

DEATH SQUADS

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Recently, one of the General Government's District Court Judges dismissed a lawsuit that challenged the purported authority of the President to order the assassination overseas of American citizens whom someone in the Executive Branch has categorized as a dangerous "terrorist". The Judge ruled that the plaintiff, being only the father of the threatened victim, rather than the victim himself, lacked "standing" to prosecute the suit, and that in any event the issue involved a "political question" that could not be adjudicated in court. So the underlying claim was not decided, one way or the other.

The judicial dodge of denying "standing" to people who raise contentions that are extremely embarrassing to rogue officials in the General Government has become all-too-familiar these days – particularly in lawsuits and other proceedings that raise challenges to the qualifications of Barak Obama for the office of President. But in this case, not merely usurpation, but nothing less than murder is the ultimate issue. Which, one might have imagined, should have given even the most legally dim-witted and morally obtuse judge serious cause for concern that perhaps the matter was not just a "political question".

Rather than analyzing the some eighty-three pages of this particular Judge's opinion, though, I shall simply lay out some of the principles on which any honest and competent jurist would not only find "standing" in a case such as this, but also declare the claims of the Executive Branch to be unconstitutional.

1. The basic assertion from the Executive Branch is that the President, in his capacity as "Commander in Chief" during "the war on terror", enjoys the inherent power, by himself or through his subordinates, to identify certain American citizens as extremely dangerous "terrorists", and on the basis of that determination to order operatives of the General Government to assassinate those Americans wherever they may be found in foreign venues. Furthermore, the exercise of this purported power: (i) is not dependent upon any prior judicial determination that an individual targeted for execution is guilty of any crime punishable by death, or that the individual could not be apprehended and made to stand trial in some court; and (ii) is not subject to any other kind of judicial review, either before or after the execution takes place. Indeed, because many of the supposed facts on which a determination of an individual's status as a "terrorist" certainly will be claimed to be "state secrets", meaningful judicial review either ex ante or ex post would routinely be impossible as a matter of practice. In addition, inasmuch as the Constitution does not limit the exercise of the powers of the "Commander in Chief" (whatever they may be) to foreign venues only, no reason can be found why the supposed authority to execute certain Americans outside of any judicial process, if it does exist at all, cannot be exercised within the United States proper, even on the lawn of the White House itself. After all, if an American "terrorist" who might be apprehended in Afghanistan

may nonetheless simply be assassinated there, because some bureaucrat in the Executive Branch considers the latter course of action more efficient than the former, then why should not an American “terrorist” operating within the United States also simply be executed out of hand, for the same eminently practical reason? So, in its fullest statement, the President’s contention is that he enjoys judicially unreviewable discretion – acting either by his own hand or by the hands of his minions – to assassinate, anywhere in the world and presumably by whatever means may prove effective, any American citizen whom someone in the Executive Branch, whose identity may never be disclosed, has identified as a dangerous “terrorist” by some process and on the basis of some purported evidence that in its most important particulars may forever remain secret.

2. This stark statement of the issue settles the question of “standing”. For, on this statement, any American – and certainly every American who, for whatever reason, may run politically afoul of the Executive Branch or of some subversive private organization with malign influence over the Executive Branch – is potentially the victim of an “official” assassination, the real reason for which can easily be disguised behind some fictional, or perhaps merely erroneous, assertion that the victim is a “terrorist”. Because the process and criteria for selection of an individual for “official” assassination are largely secret, one cannot predict who these victims will be, until they are killed and someone from the Executive Branch admits to complicity in the deed. But, self-evidently, once a victim has been executed, an injury irreparable by judicial process will have occurred. So, if the courts are to enforce the constitutional mandate of the Fifth Amendment that “[n]o person shall * * * be deprived of life * * * without due process of law” – with proper emphasis on the word “[n]o” – then they must entertain at least one suit by one American to determine the legality of the power the President claims, before that individual – or anyone else – is actually assassinated. Which means that the very first lawsuit meeting the standard requirements for personal jurisdiction and venue should be heard on the merits. (Of course, this would not guarantee that the issue would be decided correctly, the Bench being overrun by one Judge Flapdoodle after another in every jurisdiction throughout the federal system. But at least it would move the process of inquiry ahead under public scrutiny.)

Prudential considerations compel the same result. The doctrine of “standing” is mostly the bastard contrivance of individual judges, in the formulation and application of which the personality on the Bench rather than any fixed and certain legal principle usually decides the outcome. As such, the doctrine of “standing” is wholly nonscientific – being both unverifiable and unfalsifiable. Yet, in this case, that is no demerit. Rather, it is an advantage. Because, here, a clever judicial wordsmith could easily concoct out of bits and snippets extracted from hundreds of other judicial opinions his own decision in favor of “standing”. And although other jurists and lawyers might disagree with his conclusion, who could declare him to be wrong in any objective sense? No one. He would, as well, be quite right morally. Because, having found “standing”, he could at least temporarily enjoin the continuation of the program of “official” assassinations, until the Judiciary could pass on the question after plenary consideration, thereby preventing who could predict how many irretrievable violations of the Fifth Amendment. Eventually, higher courts might overrule

him, licensing the assassins to proceed. But then the blood would encarnadine those judges' hands, not his.

If they were honest in their claim of constitutional authority, the President and his agents in the General Government, too, would themselves encourage this result, so as to find out exactly where they stand legally. For if "official" assassinations committed anywhere within the United States are unconstitutional, then both the assassins and their principals are criminals for whose transgressions the penalty may be death. For just one example, Title 18 of the United States Code provides as follows:

§ 241. Conspiracy against rights. If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured – They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, * * * or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

§ 242. Deprivation of rights under color of law. Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, * * * shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, * * * or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

Moreover, the victims of attempted unconstitutional "official" assassinations would, in the exercise of their natural right of self-defense, be entitled to resist their assailants with deadly force. Which means that, in an environment in which any agent of the General Government might secretly be engaged in an "official" assassination on American soil, against which the Judiciary refused to protect the citizenry, any American – and certainly

any political dissident – could reasonably and justifiably resist any government agent with deadly force at any time, because the victim would have no way of knowing whether that particular agent’s assault was actually a “hit” disguised as some kind of supposedly valid “law enforcement”. Too many contemporary Americans may be sheep willing to be shorn; but it is unlikely that more than a few of them are sheep willing to be slaughtered after they finally realize that such is the shepherd’s intention, and are exposed to some examples of his bloody handiwork. And having publicly espoused the position that they may with impunity kill any American for secret (and judicially unreviewable) reasons at any time, agents of the General Government could hardly complain if every American took them at their word, and defended himself accordingly.

Obviously, to allow a situation of this kind to degenerate into widespread violence would verge on madness. So, any judge’s invocation of the “standing” ruse to derail timely litigation of this issue is more than merely intellectually indefensible and morally irresponsible. Unless the judge can successfully invoke the defense of insanity on his own behalf, his misuse of the “standing” doctrine amounts as well to his complicity in – and at least equal culpability for – whatever crimes may be perpetrated in the course of any attempted “official” assassinations.

3. And crimes they will be. For “official” assassinations are blatantly unconstitutional. That being so, the matter cannot possibly raise a “political question”. As everyone knows, the doctrine of “political question” derives from Chief Justice John Marshall’s opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), in which he wrote:

The province of the [Supreme C]ourt is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court.

Of course, though, if the Constitution withholds some power from the President, then he cannot possibly make any claim under color of such a power to “perform duties in which [he has] a discretion”. The President has no “discretion” to violate the Constitution. So a judge cannot decide that a “political question” exists until he has first determined that the Constitution and laws do in fact rightfully empower the President to act in a certain manner.

Now, the theory of the Executive Branch in this case is that, as “Commander in Chief” engaged in fighting a supposed “war on terror”, the President may authorize assassinations of specifically identified “terrorists”. Yet, as the Constitution makes as plain as day, the President is not a “Commander in Chief” in general, ruling over every one and every thing imaginable within the United States, in the manner of a German Führer or an Italian Duce. Neither is he a “Commander in Chief” specifically with respect to “death squads”, in the manner of a Caudillo of some Central American banana republic. Rather, the powers of the President as “Commander in Chief” are narrowly defined, and therefore limited: to wit,

“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States[.]”

Article II, Section 2, Clause 1 (emphasis supplied). The President is “Commander in Chief” of nothing else, and for no other purposes.

“[T]he Army and Navy of the United States” are entirely constructs of Congress, which alone exercises the powers “[t]o raise and support Armies” and “[t]o provide and maintain a Navy”. Article I, Section 8, Clauses 12 and 13. Absent Congressional legislation, no “Army and Navy of the United States” exist as to which the President can function as “Commander in Chief”. Furthermore, “the Army and Navy of the United States” that do exist are always subject to – indeed, are uniquely defined in their organization and operations by – the power of Congress “[t]o make Rules for the Government and Regulation of the land and naval Forces”. Article I, Section 8, Clause 14. The President can exercise no control over “the Army and Navy of the United States” that ventures even one Angstrom Unit beyond the bounds of these “Rules”, because “the Army and Navy of the United States” do not exist outside of these “Rules”.

Similarly for “the Militia of the several States”. Except that, with respect to the Militia, the President’s authority is even narrower, because he enjoys the status of “Commander in Chief” of the Militia only when the Militia are “called into the actual Service of the United States”. And that can be for three purposes alone: namely, “to execute the Laws of the Union, suppress Insurrections and repel Invasions”. Article I, Section 8, Clause 15. Furthermore, even then, the President cannot exercise untrammelled command, but must abide by whatever rules Congress has “provide[d] * * * for governing such Part of the[Militia] as may be employed in the Service of the United States”. Article I, Section 8, Clause 16. When the Militia have not been “called into the actual Service of the United States”, they remain State institutions, governed by State officers, and are not subject to the orders of the President at all. See Article I, Section 8, Clause 16.

So, if as “Commander in Chief” the President dares to claim any power to order “official” assassinations, that power must be proven to derive from some exercise of Congress’s powers to “make Rules for the Government and Regulation of the land and naval Forces” and to “provide * * * for governing * * * Part” of the Militia. Where, though, does any legislation, purportedly enacted by Congress under color of those powers, and authorizing anyone to order or to commit “official” assassinations of anyone, appear in the Statutes at Large? Nowhere of which I am aware.

And what if it did? A purported “law” of Congress, identifying a specific individual and condemning that individual to death, would be a “Bill of Attainder”. As Justice Joseph Story explained,

Bills of attainder * * * are such special acts of the legislature as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. * * * In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying

itself with proofs, when such proofs are within its reach, whether they are conformable to the laws of evidence or not. In short, in all such cases, the legislature exercises * * * what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions. * * * The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others. – *Commentaries on the Constitution of the United States (Boston, Massachusetts: Little, Brown, and Company, 5th Edition, 1891), Volume II, § 1344, at 216-217 (footnotes omitted).*

For these reasons, the Constitution explicitly, unequivocally, and without exception outlaws all “Bills of Attainder”, both for Congress – “[n]o Bill of Attainder * * * shall be passed”; and for the States – “[n]o State shall * * * pass any Bill of Attainder”. Article I, Section 9, Clause 3 and Article I, Section 10, Clause 1 (emphases supplied). These prohibitions of “Bills of Attainder”, it should be noted, reach all statutes or regulations, “no matter what their form, that apply either to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without a judicial trial”. *United States v. Lovett*, 328 U.S. 303, 315 (1946). See also *United States v. Brown*, 381 U.S. 437 (1965).

So Congress constitutionally cannot, in the guise of promulgating rules for the governance of the Army, the Navy, or the Militia, authorize the “official” assassination of anyone, whether directly by name or indirectly by reference to membership in some particular group. Thus, to draw a picture that should be familiar to all, in prosecution of “the war on crime” (which has been going on far longer than “the war on terror”), Congress is absolutely powerless to enact a statute providing for the assassination of “Don Corleone” by name, or of “any member of the Corleone Family” by general attribution.

And if Congress cannot constitutionally promulgate rules for the governance of the Army, Navy, and Militia that amount to “Bills of Attainder”, then the President cannot constitutionally purport to enforce such rules in the guise of the “Commander in Chief”.

Neither can Congress delegate a nonexistent power to put out “Bills of Attainder” to the President, for him to employ at his discretion. Nor can the States license their Militia to exercise such a forbidden power, or command their Militia to obey a Presidential order to do so. And inasmuch as the substance of the President’s authority as “Commander in Chief” depends in the first instance upon Congressional legislation, and ultimately upon the existence of the Militia as permanent State institutions, he cannot possibly even claim, let alone put into practice, such a power by himself alone.

And, of course, the President cannot invoke any supposed authority as “Commander in Chief” to require or allow various civilian agencies of the General Government – such as the Department of Homeland Security and the Central Intelligence Agency – to engage in “official” assassinations, because the President is not in any way a “Commander in Chief” with respect those agencies, by constitutional definition. What those agencies are allowed to do, Congress alone determines – except, interestingly enough, that even Congress cannot constitutionally subordinate them to the President as “Commander in Chief”, because the Constitution itself extends that status only to the Army, Navy, and Militia. And Congress cannot constitutionally promulgate any rules for those civilian agencies that amount to, or require or allow them to execute, “Bills of Attainder”. So, inasmuch as agencies such as the DHS and the CIA constitutionally can have nothing whatsoever to do with “Bills of Attainder”, then in and through his administration of them neither can the President.

Finally, the President labors under an explicit constitutional duty to “take Care that the Laws be faithfully executed”. Article II, Section 3. Other than the Declaration of Independence, the most important of these “Laws” is the Constitution itself. The Constitution prohibits any and every “Bill of Attainder”. Therefore, the President can take no action that purports to create, enforce, or countenance in any way a “Bill of Attainder”. Rather, he must bend every effort to stop any “Bill of Attainder” from being prepared, passed, or enforced. In particular, he must prevent everyone in the Army, the Navy, the Militia, the Department of Homeland Security, civilian intelligence agencies such as the CIA, law-enforcement agencies such as the FBI, and all other agencies in the Executive Branch from even proposing, let alone preparing and putting into effect, plans for “official” assassinations. And he must take effective steps swiftly, surely, and severely to punish everyone in any way involved in such schemes. Indeed, if he fails to do so, while aware that “official” assassinations are being plotted within (and perhaps actually being carried out by) the Armed Forces, the Militia, or agencies in the Executive Branch, the President should be impeached, convicted, and removed from office for a “high Crime[]” sine die. Article II, Section 4.

So much the Constitution commands on its face, in explicit, unmistakable language. Well, “unmistakable” to anyone who reads it intelligently and in good faith. Apparently, though, no one in high office in the General Government today is able or willing to do so – or “death squads” would not be in the works in the Executive Branch, and their operations would not be excused as a “political question” by the Judiciary. (I leave aside the failure of Congress to impeach and convict Mr. Obama on this ground, because it is arguable that, not being qualified for the office of President at all, he cannot constitutionally be removed by that method from a position he can not, does not, and never did hold.)

What should really give conscientious Americans pause, though, is how much worse this situation is than what the Founders Fathers faced at the time of the Declaration of Independence. For although the Declaration rightly indicted King George III as guilty of “usurpations” and intent upon “the establishment of an absolute Tyranny over these States”, and mercilessly castigated him for “waging War against us”, it never accused him of employing “death squads” to assassinate patriotic American leaders. A tyrant he may have been – a murderous thug, no. That America freed herself from a such a tyrant then, only to come under the heels of such thugs now, is a most telling corroboration of the old

adage that “against human stupidity even the gods themselves contend in vain”. For part one click below.

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