

jailing, the power of the juvenile court is marginalized and it will be less able to achieve its basic goals.

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## Constitutionality of the Federal Sex-Offender Law

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### Supreme Court Reverses the Fourth Circuit Court of Appeals and Allows Federal Civil Commitment of Sex-Offenders

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), the United States Supreme Court reversed and remanded the decision of the U.S. Court of Appeals for the Fourth Circuit that Federal Statute 18 U.S.C. § 4248 (2006) is unconstitutional by intruding on powers reserved for the states by the Constitution.

#### *Facts of the Case*

Federal Statute 18 U.S.C. § 4248 (2006) was originally enacted by Congress to establish guidelines for the civil commitment of federal prisoners or persons in federal custody who had been deemed “sexually dangerous.”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; and [who] suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty refraining from sexually violent conduct or child molestation if released” (§ 4247 (a)(5)–(6)). On the basis of this statute, a mentally ill, sexually dangerous federal prisoner can be indefinitely civilly committed to the custody of the Attorney General, beyond his release date, by a district court until he is deemed no longer dangerous or able to return to his home state for his care, custody, and treatment. To commit, a hearing is scheduled at which the government must prove that the prisoner meets such con-

ditions by clear and convincing evidence. The prisoner is entitled to be represented by counsel, have an opportunity to testify and present evidence, and to cross-examine the government’s witnesses. Should the prisoner be found to be a sexually dangerous person, the court will civilly commit the prisoner to the custody of the Attorney General. The Attorney General must then “make all reasonable efforts” to return the prisoner to the custody of the state where he was tried or previously lived, in order for the state to “assume responsibility for his custody, care and treatment.” If this is not possible, the prisoner will remain in the custody of the Attorney General at a federal treatment facility.

When this statute was originally instituted, five respondents, including Graydon Earl Comstock, Jr, questioned the statute’s constitutionality. In four of the five cases, the respondents were certified as sexually dangerous persons and held in federal custody past their original prison sentence completion dates. The respondents moved to dismiss their commitments, stating that § 4248 was unconstitutional in that it violated the Double Jeopardy Clause, the Ex Post Facto Clause, and the Sixth and Eighth Amendments. Also, they alleged that the statute violated their substantive and procedural due process rights by exceeding Congress’s enumerated powers. The United States District Court for the Eastern District of North Carolina agreed that § 4248 was not constitutional and granted dismissal. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s decision, stating that the statute was not based on enumerated congressional powers, particularly those justified by the Commerce Clause or the Necessary and Proper Clause. The United States Supreme Court granted *certiorari* in July 2009 to determine specifically whether the Necessary and Proper Clause of the Constitution grants Congress the authority to enact such a federal civil commitment program under § 4248.

#### *Ruling and Reasoning*

The Supreme Court initially reviewed its rationale for granting *certiorari* for the case, stating that since the Fourth Circuit’s decision in *Comstock*, two other courts of appeals had decided that § 4248 was constitutional, thereby creating a split of authority among the circuit courts (*United States v. Volungus*, 595 F.3d 1 (1st Cir. 2010); *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009)). Before those cases, there

was also a significant split regarding rulings on the constitutionality of § 4248 among district courts. District courts in Minnesota, Massachusetts, and North Carolina had concluded that § 4248 was unconstitutional, while district courts in Hawaii, Massachusetts, and Oklahoma upheld § 4248 as a valid exercise of Congress's enumerated powers. Although multiple alleged constitutional violations were listed, the Supreme Court decided to limit their discussion specifically to the question of Congress's authority under Article I, § 8 of the Constitution (the Necessary and Proper Clause).

The Supreme Court concluded that the Constitution grants Congress legislative power sufficient to enact § 4248. As such, they based their decision on five considerations that were to be taken together. First, the Court considered that the Necessary and Proper Clause grants Congress "broad authority" to enact federal legislation, provided that such statutes constitute means that are "rationally related" to the ends, as well as statutes that are not prohibited by the Constitution. They discussed congressionally created statutes that, although not specifically enumerated in the Constitution, were created under the provisions of the Necessary and Proper Clause, including specific federal crimes outside of "counterfeiting," "treason," or "Piracies and Felonies committed on the High Seas" or "against the Law of Nations." This logic allows for further related powers to be valid, including the ability to punish and federally imprison those who violate such federal crimes, provide for those who are imprisoned, and maintain the safety of those in nearby communities who may be affected by those imprisoned.

Second, the Court stated that § 4248 was a "modest addition" in the federal government's long history of involvement in the provision of mental health care to and civil commitment of federal prisoners who were thought to be dangerous due to mental illness, specifically found in § 4246, created in 1949. These statutes formally date back to 1857, when over the course of three decades Congress created a federal civil commitment program for "insane" persons who were charged with or convicted of federal offenses. However, at that time, these statutes limited such commitment to the term of the prisoner's original criminal sentence. This limitation changed in 1949 when Congress modified the statute to reflect information gathered by the Judicial Conference of the United States, thus providing civil commitment for

mentally ill federal prisoners to extend past their original prison sentences if their release "would probably endanger the safety of the officers, the property, or other interest of the United States." In 2006, Congress enacted § 4248, which focuses specifically on those federal prisoners who, due to mental illness, are sexually dangerous. The Court holds that § 4248 is similar to the provisions of § 4246, and further, that these prisoners would most likely already be subject to continued federal civil commitment under the previous statute.

Third, the Court described the federal government as the "custodian of its prisoners," and states that, as such, it has the necessary and proper constitutional power to detain federal prisoners beyond their sentences if doing so protects the general public from harm. It further compares the release of a prisoner with a diagnosis of a communicable disease that may threaten to infect others without proper treatment to the release of a prisoner with mental illness that may threaten others to the same degree.

Fourth, the Court opined that contrary to the respondents' claims, § 4248 does not violate the Tenth Amendment (i.e., does not invade the province of state sovereignty), but instead accommodates the interests of the states. The statute provides that the Attorney General is required to inform the state where the federal prisoner "is domiciled or was tried" of the prisoner's impending civil detainment and must encourage the state to assume responsibility for the prisoner's care, custody, and treatment. If the state, at any time, wishes to assert authority over the individual, the Attorney General must return custody to the state immediately. The Court stated that this issue had been broached in *Greenwood v. United States*, 350 U.S. 366 (1956), but noted that *Greenwood* was less protective of states' rights than § 4248. This ruling was supported in an *amicus* brief by 29 states, holding that they did not believe § 4248 infringed on state sovereignty and primarily citing financial concerns for assuming custody of these individuals.

Finally, the Court ruled that § 4248 is "narrow in scope" and that the link between the statute and an enumerated congressional power is not "too attenuated." It cited multiple examples in which congressional legislation often is "one step removed" from an enumerated or implied power, pursuant to the Necessary and Proper Clause. It denied that § 4248 confers on Congress a "police power, which the

Founders denied the National Government and reposed on the States” (*United States v. Morrison*, 529 U.S. 598, 618 (2000)).

Justices Thomas and Scalia filed a dissent, emphasizing that § 4248 did not execute any enumerated power under the Necessary and Proper Clause. Further, the “five factor test” was criticized as unprecedented. They asserted that § 4248 resembles involuntary civil commitment laws enacted by the states under *parens patriae* and general police powers.

*Discussion*

This case carries particular importance, in that the Supreme Court has ruled on the issue of civil commitment for sex offenders who are currently in federal correctional confinement. Civil commitment under a police powers or *parens patriae* model has largely been a governmental authority left to the states. With this decision, the federal government is approving the controversial practice of confinement

of prisoners after the completion of their sentences. Therefore, states with sexually violent predator or sexually dangerous offender statutes may be asked to accept these federal sex offenders into their state treatment programs. For federal sex offenders in states that have not created such programs, the sex offender may be committed to a federal facility for further confinement and treatment.

Of note, the Court chose to rule on only a portion of the original respondents’ claims, specifically Congress’s enumerated powers under the Necessary and Proper Clause. This decision does not address other matters that were raised by the respondents regarding procedural due process and the required standard of proof, substantive due process, and potential violations of the Double Jeopardy Clause, the Ex Post Facto Clause, and Sixth and Eighth Amendment rights.

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