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[Due Process in Jeopardy](#)

The Supreme Court takes liberty lightly.

Posted May 24, 2010

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Last week the Supreme Court ruled in *United States v. Comstock et al.* that Congress has the constitutional authority to empower federal district courts to civilly commit dangerous sex offenders who had completed their sentences. In effect, the courts can mandate indefinite confinement of such federal prisoners. The controversial power derives from Section 4248 of the Adam Walsh Child Protection and Safety Act of 2006.

Civil commitment generally refers to the involuntary confinement in a mental institution of a person deemed dangerous to themselves or to others. In 1949 the federal government assumed the power to detain federal prisoners in treatment facilities past their sentences if they were judged insane. The new decision expands this power in significant ways. Moreover, given the aggressiveness with which the law and public opinion focuses on sex offenders, use of the new civil commitment power is likely to become widespread.

The decision also invites state involvement in federal civil commitment. The ruling declares that “‘all reasonable efforts’ must be made to cause the State where tried person was tried, or the State where he is domiciled, to ‘assume responsibility for his custody, care, and treatment.’” Only if both states refuse will the federal government accept responsibility for the prisoner. Currently, 20 states have their own civil commitment programs that include sex offenders. Presumably, all states will now be expected to establish policy on this issue.

The respondents in the original motion were federal prisoners who challenged the constitutionality of being detained through civil commitment for years past their release date. The federal government argued the Walsh Act is authorized by both the Commerce Clause and the Necessary and Proper Clause of the Constitution, which are often paired together. The Commerce Clause (Article I, Section 8, Clause 3) gives Congress the

power “To regulate Commerce ... among the several States....” It has been broadly interpreted to include laws mandating the state sex registries also established by the Walsh Act. The Necessary and Proper Clause (Article I, Section 8, Clause 18), also known as the Elastic Clause, gives Congress the power “To make all Laws which shall be necessary and proper for carrying into 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.” The government argued that the Walsh Act is necessary to establish and maintain a federal penal system.

In an amicus brief filed on behalf of the prisoners, the Cato Institute countered these claims. Regarding the Commerce Clause: “Notably, the Government does not and cannot affirmatively argue that the Act is a legitimate exercise of Congress’ Commerce Clause power. Civil commitment involves neither commerce nor interstate activity. Mental illness demands physicians not merchants.” Regarding the Necessary and Proper Clause: “[L]egislation adopted under the Clause may be justified only by an enumerated power, not by an implied power. Congress may carry into execution the powers specifically delegated to it, and the Necessary and Proper Clause permits adoption of reasonable means to carry into execution the enumerated power. But there the power ends. Indeed, the Tenth Amendment was adopted to ensure that Congress did not rely upon the Clause to expand its powers....”

Lower courts agreed with Cato’s analysis.

In the original motion both the district court and the Fourth Circuit Court of Appeals found that Congress had exceeded its constitutional powers. The unanimous appellate decision held that Congress lacked a general police power to protect the public at large from crime. (By contrast, the Eighth Circuit Court of Appeals upheld the constitutionality of civil commitment for a “sexually dangerous person.”)

The Supreme Court decision, however, endorsed the federal power by a vote of 7-2. Justices Clarence Thomas and Antonin Scalia dissented. In the dissenting opinion, Thomas stated, “The fact that the federal government has the authority to imprison a person for the purpose of punishing him for a federal crime — sex-related or otherwise — does not provide the government with the additional power to exercise indefinite civil control over that person.”

Interestingly, the constitutional protections of due process contained in the Bill of Rights played no substantive part in the ruling. The decision stated, “We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution.”

Thus the most important issue for civil libertarians was not addressed: Does the continued imprisonment of a category of criminals who have served their sentence violate the due-process and equal-protection guarantees in the Constitution? The closest the Court came to addressing this issue was Justice Breyer’s statement, “[We] assume, but we do not decide, that other provisions of the Constitution — such as the Due Process Clause — do not prohibit civil commitment.” In short, the Court’s default position is that indefinite confinement of a prisoner past his sentence is constitutional and legally proper. Constitutional considerations such as the due-process protections of the Fourth and Fifth Amendment, the Eighth Amendment protection against “cruel and unusual punishment,” and the Equal Protection of the Fourteenth Amendment appear not to automatically apply to “dangerous’ sex offenders.”

A key concern about the ruling is mission drift — namely, that civil commitment will be applied to ever widening categories of people. Since alcoholics and drug addicts are currently subject to such involuntary commitment in

several states, this is a reasonable concern. It is not reassuring that the government's case in *Comstock* was presented by Solicitor General Elena Kagan, Obama's pick for the Supreme Court. She is almost certain to be confirmed. Orin Kerr, who attended the proceedings, [reported](#) at the Volokh Conspiracy website, "Kagan made a much broader Article I power argument at oral argument than was made in the Government's brief. Indeed, her argument struck me as sort of shockingly broad: She argued that the Constitution gives the federal government the general power 'to run a responsible criminal justice system,' and that anything Congress plausibly thought a part of running a 'responsible criminal justice system' was within the scope of federal power."

This does not bode well for individual rights or due process.

There Are 3 Responses So Far. »

1. *Comment by [akaGaGa](#) on [24 May 2010](#):*

What Rich said.

2. *Comment by [Drik](#) on [24 May 2010](#):*

And after the republic gets degraded into a democracy and collapses, the ensuing military dictatorship ensues, but always using the courts to justify its actions and the motivation of the "welfare of humanity".

History repeats, yet again.

3. *Comment by [RC.](#) on [25 May 2010](#):*

Dirk nailed it. The case in point; Nazi Germany.

Long live the "Mother Land", and it's people. . . not so much.

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NameThom May 24

A curious decision and no argument regarding the slippery slope issue. Let's play like Bastiat and look a applies to people who do not change their sexual preference or the way they go about satisfying thes predators are still violent sexual predators when released, however generally more careful and deadly evidence or witnesses.

Do we give life sentences for all violent sexual acts or perhaps wait for them to commit a deadly sexual prison that will now allow us to sentence them to a murder rather than just the violent sexual act? No €



[Aland Coons](#) May 24

Elena Kagan would certainly be a larger public menace as a supreme court justice than as solicitor gene population in nation already -- suspending due process even if only for special classes of criminals is an constitutionally enumerated rights and an abuse of our trust for justice.

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Rich Matarese May 24

@ Buddy Brown - Sex offenders cannot be "the scum of the earth." To achieve that state, they would officers of civil government, and it cannot be argued that sex offenders do more damage than our "pu

When assessing scum, keep your eye on what settles on top and crushes out all life.



[Buddy Brown](#) May 24

Understanding that sex offenders are the scum of the earth, I still have to agree with the author on th well for individual rights or due process.

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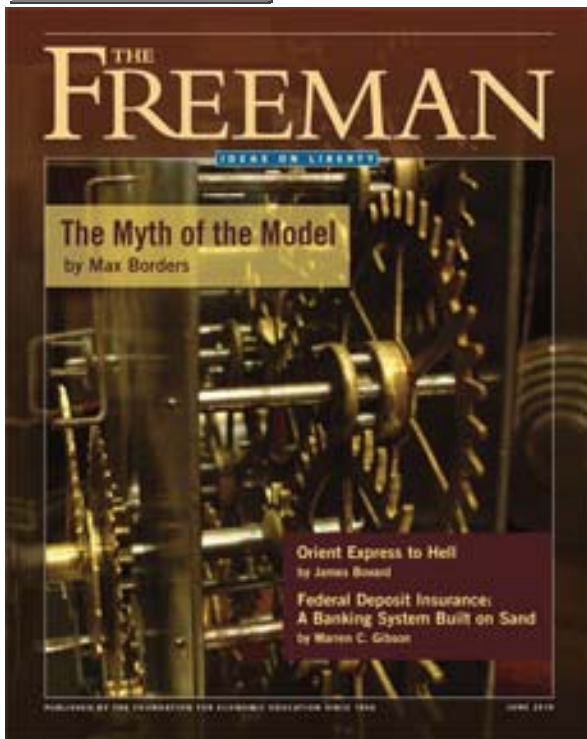
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