

Covert Action, Loss of Life, and the Prohibition on Assassination

Jonathan M. Fredman

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From the early days of the CIA, its officers contemplated the use of lethal force against named, specific individuals. At various times during the first three decades of the Agency's existence, plans were made along these lines and actions were taken to implement them. Among the most notorious of the political assassination proposals were the several schemes to assassinate Fidel Castro, the pre-empted plot against Congo's Patrice Lumumba, and even the reported consideration, at middle levels of the Agency, of an attempt on the life of Joseph Stalin.

In no case was CIA assassination plotting ultimately successful. The Agency quietly abandoned some of its political assassination proposals before taking effective action, and even the case that progressed most fully to completion, the planned assassination of Lumumba, saw the CIA attempts superseded when Lumumba's other enemies reached him first.

CIA also maintained covert relationships with others who independently planned or completed political assassinations. The Agency provided arms to the dissidents who later assassinated Dominican leader Rafael Trujillo, and encouraged the coup attempt by Chilean military officers that ultimately resulted in the death of Gen. Rene Schneider. CIA also had been aware of the coup plans that resulted in the deaths of South Vietnamese President Ngo Dinh

Diem and his brother Nhu, although in that instance the Agency had refused to assist the coup plotters once it learned that they were contemplating assassination.

Beyond its involvement in assassination attempts, CIA conducted a number of additional activities that endangered lives. These included paramilitary activities, such as the invasion by Cuban exiles at the Bay of Pigs and the covert support to UNITA fighters in Angola. The Agency also sponsored propaganda broadcasts into Communist nations to encourage resistance against the Soviet Union and supported successful coups in Guatemala and Iran. Each of these types of CIA operations carried with it the potential for casualties, and many produced significant loss of life.

In 1975, the Senate committee investigating CIA activities, chaired by Senator Frank Church, concluded that the Agency had not acted independently in conducting its paramilitary operations, support for foreign coups, and plans for political assassination. Rather, the Church committee found that those CIA activities had implemented US Government policies approved at the Cabinet level; for example, the committee reported that senior US officials had known about, and in some instances encouraged, CIA or indigenous plots against Castro, Lumumba, and Trujillo, as well as coup attempts in South Vietnam and Chile.

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By 1976, the disclosures about official US participation in assassination attempts led President Ford to prohibit any further government involvement in political assassination. Since that time, however, neither the President nor Congress has forsworn the use of certain other types of operations, such as paramilitary activities, assistance in coup preparations, or dissemination of deception and propaganda. As a result, when directed by the President, pursuant to US law, the Agency still may conduct a number of activities that risk the loss of life.

This article examines the assassination prohibition as it has been applied in practice since 1976, the date of its first promulgation, and since 1978, when the scope of the prohibition was expanded. It also explores CIA's experience during the past 20 years with the separate and serious policy considerations that apply whenever its activities may cause the loss of life, whether or not that loss, strictly defined, would constitute assassination.

The End of Assassination as an Instrument of US Policy

CIA assassination plots commonly involved the potential *political* assassinations of foreign leaders. In response, when Congress in the mid-1970s considered whether to provide a detailed statutory charter for the US Intelligence Community (IC), the legislators considered imposing a blanket prohibition against US Government involvement in political assassination. But the effort to enact a statutory charter for intelligence eventually failed, and no subsequent legislation has directly addressed the subject of officially sponsored assassination.

Rather, in 1976, President Ford dealt with the issue administratively, in the first of a series of Presidential Executive Orders (E.O.s) setting forth the parameters within which US intelligence may operate. E.O. 11905¹ expressly provided:

Sec. 5. Restrictions on Intelligence Activities.

(g) Prohibition on Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination.

E.O. 11905 clearly proscribed political assassination, but it did not define the term. Nor did it specifically address other types of lethal activities, such as support to indigenous coup attempts or paramilitary operations, although another portion of section 5 provided that the Order did “not authorize any activity not previously authorized and [did] not provide exemption from any restriction otherwise applicable.” Indeed, a search in the late 1980s by CIA attorneys of relevant Ford administration records at the National Archives in Washington and the Presidential Library in Ann Arbor located no additional written insight into the scope of the term “political assassination.”

Nevertheless, the meaning of the prohibition on political assassination was clearly understood in 1976: the

President no longer would authorize CIA to engage in the assassination of foreign political leaders or support those who do. But in 1978, when President Carter replaced E.O. 11905 with E.O. 12036,² he modified the provision in two important respects. First, the new Order explicitly recognized the already existing understanding that the prohibition constrained not only US Government employees, but also their agents. Second, in an expansion of the literal scope of the prohibition, the modifier “political” was dropped:

*2-305. 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.*³

President Reagan retained that language without change as section 2.11 of E.O. 12333,⁴ which he issued in 1981 and which remains in effect today.⁵ As a result, whatever contextual limitation may have been placed upon the prohibition by the inclusion of the modifier “political” in 1976 vanished by 1978.

The Prohibition and Related Policies

Promulgation of the Ford, Carter, and Reagan E.O.s reflected moral and ethical objections to the official US Government use of political assassination, as well as reaction to the violence that had rocked the United States itself during the 1960s and concern about retaliation from leaders or countries targeted by this country. Pragmatic calculations of costs and benefits also impelled the change. It is not clear, for example, that a hypothetical assassination in 1938 of Adolf Hitler would have

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produced an enduring peace; it is equally possible that Rudolf Hess or Martin Bormann would have replaced him without any change in Nazi behavior.

Even so, the United States retained the options of encouraging coups, supporting indigenous paramilitary groups, disseminating propaganda abroad, and working with unsavory persons to collect intelligence. Pursuant to US law, moreover, the President still may authorize CIA to conduct operations abroad that endanger the lives of others. The textual expansion of the assassination prohibition in 1978 therefore continues to engender discussion among CIA, the White House, other Executive Branch agencies and departments, and the Congressional oversight committees. While political assassination is clearly understood and avoided, the parameters of simple “assassination” are not always so clear.⁶

Furthermore, Agency activities that pose a risk to life raise serious policy concerns far beyond the specific terms of the assassination prohibition. These policy considerations reflect the moral and ethical requirement to minimize the risk of casualties among noncombatants or other innocent people. As a result, where the President has directed CIA to conduct such an activity, the Agency has had to comply both with the prohibition on assassination and with the separate policy requirement to limit the prospects of any unwarranted violence.

The Experience Since 1976

By its terms, the assassination prohibition is not limited to CIA or the IC. The provision has been analyzed

at length since its promulgation, particularly in the context of US military operations.⁷ Close attention also has been devoted to the prohibition as applied to the original author of such plans—the CIA.⁸ Nonetheless, the full ramifications of the assassination prohibition and the related policy concerns have rarely been described as the Agency applies them in practice.

When specifically authorized by US law, the Agency may engage in lawful activities that can result in the death of foreign nationals. Such activities normally fall within the rubric of “covert action,” which comprises CIA activities intended to influence foreigners abroad and requires specific authorization by the President,⁹ although at times a risk to life may result from other types of Agency activities as well.

Covert actions that may produce casualties can constitute activities considered inherently *lethal*, such as providing arms, ammunition, military training, or related support to an indigenous group of insurgents, or demolition equipment to be used in sabotage of an industrial facility. They may also comprise activities considered *nonlethal* in nature, such as providing food, shelter, financial assistance, or political support to a foreign group not engaged in armed conflict, or disseminating propaganda abroad to further US interests. Even *nonlethal* activities may indirectly present a risk to life—for

example, when a CIA-sponsored radiobroadcast made in the name of an opposition group may cause a foreign regime to react harshly against those it believes responsible.

The US armed services also may undertake activities that result in death, and they similarly have to review proposed operations in light of the E.O. prohibition and relevant policies. There is, however, one crucial difference in this respect between the Agency and the US military: As part of its assigned responsibilities, the military prepares for and may at times engage in lawful killing. The law of war provides the armed services with clearly delineated distinctions between lawful and unlawful killing; “assassination” in the military context is a subset of “unlawful killing.”¹⁰

Accordingly, where the President has authorized CIA to provide paramilitary support to an armed faction, the Agency simply applies the correlative military rules in training the supported group. But as a civilian agency, CIA faces unique issues when it engages in other forms of lethal or nonlethal activities that may lead to casualties. For example, an activity designed to achieve a specific political result, such as the replacement of one foreign regime with another, may require that CIA assist military officers planning a coup, although it may be unclear at the outset whether the coup will be bloodless or violent.

Lawfully authorized CIA activities to support US military forces also may raise issues under the assassination prohibition and related policies. These concerns can arise, for example, when the Agency acts to sow distrust among members of a hostile army in order to weaken its ability to

resist US troops, or places articles or radiobroadcasts into media outlets overseas, hoping to increase tensions among a set of murderous foreign leaders if the intended audience retaliates violently against its perceived enemies.

Each of these scenarios bears the possibility, if not necessarily the intent, that identifiable or nonidentifiable persons may be killed as a direct or indirect result of the Agency's activities. The severe nature of the potential harm, coupled with the lack of clearly articulated analogues in the intelligence sphere to the law of war, requires that all such CIA operations be reviewed closely to ensure that they are consistent with US law and policy. This analysis encompasses not only E.O. 12333 and the related desire to avoid unnecessary harm, but also other relevant law and policy. The review takes place both at CIA and elsewhere in the government, including the Department of Justice. It assesses the likelihood of any specific outcome; whether that outcome would be produced directly by the CIA operation, or is simply a conceivable result of some superseding event—the issue lawyers refer to as proximate cause; and the general humanitarian considerations that may be involved.¹¹

Four Major Categories

The E.O. prohibition and the underlying reasons for the original ban on political assassination are well understood by the Executive Branch and the Congress. As a result, rarely—if ever—have proposed covert actions since 1975 presented the option of political assassination. But the 1978 expansion of the provision and the related policy requirement to limit

the risk of unnecessary casualties have rendered the issue of political assassination only one part of the inquiry.

The review is triggered wherever loss of life is possible, whether or not the loss would constitute "assassination."¹² Moreover, as required by the Order's section 2.12, the analysis is performed regardless of whether CIA will directly engage in the activity, or will support cooperating second parties such as coup plotters or paramilitary groups.

Four major categories of CIA operations raise these concerns. The first two involve Agency activities that are *lethal* by their very nature, while the latter two consist of operations in which CIA and its contacts engage in activities that themselves are *nonlethal* but which could set in motion a chain of events culminating in death.

The first lethal category comprises activities by CIA or cooperating individuals that directly pose a strong possibility of death or serious personal injury. Such activities may include the provision of paramilitary support to insurgent groups, or assistance to foreign military officers planning to use force to depose their country's political leadership.

The second lethal category also involves inherently dangerous actions by CIA or its contacts but in circumstances designed to minimize the danger of death or serious personal injury. For example, this category could include a CIA-supported sabotage and destruction of an explosives factory belonging to a foreign terrorist group, at a time when it is believed no persons are inside, or support to a coup attempt abroad when it is believed that the

foreign nation's political leaders will not be harmed.

The first nonlethal category comprises nonviolent activities, such as the broadcast of deception or propaganda, intended to induce unwitting third parties to take nonviolent action against identifiable individuals. Because CIA does not control those third parties, the danger exists that they may react violently. For example, the Agency may seek to cast doubt upon the loyalty of a hostile military commander, hoping that the enemy authorities will remove the officer from command; instead, those authorities may opt for execution. Intelligence collection or sharing activities may fall within this category as well, in cases where such activities require CIA to work with others who may engage in violence.

The second nonlethal category also consists of nonviolent CIA operations that are intended to influence unwitting third parties but in situations where those activities are *not* directed against specific individuals. Even in such circumstances, violence may result. For example, CIA-sponsored radiobroadcasts directed to an oppressed minority, intended to encourage peaceful resistance against a repressive government, may engender violent retaliation.

Lethal Operations Directly Risking Loss of Life

When authorized by the President, CIA may engage in several types of activities within this category. For example, pursuant to law the Agency may provide paramilitary equipment and training to Third World insurgent groups, such as the Nicaraguan contras or the Afghan mujahidin, or

supply arms and ammunition to foreign nationals planning to overthrow a despot. Deaths among hostile forces normally are expected in the course of paramilitary operations; even where a nonviolent coup is planned, lives may be lost as the operation progresses.

Paramilitary operations. In supporting paramilitary operations, CIA draws from the relevant US military guidance, applies it as appropriate to its covert activities, and warns those with whom it works that violation of those rules will jeopardize continued CIA assistance. For example, where CIA lawfully provides arms, materiel, training, and support to a paramilitary group, a military operation that is permitted under the law of war should violate neither the assassination prohibition nor the related policies against risk to noncombatants. Accordingly, the ambush of hostile forces by the supported group, or an attack directed against an enemy military commander during a time of hostilities, should violate neither the E.O. nor the related policies.

In contrast, paramilitary operations designed to kill every enemy soldier, with surrender to be refused even if offered, clearly would be prohibited. Nor would CIA condone the use by a supported group of car bombs to spread terror among an enemy population.

Moreover, in keeping with the policy against unnecessary risk to innocents, at the conclusion of any paramilitary program the United States has to minimize any residual dangers to foreign nationals or its own citizens. For example, it has been widely reported that CIA offers

large sums for the return of numerous Stinger missiles that it previously provided to Afghan fighters for use against Soviet forces. Similarly, it has been reported that certain veterans of the Afghan war now apply their expertise to criminal or terrorist activities abroad, with serious consequences to the West. Because efforts by the United States to contain the effects of its paramilitary operations may not always succeed, when it designs and implements this form of covert action the Agency also has to consider the likely ramifications after the program is terminated.

Retaliation by the opposition. Somewhat different issues may arise when CIA is authorized to support a paramilitary group that itself respects the laws of war but is engaged in hostilities against an opponent that does not. If enemy forces routinely commit atrocities against the civilian population in retaliation for lawful attacks, the Agency has to evaluate carefully whether and how the resistance should proceed.

Although the E.O. prohibition per se will not apply in this type of situation, the need to limit the danger of innocent casualties necessitates a careful assessment of the likely enemy reaction. In the most extreme instances, CIA may need to direct the supported group to suspend its attacks against the opposition forces.

Coup preparations. Coup planning presents still another set of concerns, illustrated in some detail by the failed 1989 attempt by Panamanian military personnel to depose Gen. Manuel Noriega. After that attempt, it was widely reported in the press that dissident Panamanian officers had sought US assistance for their

plans but been turned down, allegedly for fear that E.O. 12333 would be violated should Noriega be killed during the coup. Two months later, President Bush sent American troops into Panama to depose the General.

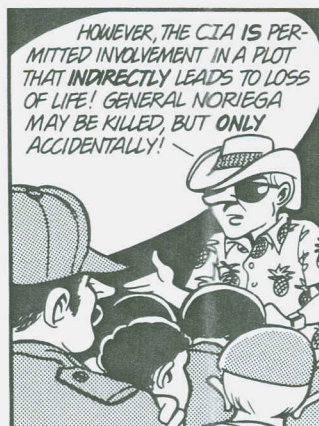
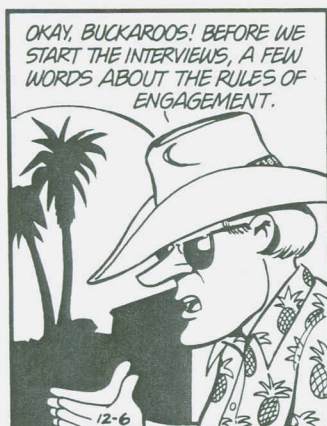
After the invasion, many believed that the prohibition on assassination had prevented the United States from availing itself of a cheap and easy way to remove Noriega from office. Responding to that concern, the Justice Department prepared a classified legal opinion examining whether the provision of US support to a planned coup against a repressive regime would necessarily violate the E.O. if there were no specific intent to kill the foreign leader but the plotters contemplated the use of force and the likelihood of violence were great. The Department concluded that E.O. 12333 would not necessarily preclude the US from assisting in such a plan but cautioned that the legality of any particular proposal has to be evaluated on its own merits.¹³

The flurry of attention extended to the pen of cartoonist Garry Trudeau. In *Doonesbury*, he graphically depicted the presumed quandary that had faced the coup plotters. (See next page.)

Regardless of whether CIA worked with the Panamanian rebels in 1989, the public debate accurately reflected the attention devoted within the government to these types of issues. If, pursuant to law and explicit Presidential direction, the Agency provides arms and training to a foreign faction, it has to provide clear instruction on the requirements of US law and policy, including the prohibition on assassination. CIA will underscore that the object of a coup

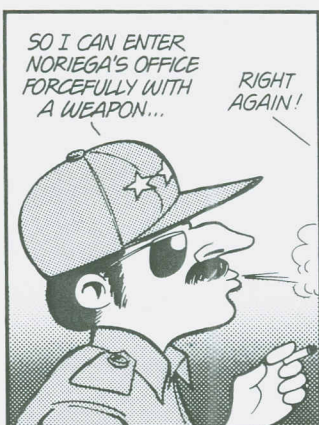
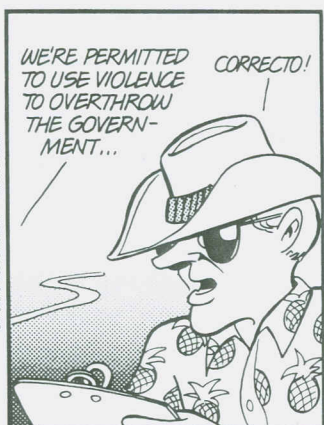
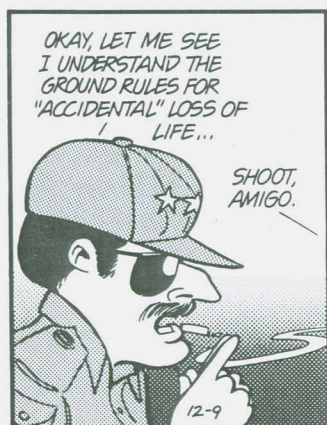
Doonesbury

BY GARRY TRUDEAU



Doonesbury

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attempt has to be to replace the existing government without bloodshed if possible, rather than by simply killing its leaders. While the coup plotters may defend themselves in the face of armed opposition, they also have to be willing to accept a peaceful surrender if one is offered. In working with such individuals, the Agency will make it clear that it cannot assist those who do not comply.¹⁴

Lethal Operations Indirectly Risking Loss of Life

Loss of life is not always the foreseeable result of a covert action involving violence, if the use of violence is designed in such a manner as to minimize the risk. For example, demolition of an enemy's industrial facility at a time when it is believed to be unoccupied may carry the risk,

but not the likelihood, that casualties will result. Pursuant to law, therefore, the President may direct CIA to carry out covert activities that employ violence but pose minimal risk to life.

Counterproliferation operations. If a hostile nation is seeking to acquire nuclear weapons or the capability to construct them, the United States

may try to dissuade third countries and private parties from assisting in that effort. Ultimately, however, the President may conclude that the American efforts will fail. Pursuant to law, the President then may direct CIA to respond to the threat by various means, including covert action.

The Presidential authorization will clearly state the terms within which the Agency will operate. CIA may be directed to enhance its clandestine efforts to obtain intelligence about supplier networks, to broaden its liaison relationships with friendly foreign security services, and to place nonattributable items in foreign press outlets in order to influence the policies of other nations. But the President also is empowered to direct CIA to disrupt the foreign nation's supply networks, destroy weapons components in transit, interfere with the hostile nation's nuclear research, or sabotage defense technology and subsystems in the foreign weapons plant.

The latter techniques clearly entail a measure of physical risk to individuals engaged in the foreign acquisition effort (and potentially to the CIA officers or others working on the operation). A carelessly designed sabotage proposal, for example, could needlessly endanger foreign workers who are not responsible for their government's decisions. Consequently, regardless of the identity or location of potential victims, the Agency has to limit the unnecessary risks to persons or property.

To this end, CIA will explore the feasible alternatives. For example, operations could be designed to intercept controlled munitions in transit, render explosive materials inert, or clandestinely replace such

items with nonsensitive substitutes. Similarly, the Agency may seek to sabotage foreign chemical weapons facilities at times when those complexes normally are empty. Although careful planning cannot wholly guarantee the absence of casualties, it can reduce that risk substantially.

Counterterrorist operations. Similar issues can arise in the course of Presidentially authorized operations intended to prevent attacks by international terrorists. Even where a planned operation would not involve a direct strike upon a terrorist group, but rather the use of clandestine measures to disrupt its capabilities, a risk to life may remain. In such a case, CIA would seek to employ comparable measures to reduce that danger, both complying with the overall policies against unnecessary loss of life and respecting the prohibition on assassination.

At times, however, the fight against terrorism may raise direct issues of self-defense similar to those that arise during a coup. Where the President has authorized CIA or other Federal agencies to conduct counterterrorist operations, those officers and their agents may need to defend themselves. Recent overseas apprehensions of terrorist suspects by US law enforcement authorities reflect this consideration in the context of arrest; at times, intelligence operations abroad may present similar issues. While assassination remains prohibited and innocent lives have to be protected, neither E.O. 12333 nor the related policies protecting innocent life constrain those acting for the United States from exercising their lawful rights of self-defense.

Nonlethal Operations Directed at Identifiable Persons

Some of the most difficult E.O. and policy issues derive from the use of nonlethal deception or propaganda methods directed against named or identifiable persons. In time of crisis, for example, US armed forces may be deployed abroad against an enemy with the fear of substantial American casualties in the event of hostilities. To reduce the threat to US troops, without attribution to the United States CIA may cast aspersions on the loyalty of specific enemy commanders or a particular group of hostile leaders. If successful, the Agency operation may induce distrust and suspicion, undermine enemy morale, and lead the hostile nation to remove capable officers from command.

Specific targets. Deception operations aimed at specific enemy officers may have the greatest chance for success. Clandestine CIA efforts may lead the political leadership of the target country to focus upon particular persons, especially if the Agency is able to cite enough specific information about those individuals to make the charges plausible. Depending upon the likely reaction of the foreign government, this type of operation can raise issues under the assassination prohibition as well as the related policies against the loss of innocent life.

Some governments, doubting the reliability of senior officers, will remove them from command, thereby unwittingly fulfilling the purpose of the covert operation. But other governments may imprison, torture, or execute such officers, and even retaliate against their families. Where the death of a targeted individual is likely, even if unintended by the

United States, the operation may fall too close to the E.O. boundary to proceed. Similarly, where severe retribution may befall innocent family members, the related policies also may counsel restraint.

To some extent, the calculation in any specific instance may turn upon whether the person at risk is a military commander or a political official and whether hostilities in fact have erupted.¹⁵ The mere risks of physical injury or lengthy imprisonment will not necessarily preclude an operation; nor will an attenuated risk of execution, so long as a peaceful removal from office or nonbrutal prison term are more likely. In each instance, the analysis will balance all the relevant considerations, including the potential reduction in the threat to US personnel, and will strive to harmonize the various interests.

Collection activities. Beyond covert action, this category of nonlethal operations also may include certain intelligence collection activities. For example, to obtain warning of planned terrorist attacks, CIA may secure advance notice from an aspiring or recruited member of a particular terrorist organization. To preserve the reporting channel, as well as the life of the cooperating individual, information about that person's relationship with CIA has to be kept absolutely secret.

At times, however, terrorist groups require their members to prove their dedication by committing acts of violence. Accordingly, where the Agency has recruited an "asset" whom the terrorists then direct to carry out an assassination or other attack, these issues fall starkly into focus.¹⁶ Clearly, E.O. 12333 prohibits CIA and its assets from engaging

in assassination or otherwise violating US law, including the several statutes directed against international terrorism. The challenge is how simultaneously to preserve the life of the asset, retain a reporting channel from the terrorist group, and maintain strict compliance with US law. The third requirement is an absolute and normally poses the least difficulty; the first two often prove more problematic.

Dissemination. The dissemination of intelligence to foreign governments may present similar concerns, especially when the recipients rely upon US information to support their own law enforcement activities. Counternarcotics and counterterrorist operations bring this issue to the fore.

Colombia, for example, has struggled for years with its domestic narcotics traffickers, and, with significant assistance from the United States, has scored some impressive successes. This military, intelligence, and law enforcement assistance has provided the Colombians with information about the location, plans, and intentions of certain major traffickers. The apprehension of those traffickers can be difficult and often results in violence, as was demonstrated when efforts by Colombian authorities to apprehend Medellin cartel leader Pablo Escobar ended in his death.

Because of the high risk of violence, CIA's procedures in this area resemble those pertaining to the authorized support of foreign coup attempts. Neither the assassination prohibition nor the related policies prevent the Agency from providing intelligence to assist in the arrest of international traffickers or terrorists, even if suspects may resist and blood

be shed. Rather, CIA may provide such information, so long as the recipient governments are willing to accept surrenders if offered and have set in place bona fide procedures by which to do so.

A related example involves the decision by the United States in 1994 to stop providing real-time flight tracking data to the Governments of Colombia and Peru. Until that time, those governments had supported US counternarcotics efforts by directing their air forces to intercept aircraft suspected of carrying narcotics. Relying upon the US-provided tracking information, the Colombian and Peruvian Air Forces had been authorized to challenge suspect aircraft in the air or on the ground, and the operations clearly carried the risk of casualties.

When they reviewed the intelligence-sharing programs in 1994, the Defense and Justice Departments concluded that the United States could not continue to provide the data to Colombia and Peru. Their conclusions were based on certain US criminal statutes that had been enacted in order to implement various international agreements safeguarding civil aviation. In their respective analyses, Defense and Justice determined that those statutes also could impose liability on US or South American personnel who provided intelligence in support of the drug interdiction programs, even if the two nations' Air Forces indeed challenged only those aircraft that were suspected of smuggling drugs. As a result, the intelligence-sharing arrangements were suspended for several months, until Congress enacted new statutory provisions to permit them to resume.

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Although controversial, the Defense and Justice actions reflected concern both for US law and for the safety of civil aviation, as did the Congressional response of crafting only a narrow counternarcotics exception. While the intelligence-sharing episode was founded upon different considerations from the assassination prohibition, these events illustrate the type of approach that also is applied to proposed CIA operations that may implicate that prohibition or the related policies.

Nonlethal Operations Not Directed at Identifiable Persons

Most remote from the E.O. prohibition, but still raising the related policy concerns, are those nonlethal CIA operations that may contribute to eventual violence or death. For example, US deception or propaganda activities that are not directed against specific individuals may raise these issues: although particular efforts to stimulate insecurity among hostile foreign elites may not identify anyone by name, the foreign security forces may retaliate against innocent suspects. To minimize that risk, CIA-sponsored radiobroadcasts or press placements may suggest that opposition groups exist but are widely dispersed, or that discontent is rampant among some but not all members of a particular faction. The aim would be to increase uncertainty among the ruling classes without providing them ready targets for retaliation.

As with the narrowly focused deception operations, the review will assess the potential risk to innocent individuals. If the likelihood of retributive violence is great, policy considerations may cause the operation to

stand down, even though the fact that it is not directed against any specific individual avoids any conflict with the E.O. prohibition. On the other hand, the mere potential for third-party violence may not require restraint where a nonviolent response is more probable.

Similarly, a lawful, Presidentially authorized covert action may direct the Agency to broadcast into a hostile nation radio programs intended to bolster the morale of an oppressed people. Although not the US objective, such broadcasts may contribute to a decision by those people to rebel, and many may die during the insurrection. It has been argued, for example, that broadcasts by the CIA-funded Radio Free Europe in 1956 may have encouraged the Hungarian freedom fighters, thereby leading them to continue their struggle and prolonging the bloodshed. The public statements by Western political leaders following the Gulf war in 1991 may have encouraged Iraqi Kurds and southern Shias to pursue their separate uprisings against Saddam Hussein. The West did not intervene militarily in any of those situations, and each of the rebellions ultimately was crushed with great loss of life.

Accordingly, even nonlethal operations intended to encourage democracy may raise the policy requirement not to risk unnecessary

harm. Here, as well, the potential dangers require strict balancing of the projected consequences, and in specific instances the balance may weigh against proceeding.

Conclusion

Although political assassination no longer is a foreign policy option for the United States, proposed US intelligence activities still may raise concerns under the E.O. prohibition on assassination and the related policy requirement to minimize gratuitous loss of life. Moreover, 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.

Even so, many covert actions appropriately may be compared to military operations, and in those cases the law of war supplies the terms of reference. But many intelligence activities do not readily compare to the military framework, and there may be no clear lines of authority by which CIA may evaluate certain proposals. Rather, the broad scope of the E.O. and policy concerns, along with the serious physical ramifications, requires the Agency to examine individually each potential operation. The absence of specific intent to attack particular individuals is only the starting point, and the inquiries frequently will involve a broad set of issues quite apart from assassination per se.

Founded upon the E.O. prohibition but extending well beyond its parameters, this application of law and policy serves the national interest. By ensuring compliance with US law and policy, in appropriate consultation with the White House, the Justice Department, and other Executive Branch agencies, as well as the Congressional oversight committees, the comprehensive review protects the Agency and its officers from charges of criminality or impropriety. And, of supreme importance, the process helps to ensure that covert US activities continue to reflect American values and law.

NOTES

1. 3 C.F.R. 90 (1977), reprinted in 50 U.S.C. § 401 (1976).
2. 3 C.F.R. 112 (1979), reprinted in 50 U.S.C. § 401 (Supp. III 1979).
3. As had sections 4 and 5 of E.O. 11905, sections 2-102 and 4-107 of E.O. 12036 made clear that the order did not confer any new legal authority on US intelligence agencies. And, removing any potential ambiguity about the scope of the order, section 2-307 further provided 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 this Order or by applicable law."
4. 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 (1982).
5. Section 2.12 of E.O. 12333 complements the assassination prohibition by providing that "[n]o agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order." As used in text, therefore, "E.O. 12333" generally refers to its sections 2.11 and 2.12, although the order also provides specific direction to the US Intelligence Community about a number of additional subjects outside the scope of this article.
6. At the time E.O. 11905 was promulgated, neither Congress nor the Department of Justice could identify any statutory authority prohibiting the US Government from authorizing the Intelligence Community to assassinate foreign nationals. That aspect of the legal landscape has not changed, so that with no Federal legislation specifically barring the practice, the current Order appears to be the sole source of the prohibition. Title V of the National Security Act (described below at note 9) explicitly authorizes the conduct of covert action, which includes the types of activities described in this article but is silent on the specific subject of assassination. Moreover, Title V itself provides that covert actions have to comply with the Constitution and Federal statutes. The Act therefore cannot be read to either authorize or foreclose the option of assassination. Nonetheless, the Supremacy Clause of the Constitution provides that duly enacted Federal statutes, together with the Constitution itself and lawfully made treaties, are "the supreme Law of the Land . . .," and Title V clearly authorizes the President to direct CIA to conduct covert actions. For these reasons, if a president were to revoke the E.O. 12333 prohibition, Congress once again would need to decide whether to enact a similar prohibition into law.
7. See, for example, W. Hays Parks, "Memorandum of Law: Executive Order 12333 and Assassination," *The Army Lawyer*, December 1989; LCdr. Patricia Zengel, "Assassination and the Law of Armed Conflict," 134 Mil. L. Rev. 123 (1991). See also Abraham D. Sofaer, "Terrorism, the Law, and the National Defense," 126 Mil. L. Rev. 89, 116-21 (1989); Lori Fisler Damrosch, "Covert Operations," 83 A.J.I.L. 795, 800-01 (1989).
8. See, for example, Russell J. Bruemmer, "The Prohibition on Assassination: A Legal and Ethical Analysis," published in *The Name of Intelligence: Essays in Honor of Walter Pforzheimer* 137 (Hayden B. Peake & Samuel Halpern, eds., 1994), and sources cited therein.
9. A thorough review of the legal provisions governing the authorization and conduct of covert action is beyond the scope of this article. It may be observed, however, that current law requires explicit presidential approval in advance for the conduct of any covert action; provides that the president shall ensure timely notification of the covert action to the intelligence committees of the House and Senate; and states that no presidential approval of covert action may authorize a violation of the Constitution or any US statute. See generally sections 501, 503, and 504 of the National Security Act.
10. The international law of war lends meaning to the term "assassination," and military operations that are permitted by that law should not run afoul of the prohibition. Zengel, *supra* n.7, at 130-41 reports that international law prohibits military forces from employing "treacherous means," such as attacks by nonuniformed personnel, against enemy soldiers; alternatively, she writes, that law may proscribe simply the use of the more limited set of "perfidious attacks," such as feigning noncombatant status and appearing to be unarmed. Drawing from similar sources, Parks, *supra* n.7, at 5 observes that "the death of noncombatants ancillary to the lawful attack of a military objective is neither assassination nor otherwise unlawful." These modes of analysis can serve well for purposes of E.O. 12333 and have been employed by CIA as appropriate since the prohibition was issued.

Although not central to this article, it should be noted that Zengel contends that the E.O., which is captioned "United States Intelligence Activities," does not encompass military operations, so that its prohibition on assassination should not be construed to limit US military options. That proposition may be debated, for despite its title section 2.11 of the Order does not apply solely to intelligence officers but to all persons "employed by or acting on behalf of the United States Government." Compare Parks, *supra* n.7, at 4, stating that his memorandum "provide[s] guidance in the revision of U.S. Army Field Manual 27-10, *The Law of Land Warfare*, consistent with Executive Order 12333." Even so, Zengel's approach to the underlying issues of definition appears sound and is not inconsistent with the E.O. prohibition.

leader from office. In such an instance, CIA representatives overseas are instructed to remind their contacts of the E.O. rules, and emphasize that the US Government will neither violate the prohibition on assassination nor condone those who, acting on their own, engage in assassination.

11. Although a military operation, not an intelligence activity, the 1993 US attack by cruise missiles against the headquarters of the Iraqi intelligence service reflected this mode of analysis. In planning its retaliation for Iraq's attempt to murder former President Bush, the United States first concluded that the attack would be permitted under both domestic US and international law; targeted no specific Iraqi national in the retaliation; and mounted the attack at a time of night in which the building would be least likely to be occupied.
12. As one moves away from reasonably foreseeable death or personal injury toward situations in which property damage is the most likely result, the analysis may take on a somewhat different cast.
13. See Bruemmer, *supra* n. 8, at 152-54.
14. These issues also arise where a foreign national advises CIA that he or she independently plans to remove a
15. Zengel, *supra* n.7, at 137-42, 148-49, observes that an attack upon a hostile military commander during a time of lawful hostilities, to be carried out by uniformed military personnel or by clearly marked warplanes, would not be prohibited by the laws of war and therefore should not constitute assassination. She cautions, however, that an attack upon the same commander, to be performed solely by civilians or by nonuniformed military personnel, might cross that line and be prohibited.
16. Where CIA has recruited an existing member of such an organization, this also may pose significant questions concerning the use of so-called dirty assets, an issue beyond the scope of this article but one that has received widespread attention. Newly revised Agency guidelines address the subject by generally requiring that, for the relationship to be maintained, the likely gain to US intelligence has to be substantial, with the appropriate Executive Branch agencies and Congressional committees informed of the decision.