

UNITED STATES V. COMSTOCK: JUSTIFYING THE CIVIL COMMITMENT OF SEXUALLY DANGEROUS OFFENDERS

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I. INTRODUCTION

The federal government's power to punish crimes has drastically expanded in the past few decades as improved telecommunications and transportation networks have turned more crimes into interstate affairs.¹ This expansion of the federal government's authority to regulate crime conflicts with the traditional division of power, in which states regulate most crimes.² The tension between the federal government's law enforcement authority and its limited powers is apparent in *United States v. Comstock*.³ This case is about how far the Constitution will allow the federal government to go in preventing crime. In *Comstock*, the Supreme Court will consider whether the federal government has the authority to indefinitely civilly commit sexually dangerous⁴ federal offenders who are already in federal custody.⁵ At the heart of *Comstock* is a question of whether Congress has the power to civilly commit prisoners as "sexually dangerous" regardless of whether they are imprisoned for committing a sex crime.

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1. See, e.g., George D. Brown, *Counterrevolution—National Criminal Law After Raich*, 66 OHIO ST. L.J. 947, 986 (2005) (stating that "there has been a veritable explosion in the number of federal criminal laws over the last half century"); Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 826 (2000) (estimating that there are more than 3600 federal crimes, 40% of which have been enacted since 1970).

2. See *Addington v. Texas*, 441 U.S. 418, 426 (1979) (describing state authority to protect the community from the mentally ill; see also Ehrlich, *supra* note 1, at 826–27).

3. *United States v. Comstock*, 551 F.3d 274, 277 (4th Cir. 2009), *cert. granted*, 129 S. Ct. 2828 (2009).

4. See *infra* notes 23 and 24 and accompanying text (defining sexually dangerous).

5. Petition for Writ of Certiorari at (I), *United States v. Comstock*, No. 08-1224 (U.S. Apr. 3, 2009).

Congressional power to civilly commit potentially dangerous people is limited by the Necessary and Proper Clause because the Constitution does not explicitly authorize civil commitments.⁶ Congress can only provide for civil commitments when they are necessary and proper to an action justified by one of Congress' enumerated powers.⁷ Whether Congress had the power to provide for civil commitment of the sexually dangerous could ultimately depend on which power the Court holds that Congress' action was founded on. If the Court holds that the civil commitment law is based on Congress' commerce power, the law will probably be unconstitutional because sexual dangerousness falls outside the scope of the Commerce Clause. If the Court holds that the law is founded on Congress' penal power, the law will probably be constitutional because civil commitment is necessary and proper to the function of a federal penal system.

II. FACTS

Congress passed the Adam Walsh Child Protection and Safety Act (the "Act") with the aim of "protecting children from sexual exploitation and violent crime."⁸ Section 4248 of the Act authorizes the federal government to civilly commit any sexually dangerous person in the custody of the Bureau of Prisons ("BOP") in a federal facility.⁹

United States v. Comstock consolidates five individuals' constitutional challenges to the Act.¹⁰ The lead plaintiff, Graydon Comstock, pled guilty to receipt of child pornography.¹¹ Six days before the end of his thirty-seven month prison sentence, the Attorney General certified him as sexually dangerous and stayed his release from prison.¹² The cases of three of the four other parties (Markis Revland, Thomas Matherly, and Marvin Vigil) followed a similar trajectory; the government certified each for civil commitment

6. See U.S. CONST., art I § 8 (omitting civil commitment from the list of enumerated powers).

7. U.S. CONST. art. I § 8 cl. 17.

8. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No 109-248, 120 Stat. 587, 587 (codified as amended at scattered sections of 18 U.S.C. and 42 U.S.C.).

9. 18 U.S.C.A. § 4248 (West 2009).

10. Petition for Writ of Certiorari, *supra* note 5, at 9.

11. *United States v. Comstock*, 551 F.3d 274, 277 (4th Cir. 2009) *cert. granted*, 129 S. Ct. 2828 (2009).

12. *Id.*

less than one month before each man completed his prison term.¹³ More than two years after the expiration of their prison terms, all four are still in the medium security Federal Correctional Institute in Butner, N.C.¹⁴

The fifth respondent, Shane Catron, was found incompetent to stand trial on charges of sexual abuse of a minor.¹⁵ After he was committed for treatment and evaluation to determine his likelihood to attain competency for trial, the government concluded that he could not be restored to competency.¹⁶ The government then moved to commit him under § 4248 as a person suffering from mental disease.¹⁷

Each respondent moved to dismiss on constitutional grounds, relying on the government's lack of authority under the Necessary and Proper Clause, the federal power to prosecute and prevent criminal conduct, and the Commerce Clause.¹⁸ The Eastern District of North Carolina agreed, holding that § 4248 was not sufficiently tied to an enumerated power.¹⁹

III. LEGAL BACKGROUND

A. §4248 and Civil Commitment of a Sexually Dangerous Person

Section 4248 authorizes the government to civilly commit “sexually dangerous” federal prisoners and other “sexually dangerous” people in federal custody,²⁰ a power that permits the federal government to extend the imprisonment of people it believes will commit sex crimes in the future. Under § 4248, three categories of people are subject to civil commitment: 1) those in the custody of the Bureau of Prisons; 2) those committed to the custody of the U.S. Attorney General based on incompetence to stand trial; and 3) those who have had their charges “dismissed solely for reasons relating to

13. *Id.* at 277–78.

14. *Id.*

15. Petition for Writ of Certiorari, *supra* note 5, at 10.

16. *Id.* See also 18 U.S.C.A. § 4241(d) (West 2009) (describing procedure for “determination of mental competency to stand trial to undergo postrelease proceedings”).

17. Petition for Writ of Certiorari, *supra* note 5, at 10; see also § 4246 (describing the procedure for “hospitalization of a person due for release but suffering from mental disease or defect”).

18. *United States v. Comstock*, 507 F. Supp. 2d 522, 530–40 (E.D.N.C. 2007), *aff'd* 551 F.3d 274 (4th Cir. 2009).

19. *Id.* at 559.

20. § 4248(a).

the[ir] mental condition.”²¹

Civil commitment under § 4248 begins with a finding by the Attorney General that a qualifying prisoner or detainee is sexually dangerous.²² To qualify as sexually dangerous, the prisoner or detainee must have “engaged or attempted to engage in sexually violent conduct or child molestation”²³ and “[suffer] from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”²⁴ The Attorney General can make these findings even if the prisoner or detainee has not been convicted of a sex crime.²⁵

Once the Attorney General determines that a prisoner is sexually dangerous, the prisoner’s release from federal custody is stayed and proceedings to review the Attorney General’s determination begin.²⁶ The prisoner is entitled to counsel, and can testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses who appear against him at the hearing.²⁷ If the government proves by clear and convincing evidence that the individual is sexually dangerous, the prisoner is committed to the civil custody of the U.S. Attorney General,²⁸ where he will remain until: 1) a court determines that he is not sexually dangerous; 2) a court determines that he will not be sexually dangerous to others if released under an appropriate care regimen; or 3) the state in which he is (or was) domiciled agrees to take custody of him.²⁹ Thus, the federal government does not decide whether the person remains in federal custody; if the state assumes responsibility, the prisoner must be relinquished to state custody for the state to try or imprison him.³⁰

B. Justification for §4248.

The government justifies §4248 in two different ways. First, it says that § 4248 is necessary and proper to Congress’ authority to enact

21. *Id.*

22. *Id.*

23. § 4247(a)(5).

24. § 4247(a)(6).

25. *United States v. Comstock*, 551 F.3d 274, 283 (4th Cir. 2009).

26. *Id.*

27. § 4248(c).

28. § 4248(d).

29. *Id.*

30. § 4248(g).

laws regarding subjects within its enumerated powers.³¹ Second, the government contends that Congress's power to operate a federal penal system includes the power to civilly commit dangerous offenders within the penal system.³²

Under the first argument, Congress must show that it has the authority to regulate sexually dangerous acts. The most logical source of authority to do so is the Commerce Clause.³³ To regulate sexually dangerous acts under the Commerce Clause, Congress must show that sexually dangerous acts substantially affect interstate commerce.³⁴ Whether Congress can show that is unclear in the wake of the Supreme Court's decisions in *United States v. Morrison*³⁵ and *Gonzales v. Raich*.³⁶

The Court's *Morrison* decision, standing alone, tends to indicate that Congress cannot regulate sexual violence.³⁷ In *Morrison* the Supreme Court articulated a four-factor test to determine an activity is substantially related to interstate commerce.³⁸ The Court looks at whether the regulated activity is economic in nature: if it is, the activity is more likely to fall under the commerce power.³⁹ The *Morrison* test also asks whether the statute's reach is limited by an express jurisdictional element; the activity is more likely to be within the scope of the commerce power if the statute contains a jurisdictional limitation.⁴⁰ The Court held that the Commerce Clause did not give Congress the power to give all victims of sex crimes a federal cause of action because sexual violence was not an activity

31. Brief for the United States at 17, *United States v. Comstock*, No. 08-1224 (U.S. Aug. 28, 2009).

32. *Id.* at 22.

33. See Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?* 9 LEWIS & CLARK L. REV. 879, 880, 890 n.79 (2005) (criticizing the Court's post-1942 "'channels' and 'instrumentalities theories'" of the Commerce Clause as allowing Congress to regulate anyone or anything that could move across state lines).

34. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

35. *United States v. Morrison*, 529 U.S. 598 (2000).

36. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); see also Miles Coleman, Note, *Unwanted Advances: Civil Commitment and Congress's Illicit Use of the Commerce Clause*—*United States v. Comstock*, 60 S.C. L. REV. 1217, 1226 (2009). (describing the scholarly divide over whether *Raich* contradicts or elaborates on the Rehnquist's prior Commerce Clause decisions).

37. See *Morrison*, 529 U.S. at 615–16 (discussing gender-motivated violence as too attenuated to interstate commerce to be regulated by Congress under the Commerce power).

38. See *id.* (holding that the civil remedy of the Violence Against Women Act exceeded Congress' Commerce Clause authority because violence against women did not substantially affect interstate commerce).

39. *Id.* at 610.

40. *Id.* at 611.

that substantially affected interstate commerce.⁴¹ In so holding, the Court explicitly rejected Congressional findings that sexual violence had a substantial effect on interstate commerce.⁴² Though the Commerce Clause did not give Congress the power to create a cause of action for all victims of sex crimes, the Court indicated that it might give Congress the power to provide a cause of action of victims of interstate sex crimes.⁴³

The Court's decision in *Raich*, however, indicates that certain activities that would generally be called noneconomic can still be regulated by Congress under the Commerce Clause if the regulation is part of a broader regulatory scheme of interstate commerce.⁴⁴ The Court held that even though marijuana was being grown for personal consumption, Congress could regulate it because regulation was necessary to protect the federal government's effort to eliminate the market for illegal drugs.⁴⁵ The Court also held that legislative action taken under the Commerce Clause is presumed constitutional so long as it is rationally related to a legitimate government interest.⁴⁶ Though the decision focused on illegal drugs, the Court's logic might be broad enough to justify regulation of other non-economic activities—including perhaps certain kinds of sexual violence.

The government's second argument is that § 4248 is a necessary and proper exercise of Congress' penal power.⁴⁷ Though the Constitution does not explicitly provide Congress with the authority to create and run a penal system, it is well established that the power to establish a penal system is a necessary and proper extension of Congress's authority to establish federal criminal laws under its other enumerated powers.⁴⁸ Though the extent of the government's penal power is not well-defined, the Supreme Court has indicated Congress's penal power includes the power to civilly commit prisoners.⁴⁹

Though Congress can civilly commit prisoners, it is not clear how broad the power is. Thus far, the Supreme Court has only upheld civil

41. *Id.* at 616.

42. *Id.* at 613–14.

43. *Id.* at 616

44. *See* *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2000) (finding that a federal legislative scheme exists to regulate the sale and use of marijuana).

45. *Id.*

46. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

47. Brief for the United States, *supra* note 31, at 22–23.

48. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416–18 (1819).

49. *Greenwood v. United States*, 350 U.S. 366 (1956).

commitment regimes for criminal defendants found incompetent to stand trial⁵⁰ and criminal defendants found not guilty by reason of insanity.⁵¹ Initially, the basis for these civil commitment regimes was quite narrow. In *Greenwood v. United States*, the Court held that the government could civilly commit defendants found incompetent to stand trial because the federal power to prosecute had not been exhausted.⁵² Over the years, however, the Court has indicated that the government's power to civilly commit defendants might be broader than *Greenwood* indicated. In *Jackson v. Indiana*, the Court recast *Greenwood* as a decision allowing the government to civilly commit mentally incompetent individuals who pose a danger to the public.⁵³ A few years later, in *Jones v. United States*, the Court held that the federal government could civilly commit defendants found to be not guilty by reason of insanity in order to protect the defendant and society from potential dangerousness.⁵⁴

C. Conflicting Interpretations of Constitutionality

Other than *Comstock*, the only circuit to consider the constitutionality of § 4248 was the Eighth Circuit in *United States v. Tom*.⁵⁵ Tom was serving a federal prison sentence for traveling between states with the intention of engaging in a sexual act with a minor.⁵⁶ Two days before his prison sentence ended, the government petitioned to have Tom civilly committed under §4248.⁵⁷

The Eighth Circuit upheld §4248 as necessary and proper to Congress' authority under the Commerce Clause to prevent interstate sex crimes.⁵⁸ Because Tom was convicted under a statute that was distinctly within Congress' commerce authority, the Eighth Circuit held that civil commitment under § 4248 was a rational and appropriate means for effectuating the purpose of that statute.⁵⁹ The Eighth Circuit reasoned that because Congress had the authority to enact the statute under which Tom was convicted, the "underlying

50. *Id.* at 375.

51. *Jones v. United States*, 463 U.S. 354 (1983).

52. *Greenwood*, 350 U.S. at 375.

53. *Jackson v. Indiana*, 406 U.S. 715, 732–33 (1972).

54. *Jones*, 463 U.S. at 368.

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

56. *Id.* at 498.

57. *Id.*

58. *Id.* at 506.

59. *Id.* at 504–06 (referring to federal sex crime statute 18 U.S.C.A. § 2241(c), which requires interstate travel).

federal criminal law would be frustrated” absent the ability to prevent the occurrence of sex crimes via the civil commitment provision.⁶⁰ The Eighth Circuit noted that although §4248 itself does not require a finding that the prisoner will commit a federal sex crime, its limitation to those who have been charged with a federal crime and have a propensity for committing sexually violent acts rendered it narrow enough to be necessary and proper to validly enacted federal sex crime statutes.⁶¹

IV. HOLDING

In *United States v. Comstock*, the Fourth Circuit held that the statute was not based in Congress’s commerce power or justified by the Necessary and Proper Clause.⁶²

The Fourth Circuit held that Congress did not have the power under the Commerce Clause to regulate sexual acts, thereby rejecting the government’s argument that § 4248 is a necessary and proper extension of Congress’ alleged power to regulate sexually dangerous acts.⁶³ The court also reasoned that “sexual dangerousness” is in no way economic activity, therefore the Commerce Clause did not apply.⁶⁴

The Fourth Circuit then held that the civil commitment regime could not be justified as a necessary and proper extension of Congress’ penal power,⁶⁵ reasoning that § 4248 lacked a connection to federal law because a determination of sexual dangerousness requires no conduct in violation of federal law.⁶⁶ In making this holding, the court held that Congress’s penal power only permitted the government to civilly commit individuals when it is necessary to 1) prevent federal crimes⁶⁷ or 2) preserve the power to prosecute criminals.⁶⁸

60. *Id.* at 504–05.

61. *Id.* at 505–06.

62. *United States v. Comstock*, 551 F.3d 274, 276 (4th Cir. 2009).

63. *Id.* at 279–80.

64. *Id.* at 280.

65. *Id.* at 281.

66. *Id.* at 283.

67. *See id.* at 281–82 (rejecting the Necessary and Proper Clause as justification for preventing all potential future criminal conduct).

68. *See id.* (reasoning that because “the Government ha[d] already charged, tried, and convicted” those subject to § 4248, the power to civilly commit the defendants was exhausted).

V. ANALYSIS

A. *Weaknesses in the Fourth Circuit's Opinion Under the Necessary and Proper Clause.*

The Fourth Circuit's opinion takes an overly narrow view of the civil commitments Congress can authorize under its penal power. As *Jones* indicates, the federal government need not show that an inmate in its custody will commit another federal crime to justify civil commitment—in some cases civil commitment can be justified by showing there is reason to believe that the inmate will be a danger to society if released.⁶⁹ By rejecting the possibility that Congress can authorize the attorney general to civilly commit sexually dangerous offenders, the Fourth Circuit failed to sufficiently consider the more difficult question raised by the previous Supreme Court cases: could the protectionist justification that permits civil commitment of those found not guilty by reason of insanity or incompetent to stand trial be applied to those who are sane enough to be found guilty and serve prison time?

The power the government wields under the Necessary and Proper Clause is accepted as broad.⁷⁰ Where Congress has the power to criminalize and punish conduct, it should have the power to pass laws reasonably related to the prevention of regulated conduct.⁷¹ As it is necessary and proper to the penal power to commit people found not guilty by reason of mental incapacity in order to protect the community,⁷² it is logical that it is also necessary and proper to commit those found guilty to effectuate the same purpose. The difference between the civilly committed and the imprisoned seems to be the level of mental disturbance. If, as in *Jones*, the defendant is deemed mentally incompetent, he will be civilly committed.⁷³ If, as in *Comstock*, the defendant is competent enough to stand trial and is found guilty, he will serve time in prison.⁷⁴ However, this distinction between competent and incompetent is artificial considered that even

69. *Jones v. United States*, 463 U.S. 354, 368 (1983).

70. See *Gonzales v. Raich*, 545 U.S. 1, 38 (2005) (Scalia, J., concurring) (citing *Houston, E. and W.T.R. Co. v. United States*, 234 U.S. 342, 353 (1914) (noting that the Necessary and Proper clause has broad scope when used in conjunction with the Commerce Clause); see also *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 38 (1937) (stating that the Necessary and Proper clause's broad scope is not limited to effectuating the Commerce power).

71. *United States v. Tom*, 565 F.3d 497, 504–05 (8th Cir. 2009).

72. *Jones*, 463 U.S. at 368.

73. *Id.* at 370.

74. *United States v. Comstock*, 551 F.3d 274, 284 (4th Cir. 2009).

the truly “mentally disturbed” are often deemed “sane” enough to serve prison time for their crimes.⁷⁵ If the difference between the civilly committed and the imprisoned is their level of sanity, not their level of sexual dangerousness, the community deserves protection from both groups. Because it is necessary and proper to the penal power to civilly commit sexually dangerous offenders found incompetent to stand trial or not guilty by reason of insanity, it is also necessary and proper to the federal government’s penal power to commit offenders found guilty in order to protect against sexual dangerousness.

If § 4248 had actually violated federalist principles by encroaching on states’ police powers, the Fourth Circuit’s decision would be more understandable. The Fourth Circuit’s decision is problematic because it did not give enough weight to § 4248’s limitation to federal prisoners.⁷⁶ Section 4248 does not expand the government’s power to civilly commit people in state custody; what it does is give the federal government the power to ensure that individuals in federal custody do not pose a danger to society upon release.⁷⁷ That the federal offenders are in lawful federal custody upon their determination of sexual dangerousness ensures that Congress is not overstepping its constitutional boundaries by attempting to civilly commit individuals subject to the states’ police powers.

B. Weaknesses in the Fourth Circuit’s Opinion Under the Commerce Clause.

In holding that Congress could not enact §4248 under the Commerce Clause, the Fourth Circuit gave too much weight to the general noneconomic nature of sexual violence.⁷⁸ It should have given more weight to the statute’s limited scope⁷⁹ and the fact that § 4248 is

75. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (describing the test for competency which requires that the defendant have a rational and factual understanding of the proceedings against him and that the defendant have the ability to consult with his lawyer regarding the proceedings).

76. See *Comstock*, 551 F.3d at 283 (describing only the lack of limitation to commercial or interstate activities, but not discussing the statute’s limitation solely to federal prisoners or detainees).

77. See *United States v. Salerno*, 481 U.S. 739, 749–50 (1987) (describing the government’s interest in preventing crime by arrestees as legitimate and compelling). See also Brief for United States, *supra* note 31, at 37–38 (describing the federal government’s obligation to protect society from those prisoners in its custody).

78. *Comstock*, 551 F.3d at 279.

79. See 18 U.S.C.A. § 4248(a) (West 2009) (limiting the jurisdiction of § 4248 to those people already in custody of the Bureau of Prisons, those for whom criminal charges have been

part of a broader federal regulatory scheme.⁸⁰ Those two things, when considered in proper context, might have led the Fourth Circuit to hold that regulating sexual dangerousness is a Constitutional exercise of Congress' commerce power.

The Fourth Circuit's decision that §4248 was not a proper exercise of the Commerce power was based on its decision that the logic of *Morrison* controlled.⁸¹ Even if the logic of *Morrison* did control, § 4248 contains the requisite jurisdictional limitation, as the statute is limited solely to federal prisoners or detainees.⁸² However, *Morrison* did not necessarily control in this case because it is possible to conclude that § 4248 is part of a federal regulatory scheme for sexual dangerousness.⁸³

If § 4248 were part of a broader regulatory scheme, then the logic of *United States v. Raich* would control.⁸⁴ The breadth of the Adam Walsh Act and the Act's national registration requirements for sex offenders⁸⁵ imply that the federal government has an interstate scheme in place regulating sexual violence. Because the federal government requires offenders to register their permanent whereabouts,⁸⁶ it is clear that the government is keeping track of sexual offenders. The Act also categorizes sexual offenders according to the severity of their offenses⁸⁷ and makes registration information including categorization available to the public.⁸⁸ Thus, the Act requires certain activities of sexual offenders in order to both educate the public about and decrease sexual violence. When reviewed under *Raich*, § 4248 could thus be a justifiable exercise of Congress' commerce power as Congressional actions regulate the activities of sexual offenders.

dismissed due to mental conditions, or those whom the Attorney General deemed mentally incompetent); see also *Comstock*, 551 F.3d at 279 (focusing on § 4248's lack of a physical jurisdictional limitation but not addressing the limitation solely to prisoners or detainees).

80. See 18 U.S.C.A. § 2250 (West 2009) (requiring registration for sex offenders traveling in interstate commerce).

81. *Comstock*, 551 F.3d at 279–80.

82. § 4248(a)

83. See *Comstock*, 551 F.3d at 280 n.6 (stating there is no federal scheme regulating sexual violence).

84. See *Gonzales v. Raich*, 545 U.S. 1, 23–24 (2005) (describing the need for a broad interstate regulatory scheme when the activity being regulated is local).

85. See § 2250 (requiring registration for sex offenders traveling in interstate commerce).

86. *Id.*

87. 42 U.S.C.A. § 16911 (West 2009).

88. See § 16918 (mandating that the public have internet access to a database of sexual offender registry information).

VI. POSSIBLE DISPOSITIONS

If the Court holds § 4248 unconstitutional, it is likely to do so by holding that Congress does not have power under the Commerce Clause to regulate sexual dangerousness. In contrast, if the Court holds that § 4248 is constitutional, it will likely hold that civil commitment is a necessary and proper extension of Congress' penal power. The Court might also rule that the government cannot civilly commit federal prisoners, but that the government can civilly commit those federal inmates deemed incompetent to stand trial because the government's power to prosecute has not been exhausted.

A. Ruling for Comstock: §4248 is Unconstitutional.

If the Court deems § 4248 unconstitutional, it is likely to hold that Congress did not have the power under the Commerce Clause to regulate sexually dangerous acts. Such a holding would rely on *United States v. Morrison*, which held that sexual violence is not economic in nature, and thus does not substantially effect interstate commerce.⁸⁹ Because §4248 appears to be an effort to prevent all sex crimes and not just federal sex crimes,⁹⁰ using the logic of *Morrison* to review this law would inevitably lead to it being struck down. This is true even if the Court considers *Raich*, because, unlike illegal drugs, there is not a long history of federal regulation of sexual violence.⁹¹

B. Ruling for the Government: §4248 Is Constitutional.

If the Court finds that § 4248 is constitutional, it likely will hold that the power to civilly commit federal offenders is necessary and proper to the Government's penal power. Like the accepted authority to provide terms of supervised release,⁹² civil commitment authority stands for the principle that the government has a responsibility to protect the public from people lawfully in its custody.⁹³ Section 4248 protects the public from federal prisoners likely to commit sexually violent crimes and serves the same preventative function as a prison sentence.⁹⁴ In so holding, the Court will likely reason that a statute

89. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

90. *United States v. Comstock*, 551 F.3d 274, 282 (4th Cir. 2009).

91. See Miles Coleman, *supra* note 36, at 1226 (discussing the unlikelihood of a congressional scheme to regulate sexually dangerous people in interstate markets).

92. Petition for Writ of Certiorari, *supra* note 5, at 26.

93. See *United States v. Salerno*, 481 U.S. 739, 747 (1987) (holding that "preventing danger to the community is a legitimate regulatory goal").

94. 18 U.S.C.A. § 4248 (West 2009).

can be a necessary and proper to a power that is accepted as a necessary and proper exercise of an enumerated power, such as that of the federal power to create a penal system.

C. Ruling Based on the Power to Prosecute.

The Court might hold that the exercise of civil commitment depends on whether the government has exhausted its power to prosecute. The Supreme Court established in *Greenwood v. United States* that an offender can be committed to preserve the federal power to prosecute where the offender has been deemed mentally incompetent to stand trial but presents a danger to the interests of the United States.⁹⁵ The Court might hold that §4248 lies outside the scope of Congressional authority only where the federal power to prosecute has been exhausted. If the Court rules this way, it would mean that the only sex offenders the government could civilly commit are those deemed incompetent to stand trial. Such a ruling would require, however, that the civil commitment serve the purpose of preserving the power to prosecute and not simply prevent danger to the community.⁹⁶ If there were no chance that the offender would regain his competency, civil commitment would be unconstitutional under this holding, because the offender's inability to regain competency means that the government would not retain any power to prosecute.⁹⁷

D. Disposition

In deciding *Comstock*, the Supreme Court must find a way to balance competing interests. On one hand, the Fourth Circuit's decision raises concerns about interference into legislative areas traditionally reserved for states. On the other, the federal government's power to prosecute offenders is an important concern for national security, and consequently a power that has recently expanded.⁹⁸ Though federalism has played a prominent role in American history,⁹⁹ the trend toward expansion of federal criminal power points to a ruling in favor of the government.

95. *Greenwood v. United States*, 350 U.S. 366, 375 (1956).

96. *See id.* at 375–76 (limiting the holding to the facts of the case and discussing the commitment as preserving the federal power to prosecute, not solely a preventative measure).

97. *See id.* (stating that a slim possibility of recovery is enough to preserve the power to prosecute).

98. Ehrlich, *supra* note 1 at 826–27.

99. *Id.*