court has expressly stated in dictum.³⁸ But the majority in *Verdugo-Urquidez* also impliedly rejected the claim that enemy aliens may be entitled to due process rights abroad.³⁹ Citing this dictum, the D.C. Circuit Court of Appeals has more recently squarely rejected the claim that the Fifth Amendment prohibits U.S. agents from torturing foreign nationals abroad.⁴⁰ If that court is right, the Fifth Amendment would pose no barrier to targeted killing of foreign nationals either.

But perhaps *Reid* still survives in more modest form. In his *Verdugo-Urquidez* concurrence, Justice Kennedy reconciled the case with *Reid* by reasoning that while the Constitution *does* travel with U.S. agents abroad, constitutional rights "do not necessarily apply in all circumstances in every foreign place."⁴¹ What is unreasonable in the United States may be reasonable abroad under foreign circumstances: "we must interpret constitutional protections in light of the undoubted power of the United States

36. U.S. CONST. amend. V.

37. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

38. See Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 945 (D.C. Cir. 1988) (hypothesizing that targeted killing of U.S. nationals living in Nicaragua by U.S. personnel could constitute a violation of the Fifth Amendment's Due Process Clause). The court stated that "[i]f the state officer's action [has] caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal, then a due process violation is likely." *Id.* (alteration in original) (quoting *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981)).

39. *Verdugo-Urquidez*, 494 U.S. at 269 (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)). *Eisentrager*, in fact, held that such aliens were not entitled to obtain writs of habeas corpus on the grounds that their Fifth Amendment rights had been violated. 339 U.S. at 768.

40. *Harbury v. Deutch*, 233 F.3d 596, 602-04 (D.C. Cir. 2000).

41. *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

to take actions to assert its legitimate power and authority abroad."⁴²

Furthermore, even if constitutional limitations do not necessarily protect a foreign national abroad from actions by U.S. agents, such agents remain entirely "creature[s] of the Constitution" who must still trace their power and authority to the Constitution or law made pursuant to it.⁴³ Whether or not foreign nationals have any right to invoke constitutional protections, U.S. officials may still be constitutionally required under *Reid* to invoke positive legal authority to conduct targeted killing. This mandate may not be judicially enforceable, but it is well established that not every constitutional mandate is for the courts to enforce.⁴⁴

C. Are "Wartime" Rules Different?

The Ruby Ridge case quoted above found "wartime [shoot-to-kill] rules patently unconstitutional for a police action."⁴⁵ Are the rules then patently constitutional in war? As commander in chief, the President has the constitutional authority to command the use of deadly force by troops in war, whether it has been declared by Congress or thrust upon us by enemy attack or invasion.⁴⁶ As noted, the applicable legal framework in a war is then the law of war, under which the killing of enemy combatants is lawful, absent treacherous means. The legality of targeted killing then turns on the target and on the means; there is still some subcategory of targeted killing which is unlawful.⁴⁷ The President may therefore order targeted killing as long as it is consistent with the law of armed conflict.⁴⁸

42. *Id.* (Kennedy, J., concurring).

43. *Reid*, 354 U.S. at 6.

44. See generally John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

45. *Idaho v. Horiuchi*, 253 F.3d 359, 377 (9th Cir. 2001).

46. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . [He] is bound to accept the challenge without waiting for any special legislative authority.").

47. See W. Hays Parks, *Memorandum of Law: Executive Order 12,333 and Assassination*, ARMY LAW., Dec. 1989, at 4.

48. See *id.* at 5.

The constitutionality of “wartime rules” for deadly force, however, is not quite as “patent” when we leave the arena of conventional war and enter the twilight zone of terrorist attacks. Undoubtedly the President still has the constitutional authority under the Commander in Chief Clause to “repel sudden attacks,”⁴⁹ but that authority has traditionally had a real time dimension—or at least an inherent imminence requirement—by analogy to the doctrine of self-defense at international law.⁵⁰ A terrorist attack, however, is usually over before it can be repelled in real time. Moreover, when the attack is a suicide attack, it is impracticable to strike back. Additionally, alternatives to force that may be effective to deter state-sponsored attacks are ineffective against freelance terrorists.⁵¹ Yet, as we have seen, even at home in the United States, the government may constitutionally use deadly force to prevent a dangerous suspect from doing harm to others if no peaceful means is left to apprehend him.⁵² It would be anomalous if the Constitution did not vest the same authority in the President to use deadly force against a terrorist if he has exhausted other means of apprehending him, as our co-contributors to the symposium discuss under the rubric of anticipatory self-defense.⁵³ Moreover, if the terrorist attacks are continuing, “the timing of the preemptive action relative to the expected attack is irrelevant, since the various terrorist acts may be regarded as part of a continuous operation.”⁵⁴ Preemptive deadly force is then no longer anticipatory self-defense—it is just self-defense.⁵⁵

Our conclusion so far, then, is that the Constitution does not prohibit the targeted killing abroad of foreign nationals who lack a substantial connection with the United States, at least in anticipatory self-defense when other more peaceful means of de-

49. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., rev. ed. 1937); cf. *In re Neagle*, 135 U.S. 1 (1890) (finding that the executive has inherent authority to order the use of force in defense of government officials).

50. See VI THE WORKS OF DANIEL WEBSTER 261 (Boston, C.C. Little & J. Brown 1851) (stating that a valid plea of self-defense must rest on a showing of “necessity of self-defense, instant, overwhelming, leaving no choice of means, no moment for deliberation”).

51. See Jackson, *supra* note 11, at 693; Johnson, *supra* note 11, at 422.

52. See *Harris v. Roderick*, 126 F.3d 1189, 1201–09 (9th Cir. 1997).

53. Michael N. Schmitt has made the same argument under international law. “As defensive options become more limited or less likely to succeed, the acceptability of preemptive action increases.” Schmitt, *supra* note 11, at 647.

54. *Id.* at 649.

55. See *id.*

fense have been exhausted. But if it does not prohibit it, does it follow that the President alone may order it? Or that he can do so in the face of a statutory prohibition? Courts have recognized the President's authority both to fight a de facto war⁵⁶ and to interpose force abroad to protect Americans and their property without prior legislative authority.⁵⁷ Necessity gives rise to the constitutional authority in both cases, and also justifies the President in exercising it without awaiting legislation. It does not follow that he could defy inconsistent legislation. Although judges have alluded to the President's inherent constitutional authority to command military troops at war,⁵⁸ that authority is less clearly implicated in targeted killing than in his authority to defend Americans and their property from attack.⁵⁹ Yet the courts which have recognized the latter in the absence of legislation have never held that Congress could not restrict that authority, or at least regulate it under the Necessary and Proper Clause.⁶⁰ To quote Justice Jackson, cases have "intimated that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress."⁶¹ The President's authority to do so, like the constitutional authority for self-defense itself, may well depend on the necessity for action and the gravity of the risk, but depending on those factors would leave room for Congress to ban or regulate targeted killings except in the extreme case of an otherwise unavoidable catastrophic attack.⁶²

D. Customary Constitutional Authority?

We have written elsewhere that congressional acquiescence and the development of customary law from executive practice have special application in national security law, in part because Congress has found it difficult to prescribe *ex ante* standards for

56. See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).

57. See *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186).

58. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (stating that "Congress cannot deprive the President of the command of the army and navy"); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, C.J., concurring) (stating that "Congress cannot direct the conduct of [military] campaigns").

59. See *In re Neagle*, 135 U.S. 1 (1890).

60. See, e.g., *id.*; *Durand*, 8 F. Cas. at 112.

61. *Youngstown*, 343 U.S. at 636 n.2 (Jackson, J., concurring).

62. See *id.*

executive action.⁶³ Apart from generously construing broad delegations of statutory authority in national security,⁶⁴ the courts have permitted the President to act without legislative authority:

The same factors that permit broad delegations of national security authority sometimes require the President to act without antecedent legislation at all. "[C]ongressional inertia, indifference or quiescence . . . [may] enable, if not invite, measures on independent presidential responsibility," as Justice Robert Jackson put it. In such cases, the President acts subject to congressional ratification or countermand; he initiates, and Congress reacts. When he acts with sufficient consistency over time and Congress knowingly acquiesces, this interaction may create customary national security law. The custom evidences the political branches' joint interpretation of the President's constitutional or statutory authority

"[A] systematic, unbroken, executive practice," Justice Felix Frankfurter noted in *Youngstown Sheet & Tube Co. v. Sawyer*, "long pursued to the knowledge of the Congress and never before questioned, . . . making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President."⁶⁵

Customary law may develop as quasi-constitutional law when the executive takes the initiative in exercising concurrent national security powers.⁶⁶ Or, a custom may develop as a gloss on a statute when the executive agency "has consistently acted under a statute in a manner known to Congress, and Congress has acquiesced in the practice by inaction, rejection of contrary legislation, or reenactment"; the statutory authority for the [agency] practice "is implied into the statute."⁶⁷

The requirement that a custom be "systematic, unbroken, . . . [and] long pursued"⁶⁸ serves to identify the custom and to prescribe the authority that it establishes. Providing notice to Congress permits the requirement of knowing acquiescence. If Congress has notice of the practice and then declines to object when it could, or reenacts the general legislation that provides the base

63. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 848 (1994).

64. *See id.* at 848-49.

65. *Id.* at 849-50 (citations omitted) (alterations in original).

66. *Id.* at 850.

67. *Id.* (citations omitted); *see also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

68. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

from which the custom emerged, or enacts related legislation that is consistent with the custom, then it can be said to have knowingly acquiesced.⁶⁹ The executive practice, of course, must not violate any constitutional provision or statute.⁷⁰

As we turn from the constitutional framework to the statutory law relating to targeted killing and the historical practice, we must therefore consider whether the predicate for customary constitutional authority for such killing is satisfied.

E. *Incorporated International Law?*

The question of whether incorporated international law could also prohibit targeted killing remains. Assuming that international customary law prohibits targeted killing,⁷¹ and that it is incorporated into our federal common law,⁷² it may yet lack legal effect in the United States if Congress or the President, let alone both, have authorized such killing. Under the prevailing interpretation of the Supreme Court's dictum in the *Paquete Habana* case, a controlling legislative or (more controversially)⁷³ executive act can supersede international customary law, as later statutes supersede treaties under the *lex posterior* or "last-in-time" rule.⁷⁴ If a targeted killing is by order of the President, therefore, it would supersede inconsistent international law on this view of *Paquete Habana*. If it was authorized by statute, the legal effect would be the same.⁷⁵ Some, however, have asserted that peremp-

69. Raven-Hansen & Banks, *supra* note 63, at 852.

70. *Id.* at 853.

71. See Bert Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 655, 660-63 (1987); Parks, *supra* note 47, at 624; Schmitt, *supra* note 11, at 624.

72. The *Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations").

73. Compare Jonathon I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913 (1986), with Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987).

74. See *Head Money Cases*, 112 U.S. 580, 599 (1884) ("[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of [the United States], it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.")

75. Interestingly, Congress has added a further wrinkle to the last-in-time rule. In the Intelligence Authorization Act for Fiscal Year 2001, Pub. L. No. 106-567, § 308(a), 114

tory norms of customary international law—*jus cogens*—cannot be thus superseded, because they are on equal legal footing with constitutional rules.⁷⁶ But even if they were on equal footing, the customary international law arguably “falls short of prescribing an international norm against assassination.”⁷⁷ Incorporated international law thus takes us back to square one: domestic executive and legislative authorities.

III. TARGETED KILLING AND TRADITIONAL CRIMINAL LAW

Since we have concluded that the Constitution leaves room for Congress to restrict or regulate targeted killing, the next logical question is whether it has done so by traditional criminal law, and for that matter, whether state criminal laws might also apply to prohibit targeted killing abroad. Without parsing any of these laws, it is safe to say that at least some criminalize premeditated killing. For two reasons, however, it is doubtful that they pose a legal obstacle.

First, it is well established that such laws are presumed to apply only to acts performed within United States territory unless the legislature clearly manifests its intent that the law be given extraterritorial application.⁷⁸ An example of a criminal prohibition that could be construed to regulate targeted killing if it applied outside the United States is the Posse Comitatus Act of 1878,⁷⁹ which forbids using the armed forces “as a posse comitatus or otherwise to execute the laws” except as authorized expressly by the Constitution or laws.⁸⁰ Courts and commentators have generally concluded that the Act does not apply extraterritorially.⁸¹ Even if the Posse Comitatus Act does apply abroad, it is

Stat. 2831 (2000), Congress provided that no subsequently enacted federal law that implements a treaty or other international agreement “shall be construed as making unlawful an otherwise lawful and authorized intelligence activity of the United States government . . . unless such Federal law specifically addresses such intelligence activity.” *Id.*

76. See *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988) (discussing this claim).

77. Schmitt, *supra* note 11, at 619; see also Newman & Van Geel, *supra* note 11, at 441 n.33. But see *Comm. of U.S. Citizens*, 859 F.2d at 941 (suggesting in dictum that there is an international customary “proscription against murder”).

78. *United States v. Bin Laden*, 92 F. Supp. 2d 189, 193 (S.D.N.Y. 2000).

79. 18 U.S.C. § 1385 (2000).

80. *Id.*

81. See, e.g., *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); Extraterritorial

unlikely that its limits on military involvement in law enforcement would be construed to limit targeted killing in pursuance of a military objective.⁸² Moreover, the later-enacted National Security Act likely constitutes an exception to whatever general prohibition the Posse Comitatus Act prescribes.⁸³

Generally, courts have insisted on explicit provision for extraterritorial application, although they have excepted a small class of criminal laws that are not dependent on locality for the government's jurisdiction and that are intended to protect government functions when that purpose would be advanced by applying the law extraterritorially.⁸⁴ Perusal of traditional criminal laws that might apply to targeted killing, enacted before the National Security Act of 1947 created the Central Intelligence Agency, revealed none that was explicitly, or, apparently, by implication, intended to have extraterritorial effect, with a single exception.

The exception is the Neutrality Act, first enacted in 1794:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined under this title or imprisoned not more than three years, or both.⁸⁵

The Act is both quaintly anachronistic ("sets on foot," "from thence," "dominion of a foreign prince") and surprisingly modern (explicitly creating "enterprise" liability), but it might appear at first glance to interdict a targeted killing abroad if (a) such a kill-

Effect of the Posse Comitatus Act, 13 Op. Off. Legal Counsel 321 (1989); Christopher A. Donesa, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 DUKE L.J. 867 (1992). *But see* DYCUS ET AL., *supra* note 10 at 777 (questioning the application of the presumption to the Posse Comitatus Act).

82. *See* Applewhite v. United States Air Force, 995 F.2d 997, 1001 (10th Cir. 1993); *United States v. Thompson*, 33 M.J. 218, 220 (C.M.A. 1991).

83. *See infra* Part IV.

84. *United States v. Bin Laden*, 92 F. Supp. 2d 189, 193 (S.D.N.Y. 2000) (citing *United States v. Bowman*, 260 U.S. 94, 98 (1922)).

85. 18 U.S.C. § 960 (2000). *See generally* Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986); Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285 (1987); Joshua Spector, Comment, *The Cuba Triangle: Sovereign Immunity, Private Diplomacy, and State (In-)Action*, 32 U. MIAMI INTER-AM. L. REV. 321 (2001).

ing constitutes a “military . . . enterprise . . . against the territory or dominion of [a] foreign . . . state”; (b) the United States is “at peace” with that state; and (c) the Act applies to persons acting on behalf of the government.⁸⁶ The first two of these requirements appear to be satisfied by most or all of the proposed targeted killings described at the start of this article.⁸⁷

It is not necessary that the “enterprise” be literally military—trained, uniformed, and organized by regulations governing the armed services.⁸⁸ It is sufficient that

a number of men, whether few or many, combine and band themselves together, and thereby organize themselves into a body, within the limits of the United States, with a common intent or purpose on their part at the time to proceed in a body to foreign territory, there to engage in carrying on armed hostilities, either by themselves or in co-operation with other forces, against the territory or dominions of any foreign power with which the United States is at peace⁸⁹

The targeted killing of a government official or political leader in the foreign state, like Hussein, Quaddafi, or Noriega, arguably meets this description.⁹⁰ The targeted killing of bin Laden or another terrorist who is not state-sponsored might not, since it is not literally directed at the foreign state or dominion. But even in that case, unless bin Laden were found in international space, the operation would inevitably intrude on the “territory or dominion” of any sanctuary state, and the unconsented intrusion might itself be construed as armed hostility or an act of war.⁹¹ The purpose of the Act, after all, was to protect United States neutrality from being compromised and the United States from being forced into hostilities with or between foreign states by ad hoc armed acts of United States citizens—in short, to secure government control of violent provocations which put at risk our peaceful relations with sovereign states. That purpose is thwarted even by

86. 18 U.S.C. § 960 (2000).

87. See *supra* notes 6–8 and accompanying text.

88. See *United States v. Hart*, 78 F. 868, 870 (E.D. Pa. 1897).

89. *United States v. O'Sullivan*, 27 F. Cas. 380 (S.D.N.Y. 1851); see also *United States v. Murphy*, 84 F. 609, 614 (D. Del. 1898); *Hart*, 78 F. at 870.

90. *Accord Brandenburg*, *supra* note 71, at 683 (concluding that “an assassin, even one lacking the intent to overthrow the government of the victim, would seem to violate the ‘dominion’ of the victim’s state”).

91. *But see* 13 Op. Att’y Gen. 177, 178 (1869) (construing Act to apply only to actions against a political entity recognized by the United States as an “independent government, entitled to admission into the family of nations”).

acts directed at private persons harbored by another sovereign if the acts provoke the sovereign.

Nor should the “at peace” requirement, properly understood in its historical context, pose an obstacle to prosecution. The Office of Legal Counsel has construed it as “the state of affairs in which there is an absence of a congressionally declared war.”⁹² In contrast, one federal court has found that the advent of covert and undeclared war has substantially narrowed the applicability of the Act by holding that the United States was not “at peace” with Nicaragua when the administration was funding the Contra cause against the Nicaraguan government.⁹³ The court’s reasoning, however, is squarely at odds with the Act’s purpose of securing a government monopoly of such provocative acts.⁹⁴ Parallel but independent private military enterprises destroy that monopoly and may pose risks to the country’s formal neutrality. Government—in accordance with applicable constitutional processes—can risk neutrality and even wage undeclared war without thereby immunizing all private acts of war.⁹⁵ Defining “at peace” by reference to the formality of declared war, or at least clear statutory authorization consistent with the War Powers Resolution,⁹⁶ not only serves the purpose of the Act, but also provides a bright line to guide conduct.

At first glance, the third hurdle to a Neutrality Act prosecution for targeted killing is also easily overcome: it applies, by its terms, to “[w]hoever, within the United States” engages in the proscribed enterprise.⁹⁷ By our definition, a targeted killing is officially approved by the U.S. government, which suggests some overt act in the United States.⁹⁸ But, given the purpose of the statute, should “whoever” be construed literally to apply to private persons and public officials alike? Two federal courts have

92. 8 Op. Off. Legal Counsel 58, 69 (1984).

93. *United States v. Terrell*, 731 F. Supp. 473, 476–77 (S.D.N.Y. 1989) (dismissing a Neutrality Act prosecution against persons supplying arms to the Contras on the grounds that the United States was not “at peace” with Nicaragua).

94. *Id.*; see 8 Op. Off. Legal Counsel at 69.

95. 8 Op. Off. Legal Counsel at 67 (“[T]he Neutrality Act . . . ensure[d] that the nation’s foreign policy was made by the President, with appropriate participation by Congress, working through the political process in fulfillment of their constitutional roles, and not by the unilateral and unrestricted acts of private individuals.”).

96. 50 U.S.C. §§ 1541–1548 (2000).

97. 18 U.S.C. § 960 (2000).

98. See *supra* Part I.

suggested that the answer is yes.⁹⁹ In an early Neutrality Act prosecution, Justice Patterson, sitting on circuit, ruled that the President's knowledge and approval of a military expedition against a state with which we are at peace would not supply a defense "because the president does not possess a dispensing power. Does he possess the power of making war? That power is exclusively vested in Congress."¹⁰⁰ Nearly 180 years later, a second federal court—in dictum—again construed the Act to apply to presidentially authorized actions.¹⁰¹

These conclusions rest not only on the plain words of the Act, however, but on an anachronistic and historically inaccurate assumption that the government cannot use armed force or violent means against foreign states unless we are at war.¹⁰² On the contrary, the President has repeatedly deployed force abroad against states on which Congress has not declared war either by declaration or by statute; sometimes on his own constitutional authority, sometimes with express statutory authorization short of war, and sometimes with implied statutory authorization or other congressional acquiescence.¹⁰³ Notwithstanding its language, the Neutrality Act should not be construed to criminalize such a broad range of foreign policy initiatives, at least when they have been approved by both political branches. Otherwise this crude instrument of criminal law would dramatically curtail this country's flexibility in dealing with foreign states. Instead, construing "whoever" to mean just private citizens and rogue government officials acting on their own (contrary to official policy and outside the scope of their employment) would accomplish the chief historical purpose of the Neutrality Act without this inhibiting effect.¹⁰⁴ The Act should therefore not apply to a targeted killing or-

99. See *Dellums v. Smith*, 577 F. Supp. 1449 (N.D. Cal. 1984); *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806).

100. *United States v. Smith*, 27 F. Cas. at 1230.

101. *Dellums*, 577 F. Supp. at 1454 ("[T]he history of the Neutrality Act and judicial precedent demonstrate the reasonableness of the view that the Act applies to all persons, including the President.").

102. See *United States v. Smith*, 27 F. Cas. at 1230.

103. See generally Peter Raven-Hansen, *Constitutional Constraints: The War Clause, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR* 29, 32-43 (Gary M. Stern & Morton H. Halperin eds., 1994).

104. See 8 Op. Off. Legal Counsel 58, 58 (1984) (concluding that "the Act does not proscribe activities conducted by Government officials acting within the course and scope of their duties as officers of the United States but, rather, was intended solely to prohibit actions by individuals acting in a private capacity that might interfere with the foreign pol-

dered by the President, so long as he does not exceed his authority by violating any other statutory or constitutional prohibition.

In any case, there is another reason why traditional criminal laws, including the Neutrality Act, do not necessarily prohibit targeted killing. They, like all legislation, are subject to superseding laws. If they are inconsistent, and if the inconsistency cannot be reconciled without violence to any of them, then the latest law prevails. Even if the Neutrality Act—whose terms have remained substantially unchanged since it was first enacted in 1794—applies to criminalize targeted killing, we cannot decide its effect without examining subsequent laws that may authorize targeted killing.¹⁰⁵ We therefore turn next to the National Security Act of 1947¹⁰⁶ and subsequent related legislation that the Office of Legal Counsel has argued “necessarily embrace activities that would otherwise be prohibited by the Neutrality Act if carried out by individuals acting without Government authorization,” and therefore “constitute an explicit recognition by Congress of the President’s authority to conduct such activities against countries with whom the United States is ‘at peace’ within the meaning of the act.”¹⁰⁷

IV. THE NATIONAL SECURITY ACT OF 1947 AND THE FIFTH FUNCTION

The most important superseding authority was the National Security Act of 1947¹⁰⁸ which cryptically vested in the Central Intelligence Agency the authority to perform certain undefined “other functions and duties.”¹⁰⁹ To construe this authority, we begin in Sub-part A with the antecedent practice of intelligence-collecting agencies of the government. We then discuss in Sub-part B how it was codified in the Act. In Sub-part C, we focus on

icy and relations of the United States.”)

105. See *id.* at 63 (“The Act today remains substantially similar to that which was first enacted in 1794.”).

106. Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified as amended in scattered sections of 5, 10, and 50 U.S.C.); see, e.g., 50 U.S.C. §§ 401–05 (2000).

107. 8 Op. Off. Legal Counsel at 58, 79.

108. Pub. L. No. 80-253, 61 Stat. 495.

109. *Id.* § 102(d)(5), 61 Stat. at 498.

the legislative history of the "other functions and duties" provision.¹¹⁰

A. Pre-1947 Practice

Secrecy was part of governance from the start, indeed, before the start. In 1775, the Continental Congress created the Committee for Secret Correspondence, and thus authorized the first official American intelligence activity.¹¹¹ Before the Committee reported to Congress, the members were instructed to delete the names of agents they employed or persons with whom they corresponded.¹¹² Throughout our history, U.S. Presidents have employed secret agents to conduct intelligence on behalf of the United States.¹¹³ The use of secret agents for gathering intelligence has traditionally been viewed as part of conducting foreign affairs, where secret gathering of intelligence information may be essential to the success of policy.¹¹⁴

In contrast to the practice of secret intelligence gathering, there is no evidence that U.S. Presidents utilized assassination as an instrument of foreign policy in the early years.¹¹⁵ In a letter to James Madison, Thomas Jefferson expressed the low regard he held for the practice: "[A]ssassination, poison, perjury . . . All of these were legitimate principles in the dark ages . . . but exploded and held in just horror in the 18th century."¹¹⁶

The first known American-sponsored assassination attempt occurred during the border war with Mexican bandits in 1916.¹¹⁷

110. *Id.*

111. 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 392 (Worthington Chauncy Ford et al. eds., 1905) (resolving "[t]hat a committee of five be appointed for the sole purpose of corresponding with . . . Great Britain, Ireland, and other parts of the world").

112. 4 *id.* at 345.

113. See CHRISTOPHER ANDREW, FOR THE PRESIDENT'S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH 137-38 (1995); STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 3-5 (1996); HENRY MERRITT WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 823 (1929).

114. See, e.g., KNOTT, *supra* note 113, at 155 (discussing President Wilson's realization of the need for secret foreign intelligence gathering).

115. *Id.* at 171.

116. See Letter from Thomas Jefferson to James Madison, *supra* note 3.

117. KNOTT, *supra* note 113, at 155.

Unbeknownst to President Wilson, someone from Army General John Pershing's staff hired four Mexicans to poison revolutionary leader Francisco "Pancho" Villa by dropping tablets into his coffee.¹¹⁸ The attempt failed and Pershing hid the news of the mission, even from the President.¹¹⁹ The cover up lasted until the 1980s when historians uncovered the story.¹²⁰

In the years between the world wars, U.S. intelligence activities abroad withered.¹²¹ The innocence—or naiveté—of the period is reflected in the statement attributed to Secretary of State Henry Stimson in 1929: "Gentlemen do not read each others' mail."¹²² By 1941, growing fears of German clandestine operations in Europe led President Franklin D. Roosevelt to appoint his law school classmate Major General William J. Donovan as Coordinator of Information ("COI") and direct him "to carry out, when requested by the President, such supplementary activities as may facilitate the securing of information important for national security."¹²³ Early on, Donovan wrote to the Secretary of the Navy that "subversive operations in foreign countries" should be part of the agency's mandate.¹²⁴

By 1942, COI was renamed the Office of Strategic Services ("OSS"),¹²⁵ and by military order the President subordinated OSS to the Joint Chiefs of Staff.¹²⁶ The agency mandate included the authority to "plan and operate such special services" or covert paramilitary operations as directed by the Joint Chiefs, as well as intelligence gathering.¹²⁷ Thus, the "special services" were performed by an entity in the military chain of command during a time of declared war.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 155–56.

122. *Id.* (citations omitted).

123. Presidential Order Designating a Coordinator of Information (July 11, 1941), reprinted in THOMAS F. TROY, DONOVAN AND THE CIA: A HISTORY OF THE ESTABLISHMENT OF THE CENTRAL INTELLIGENCE AGENCY 423 (1981).

124. Letter from Major General William Donovan, Coordinator of Information, to Frank Knox, Secretary of the Navy (April 26, 1941), reprinted in part in TROY, *supra* note 123, at 417.

125. KNOTT, *supra* note 113, at 156.

126. Military Order of June 13, 1942, Office of Strategic Services, reprinted in TROY, *supra* note 123, at 427 [hereinafter Military Order].

127. Military Order, *supra* note 126, § 2.b.

Donovan was known as "Wild Bill,"¹²⁸ reflecting his "personal fascination with gung-ho military exploits" from his days as a Congressional Medal of Honor winner in World War I.¹²⁹ Donovan and his intelligence operatives learned from the practices and successes of the British Special Operations Executive ("SOE"), which aided and performed missions with resistance movements in Europe and Asia.¹³⁰ At least in part because Donovan realized that OSS had to prove its worth to the military and to the President, OSS undertook daring and dangerous missions throughout Europe, Asia, and Africa.¹³¹ Under General Donovan's leadership, OSS engaged in a range of covert operations during the war, including blowing up bridges in the Balkans, leading tribesmen against the Japanese in Burma, and conducting guerilla operations behind enemy lines prior to D-Day.¹³² In the North Africa campaign, "several assassinations were authorized."¹³³ Further, OSS "may have been involved in the assassination of Vichy French admiral Jean-François Darlan," and OSS operatives reportedly had contacts with the group that attempted to assassinate Hitler in 1944.¹³⁴

OSS was not the only entity that targeted individuals for lethal force during the war. Relying on an intercept of a decrypted Japanese signal during the war in the Pacific in 1943, President Roosevelt is reported to personally have authorized the successful shoot-down of the plane carrying Japanese Admiral Yamamoto, leader of the attack on Pearl Harbor.¹³⁵

After the tide of the war turned in 1944, Donovan began positioning himself to persuade Roosevelt to establish a permanent peacetime intelligence agency.¹³⁶ In a direct appeal to Roosevelt, Donovan urged taking control over intelligence away from the military after the war and placing the intelligence function "un-

128. JOHN PRADOS, *PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS SINCE WORLD WAR II* 15 (1986).

129. JOHN RANELAGH, *THE AGENCY: THE RISE AND DECLINE OF THE CIA* 87 (1986).

130. PRADOS, *supra* note 128, at 15.

131. *Id.* at 15-16; RANELAGH, *supra* note 129, at 88.

132. PRADOS, *supra* note 128, at 15-17.

133. RANELAGH, *supra* note 129, at 88.

134. KNOTT, *supra* note 113, at 157.

135. ANDREW, *supra* note 113, at 137-38; *see also* BURKE DAVIS, *GET YAMAMOTO* 10 (1969).

136. TROY, *supra* note 123, at 226-27.

der the direction and supervision of the President.”¹³⁷ Donovan proposed that the agency “would coordinate, collect, and produce intelligence” for all government agencies.¹³⁸ In addition, the new service should be responsible for “all secret activities” including “subversive operations abroad,” and would perform “such other functions and duties relating to intelligence,’ as the president might direct.”¹³⁹ In essence, Donovan’s plan was “designed to make a wheel out of the many spokes” of intelligence then at hand.¹⁴⁰ When OSS special warfare chief Brigadier General John Magruder was asked to review Donovan’s plan, he opined that special operations and intelligence were “ancillary to each other” and that Donovan’s proposal was for the peacetime “study of such operations” so that they “may be quickly developed” when war threatens.¹⁴¹ However, when civilians from the Joint Intelligence Staff reviewed Donovan’s proposal, they rejected the “subversive operations abroad” provision and observed that such activities did “not appear to be an appropriate function of a central intelligence service.”¹⁴²

In the tugs of war over control of the intelligence function, the “subversive operations abroad” provision was dropped out of subsequent proposals for a peacetime intelligence organization.¹⁴³ There is no record of the topic being discussed again in further reviews of Donovan’s plan, in the development of interim intelligence entities, or in considering the eventual legislation.¹⁴⁴ Meanwhile, Donovan’s proposal that the new agency “should perform ‘such other functions and duties relating to intelligence as the President from time to time may direct’” remained, with only minor changes in language.¹⁴⁵ Its meaning was never questioned in subsequent iterations, including the 1947 Act.¹⁴⁶ The Joint

137. *Id.* at 227.

138. *Id.* at 228.

139. *Id.* at 221–28 (Donovan’s Memorandum for the President is reprinted in TROY, *supra* note 123, at 445–47). When Donovan was asked to submit his plans for liquidating OSS in August 1945, he included a “Statement of Principles” that advocated the creation of a new intelligence agency “in the foreign field only, to carry on services such as espionage, counterespionage and . . . special operations . . .” *Id.* at 457–58.

140. TROY, *supra* note 123, at 228.

141. *Id.* at 413.

142. *Id.* at 235.

143. *See id.* at 413–15.

144. *See id.* at 415.

145. *Id.* at 415.

146. *Id.*

Chiefs of Staff borrowed Donovan's "such other functions and duties" language,¹⁴⁷ as did the Joint Intelligence Committee, creating a combined military/civilian entity created in World War II.¹⁴⁸

Nothing was resolved before Roosevelt died on April 12, 1945, and by the war's end in September, President Harry S. Truman appointed Donovan to the Nuremberg war crimes trials and signed an executive order dissolving the OSS.¹⁴⁹ The parts of OSS that gathered and analyzed intelligence moved to the State Department, and the operations staff went to the War Department as a new Strategic Services Unit ("SSU").¹⁵⁰ Following Truman's directive, however, SSU was largely dismantled in early 1946.¹⁵¹

Within six months, Cold War realities caused Truman to reverse course and the President became a proponent of a centralized intelligence capability.¹⁵² The emerging Cold War already generated an intelligence war in Europe, as Soviet and U.S. agents competed to secure cooperation from German experts, and as agents and operatives were kidnapped and murdered.¹⁵³ Although Donovan was out of the picture, a National Intelligence Authority ("NIA") was established in January 1946 to oversee a Central Intelligence Group ("CIG"), created in Donovan's image—the first peacetime intelligence agency, coordinated and centralized under the President's control.¹⁵⁴ The NIA was composed of the secretaries of state, war, and navy, and Truman's personal representative, the forerunner to the Director of Central Intelligence ("DCI").¹⁵⁵

The directive establishing the CIG did not authorize covert operations as Donovan proposed; nor were there to be "police, law enforcement or internal security functions . . ." ¹⁵⁶ However, the Directive did permit the DCI to "[p]erform such other functions and duties related to intelligence affecting the national security

147. *Id.*

148. *Id.* at 251.

149. RANELAGH, *supra* note 129, at 98–99.

150. *Id.* at 101.

151. *Id.* at 102.

152. *Id.*

153. *Id.* at 105.

154. Presidential Directive on Coordination of Federal Foreign Intelligence Activities, 11 Fed. Reg. 1337, 1339 (Feb. 5, 1946) [hereinafter Intelligence Directive].

155. RANELAGH, *supra* note 129, at 102–03.

156. Intelligence Directive, *supra* note 154, 11 Fed. Reg. at 1337.

as the President and the [NIA] may from time to time direct.”¹⁵⁷ The “affecting the national security” limitation was a revision of Donovan’s language, a qualification that appeared five other times in the directive.¹⁵⁸ In practice, the CIG was a paper entity: though autonomous, the CIG had no clear mandate and the departments of state, war, and navy were then waging a struggle for control over intelligence and its operations.¹⁵⁹

B. *The National Security Act of 1947*

The end of World War II and the onset of the Cold War left President Truman and intelligence officials with a new legal problem. Americans were celebrating their victory and were not prepared to continue to struggle against a new enemy.¹⁶⁰ Yet the administration realized that the nation would need a continuing intelligence capability as if the war never ended.¹⁶¹ At the same time, no one expected that the intelligence organization would become a permanent fixture of the post-war world.¹⁶² Thus, the President decided to continue with the NIA and CIG because he perceived emergency conditions that would likely abate soon.¹⁶³

The legal problem was that the declared war was over—in peacetime, the intelligence apparatus and its activities needed a legal footing.¹⁶⁴ The authority over intelligence and intelligence operations was incident to the President’s powers as commander in chief during the war, including the power to use lethal force targeted at an individual enemy.¹⁶⁵ During peacetime, if the CIG determined to have someone killed, the legal basis for the operation would be far less certain.¹⁶⁶

CIG General Counsel Lawrence Houston recognized the lack of legal authority for a permanent peacetime intelligence entity.¹⁶⁷

157. *Id.*

158. TROY, *supra* note 123, at 347.

159. *See id.*

160. RANELAGH, *supra* note 129, at 106.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See id.*

165. *Id.*

166. *Id.*

167. *See id.*

Houston even ventured that, as an entity within the executive branch, CIG could not exist for more than one year without statutory authorization.¹⁶⁸ Based in part on Donovan's 1944 memorandum to the President, Houston reported to the director in June 1946 that CIG "had 'purely a coordination function with no substance or authority to act on its own responsibility in other than an advisory and directing capacity,'" and that the agency might have no legal status after January 1947.¹⁶⁹

The first DCI, Admiral Sidney W. Souers, also cited the need for enabling legislation in his outgoing progress report of June 1946, presented to his successor, General Hoyt Vandenberg.¹⁷⁰ Because a comprehensive defense reorganization initiative was already underway, it became expedient to fold the proposal for an intelligence agency into the larger unification bill.¹⁷¹ The Senate Military Affairs Committee produced a bill that called for a National Security Council—a single military department with one secretary, an assistant secretary for intelligence, and a Central Intelligence Agency ("CIA")—similar to the Joint Chiefs of Staff adaptation of Donovan's proposal.¹⁷²

Meanwhile, in July 1946, Vandenberg authorized Houston to prepare "A Bill for the Establishment of a Central Intelligence Agency."¹⁷³ Houston prepared the draft and then sent it to Clark Clifford, the President's Special Counsel.¹⁷⁴ In a meeting to discuss the draft, Clifford reminded Houston that Truman had not intended to establish a separate agency and that the January 1946 directive would be an adequate grounding for the CIG.¹⁷⁵ When Houston outlined the problems presented by the CIG operating as "a step-child of three separate departments," Clifford

168. *See id.* Houston based his opinion on the Independent Offices Appropriation Act of 1945, Pub. L. No. 78-358, 58 Stat. 387 (1944) (codified as amended at 31 U.S.C. § 1347 (2000)), which provided that no agency could operate for more than one year without an appropriation from Congress. 31 U.S.C. § 1347 (2000).

169. RANELAGH, *supra* note 129, at 106.

170. TROY, *supra* note 123, at 365-66; *see also* Minutes of the Fifth Meeting of the Intelligence Advisory Board (June 10, 1946), in FOREIGN RELATIONS OF THE UNITED STATES, 1945-1950: EMERGENCE OF THE INTELLIGENCE ESTABLISHMENT 369, 369-72 (C. Thomas Thorne, Jr. & David S. Patterson, eds., 1996) [hereinafter FOREIGN RELATIONS], available at http://www.state.gov/www/about_state/history/intel/155_164.html.

171. *See* TROY, *supra* note 123, at 368-69.

172. *See id.* at 368.

173. *Id.* at 369.

174. *Id.*

175. *See id.* at 370.

agreed to discuss the concept of a new agency with the President.¹⁷⁶ Soon thereafter, the President agreed to incorporate the intelligence agency within the military reorganization bill but opposition by some elements of the military to portions of the bill unrelated to intelligence kept it from moving forward in 1946.¹⁷⁷

Although some who advised Truman recommended that he implement the intelligence part of the reorganization through an executive order as a non-controversial item, he rejected their advice apparently for fear of jeopardizing the larger plans for reorganization.¹⁷⁸ Meanwhile, Clifford prepared a bill for the President (while CIG revised its draft) and then sent it to the White House in December 1946.¹⁷⁹ By early 1947, the Cold War was in full bloom, and fears of Soviet spying and worldwide dominance filled the newspapers. When the services resolved their differences in January of that year, Truman ordered his staff to draft a new bill including the intelligence component.¹⁸⁰ However, the new drafters ignored the CIG and Clifford's versions of the bill, choosing instead to lift the intelligence language from the failed 1946 Senate version—a proposal that reflected none of the CIG recommendations and that was lacking in detail.¹⁸¹ Although minor revisions were made after protests by CIG, the proposed National Security Act of 1947, submitted to Congress on February 26 of that year, included a proposal for a Central Intelligence Agency along the lines of the 1946 bill.¹⁸²

As presented, the President's bill did not spell out in any detail either the functions of the CIA or the restrictions on its activities.¹⁸³ The White House feared that the CIA concept would be controversial in Congress and believed that keeping its presence

176. *Id.*

177. *See id.* at 369–70.

178. *See id.* at 371.

179. *See* Memorandum from the Director of Central Intelligence (Vandenberg) to the President's Special Counsel (Clifford) (Dec. 2, 1946), in *FOREIGN RELATIONS*, *supra* note 170, at 538–48 (Doc. No. 201), available at http://www.state.gov/www/about_state/history/intel/201_214.html.

180. *See* Letter to the President of the Senate and to the Speaker of the House Concerning Creation of a Department of National Defense (Jan. 18, 1947), in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, JANUARY 1 TO DECEMBER 31, 1947*, at 101–02 (1963).

181. *See* TROY, *supra* note 123, at 374–75.

182. *See id.*

183. *See id.*

relatively inconspicuous might facilitate enactment of the larger reorganization bill.¹⁸⁴ Although the Senate Armed Services Committee heard from those who wanted the functions of the agency spelled out, "no one ever questioned or quarreled about the functions. They were simply accepted."¹⁸⁵ The bill was reported to the full Senate in June; the CIA would continue to be governed by the 1946 directive until permanent legislation was enacted.¹⁸⁶

There was more scrutiny of the CIA proposal in the House.¹⁸⁷ Congressman Clarence Brown complained that he could not tell what power or authority the bill would provide the CIA, while Congressman Mitchell Jenkins stated that the "agency's functions 'should be more accurately defined in the legislation and less subject to change' by executive order."¹⁸⁸ Others expressed the fear that an untethered agency could become a potential "gestapo" and a threat to the civil liberties of Americans.¹⁸⁹ Senate Armed Services Committee Chairman Clare Hoffman responded by introducing a new bill that revised the intelligence provisions to reflect the criticisms voiced during the committee hearings.¹⁹⁰ Rather than writing from scratch, Senator Hoffman borrowed from President Truman's NIA/CIG directive and mostly shifted paragraphs, while ascribing the new duties to the CIA rather than the DCI.¹⁹¹ Included in Hoffman's bill was the "such other functions and duties" language originally crafted by Donovan.¹⁹²

Floor debate was minimal in the Senate, and members did not clarify what they thought the CIA was empowered to do, even though the Senate bill did not specify the functions of or restrictions on the agency.¹⁹³ In the House, most of the limited debate on the intelligence portions of the bill voiced concerns about protecting against a domestic gestapo, making the DCI a civilian, and protecting the domestic role of the FBI.¹⁹⁴ Once passed by both

184. *See id.*

185. *Id.* at 385.

186. *See id.*

187. *See id.* at 389.

188. *Id.*

189. *Id.* at 389, 391-92.

190. *See id.* at 393 (citing H.R. 3979, 80th Cong. (1947)).

191. *See id.* at 394.

192. *See id.* at 393-94.

193. *See id.* at 396 (citing S. 758, 80th Cong. (1947)).

194. *See id.* at 396-401.

chambers, a conference committee reconciled the bills, with the Senate conferees agreeing to accept the limited delineation of CIA functions and restrictions contained in the House bill.¹⁹⁵ By July 26, 1947, the revised bill had been passed on voice votes and signed into law by the President.¹⁹⁶

C. *Meaning of the Fifth Function*

As originally enacted, section 102(d)(5) of the National Security Act provided that the DCI shall “perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.”¹⁹⁷ This was called the “Fifth Function” after the subsection in which it appeared.¹⁹⁸ Textually, of course, “such other functions” could include anything related to intelligence affecting the national security that the NSC determined should be pursued. Was targeted killing among them?

The legislative history does not clarify congressional intent on the Fifth Function.¹⁹⁹ Lifted from Donovan’s 1944 proposal to President Roosevelt, and changed only in minor ways during its evolution in President Truman’s NIA/CIG directive and in the 1946 Senate bill, the Fifth Function was a minor footnote in the larger struggle over defense reorganization. CIA General Counsel Houston acknowledged, in a memorandum written just weeks after passage of the Act, that the legislative history included no support for the conclusion that Congress intended to authorize covert action, much less assassination.²⁰⁰ In the end, Congress contributed no original thinking to the functions or duties of the CIA. Rather, the legislation cribbed from Donovan and the CIG. Congress, however, did assert successfully the civilian character

195. *See id.* at 402.

196. *See id.*

197. National Security Act of 1947, Pub. L. No. 80-253, § 102(d)(5), 61 Stat. 495, 498 (codified as amended at 50 U.S.C. § 403-3(d)(5) (2000)). The current provision omits references to “the President” and deletes the “from time to time” modifier. *See* 50 U.S.C. § 403-3(d)(5).

198. *See id.*; S. REP. NO. 94-755, at 132 (1976).

199. *See* S. REP. NO. 94-755, at 132 (1976).

200. *See id.* (citing Memorandum from the CIA General Counsel to the Director) (Sept. 25, 1947)).

of the CIA, and members did establish statutory control over the intelligence function for the first time in our nation's history.

White House Special Counsel Clark Clifford referred to the Fifth Function as the "catch-all-clause."²⁰¹ According to Clifford, the Fifth Function was added because the drafters "were dealing with a new subject with practically no precedents," and the clause would "provide for unforeseen contingencies."²⁰² Clifford, a central participant in the drafting and shaping of the eventual Act, believed that the Fifth Function was understood by the CIA and NSC to have authorized the covert operations that were planned in 1947 and 1948.²⁰³ Clifford also believed that the "affecting the national security" condition was "an important limiting and restricting clause."²⁰⁴

Another limitation on the Fifth Function remains, namely that such activities be "related to intelligence affecting the national security."²⁰⁵ Many of the early covert activities carried out by the CIA may have been "related" to intelligence affecting the national security in that the operations were coordinated with intelligence collection, may have used similar sources and methods, and may have produced useful information. However, a targeted killing sponsored by the CIA has no intelligence purpose, even if the operation has a clear effect on national security. The United States does not gain intelligence information by killing its target. The elimination of the target may facilitate intelligence gathering, or may have some relationship to other intelligence operations, but those relationships are indirect at best.

At the same time, nothing in the 1947 Act expressly prohibited covert action or assassination.²⁰⁶ Absent a prohibition, it is at least possible that a sustained executive branch practice of conducting such operations could ripen into customary law authorization for them, in view of the potentially dynamic grant of authority contained in the Fifth Function. Regardless, the practice of carrying out covert operations began almost immediately, although the consideration of assassination as a policy objective came later.

201. *Id.* at 144.

202. *Id.* (citation omitted).

203. *See id.*

204. *Id.* (citation omitted).

205. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495, 498 (codified as amended at 50 U.S.C. § 403-3(d)(5)).

206. *See id.*

V. PRACTICE 1947–1974

A. *Evolving Practices*

In December 1947 and June 1948, the NSC approved two directives that authorized covert operations. NSC 4-A made the DCI responsible for psychological warfare.²⁰⁷ Six months later NSC 10/2 superseded the earlier directive and expanded the CIA responsibility to include all “covert operations,” defined as all activities

which are conducted or sponsored by this Government against hostile foreign states or groups or in support of friendly foreign states or groups but which are so planned and executed that any US Government responsibility for them is not evident to unauthorized persons and that if uncovered the US Government can plausibly disclaim any responsibility for them.²⁰⁸

“Plausible denial” became the method for protecting the President and other senior officials by reporting embarrassing activities in ways that would enable the senior officials to disclaim knowledge or responsibility for them.²⁰⁹ As President Eisenhower stated to Senator Knowland during a 1954 White House meeting, “in the conduct of foreign affairs, we do so many things that we can’t explain.”²¹⁰

The covert activities covered by NSC 10/2 included:

propaganda, economic warfare; preventive direct action, including sabotage, anti-sabotage, demolition and evacuation measures; subversion against hostile states, including assistance to underground resistance movements, guerrillas and refugee liberation groups, and support of indigenous anti-communist elements in threatened countries of the free world.²¹¹

207. Memorandum from the Executive Secretary of the National Security Council (Souers) to the Director of the Central Intelligence Agency (Hillenkoetter) (Dec. 17, 1947), in *FOREIGN RELATIONS*, *supra* note 170, at 649–651.

208. National Security Council Directive on Office of Special Projects: NSC 10/2 (June 18, 1948), in *FOREIGN RELATIONS*, *supra* note 170, at 713–15 [hereinafter NSC 10/2].

209. *See id.*; ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 260–61 (1975) [hereinafter CHURCH COMMITTEE REPORT] (quoting CIA General Counsel Memorandum (Apr. 6, 1962)).

210. 2 STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 226 (1984) (quoting remarks made during a conference between President Eisenhower and Senator Knowland).

211. NSC 10/2, *supra* note 208, at 714.

During the Korean War, President Truman expanded the CIA's independence in conducting covert operations and enlarged the agency's authority over guerilla warfare.²¹² Although President Eisenhower affirmed the CIA role in conducting covert operations abroad, he promulgated NSC directive 5412/2 requiring the DCI to coordinate covert activities with the State and Defense Departments to ensure that the activities were consistent with U.S. policies.²¹³ It further required that representatives of the President and the Departments of State and Defense be notified in advance of any major covert operations initiated by the CIA.²¹⁴ In 1962, CIA General Counsel Houston opined that CIA activities were "not inhibited by any limitations other than those broadly set forth" in NSC directive 5412/2.²¹⁵ Revisions were made to the policy guidance during the Eisenhower, Kennedy, Johnson, and Nixon administrations, but the basic covert operations authority and procedures remained unchanged until 1970.

The internal decision process for covert action during this time focused on a "Special Group" of executive officials who would review and approve operations proposed by the CIA.²¹⁶ The Special Group was nominally chaired by the National Security Adviser and included the DCI, Deputy Secretary of Defense, and Under Secretary of State for Political Affairs.²¹⁷ However, in practice, membership of the Special Group varied, as did the criteria for bringing projects before the group and for judging their feasibility or suitability.²¹⁸ During 1962, the "Special Group (Augmented)" was established to oversee covert operations in Cuba.²¹⁹ Its additional members included the Attorney General and General Maxwell Taylor.²²⁰ Typically, proposed actions would come before the NSC only if there was disagreement in the Special Group—a

212. See Note by the Executive Secretary to the National Security Council: NSC 10/5 (Oct. 23, 1951), in *CIA COLD WAR RECORDS: THE CIA UNDER HARRY TRUMAN* 437, 437–39 (Michael Warner ed., 1994).

213. See *THE CENTRAL INTELLIGENCE AGENCY: HISTORY AND DOCUMENTS* 63 (William M. Leary ed., 1984) [hereinafter *CIA HISTORY*] (discussing NSC 5412/2 (Nov. 1955)).

214. See *id.*

215. *CHURCH COMMITTEE REPORT*, *supra* note 209, at 9.

216. See *CIA HISTORY*, *supra* note 213, at 63.

217. See *id.*

218. See *CHURCH COMMITTEE REPORT*, *supra* note 209, at 50–51.

219. See *id.* at 10.

220. *Id.*

procedure that was designed in part to facilitate plausible denial.²²¹

During the period when CIA involvement with assassinations of foreign leaders occurred, CIA General Counsel Houston documented his view that the CIA itself was responsible for implementing the objectives of NSC 5412/2, as well as obtaining “necessary policy approval.”²²² As membership in and authorization procedures for the Special Group changed over time, however, no clear picture emerged concerning how, by whom, and to what extent covert operations—including assassinations—were authorized.²²³ Few formal procedures existed prior to 1955, and an internal CIA memorandum characterized the procedures in existence from 1955 through 1963 as “somewhat cloudy and . . . based on value judgments by the DCI.”²²⁴ The Chairman of the Special Group was normally in charge of deciding which projects required consideration by the President.²²⁵

The Church Committee, created by Congress in 1974 to investigate alleged United States involvement in assassination plots, found that in the aggregate, the covert operations processes were neither formal nor regularly followed.²²⁶ As the Committee noted, informal processes may have been employed, either ad hoc or on a more systematic basis.²²⁷ The substitute informality might have been for the purpose of circumventing prescribed procedures in order to preserve “plausible denial” for the President and perhaps other high-ranking officials, and/or to serve as a substitute set of rules for special cases, such as assassination.²²⁸ The Church Committee did speculate that the procedures for authorizing covert operations were so flawed that “assassination could have been undertaken by an agency of the United States Government without express authority.”²²⁹

221. *See id.* at 9–10.

222. *See id.* at 9.

223. *Id.* at 10.

224. *Id.* (citation omitted).

225. *See id.*

226. *Id.* at 6–7.

227. *Id.*

228. *See id.*

229. *Id.* at 6.

B. *The CIA and Assassination Plots*

The Church Committee found that between 1960 and 1970, "the United States was implicated in several assassination plots."²³⁰ Although the Committee's investigations were compromised by the CIA practice of concealing the agency's involvement and exercising "plausible denial" by purposefully communicating within the agency and to higher officials in an incomplete, convoluted, or misleading way, available contemporaneous documents and witnesses helped generate a considerable record of U.S. involvement in assassinations.²³¹ The Committee investigated United States involvement in plots targeting Patrice Lumumba of the Congo, Fidel Castro of Cuba, Rafael Trujillo of the Dominican Republic, General Rene Schneider of Chile, and Ngo Dinh Diem of South Vietnam.²³² The CIA also reportedly planned to assassinate Colonel Abdul Kassem in Iraq, although the claim was not investigated by the Church Committee.²³³ Kassem was killed by a firing squad before the CIA had an opportunity to act.²³⁴ The absence of a written record, along with the failing memories of principal witnesses, prevented the Church Committee from establishing conclusively that Presidents Eisenhower or Kennedy personally authorized the assassination of any foreign leader.²³⁵ Although CIA operatives killed none of the leaders themselves, William Colby, DCI at the time of the investigations, testified that "[i]t wasn't for want of trying."²³⁶

Two plots were expressly conceived by the United States and were designed to assassinate foreign leaders. In 1960, after the Republic of the Congo won its independence from Belgium, President Eisenhower expressed his concern at a NSC meeting that

230. *Id.* at 1.

231. *See id.* at 3.

232. *Id.* at 4-5. Aside from these principal investigations, the Committee received evidence of CIA involvement in plots to assassinate President Sukarno of Indonesia and "Papa Doc" Duvalier of Haiti. *Id.* at 4 n.1. The Committee also found that there may have been a "generalized assassination capability," authorized by ranking officials within the CIA. *Id.* at 5.

233. *See RANELAGH, supra* note 129, at 336, 344-45.

234. *See id.* at 345. The Church Committee also investigated allegations that the CIA had attempted to assassinate Egyptian leader Gamal Nasser in 1957 and Chinese leader Chou En-lai in 1955. *See id.* at 766 n.55. Neither plot could be confirmed by the Committee. *Id.*

235. *See id.* at 336.

236. *Id.*; *see also* CHURCH COMMITTEE REPORT, *supra* note 209, at 256.

the new government of Prime Minister Patrice Lumumba could become a Cold War pawn of the Soviet Union.²³⁷ DCI Allen Dulles construed the President's concern as authority to assassinate Lumumba.²³⁸ By August 1960, Dulles sent a cable to the CIA station chief in Africa instructing subordinates in the agency to assassinate Lumumba.²³⁹ Although poisons were delivered to the Congo and some steps were taken to obtain access to the Prime Minister for the CIA-trained assassins,²⁴⁰ Lumumba was killed by rivals in the Congo in early 1961—apparently without the involvement of the United States.²⁴¹ The Church Committee found that the evidence supported “a reasonable inference” that Eisenhower had authorized the plan to kill Lumumba, but the Committee backed off that conclusion in the face of countervailing statements and ambiguity in the records.²⁴²

Between 1960 and 1965, at least eight plots were hatched in the United States to kill Fidel Castro.²⁴³ Operatives included figures from the underworld, disaffected Cubans, and others.²⁴⁴ Support was provided by the United States.²⁴⁵

In January and March of 1960, a subcommittee of the Special Group first discussed assassinating Castro.²⁴⁶ These meetings led to a cloaked discussion of the topic in the NSC, with the President presiding.²⁴⁷ After the debacle at the Bay of Pigs, renewed efforts to kill Castro were made—likely at the urging of Attorney General Robert Kennedy and possibly of the President, as an adjunct to the larger covert Operation Mongoose.²⁴⁸ The failed plots reached absurd levels—a seashell rigged to explode as Castro swam over it, a planned gift to Castro of a diving suit treated with a fungus and its regulator contaminated with tubercula ba-

237. CHURCH COMMITTEE REPORT, *supra* note 209, at 15–16.

238. *See id.* at 15.

239. *See id.* at 15–16. One NSC staffer testified that President Eisenhower ordered the Lumumba killing at an NSC meeting a few days in advance of the Dulles cable. *Id.* at 15 n.1.

240. *Id.* at 26–33.

241. *Id.* at 49–50.

242. *Id.* at 263; *see also* PRADOS, *supra* note 128, at 233–35.

243. PRADOS, *supra* note 128, at 181–83.

244. *Id.*

245. *Id.*

246. *Id.* at 176–77.

247. *Id.* at 177.

248. *Id.* at 212.

cillus, and a ballpoint pen built with a hypodermic needle so fine that Castro literally would not know what hit him.²⁴⁹ The attempts continued until President Kennedy was assassinated.²⁵⁰ The campaign against Castro was driven from the White House, in part to avoid briefing DCI John McCone, an opponent of assassinations.²⁵¹ Conflicting testimony and memory lapses among key participants led the Church Committee to find "insufficient evidence" that a President, senior advisers, or the Special Group authorized the assassination of Castro.²⁵²

The third plot was initiated not by the United States directly, but by a group supported by the United States that made clear its intentions to kill Rafael Trujillo of the Dominican Republic.²⁵³ Beginning in 1961, the United States supported dissidents in the Dominican Republic who were seeking to kill Trujillo.²⁵⁴ United States officials supplied guns to the dissidents who later killed Trujillo in 1961.²⁵⁵ The day before the assassination, a cable personally authorized by President Kennedy was sent to the American Consul General stating that the United States did not condone assassination.²⁵⁶ The cable also made the inconsistent statement that the United States continued to support the opposition group.²⁵⁷ It is not clear whether the guns were knowingly provided for use in the assassination, or whether any of the guns were present at the assassination.²⁵⁸

During the fourth and fifth attempts the United States supported a change of government, but there is no evidence that U.S. officials contemplated assassination. The United States supported toppling the Ngo Dinh Diem government of South Vietnam.²⁵⁹ When the General's coup was carried out on November 2, 1963, the President and his brother were killed—apparently not

249. CHURCH COMMITTEE REPORT, *supra* note 209, at 88–89.

250. See RANELAGH, *supra* note 129, at 390.

251. See *id.* at 387.

252. CHURCH COMMITTEE REPORT, *supra* note 209, at 263.

253. *Id.* at 191.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. See RANELAGH, *supra* note 129, at 433–34.

as part of the coup plan and without the support or involvement of the United States.²⁶⁰

In October 1970, Chilean Army commander in chief Rene Schneider died from gunshot wounds suffered when he resisted a kidnap attempt.²⁶¹ Schneider was an obstacle to the coup that the United States supported to prevent Salvador Allende from taking office as the elected President of Chile.²⁶² The United States provided money, guns, and other equipment to the coup plotters, but apparently withdrew support from the group that carried out the kidnapping attempt.²⁶³ There is no evidence that the United States was directly involved in any attempt to kill Schneider.²⁶⁴

C. *Did the Practice of Plotting Assassinations Create Customary Authority?*

1. The Argument from Appropriations

In response to inquiries from Secretary of Defense James Forrestal concerning the authority of the CIA to engage in covert operations, a September 25, 1947 memorandum from CIA General Counsel Houston concluded that the National Security Act did not authorize the CIA to conduct covert operations, except to the extent that such operations were "related to intelligence affecting the national security."²⁶⁵ When the DCI expressed dissatisfaction with the legal opinion, Houston produced a second memorandum.²⁶⁶ Houston opined that "if the President, with his constitutional responsibilities for the conduct of foreign policy, gave the agency appropriate instructions and if Congress gave it the funds to carry them out, the agency had the legal capability of carrying out the covert actions involved."²⁶⁷

260. *See id.* at 433–35; PRADOS, *supra* note 128, at 245–47.

261. CHURCH COMMITTEE REPORT, *supra* note 209, at 5.

262. *Id.*

263. *Id.*

264. *Id.*; *See also* PRADOS, *supra* note 128, at 318 (finding that the CIA encouraged the assassination of Schneider until about a week before the kidnapping).

265. PRADOS, *supra* note 128, at 27.

266. *Id.* at 27–28.

267. *Id.* (quoting General Counsel Lawrence R. Houston).

By 1948, the CIA was engaged in covert operations, and the President had approved the first NSC directives prescribing the procedures pertinent to such actions.²⁶⁸ When the administration sought and obtained enactment of the Central Intelligence Agency Act of 1949, its "clear purpose . . . was to protect the security of secret operations."²⁶⁹ The 1949 Act facilitates CIA secrecy by authorizing agency spending outside the traditional legal requirements for accounting and disclosure of public funds.²⁷⁰ Instead, CIA funds are secretly transferred to the agency from other agencies—a sort of shell game designed to hide intelligence spending from U.S. adversaries.²⁷¹ However, as the Church Committee later found, although the House Committee on Armed Services may have known that covert operation plans were pending at the time of considering the 1949 bill, "[t]here [was] no evidence that the full Congress . . . knew or understood the range of . . . covert action which the Executive was undertaking."²⁷² In other words, enactment of the 1949 Act may have constituted authorization for some secret activities, but not covert action.

Over the years it has been argued that congressional appropriation of funds for CIA activities constitutes a ratification of past activities or acquiescence in ongoing activities.²⁷³ The courts have created only a rule of narrow construction, that ratification by appropriation is disfavored absent clear evidence that Congress knew of or acquiesced in a precise course of executive conduct.²⁷⁴ But analysis of Congress's acquiescence is complicated because "legislative history for national security appropriations [is] likely to be shallow and confused" due to the often truncated legislative process that produced the money.²⁷⁵ These tendencies are

268. CHURCH COMMITTEE REPORT, *supra* note 209, at 133.

269. *Id.*

270. See 50 U.S.C. § 403j(b) (2000).

271. See *id.*; see also DYCUS ET AL., *supra* note 11.

272. CHURCH COMMITTEE REPORT, *supra* note 209, at 133.

273. See *id.* (citations omitted).

274. See, e.g., *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 574 (9th Cir. 1980) (finding that the government failed to show that Congress either intended its specific appropriations to preclude California Indians from receiving other IHS funds, or was aware of any IHS policy to that effect); *City of Santa Clara v. Andrus*, 572 F.2d 660, 672 (9th Cir. 1978) (noting that ratification by appropriation will not be found unless the government has sustained the heavy burden of demonstrating congressional knowledge of the precise course of action alleged to have been acquiesced).

275. WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 112 (1994).

only enhanced by the secretive nature of the appropriations process for intelligence spending.²⁷⁶ Because Congress as a whole appropriates funds for the CIA without knowing, much less approving, of specific uses of the funds, “the appropriation must plainly show a purpose to bestow the precise authority which is claimed” in order to constitute acquiescence.²⁷⁷ If the required showing is made, courts will find that an appropriation for an executive action constitutes ratification of the action.²⁷⁸ There must be evidence that Congress knows and intends that the agency action in question is within the appropriated program,²⁷⁹ and that “the agency ha[s] at least an arguable legal basis for its action.”²⁸⁰

The Church Committee mistakenly concluded that Congress had not ratified CIA covert operations by appropriating funds for them because “Congress as a whole ha[d] never voted for appropriations for [them].”²⁸¹ Although the CIA obtains its funds through a secretive set of budget transfers from other agencies, the funds *are* appropriated funds that are approved by Congress “as a whole,” pursuant to a statutory arrangement that Congress approved in 1949.²⁸² Nonetheless, the ratification claims made by

276. See 50 U.S.C. § 403j(b) (2000).

277. *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944); see also *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978) (holding that absent both congressional awareness of construction of the Endangered Species Act which would effectively repeal it with respect to Tellico Dam and explicit language removing dam from scope of statute, appropriation of funds for dam did not constitute implied repeal of the statute); *Sierra Club v. Andrus*, 610 F.2d 581, 585 (9th Cir. 1979), *vacated by* *Sierra Club v. Watt*, 451 U.S. 965 (1981) (deciding that appropriations act constituted authorization for pumping plant as Congress had knowledge of the precise project at issue and was explicitly and specifically addressing that project); *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742, 746 (9th Cir. 1979) (finding that appropriations act did not confer statutorily required authorization for construction of dam as there was no evidence that Congress had affirmatively addressed itself to the issue of authorization or was even aware of it).

278. See, e.g., *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947) (opining that contemporaneous and consistent construction by the chief executive is entitled to great weight by the judiciary); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941) (noting that repeated appropriations of funds raised by administration practice with congressional knowledge of that practice constituted ratification of executive branch practice); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937) (indicating that Congress ratified the President’s actions by passing appropriation acts that covered the Department of Commerce’s necessary salaries and expenses); *Wells v. Nickles*, 104 U.S. 444, 447 (1881) (explaining that authority from Congress to support the Department of Interior’s timber-protection policy may be fairly inferred from appropriations made to pay for the agents).

279. See, e.g., *Sierra Club*, 610 F.2d at 601–02.

280. See 1 U.S. GENERAL ACCOUNTING OFFICE, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-54 (2d ed. 1991).

281. CHURCH COMMITTEE REPORT, *supra* note 209, at 134.

282. *Id.*

defenders of the agency are wide of the mark due to the absence of notice to Congress before the congressional investigations of the covert operations—the assassination plots in particular—and to the failure of the appropriations to “plainly show a purpose to bestow the precise authority” claimed.²⁸³

2. The More General Argument for Acquiescence

Still, the Church Committee found that “in recent years [Congress] has been aware that funds for [covert] operations were being channeled to the CIA.”²⁸⁴ Because Congress could have ended the operations by attaching conditions to the appropriations, “[t]he failure to exercise this power may be interpreted as congressional ratification of CIA authority.”²⁸⁵ This conclusion is closer to, though still wide of, the mark.

The CIA involvement in assassination in the years before 1974 may or may not have been a “systematic, unbroken, executive practice, long pursued.”²⁸⁶ The Fifth Function is sufficiently opened to “enable, if not invite” executive initiative.²⁸⁷ For the purposes of establishing customary law, however, the practice breaks down because it cannot be said that congressional acquiescence was knowing. The system for congressional oversight of CIA activities, including covert operations, helped assure that Congress as a whole did not know what the CIA was doing.

After 1947, the Armed Services and Appropriations Committees of the House and Senate were given formal oversight responsibility for CIA activities and spending.²⁸⁸ In the Senate, CIA subcommittees were created within the two committees.²⁸⁹ Yet the tendency during the relevant period was not to question agency activities, as Senator Leverett Saltonstall explained in 1956:

[I]t is not a question of reluctance on the part of the CIA officials to speak to us. Instead, it is a question of our reluctance, if you will, to

283. *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944).

284. CHURCH COMMITTEE REPORT, *supra* note 209, at 134.

285. *Id.*

286. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

287. *Id.* at 637 (Jackson, J., concurring).

288. CHURCH COMMITTEE REPORT, *supra* note 209, at 149.

289. *Id.*

seek information and knowledge on subjects which I personally, as a member of Congress and as a citizen, would rather not have, unless I believed it to be my responsibility to have it because it might involve the lives of American citizens.²⁹⁰

As the Church Committee later determined, oversight of CIA activities was largely a function of personal relationships between committee chairmen and the DCI.²⁹¹ The agency talked to its “friends” in Congress who exercised political influence on matters important to the agency.²⁹² The CIA subcommittees received only episodic and general information about covert operations.²⁹³ Instead, Senator Richard Russell, one of the most powerful senators in the 1950s and 1960s, formed an unofficial committee of the committee chairmen with oversight responsibility of the CIA and other influential insiders, including Clark Clifford.²⁹⁴ Russell used the informal committee to receive reports on CIA activities and to prevent any real oversight of agency operations.²⁹⁵ Before the investigations of the 1970s, the system “worked because the agency was trusted, its directors were respected, and it was seen as being America’s principal defense against the subterranean machinations of world communism.”²⁹⁶ There is no evidence that any member of Congress was informed under this system, before or after the fact, that the CIA participated in plots to assassinate foreign leaders.²⁹⁷ Thus, the CIA activities of the 1950s, 1960s, and early 1970s cannot be supported by customary law.

D. *The Hughes-Ryan Amendment of 1974*

As President Nixon attempted to contain the growing Watergate scandal in 1973—including allegations that he employed the CIA for political purposes—DCI James Schlesinger was appointed Secretary of Defense and William Colby was named by the President as the new DCI.²⁹⁸ In the midst of growing public

290. 102 Cong. Rec. S5924 (1956) (statement of Sen. Saltonstall).

291. CHURCH COMMITTEE REPORT, *supra* note 209, at 150.

292. *See id.*

293. *See id.* at 150–51.

294. RANELAGH, *supra* note 129, at 282.

295. *Id.*

296. *Id.* at 281.

297. *See id.*

298. WILLIAM COLBY & PETER FORBATH, HONORABLE MEN: MY LIFE IN THE CIA 343

and media attention to Watergate, departing DCI Schlesinger and nominee Colby prepared a directive to senior officials at the CIA ordering them to report to the DCI "any activities now going on, or that have gone on in the past, which might be construed to be outside the legislative charter of this agency."²⁹⁹ The "skeletons list," as it was referred to in the agency, ran 693 pages and included an entire range of "dirty tricks," including the assassination plots against Lumumba, Castro, and Trujillo.³⁰⁰ Colby then publicly revealed the "skeletons" in his confirmation hearings.³⁰¹

However, it was the covert operation in Chile that most directly prompted Congress to change the oversight rules for the CIA.³⁰² Efforts by the United States to support anti-communist forces in Chile date to the 1950s and reflect the Cold War rivalries with the Soviet Union for influence around the world.³⁰³ After Marxist and other leftist parties gained elective office in 1964 and again in 1970,³⁰⁴ the CIA instigated a coup in 1970 to prevent leftist Salvador Allende from taking office as president.³⁰⁵ The groups of plotters agreed that kidnapping Army Commander Rene Schneider would be essential to the success of any coup, because Schneider was publicly committed to following constitutional processes.³⁰⁶ The CIA withdrew its support from the group that eventually killed Schneider in the kidnapping attempt.³⁰⁷

In 1973, the CIA was aware that another coup was planned, did not discourage the plotters, and knew that the junta of General Pinochet was engaged in a campaign of human rights abuses in the months after Allende's government was overthrown.³⁰⁸ During the 1970 period, President Nixon ordered the CIA not to reveal its activities in Chile to the relevant NSC committee, the

(1978).

299. *Id.* at 338 (quoting Memorandum from James Schlesinger to CIA employees (May 9, 1973)).

300. RANELAGH, *supra* note 129, at 556-57 (citing memorandum from William V. Broe, Inspector General, to William Colby, incoming DCI (May 21, 1973)).

301. *Id.* at 555-57.

302. SELECT COMM. TO STUDY GOV'T OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 94TH CONG., COVERT ACTION IN CHILE: 1963-1973, at 49 (Comm. Print 1975) [hereinafter COVERT ACTION IN CHILE].

303. *See id.* at 4.

304. *Id.* at 5.

305. *Id.* at 23.

306. *See* RANELAGH, *supra* note 129, at 517.

307. COVERT ACTION IN CHILE, *supra* note 302, at 26.

308. *Id.* at 39.

State or Defense Departments, or the ambassador in Chile.³⁰⁹ The Church Committee later found that, of the thirty-three covert action projects approved by the NSC committee for Chile between 1963 and 1974, only eight were briefed in some fashion to Congress.³¹⁰

After the American press reported on CIA activities in Chile, these covert operations, along with Watergate and reports of CIA activities in Southeast Asia, served to focus additional attention on the CIA.³¹¹ In response, Congress acted to formalize by statute the oversight of CIA activities even before the Church Committee and related investigations documented the CIA involvement in assassination. Passed on December 30, the Hughes-Ryan Amendment to the Foreign Assistance Act of 1974 provided:

No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress³¹²

The Hughes-Ryan Amendment worked a major change in the relationship between Congress and the CIA, forcing an explicit role for congressional committees in reviewing proposals for covert action, including any support for assassination.³¹³ Hughes-Ryan added the House Foreign Affairs and Senate Foreign Relations Committees to the four committees that already had CIA oversight responsibility.³¹⁴ In addition, Hughes-Ryan ended the practice of plausible denial for the President, at least in his relations with Congress.³¹⁵ Requiring the President's approval was

309. RANELAGH, *supra* note 129, at 515–16.

310. CHURCH COMMITTEE REPORT, *supra* note 209, at 150–51.

311. See SCOTT BRECKENRIDGE, *THE CIA AND THE U.S. INTELLIGENCE SYSTEM* 264–65 (1986).

312. Hughes-Ryan Amendment, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (1974) (codified as amended at 22 U.S.C. § 2422 (Supp. 1975)).

313. See *id.*

314. BRECKENRIDGE, *supra* note 311, at 266. The seventh and eighth committees were added to the Church Committee investigations when each house established a special committee for oversight of intelligence.

315. FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755, at 58 (1976) [hereinafter FINAL REPORT] (“The concept of plausible denial . . . is dead.”).

also intended to enhance the internal review of proposals in the executive branch and to force the President carefully to review each proposal.³¹⁶

Ironically, however, Hughes-Ryan may also be read to authorize covert operations. Although the animating purpose of Congress was to improve intelligence oversight and to reign in abuses,³¹⁷ Representative Holtzman warned during floor debates that the amendment would permit the CIA "to subvert or undermine foreign governments."³¹⁸ After enactment, CIA special counsel Mitchell Rogovin maintained that the amendment "clearly implies that the CIA is authorized to plan and conduct covert action."³¹⁹ The Church Committee maintained that "[o]n its face [Hughes-Ryan] contributes nothing to the CIA's authority to do anything."³²⁰ Hughes-Ryan does not explicitly authorize covert operations, but the amendment surely "contributes" to recognition by Congress that authority for covert action exists, supporting the dynamic construction of the Fifth Function to allow such action and the inference of congressional acquiescence. At a minimum, by recognizing that the CIA acts in ways other than collecting foreign intelligence, Congress did not foreclose covert operations. It merely required that the executive follow prescribed procedures in carrying out the operations without also requiring prior notice to Congress—much less approval by Congress of such operations.

If Hughes-Ryan formally acknowledged that covert operations could be conducted according to law, did the acknowledgement include assassination? The new procedures required by Hughes-Ryan clearly applied to all activities undertaken pursuant to Fifth Function authority. Textually, "operations in foreign countries, other than activities intended solely for obtaining necessary

316. CENTER FOR NATIONAL SECURITY STUDIES, COVERT OPERATIONS AND THE DEMOCRATIC PROCESS: THE IMPLICATIONS OF THE IRAN/CONTRA AFFAIR 38-39 (Alex Whiting ed., 1987).

317. Senator Hughes and others in Congress viewed Hughes-Ryan as the first step in a reform process, as the reports generated under Hughes-Ryan would tell Congress what controls to impose. See 120 Cong. Rec. 33, 488-89 (1974) (statements of Sen. Hughes); *Id.* at 33, 490-91 (statements of Sen. Baker and Sen. Symington).

318. 120 CONG. REC. 39,165 (1974).

319. *U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence: Hearings Before the Select Comm. on Intelligence*, 94th Cong. 1737 (1976) (statement of Mitchell Rogovin, Special Counsel to the DCI).

320. FINAL REPORT, *supra* note 315, at 135.

intelligence,” include assassination.³²¹ Even though there was no contemporaneous notice or even informal acknowledgement to Congress that the CIA was involved in assassination plots or activities, the “skeletons list” discussed by DCI Colby in his 1973 confirmation hearings included references to the Lumumba, Castro, and Trujillo plots.³²² After the CIA involvement in coup plotting and the death of Schneider in Chile, Senator Abourezk proposed a ban on all covert operations.³²³ In floor debate on his defeated bill, Abourezk stated that this intention was to foreclose covert operations “which result in assassinations.”³²⁴ Although Hughes-Ryan should not be read to ratify or authorize activities that Congress does not know about, it is reasonable to impute knowledge of CIA involvement in assassination to Congress by December 1974.³²⁵ The dynamic construction of the Fifth Function permitted the development of customary law to support the covert action capability, in part because Congress was informed at least generally concerning such activities. Its knowing acquiescence may extend to targeted killing.

E. *The Lopez-Lima Decision*

The potential scope of the Fifth Function was recognized in a 1990 federal court decision, *United States v. Lopez-Lima*.³²⁶ Rinaldo Juan Lopez-Lima and Enrique Castillo-Hernandez hijacked a plane to Cuba in 1964 and were subsequently indicted in absentia for air piracy.³²⁷ Almost twenty years later, Lopez-Lima returned to the United States where he was prosecuted after authorities realized that he was under indictment.³²⁸ At his trial, however, Lopez-Lima made a “CIA defense”—asserting that he and his associate were CIA operatives hired to hijack the plane and pose as defectors to Cuba.³²⁹ When he sought discovery of classified information to establish this defense, the court had to

321. Hughes-Ryan Amendment, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (1974) (codified as amended at 22 U.S.C. § 2422 (Supp. 1975)).

322. RANELAGH, *supra* note 129, at 555–57.

323. 120 CONG. REC. S33,477 (daily ed. Oct. 2, 1974) (statement of Sen. Abourezk).

324. *Id.*

325. *See supra* Part V.C.2.

326. 738 F. Supp. 1404 (S.D. Fla. 1990).

327. *Id.* at 1406.

328. *Id.*

329. *Id.*

rule on whether the CIA has the “real authority” to order a hijacking in violation of federal criminal law in order to determine whether Lopez-Lima could reasonably rely on such authority and therefore whether such discovery was relevant.³³⁰

The court first noted that the Church Committee had made extensive findings of intelligence activities that violated policy and law up until 1964 and beyond.³³¹ It then found authority for these practices in the National Security Act of 1947, concluding that the Fifth Function supplied “the broad, nonspecific grant of power” that enabled the various NSC directives reviewed above, including 5412, the one in effect in 1964.³³² The court read the directive to impose no requirement for compliance with U.S. law and therefore to give the CIA “the real authority to authorize a hijacking to Cuba, as one of its ‘deception plans and operations.’”³³³ Finally, the court considered Executive Order 12,333,³³⁴ which provided in 1981 that “[n]othing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States.”³³⁵ Reasoning that nothing comparable to this provision was in effect in 1964, the court found that the CIA was not precluded explicitly from authorizing Lopez-Lima to hijack a plane to Cuba.³³⁶ Accordingly, Lopez-Lima was entitled to show that he reasonably relied on the authorization he claimed to have received.³³⁷ The court’s decision represents additional evidence of CIA authority to engage in otherwise unlawful acts, possibly including targeted killing, at least in 1964. The authority was based in the Fifth Function, and the court not only found the authorization, but applied it to actions occurring in the United States.³³⁸

330. *Id.* at 1408; see also Lauren Weiner, *Hijack Charge Erased, Cuban Must Face INS*, WASH. TIMES, June 25, 1990, at A9.

331. *Lopez-Lima*, 738 F. Supp. at 1409.

332. *Id.*

333. *Id.* at 1410 (quoting NSC Directive 5412).

334. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), reprinted in 50 U.S.C. § 401 (2000).

335. *Lopez-Lima*, 738 F. Supp. at 1410.

336. *Id.*

337. *Id.* at 1413.

338. *Id.*

F. *The Church Committee and a Proposed Charter for the Intelligence Community*

Although DCIs Richard Helms and William Colby issued directives in 1972 and 1973 to CIA officials banning assassination, suspicion about past CIA activities continued in 1974.³³⁹ In December, press reports detailed a massive CIA operation carried out against American opponents of the Vietnam War, including mail intercepts, wiretapping, and break-ins.³⁴⁰ When DCI Colby submitted a thirty-page report to National Security Adviser Henry Kissinger and President Ford detailing, among other things, the CIA assassination plots against Castro, Diem, Trujillo, and Lumumba, the President responded by announcing a commission to investigate domestic abuses, to be chaired by Vice President Nelson Rockefeller.³⁴¹ Congress soon established its own investigation; the Senate creating the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church, and the House creating the Select Committee on Intelligence, chaired by Representative Otis Pike.³⁴² The Church Committee then investigated the alleged assassination plots involving the CIA, and in November 1975 issued the interim report.³⁴³

The Committee made findings about the CIA decision process and about policy, finding confusion, ambiguity, and disarray.³⁴⁴ The record showed breakdowns in communication between operatives and superiors and failures by officials who authorized assassinations to check their assumptions: (1) that assassination was a permissible policy option; and (2) that such operations could be mounted without express authorization.³⁴⁵ Senior agency officials did not guide the field agents, and those agents did not know their limits.³⁴⁶

Although the Committee was reporting after Hughes-Ryan ended the practice of plausible denial, the interim report stated

339. CHURCH COMMITTEE REPORT, *supra* note 209, at 282.

340. See PRADOS, *supra* note 128, at 326–27.

341. See *id.* at 326–33.

342. *Id.* at 334.

343. See CHURCH COMMITTEE REPORT, *supra* note 209.

344. See *id.* at 261.

345. *Id.* at 261–67.

346. *Id.* at 264–67.

that

the extension of the doctrine to the internal decision-making process of the Government is absurd. Any theory which . . . places elected officials on the periphery of the decision-making process is an invitation to error, an abdication of responsibility, and a perversion of democratic government. The doctrine is the antithesis of accountability.³⁴⁷

Plausible denial was often accomplished by using euphemisms to shield senior officials from accountability and to enable lower officials to avoid having to confront the enormity of targeted killing.³⁴⁸ Generalized instructions, along with the perception that, once approved, the instructions to act carried over from one administration to the next, also thwarted careful review of proposed operations.³⁴⁹

The Committee also found that "assassination violates moral precepts fundamental to our way of life," and that assassination is not an acceptable foreign policy tool.³⁵⁰ However, the Committee recognized that the death of a foreign leader could result from an operation that would not involve assassination, and it reserved its strongest criticisms for the Castro and Lumumba operations, where assassination was the express goal of the CIA.³⁵¹ Finally, the Committee proposed a bill to make assassination a felony.³⁵²

In its final report on its overall charge to investigate the intelligence community issued in April 1976, the Church Committee considered but rejected a proposal endorsing "a total ban on *all* forms of covert action."³⁵³ However, the Committee concluded that the Hughes-Ryan injunction that covert operations be found "important to the national security of the United States" was insufficiently strict and that "covert action must be seen as an excep-

347. *Id.* at 277-78.

348. *Id.* at 278.

349. *Id.* at 278-79.

350. *Id.* at 257.

351. *Id.* at 257-58 ("The possibility of assassination . . . is one of the issues to be considered in determining the propriety of United States involvement in coups, particularly in those where the assassination of a foreign leader is a likely prospect.")

352. *Id.* app. A at 289.

353. FINAL REPORT, *supra* note 315, at 159.

tional act, to be undertaken only when the national security requires it and when overt means will not suffice."³⁵⁴

VI. EXECUTIVE ORDER NO. 11,905 AND ITS PROGENY

A. *Executive Order No. 11,905*

The criminal ban on assassination proposed by the Church Committee was never enacted. Instead, President Ford preempted it with a ban of his own.³⁵⁵ During the Church Committee investigations, he had already publicly stated his opposition to "political assassination."³⁵⁶ One week after the Committee completed the report containing the assassination bill, he asserted that he had issued specific instructions that "under no circumstances" should any government agency "participate in or plan for any assassination of a foreign leader" during his presidency.³⁵⁷ When Ford subsequently issued Executive Order No. 11,905—in apparent response to the leak of the Committee's report on assassination³⁵⁸—the order's "Prohibition on Assassination" cut a somewhat narrower swath: "No employee of the United States Government shall engage in, or conspire to engage in, *political* assassination."³⁵⁹ Although searches for legislative history of the order have drawn a blank,³⁶⁰ the close proximity in time between the order and the leak of the Church Committee assassination report strongly suggests that it was intended to forestall enactment of the Committee's bill. Absent contrary legislative history, we contend that the order can be reasonably interpreted by reference to the Church bill,³⁶¹ which yields three important conclusions about the order's scope.

354. *Id.* at 159–60.

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

356. 11 WEEKLY COMP. PRES. DOC. 661 (June 9, 1975).

357. 1975 Pub. Papers 1902, 1905; see Brandenburg, *supra* note 71, at 684–85 n.190 (listing news conferences and letters at which Ford stated his policy).

358. Johnson, *supra* note 11, at 408.

359. See Exec. Order No. 11,905, § 5(g), 3 C.F.R. 90, 101 (1976) (emphasis added).

360. Fredman, *supra* note 11, at 16.

361. It also seems reasonable to interpret it no more restrictively than the proposal it preempted. See Schmitt, *supra* note 11, at 663. *But see* Zengel, *supra* note 11, at 635–36 (asserting that the order's ambiguity has invited more restrictive interpretations).

First, by prohibiting “*political* assassination” the order prohibits the assassination of foreign officials for their political views, actions, or statements, tracking the Church bill.³⁶² The bill defined “foreign official” as “a Chief of State or political equivalent, President, Vice President, Prime Minister, Premier, Foreign Minister, Ambassador, or other officer, employee, or agent” of a foreign government or of a “foreign political group, party, military force, movement or other association.”³⁶³ The order therefore only prohibited the targeting of such foreign officials for their political views or actions—on ideological grounds, in other words—as were the targets of assassination plots that the Church Committee had investigated. The Committee never reached the question whether targeted killing for reasons of self-defense was unlawful, probably because no one advanced this justification for the CIA’s assassination plots.³⁶⁴ Yet it stressed that “the assassination plots were not necessitated by imminent danger to the United States”³⁶⁵ as its lead conclusion under the heading, “[*t*]he setting in which the assassination plots occurred explains, but does not justify them.”³⁶⁶ This formulation plainly suggests the negative implication that “imminent danger” might “justify” them.³⁶⁷ A targeted killing of a foreign official in self-defense against continuing terrorist attacks or in anticipatory self-defense against imminent or impossible-to-repel attacks would not be undertaken “because of [that] official’s political views, actions, or statements”³⁶⁸ but, rather, because the United States deemed it necessary to defend itself against attack. Such a killing would therefore not constitute “political assassination.”³⁶⁹

Second, the order’s prohibition should be read to apply only to officials “*of a foreign government* with which the United States is not at war pursuant to a declaration of war or against which United States Armed Forces have not been introduced into hos-

362. CHURCH COMMITTEE REPORT, *supra* note 209, app. A at 289.

363. *Id.* app. A, § 1118(e)(2), at 289–90.

364. Sofaer, *supra* note 14, at 119.

365. CHURCH COMMITTEE REPORT, *supra* note 209, at 258.

366. *Id.*

367. *See id.*

368. *Id.* app. A, § 1118(a), at 289.

369. *But see* Jules Lobel, *The United States Constitution in its Third Century: Foreign Affairs Rights—Here and There*, 83 AM. J. INT’L L. 871, 879 n.45 (1989) (arguing that the Church Committee drew no exceptions but left the President to act at his own peril “where such an action represented an ‘indispensable necessity’ to the life of the nation . . .”).

tilities or situations pursuant to the provisions of the War Powers Resolution,” as the Church Committee bill put it.³⁷⁰ Significantly, that resolution acknowledges constitutional authority in the President to use armed force in “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces,” in addition to situations of declared war or statutorily authorized hostilities.³⁷¹ The Church Committee bill’s exception reflected the Committee’s recognition that the applicable legal framework in wartime is provided by the law of armed conflict, with its own definition of assassination and its expanded tolerance of targeted killing.³⁷² Nothing in the executive order shows that it was intended to supplant that legal framework when armed conflict has been constitutionally authorized; indeed, the order is titled “United States Foreign Intelligence Activities” and states that it is intended “to clarify the authority and responsibilities of the *intelligence* departments,” not the *military*.³⁷³ Thus, even though the order’s prohibition is not framed narrowly, it can reasonably be interpreted as supplying the legal framework only when the country is not in armed conflict by reason of a declaration of war, a statute consistent with the War Powers Resolution, or a national emergency created by an attack.³⁷⁴

Third, in prohibiting political assassination by executive order the President did not ban such killing absolutely, he only insisted that it could not lawfully be undertaken *without his approval*.³⁷⁵ Although an executive order is binding on members of the executive branch (as long as it is not contrary to other law),³⁷⁶ it can be

370. CHURCH COMMITTEE REPORT, *supra* note 209, app. A, § 1118(e)(2), at 289 (emphasis added).

371. 50 U.S.C. § 1541(c)(3) (2000).

372. CHURCH COMMITTEE REPORT, *supra* note 209, app. A at 289.

373. Exec. Order No. 11,905, 3 C.F.R. 90 (1976) (emphasis added).

374. *Cf.* Anderson, *supra* note 11, at 314 (urging that the order not be interpreted to apply in wartime, without noting the limitation of the Church bill).

375. *See* Jackson, *supra* note 11, at 676 (“[I]nstead of being an absolute ban on assassination, the order reserves the right to mandate such an action solely to the President.”); accord Zengel, *supra* note 11, at 637.

376. *See* Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 297–301. The General Accounting Office has claimed that orders which are issued without statutory authority do not have the force and effect of law. *See* U.S. GENERAL ACCOUNTING OFFICE, THE USE OF PRESIDENTIAL DIRECTIVES TO MAKE AND IMPLEMENT U.S. POLICY GAO/NSIAD 92-72, at 1 (1992). However, this statement ignores orders for which the President has inherent constitutional authority or customary authority in which Congress has acquiesced, such as orders involving national security, intelligence, and targeted killing rest, in part, on the

changed or revoked by the President, unlike a statute.³⁷⁷ Thus, if the President could prohibit political assassination, he could also allow it—by lifting that ban—unless other legal authorities or political considerations forbid him from doing so.³⁷⁸ This result was surely not contemplated by the Church Committee, but is, in fact, one which addresses one of the Committee's principal concerns: the accountability-destroying prevalence of "plausible denial" *within* the government.³⁷⁹ The Committee found that

THE APPARENT LACK OF ACCOUNTABILITY IN THE
COMMAND AND CONTROL SYSTEM [OF THE CIA] WAS SUCH
THAT ASSASSINATION PLOTS COULD HAVE BEEN
UNDERTAKEN WITHOUT EXPRESS AUTHORIZATION.

. . . .

Whether or not the Presidents in fact knew about the assassination plots, and even if their subordinates failed in their duty of full disclosure, it still follows that the Presidents should have known about the plots. This sets a demanding standard, but one the Committee supports.³⁸⁰

latter forms of authority. *See supra* Part I.

377. Raven-Hansen, *supra* note 376, at 298. Although executive orders are usually sent to the Attorney General "for his consideration as to both form and legality," 1 C.F.R. § 19.2(b) (2001), and then must be published in the *Federal Register*, 44 U.S.C. § 1505(a) (2000), there is no magic in the form of presidential lawmaking. *See* U.S. Dept. of Justice, Office of Legal Counsel, Memorandum on Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, (Jan. 29, 2000) [hereinafter OLC Memorandum], available at 2000 O.L.C. LEXIS 4. In fact, most executive national security orders have taken the form of National Security Directives, National Security Decision Directives, or Presidential Decision Directives, depending on the administration. *See* DYCUS ET AL., *supra* note 10, at 49–50 n.2. Furthermore, as we discuss below, even a written "presidential finding," pursuant to the intelligence oversight legislation, may constitute a "constructive rescission" of prior inconsistent presidential orders. *See* Pickard, *supra* note 18, at 29; Zengel, *supra* note 11, at 637. Moreover, these forms of national security law are typically classified. DYCUS ET AL., *supra* note 10, at 50; *cf.* Brandenburg, *supra* note 71, at 687 n.203. We believe, therefore, that the President could lawfully rescind or change his own order secretly. It is doubtful, however, that he could violate it without changing or rescinding it. *Cf.* United States v. Nixon, 418 U.S. 683, 696 (1974).

378. *See* Zengel, *supra* note 11, at 637. Zengel writes that

the executive order constitutes a statement—albeit an ambiguous one—of administrative policy, made in a manner that precludes, or makes very difficult, changes in that policy without prior consultation with Congress. Attempts to narrow the definition are actually efforts to exclude certain acts from those that the President has assured Congress he will not undertake and are seen by many as a surreptitious attempt to narrow the scope of that assurance.

Id. at 637.

379. *See* CHURCH COMMITTEE REPORT, *supra* note 209, at 261.

380. *Id.*

By forbidding political assassination, President Ford helped meet that standard because government agents who proposed such killing would be required to ask him to lift the ban to make their acts lawful.³⁸¹

B. *Executive Order No. 12,036*

Congressional efforts to enact a ban on assassination did not end with the Church Committee bill. In 1976, a bill was introduced providing that "whoever, 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."³⁸² Though the bill went nowhere, two years later President Jimmy Carter—who came to office promising that "moral principles" would guide his administration³⁸³—re-issued the ban on assassination without the modifier "political."³⁸⁴ Did this deletion expand the ban, and if so, how? Here again, there is no legislative history to resolve the question.

Logically, the deletion of the restrictive modifier expands the ban. Thus, one scholar concludes: "the assassination prohibition itself may not be interpreted solely with respect to the specific cases that underlay its first enunciation in 1975; because of the change in 1978 from 'political assassination' to 'assassination,' whether a particular death might be construed as a political killing cannot be the only criterion."³⁸⁵

Consequently, another scholar concludes that the 1978 ban prohibited killing "anyone for any purpose whatsoever."³⁸⁶ This construction would also be consistent with the 1976 bill which criminalized the killing of "any person," although the two-year lag

381. See Executive Order No. 11,905, 3 C.F.R. 90 (1976).

382. H.R. 15,542, 94th Cong. § 9(1) (1976).

383. JIMMY CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT 143 (1982); see Dorian D. Greene, *Ethical Dilemmas Confronting Intelligence Agency Counsel*, 2 TULSA J. COMP. & INT'L L. 91, 103 (1994).

384. Exec. Order No. 12,036, 3 C.F.R. 112 (1978). Carter also clarified the applicability of the ban to persons employed on behalf of the United States. See *infra* notes 516–20 and accompanying text.

385. Fredman, *supra* note 11, at 23; accord Schmitt, *supra* note 11, at 663.

386. Newman & Van Geel, *supra* note 11, at 433.

between the bill and the order casts doubts on efforts to interpret the latter by reference to the former.³⁸⁷

Alternatively, the omission may simply have been an insignificant³⁸⁸ editing change based on a belief that “a political assassination” was a redundancy. Carter’s Attorney General, Griffin Bell, reported that Carter rejected earlier drafts as “incomprehensible, redundant, wordy and full of intelligence jargon wrapped in legalisms.”³⁸⁹ Only after the draftsmen shortened the original draft by one-third did Carter sign it.³⁹⁰ This account lends support to the argument that Carter made no substantive change to the executive ban on assassination.³⁹¹ Furthermore, nothing in the order reflected any retreat from the construction that would make it inapplicable in wartime—an exception also preserved in the 1976 bill.³⁹² Despite its change in the original wording, the 1976 order still fell short of imposing an absolute ban on targeted killing.

C. *The Present Order: Executive Order No. 12,333*

In 1981, President Ronald Reagan carried the Carter language forward in Executive Order No. 12,333,³⁹³ which remains in effect as we write in mid-2002.³⁹⁴ But in 1984, during a televised presidential debate with Walter Mondale, Reagan asserted that the CIA’s preparation of an assassination manual was “in direct contravention of my own Executive Order, in December of 1981, that we would have nothing to do with regard to *political* assassination.”³⁹⁵ This post-enactment legislative history lends some weight to the “redundancy” interpretation of the Carter change

387. *But see* Sofaer, *supra* note 14, at 119 n.62 (noting that the bill “might explain” the change in the order).

388. *Compare* Pickard, *supra* note 18, at 26 (finding that the ban “was reissued without significant change”), *with* Johnson, *supra* note 11, at 409 (ignoring the change altogether).

389. GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 103 (1982).

390. *Id.*

391. *See* Pickard, *supra* note 18, at 26; Zengel, *supra* note 11, at 635.

392. *See* Zengel, *supra* note 11, at 636.

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

394. O.L.C. Memorandum, *supra* note 377 (“[B]ecause a presidential directive issues from the Office of the Chief Executive, it would remain in force, unless otherwise specified, pending any future presidential action.”).

395. 1984 Presidential Debate Between the President and Former Vice President Walter F. Mondale, 20 WEEKLY COMP. PRES. DOC. 1591, 1593 (Oct. 21, 1984) (emphasis added).

and takes us back to our interpretation of the original Ford ban.³⁹⁶ Moreover, the consistent defeat of more restrictive assassination bills since the original 1976 order³⁹⁷ may signify congressional acquiescence in the narrower ban, if not also in the President's implied reservation of the policy option of targeted killing.³⁹⁸

In light of the foregoing history of the successive executive orders and the fragment of post-enactment history for the 1981 order in effect today, does the latter apply to the proposed targeted killings of terrorist leaders and despotic heads-of-state? The answer turns on the following: (1) whether the target falls within the group of persons protected by the order; (2) whether the targeted killing takes place in armed conflict authorized by war or statute; (3) even if not, whether the target was selected only for his political views or to defend against continuing, imminent, or impossible-to-repel attack; and finally, (4) even if the order would otherwise apply, whether it has been waived or rescinded.

The first question is easily answered. Saddam Hussein, Manuel Noriega, and Quaddafi all qualify as "foreign officials" by the definition of the original Church Committee bill, and by implication, of the order, as de jure or de facto heads of their respective states.³⁹⁹ Osama bin Laden is (was) not the head of any state, but he would still qualify as the "political equivalent" (term taken from the bill) of a chief-of-state or at least as an agent of al-Qaida, a foreign "political group" or "[para]military force."⁴⁰⁰

The second question is also easily answered, if the only qualifying armed conflicts are those authorized by declaration or by a statute conforming to the War Powers Resolution. While no war has ever been declared during the life of the executive ban, Congress has twice relevantly authorized armed conflict by conforming statute.⁴⁰¹ The Authorization for Use of Military Force

396. See *supra* Part VI.A.

397. See Johnson, *supra* note 11, at 410 n.57 (citing and quoting one such bill).

398. See Jackson, *supra* note 11, at 675-76; Zengel, *supra* note 11, at 634.

399. See Zengel, *supra* note 11, at 637-44.

400. See CHURCH COMMITTEE REPORT, *supra* note 209 app. A, § 1118(e), at 289-90; see also Jackson, *supra* note 11, at 677-78.

401. See Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) (authorizing the use of force against the perpetrators of the September 11 attacks); Pub. L. No. 102-1, 105 Stat. 3 (Jan. 14, 1991) (authorizing the use of force against Iraq in the Gulf War). Congress also authorized deployment of armed forces to Lebanon in conformity with the War Powers Resolu-

Against Iraq authorized the 1991 Gulf War.⁴⁰² During the Gulf War, therefore, the law applicable to any proposed killing of Saddam Hussein was the law of armed conflict, not the executive order; this resolution “removed any legal obstacle that Executive Order No. 12,333 placed on Saddam’s assassination.”⁴⁰³ As most (though not all) scholars have interpreted it, that law would have authorized his killing by non-treacherous means during that war.⁴⁰⁴ However, while there may be legitimate debate about when, precisely, the Gulf War concluded, few scholars could seriously argue that the war—or Congress’s authorization for it (which focused on the use of armed force to implement the Security Council Resolution calling for Iraq’s withdrawal from Kuwait)⁴⁰⁵—continues into 2002.⁴⁰⁶

Congress, however, in conformity with the War Powers Resolution also authorized the use of “all necessary force and other means” against the perpetrators of the September 11 attacks and those who aided them.⁴⁰⁷ If Iraq, at Hussein’s direction, is among them, then the executive order ban still does not apply to him today. Equally important, the ban does not apply to the targeted killing of bin Laden, who falls squarely in the cross-hairs of the congressional authorization.⁴⁰⁸ As we interpret the executive order’s exception for authorized war, however, that exception does not extend to any conflict that the President might denominate as “war” (as in the “war on terrorism” or “war on drugs”). The Church Committee bill exempted only conflicts authorized by dec-

tion. See Pub. L. No. 98-119, 97 Stat. 805 (1983).

402. Pub. L. No. 102-1, 105 Stat. 3. The Authorization specifically stated the Congress intended it “to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” *Id.* § 2 (c)(1), 105 Stat. at 4.

403. Johnson, *supra* note 11, at 431; accord Anderson, *supra* note 11, at 311.

404. See, e.g., Anderson, *supra* note 11. Of course, nothing in our interpretation of the order, or our concededly limited understanding of the law of war, would justify also targeting Hussein’s family or mistress, unless they also held governmental positions that made them proper targets under the law of war. See Johnson, *supra* note 11, at 401 (noting the Air Force Chief of Staff boasted that the United States would probably target Hussein and his family and mistress in the event of war, remarks for which he was promptly fired).

405. Pub. L. No. 102-1, § 2(a), 105 Stat. at 3.

406. Cf. Zengel, *supra* note 11, at 637–39 (noting that the legality of the authorization of force that is required was clear from the present state of war).

407. Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

408. See *id.*

laration of war or a statute which satisfies the War Powers Resolution.⁴⁰⁹

Nevertheless, the answer to the third question may supply an alternate escape from the order for the targeted killing of such terrorists, and an alternative ground for going after bin Laden, if not Hussein. Since bin Laden, senior leaders in al-Qaida, or other terrorists who have attacked the United States in the past and who have the intent and capacity to do so in the future would be targeted primarily to defend against continuing, imminent, and otherwise impossible-to-repel attacks—and not just because of their political views—their targeted killing would not be prohibited under the order, as informed by the Church Committee bill that it preempted.⁴¹⁰ Likewise, if the facts established a pattern of attacks orchestrated by Hussein, his involvement in the September 11 attacks, or his intent and capacity to mount an attack against the United States, its nationals, or its property with weapons of mass destruction (“WMD”) that could not be averted by other means of defense or negotiation, killing him in anticipatory self-defense would not violate the order by this interpretation.⁴¹¹ The problem here lies more in the proof than in the order. We doubt that Iraqi involvement in the failed assassination plot against former President George H.W. Bush nine years ago⁴¹² and continuing support of Palestinian suicide bombers,⁴¹³ is enough to make out any continuing attack on the United States—particularly when no proof has yet been made public establishing present Iraqi capability, let alone intent, to use WMD against the United States or its nationals.

There remains the question of whether the order, even if it applies to prohibit a particular targeted killing, has been waived or rescinded. As we have previously argued, although the President may not violate his own order while it is in effect, he may waive or rescind it.⁴¹⁴ Moreover, if he waives or rescinds the order to authorize a targeted killing in anticipatory self-defense, he can appropriately classify the waiver or rescission—as he has most Na-

409. CHURCH COMMITTEE REPORT, *supra* note 209, app. A at 289.

410. *See id.*

411. *See id.*

412. *See* DYCUS ET AL., *supra* note 10, at 362–63.

413. *See* Lee Hockstader, *Israel Sets Out Charges Arafat Supported Terror*, WASH. POST, May 6, 2002, at A1.

414. *See supra* notes 377–78 and accompanying text.

tional Security Directives and presidential findings authorizing covert operations.⁴¹⁵

In fact, newspaper reports suggest that Presidents have done so on at least three occasions. President Reagan is reported to have made a secret presidential finding authorizing the use of lethal force to kill Quaddafi prior to the United States air raid on Libya in 1984.⁴¹⁶ President Clinton reportedly also authorized the killing of bin Laden in 1998 prior to a U.S. missile attack on a terrorist training camp in Afghanistan run by al-Qaida.⁴¹⁷ More recently, President Bush reportedly made a finding authorizing targeted killing of bin Laden and his associates.⁴¹⁸ At the time of this writing, the scope and continued legal effect of such authorizations is unclear; one or more Presidents may have waived the executive order more generally for targeted killing of terrorists.

VII. PROCEDURAL REQUIREMENTS FOR TARGETED KILLINGS: INTELLIGENCE OVERSIGHT LEGISLATION

President Ford preempted a statutory ban on assassination by issuing Executive Order No. 11,905,⁴¹⁹ but he could not altogether avoid legislative regulation of covert activities.⁴²⁰ Although Congress gave up on plans for an ambitious substantive charter for the intelligence community, it at least imposed modest procedural requirements as part of the Intelligence Oversight Act of 1980.⁴²¹ As subsequently modified and supplemented by the Intelligence Authorization Act for Fiscal Year 1991, this intelligence oversight legislation has continuously regulated covert actions since

415. See *infra* Part VII.

416. See Bob Woodward & Walter Pincus, *1984 Order Gave CIA Latitude: Reagan's Secret Move to Counter Terrorists Called "License to Kill,"* WASH. POST, Oct. 5, 1988, at A1.

417. See James Risen, *Bin Laden Was Target of Afghan Raid, U.S. Confirms*, N.Y. TIMES, Nov. 14, 1998, at A3 (reporting that President Clinton made a finding authorizing covert lethal action against bin Laden's terrorist network after a White House legal review found such action lawful under U.S. and international law).

418. See Barton Gellman, *CIA Weighs "Targeted Killing" Missions: Administration Believes Restraints Do Not Bar Singling Out Individual Terrorists*, WASH. POST, Oct. 28, 2001, at A1.

419. Exec. Order No. 11,905, 3 C.F.R. 90 (1976); see also *supra* Part VI.A.

420. Intelligence Oversight Act of 1980, Pub. L. No. 96-450, § 407(b), 94 Stat. 1981 (Oct. 14, 1980) (codified as amended at 50 U.S.C. § 413 (2000)).

421. *Id.*

1980.⁴²² Does it apply to targeted killings, and, if so, how? We conclude that it not only applies, but impliedly authorizes such killings when they are not prohibited by other U.S. law, provided that the President makes a written finding authorizing the killing and reports the operation to the congressional intelligence committees.

The 1980 oversight legislation required that the President keep the intelligence committees “fully and currently informed” of “significant anticipated intelligence activit[ies],” reserving authority for the President to limit or possibly withhold prior notice in “extraordinary circumstances.”⁴²³ Although the 1980 Act did not define “significant anticipated intelligence activities,” it substituted this term for the term “[CIA] operations in foreign countries” in the Hughes-Ryan Amendment.⁴²⁴ The 1980 Act could therefore reasonably be construed to encompass the latter, as well as operations by other “departments, agencies, and other entities of the United States involved in intelligence activities.”⁴²⁵ A fortiori, a targeted killing abroad carried out by or on behalf of the intelligence community would be a “significant anticipated intelligence activity” that the President would have to authorize by finding and report to the intelligence committees at some point.⁴²⁶

The 1991 Act left this general finding and reporting requirement essentially intact, but broadened it to include intelligence activities by any part of the government, not just members of the intelligence community.⁴²⁷ In addition, it added more specific requirements for the regulation of “covert action,” which it defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly”⁴²⁸ Because any targeted killing by the United States would inevitably have the purpose of influencing political or military conditions abroad (by

422. Intelligence Authorization Act for Fiscal Year 1991, Pub. L. No. 192-88, 105 Stat. 441 (codified as amended at 50 U.S.C. §§ 413–414 (2000)).

423. Pub. L. No. 96-450, § 501(a), 94 Stat. at 1981.

424. Hughes-Ryan Amendment, Pub. L. No. 93-559, § 32, 88 Stat. 1804 (1974), amended by Act of Oct. 14, 1980, Pub. L. No. 96-450, § 501(a)(1), 94 Stat. 1981.

425. Pub. L. No. 96-450, § 501(a), 94 Stat. at 1981.

426. *Id.* § 501(a)(1), 94 Stat. at 1981.

427. *See id.*; 50 U.S.C. § 413a(a)(1) (2000).

428. 50 U.S.C. § 413b(e) (2000).

removing a political or military threat), any targeted killing in which the role of the U.S. government is intended to be concealed or denied would qualify as a “covert action” under the 1991 Act.⁴²⁹

The 1991 Act requires the President to make a written finding, determining that a covert action is “necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States,” and specifying the U.S. departments, agencies, or entities, and any third parties not elements or agents of the U.S. government, who are authorized “to fund or otherwise participate in any significant way in the covert action.”⁴³⁰ The Act thus removes any doubt that presidential findings must be in writing—enhancing the accountability that was one aim of the original finding requirement in Hughes-Ryan—and focuses the required finding in part on funding, in belated response to the creative financing of the Iran-Contra Affair by which the Reagan Administration sought to avoid statutory funding restrictions.⁴³¹ In addition, the 1991 Act newly enforces the finding requirement by prohibiting the use of funds appropriated “or otherwise available” to the government for covert actions “unless and until a Presidential finding” has been made in accordance with its provisions.⁴³²

Finally, the 1991 Act expressly requires the DCI and “the heads of all departments, agencies, and entities of the United States government involved in a covert action” to keep the intelligence committees “fully and currently informed.”⁴³³ Since they must already be fully and currently informed of intelligence activities—which, as we have seen, include targeted killings for which United States responsibility is to be acknowledged—a notice requirement ultimately applies to all targeted killings.⁴³⁴ On the other hand, the 1991 Act preserves the loopholes of the original 1980 Act: the President may limit notice to a small number of congressional leaders in “extraordinary circumstances,” and by

429. *See id.*

430. *Id.* § 413b(a)(4).

431. *See* DYCUS ET AL., *supra* note 10, at 473–508.

432. 50 U.S.C. § 414(c) (2000).

433. *Id.* § 413b(b) (2000).

434. *See id.*

implication, withhold it altogether in rare cases, subject to subsequent reporting “in a timely fashion.”⁴³⁵

So far, we have characterized the 1991 Act as entirely procedural. But it also forbids the President for authorizing any covert action “that would violate the Constitution or any statute of the United States.”⁴³⁶ Unlike the executive orders banning assassination, the Act therefore does not itself forbid “assassination” or targeted killing; it merely cross-references other laws and thus adds no new limitation on such acts.⁴³⁷ Indeed, read as a whole, the Act *authorizes* targeted killing by the United States government, whether the government’s role is concealed or acknowledged, as long as it is not otherwise prohibited by U.S. law and the President abides by its finding and notice procedures.

VIII. “LAST-IN-TIME” U.S. LAWS AFFECTING TARGETED KILLING

We concluded in the prior section that the 1991 Act added no new substantive limitations on targeted killings; instead, it begged the question of their lawfulness by directing us to other U.S. laws.⁴³⁸ We have argued that none prohibited such killings in the early decades of the CIA’s history—and the heyday of its involvement in assassination planning and attempts—because, under the “last-in-time” rule of statutory construction, the Fifth Function of the National Security Act of 1947 superseded any prohibition that the hoary Neutrality Act might place on such killings and because no other arguably relevant contemporaneous criminal law had extraterritorial application.⁴³⁹ It remains to be seen, however, whether more recent legislation alters that conclusion. A 1972 law criminalizing the killing or attempted killing of “a foreign official, official guest, or internationally protected person” at first inspection seems to supersede the National Security Act of 1947 and thus serve as a statute constraining targeted killings.⁴⁴⁰ However, we show in this section that the prohibition is irrelevant to the most probable locus of targeted killings—the

435. *Id.* § 413b(c)(1)–(2).

436. *Id.* § 413b(a)(5).

437. *See id.*

438. *See supra* Part VII.

439. *See supra* Part IV.

440. *See* 18 U.S.C. § 1116(a) (2000).

victims' home country. More significantly, even its narrow prohibition may itself be superseded for the killing of terrorists pursuant to the Antiterrorism and Effective Death Penalty Act of 1996,⁴⁴¹ the targeted killing of Saddam Hussein and other military leaders of Iraq during the Gulf War pursuant to the 1991 Authorization for the Use of Military Force Against Iraq Resolution,⁴⁴² or the targeted killing of persons involved in the September 11 terrorist attacks or who have provided aid or sanctuary to such persons, pursuant to the 2001 Authorization for the Use of Military Force.⁴⁴³

A. 18 U.S.C. § 1116

In 1976, the United States ratified the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,⁴⁴⁴ which called upon signatory states to criminalize the killing of certain internationally protected persons.⁴⁴⁵ The United States executed the treaty by enacting 18 U.S.C. § 1116, prohibiting the killing or attempted killing of "a foreign official, official guest, or internationally protected person."⁴⁴⁶ The law's potential reach in prohibiting targeted killing, however, was substantially shortened by its definition of "foreign official" as a foreign official of "[c]abinet rank or above . . . while in the United States," and of an "internationally protected person" as "a Chief of State or the political equivalent, head of government, or Foreign Minister . . . in a country other than his own" or "who at the time and place concerned is entitled pursuant to international law to special protection"⁴⁴⁷—an apparent reference to the international law of diplomatic immunity for persons posted abroad as official representatives of foreign governments or international organizations.

Section 1116 therefore prohibits targeted killing of the identified persons *outside their own country*, but apparently not at

441. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 18 U.S.C.).

442. Pub. L. No. 102-1, 105 Stat. 3 (1991).

443. Pub. L. No. 107-40, 115 Stat. 224 (2001).

444. Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

445. *Id.* at 1978, 1035 U.N.T.S. at 169.

446. 18 U.S.C. § 1116(a) (2000).

447. *Id.* § 1116(b)(3)-(4) (emphasis added).

home.⁴⁴⁸ Moreover, its prohibition does not apply at all to a private non-state actor, like Osama bin Laden, who is not a foreign official or an internationally protected person.⁴⁴⁹

B. *The Antiterrorism and Effective Death Penalty Act of 1996*

In any case, even § 1116's prohibition—whether viewed as statutory or treaty-based—can be superseded by subsequent inconsistent statutes. Although repeal by implication is disfavored, “where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.”⁴⁵⁰ Well after enacting § 1116, Congress found in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)⁴⁵¹ that

the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens.⁴⁵²

Does this provision of the AEDPA impliedly repeal § 1116 and authorize targeted killing of foreign officials who might be found at terrorist training facilities or safe havens outside their home countries?⁴⁵³

The first problem in arguing that it does is that the Act does not expressly authorize targeted killing at all; it targets “interna-

448. *Id.*

449. *Id.*

450. *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

451. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 40 and 42 U.S.C.).

452. *Id.* § 324, 110 Stat. at 1255.

453. The AEDPA finding was cited by President Clinton's National Security Adviser Sandy Berger as authority for the August 1998 cruise missile attacks on an alleged terrorist training camp in Afghanistan and on a pharmaceutical plant in Sudan alleged to have been involved in manufacturing nerve agents for possible terrorist use. See *DYCUS ET AL.*, *supra* note 10, at 364–66 & n.8. Training camps and manufacturing facilities are clearly “infrastructure,” but the attack on the camp was also apparently deliberately timed to kill terrorist leaders thought to be meeting there and would thus constitute an attempted targeted killing. *Id.* Section 1116 would not apply to such an attack because the terrorist leaders who were expected to be at the camp presumably did not include “foreign officials” or “internationally protected persons,” other possibly than leaders of the Taliban, who were in their own country and therefore outside the act for that reason. See Pub. L. No. 104-132, § 324(4), 110 Stat. at 1255.

tional infrastructure used by international terrorists,” not the terrorists themselves, let alone persons who harbor them.⁴⁵⁴ If Congress had wanted to authorize killings, it could surely have expressed itself more directly (e.g., “all necessary means, including lethal [or military] force”).⁴⁵⁵ One may therefore reasonably doubt whether a purpose to supersede the criminal law against killing foreign officials and internationally protected persons was “clearly” or “manifestly” expressed by the AEDPA.⁴⁵⁶ On the other hand, Congress was surely mindful that the terrorists using such facilities and safe havens could be present when they are destroyed, as could their hosts. At the same time, the provision leaves no doubt that the President should use “all necessary means, including covert action and military force,” which surely embraces lethal force needed to kill the terrorists.⁴⁵⁷

The second problem at first glance seems more daunting. The provision was a “finding,” appearing in the preamble to a far more innocuous provision entitled “Prohibition on assistance to countries that aid terrorist states.”⁴⁵⁸ The operative part of the provision amended the Foreign Assistance Act of 1961, and simply required the President to withhold foreign assistance from countries that aid any state which the Secretary of State determines to have repeatedly provided support for acts of international terrorism.⁴⁵⁹ Only the operative part was actually codified in the United States Code; the “all necessary means” finding appeared in original Act.⁴⁶⁰ Arguably, this congressional “finding,” like a “sense of the Congress” statement or a “whereas” clause is merely precatory—Congress blowing rhetorical smoke⁴⁶¹—and not

454. Pub. L. No. 104-132, § 324(4), 110 Stat. at 1255.

455. *See id.*

456. *See Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936) (“[T]he intention of the legislature to repeal [a prior inconsistent statute] must be clear and manifest.”); *Cook v. United States*, 288 U.S. 102, 120 (1933) (asserting that a treaty “will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”).

457. *See* Pub. L. No. 104-132, 110 Stat. at 1255.

458. *Id.*

459. *Id.*

460. *Id.*

461. The finding was briefly referenced in the conference report as urging the President to establish a White House counterterrorism office to coordinate counterterrorism efforts and develop multinational responses to the threats of international terrorism. H. REP. NO. 104-518, at 114 (1996) (commenting on section 324 of the Act). There is apparently no record of it ever having been the subject of any public debate in committee or on the floor relating it to targeted killing or assassination.

operative law.⁴⁶² “Finding” that the President “shall” use all necessary means to destroy terrorist infrastructure is like phrasing “Thou shall not kill” as “[i]t is the sense of the Lord that thou shall not kill.”⁴⁶³

The AEDPA provision can be construed as authority for targeted killing of terrorists in another sense, however. Even if it did not directly authorize such killing, it could be said to represent congressional acquiescence to such acts by the executive on the authority of customary law.⁴⁶⁴ The issue would then be whether the AEDPA is “quiescence [which], at least as a practical matter, enable[s], if not invite[s], measures on independent presidential responsibility,” and whether there is a sufficient practice known to Congress to establish such customary law.⁴⁶⁵ When AEDPA was enacted in 1996, Congress was aware of the 1986 air raid against Libya, apparently partly targeting Quaddafi’s personal compound in retaliation for Libya’s alleged orchestration of a terrorist bombing in Berlin which killed U.S. servicemen.⁴⁶⁶ Two years after AEDPA was enacted, the Administration ordered cruise missile attacks on alleged terrorist training camps in Afghanistan and alleged nerve gas manufacturing facilities in Sudan, citing the AEDPA provision as authority.⁴⁶⁷ If the practice of targeting terrorists was insufficient to establish customary authority in 1996, it was surely evolving by 1998, and may now receive congressional acceptance.

462. See, e.g., *State Highway Comm’n of Mo. v. Volpe*, 479 F.2d 1099, 1120–21 n.4 (8th Cir. 1973) (Stephenson, J., dissenting) (“It is now well established that statements of policy do not add to or alter specific operative provisions of a statute.”). The majority in *Volpe* followed a sense of the Congress provision stating Congress’s view of “existing law,” but it is unclear whether they were giving effect to the sense-of-the-Congress statement or merely agreeing with Congress’s assessment therein of “existing” operative law. See also Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330, 1335–36 n.31 (1984) (arguing that the “policy” provision of War Powers Resolution is without force and effect as law). Of course, sense-of-the-Congress statements, policy statements, or findings in a statute may help guide interpretation of an operative provision even if they themselves lack operative force.

463. See *United States v. Shelhammer*, 681 F. Supp. 819, 820 (S.D. Fla. 1988) (drawing this analogy in finding that a sense-of-the-Congress provision is at most a guide to the construction of the statute).

464. See *supra* Part II.D.

465. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

466. See *DYCUS ET AL.*, *supra* note 10, at 351–52.

467. *Id.* at 365.

C. *The Authorization for the Use of Military Force Against Iraq Resolution*

No such ambiguity surrounds Congress's grant of authority to President George H.W. Bush in 1991 to use military force against Iraq. The authorization expressly authorized the President to use United States armed forces pursuant to United Nations Security Council Resolution 678 "in order to achieve implementation" of that resolution's precursors directed at Iraq.⁴⁶⁸ Although reasonable people could disagree about whether the targeted killing of Saddam Hussein—Iraq's senior military commander and its Chief of State—is best calculated to implement resolutions calling for Iraq's withdrawal from Kuwait and related resolutions, the Commander in Chief Clause vests the full power of command of U.S. forces in the President during an authorized war.⁴⁶⁹ As Professor Berdahl has written, the President "alone . . . determines how the forces shall be used, for what purposes, the manner and extent of their participation in campaigns, and the time of their withdrawal," after Congress has authorized their use.⁴⁷⁰ Accordingly, "*he may do practically anything calculated to weaken and destroy the fighting power of the enemy and bring the war to a successful conclusion,*" subject to laws of war and the terms of the congressional authorization.⁴⁷¹

The abortive assassination ban proposed by the Church Committee in 1975 supports this conclusion, for, as noted above, it expressly applies only to officials of a foreign government on whom we have not declared war or "against which United States Armed Forces have not been introduced into hostilities or situations pursuant to the provisions of the War Powers Resolution."⁴⁷² The 1991 Authorization provided that it "is intended to constitute specific statutory authorization within the meaning of . . . the War Powers Resolution."⁴⁷³ Thus, even the Church Committee would not have applied its proposed ban on assassination to the killing of Hussein during the Gulf War.

468. Authorization for Use of Military Forces Against Iraq Resolution, Pub. L. No. 102-01, 105 Stat. 3 (1991).

469. See U.S. CONST. art II, § 2, cl. 1.

470. CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 122 (1921) (citations omitted).

471. *Id.* at 125 (emphasis added).

472. CHURCH COMMITTEE REPORT, *supra* note 209, at 283-84.

473. Pub. L. No. 102-01, § 2(c)(1), 105 Stat. 3 (1991).

The issue posed by the Act is therefore not whether it permitted the President to use U.S. armed forces to kill Saddam Hussein during the Gulf War, but whether that permission survived the ceasefire with Iraq in March 1991.⁴⁷⁴ Iraq subsequently violated the ceasefire in multiple respects,⁴⁷⁵ but does the violation of a ceasefire reinstate full authority for the original conflict? There are at least two reasons to doubt it.

First, the terms of the ceasefire were originally laid down in 1991 under United Nations Security Council Resolution 687.⁴⁷⁶ Iraq's undertaking therefore ran to the United Nations, not to the United States. When it subsequently violated the terms, the Security Council—not any individual member state—determined the nature of the response in a succession of resolutions.⁴⁷⁷ Some were merely condemnatory and hortatory, and some referred to continuing the “duration of prohibitions” on Iraq laid down in Resolution 687; but significantly, none repeated the Security Council's original 1990 formula for military sanctions: “authoriz[ing] member states . . . to use all necessary means to uphold and implement the Security Council Resolution 660 [demanding Iraqi withdrawal from Kuwait] and all subsequent relevant resolutions.”⁴⁷⁸ If the Security Council, which had fixed the terms of the ceasefire, did not call for the use of force by member states to enforce the ceasefire in any “subsequent relevant resolution,” arguably no member state could draw authority from any of the resolutions to do so unilaterally.⁴⁷⁹

Nor does the 1991 authorization for the Use of Military Force Against Iraq Resolution go any further, tied as it expressly was to Security Council Resolution 678 and its precursors.⁴⁸⁰ Moreover, stepping back from its express language, its practical intent was to authorize the use of U.S. military to oust Iraq from Kuwait and to accomplish related objectives set out in Security Council reso-

474. See Alfred B. Prados, *Iraq: Former and Recent Military Confrontations with the United States* (Cong. Res. Serv. Issue Brief No. 94049, Sept. 6, 2002).

475. See generally *id.*

476. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

477. See Press Release, White House Office of the Press Secretary, *A Decade of Deception and Defiance: Saddam Hussein's Defiance of the United Nations* (Sept. 12, 2002) (listing the violated United Nations Resolutions), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912.html>.

478. S.C. Res. 678, U.N. SCOR, 45th Sess., at 27–28, U.N. Doc. S/INF/46 (1990).

479. *Id.*

480. See Pub. L. No. 102–1, § 2(a), 105 Stat. 3 (1991).

lutions prior to 678.⁴⁸¹ None of these resolutions, or any subsequent relevant resolution, sought regime change. Even if pettifoggery lawyers contrived a cut-and-paste case from the 1991 authorization for authority to kill Saddam Hussein more than a decade later, it would offend any conceivable spirit of the original legislation, taking it far beyond its understood purpose.

D. *The 2001 Authorization for Use of Military Force*

No such heroic—and, we have argued, insupportable—construction is necessary to find that the 2001 Authorization for Use of Military Force authorized targeted killing.⁴⁸² Enacted just days after the September 11 attacks, the joint resolution authorized the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁴⁸³

Not only does the resolution thus expressly authorize “all necessary and appropriate force” (not limited, despite its official title, to “military” force), but it also provides that “it is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”⁴⁸⁴ In terms of the original Church Committee bill on assassination, to which we have looked in interpreting the ban of Executive Order No. 12,333, the 2001 Authorization thus left nothing to chance; it would take any consequent targeted killing outside even the Church bill, and, we have argued, outside the order.

Moreover, the target list is equally unambiguous, burying any distinction among foreign officials, internationally protected persons, freelance terrorists, or other private persons.⁴⁸⁵ All are permissible targets provided that they planned, authorized, commit-

481. *See id.*

482. Pub. L. No. 107-40, 115 Stat. 224 (2001).

483. *Id.* § 2(a), 115 Stat. at 224.

484. *Id.* § 2(b)(1), 115 Stat. at 224.

485. *Id.* § 2(a), 115 Stat. at 224.

ted, or aided the September 11 attacks or harbored those who did.⁴⁸⁶ Here then, is the answer under U.S. law to the proposal to go after not just the heads, but “the arms and fingers” of the September 11 terrorist networks:⁴⁸⁷ Congress said, *go do it*.

Yet the sweep of the 2001 authorization for targeted killing should not blind us to its predicate: involvement in the September 11 attacks or harboring those who were involved. Osama bin Laden is fair game, if not on the strangely piecemeal and casual proof put out by the U.S. government, or the more formal white paper released by the British government,⁴⁸⁸ then by his own admission.⁴⁸⁹ But, at this writing, Saddam Hussein is not. No credible publicly released evidence links him to the September 11 attacks, as, indeed, the administration admitted in early September 2002.⁴⁹⁰ Furthermore, even other terrorist networks which target U.S. persons or property do not fall with the 2001 authorization unless they also meet the September 11 predicate. There is therefore still a narrow role for 18 U.S.C. § 1116 to play in restricting targeted killing.

IX. EXERCISING ASSASSINATION AUTHORITY INDIRECTLY: AGENTS, SUPPORT FOR COUPS, AND THE USE OF “DIRTY ASSETS”

The Church Committee learned in its investigations that United States involvement in assassination had been largely indirect.⁴⁹¹ For the most part, the CIA supported coup plotters who may have planned to kill the disfavored foreign leader or provided technical means for a hired assassin to act on his own.⁴⁹² To the extent that the authority to engage in targeted killing exists, do the same rules apply when the United States hires an agent to do

486. *Id.*

487. Lawrence J. Siskind, *Our Killer Instinct*, LEGAL TIMES, Oct. 8, 2001, at 61.

488. Press Release, 10 Downing Street, Responsibility for the Terrorist Atrocities in the United States, Nov. 14, 2001, available at <http://www.pm.gov.uk/output/page3863.asp>.

489. Elisabeth Bumiller, *A Nation Challenged: The Video; Bin Laden, on Tape, Boasts of Trade Center Attacks; U.S. Says It Proves His Guilt*, N.Y. TIMES, Dec. 14, 2001, at A1.

490. Dana Priest, *U.S. Not Claiming Iraqi Link to Terror*, WASH. POST, Sept. 10, 2002, at A1. *But see* Eric Schmitt, *Rumsfeld Says U.S. Has “Bulletproof” Evidence of Iraq’s Links to al Qaeda*, N.Y. TIMES, Sept. 28, 2002, at A9 (acknowledging information regarding links between Baghdad and al-Qaida was reliable, but that it is “probably not strong enough to hold up in an American court”).

491. *See supra* Part V.B.

492. *Id.*

the killing, or supports foreign dissidents engaged in a coup? If so, how does the indirect nature of the resulting United States involvement in the targeted killing affect its legality?

Even the earliest U.S. intelligence operations delegated the task outside government. George Washington and other early Presidents hired agents outside the United States to carry out intelligence gathering operations.⁴⁹³ In more recent times, the CIA relied on proprietaries—business entities wholly owned by the CIA—either to do business or appear to do business as an adjunct to the conduct of intelligence operations.⁴⁹⁴ The Church Committee found that the CIA relied on the Fifth Function and the Central Intelligence Act of 1949 to establish proprietaries in support of covert operations, most notably in Laos, where upwards of 20,000 Hmong and other tribesmen became United States-paid “volunteers” fighting the Pathet Lao.⁴⁹⁵

The Lumumba and Castro episodes investigated by the Church Committee serve as stark examples of direct, albeit failed, attempts by the United States to kill a foreign leader.⁴⁹⁶ The plan to poison Lumumba was in-house, conceived of and planned for execution by CIA operatives.⁴⁹⁷ Of at least eight plots to kill Castro, most were strictly operations conducted by the CIA (or its delegates, including mob operatives) and were thus considered direct attempts, including mob operatives or others.⁴⁹⁸ At least one operation, however, involved supplying weapons to a Cuban dissident inside the government who sought the means to kill Castro as a prerequisite to a successful coup.⁴⁹⁹

In the Church Committee’s investigations of CIA involvement in coup-related assassination plots, it found that U.S. officials consistently “had exaggerated notions about their ability to control the actions of coup leaders.”⁵⁰⁰ In the CIA’s dealings with dissident groups in South Vietnam and in the Dominican Republic, it found that its efforts to halt a coup (in Vietnam) or an assassi-

493. See WRISTON, *supra* note 113, at 19–37.

494. FINAL REPORT, *supra* note 315, at 205.

495. See *id.* at 206; PRADOS, *supra* note 128, at 261–96.

496. CHURCH COMMITTEE REPORT, *supra* note 209, at 4–5.

497. *Id.* at 19–37.

498. *Id.* at 71–72.

499. *Id.* at 86–90.

500. *Id.* at 256.

nation attempt (against Trujillo) "could not be turned off to suit the convenience of the United States government."⁵⁰¹ Although the targets died in the instances of Vietnam, the Dominican Republic, and Chile (where the United States supported the coup), the United States did not directly participate in the assassination attempts.⁵⁰² In Vietnam, the assassination was apparently a spontaneous act, carried out without U.S. knowledge or support.⁵⁰³ In the Dominican Republic, U.S. officials were at least aware that the dissidents supported by the United States planned to kill Trujillo.⁵⁰⁴ However, "conflicting evidence [exists] concerning whether weapons were knowingly supplied for use in the assassination, and whether they were in fact so used."⁵⁰⁵ In Chile, General Schneider apparently died when he was shot trying to fend off his abduction by Chilean coup plotters.⁵⁰⁶ Although the United States supported the coup to prevent Allende from taking office, there is no evidence that the United States either planned Schneider's death or anticipated that he would be killed.⁵⁰⁷ In Cuba and the Congo, United States involvement was more direct because the deaths of Castro and Lumumba were more clearly sought by the United States.⁵⁰⁸ Accordingly, the Church Committee reserved its strongest condemnation for the latter two cases.⁵⁰⁹

Thus, it was hardly surprising that the Church Committee found that assassination was not an acceptable policy.⁵¹⁰ Yet when the Church Committee issued its prescriptions for U.S. policy on targeted killings, the Committee pointedly did not prohibit all killing during coup attempts.⁵¹¹ Instead, the Committee stated that "[t]he possibility of assassination . . . is one of the issues to be considered in determining the propriety of United States involvement . . . particularly . . . where the assassination of a foreign leader is a likely prospect."⁵¹²

501. *Id.* at 257.

502. *Id.* at 5.

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.*

508. *See id.* at 257.

509. *See id.* at 257-58.

510. *Id.* at 258.

511. *See supra* Part V.F.

512. CHURCH COMMITTEE REPORT, *supra* note 209, at 258.

As we discussed above, President Ford successfully headed-off a statutory charter for regulating intelligence operations in part by promulgating Executive Order 11,905.⁵¹³ But the order did not address support to others, such as indigenous groups, who might kill a leader in carrying out a coup.⁵¹⁴ Another provision of the Ford order refused to "authorize any activity not previously authorized and [did] not provide exemption from any restrictions otherwise applicable."⁵¹⁵ This disclaimer merely left the law undisturbed, and the ambiguous state of the law regarding United States support for others who assassinate in carrying out a coup was also unaffected.

Executive Order 12,036 did expressly extend the prohibition to any person "acting on behalf of" the U.S. government.⁵¹⁶ President Carter's update also stated that "[n]o agency of the Intelligence Community shall request or otherwise encourage, directly or indirectly, any person, organization, or government agency to undertake activities forbidden by the order or applicable law."⁵¹⁷ Thus, agents acting on behalf of the United States are covered by the proscription.⁵¹⁸ However, the "directly or indirectly" proviso forbids U.S. officials from encouraging any person "employed by or acting on behalf of" the United States to carry out an assassination.⁵¹⁹ Nothing in the Carter order further clarifies the legality of United States support for a coup in which a third party may engage in assassination. Narrowly construed, the executive order might not stand in the way of U.S. support for a coup where the death of a leader is likely, so long as U.S. officials do not approve of plans to kill the leader.⁵²⁰ As usual, the devil lies in the details. If the CIA is involved in assisting foreign military officers or dissidents planning a coup, to what extent will officials know whether the coup will be bloodless or violent, whether the coup leaders or operatives plan to kill the existing leader, and whether the coup leaders are fully communicating their plans to the CIA, or are being honest in their appraisals?

513. See *supra* Part VI.A.

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

515. *Id.* § 5.

516. Exec. Order No. 12,036, § 2-305, 3 C.F.R. 112 (1978).

517. *Id.* § 2-307.

518. See *id.*

519. *Id.* § 2-305.

520. *Id.*

The U.S. efforts to remove General Manuel Noriega from power in Panama in the late 1980s illustrate the dimensions of the agent/coup problem. In 1988, the Reagan Administration's plan to support a coup to topple Noriega ended when the Senate Intelligence Committee formally opposed the plan in a letter to President Reagan.⁵²¹ A CIA assessment had indicated that Noriega might be killed in the operation, and that the United States did not control the operatives who would carry out the coup.⁵²²

In 1989, President George H.W. Bush took tentative steps to support a coup attempt by Panamanian dissidents.⁵²³ When the Intelligence Committees reviewed the plans with CIA officials, it was revealed that the coup planners in Panama told the CIA station chief that they intended to kill Noriega.⁵²⁴ The CIA also reported grave uncertainties about the prospects for success of the coup.⁵²⁵ Caution prompted by the executive order ban on assassination caused the operational role of the United States to be strictly limited to preventing pro-Noriega reinforcements from reaching the Noriega headquarters.⁵²⁶ Although the dissidents succeeded initially in taking Noriega captive in an October 1989 coup, their plan began to weaken after Noriega was permitted to communicate with his loyalists, and the United States did nothing to salvage the situation.⁵²⁷ Noriega's men successfully crushed the dissident's attack and the reinforcements were not needed.⁵²⁸

Within days, DCI William H. Webster publicly argued for a relaxation of the interpretation of the assassination ban that prohibited United States assistance to a coup that could lead to the death of a nation's leader.⁵²⁹ While he offered assurances that the United States would not engage in "selective, individual assassination," Webster argued that "when despots take over, there has

521. Stephen Engelberg & Susan F. Rasky, *White House, Noriega and Battle in Congress*, N.Y. TIMES, Oct. 25, 1989, at A10.

522. *Id.*

523. *Id.*

524. *Id.*

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

526. REBECCA L. GRANT, *OPERATION JUST CAUSE AND THE U.S. POLICY PROCESS* 33 (1991).

527. *Id.* at 34.

528. *Id.*

529. Engelberg, *supra* note 525, at A1.

to be a means to deal with that."⁵³⁰ The eventual military operation that ended Noriega's tenure in December 1989, Operation Just Cause, included a frontal assault on Noriega's headquarters.⁵³¹ Noriega was eventually arrested and removed to the United States.⁵³²

The exchanges between the Intelligence Committees and the Reagan and Bush administrations over the executive order provision illustrate the ambiguity in the ban as it applies to U.S. support of foreign groups that engage in a coup resulting in the death of a foreign leader. After the Panama invasion, critics complained that Executive Order 12,333's prohibition on assassination stood in the way of a cheaper and easier way of removing Noriega.⁵³³ Others opined that the ban would not prohibit support of the kind of coup attempt presented in October 1989.⁵³⁴ Among them, Senator Boren argued that U.S. support for a coup would not be prohibited if assassination was not an explicit objective of the operation.⁵³⁵ The Justice Department also concluded that the executive order ban would not necessarily preclude the United States from assisting in a coup if there was no specific intent to kill the foreign leader, even if force was contemplated and the likelihood of violence was high.⁵³⁶ In effect, each case would have to be reviewed to determine the applicability of the assassination ban.⁵³⁷

According to CIA lawyer Jonathan Fredman, if the President directs the CIA to provide "arms and training" to foreign coup plotters, the agency must provide instruction on U.S. law, including the assassination ban.⁵³⁸ The instruction must stress that the coup plotters should seek to avoid violence, must accept surrender if it is offered, and must only allow the use of force in the event of armed opposition.⁵³⁹ By these criteria, the operational role of the United States in the October 1989 coup was correctly curtailed, given the statement by the coup plotters that they

530. *Id.*

531. *See* GRANT, *supra* note 526, at 37.

532. *Id.* at 38.

533. *See* Thomas Powers, *The Perils of Covert Policy: Snares and Seductions*, L.A. TIMES, Oct. 29, 1989, at M1.

534. *See id.*

535. *Id.*

536. Fredman, *supra* note 11, at 19.

537. *Id.*

538. *Id.*

539. *Id.* at 19-20.

planned to kill Noriega. Nor would the positions of DCI Webster or Senator Boren be consistent with the CIA interpretation of the executive order.

How would the cases investigated by the Church Committee fare under the more recent rules? The Lumumba operation and most of the Castro plans would clearly have been proscribed as direct or indirect participation in assassination. The Castro plot, which involved assassination as a prerequisite to a coup, would also likely fail the test because the United States approved the plans and supplied the means to affect the killing. The Trujillo case is less clear, in part because of conflicting evidence, but it is at least arguable that United States officials would have violated the ban by generally supporting the dissidents and supplying guns that could have been used to carry out the attack. The Schneider death would not likely be ascribed to the United States under the circumstances because the operatives shot Schneider when he resisted the kidnapping attempt. The United States had also disavowed its support of the particular group that carried out the abduction. Finally, the Diem killing was spur-of-the-moment, and the United States would not be legally responsible for his death. The plans for the coup, supported by United States officials, did not include assassination.

In the decades since the Church Committee and the executive order trilogy, much of foreign intelligence has been devoted to counterterrorism.⁵⁴⁰ Among the techniques for collecting counterterrorism intelligence, the CIA has recruited from within terrorist organizations.⁵⁴¹ Such a source may become a "dirty asset" if he has, before or during his relationship with the CIA, violated U.S. laws, including the ban on assassination.⁵⁴² For example, in the 1970s the CIA recruited the Palestinian Liberation Organization (PLO) Chief of Intelligence, Ali Hassan Salameh.⁵⁴³ Through Salameh, the CIA learned about terrorist activities and groups, and Salameh intervened to stop planned attacks.⁵⁴⁴ Salameh was also a member of the "Black September" organization, and he may have helped plan the slaughter of Israeli athletes at the Mu-

540. See David Ignatius, *Penetrating Terrorist Networks*, WASH. POST, Sept. 16, 2001, at B7.

541. See *id.*

542. *Id.*

543. *Id.*

544. *Id.*

nich Olympics in 1972.⁵⁴⁵ Ironically, the CIA reportedly targeted Salameh for assassination, although agents continued to work with him until the Israelis killed him in 1979.⁵⁴⁶

In response to widespread media attention devoted to the torture, disappearance, or death of U.S. citizens in Guatemala in the 1980s and early 1990s, President Clinton directed the Intelligence Oversight Board ("IOB") to review allegations that the CIA was responsible for some of the reported atrocities involving Americans.⁵⁴⁷ The IOB found that, to achieve laudable goals in Guatemala, the CIA must "deal with some unsavory groups and individuals" including instances where "allegations of serious human rights abuse [were] made against several station assets or liaison contacts."⁵⁴⁸ In response to headlines generated by accusations that the CIA conspired with Guatemalan military officers in torture, murder, and other atrocities in Guatemala, the CIA issued guidelines in 1995 to make case officers more selective in their recruiting.⁵⁴⁹ Apparently the guidelines require case officers to obtain a waiver from CIA headquarters before employing any asset whose background includes assassinations, torture, or other serious criminal activities.⁵⁵⁰ The June 2000 Report of the National Commission on Terrorism maintained that the guidelines "have deterred and delayed vigorous efforts to recruit potentially useful informants. The CIA has created a climate that is overly risk averse."⁵⁵¹ Although a CIA spokesperson later defended the guidelines and said that they had not impeded the agency in its counterterrorism efforts,⁵⁵² Congress acted in the wake of the September 11 terrorist attacks to direct the DCI to rescind the

545. *Id.*

546. *Id.*

547. INTELLIGENCE OVERSIGHT BD., REPORT ON THE GUATEMALA REVIEW (June 28, 1996), available at <http://www.us.net/cip/iob.htm>.

548. *Id.*

549. *Id.*

550. *Id.* ("Guidance has been recently issued for dealing with serious human rights violations or crimes of violence by assets . . . We believe this guidance strikes an appropriate balance by generally barring such relationships but permitting appropriately senior officials to authorize them in special cases when national security interests warrant.")

551. NAT'L COMM'N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM (June 2000), available at <http://www.fas.org/irp/threat/commission.html>.

552. See *Congress Rushes In*, SECRECY NEWS (Fed'n of Am. Scientists/Project on Gov't Secrecy, Washington, D.C.) Sept. 14, 2001, at <http://www.fas.org/sgrp/news/secrecy/2001/09/091401.html>.

portions of the 1995 guidelines that pertain to the recruitment of counterterrorism assets.⁵⁵³ The same law requires the DCI to “issue new guidelines that more appropriately weigh and incentivize risks” in obtaining information from human sources about potential plans or attacks.⁵⁵⁴

If the 1995 guidelines discourage dirty asset hiring, the new rules may give more hiring discretion to the field officers. If the CIA can recruit known terrorists for counterterrorism purposes, such discretion almost surely extends to recruiting trained assassins. However, the legal restrictions on targeted killing still apply, and the assets would be agents acting on behalf of the United States in carrying out their activities. The post-September 11 legislation may or may not loosen control over who is recruited, but it does not affect the rules on targeted killing.

X. CONCLUSION

The legal debate about assassination has focused too long and too superficially on Executive Order No. 12,333, and not enough on domestic legal authorities beyond the order. Proposed statutory responses to this debate have, therefore, understandably been misdirected as well. Such responses, however, provide a useful vehicle for concluding our analysis of the full range of legal authorities.

Reading the order as a full stop to targeted killing, Congressman Bob Barr of Georgia introduced a bill in 2001 to Congress antiseptically short-titled as the Terrorist Elimination Act of 2001 for the purposes of “nullify[ing] the effect of certain provisions of various Executive orders.”⁵⁵⁵ Finding that “past Presidents have issued Executive orders which severely limit the use of the military when dealing with potential threats against the United States of America,” the bill provides that the assassination provisions of Executive Orders 11,905, 12,036 and 12,333 “shall have no further force or effect.”⁵⁵⁶

553. Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 403, 115 Stat. 1394, 1403 (2001).

554. *Id.* § 403(2), 115 Stat. at 1403.

555. Terrorist Elimination Act of 2001, H.R. 19, 107th Cong. (2001).

556. *Id.* §§ 2–3.

The proposed finding is wrong, and the “nullification of effect” of the orders unnecessary, unwise, and possibly itself without legal effect.⁵⁵⁷

In the first place, even the Church Committee assassination ban which the first executive order preempted had no application to targeted killing by the military in declared war, hostilities authorized consistently by the War Powers Resolution, or a national emergency created by an attack on the United States. If the order can reasonably be construed in light of the bill which it was intended to preempt, the order should not apply in these situations either.

Moreover, the first executive order adopted the bill’s language of “political assassination,” and we have tried to show that the omission of “political” in later orders did not substantively change the definition. Consequently, if a targeted killing by the military or any other agency of the United States is in anticipatory self-defense, and not merely to punish the victim for his political views or positions, it is not “[political] assassination” within the ambit of the orders.

If we are right, and the orders do not “severely limit” the targeted killing option as a matter of law, then Barr’s attempt to nullify the effect of the orders is unnecessary. The orders do not prevent the defensive use of targeted killing by the military or the CIA, and, if they did, they could be waived, as we have shown. Furthermore, the bill ignores the green light which the 1991 Authorization for the Use of Military Force Against Iraq Resolution gave for targeted killing during the Gulf War, as well as Congress’s acquiescence in—if not delegation of authority for—targeting killing of terrorists in attacks on terrorist infrastructure, as reflected in the 1996 Antiterrorism and Effective Death Penalty Act. And, of course, the January 2001 bill did not anticipate Congress’s September 2001 authorization of “all necessary and appropriate force” against the September 11 perpetrators and their helpers or protectors.

If the executive orders therefore do not “severely limit” the use of the military as a *legal* matter, they may nevertheless discourage the use of targeted killing as a *practical* matter, because they effectively forbid such an operation without prior specific ap-

557. *See id.*

proval by the President. But this result merely reflects the utility of the orders as management controls, and, indeed, is consistent with the procedural limitations which Congress itself has placed on covert action and “significant anticipated intelligence activities” by intelligence oversight legislation. The requirement for presidential approval may make resort to targeted killing less common than it was in the heyday of CIA assassination involvement, but even the Barr bill itself concedes that such killing “is a remedy which should be used sparingly and considered only after all other reasonable options have failed or are not available”⁵⁵⁸

Finally, to the extent that the Barr bill purports to remove the President’s management control, it is unclear whether it is constitutional. Authorizing the President to use targeted killing is one thing; dictating how he does so is another. If, as we have argued, the orders really function as management controls reserving the decision for targeted killing to the President alone, it is unclear whether Congress may simply nullify the control or whether it is an executive prerogative. We are inclined to find wide constitutional leeway for Congress to *add* controls and improve on the process by insisting upon written presidential findings and notice to the intelligence committees, but even this effort at disciplining the executive decisionmaking process has been attacked by some scholars as an invasion of executive prerogative. We would at least agree that statutory interventions in an executive decision-making process require the most sensitive application. Sensitive is not an adjective that fits the heavy-handed H.R. 19 “to nullify the effect of certain provisions” of three executive orders that the last seven Presidents have apparently followed consistently.⁵⁵⁹

What then of legislation to prohibit “assassination of foreign officials under any circumstances,” as some scholars have advocated?⁵⁶⁰ Such legislation would certainly fill a gap in the U.S. law. Other scholars have concluded that “the current Order appears to be the sole source of the prohibition” on assassination,

558. *Id.* § 2(6).

559. *Id.*

560. Johnson, *supra* note 11, at 434; *see also* Brandenburg, *supra* note 71, at 696–97 (asserting that “a legislative ban on assassinations deserves enactment”). Brandenburg earlier defined “assassination” to include the killing of “internationally protected person[s],” as defined by treaty and 18 U.S.C. § 1116, but extending it to persons “even while inside their own territory.” *Id.* at 655 n.1.

though we have shown that § 1116 of the criminal code adds a narrow further limitation for internationally protected persons outside their home country.⁵⁶¹

A more sweeping ban on “assassination in any circumstances,” however, might well sweep the use of targeted killing in authorized hostilities or in anticipatory self-defense under its ambit as well, depending on how it defined “assassination.” Not only do we seriously doubt the wisdom of leaving this weapon on the table, especially where it holds out hope of using less aggregate violence than would the alternative of overt full-spectrum military force, but it could also be unconstitutional to deny it to the President if he is responding to continuing attack. The constitutionality of anticipatory self-defense is still an unresolved question, just starting to receive the attention it deserves in an era of increasingly violent terrorist attacks on the United States, but it is sufficiently difficult to counsel hesitation in enacting any absolute statutory ban.

At the other extreme, Secretary of Defense Donald Rumsfeld recently proposed to expand the role of special operations military forces to seek out and target with lethal force those associated with al-Qaida, even in countries where the United States is not at war, and without notifying local governments in advance.⁵⁶² Regardless of the reach of the 2001 resolution authorizing military force, substituting military personnel for CIA operatives in targeted killing operations would undermine the regime created by the executive order and the intelligence oversight laws for managing such sensitive operations.⁵⁶³ Instead of presidential findings and reporting to the Intelligence Committees, military commanders could, under Secretary Rumsfeld’s proposal, order targeted killings anywhere in the world, subject only to the military chain of command.⁵⁶⁴ The system now in place is far better.⁵⁶⁵

561. Fredman, *supra* note 11, at 24 n.6. Fredman was writing in 1997. He noted that neither the Department of Justice nor the Congress could find any other domestic legal limitation as of 1976. Fredman, *supra* note 11, at 24 n.6. This conclusion was also reached by the court in *Lopez-Lima*, as we discuss above. *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1410 (S.D. Fla. 1990).

562. Lawrence J. Korb & Jonathon D. Tepperman, *Soldiers Should Not Be Spies*, N.Y. TIMES, Aug. 21, 2002, at A17.

563. *See id.*

564. *See id.*

565. *See id.*

This is not to conclude that the present legal framework is ideal. The order's continued use of the term "assassination," without definition or limitation, leaves an ambiguity which prompts misunderstanding of its effect and responses like Representative Barr's. It would be preferable to supply a definition, drawing on the original Church Committee bill and the since-evolved theory of anticipatory self-defense. Similarly, the managerial effect of the order is implicit rather than explicit, and the order makes no reference at all to the related procedural requirements of the intelligence oversight regime. These deficiencies in the current regime point to a refinement of the executive order, perhaps, more than they do to a superseding statute (if one *could* supersede the order).

However, a statutory deficiency also exists in the current legal framework. We have shown that "covert action" and "significant anticipated intelligence activity" should be construed to embrace targeted killing. But past experience, notably in the Iran-Contra affair, suggests any ambiguity in the intelligence oversight regime may be exploited by some administration in the future. Therefore, a case may be made for revising intelligence oversight legislation to make explicit the inclusion of targeted killing within the scope of the legislation's presidential finding and notice requirements.

These, however, at most refine rather than radically change the current United States legal framework for targeted killing. They also divide the labor fairly, and, we believe, constitutionally between the branches. And they leave the nasty business of targeted killing where it should lie, as a permissible but tightly managed and fully accountable weapon of national self-defense in an era of horrific terrorist attacks on the United States and its people.
