Why Didn't the Federal Government Even Try to Argue the Commerce Clause in its Supreme Court Brief in United States v. Comstock?

Ilya Somin • October 28, 2009 3:07 am

I am currently in the process of drafting an amicus brief in the Supreme Court case of *United States v. Comstock*, on behalf of the Cato Institute and co-blogger Randy Barnett. As longtime VC readers can probably guess, we will be arguing that Article I of the Constitution does *not* give Congress power to retain custody of "sexually dangerous" persons held in federal prisons after their term of imprisonment ends.

I was extremely surprised to learn that, in her Supreme Court Petitioner's brief for the federal government, Solicitor General Elena Kagan, is *not* arguing that Congress has the power to enact this law under its power to regulate interstate commerce. Instead, she is arguing only that Congress has the power to hold the "sexually dangerous" former convicts under its power to operate a federal prison system and the Necessary and Proper Clause This, despite the fact that existing Supreme Court precedent lends considerable support to a Commerce Clause argument. And of course the Fourth Circuit considered the Commerce Clause issue when it ruled against the government in the decision that led the Supremes to take the case.

Why would the Solicitor General choose to forego a potentially winning argument? One possibility is that she simply doesn't think that it is likely to win. But even if she is uncertain about the prospects, why not at least try? After all, nothing prevents the United States from making both the Commerce Clause and Necessary and Proper Clause arguments. Another possibility is that either Kagan or one of her superiors in the Obama Administration secretly disagrees with the Supreme Court's most expansive Commerce Clause precedents, such as *Gonzales v. Raich*, and does not want to see them extended. I hope this is true, but it seems unlikely for any number of reasons. I highly doubt that either Kagan or other high-ranking members of the Obama Justice Department disagree with the near-universal consensus among liberal jurists and legal scholars in favor of virtually unlimited congressional Commerce Clause authority.

The last possibility that occurs to me is that the administration not only expects the Commerce Clause argument to lose but fears that if that happens, it will create an unfavorable precedent for the federal government in future cases; even if the feds manage to win *Comstock* itself on the narrower penal system argument, that theory

would not apply to other matters that the feds might seek to regulate under the Commerce Clause. As a result, the SG be willing to forego a (small) chance of winning the case on the Commerce Clause in exchange for increasing the likelihood that the Court might avoid the Commerce Clause issue entirely in making its ruling. If this conjecture is correct, it suggests that Kagan and the administration believe that the justices are more willing to cut back on *Raich* than I fear might be the case. If that really is the reason for the government's posture in *Comstock*, I would be very happy. Kagan and her staff surely have a lot more inside information about the justices' views than I do.

Of course, it's always possible that they have some other reason entirely for omitting the Commerce Clause. There are a lot of outstanding appellate lawyers in the solicitor general's office, and one of them could have come up with some clever tactical reason for taking this approach that I simply haven't thought of.

NOTE: I should emphasize that the above speculations are solely my own conjectures and do not necessarily represent the views of the Cato Institute or Randy Barnett, or the other lawyers who are helping draft the brief.