Supreme Court Upholds Federal Government's Authority to Indefinitely Commit Sex Offenders

The U.S. Supreme Court, in a 7-2 ruling, upheld the federal judiciary's authority under the Necessary and Proper Clause to indefinitely civilly commit sexually dangerous prisoners with mental disorders after they have served their criminal sentences under 18 U.S.C. §4248, which was enacted as part of the Adam Walsh Child Protection and Safety Act. ***United States v. Comstock, 2010 WL 1946729 (U.S. Sup. Ct. May 17, 2010).***

Respondents challenged the constitutionality of §4248 under the Necessary and Proper Clause. A North Carolina federal district court dismissed the civil commitment proceedings, 507 F. Supp. 2d 522 (E.D.N.C.), and the Fourth Circuit affirmed, finding that Congress had exceeded its authority in enacting §4248, 551 F.3d 274 (4th Cir. 2009), 33 MPDLR 259.

Writing for the Court, Justice Breyer embraced, in large part, the arguments expressed by Elena Kagan in her role as U.S. Solicitor General. Accordingly to the majority, five considerations compelled their finding that Congress had authority under the Necessary and Proper Clause to enact §4248. First, this clause "grants Congress Broad authority to enact federal legislation" as part of the "'ample means'" it is given to execute its enumerated powers consistent with "'the letter and spirit of the constitution.'" There is no express constitutional authority to create federal crimes beyond those specifically enumerated to

protect persons in the community who may be affected by the imprisonment of federal inmates. Nonetheless, Congress has broad authority under the Necessary and Proper Clause to carry out this governmental function.

Second, Congress has a long history of providing mental health care to federal prisoners, particularly under the Insanity Defense Reform Act of 1984, 18 U.S.C. §4241-47. Moreover, many of the individuals confined under §4248 were likely already subject to civil commitment under §4246, which since 1949 has authorized the civil commitment of federal prisoners whose mental illness renders them dangerous. Thus, §4248 is merely a "modest addition to a longstanding federal statutory framework, which has been in place since 1855."

Third, the federal government, as the "custodian" of federal prisoners, has the power under the Constitution to protect communities from any dangers prisoners may pose. Section 4248 is "'reasonably adapted" to this power. "Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to 'have serious difficulty in refraining from sexually violent conduct,' §4247(a)(6), would posed an especially high danger to the public if released." Congress also could have reasonably concluded that the state would not likely detain a reasonable number of these individuals if they were released from federal custody, partly "because the Federal Government itself severed [its] claim to 'legal residence in any State' by incarcerating them in remote federal prisons."

Fourth, §4248 does not violate the Tenth Amendment because if does not invade "'state sovereignty in an area typically left to state control.'" The Necessary and Proper Clause expressly "requires *accommodation* of state interests." Under §4248(d), the Attorney General is required to encourage the state in which the federal prisoner is domicile or was

tried to assume custody of the individual and, if the state wishes to do so, the Attorney General must immediately to turn over the individual.

Finally, §4248 "is narrow in scope," as it only applies "to a small fraction of federal prisoners" who already are in federal custody. This opinion does not create for the federal government a general police power, which is supposed to be exclusively a state function. "Thus, far from a 'general police power,' §4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system." The majority rejected "respondents' argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress."

In closing, the majority noted that, because it did not decide whether §4248 violated the Equal Protection or Due Process Clauses, respondents "are free to pursue those claims on remand."

Four justices disagreed with the way in which the majority had expanded the federal government's power under the Necessary and Proper Clause. Justice Kennedy concurred to observe that the incorrectness of respondents' argument that "congressional authority . . . can be no more than one step removed from an enumerated power." The Court's opinion "should not be interpreted to hold that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions." States' rights under the Tenth Amendment also are a constraint. Thus, a constitutional analysis balancing federalism with state sovereignty "depends not on the number of links in the congressional-power chain but on the strength of the chain." Merely because Congress takes an action that is only one step removed from an enumerated power does not make it constitutional.

Justice Alito concurred to express his concern "about the breadth of the Court's language" in upholding §4248. He agreed with the dissent that "the Necessary and Proper Clause empowers Congress to enact only those laws that 'carry[y] into Execution' one or more of the federal powers enumerated in the Constitution." Section 4248, as do "most federal criminal statutes, rest[s] upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct, and in order to do that it is obviously necessary and proper to provide for the operation of a federal criminal justice system and a federal prison system." Here, "it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment."

Justice Thomas, joined by Justice Scalia, dissented, contending that nothing in the Constitution, including the Necessary and Proper Clause, "expressly delegates to Congress the power to enact a civil commitment regime for sexually dangerous persons." Congress is only authorized to enact those laws that execute "one or more of the federal powers enumerated in the Constitution." Section 4248 is not related to such a power. "`As every school child learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . Congress has no power to act unless the Constitution authorizes it to do so." With regard to §4248, "[t]his Court . . . consistently has recognized that the power to care for the mentally ill and, where necessary, the power 'to protect the community from the dangerous tendencies of some' mentally ill persons, are among the numerous powers that remain with the States." *Addington v. Texas*, 441 U.S. 418 (1979).