

THE CONSTITUTIONALITY OF THE OVERSEAS PRISON OVERSIGHT LAW
PRISONER FAMILIES V. UNITED STATES

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Constitutional Law: Structures of Power and Individual Rights
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The families of the three prisoners who were imprisoned and interrogated by the Overseas Prison Agency (OPA) under its authority provided by the Overseas Prison Oversight law (OPAL) do not have standing to sue the entire legislation. The law does not injure the families on Appointment Power or Removal Power grounds. Those clauses may injure the Secretary of Defense in a concrete way by depriving him or her of the powers granted by the Constitution regardless if they are explicitly written or implicitly read. He or she would be the appropriate individual to bring a proper suit challenging those clauses on these grounds.

The families do indeed have the standing to sue the OPA on due process grounds. Without delving into the due process issue here, the families of the individuals have a concrete injury because the government may have deprived their relatives of rights guaranteed to citizens by the Constitution. The standing to sue on due process grounds is particularly strong in this case because of the use of enhanced interrogation. The Court will not address the issue further beyond this statement.

The Court now turns to examination of the second and third clause of this legislation. The head of the OPA certainly acts in an executive function. Congress provides specific instructions for the head of the OPA to guide his or her decision-making in executing the OPOL. Executive officials fall under the textual Appointment Power as it was prescribed in the Constitution. “We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an “Officer of the United States,” and must, therefore, be appointed in the manner prescribed...” (Buckley, 1976)

First, the Court must decide whether the head of the OPA is a principle or inferior official. The past decisions of this Court have shed some light on the principal or inferior officer issue. The Court in Morrison characterized this distinction as one with not much textual

framework available. “The line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn.” The Court finds that it should provide the branches with a reasonable amount of discretion when making this determination provided that the action in question does not represent a possible encroachment of the separation of powers from one branch by another. (Morrison, 1988)

Even if the Court provides this discretion to Congress, by placing the head of the OPA’s appointment power in the Secretary of Defense, Congress’ legislation has already determined to some extent the inferiority of the head of the OPA. Article II, Section 2 of the Constitution provides the textual basis for a distinct Executive power of appointment. The Appointment Clause allows Congress to “vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” (Art. II, S 2, cl. 2 of the Constitution).

The legislation in question does not specify whether or not the OPA falls under the control of the Department of Defense. If it does, the Head of the OPA does not resemble a principal officer because he does not serve at a cabinet level position. The OPA presumably falls under the purview of the Department of Defense and under the direct control of the Secretary of Defense. Congress impeding the ability of a department head’s ability of appointment with a Senate Confirmation requirement oversteps the separation of powers doctrine. (Morrison, 1988)

The Secretary of Defense, as the head of a cabinet level position in the Executive Branch, and previously confirmed by the “Advice and Consent of the Senate” should be allowed total discretion in executing the laws of the United States faithfully. Requiring a Senate confirmation of an inferior officer under his direct employ stands as an overreach of Congressional authority because this principle directly opposes the explicit constitutional grounds for appointment

procedures.

The Court rules that Congress cannot give the Secretary of Defense the power to appoint the head of the OPA but subject that appointment to Senate confirmation.

Now that the Senate confirmation requirement has been struck down for appointing the head of the OPA, the Court now turns to the restriction that the head must be chosen from a class of retired military officers. Having previously determined the inferior classification of the head of the OPA, Article II, Section 2 allows Congress to vest the appointment of such an official solely in the hands of others as explicitly written. Congress has no textual basis for determining the validity of an inferior officer's qualifications, nor does it have the ability to limit the Appointment Clauses' applicability. This sets up a slippery slope that eventually would allow the violation of the Appointment clause on these grounds. Imagine allowing Congress the power to qualify employment on such grounds. A full-fledged logical extension of this ability would allow Congress direct appointment ability. Congress could conceivably restrict the appointment in question to a specific person and skirt Article II entirely. If Congress cared about whether or not the head of the OPA would be a retired military officer, the question should have been posed to the Secretary of Defense before the Senate voted to confirm him in his post. Instead, Congress chose to infringe upon the separation of powers by limiting the Appointment Powers of the Executive Branch. The court finds this clause unconstitutional. (Art. II, S 2, cl. 2 of the Constitution)

The decision now turns towards the third clause and seeks to determine whether Congress may qualify the power of removal to only it "for cause." In Morrison the court decided, "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority." The Court made itself clear that this principle taken at face value does

not violate any separation of powers doctrine, at least not as a violent power grab. Congress should be allowed far more deference from the court in the implementation of this provision because mechanisms still exist for the executive to exert due influence over its official. The “good cause” standard provides a reasonable limitation on the termination of an employee, presumably with the purpose of insulating the official from acting outside the bounds of a proper execution of office for political purposes. The “good cause” standard is allowable and can only safeguard the proper use of the inferior officer’s power while executing his or her authority, at least under the separation of powers doctrine. (Morrison, 1988)

Textually, there is no explicit assignment in the Constitution for what constitutes a proper power of removal. Congress has much more freedom in this case in determining the methodology by which such an officer may be removed. Absent an implicit separation of powers conflict and an explicit restriction on the removal methodology, the restriction to “for cause” removal stands as compliant with the Constitution.

The removal issue here is that the third clause of the OPOL assigns removal power to both the Secretary of Defense and the Chief Justice of the Supreme Court. Humphrey's Executor determined that the power of Congress to limit the removal does indeed exist. Pursuant to the prior determination that removal power is not mentioned whatsoever in the Constitution, this outcome flows readily without textual impediment. (Humphrey’s Executor, 1935)

In *Myers*, Chief Justice Taft, a former President of the United States, established a proper evaluating principle for this type of fringe condition. Upon investing the appointment power in the Secretary of Defense, the removal power cannot be stripped from that office. Splitting the removal power between two federal branches would be an inappropriate violation of the separation of powers. Congress must decide initially which branch to entrust the appointment of

the inferior official in question and leave the removal power with that office. This calculus must be included in the assignment of the appointment powers. (Myers, 1926)

The Court finds that the Appointment and Removal Powers are inextricably linked and that Congress has no right to sever the two from each other. Upon presenting the Appointment Power to the Secretary of Defense, Congress may not also allow the Chief Justice of the United States to exercise a removal power.

The request for information on the part of the families instigates a judicial review of executive privilege. Executive privilege, as established by this Court, is a concrete but limited ability. Great care must be taken while determining the size and scope of this power for fear of eradicating a proper separation of powers. Certain procedural mechanisms should be avoided in order to avoid forcing the President to openly confront the other branches to force a review. In Nixon, the Court stated that “the subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown.” The materials in this case are also not available because they are uniquely the secret record of the United States Government. Moreover, the executive seeks for the Court to turn down the document request based upon the national security necessity of these actions.

Chief Justice Warren Burger briefly touched on the national security interest which somewhat strengthens the claim to executive privilege in the Nixon case. “Absent a claim of need to protect military, diplomatic, or sensitive national security secrets...” there is no strong barrier to providing the documents necessary for inspection. In this case there is a viable claim for sensitive national security. The Court must now decide the extent to which this protects the communications. (Nixon, 1974)

Although no previous case law exists, the Court finds that the scope of executive privilege should be extensive when an overriding national security interest is at risk. The Nixon case only applied towards the high-level communications of the Executive Branch, but the facts of that case were overwhelmingly aligned against the executive privilege there. Conceivably, a low level official in the OPA could know sensitive information that would produce international crises if released. The Executive has the greatest degree of separation in such a case as can be allowed without directly abandoning the letter and spirit of the Constitution. Even an OPA janitor is protected from receiving a subpoena in this case.

This extension of the executive privilege does not establish an absolute power. The national security issue must be a justifiable, pressing matter. Although the national security situation may extend executive privilege further in scope than in any other hypothetical, the situation does not strengthen so much the Executive Branch's ability to infringe on individual rights. When possible, every effort must be made by the judiciary to provide for a closed mechanism for providing the relevant material, but only when absolutely necessary to ensure the individual rights of American citizens.

The Court finds that the executive privilege here does not provide a full protection of the Executive Branch's actions because the prisoners are American citizens. The Court will proceed with an evaluation of due process grounds in a closed manner in order to protect as much as possible the national security interests at stake.

Upon determining the outcome of this case, I will now examine some of the policy effects of the decision. Most of the ruling first checked what the textual basis for the decision would be, and then proceeded to decide whether or not the legislation could be deemed a power grab by one of the branches of the Federal Government. The narrow and strict adherence to appointment procedures, as well as determining that the removal power is inextricably linked to that appointment, on the whole strengthens the separation of powers doctrine by reducing the friction between the branches on these grounds.

The President's ability to prosecute the War on Terror would be reasonably unaffected in the short term, but the civil liberties of American citizens would be particularly well defended. The Judiciary's provision of a closed mechanism for review of possible violations of these rights would hopefully allow certain cases that involve citizens to proceed without unnecessary hindrance from the executive privilege, but also close off this means of evidence from non-citizens. The American people would most likely appreciate this distinction, and the Court's popularity and perceived legitimacy may rise because of this opinion. Also, this case represents a degree of judicial activism in that it places this closed mechanism in the Judicial Branch. Congress may pass retaliatory legislation defining this closed mechanism, but it would do so with significant risk to reelection campaigns.

This decision does not consider whatsoever the due process grounds for the case, but the families had no standing to sue on Appointment or Removal Power grounds. The case would have been thrown out on these grounds. The executive privilege decision would have probably allowed the prisoners in this case to receive some kind of judicial review of whether or not their rights were violated. It may quiet the concerns of the Senator Rand Paul from Kentucky, who recently filibustered a Senate confirmation because of the targeted killing of an American citizen.

Bibliography

- Buckley v. Valeo, 424 U.S. 1 (Supreme Court 1976)
Humphrey's Executor v. United States, 295 US 602 (Supreme Court 1935)
Morrison v. Olson, 487 U.S. 654 (Supreme Court 1988)
Myers v. United States, 272 U.S. 52 (Supreme Court 1926)
Nixon v. United States, 506 U.S. 224 (Supreme Court 1993)

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