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Analysis of the Overseas Prison Oversight Law

The challenge to the Overseas Prison Oversight Law (OPO) raises several constitutional issues regarding the separation of powers doctrine, Presidential power, and executive privilege. This opinion reviews and analyzes the constitutionality of (a) the President's actions to imprison and interrogate three US citizens, (b) the President's assertion of executive privilege in response to the prisoners' families' request for the production of documents, and (c) all three parts of the OPO. Ignoring any claims of due process violations, the imprisonment and interrogation of the 3 US citizens is constitutional. President Obama's assertion of executive privilege over the requested documents is valid, except for those not related directly to national security or diplomatic affairs. Part a) of the OPO withstands constitutional scrutiny in terms of the separation of powers doctrine, while parts b) and c) are unconstitutional as violations of Presidential power.

I. Imprisonment of US Citizens

In our prior ruling in *Hamdi v. Rumsfeld*¹, this Court recognized the power of the federal government (but ignoring any aspects of due process violations) to detain US citizens in support of forces "hostile to the United States" as enemy combatants so long as such detainees continue to pose a threat to US forces. As the detainees in this action were caught committing terrorist actions and could reasonably return to committing terrorist action upon release, their detention fits the requirements outlined in *Hamdi*. However, it is important to note that this detainment is not unconditional. As US citizens, the detainees have the right to challenge their enemy

¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

combatant status. Moreover, the government can't hold the detainees for the purpose of interrogation and must demonstrate a reasonable potential for harm upon their release. However, given the limited facts on the case, and our dismissal of any due process challenges for the time being, the detainment of US citizens withstands constitutional scrutiny.

On the issue of the detainees' families' standing to bring this action, a minor, yet potentially disputable issue, *Hamdi* also provides the standing for the families of the detainees to sue, as the proper 'next friend' of the detainees. This provides clear standing in this case.

II. Executive Privilege

President Obama's assertion of executive privilege is largely valid, due to the nature of the interrogation documents and the exempted documents outlined in *United States v. Nixon*². In *Nixon*, this Court asserted the necessity of due process and the ability to collect evidence as overcoming the President's generalized interest in confidentiality, but protecting those documents from disclosure whose contents relate to military or diplomatic affairs where confidentiality is essential. In the instant case, as most of the documents requested concern interrogation of terrorists, the information related to the interrogations has a clear relationship with national security and military affairs. Thus, President Obama's assertion of executive privilege will largely stand based on the interest in national security.

III. Constitutionality of the OPO

A. Part a) of the OPO

Part a) of the OPO withstands constitutional scrutiny in the context of the separation of powers doctrine based on the precedent set in *Mistretta v. United States*³. This Court ruled in *Mistretta* that while Congress cannot generally delegate its powers, it may do so with an

² *United States v. Nixon*, 418 U.S. 683 (1974)

³ *Mistretta v. United States*, 488 U.S. 361 (1989)

intelligible principle to which the body or person with the delegated power must conform to, based on a previous ruling in *J. W. Hampton Jr., & Co. v. United States*⁴. The test developed in *Mistretta* requires Congress to provide broad directives while still enumerating specific and detailed requirements (i.e., the public agency which to apply it, and the boundaries of this delegated authority). In this case, the broad directive part of the test is met through the requirement of the OPO to balance concerns for civil liberties and national security. This high level and general goal matches the acceptable set of goals outlined in *Mistretta* regarding fairness in sentencing. Moreover, by specifying the permissibility of enhanced interrogation usage by the Overseas Prison Agency (OPA), the OPO fulfills the condition of specific and detailed requirements required by *Mistretta* for a delegation of power to survive constitutional scrutiny.

Given that the OPO is permissible under the separation of powers doctrine, the basis for part a) withstanding all constitutional scrutiny then turns to the legal permissibility of enhanced interrogation techniques such as waterboarding. If enhanced interrogation techniques are not permissible, then that aspect of the OPO must be struck down, leaving it without any specific and detailed requirements provided by Congress for the OPA. However, this Court has not ruled on the legality of enhanced interrogation techniques, and will not do so at this time as that is not the issue on hand.

B. Part b) of the OPO

Part b) of the OPO is partially unconstitutional, with the appointment process outlined as a violation of the Appointment clause of Article II, Section 2, using the determination of an Officer of the United States established by the ruling in *Buckley v. Valeo*. The President has the exclusive power to appoint Officers of the United States, with the advice and consent of the

⁴ *J. W. Hampton Jr., & Co. v. United States*, 276 U.S. 394 (1928)

Senate, as provided by the Appointment clause of Article II. Moreover, Congress may choose to give the power to appoint inferior officers to the President alone, the courts, or the heads of departments. *Buckley* established the standard for an Officer of the United States, as an official who exercises “significant authority pursuant to the laws of the United States.” However, the head of the OPA does not fit this qualification, as similar positions, such as the head (known as Director) of the Federal Bureau of Prisons in the Department of Justice, are not appointed by the President, but rather appointed by the heads of various executive departments.

This determination of the head of the OPA as an inferior officer is further backed up by this Court’s decision in *Edmond v. United States*⁵, in which this Court held that inferior officers included those who could be removed by other officers appointed by the President with the advice and consent of the Senate. That definition would classify the head of the OPA as an inferior officer, given the Secretary of Defense’s removal power in part c). Thus, as an inferior officer appointed by the head of a department, the appointment of the head of the OPA cannot require the advice and consent of the Senate.

Moreover, even if the new head of the OPA were not an Officer of the United States, subject to Presidential appointment, the appointment process outlined in the OPO violates the Appointment clause. In this case, the OPO has merged the appointment processes for Officers of the United States and inferior officers by allowing the Secretary of Defense, a head of department, to appoint the head of the new OPA, while still requiring the advice and consent of the Senate. Thus, the appointment process for the head of the new OPA would fit the requirements for neither an Officer of the United States nor an inferior officer, and violate the requirements of the Appointment clause.

⁵ *Edmond v. United States*, 520 U.S. (1997)

The last part of part b), regarding the appointment of exclusively retired military officers, withstands constitutional scrutiny as several other positions in the Executive branch have similarly specific and arbitrary qualifications required. For example, the Secretary of Defense (among many other Department of Defense positions) must be a person at least 7 years removed from active service. This requirement fulfills the government interest in maintaining civilian control over the military. In the case of the OPO, the foreign and militaristic nature of overseas prisons can rationally require the expertise of a military officer, while still maintaining civilian control.

C. Part c) of the OPO

Part c) is constitutional in part. We find that the Secretary of Defense may remove the head of the OPO “for cause”, while giving the Chief Justice of the Supreme Court removal power of the head of the OPO is unconstitutional. Several previous cases support the notion that a member of the executive branch who is not the President can remove subordinate members. First, this Court held in *Humphrey’s Executor v. United States*⁶ that while the President has generally exclusive and unlimited removal power as supported by *Myers v. United States*⁷, quasi-legislative and quasi-judicial independent agencies are exempt from general Presidential removal. In this case, the OPA is neither quasi-judicial nor quasi-legislative. It is an administrative agency tasked with oversight of the prisons. Moreover, the treatment of prisoners is not a judicial question, in the sense of interpretation of the law, but rather a law enforcement and intelligence one, functioning more similarly to an agency such as the FBI.

In a nearly identical pretense, the special prosecutor in the wake of the Watergate scandal was appointed in a Career Reserved position in the Department of Justice, meaning that the

⁶ *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)

⁷ *Myers v. United States*, 272 U.S. 52 (1926)

Attorney General could fire the incumbent special prosecutor, but only “for cause.” In what became known as the “Saturday Night Massacre”, President Nixon was forced to ask the Attorney General to fire the special prosecutor, Archibald Cox. In the process, the current and deputy Attorneys General resigned rather than fulfill Nixon’s order. The Federal Court for the District of Columbia ruled in *Nader v. Bork* that upheld the “for cause” restriction on removal, while also demonstrating the ability for a non-presidential executive removal⁸. This lower court’s decision was reinforced in *United States v. Nixon*, where this Court held that the special prosecutor could subpoena the President.

On the other hand, it is unconstitutional for Congress to give the Chief Justice of the Supreme Court the power to remove the head of the OPO. This Court addressed the issue in *Bowsher v. Synar*⁹. In *Bowsher*, this Court held the removal of an executive official by Congress for reasons other than impeachment was prohibited as a violation of the separation of powers. First, nowhere in the Constitution does the judicial branch have the power to remove members of the executive branch; rather, the power rests with Congress. Furthermore, using the ruling and justification established in *Bowsher*, by attempting to give the Chief Justice of the Supreme Court the power to remove the head of OPA, Congress attempts to give increased power to the judiciary while making the head of OPA responsive to someone other than the executive in the course of performing the executive duties outlined in the initial examination of part c) of the OPO.

Implications concerning the War on Terror

This decision carries little weight in changing how President Obama prosecutes enemy combatants in the War on Terror. This Court upheld two key elements towards the prosecution:

⁸ *Nader v. Bork*. 366 F Supp. 104. US District Court, District of Columbia. (1973)

⁹ *Bowsher v. Synar*. 478 U.S. 714 (1986)

the legal authority to hold US citizens as enemy combatants, as well as largely upholding Obama's executive privilege. By upholding the legal authority to hold US citizens as enemy combatants, President Obama can continue to use effective and efficient measures to prevent further terrorism, especially that on US soil. Moreover, by upholding most parts of Obama's executive privilege, President Obama will be able to continue to hold private and confidential conversations with his advisors on the matters of national security and military affairs relating to the War on Terror.

With regards to our ruling on the OPO, since part a) was upheld, and merely the appointment and removal of the head of the agency was found suspect, President Obama will be able to implement the OPA provided the appointment and removal process is clarified and constitutional. This will create further stabilizing features in the bureaucracy to handle overseas cases and allow for a better prosecution and interrogation of detainees.

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