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## TIME TO REPEAL THE ASSASSINATION BAN OF EXECUTIVE ORDER 12,333: A SMALL STEP IN CLARIFYING CURRENT LAW

MAJOR TYLER J. HARDER[1]

*The ruling to kill Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it . . . .*

Osama bin Laden, 23 February 1998

### I. Introduction

On 11 September 2001, four commercial airliners were hijacked by members of al Qaeda, the terrorist network founded and led by Osama bin Laden, the disavowed son of a Saudi construction magnate.[2] The terrorist

1. Judge Advocate General's Corps, United States Army. Presently assigned as Professor, Criminal Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. LL.M., 2000, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 1990, University of Montana School of Law, Missoula, Montana; B.S., 1987, Montana State University-Billings, Billings, Montana. Previously assigned as Senior Defense Counsel, Fort Wainwright, Alaska, 1997-1999; Chief of Claims, 4th Infantry Division, Fort Carson, Colorado, 1996-1997; Trial Defense Counsel, Fort Carson, Colorado, 1994-1996; Senior Trial Counsel, 6th Infantry Division (Light), Fort Wainwright, Alaska, 1992-1994; Operational Law Attorney and Legal Assistance Attorney, 6th Infantry Division (Light), Fort Wainwright, Alaska, 1991-1992. This article was submitted in partial completion of the Master of Laws degree requirements of the 48th Judge Advocate Officer Graduate Course. The author wishes to thank Lieutenant Colonel Geoff Corn for his guidance and assistance on this article.

2. *See* Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead*, WASH. POST, Sept. 12, 2001, at A1; NBC News, *Osama bin Laden: FAQ*, *at* http://www.msnbc.com/news/627355.asp (last visited May 14, 2002).

hijackers intentionally crashed two of the airliners into the World Trade Center in New York and one into the Pentagon in Washington, causing the deaths of thousands of civilians.[3] Almost immediately, Osama bin Laden became the number one suspect, and in the weeks that followed, the trail of evidence would affix responsibility to bin Laden and his organization.[4] Certainly, hunting down Osama bin Laden and killing him would be an assassination. Or would it?

The word "assassination" invites memories of the tragic murders of past U.S. presidents and other great Americans, images of world leaders and heads of state being gunned down without legal justification, and covert operations where snipers take out foreign leaders that are deemed a nuisance to the United States. Those familiar with U.S. military laws quickly agree: assassination is illegal, absolutely prohibited. When asked the authority for that conclusion, many are quick to reference Executive Order 12,333 (EO 12,333), which specifically prohibits "assassination."[5] Closer examination of this subject, however, reveals obvious confusion leading to frequent debate. First, EO 12,333 does not make assassination illegal; assassination is and was already illegal according to both federal and international law.[6] Second, the distinction between "legal" or "permissible" killing and "assassination" is not all that clear, thus adding to the confusion. In the context of how the U.S. prohibition on assassination applies to the military, EO 12,333 creates a dangerous pitfall. It has the potential to artificially circumscribe U.S. flexibility or, at a minimum, create misplaced public enmity towards the military.

This article calls for a repeal of the assassination language found in paragraph 2.11 of EO 12,333.[7] Repealing the language would not make assassination legal. It would, however, eliminate some of the confusion over assassination and push the focus of the debate back to the proper applicable law, that is, federal and international law. First, this article discusses the definitions of assassination as applied during both war and

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3. *Grunwald*, *supra* note 2, at A1 (The fourth airliner crashed in rural Pennsylvania.).

4. Associated Press, *Oct. 4: Text of British Document, Summary of Evidence Against Osama bin Laden* (Oct. 4, 2001), http://www.msnbc.com/news/638189.asp.

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

6. *See infra* notes 29-61 and accompanying text.

7. The specific provision prohibiting assassination is found in paragraph 2.11 of EO 12,333. Exec. Order 12,333 comprises much more than just the assassination ban; however, for purposes of this paper, it is the assassination ban in para. 2.11, and not the entire executive order, that is the subject of discussion. *See infra* note 77 and accompanying text.

peacetime, and it provides a brief history of the law prohibiting assassination. Second, it looks at the environment and context in which the President promulgated the original executive order prohibiting assassination,[8] and it provides an analysis of the confusion surrounding the prohibition of assassination found in EO 12,333. Finally, it offers justification for the repeal of EO 12,333, paragraph 2.11, concluding that upon repeal Congress and the executive branch could respond to foreign crises more effectively, consistent with international conventional and customary law.

## II. Defining Assassination

Assassination can be defined very broadly or very narrowly. Depending on the breadth of definition, assassination could define *any* intentional killing, or it could define only murders of state leaders in the narrowest of circumstances. Some scholars discuss assassination without defining it;[9] however, it is essential to define the term. Without an accurate definition, it becomes impossible to recognize the frequent misunderstandings of EO 12,333, for defining what is *not* assassination is as important as defining what is assassination.[10] This becomes increasingly important in situations where executive agents are required to interpret the assassination ban of EO 12,333. Unfortunately, EO 12,333 fails to provide a definition of assassination.[11] The early commentators defined assassination as "treacherous murder."[12] The modern approach tends to define it from one of two perspectives: a wartime perspective, or a general peacetime perspective.

### A. Wartime Definition

The British *Manual of Military Law*, unlike the Uniform Code of Military Justice,[13] defines assassination, which is "the killing or wounding of

8. The original executive order containing an assassination ban was issued in 1976 by President Ford and is the basis for the current EO 12,333. *See* Exec. Order No. 11,905, § 5(g), 3 C.F.R. 90, 101 (1977), *reprinted in* 50 U.S.C. § 401 (1976).

9. *See, e.g.*, FRANKLIN L. FORD, POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM 1-2, 301-02 (1985).

10. The struggle in defining the term is not new. So it is understood, regardless of what definition is given to assassination, not everyone will agree.

11. *See infra* note 95 and accompanying text.

12. *See* Lieutenant Colonel Joseph B. Kelly, *Assassination in War Time*, 30 MIL. L. REV. 101, 102 & n.3 (1965) (listing several early commentators, including Grotius and Vattel).

13. 10 U.S.C. §§ 801-946 (2000).

a selected individual behind the line of battle by enemy agents or partisans . . . ."[14] This definition would seem to follow the definition of assassination found in the law of war, which, as discussed later, finds its roots in the Hague prohibition against "treacherous killing."[15] Focusing on the issue of treachery, a 1965 journal article defined assassination as "the *selected* killing of an enemy by a person *not in uniform.*"[16] The author explained that the killer's failure to wear a uniform was the very essence of treachery.[17] Although this view is consistent with the traditional view of a treacherous attack, it is not reflective of the post-World War II view.[18]

Professor Michael Schmitt, considered one of the leading scholars on the law of assassination, concluded that wartime assassination consists of two elements, "the targeting of an individual, and the use of treacherous means."[19] He argued that treachery is the key component of wartime assassination, and he defined treachery as a "breach of confidence."[20] During wartime then, a killing could not be an assassination unless it was accomplished by treacherous means (which would be a violation of the law of war), and was a killing of a specifically targeted individual. In other words, if the law of war is not violated, an assassination has not occurred.[21]

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14. Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law,* 17 YALE J. INT'L L. 609, 632 n.109 (1992) (quoting WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW art. 115 (1958) (U.K.), *reprinted in* 10 DIG. INT'L L. 390 (1968)).

15. *See infra* notes 32-43 and accompanying text.

16. Kelly, *supra* note 12, at 102.

17. *Id.* at 103.

18. *See* W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 6. Before World War II, the law of war obligated soldiers to wear uniforms so they could be distinguished from the civilian (noncombatant) population. It would be considered a "treacherous killing or wounding" for a soldier to disguise himself in civilian clothes for the purpose of carrying out a surprise attack on an enemy force. Due to the large number of partisan forces and resistance groups relied upon in World War II, the law of war changed and now acknowledges the lawfulness of partisans to engage in combat, although the extent to which civilian clothing may be used by conventional forces is not clear. *Id.*

19. Schmitt, *supra* note 14, at 632.

20. *Id.* at 633. "The essence of treachery is a breach of confidence. For instance, an attack on an individual who justifiably believes he has nothing to fear from the assailant is treachery." *Id.* (internal citation omitted). *See also infra* note 32.

21. That is certainly not to say, however, that all killings that violate the law of war are assassinations.

B. Peacetime Definition

Those who have attempted to define assassination from a general perspective have not agreed upon a universal definition either. One writer defined it as "the intentional killing of a specified victim . . . perpetrated for reasons related to his . . . public prominence and undertaken with a political purpose in view."[22] Another defined assassination as a "premeditated and intentional killing of a public figure accomplished violently and treacherously for political means."[23] Judge Abraham Sofaer, former Legal Adviser at the U.S. Department of State, offered a simpler definition: "any unlawful killing of particular individuals for political purposes."[24] W. Hays Parks concluded: "In general, assassination involves murder of a targeted individual for political purposes."[25]

Although there are many definitions of assassination,[26] most definitions contain three common ingredients: an intentional killing, a specifically targeted individual, and a political purpose. As many scholars point out, however, assassination is an *illegal* killing, so an assassination must also be a murder.[27] Therefore, in understanding and applying the current policy, an assassination consists of three elements: (1) a murder, (2) of a specifically targeted figure, (3) for a political purpose. Absent any of these elements, a killing is not an assassination.

Several conclusions can be drawn from an analysis of this definition. A lawful homicide is never an assassination. An unlawful homicide may be a murder, but if the killing lacks a political purpose, it would not be an assassination. Finally, a political killing may be a murder, but if it lacks the specific targeting of a select figure, it would not be an assassination. For example, as Parks pointed out, the murder of a private citizen by ter-

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22. Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT'L L.J. 569, 598 (1995).

23. Boyd M. Johnson III, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401, 402 n.7 (1992).

24. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 117 (1989).

25. Parks, *supra* note 18, at 4. W. Hays Parks is the Chief of the Army's Law of War Branch of the Office of The Judge Advocate General.

26. *Id.*, app. A, at 8 (providing additional general definitions of assassination).

27. *See* Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 146 (1991); Sofaer, *supra* note 24, at 117; Parks, *supra* note 18, at 4.

rorists aboard the Italian cruise ship *Achille Lauro* in 1985 was for political purposes, but it was not considered an assassination.[28]

This article defines assassination during peacetime as "a political murder of a specifically targeted figure," and during wartime as "the targeting of an individual by treacherous means." By adopting these definitions, one can properly identify what is and what is not an assassination. One can also distinguish assassinations from broader acts that do not necessarily amount to assassinations, such as political killings, murders, and military targeting of leaders. In addition, by reviewing the history of assassination law, one can understand the legal framework in which current policy exists.

## III. A Brief History of International Law Prohibiting Assassination

### A. During Armed Conflict

History demonstrates that assassinations are not new,[29] nor are the debates that accompany them. Throughout the centuries, many scholars have written on the subject of assassination, debating whether it is a legitimate means of warfare.[30] Beginning in the thirteenth century, men such as Saint Thomas Aquinas, Sir Thomas More, Alberico Gentili, Hugo Grotius, Balthazar Ayala, and Emer de Vattel have wrestled with the morality of assassination and its applicability, but almost exclusively in the context

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28. Parks, *supra* note 18, at 4.

29. One of the first recorded assassinations occurred around 1250 B.C. when Israel found itself under the rule of King Eglon and the foreign nation of Moab. A Jewish judge named Ehud strapped a sharp, eighteen-inch dagger to his thigh and, hiding it under his cloak, brought gifts to the obese king. After delivering the gifts, Ehud told the king he needed to deliver a message to him secretly. Once alone with the king, he plunged the dagger completely through the king's massive belly, entering his stomach and exiting out his back. *See Judges* 3:16-22 (NIV).

30. *See generally* ST. THOMAS AQUINAS, ON POLITICS AND ETHICS (Paul E. Sigmund trans. and ed. 1988); THOMAS MORE, UTOPIA (J. Churton Collins ed., Oxford U. Press 1904) (1516); ALBERICO GENTILI, DE IURE BELLI LIBRI TRES (John C. Rolfe trans., 1933) (1612); HUGO GROTIUS, THE LAW OF WAR AND PEACE (1625), *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 16 (L. Friedman ed., 1972); BALTHAZAR AYALA, THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE (John P. Bate trans., Carnegie Institution 1912) (1582); EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW (Charles Fenwick trans., Carnegie Institution 1916) (1758).

of armed conflict.[31] The majority of these scholars considered acceptable the targeting of specific individuals during wartime, provided it was not done "treacherously."[32] This view is now accepted as customary international law,[33] and it serves as the basis for today's prohibition of assassination during armed conflict.[34]

To understand properly the current law of assassination, Professor Schmitt listed three critical points that should be noted from these early writers: (1) historical norms established by these writings have not placed absolute prohibitions on the use of assassination; they only establish narrow exceptions to the more general idea that the selection of specific enemy targets is a permissible wartime practice;[35] (2) treacherous killing is not acceptable during armed conflict, but "treacherous" should not be construed too broadly, and thereby confused with stealth or trickery; it is treacherous only if the victim has an affirmative reason to trust the assailant;[36] and (3) international law regarding assassination and international law in general are interrelated, and therefore, an evaluation of the law prohibiting assassination must also include consideration of other broader

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31. Schmitt, *supra* note 14, at 614. For a more in-depth review of the historic debate on assassination, see generally FORD, *supra* note 9; Zengel, *supra* note 27.

32. Schmitt, *supra* note 14, at 614-16. "Under Gentili's model, treachery is the violation of the trust a victim rightfully expects from an assassin." *Id.* at 615. Treachery is therefore a "breach of confidence." The act of sneaking into the enemy camp to kill a leader would not be such a breach of confidence, but if the killing were committed by a member of the victim's household, it would be unlawful (that is, a treacherous killing). *Id.*

33. *See infra* note 42.

34. *See* U.S. DEP'T OF ARMY, PAM. 27-1, TREATIES GOVERNING LAND WARFARE 12 (7 Dec. 1956) [hereinafter DA PAM 27-1]; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 31 (18 July 1956) [hereinafter FM 27-10].

35. Schmitt, *supra* note 14, at 617.

36. *Id.* Schmitt uses the distinction between ruses and perfidy in expressing this point. A ruse is designed to mislead the enemy, but can be lawful, whereas perfidy involves the attempt to "convince the enemy that the actor is entitled to protected status under the law of war, with the intent of betraying this confidence." *Id.*

Whereas ruses are lawful under the law of war "so long as they do not involve treachery or perfidy," treacherous and perfidious acts are always forbidden. FM 27-10, *supra* note 34, para. 50. *See also* U.S. DEP'T OF ARMY, PAM. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 37 (1 Sept. 1979) [hereinafter DA PAM 27-1-1]. The United States signed the Protocols on 12 December 1977, but never ratified them. However, Article 37 is recognized by the United States as an expression of customary international law. *See* Michael Matheson, U.S. Dept. of State Deputy Legal Advisor, *Comments at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, *reprinted in* 2 AM. U. J. INT'L L. & POL'Y 428 (1988).

principles of international law, for example, the principle of necessity.[37] These points from the early writers are important to keep in mind when applying assassination law during armed conflict today.

The early customary international law is the basis for current assassination law. The United States first attempted to codify customary international law regarding assassination on 24 April 1863, with the promulgation of General Order No. 100, commonly known as the Lieber Code.[38] Article CXLVIII provided:

> The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.[39]

At the beginning of the twentieth century, the proscription of treacherous killing during wartime was embodied in the Annex to Hague Convention IV.[40] Article 23(b) of the Annex prohibits killing or wounding treacherously any individual of the hostile nation or army.[41] These regulations are considered to reflect customary international law.[42] Although Article 23(b) does not mention the word assassination, in 1956 the U.S.

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37. Schmitt, *supra* note 14, at 618. In general, the law of war prohibits any violence beyond that necessary for military purposes. The principle of "military necessity," one factor that must be considered in military targeting decisions, is defined as "that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible." *See* FM 27-10, *supra* note 34, para. 3. Other principles of the law of war are discussed *infra* note 216.

38. General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, art. 148, *reprinted in* 1 THE LAW OF WAR, A DOCUMENTARY HISTORY 158 (L. Friedman ed., 1972).

39. *Id.*, *reprinted in* 1 THE LAW OF WAR, A DOCUMENTARY HISTORY 184.

40. Hague Convention No. IV, Annex to the Convention. Regulations Respecting the Laws and Customs of War on Land [hereinafter Annex to Hague IV], *reprinted in* DA PAM 27-1, *supra* note 34, at 8.

41. *Id.* art. 23(b), *reprinted in* DA PAM 27-1, *supra* note 34, at 12.

Army interpreted the article as "prohibiting assassination" in paragraph 31 of *Field Manual 27-10, The Law of Land Warfare*.[43] Thus, assassination during war, as previously defined, is interpreted by the United States as a violation of international law.

These customary and conventional international law provisions form the basis of the prohibition of assassination during armed conflict between states. Although U.S. policy applies the law of war to all military operations,[44] the law of war will not apply as a matter of *law* in peacetime situations.[45] There is, however, both customary and conventional international law that makes assassination illegal at all times, including peacetime.

## B. During Peacetime

Two primary sources of international law are customary law and international agreements.[46] Although these two sources of law are considered to have equal authority,[47] when the sources conflict, treaty law will supersede customary law.[48] One exception to this rule is when the customary law is considered a peremptory norm, in which case it will supersede

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42. "[B]y 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war . . . ." International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 248-49 (1947). International agreements often codify existing customary international law. 1 RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 33, § 102 (1986) [hereinafter RESTATEMENT].

43. Paragraph 31 reads, "This article is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive'." FM 27-10, *supra* note 34, para. 31.

44. *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DOD DIR. 5100.77]; CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (27 Aug. 1999). Due to lack of resources during many military operations, however, the United States may not be able to comply completely with the law of war at all times. W. Hays Parks stated in a memorandum to The Judge Advocate General of the Army on 1 October 1990 that it has been the United States practice to comply to the extent practicable and feasible. INT'L AND OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK 5-2 (2000) [hereinafter JA-422].

45. *See* 1 THE GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY 28, 32 (Jean S. Pictet ed., 1952) [hereinafter PICTET COMMENTARY] (construing the Geneva Conventions).

46. RESTATEMENT, *supra* note 42, § 102.

47. *Id.* § 102 cmt. j.

48. *Id.*

treaty law.[49] A peremptory norm, or *jus cogens*, is a rule of international law considered so fundamental that it binds all states, and it will supersede any treaty law that it might conflict with.[50] Customary international law prohibiting genocide, slavery, murder, and torture are examples of *jus cogens*.[51] Since assassination by definition is a murder,[52] it is only logical to include assassination as a subset of murder. This *jus cogens* of international law would therefore prohibit assassination.

Another source of international law prohibiting assassination is treaty law. With the forming of the United Nations in 1945, the member states agreed to the international law contained in the Charter of the United Nations. Article 2(4) of the Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[53] The "Purposes of the United Nations" include the "suppression of acts of aggression or other breaches of the peace . . . ."[54] This prohibition on the use of force has become international law binding on all states.[55] The *murder* of a state leader, wherever it occurred, would have to qualify as the use of force, or an act of aggression or a breach of the peace.[56] As Professor Schmitt concluded, "any state-sponsored assassination, however defined, would probably violate the prohibition on the use of force contained in Article 2(4) of the U.N. Charter."[57]

Additional treaty law addressing assassination, adopted by the General Assembly of the United Nations on 14 December 1973, is the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (commonly called the New York Convention).[58] Ratified by the United States on 26 October 1976, the treaty came into force on 20 February 1977.[59] Article 2 requires

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49. *Id.*

50. *Id.* § 102 cmt. k.

51. *Id.* § 702 cmt. n.

52. *See supra* notes 22-27 and accompanying text.

53. U.N. CHARTER art. 2, para. 4.

54. *Id.* art. 1, para. 1.

55. RESTATEMENT, *supra* note 42, § 102 cmt. h. The Restatement goes even further, stating "[i]t is generally accepted that the principles of the United Nations Charter prohibiting the use of force . . . have the character of *jus cogens*." *Id.* § 102 cmt. k.

56. As previously discussed, murder by its very nature is a violation of international law. There are situations where self-defense would permit a lawful homicide, but a lawful homicide would not be a murder. *See also infra* note 112 and accompanying text.

57. Schmitt, *supra* note 14, at 621.

state parties to the treaty to make murder (among other acts) of internationally protected persons criminal under internal law.[60]

In summary, short of armed conflict, assassination is prohibited by *jus cogens*, customary law, and international agreements. As one writer states, these sources "constitute persuasive evidence of a peacetime ban of assassination . . . ."[61] During armed conflict, the law of war is an additional body of law prohibiting assassination. This corpus of law prohibits assassination with or without EO 12,333, thereby begging the question, why was an executive order banning assassination ever promulgated?

## IV. Concern Preceding E.O. 12,333

To understand why EO 12,333 exists today, it is important to first examine the state of U.S. foreign affairs immediately before the first promulgation of the executive ban on assassination. With the passage of the National Security Act of 1947, the Central Intelligence Agency (CIA) became the lead agency in the intelligence community.[62] The CIA primarily served the executive branch, and congressional access to intelligence information was very limited.[63] Congress was largely willing to defer to executive authority on foreign issues and covert operations.[64]

It was not until the 1970s, in the midst of Watergate, that Congress was no longer willing to allow the Executive a free hand in this area.[65] In

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58. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* 14 December 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (20 Feb. 1977).

59. *Id.*

60. *Id.* art. 2. The internal law enacted by the United States in compliance with this treaty is found at 18 U.S.C. §1116 (Murder or manslaughter of foreign officials, official guests, or internationally protected persons). By definition of an "internationally protected person" under the New York Convention, protection of Heads of State against assassination extends only when "such person is in a foreign state." *Id.* art. 1. So, although the treaty makes assassination a violation of international law, it does not extend to protecting leaders in their home state. Regardless of this perceived shortfall, other international treaty law would still make murder (to include assassination) a violation of international law. *See supra* notes 53-57 and accompanying text.

61. Bert Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT'L L. 655, 662 (1987).

62. L. BRITT SNIDER, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE pt. 1 (Center for the Study of Intelligence, Intelligence Monograph CSI-97-10001, Feb. 1997), *available at* http://www.odci.gov/csi/monograph/lawmaker/toc.htm.

63. *Id.*

April 1974, the Director of Central Intelligence (DCI), William Colby, testified before a subcommittee of the House Armed Services Committee concerning reports of alleged CIA involvement in a military coup in Chile.[66] His testimony leaked to the *New York Times* and set off a public outcry that ultimately resulted in both executive (Rockefeller Commission) and congressional (Church and Pike Committees) investigations.[67]

In January 1975, the Senate established an investigating committee, headed by Senator Frank Church, "to investigate the full range of governmental intelligence activities," to include certain alleged assassination attempts.[68] The investigations focused on alleged CIA involvement in assassination plots in five foreign countries, mostly during the 1960s.[69] Although it found that no foreign leaders were killed as a result of assassination plots initiated by U.S. officials, the Committee did find that the U.S. Government was involved with the initiation of two failed plots, and it had encouraged other successful ones.[70] The Committee also indicated that the Executive apparently lacked proper control over the CIA.[71] Finally, the Committee denounced assassination as an acceptable tool of American foreign policy, stating that "a flat ban against assassination should be written into law."[72]

Congress's concern regarding the Executive's lax control over the CIA and the use of political killing as a tool of foreign policy would ultimately contribute to the legislative movement to assert a greater role in for-

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64. *Id.* at 6; *see also* Lori Fisler Damrosch, *Covert Operations*, 83 AM. J. INT'L L. 795 (1989). *Covert operations* are "operations which are planned and executed so as to conceal the identity of or permit plausible denial by the sponsor." Parks, *supra* note 18, at 4 (citing JOINT CHIEFS OF STAFF, JCS PUB. 1, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (1 June 1987)).

65. SNIDER, *supra* note 62, at 1.

66. *Id.* at 6.

67. *Id.*

68. ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-465, at 1 (1975) [hereinafter COMMITTEE REPORT].

69. The five countries were Cuba, the Congo (Zaire), the Dominican Republic, Chile, and South Vietnam. The individuals targeted or killed were Fidel Castro, Patrice Lumumba, Rafael Trujillo, General Rene Schneider, and Ngo Dinh Diem, respectively. *Id.* at 4.

70. *Id.* at 256.

71. The Committee reported, "Based on the record of our investigation, the Committee finds that the system of Executive command and control was so inherently ambiguous that it is difficult to be certain at what level assassination activity was known or authorized." *Id.* at 261.

eign affairs.[73] The situation in the mid-1970s, however, called for some form of immediate action. That action would come in the form of an executive order.

## V. Original Motivation for an Executive Order Prohibiting Assassination

The original motivations for enacting the executive assassination ban serve as the bases for assessing the original scope of restriction intended by the ban. Therefore, the scope of the ban's restriction can be determined only after examining the context in which the ban was created.

### A. The Birth of EO 12,333

In June 1975, during the Church Committee investigation, President Ford publicly banned the use of political assassination by his administration.[74] He followed his announcement with the issuance of Executive Order 11,905 on 18 February 1976, which read: "Prohibition of Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination."[75] In 1978, President Carter modified the ban when he issued Executive Order 12,036.[76] The ban, as modified by Carter, was incorporated without change in Executive Order 12,333 by President Reagan in 1981, and it reads: "Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[77]

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72. *Id.* at 281. The Committee went on to further state:

> We condemn assassination and reject it as an instrument of American policy. Surprisingly, however, there is presently no statute making it a crime to assassinate a foreign official outside the United States. Hence, . . . the Committee recommends the prompt enactment of a statute making it a Federal crime to commit or attempt an assassination, or to conspire to do so.

*Id.* For a description of the proposed statute, see *infra* note 78.

73. *See infra* note 184 (providing examples of this movement).

74. COMMITTEE REPORT, *supra* note 68, at 281.

75. Exec. Order No. 11,905, § 5(g), 3 C.F.R. 90, 101 (1977), *reprinted in* 50 U.S.C. § 401 (1976).

76. Exec. Order No. 12,036, §2-305, 3 C.F.R. 112, 129 (1978), *reprinted in* 50 U.S.C. § 401 (1978).

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

An analysis of the motivations behind the enactment of the original executive order, and why subsequent administrations have kept it, would be difficult without first looking at why Congress has never enacted legislation prohibiting assassination.

## B. Failed Legislative Attempts

During the same period when the executive branch enacted and modified the current executive order, Congress made three attempts to enact a statutory prohibition of assassination. The first attempt came in 1976 on the heels of the Church Committee's recommendation to add 18 U.S.C. § 1118, making assassination, attempted assassination, or conspiracy to assassinate a crime.[78] The second attempt came in 1978, and it intended to clarify the existing executive order prohibiting assassination.[79] Finally, in 1980, legislation that copied the identical language of Executive Order 12,036 was introduced in both the House and Senate, but was ultimately abandoned.[80] Why Congress failed to enact a ban is uncertain; however, there is ample support to suggest that after several failed attempts, Congress and the Executive simply agreed to a political compromise.

Congress started out on the offensive in 1975, pushing for a legislative ban notwithstanding the Executive's ban, but found their momentum severely weakened when classified information leaked from the Pike

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78. *See* COMMITTEE REPORT, *supra* note 68, at 289. The proposed statute would have made it unlawful for any U.S. officer, employee, or citizen, while outside the United States, to conspire to kill, attempt to kill, or kill "any foreign official, because of such official's political views, actions or statements . . . ." *Id.* at 289. The proposed statute defined "foreign official" as:

> a Chief of State or the political equivalent, President, Vice President, Prime Minister, Premier, Foreign Minister, Ambassador, or other officer, employee, or agent . . . of a foreign government . . . or . . . of a foreign political group, party, military force, movement or other association *with which the United States is not at war* pursuant to a declaration of war *or against which the United States Armed Forces have not been introduced into hostilities or situations* pursuant to the provisions of the War Powers Resolution . . . .

*Id.* at 289-90 (emphasis added).

79. Brandenburg, *supra* note 61, at 685 n.195 (citing S. 2525, § 134(5), 95th Cong., 2d Sess., 124 CONG. REC. 3074 (1978)).

80. *Id.* at 686 n.195 (citing H.R. 6588, 96th Cong., 2d Sess. § 131 (1980); S. 2284, 96th Cong., 2d Sess. § 131 (1980)).

Committee.[81] The leaked information, obtained by CBS reporter Daniel Schorr, allegedly caused the murder of CIA agent Richard Welch in Greece by unknown individuals.[82] One Senator was quoted as saying, "Pike, Welch, and Schorr, those were the three names that caused us to pull back . . . ."[83] As the Senate and House struggled with internal battles, Congress found itself looking for a compromise.[84] Congressional efforts to pass legislation were also weakened by growing public indifference.[85] As Representative Pike stated, "It all lasted too long, and the media, the Congress, and the people lost interest."[86]

These congressional attempts to propose legislation seem to reflect this search for compromise since each proposal became less restrictive. In fact, the last attempt was nothing more than an effort to place the language of the executive ban into a statute.[87] And, according to one report, this last effort failed, in part, because President Carter had nothing more than "luke-warm support" for the proposal.[88]

### C. Executive Motivation: Avoid Legislation

While Congress may have compromised its initial intent, it is equally likely that had President Ford not enacted the executive ban, Congress, lacking an incentive to compromise, would have eventually passed legislation. One author suggests that Ford's initial ban in 1975 preempted the perceived immediate need for a statutory ban on assassination, thus contributing to the initial failure to legislate a ban in 1976.[89] In light of all that was going on at the time,[90] it seems the President wanted to respond quickly to the perceived notion that the CIA was an out-of-control

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81. Leslie Gelb, *Spy Inquiries, Begun Amid Public Outrage, End in Indifference*, N.Y. TIMES, May 12, 1976, § 1, at 20.

82. *Id.* Richard S. Welch was the head of the CIA office in Greece and was murdered shortly after a magazine identified him. Daniel Schorr was a reporter for CBS who obtained and arranged for publication of the Pike Committee report while it was still classified. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Johnson, *supra* note 23, at 411.

88. *Id.*

89. *Id.*

90. Public confidence in the Executive office was already low in the aftermath of Watergate and the Congressional Committee investigations.

agency.[91] After the ban was issued, administrative officials quickly took the position that enough had been done to fix the problems, thereby thwarting congressional efforts to pass legislation.[92] As one writer stated, "the [executive] order responded to intense political pressure to 'do something' while maintaining flexibility in interpreting exactly what had been done."[93] Thus, the ban was an alternative to a "legislative fix." The same writer pointed out that the legislative ban would likely "have been far more specific, and, given the political climate at the time, far more restrictive."[94]

In support of the theory that the Executive sought to maintain flexibility, one need only look at EO 12,333 in its entirety. Paragraph 3.4 of EO 12,333 is devoted to defining various terms used throughout the order, but "assassination" is not one of them.[95] That an ambiguously broad term like "assassination" would go undefined tends to support a conclusion that a definition of assassination was intentionally omitted. Moreover, President Carter's removal of the modifier "political" from the ban in 1978 might also indicate the Executive's continuing desire to avoid a legislative ban. As Judge Sofaer pointed out, the change from banning "political assassination" to banning "assassination" came at the same time that Congress was attempting to enact a much broader and more restrictive ban on killing.[96] Thus, a change, albeit minor and inconsequential for practical purposes, may have served to appease Congress and, once again, weaken congressional resolve to pass a legislative ban.

### D. Executive Motivation: Clarify U.S. Policy

The evidence strongly supports the conclusion that the executive order was as much a political enactment as anything else. It was issued amid public outcry over alleged CIA involvement in assassinations, and motivated by political pressure and a desire to avoid a legislative (and more restrictive) ban. However, there was undoubtedly some practical

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91. *See supra* note 71; *infra* notes 99-101 and accompanying text.

92. Gelb, *supra* note 81.

93. Zengel, *supra* note 27, at 145.

94. *Id.*

95. Exec. Order No. 12,333, para. 3.4, 3 C.F.R. 200 (1982), *reprinted in* 50 U.S.C. § 401 (2000). The original Executive Order 11,905 did not define assassination either.

96. "During the years after President Ford adopted Executive Order 11,905, several bills were introduced in Congress to convert the ban to a legislative one . . . . [This] might explain the issuance in 1978 of a new executive order prohibiting any 'assassination,' not only 'political' assassination." Sofaer, *supra* note 24, at 119 n.62.

need for the ban as well. The CIA had engaged in activities that were not only illegal, but in violation of U.S. policy, even before the creation of the executive order prohibiting assassination. In 1972, CIA Director Richard Helms issued an internal memo to all Deputy Directors banning assassination.[97] Again, in 1973, CIA Director William Colby issued a memo to his Deputy Directors prohibiting assassination.[98] Based on these findings, the Church Committee determined that there was a failure in the CIA command and control system.[99]

The CIA's failure resulted from action officers failing to keep their superiors informed, and from superiors failing to make clear that assassination was impermissible.[100] The apparent confusion over the CIA's assassination policy stemmed from this breakdown in communication between the leadership and the action officers. Since the "leadership" would have to include the President himself, it would be important to issue some authoritative statement clarifying the U.S. position on assassination. This was Professor Schmitt's conclusion when he stated, "one likely motivation for the executive orders was to remedy the confusion over the U.S. assassination policy."[101]

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97. COMMITTEE REPORT, *supra* note 68, at 282. The memo, stated:

> It has recently again been alleged in the press that CIA engages in assassination. As you are well aware, this is not the case, and Agency policy has long been clear on this issue. To underline it, however, I direct that no such activity or operation be undertaken, assisted or suggested by any of our personnel . . . .

*Id.* (citing Memorandum from CIA Director Helms to Deputy Directors (Mar. 6, 1972)).

98. *Id.* The memo, stated, "CIA will not engage in assassination nor induce, assist or suggest to others that assassination be employed." *Id.* (citing Memorandum from CIA Director Colby to Deputy Directors (Aug. 29, 1973)).

99. *Id.* at 261. *See also supra* note 71 (quoting the language used by the Committee).

100. Schmitt, *supra* note 14, at 657.

101. *Id.* Schmitt remarked that

> the communication process within the agency was in disarray. Those in charge of the operations did not know what boundaries they were required to work within, and their superiors made no effort to guide them. Thus, while none of the operations reviewed was alone renegade, in a sense, the entire agency was.

*Id.*

The weight of the preceding analysis would support the conclusion that the enactment of the executive assassination ban was motivated by an effort to pacify Congress and the public (thus avoiding a legislative ban), and to clarify any existing confusion over the U.S. policy on assassination. Because assassination was already unlawful under international law[102] and contrary to CIA policy,[103] the assassination ban serves only to clarify and reemphasize existing law. If the assassination ban in Executive Order 11,905 was never intended to *change* existing law, it would logically follow that the scope of its restriction was never intended to be any greater than existing law.

## VI. Contemporary Misunderstanding of the Prohibition

The executive prohibition on assassination has endured for over a quarter century, appearing to merge with the law of war on occasion,[104] and brandished by many as authority for arguing what the United States can or cannot do. Every time the military appears to target a specific individual during military operations, there are those who condemn the action and cite EO 12,333 as support.[105] On the other side are those who defend the action and attempt to explain the rationale and purpose behind the EO 12,333.[106] A number of factors contribute to the misunderstanding of EO 12,333 and the extent of its application. The definition of assassination and the interpretation of a state's right to use self-defense seem to be the two greatest contributors to this misunderstanding.

### A. Failure to Understand the Definition of Assassination

Unfortunately, a proper legal definition[107] of assassination is rarely applied when the subject is discussed. Many tend to define the word by use of specific examples rather than by applying a definition of the word

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102. *See supra* notes 46-61 and accompanying text.

103. *See supra* notes 97-98.

104. In reality, EO 12,333 does not affect the application of the law of war during armed conflict. *See infra* note 217 and accompanying text.

105. *See, e.g., infra* notes 125, 130, 151 and accompanying text.

106. *See, e.g., infra* notes 146, 150 and accompanying text.

107. A legal definition during wartime would include the two elements of treacherous killing and specific targeting, and a legal definition during peacetime would include the three elements of murder, political purpose, and specific targeting. *See supra* notes 13-28 and accompanying text.

to a specific situation. Because of America's history of presidential assassinations, the definition more commonly used seems to be the intentional killing of any public official.[108] For the reasons previously described, applying such a general definition will result in inaccurate conclusions. Some argue that assassination cannot be comprehensively defined, but that "most would probably recognize an assassination when they see one."[109] It is precisely this erroneous view that causes much of the misunderstanding over EO 12,333.

To violate the assassination ban found in EO 12,333, there must be a politically motivated murder of a specific individual during peacetime, or there must be a treacherous killing of a specific individual during armed conflict. In other words, outside of armed conflict, if there is a lawful basis for the killing, it is not murder, and it cannot be assassination. And likewise, during armed conflict, if there exists a lawful target and the target is not treacherously killed, the law of war is not violated, and it cannot be assassination.[110] Under the law of war, one lawful basis for killing that has been long recognized is self-defense.

## B. A State's Right to Self-Defense

Article 2(4) of the U.N. Charter prohibits the threat or use of force.[111] Just like domestic law, however, international law recognizes the right to self-defense. Article 51 of the U.N. Charter states in part, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . ."[112] Therefore, if the United States is acting in self-defense, a legal basis to use force exists.[113] If the United States is subject to an armed attack, or it subjects another state to armed attack, the situation becomes armed conflict, and the United States will apply the law of war.[114]

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108. *See* Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLINE J. PUB. L. & POL'Y 291, 292 (1992).

109. Johnson, *supra* note 23, at 402.

110. *See supra* notes 40-43 and accompanying text. For an excellent discussion of the different analyses of wartime assassination and peacetime assassination, see Schmitt, *supra* note 14.

111. *See supra* notes 53-54 and accompanying text.

112. U.N. CHARTER art. 51.

113. *Id.*

Unfortunately, scholars fail to agree on exactly what comprises self-defense and armed attack.

One side of the debate maintains that there must actually be an attack before the right to self-defense can be invoked.[115] The other side argues that striking first is critical in military operations and, therefore, *anticipatory* self-defense allows the use of force before an armed attack actually occurs.[116] This debate has added more confusion, contributing further to an improper interpretation of assassination and EO 12,333.

One writer argued that the President can improperly circumvent the assassination ban of EO 12,333 by merely disguising an assassination attempt "under the cloak of Article 51 self-defense."[117] The writer incorrectly viewed the 1986 Libya raid[118] as nothing more than an assassination attempt of a foreign leader.[119] As Parks stated, however, the United States recognizes three types of self-defense: the first is response to actual force

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114. As previously mentioned, the U.S. policy is to apply the law of war in all military operations. *See* DoD DIR. 5100.77, *supra* note 44. Legally, the law of war does not apply in a peacetime situation, and during armed conflict what law of war applies depends upon whether the conflict is international (referred to as Article 2 armed conflict from the Geneva Convention General Articles) or internal (referred to as Article 3 armed conflict from the General Articles). *See* PICTET COMMENTARY, *supra* note 45, at 28, 37. The distinction between international armed conflict and internal armed conflict is beyond the scope of this paper. For purposes of discussion, both international and internal armed conflict will be considered together.

115. *See* Schmitt, *supra* note 14, at 646.

116. *Id.*

117. Johnson, *supra* note 23, at 423.

118. *See infra* notes 121-24 and accompanying text (discussing the 1986 Libya raid).

119. Johnson, *supra* note 23, at 423. Johnson argues that EO 12,333 is too easily circumvented and that a legislative ban prohibiting assassination is necessary. He calls for "comprehensive congressional legislation" precluding assassination "at all times, including wartime." *Id.* at 433. A legislative ban prohibiting assassination, however, would not change the available options (unless it incorrectly defined assassination as "any intentional killing of a leader"). His view, that EO 12,333 has either been violated or circumvented and that legislation would prevent U.S. actions such as the Libya raid, is erroneous. Johnson misunderstands assassination and current international law, and the legislation he envisions would actually change U.S. law, making it more restrictive than current international law.

or hostile acts; the second is preemptive self-defense against imminent force; and the third is self-defense against a continuing threat.[120]

Applying the previously discussed definitions of assassination and the U.S. policy on self-defense to specific situations may explain why the prohibition in EO 12,333 is misunderstood. The media, congressmen, administration officials, and even scholars misapply the definition of assassination and the right to self-defense, and consequently, they misunderstand the prohibition found in EO 12,333. Two foreign affairs incidents illustrate this point, the 1986 Libya raid and the 1991 Gulf War.

## C. 1986 Libya Raid

On 14 April 1986, the United States had strong evidence that Colonel Muammar Qadhafi ordered the terrorist bombing of a nightclub in Germany eleven days earlier.[121] Intelligence reports further indicated Libyan involvement in other planned attacks on the United States around the world, including in Europe and Asia.[122] One report indicated that Libya was targeting up to thirty U.S. diplomatic facilities worldwide.[123] Based on this information, President Reagan ordered U.S. F-111 and A-6 aircraft to strike five selected targets in Libya, including Qadhafi's home and headquarters.[124] Immediately, there was concern that targeting Qadhafi's home was a violation of EO 12,333.[125] The administration denied Qadhafi had been specifically targeted, however, and justified the attack as anticipatory self-defense.[126] This initial denial suggests that the executive branch either misunderstood the scope of EO 12,333, or was simply uncomfortable with what the public perception might be concerning an alleged assassination. According to one investigative reporter, the primary goal of the

120. Parks, *supra* note 18, at 7.

121. Bob Woodward & Patrick E. Tyler, *U.S. Targeted Qaddafi Compound After Tracing Terror Message*, WASH. POST, Apr.16, 1986, at A24.

122. *Id.* The intelligence reports showed "an orchestrated, worldwide, centrally directed campaign of terror directed through the Libyan diplomatic channels and missions specifically targeting Americans." *Id.*

123. Schmitt, *supra* note 14, at 668 (citing *Joint News Conference by George Schultz, Secretary of State, and Casper Weinberger, Secretary of Defense* (Apr. 14, 1986), *in* DEP'T ST. BULL., June 1986, at 3).

124. *Id.* at 666 (citing *U.S. Jets Bomb Libyan Targets*, FACTS ON FILE WORLD NEWS DIG., Apr. 18, 1986 (LEXIS, NEXIS Library, U.S. Affairs File)).

125. Woodward, *supra* note 121.

126. *Id.*

attack, however, was Qadhafi's "assassination," and the pilots who flew the mission were so briefed.[127]

In the wake of high public approval of the raid, several legislators pushed for changing EO 12,333 to *broaden* the President's authority.[128] Senator Pressler stated, "I know it is repugnant to our thinking and repugnant in a democracy to even talk of such things, but we may be living in an era in which, to protect the lives of American citizens, we might need to consider changing that Executive Order."[129] The Senator misunderstood the scope of EO 12,333 and the legal basis for the military strike on Libya. He is not alone. Senator William Cohen, while arguing against removing the assassination ban in 1989, stated, "Executive Order 12,333 would appear to ban placing a poison pen in one of Col. Moammar Gadhafi's jump suits, but permit the release of a gravity bomb from several thousand feet onto his desert compound."[130]

Legal scholars have also interpreted the Libya raid as a violation of EO 12,333.[131] Several years later, however, Judge Sofaer wrote: "[Colonel Qadhafi] was and is personally responsible for Libya's policy of training, assisting, and utilizing terrorists in attacks on U.S. citizens, diplomats (sic) troops, and facilities. His position as head of state provided him no legal immunity from being attacked when present at a proper military target."[132] Professor Schmitt interpreted Judge Sofaer's "being attacked" language as implying that Sofaer considered Qadhafi a legitimate target.[133]

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127. Seymour M. Hersh, *Target Qaddafi*, N.Y. TIMES, Feb. 22, 1987, § 6 (magazine), at 17.

128. Schmitt, *supra* note 14, at 667.

129. 132 CONG. REC. S4574 (1986), *quoted in* Schmitt, *supra* note 14, at 667 n.264. In fact, both the House and Senate introduced bills in 1986 that would have given the President authority to use whatever measures he "deems necessary" to fight terrorism. This was considered by at least some Congressmen as authorization to assassinate leaders personally involved in terrorism. *See* Linda Greenhouse, *Bill Would Give Reagan A Free Hand on Terror,* N.Y. TIMES, Apr. 18, 1986, at A9; Helen Dewar, *GOP Lawmakers Propose Strengthening Reagan's Antiterror Hand*, WASH. POST, Apr. 18, 1986, at A24.

130. William S. Cohen, *Noriega: Not Worth American Killing*, WASH. POST, Oct. 17, 1989, at A27. Senator Cohen's "poison pen" example would have been illegal, *not* because it would have violated EO 12,333, but because it would have violated the law of war. *See* Annex to Hague IV, *supra* note 40, art. 23(a) (prohibiting use of poison or poisoned weapons).

131. *See, e.g.*, Brandenburg, *supra* note 61, at 690, 692-93; Johnson, *supra* note 23, at 423.

132. Sofaer, *supra* note 24, at 120.

133. Schmitt, *supra* note 14, at 668.

Under the law of war, indeed he was. He was a terrorist supporter, and a continuing threat to U.S. citizens.[134]

Under the U.S. interpretation of Article 51 of the U.N. Charter, the United States has the right to use self-defense against a continuing threat.[135] Once the decision to respond with force against Libya was made, the law of war targeting analysis[136] applied, and since Qadhafi was a combatant by virtue of his position, he could be lawfully targeted.[137] Although many felt EO 12,333 prevented the targeting of Qadhafi, a proper interpretation of EO 12,333 within the greater body of existing law indicates such a targeting is lawful as long as it is not done treacherously. Thus, the legislative change called for by some congressmen was unnecessary.

## D. 1991 Gulf War

Possibly the most illustrative example of misunderstanding the prohibition on assassination is the Gulf War. On 2 August 1990, Iraqi troops invaded Kuwait.[138] The United States immediately condemned the invasion as blatant military aggression.[139] In December, the U.N. Security Council passed U.N. Resolution 678, which authorized the use of force against Iraq and set a deadline of 15 January 1991 for Iraq to withdraw from Kuwait.[140] On 14 January 1991, Congress passed legislation autho-

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134. *See supra* note 122-23 and accompanying text.

135. *See supra* note 120 and accompanying text.

136. *See infra* note 216 and accompanying text (defining the principles of the law of war used in a targeting analysis).

137. Members of the armed forces of a party to the conflict are combatants. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4 (12 Aug. 1949), *reprinted in* DA PAM 27-1, *supra* note 34, at 68; and Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 13 (12 August 1949), *reprinted in* DA PAM 27-1, *supra* note 34, at 28 (applying the law of war protection to combatants). *See also* DA PAM. 27-1-1, *supra* note 36, art. 43, at 30. Military objectives that may be attacked include combatants and "places devoted to the support of military operations or the accommodation of troops." FM 27-10, *supra* note 34, para. 40; DA PAM. 27-1-1, *supra* note 36, art. 48, at 34.

138. Michael R. Gordon, *Iraq Army Invades Capital of Kuwait in Fierce Fighting*, N.Y. TIMES, Aug. 2, 1990, at A1.

139. *Id.*

140. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S/RES/678 (1990), *cited in* Johnson, *supra* note 23, at 430. This use of force was authorized under Article 42 of the U.N. Charter, which allows the Security Council to "take such action by air, sea, or land forces [of Members of the United Nations] as may be necessary to maintain or restore international peace and security." U.N. CHARTER, art. 42.

rizing President Bush to use military force,[141] and on 16 January 1991, the United States commenced armed conflict with Iraq.[142]

Soon after the Iraqi invasion, the debate over whether Saddam Hussein could be legally "assassinated" hit the newspapers.[143] In one article, Professor Turner[144] accurately distinguished between "killing" and "murder."[145] He argued that a state must meet two requirements to use force in self-defense: the force must be necessary (peaceful attempts to resolve the issue have been exhausted), and force must be proportional (use only the level of coercion necessary to achieve the permitted objectives).[146] He then applied the theory of "justifiable tyrannicide" and correctly suggested that killing Hussein would be morally and legally permitted.[147] Not everyone understood his perspective.

On 4 February 1991, on a *Nightline* television episode, Ted Koppel interviewed Judge Sofaer and Professor Abraham Chayes.[148] He asked both if it would be legal to target Hussein.[149] Judge Sofaer replied that it may not be politically wise, but it would be legal (the executive order notwithstanding).[150] Professor Chayes disagreed, however, stating, "If Sad-

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141. Authorization for Use of Military Force Against Iraq, Pub. L. 102-01, 105 Stat. 3 (1991), *cited in* Johnson, *supra* note 23, at 431.

142. Johnson, *supra* note 23, at 431. It should be noted that military force would also be authorized in collective self-defense under Article 51 of the U.N. Charter; however, in an attempt to distinguish this situation from the 1986 Libya raid, it will be analyzed from an Article 42 of the U.N. Charter, use of force perspective. *See supra* note 140 and accompanying text.

143. *See, e.g.*, Robert F. Turner, *Killing Saddam: Would It Be a Crime?*, WASH. POST, Oct. 7, 1990, at D1; Daniel Schorr, *Hypocrisy About Assassination*, WASH. POST, Feb. 3, 1991, at C07; Eric L. Chase, *Should We Kill Saddam*, NEWSWEEK, Feb. 18, 1991, at 16; Tom Kenworthy, *From Capitol Hill, A Potshot At Saddam*, WASH. POST, Feb. 27, 1991, at A23.

144. Professor Robert Turner is associate director of the Center for National Security Law at the University of Virginia School of Law.

145. Turner, *supra* note 143.

146. *Id.* at D2.

147. *Id. See also* Johnson, *supra* note 23, at 401 (explaining justifiable tyrannicide by using Abraham Lincoln's conclusion that killing a leader is "morally justified when a people has suffered under a tyrant for an extended period of time and has exhausted all legal and peaceful means of ouster"). *See generally* FORD, *supra* note 9 (providing an in-depth discussion of tyrannicide).

148. Professor Chayes of Harvard Law School served as the Legal Advisor at the U.S. Department of State during the Kennedy Administration. Schmitt, *supra* note 14, at 674.

149. Schmitt, *supra* note 14, at 674 (citing *Nightline: Why Not Assassinate Saddam Hussein?* (ABC television broadcast, Feb. 4, 1991)).

150. *Id.* (same).

dam was out leading his troops and he got killed in the midst of an engagement, well that's one thing. But if he is deliberately and selectively targeted, I think that's another . . . ."[151] As Professor Schmitt pointed out,

> [Professor Chayes'] comments simply misstate the law. . . . [L]awful targeting in wartime has never required that the individual actually be engaged in combat. Rather, it depends on combatant status. The general directing operations miles from battle is as valid a target as the commander leading his troops into combat. The same applies to Saddam Hussein. Once he became a combatant, the law of war clearly permitted targeting him.[152]

Members of Congress were also concerned about the assassination ban. On 17 January 1991, Representative McEwen introduced a resolution supporting the suspension of EO 12,333 for Iraqi leaders only, to make it legal to assassinate Hussein.[153] The resolution failed to move, so the Congressman introduced the resolution again on 26 February 1991, saying "I don't want some American pilot pulling two G's over Baghdad to be hauled up before some congressional inquisition a few years from now because he got Saddam Hussein."[154] House Speaker Foley responded by pointing out: "[T]hat is an executive order. It is not a statute. The president can [change it] with a stroke of a pen . . . ."[155] Unfortunately, neither Congressman correctly understood the assassination ban.

Applying the law of war, Hussein was a lawful combatant and was, therefore, a lawful target.[156] As Lieutenant Colonel Kelly correctly wrote years ago, "A man in uniform, whether that of a general or a private, is a proper target."[157] The only issue would be *how* Hussein was killed. Only if it were accomplished through means of treachery would it be unlawful.

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151. *Id.* (same).

152. *Id*.

153. Kenworthy, *supra* note 143.

154. *Id*. The Representative argued that EO 12,333 "prevents us from targeting the sources of attack upon the American forces," and "those military planners, those secretaries of defense, those commanders-in-chief, that pilot who is flying into Baghdad, should not have to be faced with the possibility of having violated an executive order. This should be removed." 137 CONG. REC. H536 (daily ed. Jan. 17, 1991) (statement of Rep. McEwen).

155. Kenworthy, *supra* note 143.

156. *See supra* note 137.

157. Kelly, *supra* note 12, at 103.

Using aircraft to strike a military target deliberately and selectively, to include Hussein, would not be an assassination.

The greatest contributor to America's misunderstanding of the assassination ban, however, is arguably the media. Reporters and journalists present the assassination ban in a light that suggests EO 12,333 alone prevents the United States from engaging in assassination, and that, but for the order, assassination would be permitted.

### E. Misunderstanding in the Media

Reporter Daniel Schorr suggested in 1991 that the United States do away with EO 12,333 "to spare us from presidential doubletalk about designs on the lives of foreign foes."[158] He referred to a November 1989, Department of Justice (DOJ) clarification on the assassination ban as "a new 'interpretation' of the assassination ban."[159] In reality, the clarification simply restated the prohibition as it was intended years earlier; that is, the U.S. government can assist with coup plotters in foreign countries as long as the death of a political leader is not their primary objective.[160] Even the headlines to the newspaper article incorrectly stated the substance of the DOJ opinion.[161] The article maintained that a request for clarification on the ban came after the botched Giroldi Coup[162] in Panama in 1989, and the opinion was based on ten attorneys searching "through 160 boxes of documents from the Ford, Carter and Reagan administrations to determine whether the executive order was meant to exclude U.S. involvement in coups where violence and accidental death were possible."[163] The DOJ

158. Schorr, *supra* note 143.

159. *Id.*

160. David B. Ottaway & Don Oberdorfer, *Administration Alters Assassination Ban*, WASH. POST, Nov. 4, 1989, at A1. The Department of Justice opinion was, in fact, consistent with the Church Committee remarks fourteen years earlier that stated the possibility of assassination of a foreign leader is but one issue to consider in determining whether U.S. involvement would be proper. *See* COMMITTEE REPORT, *supra* note 68, at 258.

161. The headlines read, "Administration Alters Assassination Ban" on one page and "CIA Director Says Administration Has Revised Assassination Ban" on another. Ottaway & Oberdorfer, *supra* note 160, at A1, A4.

162. *See infra* notes 185-87 and accompanying text.

163. Ottaway & Oberdorfer, *supra* note 160, at A4.

opinion did not "loosen" the rules; rather, it was a "clarification of the 1976 Executive Order."[164]

The Army had attempted to provide its own clarification of the assassination ban before the Giroldi Coup failure.[165] As the Chief of the Army's Law of War Branch, Office of The Judge Advocate General, W. Hays Parks had prepared the memorandum mentioned earlier in this article regarding EO 12,333.[166] About this memo Professor Schmitt commented that "[b]efore publication, the press learned of the memo and characterized it as an attempt to narrow Executive Order 12,333 to the point of rendering it meaningless. Some members of the press even claimed that the memo permitted assassination."[167] Clearly, it does not; the memorandum places the assassination ban in proper context within the larger application of national and international law.[168] Indeed, the memorandum provides examples, as far back as 1804, where the law was applied consistent with modern application.[169]

The furor of media misunderstanding occurred again during the weeks following the terrorist attacks on the World Trade Center and the Pentagon. Three days after the attacks, CNN reporter Wolf Blitzer asked former Secretary of State Lawrence Eagleburger if it was time to repeal the assassination ban.[170] Two days later, CNN's Aaron Brown directed a similar question to Senator Bob Graham of the Senate Intelligence Committee, questioning whether the executive order "put handcuffs on the President."[171] Senator Graham responded that if he had to choose between assassinating bin Laden and the rubble of the World Trade Center and Pentagon, he would "have to opt for the assassination."[172]

Newspapers were also astir with reports of the significance of the assassination ban. The *Washington Post* printed an article entitled *Assassination Ban May Be Lifted for CIA.*[173] The article reported Secretary of

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164. *Id.*

165. Schmitt, *supra* note 14, at 671.

166. *See* Parks, *supra* note 18.

167. *Id.* (citing *Department of Defense Press Briefing*, FED. NEWS SERVICE, Apr. 11, 1989 (briefing by Dan Howard), *available at* LEXIS, Nexis Library, U.S. Affairs File).

168. *See* Parks, *supra* note 18.

169. *Id.* at 7.

170. *CNN Live* (CNN television broadcast, Sept. 14, 2001).

171. *CNN Live, America's New War* (CNN television broadcast, Sept. 16, 2001).

172. *Id.*

173. Walter Pincus & Dan Eggen, *New Powers Sought for Surveillance, Assassination Ban May Be Lifted for CIA*, WASH. POST, Sept. 17, 2001, at A1.

State Powell as saying that the administration was reviewing the executive order.[174] Unfortunately, it was assumed that Secretary Powell viewed the executive order as an obstacle to going after bin Laden. The reporters wrote, "administration officials said yesterday that they are considering lifting a 25-year-old ban on U.S. involvement in foreign assassinations," and that "administration officials and some lawmakers said the ban is unrealistic in an age of terrorism."[175] Initial indications, however, are that the Bush Administration properly understands that the assassination ban does not prohibit targeting bin Laden. As reported in *USA Today*, White House spokesman Ari Fleischer stated that the assassination ban "would not shield bin Laden," and that following review of the executive order, it was determined that the order would "not limit the United States' ability to act in its self-defense."[176]

The confusion and misunderstanding of EO 12,333 exists among scholars, journalists, and politicians alike. As Professor Schmitt stated with regard to ABC's *Nightline* episode in 1991, "[t]hat such an eminent legal scholar as Professor Chayes so misunderstands the law on assassination is strong evidence that the issue requires much clarification."[177] Indeed it does. One proposal might be to provide the necessary clarification and to educate those who misunderstand the assassination ban. A better proposal, however, is to simply get rid of the ban; if the ban does not exist, the confusion over the ban will cease to exist. While confusion may continue concerning assassination law generally, the debate will at least be shifted to the proper sources of law.

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174. *Id.* at A6.

175. *Id.*

176. Laurence McQuillan, *White House: Bin Laden Fair Game Despite Order*, USA TODAY, Sept. 18, 2001, at 4. Vice President Cheney echoed the Bush Administration's understanding that the assassination ban does not prohibit going after bin Laden. Cheney stated that he did not believe any U.S. or international law would prevent American agents from killing bin Laden. Dan Balz, *President Says Bin Laden Is Wanted 'Dead or Alive'*, WASH. POST, Sept. 18, 2001, at A16 (citing *Meet the Press* (NBC television broadcast, Sept. 16, 2001) (statement of Dick Cheney)).

177. Schmitt, *supra* note 14, at 675.

## VII. Repeal of EO 12,333 Assassination Ban Is in the Best Interest of the United States

### A. The Ban Is Redundant and Has Outlived Its Original Purpose

The enactment of EO 11,905 (and ultimately EO 12,333) added nothing substantive to the law prohibiting assassination. As previously discussed, it merely served as a policy statement for current issues. The essence of the prohibition already exists in law. Even at the time EO 11,905 was issued, the law of war and other customary international law prohibited assassination.[178] The CIA, the agency over which the entire controversy centered, had already established internal policy prohibiting assassination.[179] The actions taken by the CIA agents in the 1960s were already illegal and against policy. Had EO 12,333 existed at that time, those actions would not have been *more* illegal.

Today, international customary and treaty law, including the law of war, prohibits assassination during peacetime and wartime. The U.S. federal courts acknowledge the international law prohibiting assassination as well.[180] Moreover, many federal statutes prohibit assassination and murder,[181] and U.S. policy on assassination is clear, with or without EO 12,333.[182]

Scholars and experts agree, the original purpose in passing the assassination ban was to assure a cynical public and a concerned Congress that U.S. agencies would not repeat the unilateral actions undertaken by the CIA in the 1960s.[183] Since the Church Committee investigation in 1975, Congress has gone to great lengths to assert a greater role in foreign affairs and intelligence activities.[184] The changes over the past twenty-four years

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178. "Assassination is unlawful killing, and would be prohibited by international law even if there were no executive order proscribing it." Parks, *supra* note 18, at 4.

179. *See supra* notes 97-98 and accompanying text.

180. *See, e.g.*, Liu v. Republic of China, 892 F.2d 1419 (9th Cir. 1989) (citing both the New York Convention and the Organization of American States Convention on Terrorism treaties in finding an international consensus condemning murder); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (finding that assassination is action "clearly contrary to the precepts of humanity as recognized in both national and international law").

181. *See, e.g.*, 18 U.S.C.S. § 351 (LEXIS 2002) (assassination of congressional, executive, and judicial branch members); *id.* § 1114 (protection of officers and employees of the U.S.); *id.* § 1116 (killing foreign officials, guests, or internationally protected persons); *id.* § 1751 (Presidential and Presidential staff assassination); *id.* § 2349aa (assassination as a terrorist act).

182. *See supra* note 72 and accompanying text.

have radically changed the political climate. Since the promulgation of the original executive order prohibiting assassination, Congress is now more involved with foreign affairs and, if it chooses, intelligence activities. Indeed, many in Congress recognize the fundamental changes in both the international and national political climates, evident by their past desires to legislate exceptions to the ban, however unnecessary those exceptions might have been. Today, unlike earlier years, the legislature understands and appreciates the need for flexibility. Today, unlike earlier years, the legislature would be unlikely to push for a legislative ban if the executive ban was repealed.

National and international law properly reflect a ban on assassination. A valid purpose for restating the ban in EO 12,333 no longer exists. But

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183. "[T]he initial ban on assassination was adopted in response to allegations concerning planned killings of heads of state and other important government officials." Sofaer, *supra* note 24, at 119. "The purpose of Executive Order 12333 and its predecessors was to preclude unilateral actions by individual agents or agencies against selected foreign public officials and to establish beyond any doubt that the United States does not condone assassination as an instrument of national policy." Parks, *supra* note 18, at 8. "Executive Order 12333 [was] designed to assure Congress and the public that unpopular and ill-conceived policies undertaken in the 1960's and early 1970's will not be repeated." Zengel, *supra* note 27, at 154.

184. A series of congressional actions over the past twenty-four years demonstrates this effort. In May 1976, following the Church Committee's final report, the Senate created the Select Committee on Intelligence as a permanent intelligence oversight committee. The House followed suit in July 1977 by creating the Permanent Select Committee on Intelligence. *See* SNIDER, *supra* note 62, pt. 1, at 8. In 1980, Congress enacted the Congressional Oversight Act, which required agency reporting of all intelligence activities to these Committees. Congressional Oversight Act, 50 U.S.C. § 413 (1980). In 1991, the Act was replaced with the current statutory requirements for intelligence activity accountability. 50 U.S.C. § 413 (1991). In 1992, Congress passed the Intelligence Organization Act of 1992, which provided a definition for "intelligence community" that included, among other agencies, the Defense Intelligence Agency, the intelligence elements of the military service departments, and "other offices within the Department of Defense." Intelligence Organization Act of 1992, 50 U.S.C. § 401a (1992). Also, the 1992 legislative changes required the Director of Central Intelligence to provide intelligence to Congress and the Committees, the first time such a requirement had been expressly stated in law. SNIDER, *supra* note 62, pt. 1, at 12. Today intelligence information is available to all Members of Congress, although classified intelligence reports are generally provided only to the committees with responsibility in national security. *Id.* pt. 3, at 1. Additionally, the Majority and Minority Leaders of the Senate and the Speaker and Minority Leader of the House have access to all intelligence held by the intelligence committees. *Id.*

aside from its uselessness, there is more importantly a real danger in keeping EO 12,333: the artificial limits it creates.

B. Misunderstanding EO 12,333 Creates Artificial Limits

Removing the assassination ban in EO 12,333 would not change U.S. law or policy; however, it might prevent the creation of artificial limits on U.S. ability to respond to situations of national interest. The 1989 coup attempt in Panama provides one example of such artificial limits.[185] The Bush Administration wanted to see Panama's military dictator, Manuel Noriega, ousted from power.[186] But once the coup, led by Panamanian officer Major Moises Giroldi Vega, began to falter, the U.S. Government, rather than assisting the coup to succeed, did nothing.[187] This inaction was based on an earlier interpretation from the Senate Intelligence Committee in 1988 that the CIA had an obligation to prevent an assassination planned by foreigners working with the United States.[188] This interpretation was based on concern that a killing under such circumstances would violate EO 12,333. As a result, the coup failed, and Noriega remained in power.

This clearly was not the original intent of EO 12,333. As stated in the 1989 DOJ opinion, the executive order did not prevent U.S. assistance to coup plotters in foreign countries, provided the coup's primary objective was not the death of a political leader.[189] Because of the erroneous interpretation, however, Noriega continued his drug trafficking, election rig-

185. Schmitt, *supra* note 14, at 669.

186. *Id.*

187. *Id.*

188. *Id.* The Senate Intelligence Committee reviewed an earlier coup plan submitted by the Reagan Administration and disapproved the plan. Some Senators felt the plan was insufficient while others viewed it as a "thinly disguised assassination plot." Stephen Engelberg, *Panamanian's Tale: '87 Plan for a Coup,* N.Y. TIMES, Oct. 29, 1989, § 1, at 18. One of the coup planners, a former Panamanian Army colonel, was informed by American "contacts" that EO 12,333 would actually *require* them (the Americans) to notify Noriega if they became aware of an assassination plot against him. *Id.*

189. *See supra* notes 159-64 and accompanying text. Apparently, the coup plan that was disapproved by the Senate Intelligence Committee did not make Noriega's death the primary objective; it was disapproved due to an overly broad interpretation of EO 12,333. A former Panamanian Army Colonel stated: "There was no assassination plot. What we wanted to do was enter Panama with a force and stage a coup. We would have seized him, arrested him, maybe burned him. We didn't know what would happen." Engelberg, *supra* note 188. The colonel was told that "the Senate Intelligence Committee saw his plans for a coup as dangerously close to violating the executive order that bars American involvement in assassinations." *Id.*

ging, and assault and intimidation tactics,[190] and he remained in power until Operation Just Cause in December 1989.[191] American troops were ordered into Panama on 20 December 1989, and at a cost of at least twenty-three American lives, accomplished what the Panamanians failed to do earlier—end Noriega's tyranny.[192]

The Panama experience is a perfect example of the potential cost of keeping EO 12,333. It has contributed to bad policy decisions, and unfortunately, to the loss of American lives. Professor Schmitt asserted that "setting forth a prohibition without clearly delineating what it means is arguably more damaging than having no order at all."[193] Repealing the prohibition would facilitate legitimate considerations of foreign assistance and legal use of force by removing the potential for misunderstanding and confusion.[194]

### C. Contemporary Threats Require Maximum Flexibility

This is a time when national security threats to the United States demand more flexible U.S. responses, not more restrictive domestic law and policy.[195] Tyrants, terrorists, and terrorist supporters threaten every American.[196] The horrific events of 11 September 2001 make that painfully clear. The U.S. responses must include the entire range of options

190. Donna Miles, *Operation Just Cause*, SOLDIERS, Feb. 1990, at 20.

191. *Id.*

192. *Id.*

193. Schmitt, *supra* note 14, at 679.

194. The author does not believe the solution lies in defining the word "assassination" within the Executive Order. One scholar has argued for a revision of EO 12,333 that would add a subparagraph to paragraph 3.4 (definitions) defining assassination. *See* Thomas C. Wingfield, *Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine*, 22 MD. J. INT'L L. & TRADE 287, 317, app. (1998). The proposed paragraph reads: "Assassination means the treacherous targeting of an individual for a political purpose. The otherwise legal targeting of lawful combatants in armed conflict, including all members of an enemy nation's or organization's operational chain of command, is not assassination and is not forbidden by this Order." *Id.* Such a proposal would be an improvement over the status quo. While the proposed change correctly states existing law, however, this recommended solution simply replaces one controversial term (assassination) with two more (treacherous and political). Eliminating the paragraph on assassination altogether and referring directly to the appropriate sources of international law seems to be a more pragmatic approach.

permitted a state by international law.[197] Reviewing two examples, one of a tyrant and one of a terrorist and terrorist supporter, emphasizes this point.

Iraq's Saddam Hussein exemplifies a tyrant.[198] When the U.N. authorized the use of military force in response to Hussein's decision to invade and destroy Kuwait,[199] killing Hussein became a legal option.[200] As one commentator reasoned, "When diplomacy fails . . . the choice will be between killing tens of thousands of conscripted soldiers in the aggressive state's army, or taking only one life—that of the tyrant responsible for the choice to wage aggressive war."[201] One should not confuse tyrannicide,[202] which may be a legal option in some cases, with assassination, which is never a legal option.[203] Critics argue that killing a foreign leader will only strengthen the enemy morale and resolve.[204] In some situations, that may be the case. That is a policy decision, however, to be made by U.S. lead-

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195. Some argue for more restrictive interpretations of assassination through legislation. *See supra* note 119. Yet, as Professor Turner cautioned in 1990:

> [Before Congress codifies] a vague prohibition against "assassination" into permanent American Law . . . they ought to carefully consider whether the absolute protection of Saddam Hussein, Adolf Hitler, or other international criminals in the years ahead is really worth the lives of the thousands of their constituents who might be placed at risk in a more conventional response to aggression, if Congress were to leave that as the only "legal" alternative.

Turner, *supra* note 143, at D2.

196. This threat was recognized even before 11 September 2001. *See* THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY (1999) [hereinafter THE WHITE HOUSE]. *See generally* SECURING THE HOMELAND STRENGTHENING THE NATION (2001).

197. The Clinton Administration recognized this need, as reflected in its National Security Strategy, wherein it stated, "We will do what we must to defend [our] interests, including, when necessary and appropriate, using our military might unilaterally and decisively." THE WHITE HOUSE, *supra* note 196, at 1.

198. As Iraq's political and military leader, he was singularly responsible for the invasion of Kuwait. During the war, a defecting Iraqi officer stated, "If you kill Saddam, all this would stop." Anderson, *supra* note 108, at 306-07.

199. *See supra* notes 138-41 and accompanying text.

200. *See infra* notes 218-22 and accompanying text.

201. Wingfield, *supra* note 194, at 294.

202. *See supra* note 147.

203. For example, tyrannicide would be a legal option in the case where a tyrant presents himself as a lawful target. Killing a lawful target cannot be an assassination unless done treacherously. *See supra* notes 40-43, 110 and accompanying text.

204. *See, e.g.*, Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT'L L. 477, 499 (1999).

ership under the specific circumstances of each situation, not a legal conclusion that automatically eliminates the option.

Similarly, the United States must not limit its ability to respond to terrorists and terrorist supporters; applying a narrow view of policies creates that potential. The current international search for Osama bin Laden and the War on Terrorism demand maximum flexibility. As Judge Sofaer concluded, "We must never permit terrorists to assume they are safe."[205] Even before the terrorist attacks on the World Trade Center and the Pentagon, the United States had recognized an increasing need to "protect the lives and personal safety of Americans, both at home and abroad."[206]

United States policy reserves the right to use military force in self-defense.[207] On 14 September 2001, the Senate and the House recognized this right and overwhelmingly passed a joint resolution authorizing the use of military force against those responsible for the September 11 attacks.[208] Hunting down and killing bin Laden or other members of the al Qaeda network would be in self-defense of future attacks, and not assassination. As Sofaer warned, however, the assassination ban is prone to overbroad application because "Americans have a distaste for . . . the intentional killing of specific individuals."[209] Americans, now forced to choose between their distaste of killing terrorists and their own personal safety, need to understand the difference between self-defense and assassi-

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205. Sofaer, *supra* note 24, at 113.

206. THE WHITE HOUSE, *supra* note 196, at 1.

207. The United States exercised the option to use force in its 20 August 1998 missile strike of Osama bin Laden's terrorist base in Afghanistan. *See infra* note 223 and accompanying text. The U.S. policy was reflected in the Clinton Administration's National Security Strategy:

> As long as terrorists continue to target American citizens, we reserve the right to act in self-defense by striking at their bases and those who sponsor, assist or actively support them.

THE WHITE HOUSE, *supra* note 196, at 14.

The Bush Administration continued this theme. "The first and best way to secure America's homeland is to attack the enemy where he hides and plans, and we are doing just that." President George W. Bush, Radio Address (June 8, 2002).

208. H.J. Res. 64, 107th Cong. (2001).

209. Sofaer, *supra* note 24, at 117.

nation. Repealing misunderstood and unnecessary executive orders like the assassination ban would be a helpful beginning toward that end.

One critic argued that assassination creates the risk of retaliation, and that Americans would be adopting the tactics of barbarians and terrorists.[210] That may be true if the United States were in fact resorting to "assassination," but targeting a terrorist who has demonstrated the desire, the ability, and the intent to kill innocent civilians is not assassination. It can be no more barbaric to act in self-defense than it is barbaric to engage in war. The current administration understands its legal options as reflected by the airstrikes in Afghanistan following the 11 September attacks and the broader War on Terrorism.[211] But the next administration may not. And the next use of military force against terrorist supporters may not have the same public support as the current use of force against the Taliban and al Qaeda.[212] It is imperative that the United States retain *all* legal options available, regardless of the popularity of exercising those options. Repealing the assassination ban would force the focus to shift from an executive order to national and international law, where it belongs.

## IX. Military Application

Until the assassination ban of EO 12,333 is repealed, the military practitioner will continue to face questions regarding the executive order and its application to military operations. As previously discussed, there are two applicable definitions of assassination, a wartime definition and a peacetime definition.[213] There are also two independent applications of international law that address a state's permissible conduct. The first, *jus ad bellum*, addresses a state's right to resort to force, while the second, *jus in bello*, addresses a state's conduct during war (that is, the law of war).[214]

The military practitioner should focus on this second area, the law of war. Likewise, the military practitioner will work with the wartime defi-

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210. *See* Johnson, *supra* note 23, at 434.

211. *See* Dan Balz, *U.S., Britain Launch Airstrikes At Taliban Sites in Afghanistan*, WASH. POST, Oct. 8, 2001, at A1.

212. The Taliban militia ruling most of Afghanistan was targeted because it supported bin Laden's terrorist organization. The Taliban refused to turn bin Laden over to the United States after the September 11 terrorist attacks. Secretary of Defense Donald H. Rumsfeld stated, "[The] objective is to defeat those who use terrorism and those who house or support [terrorists]." *Id.* at A6.

213. *See supra* notes 14-28 and accompanying text.

nition of assassination. Any operation involving the military will require, as a matter of policy, application of the law of war.[215] The law of war prohibits treacherous killing, and it requires application of the principles of military necessity, proportionality, humanity, and distinction in determining whether someone is a proper military objective.[216] Since any planned killing by the military will have to first consider this law of war analysis, a violation of the assassination ban cannot occur so long as the killing complies with the law of war. In other words, it is never an assassination if an individual is a lawful target and not treacherously killed. Therefore, when a military legal advisor is faced with the question of whether it is legal to kill a specific individual, the analysis should be made entirely from a law of war perspective.

In a pragmatic sense, EO 12,333 does not apply to the military.[217] Consider two examples, one during armed conflict, and one during peacetime, which illustrate this point. During the Gulf War, Saddam Hussein was the military leader of the Iraqi forces, and his position made him a combatant.[218] "[E]nemy combatants are legitimate targets at all times, regardless of their duties or activities at the time of their attack."[219] There-

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214. *See* DOCUMENTS ON THE LAWS OF WAR 1 (Adam Roberts & Richard Guelff eds., 3rd ed. 2000) (discussing *jus ad bellum* and *jus in bello*). While there may be overlap between *jus ad bellum* and *jus in bello*, the military practitioner's focus is *jus in bello*, the law that governs the actual conduct of war. *Jus in bello* applies in all situations of armed conflict whether or not there is a formally declared war. *Id.* at 2.

215. *See* DOD DIR. 5100.77, *supra* note 44 and accompanying text.

216. *See supra* note 37 (discussing the principle of military necessity). The principle of humanity (or unnecessary suffering) generally forbids causing unnecessary destruction of property or using weapons intended to cause unnecessary suffering; the principle of proportionality requires that the anticipated loss of life and property damage resulting from a military attack not be excessive when compared to the concrete and direct military advantage expected to be gained; the principle of distinction (or discrimination) is the requirement that combatants be distinguished from non-combatants, and military objectives be distinguished from protected property or places, so that military operations are directed only against combatants and military objectives. *See* JA-422, *supra* note 44, at 5-4, 5-5. *See also* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 1-26 (1996) (providing a more in-depth discussion of the law of war principles).

217. Numerous writers make the argument that EO 12,333 effectively has no applicability during war. *See, e.g.*, Schmitt, *supra* note 14; Wingfield, *supra* note 194. Interestingly, the language of the statute proposed by the Church Committee in 1975 specifically excluded circumstances where the U.S. was involved in armed conflict. *See supra* note 78. Schmitt construes this exclusion by the Committee both as "an acknowledgment that the targeting of certain officials would not constitute assassination under the law of armed conflict, and as a desire to avoid unreasonably limiting valid military operations." Schmitt, *supra* note 14, at 660.

218. *See supra* note 137.

fore, during the war, killing Hussein, whether with a Tomahawk cruise missile or a single sniper's bullet, would only have been an assassination if it were accomplished by means of treachery.[220] As previously noted, treachery is a breach of confidence or a perfidious act, that is, an attack on an individual who justifiably believes he has nothing to fear from the attacker.[221] Attacks on combatants not engaged in the battle at the time of the attack are not considered treacherous.[222] As this example demonstrates, the entire legal analysis that would permit targeting Hussein is accomplished by application of the law of war; EO 12,333 never enters the analysis.

The 1998 cruise missile strike against Osama bin Laden's terrorist base camp in Afghanistan provides a peacetime example.[223] The decision to use military force in self-defense was made at the Executive's level.[224] Once the decision to use force had been made and the military became involved, the *jus ad bellum* was no longer an issue for the military legal advisor. It had become a situation where the law of war applied, and thus a law of war targeting analysis was used. The base camp was the operations and training center for a terrorist group.[225] Provided the base camp

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219. Parks, *supra* note 18, at 5.

220. As far as the means used to effectuate the killing, the law of war only requires that it be a lawful weapon. Parks stated that "the prohibition on assassination [does not] 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." *Id.*

221. *See supra* notes 20, 32, 36 and accompanying text.

222. *Field Manual 27-10* provides that, although Article 23(b) of Hague IV has been construed as prohibiting assassination, it does not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere." FM 27-10, *supra* note 34, para. 31.

223. The Clinton Administration explained the strike as follows:

> On August 20, 1998, acting on convincing information from a variety of reliable sources that the network of radical groups affiliated with Osama bin Laden had planned, financed and carried out the bombings of our embassies in Nairobi and Dar es Salaam, and planned future attacks against Americans, the U.S. Armed Forces carried out strikes on one of the most active terrorist bases in the world. Located in Afghanistan, . . . the strikes were a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities, and demonstrated that no country can be a safe haven for terrorists.

THE WHITE HOUSE, *supra* note 196, at 14-15.

224. *Id.*

qualified as a lawful military target, and treachery was not employed, any death caused by the strike could not be an assassination.[226] This is true even if the United States had knowledge that bin Laden was present at the time of the strike.[227]

The reality of these situations to the military legal advisor is simple. Executive Order 12,333 prohibits assassination, but so does the law of war. If a military operation complies with the law of war, there is no need to be concerned with EO 12,333 and the plethora of contentious issues that accompany it.[228]

## X. Conclusion

Repealing the assassination ban found in EO 12,333 would clarify an often-misunderstood issue. Repealing the ban would not make assassination legal; rather, it would eliminate the current confusion and misunderstanding EO 12,333 creates, and ensure that the United States has maximum flexibility in responding to contemporary foreign affairs issues.

Executive Order 12,333 prohibits assassination, yet fails to provide a definition of that term. At least on one occasion, it has prevented the United States from following legal policy that could have saved American lives. Why should U.S. executive agencies continue to struggle with establishing the boundaries of this controversial prohibition? A father tells his child not to touch, but without parameters—a clarification of the father's

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225. *Id.*

226. Professor Turner analogizes killing bin Laden to killing a criminal. "Every civilized society recognizes the moral imperative of instructing police sharpshooters to kill a gunman who is murdering hostages. This is law enforcement, not assassination." Robert F. Turner, *In Self-Defense, U.S. Has Right to Kill Terrorist bin Laden*, USA TODAY, Oct. 26, 1998, at 17A.

227. Through a law of war analysis, bin Laden would be considered a lawful military target. Terrorists, like combatants, are lawful targets when they are the objects of self-defense. *See* THE WHITE HOUSE, *supra* note 196, at 14. As Turner stated, "[k]illing someone like bin Laden would be a legitimate act of self-defense under international law." Turner, *supra* note 226, at 17A.

228. Reisman and Baker intuitively observed that "[b]ecause of the difficulties of definition, legal analysis of the lawfulness of [assassination] is best resolved with a contextual reading of each case which relies on both political context and reference to the traditional doctrines governing the use of force: proportionality, necessity and discrimination concerning the target." W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW 23 (1992), *quoted in* Schmitt, *supra* note 14, at 625.

intent, and an understanding of the context in which the "don't touch" rule applies—that child will be either pathetically restricted or frequently in violation. The child learns the father's intent through trial and error, discovering the parameters of the rule over time. In the case of the assassination ban, executive agents simply cannot afford to discover the parameters through a process of trial and error.[229]

Meanwhile, as administrative officials wrestle with the definition of assassination, those in the military need to focus on the basics: apply the law of war in all military operations, using the principles of necessity, proportionality, humanity, and distinction.[230] To ensure commanders receive sound legal advice, military legal advisors should ignore the confusion created by EO 12,333. Legal advisors must also understand law and policy, applying both to meet the needs of their clients most effectively.

Some may fear that repealing the executive order's assassination ban will send the wrong message to the public, a message that is construed to authorize assassination by those who fail to understand assassination law. The need for clarification and explanation of assassination law, however, still exists. Time can be wasted debating what is and what is not assassination every time a conflict arises, or the assassination ban of EO 12,333 can be repealed so the essential elements of assassination law can be clarified once and for all.

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229. As Schmitt pointed out, "[t]he failure of the executive order to outline exactly what it prohibits has set planners and operators adrift." Schmitt, *supra* note 14, at 679.

230. *See supra* note 216.