Constitutionality of the Federal Sex-Offender Commitment Law

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Indefinite Civil Commitment of Sex-Offenders by the Federal Government Found Unconstitutional

In *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009), the Court of Appeals for the 4th Circuit affirmed the decision of the district court that a 2006 Federal Statute, 18 U.S.C. § 4248 (2006), was outside the limits of Congress' power and intruded on the powers reserved for the states.

Facts of the Case

Federal Statute 18 U.S.C. § 4248 was enacted by Congress as part of the Adam Walsh Child Protection and Safety Act of 2006. The Act was intended to protect children from "sexual exploitation and violent crime." It created a national sex offender registry, increased punishment for federal crimes against children, strengthened child pornography prohibitions, and authorized federal civil commitment of sex offenders. Specifically, it allows the commitment of any "sexually dangerous" person "in the custody" of the Bureau of Prisons. Initiation of the commitment process requires only a certification from the Attorney General that the prisoner is "sexually dangerous." A "sexually dangerous person" is defined as one who has "engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." The person must also have a mental illness that would cause difficulty in refraining from such behavior if he were released from prison. After certification by the Attorney General, the statute directs the district court to decide on the person's sexual dangerousness by using the clear-and-convincing standard. Inmates found to be dangerous are committed to federal custody, and the Attorney General is directed to make "all reasonable efforts" to transfer the person to an appropriate state facility. However, if a state refuses to assume responsibility, the Attorney General must find placement in "a suitable facility."

The statute's constitutionality was questioned by four petitioners who were held in federal custody after their prison sentences had expired. Graydon Comstock was serving a 37-month federal prison sentence for receipt of child pornography. Six days before his release, he was certified by the Attorney General as a sexually dangerous person. He was then confined within the federal correctional institution at Butner, North Carolina, for more than two years. Mr. Comstock filed the first challenge to 18 U.S.C. § 4248 and was joined by three other men facing the same scenario. After the government petitioned for a hearing on sexual dangerousness, each of the men moved to dismiss his case on the grounds that 18 U.S.C. § 4248 was in violation of the Constitution. The district court held that federal civil commitment under 18 U.S.C. § 4248 "exceeds the limits of congressional power." The U.S. Government appealed the district court's decision. This is the first appellate court to rule on the constitutionality of this statute.

Ruling and Reasoning

The court of appeals initially reviewed the history of civil commitment. Civil commitment of the mentally ill has historically been reserved for the states under both the police power and *parens patriae* models. The decision in *United States v. Lopez*, 514 U.S. 549 (1995), stated that civil commitment is a state power and "the federal government has no general police or *parens patriae* power" (*Lopez*, p 566). The question in the present case is whether Congress may grant the federal government the authority for civil commitment of sexually dangerous persons. 18 U.S.C. § 4248 granted the federal government a broad civil commitment authority. However, the Constitution requires that there be a specific enumerated power to support every statute that Congress enacts, including 18 U.S.C. § 4248. The government relied on the Necessary and Proper Clause (U.S. Constitution Art. I, § 8, Cl. 18) and the Commerce Clause (Art. I, § 8, Cl. 3) to justify the powers enacted by 18 U.S.C. § 4248.

The Commerce Clause grants Congress the power to "regulate Commerce among the several states." The court of appeals looked at recent Supreme Court precedent to address the question of the authorization of 18 U.S.C. § 4248 under the Commerce Clause. In *United States v. Lopez*, the court ruled that the Gun-Free School Zones Act (making possession of a firearm in a school zone a federal crime) exceeded the Commerce Clause power because it did not regulate commercial or interstate activity. In *United States v. Morrison*, 529 U.S. 598 (2000), further limits were placed on Congress' power under the Commerce Clause. A provision of the Violence Against Women Act that created a federal civil remedy for noneconomic sexual violence was ruled unconstitutional because those crimes "do not substantially affect interstate commerce." The Supreme Court identified three specific areas that Congress can regulate under the Commerce Clause power: channels of interstate commerce, persons and things in interstate commerce, and activities that "substantially affect" interstate commerce. The court of appeals stated that 18 U.S.C. § 4248, like the statutes in *Lopez* and *Morrison*, could be upheld only if it regulated activities that "substantially affect" interstate commerce. The decision in *Morrison* was used to strike down the argument that 18 U.S.C. § 4248 met that requirement. The court stated that 18 U.S.C. § 4248 was very similar to the *Morrison* provision that was struck down by the Supreme Court. The current statute calls for a civil remedy (i.e., civil commitment to a federal facility), to prevent sexual violence. The court used the rationale that the Supreme Court applied in *Morrison*:

> The regulation and punishment of intrastate violence- . . . has always been the province of the States. Indeed, we can think of no better example of the police power, which the founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims [*Morrison*, pp 618–19].

The court stated that to rule otherwise would "encroach on the police and *parens patriae* powers reserved to the sovereign states." It also noted that sexual dangerousness does not substantially affect interstate commerce and that 18 U.S.C. § 4248 may be a good social policy, as in the two aforementioned cases, but that good policy does not create authority. The court ruled that 18 U.S.C. § 4248 was beyond the powers granted to Congress under the Commerce Clause.

The court then addressed the government's reliance on the Necessary and Proper clause as a source of congressional power. Citing *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), it stated that this clause does not create a power; it only allows Congress to have the means to carry out the powers granted in Article I of the Constitution. The government contended that its ability to establish a federal penal system rendered 18 U.S.C. § 4248 necessary and proper and therefore constitutional. The court could not find precedent in support of this argument and the government did not cite a precedent. The government argued that since it has the power to incarcerate individuals who violate federal law, it has the right to confine persons who are believed to be sexually dangerous after their sentences end. The court stated that the power to impose indefinite civil commitment on an individual after the end of a prison term solely on the basis of "possible" future acts was much different from the power to maintain a federal penal system. The court maintained that a person's having been in federal custody does not alone grant the right to regulate future conduct that occurs outside of custody.

The court next pointed out that in *United States v. Perry*, 788 F.2d 100 (3d Cir. 1986), "the federal government may resort to civil commitment when such commitment is necessary and proper to the exercise of some specific federal authority. Congress may not, however, authorize commitment simply to protect the general welfare of the community at large" (*Perry*, p 110). The court held that *Perry* does not support the government's argument, because 18 U.S.C. § 4248 does not refer to a specific federal crime, most sexual crimes violate state and not federal law, and it does not demonstrate that a person is likely to commit a specific federal crime. The court stated that "were we to accept the government's logic, Congress could authorize the civil commitment of a person on a showing that he posed a general risk of any sexually violent conduct, even though not all, or even most, of this potential conduct violated federal law" (*Comstock*, p 283).

Finally, the court of appeals addressed the government's claim that, under the Necessary and Proper Clause, it has the right to prosecute anyone in custody who is charged with a criminal offense, despite the fact that the men in the current case have all been tried and convicted of their offenses. The government relied on *Greenwood v. United States*, 350 U.S.

366 (1956), for its argument. That decision allowed federal civil commitment of those found incompetent to stand trial on federal charges for which state custody was not available. The court identified the persons who would meet federal civil commitment under this ruling as those in federal custody facing federal charges who were not accepted by a state for care, unlike those facing commitment under 18 U.S.C. § 4248 who have stood trial, been convicted, and served their sentences.

The court of appeals ruled that the district court correctly held that 18 U.S.C. § 4248 was unconstitutional. It then stated that, if the federal government truly has concerns about the dangerousness of a person up for release, it should contact the state authorities to proceed with civil commitment under state law.

Discussion

The matter of civil commitment for sex offenders has been a much-debated topic throughout its history. Most of the debate has surrounded the constitutionality of state sexually violent predator acts and the civil commitment of sex offenders under these acts, which this case does not address. This decision solely affects the ability of the federal government to carry out the civil commitment of a person whom it certifies as "sexually dangerous." It remains important because it addresses a matter that has divided trial courts at the federal level. The court of appeals decision states that the power for civil commitment of sex offenders is held by the state and that Congress does not have the power to grant this authority to the federal government.

The constitutionality of state statutes permitting the civil commitment of sex offenders has been upheld. The U.S. Supreme Court ruled in *Kansas v. Hendricks*, 521 U.S. 346 (1997), that the Kansas Sexually Violent Predator Act was constitutional. In that decision, the court stated that the basis for the commitment must be dangerousness to others that is linked to a "mental abnormality" or "personality disorder." The person must have a mental condition that causes a likelihood of sexually violent behavior in the future. The persons determined by the state to meet those requirements are then afforded appropriate due process before their commitment. The ruling by the Supreme Court established the constitutionality of these civil commitments for the purpose of treatment. The court of appeals' decision was in line with the Supreme Court's ruling that the state has the power to commit sex offenders and provide them with treatment. The Supreme Court ruling establishes the due process elements that make the Sexually Violent Predator Acts constitutional.

In ruling that the federal government does not have the power of indefinite civil commitment of sex offenders, the court of appeals has strengthened the position of the state programs that allow such civil commitment. The court ruled that the power of civil commitment has always been held by the states and that the commitment of sex offenders should also remain under the states' control. It appears that civil commitment of federal prisoners as sexually violent predators may still be possible as long as the commitment proceedings are pursuant to state statutes.

The Therapist-Patient Privilege Challenged

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Psychotherapy-Patient Privilege Upheld in a Civil Action in Which Physical, Not Emotional, Injury Was Alleged

In *Sims v. Blot*, 534 F.3d 117 (2nd Cir. 2008), the Second Circuit Court of Appeals considered whether a litigant had waived his psychotherapist-patient privilege in responding to questions at deposition. The court considered whether the inmate's claim of "garden-variety," or nonpathologic, emotional injuries sustained during an alleged assault by correctional officers would be enough to cause a waiver of his privilege. The inmate was found not to have waived his privilege. Basing its decision largely on the U.S. Supreme Court case of *Jaffee v. Redmond*, 518 U.S. 1 (1996), and the D.C. Circuit Court of Appeals case of *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007), the court found that garden-variety emotional damage claims are not enough to sustain a waiver of the psychiatrist-patient privilege.