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Assassination Ban and E.O. 12333: A Brief Summary

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Summary

In the wake of the September 11, 2001, terrorist attacks on the New York World Trade Center and the Pentagon, some attention has been focused upon the assassination ban contained in Executive Order (E.O.) 12333, Section 2.11, and whether it would prohibit the United States from responding to the attacks by targeting those who orchestrated these acts of terrorism. In considering the challenges involved in effectively combating terrorism and protecting the United States from future terrorist attacks, there has been wide-ranging debate as to what approaches might be beneficial. Part of that discussion has centered around whether assassination of terrorist leaders is, or should be, one of the options available. This report offers a summary discussion of the assassination ban in E.O. 12333, its context, and possible interpretations of its scope.

On December 4, 1981, President Ronald Reagan issued Executive Order 12333 on "United States Intelligence Activities." Section 2.11 of the order provides: "*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." Section 2.12 of the order prohibits indirect participation in activities prohibited by the order, stating: "*Indirect participation.* No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order." E.O. 12333 is still in force.

E.O. 12333 is the latest in a series of three executive orders which included assassination bans. The first, Executive Order 11905, Sec. 5(g),¹ 41 Fed. Reg. 7703, 7733 (President Gerald Ford, 2/19/76), was part of an executive order issued by President Ford in response to concerns raised in the 1970's with respect to alleged abuses by the U.S. intelligence community. A select committee chaired by Senator Frank Church (the Church Committee), in its interim report, addressed allegations of possible U.S. involvement in assassination plots against certain foreign leaders. In its recommendations section, the Church Committee

¹ This section of E.O. 11905 stated, "Prohibition of Assassination. No employee of the United States Government shall engage in, or conspire to engage in, political assassination."

condemned assassination and rejected it as an instrument of American policy.² The assassination ban in E.O. 11905 was superseded by Executive Order 12036, Sec. 2-305 (assassination prohibition) and Sec. 2-309 (indirect participation prohibition),³ 43 Fed. Reg. 3674, 3688, 3689 (President Jimmy Carter, 1/26/78). The pertinent provisions in President Reagan's E.O. 12333, in turn, superseded those in President Carter's order.

What does the assassination ban in E.O. 12333 cover? The term "assassination" is not defined in E.O. 12333, nor was it defined in the predecessor orders.⁴ In general, it appears that an assassination may be viewed as an intentional killing of a targeted individual committed for political purposes. However, the scope of the term seems to be the subject of differing interpretations, both generally, and depending upon whether the killing at issue took place in time of war or in time of peace. For example, it might be contended that the Ford executive order and its successors were responding to concerns raised with respect to killing of foreign officials or heads of state, and may not have been intended to extend to killing of others. Such an interpretation would be consistent with the focus of the Church Committee's investigation, to which the Ford executive order responded. In his "Special Message to the Congress Proposing Legislation To Reform the United States Foreign Intelligence Community," (Special Message to Congress) delivered Feb. 18, 1976, accompanying the issuance of E.O. 11905, President Ford did not refer to the assassination ban in the order explicitly, but did indicate that he would "support legislation making it a crime to assassinate or attempt or conspire to assassinate a foreign official in peacetime."⁵ President Carter made only a passing reference to the assassination ban in his statement accompanying issuance of E.O. 12036,⁶ and did not refer to it in his remarks on signing the

² See *Alleged Assassination Plots Involving Foreign Leaders, An Interim Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, United States Senate*, S. Rept. 94-465, 94th Cong., 1st Sess. 281-84 (Nov. 20, 1975) (Church Committee).

³ The pertinent provisions of the Carter order read, "2-305. *Prohibition on Assassination.* No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination. . . . 2-307. *Restrictions on Indirect Participation in Prohibited Activities.* No agency of the Intelligence Community shall request or otherwise encourage, directly or indirectly, any person, organization, or government agency to undertake activities forbidden by this order or by applicable law."

⁴ It is interesting to note that the Ford order referred to "political assassination," a term which was not defined in E.O. 11905, while the Carter and Reagan orders use the term "assassination," again without defining it. It is thus unclear from these orders and the statements accompanying their issuance whether or not this change in language was intended to portend any change in the scope of the ban.

⁵ *Public Papers of the Presidents of the United States, Gerald R. Ford, 1976-77*, Book I, 362, 364 (1979).

⁶ *Public Papers of the Presidents of the United States, Jimmy Carter, 1978*, Book I, 189-216 (1979). The context of President Carter's reference was as follows:

3. Our intelligence agencies have a critical role to play in collecting and analyzing information important to our national security interests and, on occasion, acting in direct support of major foreign policy objectives. It is equally important, however, that the methods employed by these agencies meet constitutional standards protecting the privacy and civil liberties of U.S. persons and are in full compliance with the law.

To accomplish this objective a major section of the Executive order is devoted entirely

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executive order. Nor did President Reagan reference the assassination ban in his “Statement on United States Intelligence Activities” of Dec. 4, 1981, accompanying the issuance of E.O. 12333.⁷

Others might argue for a broader interpretation of the assassination ban, contending that any killing of a targeted individual for political purposes would be within the assassination ban in the sweep of the Ford, Carter, and Reagan executive orders. Alternatively, it might be suggested that the assassination ban’s inclusion within an executive order on U.S. intelligence activities may serve to distinguish it from, and limit its applicability to, a use of military force in response to a foreign terrorist attack on U.S. soil or against U.S. nationals. Such an argument might place reliance on Article 51 of the United Nations Charter, which recognizes that nations have an inherent right of self-defense:

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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The right of the United States to defend itself against armed attack has been the focus of some of the recent debate as the United States considers its options in responding to the terrorist attacks of September 11, 2001.⁸

In the process of rewriting the *U.S. Army Field Manual 27-10, The Law of War*, a “Memorandum of Law: EO 12333 and Assassination” (hereinafter Memorandum of Law 27-

⁶ (...continued)

to setting forth detailed restrictions on intelligence collection, covert activities in support of foreign policy objectives, experimentation, contracting, assistance to law enforcement authorities, personnel assigned to other agencies, indirect participation in prohibited activities,, dissemination and storage of information, and a prohibition on assassinations. The FBI’s intelligence activities no longer have a blanket exception to these restrictions.

At the heart of the restriction process is a greatly enhanced role for the Attorney General, as the Nation’s top legal officer, to establish and approve procedures to regulate the conduct of the most sensitive intelligence activities. These detailed procedures, which will be made available to the congressional oversight committees, will ensure compliance with the law, protect constitutional rights and privacy, and ensure that any intelligence activity within the United States or directed against Americans will employ the least intrusive means possible and that the use, dissemination, and storage of such information is limited to that necessary to achieve lawful governmental purposes.

Id. at 215-16.

⁷ *Public Papers of the Presidents of the United States, Ronald Reagan, 1981*, 1126-27 (1982).

⁸ For a brief review of legal issues and authorities regarding the use of military force to respond to terrorist attacks, see CRS Report RS21009, *Response to Terrorism: Legal Aspects of the Use of Military Force.. Cf.,* Stuart G. Baker, “Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51,” 24 *Ga. J. Int’l & Comp. L.* 99 (1994).

1a) was prepared to explain the term “assassination” in the context of military operations. In Memorandum of Law 27-1a, it is suggested that, in time of peace, an element of covert action or surprise attack may be required for a killing for political purposes to be deemed an assassination, particularly where the target is a private individual rather than a public figure or national leader. The murder for political purposes of a national leader in time of peace may be regarded by some as an assassination solely because of the target, while others might also consider whether a surprise attack was involved.

For example, the 1978 “poisoned-tip umbrella” killing of Bulgarian defector Georgi Markov by Bulgarian State Security agents on the streets of London falls into the category of an act of murder carried out for political purposes, and constitutes an assassination. In contrast, the murder of Leon Klinghoffer, a private citizen, by the terrorist Abu el Abbas during the 1985 hijacking of the Italian cruise ship *Achille Lauro*, though an act of murder for political purposes, would not constitute an assassination. The distinction lies not merely in the purpose of the act and/or its intended victim, but also under certain circumstances in its covert nature. Finally, the killing of Martin Luther King and Presidents Abraham Lincoln, James A. Garfield, William McKinley and John F. Kennedy generally are regarded as assassination because each involved the murder of a public figure or national leader for political purposes accomplished through a surprise attack.⁹

In time of war, assassination appears to be distinguished in some discussions from cases of lawful killing, because the former is carried out in a “treacherous” manner.¹⁰ “Treacherous” is not defined in the Hague Convention IV, but does not appear to be interpreted to foreclose operations in time of war involving the element of surprise.¹¹ However, putting a price on the head of an enemy appears to be regarded by some as an act which would render a resulting killing an assassination, as distinguished from a lawful attack on legitimate military targets, including the enemy chain of command.¹² A review of historical discussions of assassination suggests that this may be, in part, because by putting a price on the head of an enemy, one could be encouraging treachery by those close to the target.¹³

⁹ W. Hays Parks, “Memorandum of Law: Executive Order 12333 and Assassination,” DAJA-IA (27-1a), *The Army Lawyer* 4 (Dec. 1989).

¹⁰ See, Article 23(b) of the Annex to the Hague Regulations (Hague Convention IV) (1907).

¹¹ Memorandum of Law 27-1a, *The Army Lawyer* 4, 5 (Dec. 1989).

¹² See, e.g., U.S. Army General Orders no. 100, paragraph 148 (1863); Article 23b, Annex to Hague Convention IV (1907); U.S. Army Field Manual 27-10, paragraph 31 (*The Law of Land Warfare*) (1956), cited in Memorandum of Law 27-1a, at 5.

¹³ Lt. Commander Patricia Zengel, “Assassination and the Law of Armed Conflict,” 134 *Mil. L. Rev.* 123, 127 (1991) (discussing the views of Hugo Grotius from *De Jure Belli Ae Pacis Libri Tres* (rev. ed. 1646); for further discussion, see Daniel B. Pickard, “Legalizing Assassination: Terrorism, the Central Intelligence Agency and International Law,” 30 *Ga. J. Int’l & Comp. L.* 1 (2001); Thomas C. Wingfield, “Taking Aim at Regime Elites: Assassination, Tyrannicide, and the Clancy Doctrine,” 22 *Md. J. Int’l L. & Trade* 287 (1999). Cf., “The Legality of Assassination of Independent Terrorist Leaders: An Examination of National and International Implications,” 24 *N.C.J. Int’l Law & Com. Reg.* 669 (1999); Robert F. Turner, “Symposium: Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power,” 22 *Houston J. Int’l L.* 77 (1999); Boyd M. Johnson, III, “Executive Order 12,333: The Permissibility of an American Assassination of a Foreign

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Can the President revoke the assassination ban in E.O. 12333? As it is part of an executive order, the President may modify or rescind the assassination ban in E.O. 12333, Section 2.11, by executive order. Except in specific circumstances, an executive order revoking a previous order would have to be published in the Federal Register under 44 U.S.C. § 1505(a) if it is deemed to be an order of general applicability. However, under 44 U.S.C. § 1505(c):

In the event of an attack or threatened attack upon the continental United States and a determination by the President that as a result of an attack or threatened attack—

- (1) publication of the Federal Register or filing of documents with the Office of the Federal Register is impracticable, or
- (2) under existing conditions publication in the Federal Register would not serve to give appropriate notice to the public of the contents of documents, the President may, without regard to any other provision of law, suspend all or part of the requirements of law or regulation for filing with the Office or publication in the Federal Register of documents or classes of documents.

Such a suspension would remain in effect until revoked by the President or by concurrent resolution of Congress.

Can Congress revoke the assassination ban in E.O. 12333? To the extent that an executive order relies upon statutory authority, Congress may also legislate to modify or repeal it. In issuing E.O. 12333, President Reagan relied upon the authority vested in him “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, in order to provide for the effective conduct of United States intelligence activities and the protection of constitutional rights.” While there is no express parallel to E.O. 12333’s assassination ban in federal statutes, there is a provision in 18 U.S.C. § 1116 which provides criminal penalties for murder, manslaughter, or attempted murder or manslaughter of foreign officials, official guests, or internationally protected persons.¹⁴ This section applies to murder, manslaughter, or attempted murder or manslaughter committed within the United States. In addition, the U.S. may exercise jurisdiction over such acts committed against internationally protected persons outside the United States if “(1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States.”¹⁵ “Internationally protected person” is defined to mean “a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him;” or “any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part

¹³ (...continued)

Leader,” 25 *Cornell Int’l L.J.* 401 (1992); 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 (1989).

¹⁴ *Cf.*, “Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents,” 28 U.S.T. 1975, TIAS 8532, signed on behalf of the United States on Dec. 28, 1973; ratified by the U.S. Senate on Oct. 28, 1975; entered into force on Feb. 20, 1977.

¹⁵ 18 U.S.C. § 1116(c).

of his household.”¹⁶ “International organization” is defined to mean “a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288) or a public organization created pursuant to treaty or other agreement under international law as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs.”¹⁷ “International organization” does not appear to encompass terrorist organizations or networks, nor does “internationally protected person” appear to reach the leaders of such organizations or networks. The earliest version of this provision was first added in 1972, P.L. 92-539, Title I, Section 101 (Oct. 24, 1972), 86 Stat. 1071, which predates the Ford executive order. However, it was not referenced by President Ford in his Special Message to Congress accompanying issuance of E.O. 11905. Repeal or modification of 18 U.S.C. § 1116 would not necessarily have any clear bearing on the scope of the assassination ban in E.O. 12333. On the other hand, recent joint resolutions of Congress, discussed presently, may pertain.

Role of Congress/Legislation

On Friday, September 14, 2001, both the House and the Senate passed joint resolutions, S.J.Res. 23 and H.J.Res. 64, authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”¹⁸ In addition, the “Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”¹⁹ S. J. Res 23 was signed by the President, and became P.L. 107-40, 115 Stat. 224 (Sept. 18, 2001). This law makes no explicit reference to the assassination ban in E.O. 12333, section 2.11. However, if the assassination ban were to be interpreted to cover U.S. responses to terrorist attacks on U.S. soil, the breadth of the authority provided by these joint resolutions might be viewed as sufficient, insofar as U.S. responses to the events of September 11, 2001 are concerned, to encompass actions that might otherwise be prohibited under the assassination ban. Other legislation has been introduced to expressly revoke the express prohibition against assassination in the Ford, Carter, and Reagan executive orders. *See, e.g.*, H.R. 19 (introduced 1/3/01 and referred to House Committee on International Relations).

¹⁶ 18 U.S.C. § 1116(b)(4).

¹⁷ 18 U.S.C. § 1116(b)(5). 22 U.S.C. § 288 defines “international organization” to mean:

. . . a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. . . .

For a list of those organizations so designated, see 22 U.S.C. § 288 note.

¹⁸ Sec. 2(a).

¹⁹ Sec. 2(b)(1).

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