

# TARGETING SADDAM AND SONS: U.S. POLICY AGAINST ASSASSINATION

By

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and

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## I. Introduction

Based on the tip of an informant, Saddam Hussein's two sons, Uday and Qusay, were killed in Mosul on July 22, 2003, following a fire fight with soldiers from the United States' famed 101<sup>st</sup> Airborne Division.<sup>1</sup> The confirmation of their deaths by the United States Central Command and the White House followed two widely publicized earlier attacks on specific locations where Saddam Hussein and his sons were thought to be located. On March 20, 2003, before the invasion of Iraq was officially launched, allied bombers conducted a surprise attack on a residence in Southern Baghdad in an effort to kill Saddam Hussein.<sup>2</sup> U.S. intelligence was unable to confirm whether Saddam or his sons were killed in that strike.<sup>3</sup> Approximately three weeks later, on April 7, 2003, allied bombers attacked an underground bunker complex in the Al Mansour residential area of Southwest Baghdad in an effort to kill Saddam Hussein and his sons.<sup>4</sup> Once again, there was no confirmation of whom may have been killed.<sup>5</sup>

Even without confirmation of the deaths of Saddam or his sons, many in the media questioned whether these attacks violated the U.S. policy against assassination. One columnist lamented that “[i]t was the misfortune of Saddam Hussein’s sons that the

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<sup>1</sup> See Kevin Sullivan & Rajiv Chandrasekaran, *Hussein's Two Sons Killed in Firefight with U.S. Troops: Tip Led Soldiers to Raid Northern Iraq Mansion*, WASH. POST, July 23, 2003, at A1.

<sup>2</sup> See Rajiv Chandrasekaran & Thomas E. Ricks, *U.S. Opens War with Strikes on Baghdad Aimed at Hussein: Iraqi Leader Defiant in TV Address after Attack*, WASH. POST, Mar. 20, 2003, at A1.

<sup>3</sup> See Walter Pincus et al., *U.S. Thinks Hussein, Sons were in Bunker*, WASH. POST, Mar. 21, 2003, at A1.

<sup>4</sup> See Dana Priest & Thomas E. Ricks, *Hussein May Have Been Hit in Strike: U.S. Officials are 'Hopeful Leader Died in Attack*, WASH. POST, Apr. 8, 2003, at A15.

<sup>5</sup> See *id.*

Bush administration has not bothered to enforce the prohibition” against political assassinations.<sup>6</sup> He continued that “[t]he ban has been overlooked so often in recent years that some wonder why the administration doesn’t simply declare the measure null and void.”<sup>7</sup>

Concern over the assassination policy has not been limited to the media. Two Congressmen have been sufficiently concerned that the U.S. policy against assassination is restricting military options that they have introduced legislation in each Congress since 1998 in an attempt to nullify the policy.<sup>8</sup> To date, no action has been taken on any of the bills.

The policy against assassination is contained in Executive Order 12333, which states that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”<sup>9</sup> The question that has generated so much confusion is whether this policy applies to the targeting of Saddam and his sons in Iraq, where United States military forces are engaged in wartime hostilities.<sup>10</sup> If the policy does apply in Iraq, did President Bush violate U.S. law by targeting Saddam and his sons?

To answer these questions, this article will explore: 1) the history and text of Executive Order 12333 and its predecessors; 2) the legal effect of an executive order; 3) the applicability of Executive Order 12333 to the war in Iraq; and 4) whether the targeting of Saddam and his sons is considered “attempted assassination” under the law of war. The subsequent killing of Saddam’s sons, Uday and Qusay, occurred during a fire fight that may have involved principles of self defense on the part of U.S. forces. That discussion is beyond the scope of this article, which is limited to whether the initial targeting of Saddam and his sons violated the assassination prohibitions in Executive Order 12333 or the law of war.

## II. Executive Order 12333

### A. History

Executive Order 12333 is the third executive order to deal with the issue of assassination. The first Order, Executive Order 11905, was issued by President Gerald Ford on February 18, 1976.<sup>11</sup> Two years later, President Jimmy Carter issued Executive Order 12036, dated January 24, 1978, which superceded the Ford order and made minor

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<sup>6</sup> George Gedda, *Not-OK shootout at Mosul*, SACRAMENTO BEE, July 24, 2003, at B7.

<sup>7</sup> *Id.*

<sup>8</sup> Together, Robert Barr (R-GA) and Terry Everett (R-AL) have sponsored four bills in an attempt to nullify the assassination ban. *See generally* Terrorist Elimination Act of 1998, H.R. 4861, 105th Cong. (1998); Terrorist Elimination Act of 1999, H.R. 1403, 106th Cong. (1999); Terrorist Elimination Act of 2001, H.R. 19, 107th Cong. (2001); Terrorist Elimination Act of 2003, H.R. 356, 108th Cong. (2003).

<sup>9</sup> Exec. Order. No. 12333, pt. 2.11, 3 C.F.R. 200, 213 (1981), *reprinted in* 50 U.S.C.A. § 401 (West 2003).

<sup>10</sup> *See generally*, KEVIN SULLIVAN & RAJIV CHANDRASEKARAN, *supra* note 1.

<sup>11</sup> Exec. Order No. 11905, 3 C.F.R. 90 (1976).

revisions in the assassination language that are discussed below.<sup>12</sup> The third order, Executive Order 12333, was issued by President Ronald Reagan on December 4, 1981.<sup>13</sup> While this order revoked the Carter order, it retained the same language against assassination as contained in the Carter order. Succeeding presidents have not changed the Reagan order, so it remains in effect today.

To understand the scope of the assassination prohibition contained in the latest order, Executive Order 12333, one must understand the circumstances and motivation that led President Ford to issue the first order containing the “Prohibition of Assassination” provision.

The National Security Act of 1947 (Act)<sup>14</sup> created both the National Security Council (NSC) and the Central Intelligence Agency (CIA).<sup>15</sup> The CIA is headed by the Director of Central Intelligence (DCI), who also serves as the head of the U.S. intelligence community<sup>16</sup> and is the chief advisor to the President on intelligence matters relating to United States national security.<sup>17</sup> The Act lists the CIA’s primary duty as assisting the DCI in carrying out his or her responsibilities.<sup>18</sup> As the head of the CIA, the DCI’s responsibilities include collecting, evaluating, and providing appropriate dissemination of national security intelligence.<sup>19</sup> While the Act does not specifically authorize the DCI or the CIA to take part in assassinations, the Act does provide a rather open-ended mission statement. Among other things, the DCI is required to “perform such other functions and duties related to intelligence affecting the national security as the President or the National Security Council may direct.”<sup>20</sup>

Events leading to Executive Order 11905 began in the early part of the 1970s, when allegations began to surface that the CIA was involved in questionable activities both within the United States and in foreign nations. In April 1974, William Colby, then Director of Central Intelligence, testified before a subcommittee of the House Armed Services Committee regarding allegations of CIA involvement in Chile.<sup>21</sup> Colby’s testimony was ultimately leaked to the press.<sup>22</sup> On December 22, 1974, the New York Times published a front-page article entitled “Huge C.I.A. Operation Reported in U.S. Against Anti-War Forces,” which alleged that the CIA was involved in domestic spying activities.<sup>23</sup> Due to the public outcry, President Ford was forced to take immediate

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<sup>12</sup> Exec. Order No. 12036, 3 C.F.R. 112 (1978).

<sup>13</sup> Exec. Order. No. 12333, 3 C.F.R. 200 (1981).

<sup>14</sup> 50 U.S.C.A. §§ 401-442 (West 2003 & Supp. 2003).

<sup>15</sup> *Id.* §§ 402, 403-1 (West 2003).

<sup>16</sup> The United States intelligence community is comprised of several distinct military and civilian agencies. For a complete list of these agencies, *see id.* § 401a (West 2003 & Supp. 2003).

<sup>17</sup> *Id.* § 403(a)(1)-(3) (West 2003).

<sup>18</sup> *Id.* § 403-1.

<sup>19</sup> *Id.* § 403-3(d)(1)-(5).

<sup>20</sup> *Id.* § 403-3(d)(5).

<sup>21</sup> Major Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12333: A Small Step in Clarifying Law*, 172 MIL. L. REV. 1, 11-12 (2002).

<sup>22</sup> *Id.* at 12.

<sup>23</sup> *See* Gerald K. Haines, *Looking for a Rogue Elephant: The Pike Committee Investigations and the CIA*, CIA STUDIES IN INTELLIGENCE, at <http://www.cia.gov/csi/studies/winter98-99/art07.html> (Winter 1998-

action. Accordingly, on January 4, 1975, he signed Executive Order 11828, which established a Commission on CIA Activities within the United States.<sup>24</sup> This became known as the Rockefeller Commission as President Ford appointed Vice President Nelson Rockefeller to be the Chairman. After the formation of the Rockefeller Commission, press reports alleged that the CIA had been involved in the assassination attempts of several foreign leaders.<sup>25</sup> Congress then decided to establish its own investigative committees. On January 27, 1975, the United States Senate created the Church Committee,<sup>26</sup> named after its Chairman, Senator Frank Church of Idaho.<sup>27</sup> On February 19, 1975, the House of Representatives created the Pike Committee, named after Representative Otis Pike of New York.<sup>28</sup>

The Church Committee focused much of its attention on the alleged role of the CIA in assassination plots against foreign leaders. The Committee was ordered to investigate governmental intelligence activities that were “illegal, improper or unethical.”<sup>29</sup> After extensive hearings on the matter, the Church Committee published its findings in a detailed interim report in November 1975 entitled “Alleged Assassination Plots Involving Foreign Leaders.”<sup>30</sup> The Committee’s investigations focused on allegations concerning CIA involvement in assassination plots against five individuals: 1) Patrice Lumumba of the Congo (currently Zaire); 2) Fidel Castro of Cuba; 3) Rafael Trujillo of the Dominican Republic; 4) General Rene Schneider of Chile; and 5) Ngo Dinh Diem of South Vietnam.<sup>31</sup> Four of these plots involved CIA attempts at overthrowing governments controlled by the targeted leaders.<sup>32</sup> The fifth (Schneider) was an attempt to prevent a new government from coming into power.<sup>33</sup>

The Committee found solid evidence of a U.S. plot to assassinate Patrice Lumumba.<sup>34</sup> In the summer of 1960, President Eisenhower voiced great concern over

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1999) (copy on file with authors) (citing Seymour Hersh, *Huge C.I.A. Operation Reported in U.S. Against Anti-War Forces*, N.Y. TIMES, Dec. 22, 1974, at 1.).

<sup>24</sup> Establishing a Commission on CIA Activities Within the United States, Exec. Order No. 11828, 40 Fed. Reg., 1219 (Jan. 7, 1975). Part of the Commission’s duties under the executive order was to submit a report to the President detailing the Commission’s findings. *See id.* On June 6, 1975, the Commission submitted its final report entitled “Report to the President by the Commission on CIA Activities Within the United States.”

<sup>25</sup> *See* Boyd M. Johnson, III, *Executive Order 12333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT’L L.J. 401, 407 (1992).

<sup>26</sup> The official name of the committee was the Select Committee to Study Governmental Operations with Respect to Intelligence Activities.

<sup>27</sup> *See* HAINES, *supra* note 23.

<sup>28</sup> *See id.*

<sup>29</sup> 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 CHURCH REPORT].

<sup>30</sup> *See id.* at 2 (stating that the Committee conducted an extensive investigation that resulted in over 8,000 pages of sworn testimony and 60 days of hearings).

<sup>31</sup> *Id.* at 4.

<sup>32</sup> Lieutenant Commander Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 MIL. L. REV. 123, 141 (1991).

<sup>33</sup> *Id.*

<sup>34</sup> CHURCH REPORT, *supra* note 29, at 13.

Lumumba's position as Premier of the Congo and his affiliations with the Soviet Union.<sup>35</sup> The Director of Central Intelligence viewed Eisenhower's strong opposition as authority to plan Lumumba's assassination.<sup>36</sup> The CIA sent biological poisons to the Congo for use on Lumumba and took some initial steps to gain access.<sup>37</sup> Before the U.S. could act, however, Lumumba was killed by Congolese rivals in early 1961.<sup>38</sup>

Regarding Fidel Castro, the Committee found concrete evidence of at least eight plots involving the CIA to assassinate the Cuban leader from 1960 to 1965.<sup>39</sup> One idea involved contaminating a box of Castro's favorite cigars.<sup>40</sup> Another idea involved rigging an exotic seashell with explosives to be placed in Castro's favorite diving spot.<sup>41</sup> In terms of authorization, the Committee concluded that the evidence was insufficient to determine whether Presidents Eisenhower, Kennedy, or Johnson authorized any of these attempts on Castro's life.<sup>42</sup>

With regard to Rafael Trujillo, the U.S. had supported him in his early years as dictator of the Dominican Republic; however, his brutality eventually caused the U.S. to fear that Trujillo was turning into another Castro.<sup>43</sup> In 1960, the U.S. supported and encouraged Dominican dissidents in their efforts to overthrow Trujillo, even to the extent of providing the dissidents with three pistols and three carbines.<sup>44</sup> Trujillo was later assassinated, but the Committee concluded that the U.S. did not instigate the plot to kill Trujillo.<sup>45</sup> Nevertheless, the Committee did find that, by providing the dissidents with weapons, "this country was implicated in the assassination ...."<sup>46</sup>

In September 1970, Salvador Allende Gossens won a plurality in Chile's presidential election.<sup>47</sup> The U.S. was strongly opposed to Allende's election, so much so that President Nixon ordered the CIA to organize a military coup that was designed to prevent Allende from becoming President.<sup>48</sup> General Renee Schneider, the Commander-in-Chief of the Chilean Army, opposed military coups and believed the constitutional election process should be followed.<sup>49</sup> Since Schneider was considered an obstacle, the coup members decided to kidnap him and made three such attempts.<sup>50</sup> During the third

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 71.

<sup>40</sup> *Id.* at 73.

<sup>41</sup> *Id.* at 85.

<sup>42</sup> *Id.* at 263.

<sup>43</sup> *Id.* at 191.

<sup>44</sup> *Id.* at 191-192.

<sup>45</sup> *Id.* at 191. Furthermore, there was no direct evidence that the weapons furnished by the U.S. were actually used in Trujillo's assassination. *Id.*

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.* at 225. Since none of the candidates had received a majority of the votes, the Chilean Constitution mandated that the Chilean Congress choose a president from among the top two candidates. History had shown that the Congress had always chosen the candidate who had won the plurality. *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 225-226.

attempt, on October 22, 1970, General Schneider was shot and died three days later.<sup>51</sup> Although U.S. officials had provided several coup members with money and weapons, the Committee found that “the intention of both the dissidents and the United States officials was to abduct General Schneider, not to kill him.”<sup>52</sup>

Ngo Dinh Diem, President of South Vietnam, and his brother, Ngo Dinh Nhu, were killed on November 2, 1963, during a military coup.<sup>53</sup> Although the Committee found that the U.S. supported and offered encouragement to the coup, there was no evidence that U.S. officials desired Diem to be killed.<sup>54</sup> Apparently, the assassination was unplanned and occurred without U.S. knowledge.<sup>55</sup> Instead, Diem’s death appeared to be a spontaneous act committed after Diem refused to resign or surrender.<sup>56</sup>

The Church Committee ultimately made several findings in its interim report, which generally condemned the use of assassinations. Nevertheless, and most significant for our inquiry, is the fact that the Committee recognized an exception for assassinations during war. It found that the U.S. should not engage in assassination by finding that “*short of war*, assassination is incompatible with American principles, international order, and morality.”<sup>57</sup>

The Committee concluded its interim report by recommending that “a flat ban against assassination should be written into the law.”<sup>58</sup> While the Committee acknowledged that the CIA had published directives in 1972 and 1973 prohibiting assassinations, it found these directives to be insufficient and recommended legislation instead.<sup>59</sup> The Committee even went so far as to include a recommended statute in the report.<sup>60</sup> Like the Committee’s findings however, the statute also contained a wartime exception.

The Church Committee’s recommended statute made it a federal crime to assassinate, attempt to assassinate, or conspire to assassinate a foreign official based on his political views, actions, or statements.<sup>61</sup> Notwithstanding this, the proposed statute

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<sup>51</sup> *Id.* at 5, 226.

<sup>52</sup> *Id.* at 5-6.

<sup>53</sup> *Id.* at 217.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1 (emphasis added).

<sup>58</sup> *Id.* at 281.

<sup>59</sup> *Id.* at 282. In 1972, then Director of Central Intelligence, Richard Helms, issued an internal memorandum to all Deputy Directors stating:

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.

In 1973, Helms’ successor, William Colby, issued his own memorandum to his Deputy Directors simply stating: “CIA will not engage in assassination nor induce, assist or suggest to others that assassination be employed.” *Id.*

<sup>60</sup> *Id.* at app. A.

<sup>61</sup> *Id.*

recognized an exception for foreign officials whose governments were the subject of a “declaration of war” by the United States “or against which United States Armed Forces have ... been introduced into hostilities or situations pursuant to the provisions of the War Powers Resolution....”<sup>62</sup>

A presidential response to the allegations regarding assassination did not occur until 1975, while the Church Committee investigation was still ongoing. During that year, President Ford made several public announcements condemning assassination. On one such occasion, Ford stated, “I am opposed to political assassination. This administration has not and will not use such means as instruments of national policy.”<sup>63</sup> Later that year, Ford stated, “I have issued specific instructions to the U.S. intelligence agencies that under no circumstances should any agency in this Government, while I am President, participate in or plan for any assassination of a foreign leader.”<sup>64</sup> It was only after the Church Committee report leaked to the press in January 1976 that Ford formally issued Executive Order 11905 on February 18, 1976.<sup>65</sup> Some have suggested that Ford may have issued the Executive Order to preempt more restrictive legislation.<sup>66</sup> Others have proposed that the Order may have been issued to clarify any confusion regarding the U.S. policy on assassination.<sup>67</sup>

Despite the Church Committee’s recommendation for a statute prohibiting assassination, as of the present time, Congress has not enacted any legislation. This is not to say that members of Congress have not tried to do so. After Ford issued his Executive Order, three attempts were made at passing legislation.<sup>68</sup> In 1976, a bill was introduced providing that “whoever, *except in time of war*, while engaged in the duties of an intelligence operation of the Government of the United States, willfully kills any person shall be imprisoned for not less than one year.”<sup>69</sup> Then, in 1978, an attempt was made to clarify Executive Order 11905.<sup>70</sup> Finally, in 1980, both the House and Senate introduced legislation that duplicated the language of Carter’s Executive Order 12036.<sup>71</sup>

Logically, the scope of Ford’s prohibition of assassination should have encompassed situations that were similar to those that had been the subject of the Church

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<sup>62</sup> *Id.* at app. A(e)(2).

<sup>63</sup> *Id.* at 281 (citing Presidential Press Conference, 6/9/1975, *Weekly Compilation of Presidential Documents*, Vol. II, No. 24, p. 611).

<sup>64</sup> JOHNSON, *supra* note 25, at 408 (1992) (citing a news conference on November 26, 1975).

<sup>65</sup> *See id.*

<sup>66</sup> *See* ZENGEL, *supra* note 32, at 145 (asserting that Ford “may have prevented legislation on the subject that likely would have been far more specific, and, given the political climate at the time, far more restrictive.”).

<sup>67</sup> *See* Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 657 (1992) (stating that “one likely motivation for the executive orders was to remedy the confusion over the U.S. assassination policy”).

<sup>68</sup> *See* Bert Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 VA. J. INT’L L. 655, 685-686 n.195 (1987).

<sup>69</sup> *Id.* (emphasis added) (citing H.R. 15542, 94th Cong. § 9(1) (2d Sess. 1976)).

<sup>70</sup> *Id.* (citing S. 2525, 95th Cong. § 134(5) (2d Sess. 1978)).

<sup>71</sup> *Id.* (citing H.R. 6588, 96th Cong., § 131 (2d Sess. 1980) and S. 2284, 96th Cong., § 131 (2d Sess. 1980)).

Committee's investigation.<sup>72</sup> These situations involved CIA activities, during peacetime, that were designed to lead to the deaths of foreign leaders considered detrimental to U.S. interests.<sup>73</sup> That the policy is limited to these peacetime intelligence operations is reinforced by the Church Committee's recognition in both its findings and proposed statute that the assassination prohibition would not apply to wartime situations. In addition, as previously noted, the bill introduced in Congress in 1976 contained a similar wartime exception.

Moreover, if the history of President Ford's Executive Order 11905 suggests that the assassination prohibition is limited to intelligence operations during peacetime, the actual text of the Order contains still further evidence of the limited nature of the prohibition.

## B. Text

In addition to the historical events that led to the issuance of Executive Order 11905, to determine the scope of the assassination prohibition, one must consider the language of the prohibition itself and the text surrounding the prohibition. Many authors writing in this area have failed to analyze the text and thereby have missed important clues as to the scope of the assassination prohibition.

At the outset, we note that President Ford's Executive Order 11905, and its successors, do not define or further explain the terms "assassination" or "political assassination." Accordingly, clues as to the scope and meaning of the Order must be found in the accompanying text.

As described above, the assassination provision is contained in three successive Executive Orders. Each Order deals exclusively with intelligence organizations and operations. In fact, the title of Ford's Executive Order 11905 was "United States Foreign Intelligence Activities." Subsequently, Carter's Executive Order 12036 and Reagan's Executive Order 12333 dropped "Foreign" from the title, leaving "United States Intelligence Activities."

The purpose of Ford's original Order was stated as follows:

Section 1. Purpose. The purpose of this Order is to establish policies to improve the quality of *intelligence* needed for national security, to clarify the authority and responsibilities of the *intelligence departments and agencies*, and to establish effective oversight to assure compliance with law in the management and direction of *intelligence agencies and departments* of the national government.<sup>74</sup>

Nothing in this stated purpose leads to a conclusion that the policies contained in this Order were intended to affect the military departments or any other federal agency or

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<sup>72</sup> See ZENGEL, *supra* note 32, at 145.

<sup>73</sup> *Id.* at 145.

<sup>74</sup> Exec. Order No. 11905, § 1, 3 C.F.R. 90 (emphasis added).

department. In fact, to the contrary, it is clear that the purpose of this Executive Order is limited to providing policy guidance and control over “intelligence agencies and departments.”

The Carter and Reagan Executive Orders deleted the purpose statement in Section 1 and reorganized the text. Nevertheless, Section 1 of the Carter Order is titled “Direction, Duties and Responsibilities with Respect to the National *Intelligence* Effort,”<sup>75</sup> and the Reagan Order is substantially the same.<sup>76</sup> Once again, the focus is exclusively on intelligence operations rather than military actions.

Section 5(g) of the Ford Executive Order contained the assassination prohibition. It read: “Prohibition of Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination.”

In considering the prohibition, it is important to note the context. First, Section 5 itself was titled “Restrictions on *Intelligence* Activities.”<sup>77</sup> Second, it is telling that the term “employee,” as used in Section 5, had a specifically defined meaning. Section 5(a)(4) defined “employee” as “a person employed by, assigned or detailed to, or acting for a United States foreign intelligence agency.” By “foreign intelligence agency,” Section 5(a)(6) included the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, and *other departments, but only while engaged in the collection of foreign intelligence*. Based on these provisions of Section 5, especially the definition of employee, the plain text of the assassination prohibition is directed at and limited to the employees of the various intelligence agencies and other departments *only* when those departments were engaged in the collection of foreign intelligence.

The Carter Executive Order carried forward the prohibition on assassination in Section 2-305 with two changes. It read: “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.” President Carter added the phrase “acting on behalf of” and deleted the assassination modifier “political.”

Once again, context is important. The prohibition was contained in Section 2, which was titled “Restrictions On *Intelligence* Activities.”<sup>78</sup> Section 2-102 contained the principles of interpretation of Section 2 and stated that the various provisions set forth limitations intended “to achieve the proper balance between protection of individual rights and *acquisition of essential information*.”<sup>79</sup> While the Carter Order changed the wording of the prohibition so the phrase “person employed by” replaced the term “employee,” the term “employee” is still specifically defined again as a person employed by, assigned to, or acting for an agency within the Intelligence Community.<sup>80</sup>

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<sup>75</sup> Exec. Order No. 12036, 3 C.F.R. 12 (emphasis added).

<sup>76</sup> The title of Part 1 of Executive Order 12333 is “Goals, Duties and Responsibilities with Respect to the National Intelligence Effort.”

<sup>77</sup> Exec. Order No. 11905, § 5, 3 C.F.R. 90 (emphasis added).

<sup>78</sup> Exec. Order No. 12036, § 2, 3 C.F.R. 112 (emphasis added).

<sup>79</sup> Exec. Order No. 12036, § 2-102, 3 C.F.R. 112 (emphasis added).

<sup>80</sup> Exec. Order No. 12036, § 4-204, 3 C.F.R. 112.

The Reagan Order, Executive Order 12333, has remained unchanged since 1981. It carried forward in Part 2.11 the same language prohibiting assassination as the Carter Executive Order. Looking at context again, the title of Reagan's Part 2 is "Conduct of *Intelligence Activities*."<sup>81</sup> Part 2.2 defines the purpose of the Order to be threefold: 1) to enhance human and technical *collection techniques*; 2) to acquire significant foreign *intelligence*; and 3) to *detect* and *counter* international terrorist activities and espionage conducted by foreign powers. Part 2.2 restates the goal of achieving the proper balance between the *acquisition of essential information* and the protection of individual interests. Furthermore, Part 3.5 explicitly limits the purpose and effect of the Order as follows: "This Order is intended to control and provide direction and guidance to the *Intelligence Community*."<sup>82</sup>

This review of the text of the three Executive Orders indicates a rather narrow application of the assassination prohibition. When the history is considered with the actual provisions of the Orders, the two compel a conclusion that the prohibition on assassination is directed at and limited to the peacetime activities of United States intelligence agencies and departments. There is no indication that the one-sentence assassination prohibition, in a multi-page Executive Order dealing exclusively with intelligence agencies and operations, was ever intended to extend beyond the peacetime pursuits of U.S. intelligence operations. Furthermore, it does not appear that the prohibition has any application to wartime hostilities nor to non-intelligence activities of the United States Armed Forces. Based on this evidence, we conclude that the targeting of Saddam Hussein and his sons during wartime hostilities, such as Iraq, is not prohibited by the assassination provision in Executive Order 12333.

### C. Definition of Assassination

None of the three Executive Orders defines the term "assassination." Therefore, we must look to other sources to understand the accepted meaning of the term under domestic and international law, and thus to understand what killing is prohibited. In doing so, we find further support for the conclusion that the targeting of Saddam Hussein and his sons did not violate Executive Order 12333 when the generally accepted definition of assassination is considered.

The most widely accepted approach in terms of defining assassination is to view assassination as having two definitions, one applying to peacetime and one applying to wartime.<sup>83</sup> As argued above, the history and text of Executive Order 12333 and its predecessors strongly suggest that the Executive Orders are limited to a peacetime application. Thus, the military definition of assassination will be explored in a succeeding section. This section is limited to considering the peacetime definition of assassination to determine how that definition affects the scope of the prohibition.

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<sup>81</sup> Exec. Order. No. 12333, pt. 2, 3 C.F.R. 200 (emphasis added).

<sup>82</sup> Exec. Order. No. 12333, pt. 3.5, 3 C.F.R. 200 (emphasis added).

<sup>83</sup> See generally HARDER, *supra* note 21, at 3-4.

Professor Jeffrey Addicott has catalogued the common definitions of the terms “assassinate” and “assassination” from the leading dictionaries.<sup>84</sup> They include: “[t]o kill by surprise or secret assault; to murder by treacherous violence;” “[t]o murder (a prominent person) by surprise attack, as for political reasons;” and “[t]he act of deliberately killing someone, especially a public figure, usually for hire or for political reasons.”<sup>85</sup>

Major Tyler Harder went one step further and summarized the elements of a peacetime assassination to be: 1) murder, 2) of a targeted individual, and 3) for political purposes.<sup>86</sup> Without each of these elements, he concluded that a killing during peacetime will not be construed as assassination.<sup>87</sup> Thus, it is clear that murder is a key element of assassination, but how is murder defined?

Black’s Law Dictionary defines murder as “[t]he killing of a human being with malice aforethought,” that is, without justification or excuse.<sup>88</sup> This definition is in accord with the common law definition of murder. Professor Joshua Dressler explains that “[o]ne who intentionally kills another human being without justification (e.g., self-defense), excuse (e.g., insanity), or mitigating circumstance (e.g., sudden heat of passion) is guilty of killing with ‘malice aforethought’... and, therefore, is guilty of common law murder.”<sup>89</sup> At common law, homicide was not considered justifiable unless it was commanded or authorized by law. One example of a lawful killing was during wartime. “The typical instances in which even the extreme act of taking human life is done by public authority are (1) the killing of an enemy as an act of war and within the rules of war, and (2) the execution of a sentence of death pronounced by a competent tribunal.”<sup>90</sup>

The Model Penal Code (MPC), prepared by the American Law Institute and used as a model by most states, also considers murder to be a criminal homicide unless a justification or excuse exists. The MPC states that “conduct is justifiable when it is required or authorized by: ... (d) the law governing the armed services or the lawful conduct of war...”<sup>91</sup> As explained by Professor Wayne LaFave:

Yet another aspect of the public duty defense is where the conduct was required or authorized by “the law governing the armed services or the lawful conduct of war.” Several modern codes specify that situation within a more general public duty statute. This means, for example, that if a soldier intentionally kills an enemy combatant in time of war and within

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<sup>84</sup> See Jeffrey F. Addicott, *Proposal for a New Executive Order on Assassination*, 37 U. RICH. L. REV. 751, 760 (2003).

<sup>85</sup> *Id.*

<sup>86</sup> HARDER, *supra* note 21, at 5.

<sup>87</sup> *Id.*

<sup>88</sup> BLACK’S LAW DICTIONARY 1038 (7th ed. 1999).

<sup>89</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 506 (3d ed. 2001).

<sup>90</sup> ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1093 (3d ed. 1982).

<sup>91</sup> MODEL PENAL CODE § 3.03(1)(d) (1962) (amended 1985).

the rules of warfare, he is not guilty of murder; but if he intentionally kills a prisoner of war, then he commits murder.<sup>92</sup>

In summary, both the common law and the Model Penal Code recognize that killings during wartime constitute valid justifications as either being allowed by law or allowed incident to the execution of a public duty. By definition then, the killing of enemy soldiers on the field of battle does not constitute murder and, it therefore follows, does not constitute assassination. Accordingly, if Saddam and his sons were considered combatants on the field of battle, their targeting would not fall within the definition of assassination.

In contrast, the CIA involvement in the plots to kill five foreign leaders occurred during times of peace and would be difficult to “justify” as lawful homicides for purposes of U.S. law. In all likelihood, the killings planned or assisted by the CIA would fall within the definition of murder, and because they also involve political leaders, would fall within the definition of assassination.

Aside from our argument that the assassination prohibition in Executive Order 12333 has limited application, some commentators have gone so far as to question whether an executive order even establishes law or whether it merely states non-binding policy. Accordingly, we turn next to the force and effect of an executive order, once issued.

#### D. Legal Effect of an Executive Order

In discussing the assassination prohibition, some commentators have suggested that because a President may modify or rescind an executive order at any time, it should be considered only policy.<sup>93</sup> The following discussion is intended to clarify the legal effect of an executive order.

What is an executive order? Unfortunately, no official definition exists. Although every President has issued at least one, the Constitution does not mention executive orders and no definition is found in any statute or executive order.<sup>94</sup> This void

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<sup>92</sup> WAYNE R. LAFAVE, *CRIMINAL LAW* 535-536 (4th ed. 2003).

<sup>93</sup> One commentator, Nathan Canestaro, asserts that “an executive order does not have the force and immutability of law, and is subject to change by the President. As a result, Executive Order 12333 is not an effective legal obstacle to assassination, but rather is only a visible symbol of policy....” Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 26 B.C. INT’L & COMP. L. REV. 1, 19 (2003). Similarly, another commentator, Daniel Pickard, states that “U.S. intelligence agencies are not prohibited by law from conducting assassinations; rather, they are prohibited by a revocable order of the president.” Daniel B. Pickard, *Legalizing Assassination? Terrorism, the Central Intelligence Agency, and International Law*, 30 GA. J. INT’L & COMP. L. 1, 3-4 (2001). Furthermore, Pickard states “Executive Order [12333] stands as an important public statement of U.S. Policy against assassination” and “that the lack of a statutory prohibition might indicate congressional approval to retain assassination as a policy option.” *Id.* at 25-26.

<sup>94</sup> See KENNETH R. MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* 34 (2001); John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 (1981).

has caused one commentator to argue that “[t]he lack of any agreed-upon definition means that, in essence, an executive order is whatever the president chooses to call by that name.”<sup>95</sup> Nonetheless, it is generally accepted that an executive order is a presidential directive that guides the executive branch in its actions.<sup>96</sup> Since executive orders are directed to the executive branch, the orders “generally have only an indirect effect upon the individual.”<sup>97</sup>

While no definition exists, President Kennedy issued Executive Order 11030 in 1962 that established a uniform system regarding preparation, presentation, filing, and publication of executive orders.<sup>98</sup> In addition, there is a federal statute that requires all executive orders to be published in the *Federal Register*, except those which are classified or pertain to specific individuals.<sup>99</sup>

The President’s power to issue executive orders stems from his executive authority.<sup>100</sup> This authority originates either from the Constitution or federal statute.<sup>101</sup> A President must state the basis of his authority in issuing the order; this is usually done in the order itself.<sup>102</sup> For example, President Reagan asserted that the bases for issuing Executive Order 12333 were both the Constitution and the statutes of the United States, including the National Security Act of 1947.<sup>103</sup>

Various clauses of Article II of the Constitution have been used as support for a President’s constitutional authority to issue an executive order. First, Section 1 states,

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<sup>95</sup> MAYER, *supra* note 94, at 34.

<sup>96</sup> *See id.* at 4. *See also* U.S. General Accounting Office, *Report to the Chairman, Legislation and National Security Subcommittee, Committee on Government Operations, House of Representatives: National Security: The Use of Presidential Directives to Make and Implement U.S. Policy*, GAO/NSIAD-92-72, at 3 (Jan. 1992).

<sup>97</sup> Robert B. Cash, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME L. REV. 44 (Dec. 1963).

<sup>98</sup> Exec. Order No. 11030, 3 C.F.R. 610 (1959-1963), *reprinted as amended in* 44 U.S.C.A. § 1505 (West 1991). Executive Order 11030 has been amended three times by Executive Orders 11354, 12080, and 12608, respectively. These orders establish the requisite format of executive orders and the process by which the orders receive approval. A proposed executive order should first be submitted to the Director of the Bureau of the Budget. If the Director approves the order, the order is then given to the Attorney General “for his consideration as to both form and legality.” On approval, the order is submitted to the Director of the Office of the Federal Register to make sure that the order is in proper form. If in proper form, the order is sent back to the President for signature. After the order is signed, it is sent back to the Director of the Office of the Federal Register for publication in the *Federal Register*.

<sup>99</sup> The Federal Register Act of 1935, 44 U.S.C.A. § 1505 (West 1991). The Act requires that all executive orders, “except those not having general applicability and legal effect or effective only against Federal Agencies or persons in their capacity as officers, agents, or employees thereof...” be published in the *Federal Register*. *Id.* at § 1505(a)(1).

<sup>100</sup> *See* MAYER, *supra* note 94, at 54.

<sup>101</sup> *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (stating that the “President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”)

<sup>102</sup> *See* Exec. Order No. 11030, § 1(b), 3 C.F.R. 610 (stating that the “order or proclamation shall contain a citation of the authority under which it is issued”).

<sup>103</sup> The preamble to Executive Order 12333 states: “by virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the National Security Act of 1947, as amended, and as President of the United States of America....”

“[t]he executive power shall be vested in a President of the United States of America.”<sup>104</sup> Second, Section 2 establishes that “[t]he President shall be commander in chief of the Army and Navy of the United States....”<sup>105</sup> Finally, Section 3 directs that the President “shall take care that the laws be faithfully executed....”<sup>106</sup> A common feature of these provisions is that they are vague. Nevertheless, for years, Presidents have based their authority to issue executive orders on these general powers.

In contrast, when the President’s authority to issue executive orders is based on congressional statutory authority, a President must assert that Congress has delegated its legislative authority through its statutes to the President.<sup>107</sup> Under such circumstances, a President cannot go beyond the scope of the delegation when issuing an executive order.<sup>108</sup> Moreover, Congress “may act ... to invalidate or repeal ‘incorrect’ executive branch interpretations of its statutes.”<sup>109</sup>

Still the question remains, is an executive order law or policy? The Supreme Court has consistently held “that executive orders, when based upon legitimate constitutional or statutory grants of power to the president, are equivalent to laws.”<sup>110</sup> In addition, unless otherwise specified, executive orders remain in force until they are replaced, amended, modified, or repealed by the president who issued it or a successor president.<sup>111</sup> Thus, an executive order continues to have legal effect from one administration to the next unless presidential action is taken on the order.

Executive orders provide a president with several advantages compared to legislation. Two advantages are speed and flexibility.<sup>112</sup> Issuing an executive order can

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<sup>104</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>105</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>106</sup> U.S. CONST. art. II, § 3.

<sup>107</sup> See Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1, 14 (Summer 1976) (differentiating between direct and implied congressional authorization).

<sup>108</sup> See *Cole v. Young*, 351 U.S. 536 (1956) (holding that Executive Order 10450 went beyond the scope of powers delegated in a federal statute).

<sup>109</sup> NOYES, *supra* note 94, at 846. See also FLEISHMAN & AUFSES, *supra* note 107, at 16:

[T]here are two avenues of attack on an executive order claiming direct authorization by Congress. The first is to demonstrate that the substance of the order exceeds the terms of the authorization. The second is to challenge the authorization itself, to suggest that the statute contains inadequate standards for guiding executive action. Neither attack is easily sustained.

<sup>110</sup> MAYER, *supra* note 94, at 35. See, e.g., *Jenkins v. Collard*, 145 U.S. 546, 560-561 (1891) (stating that executive orders have “the force of public law”). See also *Farkas v. Tex. Instrument*, 375 F.2d 629, 632 (5th Cir. 1967) (declaring that executive orders are to “be accorded the force and effect given to a statute enacted by Congress”); NOYES, *supra* note 94, at 841 (stating that “[l]ike a federal statute, a ‘proper’ executive order has the force and effect of law...”); CASH, *supra* note 97, at 50 (asserting that “whenever an executive order or proclamation is founded upon constitutional or delegated authority, it has the force of public law”).

<sup>111</sup> PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION* 20 (2002).

<sup>112</sup> See generally FLEISHMAN & AUFSES, *supra* note 107, at 38.

be accomplished in far less time than is normally needed to pass legislation.<sup>113</sup> And if the President wants to cancel an order, he can, since a president may revoke or modify an executive order at any time.<sup>114</sup>

There are limits, however, to the way in which an executive order may be used. A president cannot issue an executive order that contradicts a statute.<sup>115</sup> When there is a conflict, the statute takes precedence and the courts will overturn the order.<sup>116</sup> Executive orders may be challenged and overturned by congressional or judicial action.<sup>117</sup> The most famous case illustrating this point is *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>118</sup> which concerned the constitutionality of Executive Order 10340. In 1952, President Truman issued an executive order that directed the Secretary of Commerce to seize and operate most of the nation's steel mills in order to avoid a strike.<sup>119</sup> The U.S. Supreme Court found the Order unconstitutional on the basis that the President lacked both constitutional and statutory authority to issue the Order.<sup>120</sup> Furthermore, a President may not violate an executive order.<sup>121</sup> Once issued, an executive order is considered law and a violation "may be made punishable by Congress."<sup>122</sup> However, enforcement of an executive order is up to the President, which gives him leeway in terms of punishment.<sup>123</sup>

Executive Order 12333, with its prohibition on assassination, has remained in effect since the Reagan administration. Moreover, since the Supreme Court has ruled that executive orders are the same as laws, the prohibition on assassination cannot be ignored nor dismissed as mere policy. If a president is to enforce the laws faithfully, then executive orders fall within this ambit. If a president disagrees with an executive order, and will not enforce its provisions, he or she is duty-bound to modify or repeal it.

Fortunately, in targeting Saddam and his sons, it was not necessary for President George W. Bush to be concerned with the dilemma of whether to enforce the assassination prohibition or modify or repeal it if it can be demonstrated that the targeting occurred in wartime. As we have shown, the history, text, and definition of assassination compel a conclusion that the Executive Order does not apply to wartime engagements or to the United States Armed Forces (except when they are engaged in peacetime intelligence operations). Instead, wartime hostilities are guided by the law of war, a topic to which we will now turn our attention.

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<sup>113</sup> *See id.* This is because an executive order allows a president to establish law without ever having to get Congressional approval. A president, in bypassing the standard legislative process, does not have to wait for Congress's approval, nor does he have to fear the possibility of a veto. *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See CASH, supra note 97, at 50.*

<sup>116</sup> *See id.*

<sup>117</sup> *But see FLEISHMAN & AUFSES, supra note 107, at 5* (asserting that "the courts generally uphold executive orders").

<sup>118</sup> 343 U.S. 579 (1952).

<sup>119</sup> *See id.* at 582-583.

<sup>120</sup> *See id.* at 585-589 (holding that "this seizure order cannot stand").

<sup>121</sup> *See BRANDENBURG, supra note 68, at 687* (asserting that a President may not violate an executive order "short of repeal").

<sup>122</sup> *CASH, supra note 97, at 50.*

<sup>123</sup> *See MAYER, supra note 94, at 26.*

### III. Assassination and the Law of War

In the preceding section, we argued that Executive Order 12333 does not apply to wartime engagements nor does it apply generally to U.S. Armed Forces. The question that arises, therefore, is whether the United States is at war with Iraq.

The United States Constitution, Article 1, Section 8, authorizes but does not require Congress to declare war.<sup>124</sup> Indeed, Congress has formally declared war only five times in the history of the United States.<sup>125</sup> The last U.S. declaration of war was against Japan in World War II.<sup>126</sup> It followed by one day the December 7, 1941 attack on Pearl Harbor.<sup>127</sup> The lack of a formal declaration of war has not prevented the United States from taking military action in the past, whether an act of war limited in scope and duration (such as the 1986 air strike against terrorist-related targets in Libya), or extended military operations.<sup>128</sup> During its history, the United States has unilaterally deployed military forces over 200 times.<sup>129</sup> Since World War II alone, the United States has deployed military forces over 50 times in many foreign locations, most notably in Korea, Vietnam, and the Persian Gulf in 1991.<sup>130</sup> The most common legal rationale for these deployments has been the inherent right of self defense, a reserved right under Article 51 of the United Nations Charter which provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations....”<sup>131</sup>

In the present case, of course, Congress has not formally declared war on Iraq. Nevertheless, on October 12, 2002, Congress passed a joint resolution authorizing President George W. Bush to use military force against Iraq.<sup>132</sup> The joint resolution, which has the same force of law as a signed bill,<sup>133</sup> authorizes President Bush “to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to...defend the national security of the United States against the continuing threat posed by Iraq....”<sup>134</sup> Acting pursuant to this authority, not only has the United States sent a substantial number of military forces into Iraq, but many other countries have supported the effort with troops or supplies. Military actions dominated the news for weeks and

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<sup>124</sup> See U.S. CONST. art. I, § 8, cl. 11.

<sup>125</sup> See generally STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 261, 334 (3d ed. 2002).

<sup>126</sup> See Declaration of War-World War II, S.J. Res. 116 (Dec. 8, 1941), reprinted in JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW DOCUMENTS 694 (1995).

<sup>127</sup> See *id.*

<sup>128</sup> See DYCUS ET AL., *supra* note 125, at 334.

<sup>129</sup> See *id.*

<sup>130</sup> See *id.*

<sup>131</sup> U.N. CHARTER art. 51.

<sup>132</sup> See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (enacted by H.J. Resolution 114) [hereinafter IRAQ RESOLUTION OF 2002].

<sup>133</sup> See FRANK CUMMINGS, CAPITOL HILL MANUAL 4 (1976) (stating that a joint resolution “must meet the same requirements as a bill, and if passed becomes a law with fully the same legal effect...as a bill”).

<sup>134</sup> IRAQ RESOLUTION OF 2002, *supra* note 132, at § 3(a)(1).

both Iraq and the coalition have suffered casualties. No one can doubt that there are hostilities sufficient in Iraq to implicate the law of war.

#### A. Definition of Wartime Assassination

Previously, we discussed the act of assassination in the context of peacetime, but can assassination also occur during times of war?

According to Professor Michael Schmitt, wartime assassination is comprised of two elements, “the targeting of an individual, and the use of treacherous means.”<sup>135</sup> Thus, a concise definition is the targeting of an individual through the use of treacherous means. Schmitt argues that treachery, defined as a “breach of confidence,” is the key characteristic of wartime assassination.<sup>136</sup> According to Lieutenant Commander Patricia Zengel, the definition of treachery is “betrayal by one owing an obligation of good faith to the intended victim.”<sup>137</sup> Similarly, Major Tyler Harder defines treachery as “an attack on an individual who justifiably believes he has nothing to fear from the attacker.”<sup>138</sup> One example of conduct considered “treacherous” before World War II was soldiers disguising themselves as civilians to carry out surprise attacks against enemy positions.<sup>139</sup> However, this example was eviscerated during World War II when all parties to the conflict relied on partisans who operated in civilian clothes.<sup>140</sup> To better understand the concept of wartime assassinations, further history is necessary.

#### B. History of Assassination in Armed Conflicts

Assassination, as a subject of controversy, is not as recent as many believe. Beginning in the thirteenth century, several early scholars began to write about assassination, often questioning whether assassination was a moral and legitimate tactic during times of war.<sup>141</sup> Such writers as Saint Thomas Aquinas, Sir Thomas More, Alberico Gentili, Hugo Grotius, and Emer de Vattel all wrote on the topic of assassination during times of armed conflict.<sup>142</sup> In summarizing their findings, Lieutenant Commander Patricia Zengel noted that “[n]one of these authors asserted that a leader or particular member of an opposing army enjoyed absolute protection, or was not a legitimate target of attack.”<sup>143</sup> Furthermore, “[t]he consensus of these early commentators was that an attack directed at an enemy, including an enemy leader, with the intent of killing him or her was generally permissible, but not if the attack was a

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<sup>135</sup> SCHMITT, *supra* note 67, at 632.

<sup>136</sup> *See id.*

<sup>137</sup> ZENGEL, *supra* note 32, at 130.

<sup>138</sup> HARDER, *supra* note 21, at 37.

<sup>139</sup> W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW, Dec. 1989, at 4, 6.

<sup>140</sup> *Id.*

<sup>141</sup> *See generally* HARDER, *supra* note 21, at 7-8.

<sup>142</sup> For further information regarding these authors, *see generally* ZENGEL, *supra* note 32, at 126-130; ADDICOTT, *supra* note 84, at 764-765.

<sup>143</sup> ZENGEL, *supra* note 32, at 125.

treacherous one.”<sup>144</sup> This consensus of the early scholars is now considered to be customary international law and is the basis for the current law on assassination.<sup>145</sup>

During the Civil War, the first significant mention of assassination occurred with the adoption of a codification of the law of war known as the Lieber Code.<sup>146</sup> On April 24, 1863, the Lieber Code was promulgated as “Army General Order Number 100.”<sup>147</sup> Paragraph 148 of the Lieber Code stated:

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 intentional 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 or rewards for the assassination of enemies as relapses into barbarism.<sup>148</sup>

In 1907, the customary law regarding the prohibition on treacherous killing during wartime was embodied in the Annex to Hague Convention IV.<sup>149</sup> Article 23 of the Annex states that “it is especially forbidden ... (b) To kill or wound treacherously individuals belonging to the hostile nation or army....” This regulation is seen as reflecting customary international law.<sup>150</sup>

In 1956, the provision contained in Article 23(b) was included in the “Department of the Army Field Manual 27-10, The Law of Land Warfare.”<sup>151</sup> Field Manual 27-10 is the Army’s means of interpreting and disseminating existing international law relating to the conduct of armed conflict.<sup>152</sup> In interpreting Article 23(b), paragraph 31 provides:

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”. *It does not, however,*

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<sup>144</sup> ZENGEL, *supra* note 32, at 130. *See also* HARDER, *supra* note 21, at 7 (stating that the “majority of these scholars considered acceptable the targeting of specific individuals during wartime, provided it was not done ‘treacherously’”).

<sup>145</sup> *See* HARDER, *supra* note 21, at 7-8.

<sup>146</sup> ADDICOTT, *supra* note 84, at 767. *See* The Lieber Code: Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War, Apr. 24, 1863, *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 158-186 (Leon Friedman ed. 1972) [hereinafter THE LIEBER CODE].

<sup>147</sup> ADDICOTT, *supra* note 84, at 767.

<sup>148</sup> THE LIEBER CODE, *supra* note 146, at para. 148.

<sup>149</sup> *See* Hague Convention IV, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *reprinted in* 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 313-323 (Leon Friedman ed. 1972).

<sup>150</sup> HARDER, *supra* note 21, at 9.

<sup>151</sup> U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 1956) [hereinafter FM 27-10].

<sup>152</sup> *See* ADDICOTT, *supra* note 84, at 768.

*preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.*<sup>153</sup>

The historical documents make it clear that it is a violation of the law of war and customary international law to target an individual by means of treachery (assassinate), to put a price on the capture of an enemy, or to offer a reward for an enemy whether his body is delivered dead or alive. What is less clear is how these prohibitions are reconciled with the last sentence in paragraph 31 above, which allows the attack on individual soldiers and officers of the enemy in any location. Are surprise attacks allowed? Can the enemy's senior military officer be targeted? Can the enemy's senior civilian government official be targeted? And, most significantly, what about family members?

### C. Application of Law of War to Saddam and Sons

During times of war, the law of war recognizes that enemy combatants are considered legitimate targets at all times.<sup>154</sup> Combatants are permitted to attack and kill any opposing combatant, regardless of the combatant's duties at the time of the attack as long as the attack is in accordance with international law.<sup>155</sup>

Surprise attacks are not precluded by the law of war because they are not considered to be treacherous acts. "While the term 'treacherous' has not been defined, ...it is not regarded as prohibiting operations that depend upon the element of surprise, such as a commando raid or other form of attack behind enemy lines."<sup>156</sup> Accordingly, the allied bombing attacks in March and April 2003, against locations where Saddam and his sons were believed to be meeting, were not precluded by the law of war on the basis that they were surprise attacks.

Targeting the enemy's senior military officer is also not precluded by the law of war. Combatants are subject to attack if they are participating in hostilities in any manner, which includes combat operations, rear-area logistics, or staff planning miles from the battlefield.<sup>157</sup> Professor Schmitt argues that "lawful 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."<sup>158</sup> Thus, the question turns on what role Saddam Hussein played before and during the hostilities. Was he the military leader of Iraq as well as its political leader? If so, he would be subject to attack under the law of war.

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<sup>153</sup> FM 27-10, *supra* note 151, at para. 31 (emphasis added).

<sup>154</sup> See PARKS, *supra* note 139, at 5.

<sup>155</sup> See *id.*

<sup>156</sup> *Id.*

<sup>157</sup> See *id.*

<sup>158</sup> SCHMITT, *supra* note 67, at 674.

Saddam Hussein's biography shows that he was elected as the Vice-Chairman of the Revolution Command Council in November 1969 and given the military rank of Lieutenant General in July 1973.<sup>159</sup> On July 16, 1979, Hussein was elected as the President of Iraq and as the Chairman of the Revolution Command Council.<sup>160</sup> One day later, on July 17, 1979, he was promoted to the military rank of Field Marshal.<sup>161</sup> Hussein frequently made public appearances in a military uniform and no one doubts that he was in control of all Iraqi military forces while he held office. In addition, his sons were given powerful positions of control over certain military and security forces. Qusay Hussein was in charge of Iraq's most elite security and intelligence services, heading the Special Security Organization service and the National Security Council in addition to the Special Republican Guard military units.<sup>162</sup> Uday Hussein commanded Saddam's Fedayeen militia.<sup>163</sup> Given their military ranks and key leadership positions, one may easily argue that Saddam and his sons were part of the command and control structure of the Iraqi armed forces and were therefore combatants engaged in hostilities. Accordingly, they were subject to attack as much as any other enemy soldier or officer.

A well known example of such a targeted killing of a member of an enemy force during wartime that is not considered assassination is the intentional killing of Japanese Admiral Isoroku Yamamoto, the alleged mastermind behind the Japanese attack on Pearl Harbor.<sup>164</sup> After receiving a report on the location of Yamamoto's aircraft, U.S. military planes shot it down.<sup>165</sup> Being a member of the Japanese military made Yamamoto an enemy combatant. Thus, the attack on his plane was legal under international law.

The more controversial question is whether it was lawful to target Saddam and his sons if we assume they held strictly civilian positions. Does the law of war allow civilians to be treated as combatants? The answer appears to be yes, with some qualifications. Initially, it should be noted that it is clear among law of war commentators that it is neither assassination nor unlawful conduct if civilians are killed when they are in close proximity to lawful military targets.<sup>166</sup> Furthermore, there appears to be agreement that a civilian head of state who serves as commander-in-chief of the armed forces may be a lawful target as part of the enemy's command and control without running afoul of the wartime assassination rules.<sup>167</sup> Lieutenant Commander Zengel argues that it is "immaterial whether a given combatant was a 'private soldier, an officer,

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<sup>159</sup> See *Saddam Hussein*, WORLD HISTORY.COM, at <http://www.worldhistory.com/hussein.htm> (last visited 9/19/2003) (copy on file with authors) (listing key events in the life of Saddam Hussein).

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> KEVIN SULLIVAN & RAJIV CHANDRASEKARAN, *supra* note 1.

<sup>163</sup> *Id.*

<sup>164</sup> See ZENGEL, *supra* note 32, at 136-137. See also CARROLL V. GLINES, *ATTACK ON YAMAMOTO 50-54* (1990); *LIGHTNING OVER BOUGANVILLE: THE YAMAMOTO MISSION RECONSIDERED 12-13* (R. Cargill Hall, ed., 1991).

<sup>165</sup> See *id.* See also GLINES, *supra* note 164, at 2-5, 64-65; *LIGHTNING OVER BOUGANVILLE*, *supra* note 164, at 19-24.

<sup>166</sup> See PARKS, *supra* note 139, at 5 (stating that "[c]ivilians and other noncombatants who are within or in close proximity to a military objective assume a certain risk through their presence in or in proximity to such targets...").

<sup>167</sup> See PARKS, *supra* note 139, at 6 n.4.

or even the monarch or a member of his family.’’<sup>168</sup> Zengel further notes that for a civilian head of state or high government official to be protected against attack, they must not belong to the armed forces, that is, they must truly be noncombatants in the same sense as private citizens.<sup>169</sup>

The qualifications to the general rule arise when considering what degree of participation in hostilities is necessary for a civilian to be classified as a combatant. Colonel W. Hays Parks, a retired U.S. Marine Corps Judge Advocate attorney and a noted law of war expert formerly for the Department of the Army and now for the Department of Defense, indicates that there are four groups of civilians to consider.<sup>170</sup> The first category are those civilians who do not participate in hostilities in any way.<sup>171</sup> They are immune from intentional attack.<sup>172</sup> Second are those civilians who support the war effort at a national level.<sup>173</sup> The third group is civilians who support the military effort in a general way without being directly involved in causing damage.<sup>174</sup> And the fourth group are those civilians who are directly involved in military operations.<sup>175</sup>

With regard to immunity of the latter three groups of civilians, Colonel Parks states:

[t]here is a lack of agreement on this matter, and no existing law of war treaty provides clarification or assistance. Historically, however, the decision as to the level at which civilians may be regarded as combatants or “quasi-combatants” and thereby subject to attack generally has been a policy rather than a legal matter.<sup>176</sup>

The evidence indicates that Saddam Hussein ruled all aspects of the government in a direct and personal manner, including direct control of his military forces. During the Persian Gulf War in 1991 and since then, he frequently has appeared on television in a military uniform and made statements about the use of his military forces. Furthermore, it has been frequently reported that his sons, Uday and Qusay, occupied supervisory positions over portions of Iraqi military and security forces. Even if Saddam and his sons were classified as civilians, they appear to most aptly fall within the fourth group of civilians who have direct involvement in military operations. This group is most easily classified as “combatants” or “quasi-combatants” and would not receive immunity from attack. As such, their killing would not be classified as assassination.

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<sup>168</sup> ZENGEL, *supra* note 32, at 131 (quoting 2 L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE § 108, at 156 (H. Lauterpacht 7th ed. 1952)).

<sup>169</sup> *See id.*

<sup>170</sup> *See* PARKS, *supra* note 139, at 6.

<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See id.*

<sup>175</sup> *See id.*

<sup>176</sup> *See id.*

#### IV. Conclusion

Executive Order 12333, and its predecessors, are documents of limited application. They were conceived in response to the CIA's peacetime activities in Central and South America during the 1960s and early 1970s. The purpose of Executive Order 12333 (and its predecessors) is to restrict the activities of the intelligence community while setting forth certain policy decisions in this peacetime context. We find no suggestion that Executive Order 12333 is applicable to the military departments (except when collecting intelligence during peacetime) nor to either military or CIA paramilitary actions in a wartime environment. Thus, we conclude that Executive Order 12333 is inapplicable to the case at hand, that is, the targeting efforts in March and April 2003 to kill Saddam Hussein and his sons by military forces during the hostilities in Iraq.

Similarly, the assassination prohibition in the law of war is not violated when combatants are lawfully targeted during time of war. Saddam and his sons exercised substantial, if not complete, control over Iraqi military and security forces. Because they were integral parts of the enemy's command and control structure, they were properly classified as combatants and were subject to being targeted by the U.S. or coalition forces whenever and wherever found.