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NOTE: The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism

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SUMMARY:
... In the wake of the terrorist attacks of September 11, 2001, President George W. Bush has led the United States and allied nations in a worldwide campaign to eliminate the threat posed by terrorist networks like al Qaeda. ... Finally, Part IV questions whether the fight against terrorism is best characterized as a war, and proposes a higher legal standard to govern targeted killing outside a recognized theater of armed conflict. ... The United States, Reagan had made clear, would not shy away from targeting those who represented a threat to national security, regardless of the prohibition on assassination. ... Taking his predecessors' narrow interpretation of E.O. 12,333 one step further, President Bill Clinton found the prohibition inapplicable to the targeting of foreign terrorist leaders engaged in attacks on American interests - years before George W. Bush ever authorized the use of targeted killing in the war on terrorism. ... On August 20, 1998, American forces fired more than seventy cruise missiles at al Qaeda terrorist camps in Afghanistan in an effort to kill bin Laden and his lieutenants; later reports indicated that bin Laden had been in one of the targeted camps the day of the attack, but left before the missiles hit. ...

TEXT:
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I. Introduction

In the wake of the terrorist attacks of September 11, 2001, President George W. Bush has led the United States and allied nations in a worldwide campaign to eliminate the threat posed by terrorist networks like al Qaeda. As part of this so-called "war on terror," the president has authorized the selective use of targeted killing, reigniting a well-worn debate over a U.S. executive prohibition on assassination that has stood since 1976. "The gloves are off," one senior official has said. "Lethal operations that were unthinkable pre-September 11 are now underway." n1

The war on terror has not been without its critics. From the toppling of regimes in Afghanistan and Iraq, to the detention and alleged torture of terrorist suspects at Guantanamo Bay, many have questioned the means employed by the Bush administration to achieve the lofty goal of eradicating terrorism. Despite the controversy surrounding Bush's publicly acknowledged targeting policy, however, the president's approval of individual killings in the fight against terrorism actually follows the precedent established by previous presidents. Since President Reagan's bombing of Colonel

Muammar Qadhafi's Libyan compound in 1981, successive commanders in chief have interpreted the [*1031] U.S. assassination ban to exclude targeted killing necessitated by times of war or national self-defense.

As detailed in Part II, the attacks authorized by presidents Reagan through George W. Bush are practically and legally distinguishable from the politically motivated Cold War plots that first led to the assassination ban. Part III discusses the domestic and international legal justifications for the war on terror, as well as the laws of war as applied to the targeted killing of terrorists. Finally, Part IV questions whether the fight against terrorism is best characterized as a war, and proposes a higher legal standard to govern targeted killing outside a recognized theater of armed conflict.

Contrary to the assertion that the "gloves are [now] off," President Bush's authorization of targeted killing is consistent with powers already exercised by his predecessors - even under the executive prohibition on assassination - when confronted with challenges to national security. The gloves, in fact, were never on. As evidenced by nearly a quarter century of practice, targeted killing can be a legally and morally justifiable means of protecting the American people. In order for it to remain so, however, the president must keep a hand in the targeting decision process to ensure that this method of combating the terrorist threat is used only under those circumstances that truly require it.

II. Targeted Killing: Presidential Policy and Practice

A. Origins of the Executive Assassination Ban

The executive ban on assassination is best understood within the context of the circumstances which gave rise to it. In the mid-1970s, public revelations of questionable CIA practices at home and abroad triggered a wave of executive and congressional inquiries into intelligence community abuses. Among these, a Senate committee headed by Senator Frank Church launched an extensive investigation in 1975 into the full range of governmental intelligence activities, including a number of assassination plots alleged to have been directed or assisted by the CIA in the 1960s and 1970s. n2

[*1032] In its report, the Church Committee concluded that the United States was involved, to varying degrees, in five separate assassination plots. n3 United States-supported coups had resulted in the deaths of Rafael Trujillo of the Dominican Republic, Ngo Dinh Diem of South Vietnam, and Rene Schneider of Chile - though the Committee determined that the U.S. government was not directly responsible for these killings. n4 More troubling was the finding that CIA officials had worked actively to kill the Premier of the Congo, Patrice Lumumba, and Cuban dictator Fidel Castro. n5 The Castro targeting program, in particular, developed an array of innovative assassination schemes involving poison cigars, exploding seashells, poison pills, and a fungus-contaminated diving suit. n6

Despite these findings, the Church Committee ultimately concluded that no plots initiated by U.S. officials had ever led directly to the assassination of a foreign leader. n7 Lumumba died at the hands of Congolese rivals, without any apparent involvement by the CIA. n8 And, for all its creativity, the Castro program generally failed to advance much beyond the planning and preparation phase; additional support and encouragement to a few Cuban would-be assassins was similarly unsuccessful. n9 The Committee nonetheless denounced the CIA's involvement in the plots, as well as the absence of oversight and accountability which characterized such operations. "Plausible denial," the Committee reported, was often achieved by using euphemisms and generalized instructions to shield senior officials. n10 As a result, "the system of Executive command and control was so inherently ambiguous that it [was] difficult to be certain at what level assassination activity was known and authorized." n11

Determining that, in the absence of war, the "coldblooded, targeted, intentional killing of an individual foreign leader" n12 has no place in the foreign policy of the United States, the Church Committee recommended that "a flat ban against assassination should be written [*1033] into law." n13 Highly critical of the lack of Executive oversight in the assassination plots, the Committee thought it best that Congress put a definitive end to such practices. It was in this charged political environment that President Ford issued Executive Order (E.O.) 11,905, providing that "no employee of the United States Government shall engage in, or conspire to engage in, political assassination." n14 It would seem that the preemption of congressional action was a possible, if not likely, motive behind issuance of the Order. n15 Regardless of Ford's motives, the effect of the executive prohibition has been clear: efforts by Congress to supplant it and similar, successive executive orders with a legislative ban - in 1976, 1978, and 1980 - have all failed. n16

B. Meaning and Purpose of the Executive Prohibition

The unsuccessful attempt by Congress to enact an assassination ban in 1978 coincided with the issuance by President Carter of Executive Order 12,036, which slightly modified the Ford prohibition. n17 Later incorporated without change in E.O. 12,333 by President Reagan in 1981, n18 the ban as amended by Carter remains in place today and reads: "No

person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." n19

Carter's decision to prohibit "assassination" generally and not only "political assassination," as Ford had specified, seems motivated more by political expediency than by any genuine desire to alter the scope of the ban. As Tyler Harder explains, "there is ample support to suggest that after several failed attempts" by Congress to push through a [*1034] legislative prohibition, "Congress and the Executive simply agreed to a political compromise." n20 Accordingly, removal of the "political" qualifier may have served to appease Congress as it sought to enact a more restrictive ban. n21 By forestalling legislative action, Carter's modification of the Order ultimately secured greater, rather than less, flexibility for the Executive.

Despite its blanket prohibition on "assassination," the executive ban as reflected in E.O. 12,333 does not actually define what practices that term encompasses. Notably absent from Section 3.4, which provides definitions for a variety of terms used throughout the Order, is any clarification of "assassination" within the context of the ban. n22 The failure of the Order to articulate the scope of the very practice it purports to prohibit suggests that a definition of assassination was purposefully omitted. The flexibility of interpretation thus retained by E.O. 12,333 has the advantage of "leaving potential adversaries unsure as to exactly what action the United States might be prepared to take if sufficiently provoked." n23 An absolute prohibition, or otherwise inelastic catalog of prohibited targets, would allow adversaries expressly protected by its terms to sleep easier at night.

The discretionary authority to construe the limits of the assassination ban remains in the hands of the president. He holds the power, moreover, to amend or revoke the Executive Order, and may do so without publicly disclosing that he has done so; since the Order addresses intelligence activities, any modifications may be classified information. n24 The placement of the prohibition within an executive order, therefore, effectively "guarantees that the authority to order assassination lies with the president alone." n25 Congress has similar authority to revise or repeal the Order - though its failure to do so, when coupled with the three unsuccessful attempts to legislate a ban, may be read as implicit authority for the president to retain targeted killing as a [*1035] policy option. n26 Indeed, in recent years, there have been some efforts in Congress to lift the ban entirely. n27

Given the nature of the Executive Order, as well as the context in which it was originally issued, a revocation of the ban - by the president or by Congress - is neither necessary nor desirable. As framed by the Church Committee inquiry, the executive prohibition was initially limited explicitly to political assassination. The Committee itself had recognized that a ban need not cover officials of a foreign government with which the United States was engaged in a military conflict pursuant to a declaration of war or the provisions of the War Powers Resolution. n28 Further, the Committee found that "the assassination plots were not necessitated by imminent danger to the United States," n29 appearing to leave open the possibility that targeted killing may be justified by threats to national security. President Carter's removal of the restrictive "political" qualifier, when viewed in light of the maneuverings between Congress and the Executive at the time, did not broaden the scope of the ban beyond that envisioned by the Committee.

As a "blanket" prohibition on purely political assassination as an element of American foreign policy, the executive order is largely, though not entirely, symbolic in nature. By giving legal effect to the Church Committee conclusion that such killings are "incompatible with American principles, international order, and morality," n30 the prohibition serves as an assurance of U.S. "moral policy" n31 to the American public and world at large. On a more practical level, the prohibition also institutes the executive oversight and accountability which the Committee had found lacking. Subject to presidential endorsement and interpretation, the prohibition leaves little doubt that the responsibility for any targeted killing operation begins and ends with [*1036] the president. n32 Finally, by leaving the construction of "assassination," and thus the ultimate scope of the ban, at the discretion of the president, Executive Order 12,333 leaves the flexibility needed - and historically exercised - by the president in times of war and national self-defense.

C. Sounding the Prohibition's Limits: Presidential Practice Under E.O. 12,333

In fact, in the years since the institution of the executive prohibition, the United States has on several occasions placed foreign state and terrorist leaders within the cross-hairs of overt targeting operations. This is undoubtedly the most convincing proof that Executive Order 12,333 does not represent an absolute ban on assassination - or, at the very least, has not been interpreted as such by the four presidents to take office since it was issued. Rather, these operations have substantiated the flexible framework instituted by the ban, which allows for the selective use of lethal force against leadership targets when military necessity or national security demand it.

1. Ronald Reagan: 1986 Bombing of Libya

The first operation took place in 1986, when President Reagan ordered the bombing of Colonel Muammar Qadhafi's compound in response to a Libyan-plotted bombing of a Berlin nightclub which killed one U.S. serviceman and wounded others. n33 Intelligence reports indicated that Libya was involved in planning other attacks against U.S. interests around the world, including up to thirty diplomatic facilities. n34 While legally justifying the military operation to the United Nations as a self-defensive measure pursuant to Article 51 of the UN Charter, n35 the administration made further assurances that the raid did not violate E.O. 12,333.

[*1037] President Reagan stated that Qadhafi himself had not been a target of the strike, though he added, "I don't think any of us would have shed any tears if that happened." n36 It was later reported, nonetheless, that nine of eighteen bombers had a specific mission to target Qadhafi, that administration officials were instructed before the raid to prepare briefs distinguishing the attack from assassination and that language announcing Qadhafi's demise was prepared for the speech that Reagan made the evening of the strike. n37

As the first attack on a state leader under the E.O. 12,333 regime, the Libyan raid was to become the military paradigm and legal precedent for future attacks on leadership targets - even in the absence of military conflict:

The lines between formal war and peace were no longer clear - the United States had indicated its intent to use deadly force against foreign leaders, even in peacetime, should they pose a threat to the nation. The use of more overt methods such as an airstrike...marked a shift away from the cloak-and-dagger schemes of the Cold War. Instead of covertly working to end a leader's life, America would strike openly, with gun camera footage visible to all on CNN the next day. n38

Though at first glance a departure from the no-assassination policy set forth in E.O. 12,333, the spectacularly overt nature of the attack may have been most effective in demonstrating the true scope of the prohibition. In marked contrast to the poison cigars and plausible deniability of the pre-Church Committee era, the Qadhafi attack featured the use of military firepower by a president who stood before his nation and the world to accept responsibility - and to provide legal justification - for it. Although Reagan denied that Qadhafi himself had been targeted, the bombs landing in the Libyan leader's backyard undoubtedly spoke louder than the words that followed. The United States, Reagan had made clear, would not shy away from targeting those who represented a threat to national security, regardless of the prohibition on assassination.

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2. George H. W. Bush: The Gulf War

During the Gulf War of 1991, President George H. W. Bush conveyed a similar message when authorizing the bombing of Saddam Hussein's presidential palace in Baghdad - though this action, too, was tempered by a less aggressive stance in the press. "We're not in the position of targeting Saddam Hussein," the president said, echoing the words of Reagan five years earlier, "but no one will weep for him when he is gone." n39 In contrast to the Qadhafi airstrike, the targeting of Hussein's palace and bunkers took place during a recognized international armed conflict, and was consequently governed by the laws of war. Accordingly, Hussein, as commander of the Iraqi forces, was a legitimate target who could be killed by any "non-treacherous" means. n40

U.S. officials, nonetheless, were not eager to admit that Hussein had been expressly targeted. General Norman Schwartzkopf repeatedly stated that the United States did not "have a policy of trying to kill any particular individual," n41 and then-Secretary of Defense Dick Cheney fired Air Force Chief of Staff Michael Dugan after he suggested that U.S. forces would "'decapitate' Iraqi leadership by targeting Saddam, his family, and even his mistress." n42 Even after the war, General Charles Horner, one of the engineers of the air campaign, would not admit to targeting Saddam without first giving a nod to the policy against assassination: "As a matter of policy we were not trying to assassinate him but we dropped bombs on every place that he should have been at work." n43

Although the position publicly adopted by administration and military officials seemed inconsistent with actions taken in the military theater - as Horner put it, "getting kind of fancy with words" n44 - this "fancy" doublespeak obscured the simpler truth that the conflict between the policy and the war effort was a false one. Reagan had already demonstrated that the executive prohibition of assassination did not afford protection - even in peacetime - to foreign leaders who threatened U.S. national security interests. Under the laws of armed [*1039] conflict, no such protection exists for military commanders, including state leaders who assume that role. As dutifully noted by Schwartzkopf, Horner, and others, the United States had maintained its policy against assassinating foreign leaders. The policy, how-

ever, was not intended to tie the hands of military commanders when confronting an otherwise legitimate target in wartime. The bombing of Saddam's presidential palace and bunkers established that the United States would not be artificially constrained by its own policy when the needs and laws of war dictated otherwise.

3. Bill Clinton: 1998 Bombing of Afghanistan

Taking his predecessors' narrow interpretation of E.O. 12,333 one step further, President Bill Clinton found the prohibition inapplicable to the targeting of foreign terrorist leaders engaged in attacks on American interests - years before George W. Bush ever authorized the use of targeted killing in the war on terrorism. In response to the al Qaeda bombing of U.S. embassies in Kenya and Tanzania, Clinton issued a presidential finding authorizing intelligence officials to use lethal force in their efforts to disrupt Osama bin Laden's terrorist network. n45 On August 20, 1998, American forces fired more than seventy cruise missiles at al Qaeda terrorist camps in Afghanistan in an effort to kill bin Laden and his lieutenants; later reports indicated that bin Laden had been in one of the targeted camps the day of the attack, but left before the missiles hit. n46

Administration officials derived legal justification for the missile attack from Article 51 of the UN Charter, as well as 1996 domestic antiterrorism legislation that instructed the president to "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." n47 This apparent statutory authorization of force was actually a congressional finding attached to a statute prohibiting assistance to foreign nations that offered aid to terrorist states. n48

[*1040] In keeping with tradition, the Clinton administration refused to admit that bin Laden himself had been singled out, even when later acknowledging that one of the clear objectives of the raid was to kill the al Qaeda leader and as many of his lieutenants as possible. n49 Officials drew a distinction between targeting a specific person like bin Laden, and attacking terrorist organization "infrastructure," to include the human command structure. n50 Secretary of Defense William Cohen admitted that the United States had been "going after" bin Laden and his colleagues - but not bin Laden alone - and concluded, "We weren't quite successful, but we sent a message." n51

That message was two-fold: first, with its unconvincing distinction between human leadership "infrastructure" and individual targets, the Clinton White House would adhere to the type of doublespeak reminiscent of prior administrations. Second, non-state terrorist actors posing a threat to U.S. national security would not be protected by the executive prohibition on assassination, nor by the borders of hostile nations willing to harbor them. n52

4. George W. Bush: the Iraq War and the "War on Terror"

When viewed in light of the military actions approved by Presidents Reagan, George H. W. Bush, and Clinton, the targeting operations authorized by President Bush in recent years do not represent a dramatic departure from the policy embodied in Executive Order 12,333. On the contrary, Bush has closely followed the precedent established by earlier presidents, which allows him to order the targeted killing of an individual in times of war or when confronted by an imminent threat to U.S. national security. Perhaps the only thing to truly distance Bush from his predecessors has been his willingness to admit that targeted killing remains a weapon in the U.S. arsenal, and that it has been used in both the Iraq War and the war against terrorism. Though Bush's public targeting of Saddam Hussein and al Qaeda members has led to renewed questioning as to whether the assassination ban is still in place, or should be, the president's aggressive stance is actually a more accurate [*1041] reflection of U.S. assassination policy for the last twenty-five years than the "fancy words" and doublespeak employed by earlier administrations.

In the spring of 2003, a worldwide television audience looked on as a mission targeting Saddam Hussein marked the beginning of the Iraq War. The sight of anti-aircraft fire streaking above Baghdad in the early hours of March 20 was reminiscent of a similar scene which had unfolded in the same skies twelve years earlier. The fact that the initial volleys in the "Second Gulf War" were aimed expressly at Saddam Hussein was likewise less shocking than it might have been had the Gulf War of 1991 never taken place. In the aftermath of that conflict, U.S. military leaders made clear that Saddam had, in fact, been considered a legitimate command target. The legal precedent for a wartime "decapitation" strike had already been established on the elder Bush's watch. But by beginning the 2003 war with an isolated attack on "selected targets of military importance," as the president put it in his speech that night, n53 Bush made it clear to the world in a way his father never had that the cross-hairs were fixed on Hussein. Bush later erased any ambiguity which might have lingered as to the identity of this "target of opportunity" n54 when, in an interview with Bob Woodward, he personally detailed the decision-making process behind targeting Saddam. n55

Aside from the president's break from tradition in the realm of public relations, the strikes which openly targeted Hussein over the course of the war were not particularly novel, and raised only the familiar assassination debates argued under earlier administrations. The targeting of terrorist leaders and operatives around the world, on the other hand, has been more controversial. Drawing on two classified legal memoranda, the first written for Clinton in 1998 and the second since the September 11 attacks, the Bush administration concluded early on in the war on terrorism that the president is lawfully authorized to single [*1042] out terrorists for death, n56 if capture is impractical and civilian casualties can be minimized. n57

Adding to Clinton's approval of lethal force against al Qaeda "infrastructure," a 2001 Bush intelligence finding broadened the potential target list beyond bin Laden and his immediate circle of operational planners; included were individuals operating outside the boundaries of the military conflict then being waged in Afghanistan. n58 More recently, in 2002, the administration prepared a "high-value target list" of two dozen terrorist leaders that the CIA is authorized to hunt down and kill, without seeking further approval each time the agency is going to stage an operation. n59 Though the president has conferred a wider authority to capture or kill al Qaeda operatives, and thus has not limited targeting to those found on the list, intelligence officials have said that the senior leaders on the "high-value" list are the agency's primary focus. n60

In November 2002, a CIA-piloted Predator drone in Yemen killed one al Qaeda leader believed to have been on the list, Qaed Salim Sinan al-Harethi, along with five other suspected al Qaeda operatives traveling in his car. n61 As the first known use of force against al Qaeda outside Afghanistan, the Predator Hellfire missile attack was viewed as a move "away from the law enforcement-based tactics of arrests and detentions" that the Bush administration had previously employed against terrorist suspects beyond the Afghan theater of operations. n62 This stealthy application of lethal force beyond the boundaries of recognized armed conflict, in particular, has drawn heated criticism to the Bush administration by those who view such killings as extra-judicial executions prohibited by law. n63

As a model of the president's aggressive targeting policy put into practice, the Yemeni Predator strike demonstrates the degree to which [*1043] Bush has followed presidential precedent. Not surprisingly, the closest parallel can be drawn to the policy instituted by President Clinton when responding to al Qaeda attacks in 1998. Like the stance adopted by Clinton, the Bush administration has consistently taken the position that E.O. 12,333 does not inhibit the nation's ability to act in self-defense against terrorists, n64 while justifying attacks like that in Yemen as part of ongoing military operations initiated pursuant to Article 51. n65

Like the 1998 missile strikes into Afghanistan, furthermore, the targeting operations authorized by Bush are designed to cross sovereign boundaries to strike at terrorists operating in foreign states either unwilling or unable to assist in the United States-led antiterrorism effort. And, although Bush's express approval is not required for each attack, the authorization for targeted killing comes directly - and publicly - from the White House. As with Reagan in 1986 and Clinton in 1998, Bush is ultimately accountable for the targeting of terrorist threats during his presidency. n66 In refusing to embrace the doublespeak of prior administrations, in fact, Bush has accepted responsibility for such targeting to a degree that his predecessors never did. Plausible deniability is not likely under the Bush system.

Although a logical outgrowth of earlier targeting policies, Bush's targeting of terrorists does present new legal challenges, insofar as it derives its legitimacy from the war on terror and what might be viewed as an indefinitely protracted Article 51 self-defensive action. Though framed as preemptive attacks intended to prevent further threats to U.S. national security, the Reagan and Clinton airstrikes were both isolated applications of force ordered, at least in part, as retaliation for attacks traced back to Qadhafi and bin Laden. The war on terrorism being waged by the Bush administration similarly draws its justification from the attacks of September 11, and the need to eradicate the imminent threat still posed by terrorist groups like al Qaeda.

In contrast to the measures adopted by Reagan and Clinton, however, Bush's authorization of selective lethal force does not seem to have any geographic or temporal limitations. "We're in a new kind of war," Secretary of State Condoleeza Rice has stated, "and we've made very [*1044] clear that it is important that this new kind of war be fought on different battlefields." n67 What is not so clear is when this new war will end, or to what degree it justifies the use of military force in parts of the world which are not internationally recognized theaters of armed conflict. Accordingly, critics of the Bush assassination policy have suggested that it permits the targeting of suspected al Qaeda operatives "anywhere in the world at anytime." n68 While this Note is not intended to fully define the nature or limits of the war on terror, some examination of the domestic and international legal justifications for the war itself is necessary for a fuller understanding of its targeted killing element.

II. Legal Justifications for Targeted Killing in the War on Terror

As demonstrated by the foregoing discussion of twenty-five years of presidential practice under the U.S. assassination ban, the legal analysis of targeted killing does not end with an examination of Executive Order 12,333. Indeed, given the limited scope attributed to the ban since its inception, the process behind authorizing a targeted killing in all likelihood does not begin with E.O. 12,333, either. The inapplicability of the prohibition to the types of targeting ordered by the last four commanders in chief, after all, does not establish affirmative legal authority for such operations. n69 Instead, presidents Reagan through Bush have relied upon other domestic and international legal authorities to justify their decision to target certain individuals. This Part examines those authorities as applied to both the fight against terrorism and, more specifically, the targeting killing operations ordered by President Bush.

A. Domestic Law: Executive and Congressional Authorities

The U.S. campaign to capture or destroy Osama bin Laden and his al Qaeda network is governed domestically by two principal authorities: the U.S. Constitution and the 2001 joint resolution of Congress [*1045] authorizing the use of force to combat terrorism. n70 Article II of the Constitution, which confers upon the president the powers of commander in chief and executor of the nation's laws, n71 has traditionally been viewed as the primary basis for the president's national security authority. Both Reagan and Clinton successfully argued that the inherent authority to use lethal force embodied in Article II allowed them to launch airstrikes against Qadhafi and bin Laden, even in the absence of a declaration of war. n72 The Bush administration has, likewise, laid the president's targeted killing directives on this constitutional foundation. n73

In addition to the executive powers granted by Article II of the Constitution, the 2001 Authorization for Use of Military Force provides sweeping congressional support for the war on terrorism. As a preliminary matter, it is worth noting that the Preamble to the Resolution recognizes that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." n74 Enacted a few days after the September 11 attacks, the Resolution provides:

That the president is authorized 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. n75

Contrary to the title, the Authorization for Use of Military Force approves the use of "all necessary and appropriate force," and not military force alone. n76 Although predicated upon involvement in the attacks of September 11 - thus excluding from its reach terrorists who were not involved, but nonetheless pose a threat to U.S. national [*1046] security - the target list is decidedly broad. n77 All "nations, organizations, or persons" who participated in the terrorist strike, seemingly to any degree, are permissible targets of American force.

By expressly authorizing the use of necessary and appropriate force against "persons," the Resolution places individual terrorists squarely within American cross-hairs. The separate mention of "organizations" and "persons" strongly suggests that Congress was making a purposeful distinction between infrastructure and human targets. While there is little doubt that Osama bin Laden falls within the reach of the Authorization, it is not limited to leadership targets. Anyone is fair game, once the appropriate determination of September 11 involvement has been made.

As William Banks and Peter Raven-Hansen conclude, "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: Congress said, go do it." n78 For all the attention given to Bush's targeting orders, the decision to strike at individual terrorists, as well as the authority to carry out such attacks, did not come from the president alone.

B. International Law: Jus Ad Bellum and the War on Terror

Under international law, the transnational use of force must comply with both jus ad bellum and jus in bello - the laws which govern, respectively, a state's resort to force, and the means with which that force is applied. n79 As the predominant international legal paradigm for jus ad bellum, the United Nations Charter prohibits the aggressive use of force, n80 subject to two exceptions: when authorized by the Security Council n81 or when necessitated by self-defense. n82 The self-defense exception, provided in Article 51, was invoked by the United States in [*1047] response to the attacks of September 11, n83 and serves as the principal international legal foundation for the U.S. war on terrorism.

Article 51 reads, in pertinent part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." n84 Although it may be argued that the al Qaeda attacks of September 11 did not constitute an "armed attack" of the sort envisioned by the drafters of the UN Charter, the United States has not been alone in characterizing the attacks as sufficiently grave to warrant self-defensive action. On September 12, 2001, the UN Security Council passed a resolution which, "recognizing the inherent right of individual or collective self-defence in accordance with the Charter," condemned the attacks and expressed the Security Council's "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism...." n85 The Security Council reaffirmed the inherent right of self-defense in another resolution passed sixteen days later. n86

Once Article 51 has vested the United States with the right to self-defense, the United States retains that right unless and until the Security Council takes "measures necessary to maintain international peace and security." n87 As Norman Printer notes, "action by the Security Council is not a condition precedent to the use of self-help. Rather, one may exercise self-help until the Council takes action." n88 The Security Council's repeated reaffirmation of the inherent right to self-defense is [*1048] best interpreted as implicit recognition of the United States' right to self-help in response to September 11. n89 The Council, furthermore, did not denounce the use of force after being notified by the United States that it had initiated action pursuant to its right of self-defense. n90 The Security Council's failure to take any "measures" to terminate the United States' Article 51 right, when coupled with its repeated resolutions on the right to self-defense, make clear that the U.S. response to the attacks of September 11 was consistent with the use of force paradigm established by the UN Charter. n91

While the UN Charter remains the principal international source of jus ad bellum, the resort to forceful measures in self-defense is further governed by customary international law under the so-called "Caroline doctrine." The indirect result of an 1837 dispute over the British destruction of a U.S. steamship which had transported sympathetic American citizens to aid Canadian secessionists, the Caroline doctrine is drawn from a letter sent by U.S. Secretary of State Daniel Webster to the British minister Henry Fox. n92 In response to British claims that their attack was legally justified by self-defense, Webster wrote that the right to self-defense could be recognized only when the "necessity of self-defence [is] instant, overwhelming, leaving no choice of means, and no moment for deliberation." n93 The customary standard for lawful self-defense under the Caroline doctrine has come to require four conditions: an imminent threat, a necessary action, the exhaustion of peaceful means, and a proportionate response. n94

The United States' resort to force to combat terrorism meets all of these requirements. As the events of September 11 made all too clear, the United States faces an established threat to national security. Terrorist attacks on American soil are not merely imminent; they have already materialized, and promise to do so again if preventive action is not taken. Any argument that a specific attack, rather than a general menace, must be imminent to justify the use of force, moreover, fails to adequately address two considerations. First, the United States has already been attacked and is responding accordingly. Second, the [*1049] danger of mass destruction and death contemplated by today's terrorist is too great for the immediacy of a particular attack to remain a prerequisite to preventive, defensive action. It is worth remembering that the Caroline doctrine itself arose from a case of preemptive self-defense, where the British sought to eliminate a perceived threat before it could be brought to bear.

The nature of the danger confronting the United States today, moreover, links the Caroline requirements of necessity and exhaustion of peaceful means. The dismantlement of al Qaeda and other terrorist networks around the world is indispensable to securing the safety of the American people. As President Bush has often said, "We are staying on the offensive, striking terrorists abroad so we do not have to face them here at home." n95 To the extent that these clandestine organizations are non-state actors, with no formal legal representatives and no demonstrated desire to negotiate any kind of peace, the use of force is a necessary - indeed, the only viable - response to the threat they pose. The United States, nonetheless, pursued the one diplomatic avenue available to it before engaging this enemy with force. American forces did not launch the military offensive in Afghanistan, and the larger war on terrorism that it signaled, until efforts to negotiate with the Taliban regime to turn over the al Qaeda leaders responsible for the September 11 attacks had been effectively exhausted. n96

Finally, the U.S. effort to eradicate the terrorist threat has been a proportionate response to both the September 11 attacks and the continuing danger that al Qaeda and other networks pose. Military force has been applied only against the terrorists and their infrastructure - and, in the case of the Taliban (and, arguably, Saddam Hussein's Iraqi regime), the state powers that harbored and supported them. While the war on terrorism is, without question, a global effort which has surpassed the boundaries of its initial battleground in Afghanistan, the principle of proportionality does not

dictate that forceful measures stop short of eliminating the threat. Proportionality, as Norman Printer writes, "is not a mathematical calculation requiring exact symmetry." n97 The continued use of force against terrorist networks, which still pose a very real and serious threat to U.S. interests around the world, meets the final Caroline requirement of proportionality.

[*1050] As a final note in this analysis of jus ad bellum, the United States itself recognizes three forms of self-defense: (1) self-defense against an actual use of force or a hostile act; (2) preemptive self-defense against an imminent use of force; and (3) self-defense against a continuing threat. n98 The foregoing discussion on the UN Charter and Caroline doctrine framework suggests that the war on terrorism is best viewed as encompassing all three forms of self-defense. The United States' resort to force was a response not only to the attacks of September 11, but also to the imminent danger of further attacks presented by a continuing al Qaeda threat. The terrorists chose to convey their message to America and the world through indiscriminate violence on a horrific scale. The United States' answer has been unquestionably and devastatingly forceful, yet guided by the measured aim and proportionality of a legally justified self-defensive measure.

C. International Law: Jus in Bello and Targeted Killing

While the UN Charter establishes a nation's right to self-defense, it does not provide legal guidelines on the "modalities of self-defense" n99 - that is, the methods and means with which self-defensive force is applied. By requiring necessity and proportionality, the Caroline doctrine incorporates some jus in bello components into its customary model of jus ad bellum. Jus in bello, nonetheless, represents a distinct component of international law, and requires a separate legal analysis with regard to the war on terror - more specifically, to the means of targeted killing authorized by President Bush as part of that war. This Section necessarily treats the war against terrorism as a true military conflict governed by the laws of war; the question of whether this is the appropriate paradigm for the fight against terrorism will be addressed later.

Jus in bello forms the basis of the law of armed conflict, a body of international customary and conventional law that governs the use of force during military conflict. n100 The fundamental tenet of jus in bello is that of limited war: "The purpose of armed conflict is to defeat the adverse party. The law of armed conflict only permits such actions as are imperative for this purpose and forbids acts which go beyond this and cause injury to persons or damage to property not essential to [*1051] achieving this end." n101 Accordingly, the four principal requirements of jus in bello are military necessity, proportionality, discrimination, n102 and avoidance of unnecessary suffering. n103

Before applying the basic jus in bello requirements to targeted killing within the specific context of the war on terror, it is important to recognize that the targeting of a particular individual has long been an undisputed and legal element of military action in times of war:

Combatants are liable to attack at any time or place, regardless of their activity when attacked... Nor does the prohibition on assassination limit means that otherwise would be lawful; no distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush, land mine or boobytrap, a single shot by a sniper, a commando attack, or other, similar means. All are lawful means for attacking the enemy and the choice of one vis-a-vis another has no bearing on the legality of the attack. n104

In fact, the only prohibitions under the law of armed conflict which can be construed as applicable to targeted killing are found in the Hague Convention IV of 1907 and Additional Protocol I to the Geneva Conventions of 1949. n105 Article 23(b) of the Annex to the Hague Convention provides that "it is especially forbidden...to kill or wound treacherously individuals belonging to the hostile nation or army." n106 Although the term "treacherously" is not defined, it has not generally been interpreted to include the use of stealth or surprise. n107

[*1052] Article 37 of Additional Protocol I, written forty-two years later, offers its own definition of treachery in its prohibition of killing "by resort to perfidy." n108 Perfidy is defined under the Protocol as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence...." n109 Once again, this provision does not prohibit the targeting of an individual combatant, but instead proscribes the use of unlawfully deceptive means - for example, faking noncombatant status or a willingness to surrender - to do so. Accordingly, Protocol I, like the Hague Convention IV, does not alter the basic rule that enemy combatants are legitimate targets at all times; nor does it preclude the use of stealth or other tactics commonly associated with targeted killing.

Targeted killing, nonetheless, may constitute an unlawful use of force if it does not comply with the requirements of necessity, proportionality, discrimination, and avoidance of unnecessary suffering. Under these standards, however, targeted killing actually seems a more "lawful" method of subduing terrorist enemies than other forceful measures. To begin, the condition of necessity within the context of jus in bello "requires that force may only be used against persons or objects contributing to an opponent's war effort, whose total or partial destruction is expected to contribute to the successful conclusion of hostilities." n110 In the war on terror, each terrorist death - particularly that of leaders like bin Laden - undoubtedly makes it more difficult for the enemy to coordinate and carry out hostilities against U.S. forces.

Furthermore, each death makes it more difficult for the terrorists to continue their efforts to destroy civilian targets. Consequently, the killing of any terrorist posing a threat to U.S. soldiers or civilians, whether by individual targeting or not, necessarily contributes to the successful conclusion of hostilities. Attacking specific leadership targets to wipe out the terrorist command structure, moreover, has the potential for hastening that conclusion. Given the ongoing threat to civilian populations that the terrorists pose, the faster that end is reached, the better.

[*1053] The principle of discrimination, which demands that parties to a conflict direct their operations against only combatants and military objectives, goes hand-in-hand with military necessity. By its very nature, the targeting of specific terrorists singles out those individuals helping to further the enemy's efforts. In this setting, the proper identification of the person within the cross-hairs is a prerequisite to the application of force; indiscriminate aggression is never an element of targeted killing. Consequently, this calculated, precise use of lethal force readily complies with the jus in bello obligation of discrimination.

The third requirement, proportionality, dictates that force be used in a way which minimizes collateral damage to civilian persons and property; n111 the anticipated loss of life and damage to property incidental to an attack must not be excessive in relation to the direct military advantage expected to be gained. Related to the requirement of proportionality is the prevention of unnecessary suffering; weapons and methods of warfare which cause unneeded losses or excessive suffering are prohibited. Once again, targeted killing satisfies these jus in bello constraints - and does so more than other, more conventional means. Particularly in the context of the war on terror, where combatants often embed themselves in civilian populations, targeted killing is the most efficient and, indeed, humane way to eliminate the danger they pose. Collateral damage to life and property is minimized, while the concentration of force on an individual target - whether by Hellfire missile or a single bullet - increases the likelihood that his own suffering will not be unnecessarily great or prolonged.

The foregoing examination of the basic requirements of the law of armed conflict reveals, in the words of one commentator, that "targeted killing is the most natural application of the principles of jus in bello in wars against terror." n112 The practice of assassination, even when justified by the exigencies and laws of war, is not often viewed as a morally defensible use of force. And yet, the comparatively widespread acceptance of the higher combatant deaths and collateral damage associated with conventional conflict is more at odds with the basic jus in bello precept of limited war.

The moral legitimacy of targeted killing becomes even clearer when compared to the alternative means of fighting terror - that is, the massive invasion of the community that shelters and supports the terrorists in an attempt to catch or kill the terrorists and destroy their [*1054] infrastructure... Hence, targeted killing is the preferable method not only because, on a utilitarian calculation, it saves lives - a very weighty moral consideration - but also because it is more commensurate with a fundamental condition of justified self-defense, namely, that those killed are responsible for the threat posed. n113

Targeted killing preserves not only the lives of civilians caught up in the conflict by combatants who often refuse to fight in the open, but also those of the troops who must engage these terrorists. n114 By directing the use of force at only those individuals who threaten U.S. soldiers and civilians, targeted killing more efficiently destroys the terrorists' ability to wage war and inflict terror, while ensuring that collateral damage is kept to a minimum. This is the very essence of limited war as prescribed by jus in bello.

IV. Justifications for Targeted Killing Outside Armed Conflict

The Article 51 characterization of the war on terror as an appropriate self-defensive measure, as well as the jus in bello justifications for targeted killing, seem readily applicable to the military conflict initiated in Afghanistan in the fall of 2001. Contrary to the assertions of the Bush administration, however, it is not so clear that the fight being brought today to terrorists "on different battlefields" n115 around the world is a war in the conventional, and legal, sense of the word. Numerous commentators have suggested that "when a nation employs Article 51 to justify a use of force in its own de-

fense, or the defense of another state, the laws of war control as they would in any formally declared [*1055] conflict." n116 Whether the law of armed conflict continues to govern more than four years after American troops set foot in Afghanistan, when the United States has targeted terrorists in countries where no armed conflict exists, is at the very least subject to debate. If jus in bello does not apply to this extended conflict, an alternative legal standard is needed to ensure that targeting killing does not amount to extra-judicial execution.

A. Is It War? Converging Law Enforcement, Intelligence, and Military Paradigms

As a threshold matter, it is not clear whether terrorists like those in the al Qaeda network are more accurately characterized as enemy combatants or criminal suspects. The nature of the threat that they pose - to both military forces and civilian populations - blurs the combatant/criminal distinction, as does the multi-faceted character of the U.S. response to this danger. The manner in which the United States has handled the issue of targeted killing, in particular, suggests that administration officials recognize that the military paradigm - and, consequently, the law of armed conflict - may not apply to all phases of the war on terror.

Bush's targeted killing directive defines terrorist operatives as enemy combatants, thus rendering them legitimate targets under the laws of war for lethal force at any place and time. n117 The very existence of a special presidential finding authorizing the covert killing of al Qaeda members outside any recognized theater of military operations, however, indicates that this is not a conventional war effort. The scope of the directive, which includes both "high-value" al Qaeda leaders and lower-level operatives, n118 is itself inconsistent with the notion that these killings are governed by the laws of war. If jus in bello actually applied to the targeting of all al Qaeda members, presidential authorization to engage in such targeting would be superfluous.

[*1056] The fact that military and intelligence officials together consider targeted killing as a last resort, when terrorist capture is too dangerous or logistically impossible, n119 further indicates that the conflict has not been conducted as a purely military endeavor. Counterterrorism officials, who recognize that a terrorist's intelligence value may far exceed his worth as a military target, prefer to capture al Qaeda leaders for interrogation. n120 Operations to capture, rather than kill, the enemy reflect the truly multi-dimensional nature of the war, linking the CIA, FBI, military, and foreign governments in a collective effort to bring terrorists to justice. n121

The dual nature of the terrorist enemy as combatant and criminal, and the different aims of the fight against it - making arrests, preventing future attacks, and destroying network infrastructure - demand, and have received, a flexible response from U.S. law enforcement, intelligence and military officials. Although treating the global war on terror as one large armed conflict is convenient for targeting purposes, the manner in which it has actually been conducted undermines the notion that the fight is a military endeavor governed solely by the laws of war. This fact alone, however, does not render the practice of targeted killing illegal.

Armed conflict, after all, has unquestionably been a major component of the war on terror. Few will dispute that Afghanistan and Iraq - assuming, for these purposes, that the latter is an extension of the fight against terrorism - both constituted recognized theaters of armed conflict. Accordingly, jus in bello applied and individual targeting would remain lawful in those regions until hostilities ceased. Further, even where U.S. self-defensive action does not amount to armed conflict, legal justifications remain for the targeted killing of terrorists. Such circumstances, however, seem to demand a different - and more exacting - standard than that provided by the laws of war.

B. Procedural Remedies to the "Extra-Judicial Killing" Problem

The principal criticism of targeted killing that takes place beyond the recognized boundaries of armed conflict is that it represents an arbitrary deprivation of life without due process of law. In response to the 2002 Yemeni Predator strike discussed earlier, n122 Amnesty International [*1057] issued a press release condemning attacks of this kind and urging full clarification of the incident: "If this was the deliberate killing of suspects in lieu of arrest, in circumstances in which they did not pose an immediate threat, the killings would be extra-judicial executions in violation of international human rights law." n123 The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions similarly questioned the attack, demanding that the U.S. and Yemeni governments justify their conduct. n124

The line of reasoning put forth by Amnesty International and the UN Special Rapporteur places the war against terrorism in a strictly law enforcement framework: terrorists are suspects, to be arrested and tried for their crimes. The Amnesty press release, nonetheless, suggests that, even under this view, circumstances in which terrorists pose an "immediate threat" may validate the use of lethal force. The "ticking bomb" scenario has been accepted by others as a viable justification for targeted killing, outside of armed conflict, when the danger a terrorist presents is immediate and

cannot be stopped by other means. n125 Such an imminent threat prerequisite, for example, is a central element in guidelines for targeted killing recently proposed by Philip Heymann and Juliette Kayyem in their Long-Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism. n126

Under the standard developed by Heymann and Kayyem, any authorization of targeted killing outside a zone of active combat must be "justified as necessary to prevent a greater, reasonably imminent harm or in defense against a reasonably imminent threat to the life of one or more persons." n127 Necessity requires that there be no reasonable alternative, like arrest or capture - that targeting killing is the last resort. n128 "Reasonably imminent" means that there must be "a real risk [*1058] that any delay in the hope of developing an alternative would result in a significantly increased risk of the lethal attack." n129 Targeted killing, furthermore, is only justifiable as a method for preventing future attacks, and not a means of retribution for past events. n130 Finally, Heymann and Kayyem apply the familiar jus in bello requirements of proportionality and discrimination, mandating that the time, place and means of an attack avoid harm to innocent persons to the extent possible. n131

To some degree, these guidelines serve only to put in writing what has already been put into practice. Beginning with the last requirement, the paradigmatic Yemeni Predator strike was launched on a single car riding in the desert; U.S. officials had been seeking, and finally found, an opportunity to attack the al Qaeda leader al-Harethi in a setting that would minimize collateral casualties. n132 Five other men were killed, including one suspected al Qaeda operative with U.S. citizenship. n133 In comparison, a Predator strike one year earlier against Taliban leader Mullah Muhammad Omar, which was presumably governed by the law of armed conflict, was aborted because of the possibility that others in a crowded house might be killed. n134

The Yemen attack, meanwhile, was carried out to prevent future terrorist attacks. While al-Harethi had been sought on charges of involvement in the attack on the USS Cole in 2000 and the French oil tanker Limburg in 2002, he and his group were also suspected of planning new attacks against oil and other economic installations. n135 Though undoubtedly justified in part by prior acts, the Predator strike was not retributive in nature. Finally, there were no reasonable alternatives to the operation. Previous efforts by the Yemeni government to detain al-Harethi and his cohorts - including a promise not to harm them if they came forward voluntarily to stand trial n136 - had resulted only in the deaths of Yemeni police officers and soldiers. n137

Accordingly, the Yemen strike meets the requirements of necessity, proportionality and discrimination common to both the military paradigm and the Heymann-Kayyem model for operations conducted [*1059] beyond the boundaries of armed conflict. It is not immediately evident, however, that the Predator attack satisfies the imminent danger standard included in the latter. The threat posed by six suspected terrorists driving through the desert does not seem particularly grave or immediate. What does seem clear is that al-Harethi - and quite possibly all of those with him in the car - was linked to previous terrorist attacks, was suspected of planning future terrorist attacks, and had resisted numerous arrest efforts with lethal force.

If the Predator strike had taken place in Afghanistan or any other recognized theater of armed conflict, where a classification of al Qaeda operatives as enemy combatants is arguably more appropriate, it would have met the legal restraints imposed by jus in bello. Instead, it has been characterized by many as illegal because of the location of the terrorists targeted, and the apparent lack of immediate danger that they posed. To some degree, this distinction between the strike in Yemen and similar terrorist targeting operations in Afghanistan is an artificial one - and certainly a convenient one for terrorists who plot the mass-murder of innocent civilians from a non-designated zone of armed conflict. Terrorists preparing attacks from Yemen who respond with lethal force to any efforts to detain them are not really distinguishable, by any practical measure, from terrorists who plan attacks from Afghanistan and take up arms as "enemy combatants" when invading U.S. forces try to stop them.

Nonetheless, the indeterminate geographic and temporal bounds of the war on terror demand that some distinction be drawn between the engagement of terrorists within and without a zone of armed conflict. To avoid the dangerous legal precedent of targeting individuals for killing at any time, anywhere in the world, under the all-encompassing shroud of enemy combatant status, a higher standard must govern where it is not clear that the laws of war should. The "immediate danger" standard offered by Amnesty International and others, however, allows terrorists like al-Harethi in Yemen to continue plotting and preparing terrorist attacks, so long as local or allied forces are unable to detain them. Given the gravity of the danger posed by these terrorists, who want to murder civilians in mass numbers and have reportedly sought to acquire weapons of mass destruction to do so, waiting until they are about to carry out their attacks is not an appropriate method of confronting the threat.

A closer reading of the Heymann-Kayyem standard for targeted killing indicates that the solution to this problem may lie in the [*1060] distinction between imminent and immediate danger. In addition to the definition provided above, the proposed guidelines state that "reasonably imminent" also means that "the development of an alternative (capture, arrest, etc.) would not eliminate a real likelihood of imminently threatened, lethal attack or would be inordinately dangerous to U.S. or allied personnel." n138 This definition of imminence subsumes the element of necessity; targeted killing is an acceptable measure where any alternative methods of preventing terrorist attacks prove disproportionately dangerous.

Such a broad interpretation of imminence recognizes that a threat need not be immediate to demand urgent action. Where any measure short of killing is not only exceedingly dangerous to those carrying it out, but also logistically impossible or ultimately unsuccessful - as the Yemeni arrest efforts repeatedly were - the threat posed by terrorists actively planning and preparing attacks may be considered "imminent" for self-defense purposes. Where no measure short of lethal force stands between the terrorists and their intended targets, targeted killing is legally justified.

Accordingly, the standard for authorization of targeted killing outside of armed conflict should require several factual determinations, best made under a clear and convincing standard of proof. n139 First, terrorist targets must pose a real threat of future harm, meaning that they must demonstrate an intent to carry out a terrorist attack, and also take some significant steps toward achieving that goal. Outside of armed conflict, where they remain viable combatant targets, al Qaeda operatives should not be killed for reasons of "guilt by membership" or thought-crime alone.

Second, any alternative measure capable of stemming the terrorist threat must be explored and, if possible, exhausted. Targeted killing may be considered necessary only when methods like arrest prove logistically impossible - for example, when the terrorists are hiding in a state hostile to or uncooperative with the United States - disproportionately dangerous to U.S. and allied forces, or unsuccessful. Together, the real threat of future harm and necessity prongs constitute the requisite determination of "reasonably imminent danger."

[*1061] Finally, authorization for targeted killing must require that the means employed are in accordance with the basic jus in bello precepts of proportionality and discrimination. Any legal justification for the selective use of lethal force would be seriously undermined if targeting operations resulted in high civilian casualties or excessive collateral damage - particularly under the imminent, as opposed to immediate, danger standard adopted here. As discussed in Part III, however, the very purpose and nature of targeted killing minimize the likelihood of such unintended consequences.

The proposed imminent danger requirement ensures that suspected terrorists are not arbitrarily deprived of life, meeting - to a degree reasonable in light of the threat posed by terrorism today - the human rights concerns of those like Amnesty International and the UN Special Rapporteur. On a more practical level, the two-pronged "imminence" determination also makes certain that terrorists are detained for arrest and intelligence purposes whenever realistically possible. This furthers the goal of terrorism prevention which prompted and sustains the larger war on terror. Finally, the proportionality and discrimination requirements reinforce the legal, if not moral, legitimacy of targeted killing operations by focusing the use of force only on those proven to be a real, and otherwise unstoppable, threat.

At the decision-making level, moreover, the addition of an imminent danger element to the traditional jus in bello requirements sets a high bar for those responsible for authorization. n140 Much as presidents operating under the Executive Order 12,333 assassination ban have historically provided independent legal justification for targeting operations outside of war, the presence of a requirement above and beyond that of the basic laws of war ensures that targeted killing decisions will not be made unless justified by particular circumstances. Where no recognized armed conflict exists, government officials will not be able to hide behind the indiscriminate classification of all terrorist targets as enemy combatants. The necessity prong of the imminent danger requirement, nonetheless, provides the appropriate flexibility demanded by the Executive in matters of national security. Once a finding has been made that no alternative methods will eliminate a threat, the president's hands are not tied - even in the absence of an "immediate" danger.

As the parallels to E.O. 12,333 suggest, the authorization for targeted killing beyond the bounds of armed conflict should continue to come, [*1062] ultimately, from the president himself. Keeping the president in the decision-making process will maintain the system of accountability instituted by the executive assassination prohibition. Under the existing presidential finding, there is no requirement that President Bush be informed of every targeting operation. n141 While concerns of operational efficiency and timeliness may dictate that actual operations be conducted without his express knowledge, the president's approval should still be required for the initial targeting decision.

This could be achieved through a presidential finding, provided to appropriate committees of Congress, which sets forth the evidence used to reach an imminent threat determination, as well as an explanation of the alternative measures

first used or considered. n142 In the alternative, notification could be given only to select members within these committees, better preserving the secrecy of information when national security demands it. This type of approval process is actually more in line with the presidential finding system already used by President Bush than the enemy combatant classifications also employed by his administration to justify the targeting of individual terrorists.

The targeting decisions demanded by the war on terror are no longer the once-in-an-administration occurrence they were under Reagan, George H. W. Bush, and Clinton. Nonetheless, the imminent danger prerequisite for authorization, as well as the presidential approval process outlined above, would ensure that targeted killing is employed outside of armed conflict only on a limited basis. It is the commander in chief's job to lead, rather than micromanage, the war on terror; if his personal authorization is required for each targeted killing decision, government officials will appropriately view this weapon as an extraordinary, and not commonplace, option. Accordingly, the procedural hurdles put in place by the proposed system should limit the use of targeted killing to those dire circumstances, supported by the necessary factual determinations, which truly demand it.

V. Conclusion

The executive prohibition on assassination was not intended, and has never been interpreted, to limit the powers available to the president in times of war or national self-defense. The targeted killings authorized by President Bush in the war on terror - like those ordered by prior [*1063] presidents acting under the ban - are far removed from the political Cold War plottings condemned by the Church Committee. As part of a legal self-defensive action prompted by the attacks of September 11 and the threat of future terrorist strikes, targeted killing remains a potent, yet strictly controlled, weapon in the United States arsenal.

The use of targeted killing to combat terrorist operatives intent on murdering large numbers of innocent civilians does not jeopardize the legal or moral legitimacy of the struggle against terrorism. It has been said that "it can be no more barbaric to act in self-defense than it is barbaric to engage in war." n143 By its very nature, targeted killing is a more discriminating and humane means of self-defense than other, more conventional measures. The selective application of lethal force against only those individuals posing a threat to U.S. national security maximizes the destruction to terrorist networks, while minimizing the damage inflicted on those who present no such threat.

In order to maintain targeted killing as a viable self-defensive measure, the president must ensure that it is used only when supported by the highest possible degree of legal justification. In the case of armed conflict, the targeted killing of enemy combatants must meet the jus in bello requirements of necessity, discrimination and proportionality. Beyond the boundaries of recognized armed conflict, where much of the war on terrorism is now being waged, a higher standard which builds upon jus in bello principles should govern the use of targeted killing. The Bush administration's classification of all al Qaeda operatives as enemy combatants, while expedient for targeting purposes, oversimplifies the matter and obscures the legitimate legal authority which does exist for such attacks. A standard of imminent danger, tempered by considerations of necessity in the absence of an immediate threat, will lend legal and moral legitimacy to targeted killing operations, without unnecessarily hindering the president's power to order them when the defense of the nation requires it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsTerrorismTerroristic ActsElementsInternational LawDispute ResolutionLaws of WarInternational LawSovereign States & IndividualsHuman RightsTerrorism

FOOTNOTES:

n1. Bob Woodward, CIA Told to Do "Whatever Necessary' to Kill bin Laden; Agency and Military Collaborating at "Unprecedented' Level; Cheney Says War Against Terror "May Never End,' Wash. Post, Oct. 21, 2001, at A1.

n2. Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Alleged Assassination Plots Involving Foreign Leaders, S. Rep. No. 94-465, at 1 (1975) [hereinafter Church Committee Report].

n3. Id. at 4-5.

n4. See id. at 256.

n5. Id. at 255.

n6. Id. at 71, 73, 85-86.

n7. Id. at 256.

n8. Id.

n9. Id. at 71, 256.

n10. Id. at 277-78.

n11. Id. at 261.

n12. Id. at 6.

n13. Id. at 281.

n14. Exec. Order No. 11,905, 3 C.F.R. 90, 101 (1977), reprinted in *50 U.S.C. 401* (1976).

n15. Patricia Zengel, Assassination of the Law of Armed Conflict, *134 Mil. L. Rev. 123, 145 (1991)*, quoted in Tyler J. Harder, Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law, *172 Mil. L. Rev. 1, 16 (2002)*. As Zengel has noted, "the order responded to intense political pressure to 'do something' while maintaining flexibility in interpreting exactly what had been done." The legislative ban would likely "have been far more specific, and, given the political climate at the time, far more restrictive."

n16. See Harder, supra note 15, at 14.

n17. See Exec. Order No. 12,036, 3 C.F.R. 112, 129, reprinted in *50 U.S.C. 401* (Supp. II 1978).

n18. See Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982), reprinted in *50 U.S.C. 401*, (2000). Executive Order 12,333 retains Carter's wording, but includes an additional section extending the ban to indirect participation in assassination activities: "No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order." Id.

n19. See Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982), reprinted in *50 U.S.C. 401* (2000).

n20. Harder, supra note 15, at 14.

n21. Id. at 16.

n22. Exec. Order No. 12,333, 3 C.F.R. 214 (1982), reprinted in *50 U.S.C. 401* (2000).

n23. Jami Melissa Jackson, 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, 675 (1999)* (citing Patricia Zengel, Assassination and the Law of Armed Conflict, *43 Mercer L. Rev. 615, 635 (1992)).*

n24. Jackson, supra note 23, at 675 n.45.

n25. Nathan Canestaro, American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo, *26 B.C. Int'l & Comp. L. Rev. 1, 24 (2003).*

n26. Jackson, supra note 23, at 676 (citing Zengel, supra note 23, at 634).

n27. Even before the terrorist attacks of September 11, Congressman Bob Barr of Georgia introduced the Terrorist Elimination Act of 2001, which found 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 proposed bill provided that the assassination provisions of Executive Order 12,333 "shall have no further force or effect." Terrorist Elimination Act of 2001, H.R. 19, 107th Cong. 2-3 (2001).

n28. Church Committee Report, supra note 2, at 289-90 (App. A).

n29. Id. at 258.

n30. Id. at 1.

n31. Canestaro, supra note 25, at 3.

n32. William C. Banks and Peter Raven-Hansen, Targeted Killing and Assassination: The U.S. Legal Framework, *37 U. Rich. L. Rev. 667, 746-47 (2003):*

(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 approval by the President... This result merely reflects the utility of the orders as management controls....) (emphasis added).

n33. Canestaro, supra note 25, at 24.

n34. Harder, supra note 15, at 21.

n35. Canestaro, supra note 25, at 25. See Part III for a discussion of Article 51 justifications for targeted killing.

n36. Daniel Schorr, Stop Winking at "the Ban," The Christian Science Monitor, Sept. 21, 2001, available at http://www.csmonitor.com/2001/0921/p11s1-cods.html (last visited Nov. 1, 2005).

n37. Canestaro, supra note 25, at 25.

n38. Id. at 27.

n39. Schorr, supra note 36.

n40. See Part III for a full discussion of targeted killing under the laws of armed conflict.

n41. Canestaro, supra note 25, at 27.

n42. Id.

n43. Transcript of Interview with Charles Horner, Commander, U.S. Ninth Air Force, with BBC/Frontline (Jan. 9, 1996), http://www.pbs.org/wgbh/pages/frontline/gulf/oral/horner/2.html (last visited Nov. 1, 2005).

n44. Id.

n45. James Risen, Bin Laden Was Target of Afghan Raid, U.S. Confirms, N.Y. Times, Nov. 14, 1998, at A3.

n46. Id. The missile attacks also struck a suspected chemical weapons plant in Sudan. See Barton Gellman & Dana Priest, U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan, Wash. Post, Aug. 21, 1998, at A1.

n47. Gellman & Priest, supra note 46.

n48. The Antiterrorism and Effective Death Penalty Act of 1996, 22 *U.S.C. 2377* (2000).

n49. Risen, supra note 45.

n50. Id.

n51. Id.

n52. See Gellman & Priest, supra note 46. Similarly, it appeared that the president would be willing to violate the borders of neighboring nations in order to strike at the terrorists. Defense officials conceded that, though the missiles into Afghanistan were launched from the Arabian Sea and the Sudan-bound missiles from the Red Sea, they did not ask overflight permission from Pakistan, Egypt, or Eritrea. Officials did not say which routes the missiles had actually taken. Id.

n53. Threats and Responses: Bush's Speech on the Start of War, N.Y. Times, Mar. 20, 2003, at A20.

n54. Barton Gellman & Dana Priest, CIA Had Fix on Hussein; Intelligence Revealed "Target of Opportunity," Wash. Post, Mar. 20, 2003, at A1.

n55. Bob Woodward, U.S. Aimed for Hussein as War Began; CIA Informants Told of His Suspected Whereabouts, Wash. Post, Apr. 22, 2004, at A1.

n56. Barton Gellman, CIA Weights "Targeted Killing' Missions; Administration Believes Restraints Do Not Bar Singling Out Individual Terrorists, Wash. Post, Oct. 28, 2001, at A1.

n57. James Risen & David Johnston, Threats and Responses: Hunt for al Qaeda; Bush Has Widened Authority of C.I.A. to Kill Terrorists, N.Y. Times, Dec. 15, 2002, at A1.

n58. Gellman, supra note 56.

n59. Risen & Johnston, supra note 57.

n60. Id.

n61. Id.

n62. David Johnston & David E. Sanger, Threats and Responses: Hunt for Suspects; Fatal Strike in Yemen Was Based on Rules Set Out by Bush, N.Y. Times, Nov. 6, 2002, at A16.

n63. See, e.g., News Release, Amnesty Int'l, Yemen/USA: Government Must Not Sanction Extra-judicial Executions (Nov. 11, 2002), available at http://www.amnesty.org. uk/deliver/document/14189 (last visited Nov. 1, 2005) [hereinafter Amnesty News Release].

n64. Gellman, supra note 56.

n65. See Response of the Government of the United States of America, prepared by the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States to the United Nations, UN Doc. E/CN.4/2003/G/80 (2003) [hereinafter Response of the United States].

n66. "The important thing is that the accountability chain is clear," said former deputy director of central intelligence, John C. Gannon. "You've got to have the political levels behind you so the intelligence officers are not left hanging." Gellman, supra note 56.

n67. Mary Ellen O'Connell, War Crimes Research Symposium: "The Role of Justice in Building Peace': To Kill or Capture Suspects in the Global War on Terror, *35 Case W. Res. J. Int'l L. 325, 326 (2003)* (citing Fox News Sunday (Fox News television broadcast, Nov. 10, 2002)).

n68. Id. Professor O'Connell notes that the Deputy General Counsel of the Department of Defense for International Affairs stated that the United States can target "Al Qaeda and other international terrorists around the world and those who support such terrorists without warning." Id.

n69. As William Banks and Peter Raven-Hansen note, "Legal authority is what differentiates murder from lawful policy." Banks & Raven-Hansen, supra note 32, at 668.

n70. See, e.g., Frederick P. Hitz, Unleashing the Rogue Elephant: September 11 and Letting the CIA Be the CIA, *25 Harv. J.L. & Pub. Pol'y 765, 775 (2002).*

n71. U.S. Const. art. II, 2-3.

n72. See Hitz, supra note 70, at 774.

n73. "I can assure you that no constitutional questions are raised here," Condoleeza Rice, Bush's National Security Advisor, reported shortly after the 2002 Predator strike in Yemen. "[The President is] well within the balance of accepted practice and the letter of his constitutional authority." John J. Lumpkin, Administration Says That Bush Has, in Effect: A License to Kill; Anyone Designated by the President as an Enemy Combatant, Including U.S. Citizens, Can Be Killed Outright, Officials Argue, St. Louis Post-Dispatch, Dec. 4, 2002, at A12.

n74. Authorization for Use of Military Force, Pub. L. No. 107-40, *115 Stat. 224.*

n75. Id. 2(a).

n76. See Banks & Raven-Hansen, supra note 32, at 736.

n77. See id. at 736-37.

n78. Id. (emphasis added).

n79. See, e.g., Norman G. Printer, Jr., The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen, *8 UCLA J. Int'l L. & Foreign Aff. 331, 333 (2003).*

n80. Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force...." U.N. Charter art. 2, para. 4.

n81. Id. art. 42.

n82. Id. art. 51.

n83. In an October 7, 2001, Letter from the United States to the United Nations, U.S. Ambassador to the UN John Negroponte stated:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.

Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. SCOR, U.N. Doc. S/2001/946 [hereinafter Letter Dated 7 October 2001]. As detailed in Part II, Article 51 was also invoked by Reagan in the Libya bombing, and by Clinton in the Afghanistan cruise missile strikes.

n84. U.N. Charter art. 51.

n85. U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001), available at http://www.un.org/Docs/scres/2001/sc2001.htm (last visited Nov. 1, 2005).

n86. U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001), available at http://www.un.org/Docs/scres/2001/sc2001.htm (last visited Nov. 1, 2005).

n87. U.N. Charter art. 51.

n88. Printer, supra note 79, at 354.

n89. Id.

n90. See Letter Dated 7 October 2001, supra note 83.

n91. See Printer, supra note 79, at 354-55.

n92. See Brenda L. Godfrey, Authorization to Kill Terrorist Leaders and Those Who Harbor Them: An International Analysis of Defensive Assassination, *4 San Diego Int'l L.J. 491, 496 (2003).*

n93. Canestaro, supra note 25, at 14.

n94. Id. at 15.

n95. Bush Accepts: "Our Tested and Confident Nation Can Achieve Anything," N.Y. Times, Sept. 3, 2004, at P4.

n96. Printer, supra note 79, 355-56.

n97. Id. at 357.

n98. W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, *1989 Army Law. 4, 7 (1989).*

n99. Printer, supra note 79, at 338.

n100. See id. at 359.

n101. Id. at 360 (citing L.C. Green, The Contemporary Law of Armed Conflict 122 (2d. ed. 2000)).

n102. For a discussion of the first three requirements, see Printer, supra note 79, at 360-61.

n103. See Basic Rules of International Humanitarian Law in Armed Conflicts, International Committee of the Red Cross (ICRC), available at http://www.icrc.org/web/eng/siteeng0.nsf/ html/668BF8?OpenDocument (Dec. 31, 1988) (last visited Nov. 1, 2005).

n104. Parks, supra note 98, at 5.

n105. See, e.g., Canestaro, supra note 25, at 8-9.

n106. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, *36 Stat. 2277* art. 23(b).

n107. See, e.g., Canestaro, supra note 25, at 8. The U.S. Army Field Manual 27-10 provides in paragraph 31 that Article 23b, Annex to the Hague Convention IV, 1907 "is construed as prohibiting assassination... It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere." Parks, supra note 98, at 6 (emphasis added). Pre-World War II law of war sources suggested that prohibited "treacherous" killings referred to soldiers disguising themselves as civilians in order to approach and kill an enemy. The italicized sentence in Field Manual 27-10 was added after World War II, with annotations indicating that the revision was made "so as not to foreclose activity by resistance movements, paratroops, and other belligerents who may attack individual persons." Id.

n108. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, art. 37 [hereinafter Protocol I]. While the United States has not ratified the Geneva Protocols, it does recognize many of the Protocol I declarations as either customary international law or generally acceptable practice. Canestaro, supra note 25, at 10.

n109. Protocol I, supra note 108, art. 37.

n110. Printer, supra note 79, at 360.

n111. See id.

n112. Daniel Statman, Targeted Killing, 5 Theoretical Inquiry L. 179, 186 (2004).

n113. Id. at 186-87.

n114. As applied to more conventional conflicts, like the Second Gulf War, the targeted killing of leaders like Saddam Hussein has the potential to minimize troop deaths on both sides of the conflict. In his theory of the "Innocent soldier," Professor Robert Turner asserts that:

The doctrine of proportionality favors the option of intentionally killing the head tyrant as a means of ending aggression, rather than sending our young men and women onto the battlefield to slaughter - and be slaughtered by - the tyrant's young men and women... Saddam Hussein's soldiers do not have the option of running off to Canada if they disagree with his policies, and I would rather see him, and not his soldiers, punished for his crimes.

Robert F. Turner, It's Not Really "Assassination": Legal and Moral Implications of Intentionally Targeting Terrorists and Aggressor-State Regime Elites, *37 U. Rich. L. Rev. 787, 800 (2003)*.

n115. O'Connell, supra note 67, at 326.

n116. Canestaro, supra note 25, at 14. See also Printer, supra note 79, at 341.

(Once a conflict has begun, the limitations of Article 51 become irrelevant. This means there is no obligation upon a party resorting to war in self-defense to limit his activities to those essential to his self-defense... He may continue to take advantage of the jus in bello, including the principle of proportionality, until he is satisfied that the aggressor is defeated and no longer constitutes a threat.)

(citing L. C. Green, The Contemporary Law of Armed Conflict 10 (2d ed. 2000)).

n117. See Risen & Johnston, supra note 57.

n118. See the discussion in Part II.

n119. Risen & Johnston, supra note 57.

n120. Id.

n121. Id.

n122. See the discussion in Part II.

n123. Amnesty News Release, supra note 63.

n124. See The Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/2004/7/Add.1 (Mar. 24, 2004) [hereinafter Report of the UN Special Rapporteur]. In response to the Report, the United States argued that the Yemeni strike did not fall within the mandate of the Special Rapporteur because it was a military operation conducted pursuant to the laws of war during the course of armed conflict with al Qaeda. Response of the United States, supra note 65.

n125. See, e.g., Emmanuel Gross, Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect its Citizens, *15 Temp. Int'l & Comp. L.J. 195, 245-46 (2001).*

n126. Philip B. Heymann & Juliette N. Kayyem, Long-Term Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism, available at http://www.mipt.org/pdf/Long-Term-Legal-Strategy.pdf (last visited Nov. 1, 2005).

n127. Id. at 60.

n128. Id. at 67.

n129. Id. at 60.

n130. Id.

n131. Id.

n132. Johnston & Sanger, supra note 62.

n133. Risen & Johnston, supra note 57.

n134. Johnston & Sanger, supra note 62.

n135. Report of the UN Special Rapporteur, supra note 124, P 612.

n136. Id.

n137. Printer, supra note 79, at 335.

n138. Heymann & Kayyem, supra note 126, at 67 (emphasis added).

n139. U.S. officials reportedly use a "clear and convincing" standard when determining whether a terrorists should be added to the "high-value" target list authorized by President Bush. Risen & Johnston, supra note 57. What remains unclear, however, is to what precise criteria this standard is applied.

n140. See Heymann & Kayyem, supra note 126, at 67.

n141. See the discussion in Part II.

n142. See Heymann & Kayyem, supra note 126, at 61.

n143. Harder, supra note 15, at 35.