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JAN 16 1976

*Out 1-16-76 to  
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MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Prosecution in the United States of  
assassinations abroad.

Question has been raised as to whether Federal law provides a basis for the prosecution of assassinations or conspiracies to carry out assassinations of foreign officials abroad.

The United States Code has no general provisions on extraterritorial jurisdiction. Certain laws are explicit on the subject. In other cases, it must be determined from the language of the statute and its purpose whether extraterritorial jurisdiction should attach. United States v. Bowman, 260 U.S. 94 (1922). In the absence of contrary indication, the presumption is that the statute does not cover activity abroad. See American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909). On the basis of these principles, we think that no statute can be construed to cover assassinations outside the United States.

At present, 18 U.S.C. 1116 makes murder or manslaughter of foreign officials or official guests unlawful; similarly, 18 U.S.C. 112 makes it a crime to assault, strike, wound, or offer violence to a foreign official or official guest. However, the definitions of foreign official and official guest explicitly state that the persons protected must be in the United States. See 18 U.S.C. 112(d) and 18 U.S.C. 1116(b)(1), (2) and (4). There is a special provision, 18 U.S.C. 1117, which covers conspiracy to murder foreign officials. However, the law requires that the object of the conspiracy must be to violate 18 U.S.C. 1116, which, as noted, is specifically limited

to officials in the United States. Similarly, the general conspiracy provision, 18 U.S.C. 371, cannot be applied unless the object of the conspiracy is to commit an offense against the United States; the conspirators must conspire to violate one or more Federal statutes. See, e.g., United States v. Smith, 200 F. Supp. 227, 229 (E.D. Tenn. 1961) and cases collected therein. Therefore, the conspiracy laws cannot be used as a bootstrap if no substantive offense can be found.

It should be noted that prior to 1972 the scope of 18 U.S.C. 112 was not as explicit. From 1964 to 1972 it provided penalties for

"Whoever assaults, strikes, wounds, imprisons, or offers violence to the person of a head of foreign state or foreign government, foreign minister, ambassador or other public minister, in violation of the law of nations, \* \* \*." (18 U.S.C. 112 (1970)).

An attack on a foreign official abroad, instigated by another state could, of course, be viewed as being "in violation of the law of nations." \*/ However, the legislative history of the law makes it clear that it was not intended to apply outside the United States. Prior to 1964 the law only protected an "ambassador or other public minister." The reason was that diplomacy traditionally was carried on by such persons and visits by heads of state or foreign ministers were not usual. However, the increase in personal diplomacy caused the State Department to request amendment in 1963 so that the head of

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\*/ If the 1964 law were found to cover assassinations out of the country, then, putting aside the statute of limitations, the general savings clause could apply. 1 U.S.C. 109. The phrase "in violation of the law of nations" was presumably used in the statute to make clear that it was based on the power of Congress "To define and punish \* \* \* Offences against the Law of Nations." Art. I, Sec. 8.

a foreign state or foreign minister would also be protected. The committee reports and submissions by both the State and Justice Departments show that the purpose of the amendment was to enable the Department of State better to discharge its responsibility to safeguard certain specified foreign officials "while visiting the United States on official business \*\*\*." S. Rep. No. 1179, 88th Cong., 2d Sess. (1964). See also Statement by Deputy Legal Adviser Kearney and letter from Deputy Attorney General Katzenbach which appear as Appendices I and II to S. Rep. No. 1179.

Various neutrality statutes prevent expeditions against foreign nations and conspiracies to destroy property in other nations. 18 U.S.C. 956, 960. A bare assassination plot would not seem to fall under either of these types of laws. \*/

The fact that a gap exists in the law has been publicly recognized. A draft report on S.1 prepared as a committee print by the Senate Judiciary Committee notes that Section 1202 of S.1 "creates a new offense of conspiring to bring about the death of a public servant of a foreign power with which the United States is not at war." p. 267. We also understand that the Internal Security Division has tried since as early as 1970 to get the Department to sponsor legislation of this kind.

Antonin Scalia  
Assistant Attorney General  
Office of Legal Counsel

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\*/ The element of government participation raises a further issue under these statutes. An early case held that authority from the President is no defense for mounting an expedition against a friendly country. United States v. Smith, 27 Fed. Cases, No. 16,342 at 1229-30 and No. 16,342a at 1243. However, a more recent case suggests that "government complicity would effectively bar any prosecution." United States v. Elliott, 266 F. Supp. 318, 324 (S.D.N.Y. 1967).