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Limits on the Necessary & Proper Clause?

Randy Barnett • November 9, 2009 9:35 am

On January 12th, the Supreme Court will hear argument on a case that promises to find a limit to the power of Congress “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.” In this blog post, Cato’s Ilya Shapiro explains:

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act. One provision of the law authorizes the federal government to civilly commit anyone in the custody of the Bureau of Prisons whom the attorney general certifies to be “sexually dangerous.” The effect of such an action is to continue the certified person’s confinement after the expiration of his prison term, without proof of a new criminal violation.

Six days before the scheduled release of Graydon Comstock — who had been sentenced to 37 months in jail for receiving child pornography — the attorney general certified Comstock as sexually dangerous. Three years later, Comstock thus remains confined in a medium security prison, as do more than 60 other similarly situated men in the Eastern District of North Carolina alone.

Comstock and several others challenged their confinements as going beyond Congress’s constitutional authority and won in both the district and appellate courts. The United States successfully petitioned the Supreme Court to review the case.

Cato and I have filed this amicus brief explaining that the the power to make laws that “shall be necessary and proper” must be linked to an enumerated power, which this law is not. As Ilya puts it:

While the government justifies its actions by invoking its implied power “to establish a federal penal system” — itself a necessary and proper auxiliary to certain enumerated powers — civil commitment is unrelated to creating or maintaining a penal system (let alone any enumerated power). Nor can the law at issue fall under

the Commerce Clause, because civil commitment involves non-economic intrastate activity.

This seems elementary given the text (see above), but it would be a small step towards Restoring the Lost Constitution (now just \$13.93!) for the Supreme Court to so rule. The case also provides an opportunity for the Court to inch away from its decision in *Raich*.

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