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## **Cato, Barnett Weigh in on Extended Civil Commitment of "Sexually Dangerous" Persons**

The Cato Institute and Professor Randy Barnett (Georgetown) filed an [amicus brief](#) in *U.S. v. Comstock*, the case involving [Title III of the Adam Walsh Child Protection Act](#), 18 U.S.C. Sec. 4248, which authorizes the Attorney General to place in indefinite civil commitment any individual in federal Bureau of Prison custody that the AG designates as "sexually dangerous."

Respondent in the case, Graydon Earl Comstock, challenges the Act as exceeding congressional authority. The Fourth Circuit [overturned](#) the Act; the Eighth Circuit upheld it in [U.S. v. Tom](#). I previously posted on the case [here](#) and [here](#).

The government [argues](#) that Congress had authority to enact the provision under the Necessary and Proper Clause alone, and as an incident of its authority to run the federal penal system (itself, claims the government, authorized by a hodgepodge of Article I powers, including the Commerce Clause).

Cato and Barnett take on this claim, and add a little Tenth Amendment:

The Constitution itself is clear: the Necessary and Proper Clause allows Congress to make laws only "for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ."

Thus, legislation 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 beyond those enumerated. As it must, this Court has guarded against the danger perceived at the founding of the Republic: **in the 190 years since [M'Culloch](#), this Court has never**

**upheld a statute based on the  
Necessary and Proper Clause that  
was not tethered to a specific  
enumerated power. . . .**

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.**

Pp. 4-6 (emphasis in original).

SDS