

In the wake of the terrorist attacks of September 11th, 2001, the United States government declared a “War on Terror”, aimed at securing the safety of the United States from future terrorist action and pursuing agents of terror abroad. Initiated during the administration of President George W. Bush, the “War on Terror” and many of its key features remain in place under President Obama, including a network of prisons overseas, designed for the holding and interrogation of suspected terrorists. Wishing to regulate these prisons, Congress passed the Overseas Prison Oversight Law, which created a supervisory agency, the Overseas Prison Agency, and provided for the appointment and removal of its head.

Three U.S. citizens have been held in one such prison and subjected to interrogation following their apprehension while committing acts of terrorism. The petitioners before us today, the families of those three citizens, claim that the President has exceeded his legal authority in ordering the imprisonment and interrogation of their relatives. Petitioners further allege that the entirety of the Overseas Prison Oversight Law is unconstitutional. It now falls upon the Court to determine the constitutionality of the Overseas Prison Oversight Law, and of the original establishment of the network of overseas prisons by the Executive.

Before we consider the Overseas Prison Oversight statute, it is imperative that the Court first ascertain the constitutionality of the international prison network which inspired it. Prior cases coming before the Court have explicated the constitutional grounding, found largely in the Necessary and Proper Clause, for the establishment of a prison system by Congress. As pointed out in *United States v. Comstock*, “the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to ‘counterfeiting’, ‘treason,’ or ‘Piracies and Felonies committed on the high Seas’ or ‘against the Law of Nations,’ nonetheless grants Congress broad authority to create such crimes....Similarly, Congress, in order to help ensure the enforcement of federal criminal laws enacted

in furtherance of its enumerated powers, ‘can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there.’”

Admittedly, the circumstances in this case differ in several ways from those described in *U.S. v. Comstock*. The prisons have been established by the Executive branch of the government, not by the Legislature; and the prisons have been established outside of the United States. Nonetheless, we find the founding of the overseas prison system by the Executive to be constitutional. This Court has traditionally exercised broad deference to the Executive regarding matters of foreign affairs and national security, under which this situation certainly falls. The Constitution grants the Executive the title of Commander-in-Chief, and while the War on Terror is a war unlike many this country has waged in the past, it has engendered action by the military, sanctioned by Congress, and controlled by the President. In his capacity of Commander-in-Chief, the President may create via executive order—carrying the force of the law behind it—overseas prisons in countries which allow him to, such as the Guantanamo Bay prison. Under the concept of extraterritorial jurisdiction, a state may claim jurisdiction over actions committed by its nationals abroad. (18 USC § 3042) As those citizens held in the prison are there as a result of committing acts of terror against the United States, we find it an appropriate exercise of power by the Executive.

Having established the constitutionality of creating a prison network located overseas, we must turn to the Overseas Prison Oversight Law written by Congress to regulate those prisons. The case before us today occupies the twilight area in which it is conceivable that both the Legislature and the Executive could claim concurrent jurisdiction. Both find their authority not necessarily in directly enumerated constitutional powers, but in extrapolations and elaborations thereof. We must therefore take

care to weigh the interests and claims of both the Congress and the Executive in determining the constitutionality of the law. (Epstein & Walker, 167-168)

First, we examine section A of the law, which “establishes a new ‘Overseas Prison Agency’ to oversee all overseas prisons and interrogation centers”, and, more specifically, permits the use of “enhanced interrogation techniques” on foreign enemy combatants suspected of terrorism. As a result of the concurrent jurisdiction of both Congress and the President, this Court believes that Congress has the right to place certain regulations on the overseas prison network. For today we will put aside the question of the constitutionality of enhanced interrogation techniques themselves; while we acknowledge that a worthwhile Eighth Amendment challenge could be made against them, that is not the primary focus of the case here before us, and would be better decided as a separate constitutional concern. Putting that aside, while we acknowledge that Congress has a special interest in overseeing the overseas prison network, in order to monitor potential abuses of Executive authority, and that the underlying concept behind section A of the statute is constitutionally sound, the law as written violates the non-delegation doctrine and must be found unconstitutional.

As determined in *Mistretta v. United States*, in delegating their authority to outside entities, as would be the case in creating the Overseas Prison Agency, Congress must “lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform” in order to ensure the constitutionality of the delegation of power. In *Mistretta*, the delegation was found constitutional due to the extensive level of detail Congress provided to the agency in the form of goals, guidelines, and considerations for the U.S. Sentencing Commission to adhere to in their creation of sentencing guidelines. (Epstein & Walker, 118-120) The Overseas Prison Oversight Law, on the other hand, is unacceptably vague in its directives. Besides stating that the Agency must “balance concerns for civil liberty and national security”, the only other mention of specifics included in

the law is the authorization of enhanced interrogation techniques. Given this, it is evident that the Overseas Prison Oversight Law imbues the Overseas Prison Agency with an overabundance of discretion in their operations and an excess of legislative authority. Barring a much more detailed set of guidelines and regulations given to the Overseas Prison Agency by Congress, section A of the Overseas Prison Oversight Act is unconstitutional.

Section B of the Overseas Prison Oversight Law deals with the appointment of the head of the Overseas Prison Agency, specifying that the head of the new Agency “shall be appointed by the Secretary of Defense and confirmed by the Senate”. As there is no question that the head of the Overseas Prison Agency will be an executive officer, in order to determine the constitutionality of this clause, we must determine whether the Agency head is a principal officer of the Executive—in which case, the President maintains appointment power—or an inferior officer of the Executive, in which case appointment power may be vested by Congress in other entities, such as the judiciary or a Cabinet head such as the Secretary of Defense (subject to confirmation by the Senate). (Epstein & Walker, 138-140)

We consider four factors in our determination, as considered in *Morrison v. Olson*: whether the agency head will be removable by an individual other than the President, the range of their duties and scope of their jurisdiction, the length of their tenure, and whether the Agency head could meaningfully impede the ability of the President to perform his duties. As the Agency head would be removable by the Secretary of Defense, we may immediately do away with the first of our criteria. While one does not need to stretch the imagination to imagine a situation in which the Agency head could potentially impede the President’s ability to perform his duty, the fact that she would be removable, if only for cause, by the Secretary of Defense, should prevent that to an acceptable extent. However, while the position of Agency head as described meets those requirements of the classification of “inferior officer”, it is less clear that it meets our remaining criteria. The head of the Overseas Prison Agency, as described

in the law, has an incredibly broad jurisdiction, and does not seem to be subject to any limitation of her power and duties in the context of the overseas prison network. Additionally, while the Agency head is removable “for cause”, her tenure seems to be otherwise unlimited, unlike the special prosecutor in *Morrison v. Olson*. It is for this reason that, without a more limited scope of duties and length of tenure attached to the position, the head of the Overseas Prison Agency must be considered a superior officer and appointed by the President. The last clause of section B, mandating that only retired military officers be considered for the Agency head position may be dismissed without extensive elaboration; once it has been determined that an appointment falls under the authority of the Executive, it becomes the Executive’s decision. Congress may not attempt to influence the decision by attaching additional requirements to the position, outside of ensuring that protected classes are not discriminated against.

The last section of the Overseas Prison Oversight Law, section C, deals with the removal of the head of the Overseas Prison Agency, stating that the Agency head may be removed either by the Secretary of Defense or the Chief Justice of the Supreme Court “for cause”. This subsection may also be determined without issue. As the Agency head is to be appointed by the Secretary of Defense, a member of the Executive, so may she be removed by the Secretary of Defense. It is additionally reasonable to mandate that the Agency head may only be removed “for cause”, as any position overseeing the actions of the President must maintain a level of protection against firing as a form of retaliation. However, the clause of subsection C granting removal power to the Chief Justice of the Supreme Court is both baffling and unconstitutional. The Supreme Court does not involve itself in matters of the Executive, with the exception of the cases brought before it and under its jurisdiction. Placing the power to remove an executive official appointed by the Executive in the hands of the Supreme Court constitutes an impermissible violation of the separation of powers intended by the Founding Fathers.

Petitioners have further demanded access to “all documents related to the interrogation of the three U.S. citizens,” including “communications between the President and his advisors, as well as emails between officials of the Overseas Prison Agency”. It falls to the Court to determine whether these documents fall under the protection of executive privilege. If they do not, they must be released to the petitioners. It is true that in the past, this Court has ruled that executive privilege is not absolute. Such was the case in *United States v. Nixon*, in which the interest in fair administration of criminal justice outweighed the President’s interest in confidentiality. (Epstein & Walker, 141-146)

However, several substantial differences exist between the details relevant to *United States v. Nixon* and those relevant to this case. In *United States v. Nixon*, the material in question was unrelated to national security, defense, and military matters. That is not the case here. Essential to the President’s ability to protect the country and formulate military and national security strategy is executive privilege. It was reasonable in *United States v. Nixon* to believe that the release of the tapes would not have a chilling effect on important communications between the President and his advisors. However, by acquiescing to the demands of these petitioners to release documents pertaining to highly classified national security and military matters, this Court would deal a drastic level of damage to the capacity of the President to handle such matters with the confidentiality they require. In the case of such sensitive matters, the Court has traditionally erred on the side of the Executive. Accordingly, petitioner’s request is denied.

In summation, for the reasons stated above, this Court finds section A, the second clause of section B, and the second clause of section C to be unconstitutional. Additionally, the Court finds that the documents and communications requested by the petitioners fall under the umbrella of executive privilege, and that the Executive is under no obligation to release them. It should be noted that the petitioners bringing this case have standing only to challenge the actions of the President in establishing

the prisons and authorizing interrogation, and section A of the law, as it would deal with the minutiae and policy directly affecting their imprisoned relatives. Standing to challenge sections B and C would likely be reserved to the Executive branch, or, in the case of the second clause of section B, perhaps non-military candidates for the position of Agency head.

The implications for this decision on the President's ability to prosecute the War on Terror primarily leave the status quo unchanged, though, until Congress addresses the errors of unconstitutionality in their Overseas Prison Oversight Law, it does shift the balance of power slightly further toward the President on such matters. The balance of power is only shifted slightly, as the President already enjoys a wide amount of deference in matters of national security granted to him by both the Court and by Congress. The overseas prison network may remain open; the question of enhanced interrogation is delayed until a future case, which would focus on the eighth amendment or due process rights. However, if Congress does decide to revisit the specifics of the Overseas Prison Oversight Law—which, given Congress's tendency toward gridlock and dysfunction recently, is questionable—then they have the potential to gain a decent amount of power over the overseas prison network. The fact that they have somewhat concurrent jurisdiction favors them, as more specific guidelines and directives would allow them to create an Overseas Prison Agency that was constitutional under the non-delegation clause.

Works Cited

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