

Can We Put the Leaders of the “Axis of Evil” in the Crosshairs?

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Imagine this scenario, set in the near future:

The President stared intently at the television monitor in front of him as he sat back in his chair on Air Force One.

“So this is one of the men who stand in the way of stability and peace for Afghanistan?” he asked.

“Yes Sir,” the National Security Advisor responded. “He’s an Iranian by birth, in charge of most of the rebel elements around the border of the Herat region. Although he resides in Iran, he has declared himself to be some kind of provisional governor over Herat, and he refuses to acknowledge the Karzai government. Our intelligence indicates his army is rather divided; some want to go back to their homes, others want to fight—but they all follow him like a father.”

“What about sending a special envoy? Can we pay him off, maybe persuade him to stand down his army for peace?”

“Not likely, Sir,” the Defense Secretary responded. “He was indicted last month by the Hague for war crimes. He allegedly ordered the slaughter of over a thousand civilians last year, even before the US campaign began. We don’t know what this guy did from 7 October 2001 until now. Before he retreated to Iran, he managed to stay alive and in power over the years by switching sides so many times—first the Russians, then the mujahideen, then the Taliban, and finally pledging loyalty to the Northern Alliance. He has been a veteran Afghan fighter since 1981. Nothing pins him to al Qaeda, though; he’s just a local menace. There is nothing global.”

“Well, then I don’t want to risk our troops getting into it with these guys if he’s just an Afghan problem. We don’t have enough men in that country if a full

shooting war erupts again, and I would rather Karzai deal with it. Can Karzai send troops to take his army out without another civil war?"

"Sir," the Chairman of the Joint Chiefs suggested, "this man is our problem, not his army. If they lose his leadership, they will very likely disband, maybe even join with the new government, as is the Afghan way. Perhaps our solution should focus on taking him out. Keep Karzai out of the loop."

"I cannot support what my fellow Cabinet members are suggesting," piped in the Secretary of State. "However, Mr. President, there is no US law preventing you, only an executive order. But as for international law, and international opinion, that's another story, Sir. . . ."

At certain times throughout our history, the President and our nation have faced threats to our national interests that have appeared in the form of one person. A leader of a hostile foreign government, a rogue military officer, or, as described in the above hypothetical scenario, an intransigent rebel leader sometimes presents a problem that realistically cannot be solved with the use of cruise missile "diplomacy," discretionary covert opposition training, or negotiation. Action must be taken, and in our past this has often required the mobilization of large air, naval, and ground forces to engage and destroy the armies commanded by these threats. Some of these times, in retrospect, particularly in dealing with totalitarian dictatorships like Hussein's Iraq in 1990 or Noriega's Panama in 1989, the use of massive military force might have been precluded by the elimination of these solitary figures.

In the above fictional scenario, the threat is a local one, with regional implications. In real life, our current threats are aptly titled the "Axis of Evil," as identified by President Bush in his State of the Union address in January 2002. With Saddam Hussein's Iraq the worst of the three named elements of that axis, the focus on removing the Iraqi threat is paramount. Hussein undoubtedly persists in his efforts to build nuclear, biological, and chemical weapons of mass destruction. He has used chemical weapons on his own people and upon his former enemy, Iran. In 1998 Iraq ended the UN weapons inspection program, and it has violated UN-approved sanctions repeatedly since 1991. In the first year of the Clinton Administration, Hussein's intelligence forces attempted to assassinate former President George H. W. Bush during his visit to Kuwait. The Czech Republic has confirmed that Iraqi intelligence officers met more than once with al Qaeda members behind the 11 September 2001 attacks on the United States. While current international discourse among our skeptical European allies revolves around whether the United States should engage the forces of Iraq and

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remove Hussein from power, bipartisan domestic discussions in Washington seemingly already have concluded the “if we should attack” debate, and now ponder the “when” and “how” of such an action. An option discarded 30 years ago as “too messy” by the politicians of that era may now offer an efficient and decisive solution to threats posed by rogue states like Hussein’s Iraq.

The President currently maintains the power to order such a solution. It is called assassination. In the wake of the terrorist attacks against the United States on 11 September, assassination reemerged in the minds of many national policymakers as another possible tool in the war on terrorism. The security and possibly the survival of the United States may demand that our Commander-in-Chief not be too squeamish to use it.

Background

Assassination can be defined as the premeditated and intentional killing of a public figure accomplished violently and treacherously for a political purpose.¹ While no exact definition may prove acceptable to scholars of the subject, all definitions of the act involve the idea of an illegal killing, a murder of a specific public figure or leader for a political rather than private purpose.² The concept of assassination is particularly “dirty” in the minds of statesmen in that it involves the use of treacherous means to kill persons—by hiring others to perform the act, by luring persons to their deaths.³ One definition of assassination has been that it is the “selected killing of an individual by a person not in uniform,” and so it conjures up the idea of hired secret CIA operatives blending into a civilian population to do their work.⁴ Assassination as an attempt to influence another nation’s leadership, foreign policy, or military capabilities would generally be considered illegal under the United Nations Charter, unless used as some form of defensive measure.⁵

The United States is alleged to have been a considerable practitioner of assassination in the decades following the end of World War II until the early 1970s.⁶ In the early part of the ’70s, reports began to filter out that US intelligence and military operatives had been involved in the assassinations of several foreign leaders.⁷ The first public renunciations of the use of assassination as a foreign policy tool came from Richard Helms, then Director of the CIA, who declared on 6 March 1972 that “no such activity or operations be undertaken, assisted, or suggested by any of our personnel.”⁸

As public knowledge of these allegations of assassination grew, a congressional committee was convened to investigate the matter in 1975. The Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church, investigated the allegations of US involvement in assassinations and attempts on foreign leaders.⁹ Through its investigations, the Church Committee unraveled an intricate process by which US officials had been able to gain authorization of assassination efforts through “plausible denial,” in which subordinates withheld full information from their superiors in order to create a shield for the chief executive in case of exposure.¹⁰ The doctrine

of “plausible denial,” the committee further noted, led to the use of euphemisms and unclear wordings in instructions to intelligence operatives.¹¹ One result of the doctrine of plausible deniability was that while the President and other senior government officials were able to deny any knowledge of activities, the subordinates receiving such orders often became confused as to the nature and extent to which these orders were to be carried out, often with deadly results for foreign leaders.¹²

The Church Committee made several conclusions as a result of its investigations. It rejected assassination as a possible foreign policy tool, short of its use in wartime.¹³ Further, the committee stated that assassination was “incompatible with American principle, international order, and morality.”¹⁴ The report made significant distinctions, however, between situations in which the United States was directly involved in plotting and carrying out an assassination and situations in which the United States responded with aid to a request by local elements in support of a coup attempt.¹⁵ While the report strongly condemned the cold-blooded intentional targeting of a specific individual leader, it noted that often the support of a coup attempt is support of the use of violence; as such there is always the risk of assassination.¹⁶ One of the main conclusions made by the committee was that proponents of a possible assassination, or a coup attempt that might lead to the death of a nation’s leader, must consider the likely lasting effect such actions could have on the overall goals of the United States.¹⁷ An effort to replace a leader in a key region might lead to lasting instability, it might invite reprisals on US leaders, or its disclosure could embarrass and weaken the United States globally.¹⁸ The Church Committee recommended a statutory prohibition be enacted by Congress to outlaw the use of assassination, but none has been passed into law.¹⁹

The first official US ban on assassination as an instrument of foreign policy was President Gerald Ford’s Executive Order 11,905, which stated: “No employee of the United States government shall engage in, or conspire in, political assassination.”²⁰ While not the legislation that the Church Committee recommended, the order did have the force of law upon all individuals operating within the US government.²¹ Under the Carter, Reagan, Bush, and Clinton administrations, the executive order against assassination was adopted and broadened.²² As currently written, Executive Order 12,333 states:

2.11 Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

2.12 Indirect Participation. No agency of the intelligence community shall participate in or request any person to undertake activities forbidden by this order.²³

Thus the updated version of the prohibition prevents the government from going around the technical wording of the order, perhaps by hiring assassins as independent contractors. The use of an executive order, rather than calling for legislation, aids the President’s power in that it enables him to possess an order far more broad and flexible—and it gives adversaries pause as to whether it may be reversed if the President is sufficiently provoked.²⁴

Skirting the Ban

Even before 11 September 2001, two members of Congress questioned the continuance of such a ban with regard to Saddam Hussein and international terrorists. In 1998, Senator Charles S. Robb stated that if Hussein continued to defy the United Nations, the United States should consider changing the executive order forbidding the assassination of foreign leaders.²⁵ Robb did not specify how he would change the order, instead stating that he raised the issue to increase pressure on Saddam Hussein and to make him feel less secure. Robb later qualified his remarks by stating that he wasn't suggesting a plan to assassinate Hussein and that the "basic prohibition against assassination is sound."²⁶ On 3 January 2001, Congressman Bob Barr introduced HR 19, the "Terrorist Elimination Act of 2001," a bill that would legislatively repeal sections of the executive orders specifically prohibiting assassinations by the US government.²⁷ Although this bill has not become law, it is likely that the Bush Administration has reviewed and perhaps even secretly adopted its precepts in the wake of 11 September. There has been considerable discussion over whether President Bush has indeed changed the US ban, but at present no new executive order has been issued. The exact nature of President Bush's revisions to this order would almost certainly remain classified under current circumstances. It is not a great leap of logic to assume that any revision would target members of al Qaeda; the real question is whether it also would cover Saddam Hussein.

Even if left unchanged, the current ban on assassination does not bar action against a hostile foreign leader like Hussein, given the proper circumstances and justifications. As currently employed, the executive order operates with the force of a congressional statute and is binding upon the US President.²⁸ Even so, there are four ways in which a President could legally carry out the assassination of a hostile foreign leader.

The first way would be for the President to act in the strictest constitutional sense and ask Congress for a declaration of war against the country of the targeted leader.²⁹ Subsequently the question of assassination would become one of removing military command and control, and as such would be more easily defensible.³⁰ A declaration of war against Iraq, not lacking in public support at present, would end the discussion in terms of the legality of eliminating a hostile foreign leader such as Saddam Hussein.

A second, more intricate way of hurdling the executive order's ban on assassination is to interpret Article 51 of the United Nations Charter as allowing the President to act against a foreign leader in self-defense or to respond to criminal activities.³¹ Article 51 states, in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security."³²

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The United States’ concept of self defense allows for a nation to act (1) against an actual use of force or hostile act, (2) in a preemptive manner against the imminent use of force, or (3) against a continuing threat.³³ As such, according to US policy, the assassination of a foreign leader may be considered legal in two situations: when another nation fails in its duty to protect American lives from violence launched from or originating in its sovereign territory, or when a nation aids and abets international criminal activities, including terrorism.³⁴

A clear example of this policy in action occurred with the 1986 air attack against the palace of Libyan President Muammar Quaddafi. In justifying the use of US bombers to target the Libyan leader, then White House Legal Advisor Abraham Sofer argued that the attack was legal as a self-defense measure under Article 51.³⁵ The President, Sofer stated, had the right to “strike back to prevent future attacks” and as such this bombing was a legal act of self-defense: a preemptive military attack.³⁶ Thus, the use of Article 51 as justification; there is clearly a precedent in American policy for using Article 51 to justify the assassination of foreign leaders who act against the United States. Given the current attitudes in Europe and at the UN General Assembly, however, it is very unlikely that such an attack would be supported by other nations—even our allies—on those grounds. Nevertheless, the President possesses a strong legal precedent for launching an attack on Iraq that results in the elimination of Hussein.

A third manner in which the President could circumvent the terms of his own executive prohibition on assassination is to narrowly construe Executive Order 12,333 as forbidding only the specific planning of assassination of individual leaders.³⁷ This manner was employed by the Administration of President George H. W. Bush when it faced off against Manuel Noriega in 1989 and Saddam Hussein in 1991. The interpretation provided then to President Bush by his advisors in the Justice Department indicated that the while a President may not specifically plan or approve the specific killing of a foreign leader, it is not illegal to authorize action wherein the leader’s death may be a result.³⁸ The Justice Department further indicated that the President could also legally issue an exception to the executive order, and thus target a specific individual.³⁹ This would require only that the President make a finding that the proposed course of action against the individual is important to the national security interests of the United States, and that he follow it up with a proper report to Congress regarding the expenditure of funds

in the execution of the plan.⁴⁰ If the President chose to classify this finding, it could remain a state secret.⁴¹

In general, the key way in which a President narrowly construes the executive order to avoid breaking it is that he does not call the approved plan an assassination.⁴² Instead, under the principle of narrow construction, a President can declare he is “restoring the legitimate government” or “apprehending an international terrorist.” While critics may argue that narrow construction of the executive order is merely putting a spin on the President’s decision to have a leader assassinated, it still allows for the objectives to be completed without the need for rewriting the executive order. As noted earlier, this is perhaps the most lawful and therefore most likely avenue that the current Bush Administration may be pursuing.

As a fourth option, rather than seeking to manipulate the wording within the executive order, the President possesses the constitutional power to strike it down and replace it with his own.⁴³ Congress and the President possess the power to repeal or amend executive orders and replace them with their own versions.⁴⁴ Also within his power, a President may create a secret exception to the ban on assassinations whenever he feels the previous loopholes do not support the facts at hand.⁴⁵ It is within the President’s power to conceal from the public the partial or total repeal of the executive order banning assassinations.⁴⁶ The President may not have to publish the executive order repealing the assassination ban, because presumably it would not apply to the general public, as it is limited to federal employees.⁴⁷ If President Bush has already modified this executive order with respect to the al Qaeda terrorists, it is only logical that he could secretly revise it again to incorporate the circumstances of the present Iraqi situation.

What We Should or Shouldn’t Do

The popular argument against replacing an explicit ban on assassinations with one that is more pliable is that it may not be in the best interests of either the nation or the chief executive. Lawrence J. Korb, an Assistant Secretary of Defense in the Reagan Administration, has argued that lifting the executive order regarding Hussein would “bring us down to his level” and violate “international norms.”⁴⁸ Certainly the current executive order is well known and exists as a clear declaration of US intentions. Its replacement with one that leaves international friend and foe alike wondering how the United States will respond arguably may not be the best thing for international stability. Proponents of scrapping the ban on assassinations cite this same uncertainty as a reason for changing the executive order: our opponents, like Saddam Hussein, the mullahs of Iran, and President Kim of North Korea, would be kept off-guard, unsure of how or when the United States might strike.⁴⁹

There have been some considerable opinions that the United States should formally legislate in this area and make it our official law that the United States does not allow the specific targeting of foreign leaders. When a President bans assassinations by executive order, he is performing a legislative function, cre-

ating “presidential legislation.”⁵⁰ Congress does have the power to legislate in areas it feels the President’s executive order is insufficient or if it feels the President has misinterpreted the law on the books.⁵¹ Congress possesses constitutional war powers as well as the power of the purse to appropriate such actions. The President does have a responsibility not only as Commander-in-Chief, but also as chief executive to “faithfully carry out” the laws. A strict interpretation of assassination might tie the hands of the President, however, perhaps forcing him to get a declaration of war by Congress every time a covert mission poses risk to a foreign leader.

More so than reflecting international norms, the executive order banning assassination as an instrument of policy is premised on the correct belief that “political murder”—the killing of leaders purely for their ideological beliefs—is anathema to a nation founded on the principles of freedom of speech, religion, and association. American Presidents have adopted and continued this formal prohibition as a reflection of their constituents’ belief that, unlike our totalitarian foes of past and present, this nation does not wantonly execute persons on the mere basis of their political positions, their membership in social or political parties, or their advocacy of policies unpopular with the global vision of the United States. Americans and their leaders would like to think that their government conducts its foreign policy in an ethical manner, that a sense of “fair play” is always considered; the current executive order banning assassination is one expression of this belief.

There are circumstances, however, where it is permissible, and indeed absolutely necessary, to deviate from this sacred national ethic in the interests of national security. The four exceptions listed above exist as an implicit recognition that there are times when threats to our basic freedoms of life and liberty are so great that we must set aside this core value of fair play in our foreign affairs. The elimination of a hostile foreign leader, when done within the framework of these exceptions, is a careful, deliberate action providing these enemies with far more fair play consideration than they likely deserve.

Under the current circumstances, assassination may prove to be a more frequent and necessary means of countering the asymmetric threats our nation will continue to face. The new world order created by the end of the Cold War, and punctuated by the impressive military victory of the 1991 Persian Gulf War, finds the United States as the lone superpower, unchallenged militarily. Rogue nations, like the members of the “Axis of Evil,” are opposed to the United States, but for purposes of self-preservation are unwilling to confront the United States with military forces they know will face certain destruction in a fixed battle. As such, these nations are currently rushing to develop weapons of mass destruction to ensure their existence, while they simultaneously arm and fund as proxy forces numerous terrorist groups (such as al Qaeda, Hamas, and Hezbollah) to serve as their own tools of foreign policy. The leaders of these rogue states perhaps believe that by “subcontracting out” their foreign military operations to terrorists, they can shield themselves from the repercussions of such actions. Terrorists are illegal irregular combatants who violate international laws and murder innocent

civilians; they can and should be targeted. So too, then, should their hosts, paymasters, and commanders: the leaders of these rogue states.

There is a basic ethical difference between the immoral assassination of a foreign social or political leader on the basis of pure ideological disagreement, and the justifiable targeting of totalitarian dictators and fascist theocratic ruling counsels who directly threaten the lives of American citizens. These individuals possess de facto command and control over irregular quasi-military forces that are the front-line troops in the asymmetric battleground of the 21st century. An absolute prohibition on the use of assassination under any circumstances, on purely ethical grounds, ignores the realities of the current threats the United States faces, and unnecessarily constrains the President's ability to respond to them.

The current executive order remains in place, as perhaps it should. It is a public statement that can be pointed to when our international critics decry the unilateralism of US foreign policy. The order is clear that the President alone makes such decisions regarding the possibility of foreign assassination.⁵² "Plausible deniability" cannot be employed under this order to shield the President from damaging actions, as was done in the past: the buck stops with the chief executive.⁵³ The executive order possesses loopholes, which must be carefully scrutinized, lest they be abused. Yet it also provides a statement that the United States is not as savage as it may be perceived to be. The loopholes require considerable detail to be gotten around, yet they do give pause to foreign leaders who might consider threatening the United States. They may be used, if, as in 1986, the President so wills it.

In returning to the hypothetical scenario which began this article, the President would be unlikely to directly change the executive order in that particular instance. However, the President may use the loopholes of protecting his forces or of "apprehending a war criminal" to authorize actions against such a foreign leader that could result in his death. The President has all the cards here. If a loophole to the current order is not sufficient, he can write a new order. In the case of Saddam Hussein, if the President decided to specifically target Hussein only, and did so through the issuance of a classified exception to the executive order banning assassinations, it would likely pass legal scrutiny.

Assassination, the word no one wants to say in the same breath with foreign affairs, does exist as an option in the arsenal of presidential constitutional authority. With the United States engaged in a global war against terrorists and the nations who harbor them, we cannot afford to overlook the possibility that a well-placed rifle shot, or properly targeted laser-guided weapon, just might preclude the need for massing our forces on the borders of a hostile rogue nation.

NOTES

1. Boyd M. Johnson, "Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader," 25 *Cornell Int'l L.J.* 401, 435.

2. Patricia Zengel, "Assassination and the Law of Armed Conflict," 134 *Mil. L. Rev.* 123, 145.

3. *Ibid.*, p. 131.

4. *Ibid.*, p. 132.

5. UN Charter, Art. 2, para. 4. See also Zengel, p. 125.
6. Johnson, p. 405.
7. *Ibid.*, p. 406. Specifically, the United States has been linked either directly or indirectly to the assassinations of Rafael Trujillo, Patrice Lumumba, Ngo Dinh Diem, and Mossadegh of Iran.
8. *Ibid.* See also US Senate, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, "Alleged Plots Involving Foreign Leaders," S. Rep. No. 755, 94th Cong., 2d sess., Book I, 7, p. 282 (hereinafter Church Committee).
9. Church Committee, pp. 4-5.
10. *Ibid.*, pp. 11-12.
11. *Ibid.*
12. Johnson, p. 403.
13. Zengel, p. 142.
14. Church Committee, p. 1. See also Zengel, p. 142.
15. Zengel, p. 142; Church Committee, p. 6.
16. Church Committee, p. 6.
17. *Ibid.*, p. 281.
18. Zengel, p. 142.
19. Lori Fisler Damrosch, "The United States Constitution in its Third Century: Foreign Affairs, Distribution of Constitutional Authority, Covert Operations," 83 *American Journal Int'l Law* 795, 800.
20. Executive Order No. 11,905, 3 C.F.R. 90 (1977); see also Johnson, p. 432.
21. Johnson, p. 432.
22. *Ibid.*, p. 401.
23. Executive Order No. 12,333, 3 C.F.R. 200 (1981), 50 U.S.C. § 401; see also Zengel, p. 144.
24. Zengel, p. 144.
25. Justin Blum, "Altering Assassination Ban Might Increase Pressure on Saddam Hussein, Robb Says," *The Washington Post*, 19 February 1998, p. A22.
26. *Ibid.*
27. Section 3 of HR 19 specifically states: "The following provisions of executive orders shall have no further force or effect:
 - (1) Section 5(g) of Executive Order 11905.
 - (2) Section 2-305 of Executive Order 12306.
 - (3) Section 2.11 of Executive Order 12333."
28. Johnson, p. 401.
29. *Ibid.*
30. *Ibid.*
31. *Ibid.*
32. U.N. Charter, Art. 51.
33. Johnson, p. 420.
34. *Ibid.*
35. Seymour M. Hersh, "Target Qaddafi," *The New York Times*, 22 February 1987, p. 84.
36. *Ibid.* See also Johnson, p. 422.
37. Johnson, p. 401.
38. George J. Church, "Saddam in the Crosshairs," *Time*, 8 October 1990, p. 29. See also Johnson, p. 423.
39. Alasdair Palmer, "Going For the Man: The Day for the Jackal," *Telegraph Group Limited*, 8 September 1996, p. 23.
40. Zengel, p. 146.
41. Palmer, p. 23.
42. Johnson, p. 425.
43. Damrosch, p. 801.
44. Johnson, p. 425.
45. Bert Brandenburg, "Legality of Assassination," 27 *Va. J. Int'l. L.* 203 (1987); see also Johnson, p. 426.
46. Johnson, p. 426.
47. 44 U.S.C. §1505(a)(1) (1988), taken from Johnson, p. 426.
48. Blum, p. A22.
49. Zengel, p. 153.
50. Johnson, p. 412. See also John E. Noye, "Executive Orders, Presidential Intent, and Private Rights of Action," 59 *Tex. L. Rev.* 837, 839 (1981).
51. Johnson, p. 425.
52. Zengel, p. 146.
53. *Ibid.*