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# PRESIDENTIAL MURDER — THE CONSTITUTIONALITY OF A STATUTE MAKING IT A FEDERAL CRIME

by

Morris D. Forkosch\*

“THE Commission recommends to Congress that it adopt legislation which would make the assassination of the President and Vice President a federal crime. A state of affairs where U.S. authorities have no clearly defined jurisdiction to investigate the assassination of a President is anomalous.”<sup>1</sup>

Thus reads the tenth recommendation of the Warren Commission’s report on its investigation of the assassination of President Kennedy on November 22, 1963. A variety of constitutionally important questions may be raised by this proposal, and it is solely these which are discussed in this Article.

## I. PRELIMINARY QUESTIONS: CONSEQUENCES OF PRESENT CHIEF JUSTICE’S MEMBERSHIP ON WARREN COMMISSION

### A. *Appeal To Supreme Court By A Future Oswald?*

Assume that the recommended legislation has been enacted, that a future Oswald is indicted and convicted under this law, and that his case on appeal ultimately comes before the present Chief Justice. Could Chief Justice Warren sit, even though he had previously served as chairman of the Warren Commission? He probably would decline to do so as a matter of discretion, but what of his power or right to sit and decide?

If the Chief Justice did hear the case, what could the new Oswald do? Unless special legislation were enacted, the only remedy apparently would be impeachment;<sup>2</sup> but, regardless of its constitutionality and validity, this course of action would not help the murderer, because it could be pursued only after the Chief Justice had heard the

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<sup>1</sup> Warren Commission, Report on the Assassination of President Kennedy 46 (N.Y. Times ed. 1964).

<sup>2</sup> Though not directly in point, as Chief Justice Taft there suggested impeachment of the President, see *Ex parte Grossman*, 267 U.S. 87 (1925) (the question involved the power of the latter to pardon for a criminal contempt).

case. Even with special legislation—*e.g.*, unseating the Chief Justice, reducing the Court to eight or seven *sans* the Chief Justice,<sup>3</sup> depriving the Supreme Court of power to decide this matter<sup>4</sup>—and assuming this legislation were timely and upheld, other factors might intrude, such as resentment by the remaining Justices.

### B. *Rendition Of An Advisory Opinion?*

A related question which arises is whether the Chief Justice presently has indulged in an advisory opinion that such a contemplated law is constitutional. Ever since the Supreme Court in the 1911 *Muskrat* decision<sup>5</sup> re-examined and reaffirmed the federal judiciary's rejection of matters upon which it could not pronounce a final judgment, there has been no effort by Congress or the President to bring anything but cases or controversies to the courts. It is unnecessary to dwell upon or cite instances of the reluctance of the Court itself to speak on a statute's constitutionality before it is so compelled.<sup>6</sup>

The Warren Commission is a Presidentially appointed and Congressionally empowered group, but the Chief Justice has chaired it. Could a future defendant claim that any federal court was influenced to any degree by the Chief Justice's *imprimatur*? No question of binding force or precedent would be present. The contention rather would involve only the psychological or subjective weight, if any, which the name of a former Chief Justice would carry in the subsequent deliberations of a federal court on the constitutionality of such a statute. In practical effect, has not the constitutionality of the tenth recommendation been advisarily upheld? And is this not so even if only one Justice has so decided? To what extent could this decision impair a future defendant's rights? To what extent is bias to cloud a future court's deliberations?

### C. *Commingling Of Judicial And Nonjudicial Functions?*

Generally, the Justices of the Supreme Court have remained judicial officers only and have not undertaken other duties, but this practice has not been inflexible. Ever since the Pension Act of 1792<sup>7</sup> unsuccessfully sought to authorize federal judges to receive and de-

<sup>3</sup> See, *e.g.*, the situation and alleged politicking in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), which was overruled in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871), discussed by Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 Harv. L. Rev. 977, 1128 (1941); Ratner, *Was the Supreme Court Packed by President Grant?*, 50 Pol. Sci. Q. 343 (1935).

<sup>4</sup> See, *e.g.*, *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), discussed in Forkosch, *Constitutional Law* 45, 332 (1963), although today this case and its logical implications may well be questioned.

<sup>5</sup> *Muskrat v. United States*, 219 U.S. 346 (1911).

<sup>6</sup> See Forkosch, *Constitutional Law* § 54 (1963).

<sup>7</sup> Act of March 23, 1792, ch. 11, 1 Stat. 243.

termine petitions by certain persons not able to obtain pensions, subject to review by the Secretary of War and Congress,<sup>8</sup> the judiciary has never undertaken any nonjudicial duties. As Chief Justice Taney phrased it in absolute terms in an 1864 case, the Supreme Court "cannot be required or authorized to exercise any other [but judicial powers]." However, obviously only the Court and not a Justice alone is referred to here. Thus, the late Mr. Justice Jackson was appointed by President Truman on May 2, 1945, to represent the United States and to act as its chief prosecutor at the Nuremberg trials, to leave the bench and the country during this period of service, and thereafter to rejoin the High Court without more. During this time, however, the Court's opinions contain the statement that "Mr. Justice Jackson took no part in the consideration or decision of this case."

But in the current instance the President of the United States created a domestic agency, requested the Chief Justice to head it (technically he did so voluntarily), directed its members "to evaluate all the facts and circumstances," and had them "report its findings and conclusions to him." Two weeks later, a Congressional Joint Resolution was passed which empowered "the Commission to issue subpoenas requiring the testimony of witnesses and the production of evidence" and which also enabled it to grant immunity to witnesses who claimed the fifth amendment's privilege against self-incrimination (although this power was not used once).<sup>10</sup> Furthermore, during the ten months of the Commission's life the Chief Justice never left the bench, retained his judicial powers and position, participated actively in all judicial functions, voted in all cases before the court, and wrote many opinions.

Under these conditions, to what extent has there been a mingling of judicial and nonjudicial functions, duties, and powers? To what extent was the President's request a directive or a command (the Chief Justice at first rejected the appointment, but capitulated when personally pressed by the President)?<sup>11</sup> To what extent, if the absolute rejection by Taney is still law, was the participation of the Chief Justice *ultra vires*? Does the Chief Justice's presence on the Com-

<sup>8</sup> See Forkosch, *Administrative Law* § 39 (1956), for a discussion of the statutes and cases involved.

<sup>9</sup> *Gordon v. United States*, 69 U.S. (2 Wall.) 561, 117 U.S. 697, 700 (1864).

<sup>10</sup> See Report, *op. cit. supra* note 1, at 4-6, giving the jurisdiction and powers of the Commission, which was created by President Johnson's Exec. Order No. 11130, 28 Fed. Reg. 12789, dated November 29, 1963, and which was further empowered by S.J. Res. 137, Pub. L. No. 88-202, 89th Cong., 1st Sess. (Dec. 13, 1963).

<sup>11</sup> "From its first meeting on December 5, 1963, the Commission viewed the Executive order as an unequivocal Presidential mandate to conduct a thorough and independent investigation." Report, *op. cit. supra* note 1, at 5.

mission affect its power and the weight of its report and recommendations?

A subsidiary question immediately becomes apparent. Assuming a commingling of judicial and nonjudicial functions and powers by the Chief Justice's participation (whether voluntary or involuntary) on the Commission, to what extent has this commingling affected his judicial votes, opinions, and determinations in cases during his chairmanship of the Commission? Can a defeated party in any of these cases seek any form or type of redress, *e.g.*, rehearing? What of any five-four decisions in which the Chief Justice was on the majority? What about the granting of certiorari where the Chief Justice's vote was required for the application of the rule of four? Regardless of the above, has the sanctity of Supreme Court discussion, voting, and all internal details in which the Chief Justice participated been violated to the point where it has affected all of the Court's deliberations?

The assumption of a commingling of judicial and nonjudicial duties and powers is not altogether accurate factually. And on a technically legal basis the existence of a bifurcation may be conceded. For example, the report states positively that the Commission's functions were not judicial, that no posthumous trial could be held, that much information was obtained and used which ordinarily would be inadmissible in a court of law, and that "the Commission has functioned neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a fact-finding agency committed to the ascertainment of the truth."<sup>12</sup>

But to what extent are answers to the questions posed above affected by the following? The President requested the Commission "to evaluate all the facts and circumstances."<sup>13</sup> Congress granted powers of subpoena and immunity. The Commission's procedures included advice to all witnesses of their right to the presence and advice of their own counsel during interrogation, to demand a public hearing (one witness so obtained two hearings), to raise objections to questions, to make any clarifying statement on the record at a later time, and to purchase a copy of their testimony. The president of the American Bar Association was requested "to participate in the investigation and to advise the Commission whether in his opinion the proceedings conformed to the basic principles of American justice,"<sup>14</sup> and "this procedure was agreeable to counsel for Oswald's widow."<sup>15</sup>

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<sup>12</sup> Report, *op. cit. supra* note 1, at 9-10; see also note 16 *infra*.

<sup>13</sup> Report, *op. cit. supra* note 1, at 4; see also *id.* Appendix VI, at 471-72.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Ibid.*

It may be argued further that if this was not an "adversary proceeding" in the strict interpretation of legal procedures,<sup>16</sup> why the analogical "ombudsman,"<sup>17</sup> why the necessity for acquiescence by the "defendant's" counsel, and why such obeisance to procedural fairness, if not outright procedural due process of law?

The preceding preliminary questions cannot be answered satisfactorily even under the broadest of technical analyses, but the fact remains that they illustrate the practical and legal difficulties in the appointment of a Supreme Court Justice or Chief Justice to a special body like the Warren Commission. Of greater importance, however, is the next question, although others could still be raised.

## II. THE CONSTITUTIONALITY OF A PRESIDENTIAL ASSASSINATION STATUTE

Assume Congress acts favorably on the bills now or later brought before it to implement the quoted tenth recommendation.<sup>18</sup> Would such a statute be constitutional, or could an effective case be made out against it?

There is no question but that the history of inaction in this area is a shameful illustration of federal neglect. It is unnecessary to list or discuss the prior assassinations which preceded the tragedy of 1963, as the Commission's report considers them in great detail.<sup>19</sup> What should be listed, however, is the action by the Congress (and the President, who is empowered to recommend bills), or rather their

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<sup>16</sup> See, e.g., the Commission's own views in Report, *op. cit. supra* note 1, at 9-10:

The procedures followed by the Commission in developing and assessing evidence necessarily differed from those of a court conducting a criminal trial of a defendant present before it, since under our system there is no provision for a posthumous trial. If Oswald had lived he could have had a trial by American standards of justice where he would have been able to exercise his full rights under the law. A judge and jury would have presumed him innocent until proven guilty beyond a reasonable doubt. He might have furnished information which could have affected the course of his trial. He could have participated in and guided his defense. There could have been an examination to determine whether he was sane under prevailing legal standards. All witnesses, including possibly the defendant, could have been subjected to searching examination under the adversary system of American trials.

The Commission has functioned neither as a court presiding over an adversary proceeding nor as a prosecutor determined to prove a case, but as a factfinding agency committed to the ascertainment of the truth. In the course of the investigation of the facts and rumors surrounding these matters, it was necessary to explore hearsay and other sources of information not admissible in a court proceeding obtained from persons who saw or heard and others in a position to observe what occurred.

<sup>17</sup> An ombudsman is a direct agent of the people appointed by the government to investigate personal grievances. They exist in Europe, Scandinavia and elsewhere (e.g., New Zealand), and may be established in Canada shortly.

<sup>18</sup> See text accompanying note 1 *supra*.

<sup>19</sup> See Report, *op. cit. supra* note 1, Appendix VII at 473-82.

inaction in this area.<sup>20</sup> A listing to 1963 requires two items only—the bills which were introduced in the respective houses of Congress soon after the death of President McKinley making it a federal crime to kill a President, but which did not pass.<sup>21</sup> Since the assassination of 1963, a spate of such bills has been introduced, but they have been held up pending the report by the Warren Commission and reintroduction is now in order.

There is a federal statute upon the books which makes it a federal crime to *threaten* to take the life of or to inflict bodily harm upon the President by mail or otherwise.<sup>22</sup> Another federal statute applies where two or more persons *conspire* "to injure [any officer of the United States] . . . in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof. . . ."<sup>23</sup> Neither statute, however, is concerned with the actual *killing* by a nonconspiring individual on state soil.

An examination of these federal statutes, and one other, gives rise to certain conclusions. By its terms, the *threat* statute is not limited to federal possessions and territories, but geographically embraces all places where the flag flies; however, it does not cover the actual murder. On the other hand, the *conspiracy* statute does cover

<sup>20</sup> A succession statute or amendment to the Constitution is, of course, also a necessity.

<sup>21</sup> S. 3653, 57th Cong., 1st Sess. (1902); H.R. 10386, 57 Cong., 1st Sess. (1901). Failure of the bills to pass was due to the Senate's refusal to accept the conference report. See Report, *op. cit. supra* note 1, at 431, 478.

The Secret Service, however, in 1902 did assume the full-time responsibility for the safety of the President, and in 1908 the President-elect was included. In 1913 Congress by statute authorized these protections, and in 1951 and 1962 legislated further. Permanent protection now is afforded to the President and his immediate family, the President-elect, the Vice President (or the one next in order of succession), the Vice President-elect, and a former President, at his request, for a reasonable period after leaving the office (usually 6 months). 62 Stat. 818 (1948), as amended, 18 U.S.C. § 3056 (Supp. V, 1964). See Report, *op. cit. supra* note 1, at 479-82.

<sup>22</sup> The Threat Statute of 1917, 62 Stat. 740 (1948), as amended, 18 U.S.C. § 871 (Supp. V, 1964). This statute was amended in 1955 and 1962 to include the individuals named in note 21 *supra*, except for the former President and the current President's immediate family. (The Warren Commission's Appendix VII does not mention the Vice President-elect as being within the statute, but he is there specifically so mentioned and included. See Report, *op. cit. supra* note 1, at 481-82.) The punishment is a fine not to exceed \$1,000 and/or imprisonment up to 5 years.

<sup>23</sup> 62 Stat. 701 (1948), 18 U.S.C. § 372 (1958). This general conspiracy statute covers "any person" or "any officer of the United States" under the circumstances there set forth; the President is not specifically named. The punishment is a fine not to exceed \$5,000 and/or imprisonment up to 6 years. This statute protects persons, rather than being directed primarily at preventing offenses. A still more general conspiracy statute, 62 Stat. 701 (1948), 18 U.S.C. § 371 (1958), is directed toward conspiracies to commit any offense against the United States "in any manner or for any purpose," and is a catch-all law.

If, however, the proposed law making it a crime to kill the President is enacted, a conspiracy to that end might conceivably be prosecuted under either of the above sections, unless the new law covered such a conspiracy and provided for other (and greater) punishment. It is suggested that any new law cover all officials (see note 21 *supra*) and all purposes desired—*i.e.*, the actual killing, the attempt so to kill, any conspiracy to kill or to attempt to kill, and punishments therefor.

murder, but requires two or more persons to conspire to that end, so that it does not apply to an individual assassin who is not involved in any conspiracy. The third statute here relevant, the Federal Assimilative Crimes Act,<sup>24</sup> is limited geographically to federal territory. In other words, a nonconspiring individual who has not threatened to but does kill the President on state ground is not covered by a federal statute. That is the Oswald case.

The application and meaning of the *conspiracy* statute may be obtained by reasoning through a *reductio ad absurdum*—i.e., by showing that an absurd and rejected conclusion is reached if we assume the statute to mean something else. We may initially assume for this purpose that “to injure” the President (as in the statute) is not the same as to kill him, although shortly afterward we will reject this hypothesis. But on this assumption we may note that a conspiracy as a crime per se has long been abandoned (if it ever did exist) by the states and the federal government.<sup>25</sup> There must be something in addition to the conspiracy that is illegal in itself. Thus, a conspiracy to kill the President in a state or on nonfederal property must assume that the killing per se is federally illegal, which it technically is not, or else the conspiracy must be for a condemned state offense that is assimilated by the Federal Assimilative Crimes Act<sup>26</sup> (which is limited, however, by its reference to federal territory, the high seas, etc.). Since only the latter is possible (if the law is assumed as given above), then, unless every state has such a law on its books (making it a crime to kill), a conspirator could not be federally prosecuted for the killing in that state (assuming no other law or fact intervened, such as, e.g., interstate crossings). Regardless of the above, if the punishment by the state is life imprisonment, and since the federal crime is likewise so punishable by the assimilation clause, then a Presidential conspirator-killer may conceivably escape with his own life. However, this conclusion is rejected as not only incredible in its premise but also as unworkable in its conclusion. The only acceptable premise and conclusion is that the conspiracy as discussed includes the killing of a President, but that only a conspirator may be punished under this law.

This conclusion means that today a single individual, who is not a conspirator or who has not threatened to kill, is immune from federal prosecution for the actual killing of a President in a state on nonfederal property. Under the law suggested in the tenth recom-

<sup>24</sup> 62 Stat. 686 (1948), 18 U.S.C. § 13 (1958).

<sup>25</sup> See analysis in Forkosch, *The Doctrine of Criminal Conspiracy and its Modern Application to Labor*, 40 Texas L. Rev. 303, 473 (1962).

<sup>26</sup> 62 Stat. 686 (1948), 18 U.S.C. § 13 (1958).



mentation of the Warren Commission making Presidential murder on state soil a federal crime, could the individual nonconspiratorial killer still go free because of the unconstitutionality of such a statute?

One argument against the statute may be predicated upon the federal-state division of jurisdiction, even though at present the scales are tipped heavily in favor of the national government. Still, today the states do have exclusive jurisdiction over certain business and social areas—especially those dealing with the family—and the police power is their greatest repository of independent ability for control. Once the federal government is permitted to move into a state's physical territory by making it a crime to kill the President on purely local ground, then, the argument continues, the states may conceivably be left powerless to stem the new federal tide. This argument, however, assumes that the federal government has absolutely no power on state ground. The converse is true. For example, interference with the mails, even though solely within a state's jurisdiction, is a federal crime;<sup>27</sup> there is in effect an umbilical cord which reaches (as with the Commerce Clause) from the conduct to a diminution of federal power, and this connection is sufficient.<sup>28</sup> Similarly, a federal statute<sup>29</sup> condemns murder of the enumerated federal officials even though committed on state soil.

Another argument may be advanced against the constitutionality of such a statute. This argument is predicated upon a somewhat astonishing fact—namely, that Congress is authorized by the Constitution to punish only certain crimes expressly there listed or named (subject to particular limitations such as, *e.g.*, the definition of treason and its prosecution, double jeopardy, and trial by jury). However, because of the necessary and proper clause<sup>30</sup> the Supreme Court has never denounced such a legislative (police) power, and it has expressly upheld countless statutes attacked because of other alleged infirmities. Numerous regulatory measures also prescribe criminal penalties for their infraction. For example, interstate movements or flow are within the federal commerce power so that its diminution, use, or interference can be made a crime—*e.g.*, kidnapping<sup>31</sup> and prostitution.<sup>32</sup> So is the power to tax within the ability of the federal

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<sup>27</sup> 62 Stat. 763 (1948), 18 U.S.C. § 1341 (1958); see *Badders v. United States*, 240 U.S. 391 (1916).

<sup>28</sup> See Forkosch, *Constitutional Law*, §§ 218-25 (1963).

<sup>29</sup> 62 Stat. 756 (1948), 18 U.S.C. § 1114 (1958).

<sup>30</sup> U.S. Const. art. I, § 8.

<sup>31</sup> 62 Stat. 760 (1948), as amended, 18 U.S.C. §§ 1201-02 (1958); see *Gooch v. United States*, 297 U.S. 124 (1936).

<sup>32</sup> 62 Stat. 812 (1948), 18 U.S.C. § 2421 (1958); see *Caminetti v. United States*, 242 U.S. 470 (1917).

government to protect, *e.g.*, the gambler's occupational tax.<sup>33</sup> The defense of the nation enables Congress to make criminal numerous acts and conduct not specifically provided for, *e.g.*, advocating the overthrow of the government by force. There is also a Congressional power to make criminal the counterfeiting of money, the smuggling of goods into the country, and other conduct which comes under clauses other than commerce or war.<sup>34</sup>

It may be said, generally, that the (police) power of Congress to make criminal the acts and conduct of persons stems from its powers found elsewhere in the Constitution; or, put negatively, without some other substantive power which must be safeguarded, there is no independent Congressional power to define legislative crimes—*i.e.*, the latter is dependent upon the former to the extent and degree required to protect it. This interdependence is orthodox constitutional law and does not incorporate the modern development, approach, and extended scope of the federal powers, but it is not absolutely required for the present analysis. To illustrate, the President is not only the Chief Executive but also the Commander-in-Chief, and to the extent that he is therefore a part of the military establishment it may be argued today that Section 1114 of Title 18 applies.<sup>35</sup> That section makes it a federal crime to kill "any officer or enlisted man of the Coast Guard," and it could accordingly be argued so as to bring the President within this provision (assuming the Coast Guard is subject to the President's "commander" powers). Also Section 1111(b) of Title 18<sup>36</sup> provides for federal punishment for the crime of murder within "the special maritime and territorial jurisdiction of the United States," and Section 7 of Title 18<sup>37</sup> defines this phrase to include certain geographical areas and vessels. Thus, a person who killed a President in (say) the Brooklyn Navy Yard, which is within the definition, could be prosecuted for murder.<sup>38</sup>

In other words, it may be concluded that any law enacted now or later which makes it a federal crime for an individual to murder the President (or Vice-President) on state soil, regardless of state laws on the subject, is constitutional. The reasoning borrows from cases in areas other than the strictly criminal, utilizes current judicial approaches to the expanded powers of the federal government, and

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<sup>33</sup> Int. Rev. Code of 1954, §§ 4411-13, 4421-23; see *United States v. Kahriger*, 345 U.S. 22 (1953).

<sup>34</sup> See generally Forkosch, *Constitutional Law*, §§ 265-79 (1963).

<sup>35</sup> 62 Stat. 756 (1948), 18 U.S.C. § 1114 (1958).

<sup>36</sup> 62 Stat. 756 (1948), 18 U.S.C. § 1111(b) (1958).

<sup>37</sup> 62 Stat. 685 (1948), 18 U.S.C. § 7 (1958).

<sup>38</sup> See also 62 Stat. 686, 18 U.S.C. § 13 (1958), which assimilates local law where no provision for federal law has been made.

commits itself to the absolute necessity for such a law. Although necessity does not furnish the base for undelegated power, it does provide the occasion for its exercise; and this exercise may be based upon implications stemming from conceded powers.<sup>39</sup>

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<sup>39</sup> Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934).