United States v. Comstock: Legislative Authority Under the Necessary and Proper Clause

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Summary

The Adam Walsh Act created 18 U.S.C. 4248, which authorizes civil commitment as sexually dangerous those otherwise about to be released from federal custody. In *United States v. Comstock*, the United States Supreme Court rejected a suggestion that enactment of Section 4248 lay outside the scope of Congress's legislative powers. It did so without considering whether the section might be vulnerable to constitutional attack on other grounds.

The Constitution reserves to the states and the people those powers that it does not vest in the federal government. It vests in Congress the authority to enact laws necessary and proper to carrying into execution the powers it bestows on the federal government. The Justice Department contended that Congress has authority under the Constitution to enact those criminal laws which it finds necessary and proper to carry into execution various of its other powers such as the regulation of interstate and foreign commerce and legislation for the District of Columbia and federal enclaves. It argued further that incident to the power to enact criminal laws is the power to enact laws for the operation of a federal penal system and for responsibility for those assigned to that system, even after the expiration of the initial authority to imprison them.

Comstock argued that Congress has no such incidental power. He contended that Congress's constitutional authority to enact legislation with respect to those imprisoned for violation of federal criminal laws ends with their terms of imprisonment. Subject to certain conditions that might lead to a different result under other circumstances, the Court agreed with the Justice Department, up to a point.

Had Comstock prevailed, there might have been some question of the continued validity of federal statutes which permit civil commitment on other grounds of federal prisoners scheduled for release or of those statutes which permit imposition of a term of supervised release to be served after federal inmates are released from prison.

As is, the opinion appears to support a more expansive view of Congress's legislative authority than was previously the case—sometimes, the Necessary and Proper Clause will support legislation to help carry into execution a power which itself is no more than necessary and proper.

The Court's conclusion in *Comstock* was predicated upon "(1) the breadth of the Necessary and Proper Clause ... , (2) the long history of federal involvement in this area, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope," 130 S.Ct. at 1965.

The extent to which absence of such factors will be found to limit the reach of the Clause in the future remains to be seen.

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Introduction

The United States Supreme Court in *United States v. Comstock* held that Congress possessed the legislative authority under the Constitution's necessary and proper clause[1] to enact 18 U.S.C. 4248.[2] Section 4248, enacted as part of the Adam Walsh Act, authorizes the civil commitment of sexually dangerous individuals whose release from federal custody is pending. The Court assumed, without deciding, "that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances."[3] The Court's "stepping stone" analysis of Congress's legislative power under the Necessary and Proper Clause[4] appears to further discourage an expansive reading of the Court's *Lopez* and *Morrison* Commerce Clause limiting decisions.[5]

Background

Among the provisions of the Adam Walsh Act lies a section which purports to permit the civil commitment of "sexually dangerous" individuals.[6] The section, 18 U.S.C. 4248, applies to three classes of sexually dangerous persons: those in the custody of the Bureau of Prisons; those in the custody of the Attorney General and found incompetent to stand trial on criminal charges; and those acquitted or against whom criminal charges were otherwise dismissed based on their mental condition. If it determines by clear and convincing evidence that such an individual, referred by the Attorney General or Bureau of Prisons, is in fact a sexually dangerous person, a federal court may release the person to the Attorney General to be transferred to state authorities for care and treatment.[7] The court may subsequently order the individual's conditional release upon certification of the facility in which he is being treated.[8]

Graydon Comstock pled guilty to receipt of child pornography and was sentenced to imprisonment for three years and a month.[9] His release upon service of his sentence, like that of more than 60 others in the Eastern District of North Carolina, was stayed pending proceedings under Section 4248.[10] The District Court granted his motion to dismiss the petition for civil

[1] U.S. Const. Art. I, §8, cl. 18 ("The Congress shall have Power ...To make all Laws which shall be necessary and proper for carrying to Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"); see also, U.S.Const. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

[2] *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010).

[3] *Id*.

[4] "[T]hese considerations lead us to conclude that the statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws [to carry into execution its enumerated powers], to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others," *Id.* at 1965.

[5] *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000) are discussed below.

[6] P.L. 109-248, §302(4), 120 Stat. 620 (2006).

[7] 18 U.S.C. 4248(a), (d).

[8] 18 U.S.C. 4248(e).

[9] *United States v. Comstock*, 507 F.Supp.2d 522, 526 (E.D.N.C. 2007).

[10] *United States v. Comstock*, 551 F.3d at 277 n.3.

commitment as a sexually dangerous person on the grounds that the statute constituted a violation of due process and exceeded Congress's legislative authority.[11] The Fourth Circuit Court of Appeals affirmed the district court's ruling on the powers of Congress and consequently found it unnecessary to consider the due process issue.[12]

On June 22, 2009, the Supreme Court granted certiorari to consider

> Whether Congress had the constitutional authority to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.[13]

At the time, one other circuit had rejected the view of the Fourth Circuit in *Comstock*[14] and the district courts that addressed the issue were divided.[15]

Legislative Authority

The Constitution vests federal legislative powers in Congress.[16] It enumerates the areas of federal legislative power throughout, but particularly in Article I, Section 8. Those legislative powers which it does not mention are reserved to the states and the people.[17] The power to regulate commerce among the states and to do so through the enactment of necessary and proper legislation are perhaps the most commonly exercised of the enumerated powers.[18] Congress's power under the Commerce Clause extends to the channels of interstate commerce; to the instrumentalities, individuals, entities, and goods in interstate commerce; and to the activities that substantially affect interstate commerce.[19]

The power is broad but not boundless. Twice in recent memory, the Supreme Court has questioned assertions of the power. In *United States v. Lopez*, it found beyond the pale a federal statute which purported to outlaw possession of a firearm within a school zone.[20] The government

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[11] *United States v. Comstock*, 507 F.Supp.2d at 559-60. The petitioners in *Comstock* included four other individuals in federal custody; two (Thomas Matherly and Markis Reveland) following conviction for possession of child pornography; a third (Marvin Virgil) following conviction for sexual abuse of minor; and a fourth (Shane Catron) following a finding that he was incompetent to stand trial for aggravated sexual abuse of a child, *Id.* at 526 n.2.

[12] *United States v. Comstock*, 551 F.3d at 276.

[13] *United States v. Comstock*, 129 U.S. 2828 (2009).

[14] *United States v. Tom*, 565 F.3d 497 (8th Cir. 2009).

[15] District courts holding that section 4248 exceeds the Congress' legislative authority include *United States v. Wilkinson*, 626 F.Supp.2d 184, 194 (D.Mass. 2009); *United States v. Volungus*, 599 F.Supp.2d 68, 77-8 (D.Mass. 2009); courts finding the section within its authority include *United States v. Abregana*, 574 F.Supp.2d 1123, 1133-134 (D.Haw. 2008); *United States v. Shields*, 522 F.Supp.2d 317, 328 (D.Mass. 2007); *United States v. Carta*, 503 F.Supp.2d 405, 408-9 (D.Mass. 2007).

[16] U.S. Const. Art. I, §1.

[17] U.S. Const. Amends. X, IX.

[18] U.S. Const. Art. I, §8, cls. 3, 18.

[19] *Gonzales v. Raich*, 545 U.S. 1, 16-7 (2005).

[20] 514 U.S. 549 (1995) (Chief Justice Rehnquist wrote the opinion for the Court in which Justices O'Connor, Scalia, (continued...)

argued that the misconduct had the potential for violence and for a deteriorated learning environment, both of which it contended would have a substantially adverse affect on interstate commerce.[21] The Court reasoned that the power would be boundless, if its reach were so elastic as to extend to such essentially local, noncommercial activity.[22]

The Court reached a similar conclusion in *United States v. Morrison*.[23] It felt that the reach of the Commerce Clause would be boundless, if the proscribed misconduct—violence driven by an animus against women—lay within its grasp. To conclude otherwise, "would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'"[24]

The Court, however, rejected an invitation to read the Commerce Clause still more narrowly in *Gonzales v. Raich*, where it was suggested that a statute, which prohibited the cultivation or possession of marijuana, exceeded Congress's Commerce Clause power, when applied to the purely within state cultivation and possession for medicinal purposes in compliance with state law.[25] The Court resolved the case under its Commerce Clause precedents which read the Clause to encompass regulation of interstate-impacting intrastate activity. When it framed the issue, however, it eluded the role of the Necessary and Proper Clause: "The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution, '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with Foreign Nations, and among the several States.'"[26]

In the lower courts, the Justice Department had relied heavily on Congress's power under the Necessary and Proper Clause in its defense of Section 4248.[27] Legislation enacted in exercise of authority under the Clause need not be absolutely necessary to carry into execution an enumerated power.[28] It is enough that the legislation be "conductive" and "plainly adapted" to carrying to execution the enumerated power.[29] For the word "necessary," "frequently imports no more than that one thing is convenient, or useful ... to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."[30]

(...continued)

Kennedy, and Thomas joined; Justice Breyer wrote a dissenting opinion in which Justices Stevens, Souter, and Ginsburg joined).

[21] *Id.* at 563-64.

[22] *Id*. at 567-68.

[23] 529 U.S. 598 (2000) (Chief Justice Rehnquist again wrote the opinion for the Court and was again joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with Justices Stevens, Souter, Ginsburg, and Breyer again in dissent).

[24] *Id.* at 612-13, quoting *United States v. Lopez*, 514 U.S. at 564.

[25] 545 U.S. 1, 15 (2005)(Justice Stevens wrote the opinion for the Court, in which Justices Kennedy, Souter, Ginsburg and Breyer joined; with Justice Scalia concurring in the judgment; and Chief Justice Rehnquist as well as Justices O'Connor and Thomas in dissent).

[26] *Id.* at 5.

[27] "Yet the Government attempts to defend the validity of § 4248 largely by direct reliance on the Necessary and Proper Clause," *United States v. Comstock*, 551 F.3d at 278.

[28] *Jinks v. Richland County*, 538 U.S. 456, 462 (2003), citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819).

[29] *Id.*

[30] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 413-14; see also *Sabri v. United States*, 541 U.S. 600, 605 (2004) (continued...)

A law is "proper" for purposes of the Necessary and Proper Clause when it is not contrary to the demands, prohibitions, or spirit of the Constitution. For instance, "[w]hen a Law ... for carrying into Execution [one of the enumerated powers] violates the principle of state sovereignty reflected in the various constitution provisions ... it is not a Law ... *proper* for carrying into Execution [that power]."[31]

In the past, the Supreme Court had generally construed the Clause with an eye to carrying into execution one of the other powers granted Congress, the courts, or the executive branch. The Court had rarely construed the Clause except when it was invoked in execution of some other specific enumerated power. It may have done so in *Greenwood v. United States* when it upheld the legislation permitting commitment of those incompetent to stand trial for the federal crimes of which they were accused.[32] Greenwood was not otherwise scheduled for release from federal custody, but the case turned solely on the Court's construction of the Necessary and Proper Clause.[33]

Implicit in the Justice Department's argument before the Court was the contention that Section 4248 presents a similar situation, one in which Necessary and Proper Clause authority works to carry into execution several enumerated powers at once. "Pursuant to its power under the Necessary and Proper Clause, Congress has carried into execution various of its enumerated powers—... U.S. Const. Art. I, § 8, Cls. 1, 3, 7, 14, and 17—by enacting criminal statutes."[34] Section 4248, it contended, "is a rational incident to Congress' Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners."[35]

The Comstock group responded that the Constitution does not permit enactment of legislation whose sole nexus to an enumerated power is that it is rationally related to an endeavor which is itself valid only because it is necessary and proper for carry into execution an enumerated power: "The government characterizes § 4248 as an exercise of Congress' powers to enact criminal laws and operate a prison system. Those powers are not enumerated anywhere in the constitution.

(...continued)

("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare ... and it has corresponding authority under the Necessary and Proper Clause ... to see to it that taxpayer dollars appropriated under that power are ... not frittered away in graft.... See generally *McCulloch v. Maryland*, 4 Wheat. 316 (1819)(establishing review for means-ends rationality under the Necessary and Proper Clause).... *McCulloch, supra*, at 417 (power to 'establish post-offices and post-roads' entails authority to 'punish those who steal letters')").

[31] *Printz v. United States*, 521 U.S. 898, 923-24 (1997)(internal quotation marks and citations omitted; emphasis in the original).

[32] *Greenwood v. United States*, 350 U.S. 366, 375 (1956).

[33] *Id.*("We reach then the narrow constitutional issue raised by the order of commitment in the circumstances of this case. The petitioner came legally into the custody of the United States. The power that put him into such custody-the power to prosecute for federal offenses-is not exhausted. Its assertion in the form of the pending indictment persists. The District Court has found that the accused is mentally incompetent to stand trial at the present time and that, if released, he would probably endanger the officers, property, or other interests of the United States-and these findings are adequately supported. In these circumstances the District Court has entered an order retaining and restraining petitioner, while in his present condition, with habeas corpus always available when circumstances warrant. This commitment, and therefore the legislation authorizing commitment in the context of this case, involve an assertion of authority, duly guarded, auxiliary to incontestable national power. As such it is plainly within congressional power under the Necessary and Proper Clause. Art. I, § 8, cl. 18").

[34] Brief for the United States at 23, United States v. Comstock, No. 08-1224 (U.S. August 2009).

[35] *Id.*

Rather, they are justified as necessary and proper means of carrying out specific enumerated powers."[36] Moreover, the Comstock group contended the distinction is important because after an individual has served his sentence the connection to an enumerated power no longer exists: "Once the power to enforce a federal criminal law has been exhausted, further exercises of federal power are not 'necessary and proper' to effectuating the enumerated power underlying that federal law."[37]

United States v. Comstock

The Court in *United States v. Comstock* adopted the Justice Department's sequential or stepping stone argument, up to a point.[38] The Court agreed that the Necessary and Proper Clause permits Congress to create federal criminal laws to ensure compliance with legislation enacted pursuant to one of its enumerated powers.[39] Having permitted the creation of criminal laws, it permits legislation necessary and proper to punish offenders. Having permitted the punishment of offenders, it permits legislation necessary and proper to punish offenders by imprisonment. Having permitted the punishment of offenders by imprisonment, it permits legislation necessary and proper to create penal institutions in which terms of imprisonment may be served. Having permitted the creation of penal institutions for federal criminal offenders, it permits legislation necessary and proper to safeguard others from those in federal custody both before and after the offenders are release from federal custody. Or in the words of the Court, Section 4248 "is a necessary and proper means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others."[40]

The Court made it clear, however, that it had applied its method of analysis only after considering factors in the case which both justify the conclusion and limit its application. The considerations include "(1) the breadth of the Necessary and Proper Clause," as understood dating from Chief Justice Marshall's landmark pronouncement in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819);[41] "(2) the long history of federal involvement in this area" of civil commitment of those under federal jurisdiction found mentally ill, involvement that dates back to pre-Civil War legislation for the treatment of members of the Armed Forces and residents of the District of Columbia, 10 Stat. 158 (1855);[42] "(3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody" should they be released when other grounds for federal detention ceased to exist;[43] "(4) the statute's accommodation of state interests" by affording states the option of assuming treatment responsibility for those of its citizens civilly committed under Section 4248;[44] "and (5)

[36] Brief for Respondents at 8, United States v. Comstock, No. 08-1224 (U.S. October 28, 2009).

[37] *Id.*

[38] 130 S.Ct. 1949, 1965 (2010).

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1965, 1956-958.

[42] *Id.* at 1965, 1958-961.

[43] *Id.* at 1965, 1961-962.

[44] *Id.* at 1965, 1962-963.

the statute's narrow scope," that is, civil commitment of sexually dangerous individuals otherwise scheduled for release from federal custody.[45]

The Court majority consisted of three members of the Court who dissented in *Lopez* and *Morrison* (Justices Breyer, Stevens, and Ginsburg) and two who joined the Court thereafter (Chief Justice Roberts and Justice Sotomayor). Two other members of the Court (Justices Kennedy and Alito) agreed that Section 4248 constitutes a valid exercise of Congress's legislative authority under the Necessary and Proper Clause, but they declined to endorse the analysis of the majority opinion.[46]

Only two Justices dissented. Justice Thomas, in a dissent largely endorsed by Justice Scalia, argued that (1) the Necessary and Proper Clause does not empower Congress "to enact a law authorizing the Federal Government to civilly commit 'sexually dangerous person[s]' beyond the date it lawfully could hold them on a charge or conviction for a federal crime;" (2) the analytical standards that the Court articulated are both at odds with the Court's precedents and lack sufficient precision for future use;[47] and (3) is contrary to the Constitution's perception of the federal government as one of limited enumerated powers.[48]

Had the views of Justices Thomas and Scalia prevailed, there might have been some question of the continued validity of federal statutes which permit civil commitment on other mental grounds of federal prisoners scheduled for release or of other statutes which permit imposition of a term of supervised release to be served after federal inmates are released from prison.

Had the views of Justice Alito—Section 4248 is the necessary and proper exercise of authority to carry into execution of the powers under which each of the criminal statutes of conviction were enacted—commanded the concurrence of a majority of the Court, no such questions would have arisen. Moreover, the scope of the Congress's power under the Necessary and Proper Clause might have been more easily applied in future cases.

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[45] *Id.* at 1965, 1963-965.

[46] *Id.* at 1966 (Kennedy, J. concurring in the judgment)("This separate writing serves two purposes. The first is to withhold assent from certain statements and propositions of the Court's opinion. The second is to caution that the Constitution does require the invalidation of congressional attempts to extend federal powers in some instances "); *id.* at 1969 (Alito, J. concurring in the judgment)(internal quotation marks omitted)(I entirely agree with the dissent that the Necessary and Proper Clause empowers Congress to enact only those laws that carry into Execution one or more of the federal powers enumerated in the Constitution, but §4248 satisfies that requirement because it is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted").

[47] *Id.* at 1974 (emphasis in the original)("The Court perfunctorily genuflects to *McCulloch*'s framework for assessing Congress' Necessary and Proper Clause authority, and to the principle of dual sovereignty it helps to maintain, then promptly abandons both in favor of a novel five-factor test supporting its conclusion that §4248 is a 'necessary and proper' adjunct to a jumble of *unenumerated* authorit[ies] . The Court's newly minted test cannot be reconciled with the Clause's plain text or with two centuries of our precedents interpreting it. It also raises more questions than it answers").

[48] *Id.* at 1983 (internal citations omitted)("Not long ago, this Court described the Necessary and Proper Clause as 'the last, best hope of those who defend ultra vires congressional action.' Regrettably, today's opinion breathes new life into that Clause, and ... comes perilously close to transforming the Necessary and Proper Clause into a basis for the federal police power that 'we always have rejected. In so doing , the Court endorses the precise abuse of power Article I is designed to prevent –the use of a limited grant of authority as a 'pretext ... for the accomplishment of objects not entrusted to the government").

Five members of the Court, however, obviously found more appropriate a more nuanced description of the scope of the Clause—sometimes, the Necessary and Proper Clause will support legislation to help carry into execution a power which itself is no more than necessary and proper. The extent to which the Court's five considerations will be found to limit the stepping stone reach of the Clause in the future remains to be seen.

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