The Adam Walsh Act: *Un*-Civil Commitment

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Introduction

Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("the Adam Walsh Act") with the aim of "protect[ing] children from sexual exploitation and violent crime."[1] Among other measures, the Act creates a National Sex Offender Registry,[2] establishes a post-conviction civil commitment scheme,[3] increases punishments for a variety of federal crimes against children,[4] and strengthens existing child pornography prohibitions.[5] The scope of this note is limited to an analysis of the commitment portion of the Act ("Commitment Provision"). This provision authorizes the federal government to civilly commit, in a federal facility, any "sexually dangerous" person "in the custody" of the Bureau of Prisons—even after that person has completed his entire prison sentence.[6]

Recently, the Supreme Court granted certiorari[7] on question of whether or not enactment of the Commitment Provision was within

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1. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, § 302, 120 Stat. 587, 620–22 (2006).

2. 42 U.S.C. § 16919 (2009).

3. 18 U.S.C. § 4248(a), (d) (2009).

4. 18 U.S.C. § 2241 (2009).

5. 18 U.S.C. § 1465 (2009).

6. 18 U.S.C. § 4248(a), (d) (2009).

7. United States v. Comstock, 551 F.3d 274 (4th Cir. 2009), *cert. granted*, 129 S.Ct. 2828 (U.S. June 22, 2009) (No. 08-1224).

Congress's authority.[8] This note will show that Congress lacked the authority to enact the Commitment Provision under either its enumerated or incontestable federal powers.[9]

The discussion will begin with an overview of the relevant Supreme Court precedents bearing on a constitutional determination of this kind. This note will show that a proper reading of these precedents demonstrates that the clause upon which the federal government most often defends its power to regulate this subject, the Commerce Clause,[10] is wholly inapplicable to an act like the Adam Walsh Act—legislation aimed at criminal law enforcement where States historically have been sovereign.

Next will be an evaluation of the current split between the Court of Appeals for the Fourth Circuit ("Fourth Circuit") and the Court of Appeals for the Eighth Circuit ("Eighth Circuit"). This note will show that only the Fourth Circuit, which held the Commitment Provision beyond congressional authority, performed an extensive analysis of the relevant Supreme Court precedents in reaching its holding. The Eighth Circuit, on the other hand, relied only on its own, distinguishable precedents. Thus the only Circuit court to analyze the constitutionality of the Commitment Provision under current Supreme Court jurisprudence has found it to be unconstitutional.

This note will show further that the Commitment Provision does not fit readily into the specific schemes where federal civil commitment has be found constitutional—namely in situations where it is used to prevent and prosecute federal crimes.

Finally, this note will show that the Commitment Provision does not satisfy the due process rationales for which the Supreme Court has found state-authorized civil commitment constitutional. The

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8. The Question Presented is:

> Whether Congress had the constitutional authority to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

Petition for Writ of Certiorari, *Comstock*, 129 S.Ct. 2828 (No. 08-1224).

9. The term "incontestable federal powers" as discussed in this note are the powers incident to the unquestioned power to prosecute acts that may validly be made crimes pursuant to the exercise of some enumerated power.

10. U.S. CONST. art. I, § 8, cl. 3.

structure of the Commitment Provision neither comports with the classic[11] rationale for lower proof burdens in state civil commitment schemes, nor does it provide for a probable cause hearing within a reasonable amount of time and the general practice is to keep prisoners locked for months beyond their release dates.

I. The Adam Walsh Act

The Adam Walsh Act was enacted in 2006.[12] A Senate sponsor described it as "the most comprehensive child crimes and protection bill in our Nation's history."[13] Section 4248 of the Act contains the Commitment Provision, which authorizes the federal government to initiate commitment proceedings with respect to any federal prisoner in the custody of the Bureau of Prisons ("the Bureau").[14] Under this provision, even prisoners who have never been previously charged with or convicted of a sex crime may be civilly committed *after completing* their entire prison sentence.[15]

To initiate civil commitment proceedings, the Bureau must certify the individual as a "sexually dangerous person."[16] The statute defines a "sexually dangerous person" as one who "has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others," and who suffers from a severe mental illness such that he would "have serious difficulty in refraining from sexually violent conduct or child molestation if released."[17] However, neither "sexually violent conduct" nor "child molestation" is defined by the statute. The Attorney General is not required to present any evidence or make any preliminary showing in the certification; he need only include an allegation of dangerousness to create an effective certification.[18] With this certification alone, the Bureau can automatically stay a person's release from prison for the

11. *See infra* section V.B.

12. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

13. 152 CONG. REC. S8012-02 (daily ed. July 20, 2006) (statement of Sen. Hatch).

14. These individuals need not necessarily be prisoners; the Adam Walsh Act also applies to persons committed to the custody of the Attorney General based on incompetence to stand trial, and to persons against whom all criminal charges have been dismissed solely for reasons relating to their mental condition. 18 U.S.C. § 4241(d) (2009).

15. 18 U.S.C. § 4248(a), (d) (2009).

16. 18 U.S.C. § 4248(a) (2009).

17. 18 U.S.C. § 4247(a)(5)-(6) (2009).

18. 18 U.S.C. § 4248(a), (d) (2009).

duration of the civil commitment proceedings.[19] This stay is truly automatic. The Commitment Provision contains no requirement of a judicial probable cause hearing before or within a reasonable time after the Bureau's initial certification of dangerousness, even if the certification causes the prisoner to be detained beyond his scheduled dates of release.[20]

Once certified, an individual is entitled to a hearing on the fact of "sexual dangerousness," but again, there is no requirement that this occur within a reasonable amount of time and the court need only find "by clear and convincing evidence that the person is . . . sexually dangerous" to commit him.[21] If the government meets this burden, the individual is committed to the custody of the Attorney General for care and treatment until a state assumes responsibility, or until "the person's condition is such that he is no longer sexually dangerous to others" or will not be sexually dangerous to others if released under an appropriate regimen of treatment.[22] In other words, unless some state assumes responsibility, the statute authorizes federal confinement for as long as the person remains "sexually dangerous."[23] The decision as to whether or not the person continues to pose a threat is left with the director of the facility in which they are committed.[24] If the director determines the prisoner no longer poses a threat, he must file a certificate to that effect with the court that ordered the commitment.[25] At this point, it is the burden of the accused party to prove by clear and convincing evidence that they are cured.[26] If the prisoner meets this burden, only then will the court order them discharged, on condition of medication if necessary.[27]

19. 18 U.S.C. § 4248(a) (2009).

20. *See* United States v. Shields, 522 F. Supp. 2d 317, 336 (D. Mass. 2007).

21. 18 U.S.C. § 4248(d) (2009). The burden of proof in criminal proceedings is "beyond a reasonable doubt," and although most civil commitment schemes use the clear and "convincing standard," the rationales for this lower burden are not applicable in the case of the Commitment Provision. *See infra* section V.B.

22. 18 U.S.C. § 4248(d)(2) (2009).

23. *Id.*

24. 18 U.S.C. § 4248(e) (2009).

25. *Id.*

26. *Id.*

27. *Id.*

II. Congress Does Not Have the Authority To Enact the Commitment Provision Under Its Enumerated Federal Powers

Congress exceeded the scope of its federal power when it enacted the Commitment Provision. The Constitution creates a federal government of certain enumerated powers[28]—"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[29] As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[30] Thus, in order for any act to be constitutional, Congress's authority to enact it must come from some incontestable or enumerated federal power.

A. Congress Does Not Have Authority To Enact The Commitment Provision Under The Necessary and Proper Clause

In enacting the Commitment Provision, Congress created a law that on its face purports to regulate conduct not within the ambit of its enumerated powers. Congress appears to base its authority to enact this statute largely on the Necessary and Proper Clause, but it did not lay this out explicitly anywhere in the legislation.[31] Even if Congress had been explicit in this assertion, the Necessary and Proper Clause does not intrinsically provide for congressional authority to enact legislation.[32] The Necessary and Proper Clause simply authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by [the] Constitution in the Government of the United States."[33] That is, the Clause by itself creates no constitutional powers;[34] it merely allows Congress to enact legislation auxiliary to an enumerated or incontestable federal power.[35] Thus, for enactment of the Adam

28. U.S. CONST. art. I, § 8.

29. U.S. CONST. amend. X.

30. ALEXANDER HAMILTON, JOHN JAY & JAMES MADISON, THE FEDERALIST PAPERS 292-93 (Clinton Rossiter ed., Penguin 1961) (1788).

31. U.S. CONST. art. I, § 8, cl. 18. *See* United States v. Comstock, 551 F.3d 274 (4th Cir. 2009); United States v. Tom, 558 F. Supp. 2d 931 (D. Minn. 2008), *rev'd*, 565 F.3d 497 (8th Cir. 2009).

32. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960).

33. U.S. CONST. art. I § 8, cl. 18.

34. *Id.*

35. Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007).

Walsh Act to be within congressional power, it must be a necessary and proper means to achieve ends within Congress's *existing* enumerated or incontestable federal powers.[36]

B. Congress Does Not Have Authority To Enact The Commitment Provision under The Commerce Clause

In the cases where the constitutionality of the Commitment Provision has been challenged, the government most often defends its federal power over this matter on the ground that enactment of the Commitment Provision is within its Commerce Clause authority.[37] Nothing in the Commitment Provision, however, lends itself to such a justification. The Commerce Clause of Article I, Section 8 gives Congress the "power "[t]o regulate Commerce with foreign Nations, and among the several States."[38] The Commitment Provision is in no way directed at commerce regulation or any economic activity for that matter. It is simply a "civil remedy" aimed at protecting the public from sexual dangerousness and is therefore not the type of legislation typical of Commerce Clause justification.[39]

There are several Supreme Court cases analyzing the scope of congressional authority to enact these non-economic, criminal statutes. Through its decisions in *United States v. Lopez*,[40] *United States v. Morrison*,[41] and *Gonzales v. Raich*,[42] the Supreme Court has laid out the factors that must be considered in a determination of whether a law such as the Commitment Provision falls within the Congress's Commerce Clause authority: (1) Are there specific congressional findings as to whether the subject of the statute substantially affects interstate commerce?[43]; (2) Is the language of the statute of a non-economic, criminal nature and therefore of the type

36. Sabri v. United States, 541 U.S. 600, 605 (2004).

37. *See* United States v. Comstock, 551 F.3d 274 (4th Cir. 2009); United States v. Tom, 558 F. Supp. 2d 931 (D. Minn. 2008), *rev'd*, 565 F.3d 497 (8th Cir. 2009); United States v. Comstock, 507 F. Supp. 2d 522, 540 (E.D.N.C. 2007); United States v. Abregana, 574 F. Supp. 2d 1123, 1133–34 (D. Haw. 2008); United States v. Dowell, No. CIV-06-1216-D, 2007 WL 5361304, at 7 (W.D. Okla. Dec. 5, 2007); United States v. Shields, 522 F. Supp. 2d 317, 328 (D. Mass. 2007); United States v. Carta, 503 F. Supp. 2d 405, 407–08 (D. Mass. 2007).

38. U.S. CONST. art. I § 8, cl. 3.

39. *See generally* 18 U.S.C. § 4248 (2009).

40. United States v. Lopez, 514 U.S. 549 (1995).

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

42. Gonzales v. Raich, 545 U.S. 1 (2005).

43. *Id.*

that the Court has identified as being a province of the states?[44]; (3) Is this something the states usually regulate?[45]; and (4) Does the statute include a jurisdictional element to ensure its application only to situations involving interstate commerce?[46]

In *Lopez*,[47] the Court analyzed whether Congress had the authority under the Commerce Clause to enact the Gun-Free School Zones Act of 1990 ("Gun-Free Act").[48] The Gun-Free Act made it a federal offense for an individual to knowingly possess a firearm in a school zone.[49] In that case, a twelfth-grade student was arrested for possessing a concealed handgun and bullets at his San Antonio high school.[50] The government argued that the "possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy" for two reasons[51]: first, because "the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population"[52]; and second, because "violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe." [53] The Government also argued "that the presence of guns in schools pose[d] a substantial threat to the educational process by threatening the learning environment." [54] The Court found these arguments unpersuasive and held that the Gun-Free Act was a "criminal statute that by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise" and thus did not come within Congress's Commerce Clause Authority.[55] The Court found pivotal to this determination that the Gun-Free Act contained no jurisdictional element to ensure, through case-by-case inquiry, that the firearm possession in question had the requisite nexus with interstate commerce.[56] The Court

44. *Id*
45. *Id.*
46. *Id.*
47. United States v. Lopez, 514 U.S. 549 (1995).
48. 18 U.S.C. § 922(q)(1)(I) (2009).
49. 18 U.S.C. § 922(q)(2)(A) (2009).
50. *Lopez*, 514 U.S. at 551.
51. *Id.* at 563.
52. *Id.* at 563–64.
53. *Id.* at 564.
54. *Id.*
55. *Id.* at 561.
56. *Id.*

explained that without some sort of jurisdictional nexus, the Government's arguments would stretch the federal authority to almost endless breadth.[57]

> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of [the Gun-Free Act], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[58]

Another aspect of the Gun-Free Act which the *Lopez* Court found problematic was that "[n]either the [Gun-Free Act] nor its legislative history contain[ed] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." [59]

The *Lopez* Court concluded by holding that Congress may "regulate the use and channels of commerce" ; it "may regulate and protect the instrumentalities of commerce, or persons or things in interstate commerce" ; and it "may regulate those things having a substantial relation to interstate commerce." [60] The Court found that because the Gun-Free Act contained no jurisdictional element linking its authority to interstate commerce and the Act's legislative history shed no light on a valid regulatory purpose, the Gun-Free Act involved neither the channels nor the instrumentalities of interstate commerce and did not regulate something that substantially affected

57. *Id.* at 563.

58. *Id.* at 564 (internal citations omitted).

59. *Id.* at 562.

60. *Id.* at 558–59.

interstate commerce.[61] Thus, it held the Act was beyond Congress's regulatory reach under the Commerce Clause.[62]

Applying the analytical framework of *Lopez* to the Commitment Provision, one comes to a similar conclusion. Like the Gun-Free Act at issue in *Lopez*, the Commitment Provision contains no jurisdictional element assuring that civil commitment of "sexually dangerous" persons has some nexus with interstate commerce. The statute, by its terms has nothing to do with commerce or any sort of economic enterprise; it is simply a civil remedy aimed at sexual dangerousness. Neither does the Commitment Provision have any congressional findings as to whether or not civil commitment of sexually dangerous persons substantially affects interstate commerce. By its terms, the Commitment Provision makes no attempt to relate its regulatory authority to commerce or any other sort of economic enterprise. Thus, according to *Lopez*, it seems apparent that the subject which the federal government aims to control through the Commitment Provision, i.e., sexual dangerousness, concerns neither the channels of commerce nor the instrumentalities of commerce. The only real question is whether its provisions are somehow "substantially related" to interstate commerce such that Congress has the power to enact this legislation.

The Supreme Court's decision in *United States v. Morrison* makes clear that the Commitment Provision is in no way "substantially related" to interstate commerce. In *Morrison*, the Supreme Court analyzed whether Congress had the power to enact the Violence Against Women Act[63] ("VAWA"), which provided a federal civil remedy to the victims of gender-motivated violence.[64] The government argued that this law came within Commerce Clause authority because "Congress may regulate *noneconomic*, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[65] The Court rejected this argument, stating that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."[66] The Court explained that the government's argument which

61. *Id.* at 562–64.

62. *Id.*

63. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796, 1799–1800 (1994).

64. United States v. Morrison, 529 U.S. 598 (2000) (emphasis added).

65. *Id.* at 617.

66. *Id.* at 610.

"seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce" [67] could not be upheld.

> The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[68]

After the Court rejected the notion that Congress had the authority to enact legislation directed at intrastate violence when that violence was not directed at interstate commerce, the Court moved to an analysis of whether or not the conduct regulated by the VAWA substantially affected interstate commerce. The Court explained that it is "[w]here *economic* activity substantially affects interstate commerce, [that] legislation regulating that activity will be sustained."[69] The Court held that the conduct which the VAWA attempts to regulate did not substantially affect interstate commerce because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." [70] The Court came to this conclusion despite the fact that the VAWA, in contrast to the Gun-Free Act in *Lopez* and the Commitment Provision here, was supported by numerous congressional findings regarding the serious impact that gender-motivated violence has on victims and their families.[71]

Like the VAWA, the Commitment Provision regulates neither the channels nor the instrumentalities of commerce. It is a civil remedy aimed at sexual dangerousness, which is no more an economic activity than the gender-motivated violence targeted by the

67. *Id.* at 615.

68. *Id.* at 617–18 (internal citations omitted).

69. *Id.* (emphasis added).

70. *Id.*

71. *Id.* at 614 (citing H.R. CONF. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 40 (1993); S. REP. NO. 101-545, at 33 (1990)).

VAWA. A "costs of crime" justification cannot be made because *Morrison* shows that the Supreme Court has explicitly rejected the aggregation principle when a law regulates non-economic violent criminal conduct.

The Supreme Court's most recent Commerce Clause opinion, *Gonzales v. Raich*,[72] does not alter the core holding in *Morrison* that Congress lacks authority to regulate non-economic sexual violence. In *Raich*, the Court sustained the drug prohibitions of the Controlled Substances Act ("CSA") as applied to the intrastate cultivation and use of medical marijuana.[73] Relying on the rationale of *Wickard v. Filburn*,[74] the Court reasoned that Congress could regulate this purely local activity as part of regulating "an economic class of activities that have a substantial effect on interstate commerce."[75] In other words, the *Raich* court held that Congress can regulate a non-economic, intrastate activity only when such regulation is necessary and proper to the success of an otherwise valid comprehensive scheme aimed at regulating interstate economic activity. In contrast to the CSA, the Commitment Provision is aimed at non-economic, intrastate activity and "constitutes no part of a 'comprehensive' legislative scheme . . . target[ing] interstate markets."[76] Thus following the *Lopez-Morrison-Raich* framework, the Commitment Provision does not substantially affect interstate commerce.

III. A Closer Look at The Current Circuit Split

Two circuit courts have addressed the issue of whether the Commitment Provision comes within Congress's Commerce Clause authority. In *United States v. Comstock*, the Fourth Circuit found that the Commitment Provision lay outside the Commerce Clause power.[77] The court came to this conclusion only after a thorough analysis of the *Lopez-Morrison* precedents. In contrast, the Eighth Circuit found the Commitment Provision to be within Congress's legislative authority under both the Commerce and Necessary and Proper Clauses in *United States v. Tom*.[78] However, it came to its conclusion

72. Gonzales v. Raich, 545 U.S. 1 (2005).

73. *Id.* at 13, 32–33.

74. Wickard v. Filburn, 317 U.S. 111 (1942).

75. *Raich*, 545 U.S. at 17 (internal quotations omitted).

76. United States v. Comstock, 551 F.3d 274, 280 n.6 (4th Cir. 2009).

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

78. United States v. Tom, 565 F.3d 497, 502–03 (8th Cir. 2009).

by relying on its own distinguishable precedents and performed no meaningful analysis of the applicable Supreme Court cases.

A. The Fourth Circuit Finds the Commitment Provision Unconstitutional Based on an Analysis of Current Supreme Court Precedents.

In *Comstock*, the government argued that the federal government had the authority to enact the Commitment Provision under its Commerce Clause powers. The Fourth Circuit found this argument unpersuasive and held that the Commitment Provision was beyond Congress's Commerce Clause authority because it targeted neither "the channels of interstate commerce . . . [n]or persons and things in interstate commerce" and "[l]ike the statutes at issue in *Lopez* and *Morrison*, . . . [it] contain[ed] no jurisdictional requirement limiting its application to commercial or interstate activities."[79] As to whether the Commitment Provision regulates something which "substantially affects" interstate commerce, the Fourth Circuit found that "*Morrison* forecloses any such argument."[80] The court explained that, like VAWA, the Commitment Provision merely "provides a civil remedy aimed at the prevention of noneconomic sexual violence" and that the *Morrison* Court's rationale for rejecting Commerce Clause authority applied equally to the case of the Commitment Provision:

> The regulation and punishment of intrastate violence . . . has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.[81]

The court noted further that the target of the Commitment Provision (sexual dangerousness), like the target of the *Morrison* statute (gender-motivated violence), was "not, in any sense of the phrase, economic activity."[82] "Like the gender-motivated violence banned in *Morrison*, sexual dangerousness does not substantially

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

80. *Id.*

81. *Id.* at 279–80 (quoting United States v. Morrison, 529 U.S. 598, 618–19 (2000)) (internal quotation marks omitted).

82. *Comstock*, 551 F.3d at 280.

affect interstate commerce."[83] Indeed, unlike *Morrison*, the Commitment Provision contains no legislative findings to the contrary. The Fourth Circuit concluded that "Supreme Court precedent thus compels the conclusion that [the Commitment Provision] does not constitute a valid exercise of Congress's Commerce Clause power."[84]

B. The Eighth Circuit Finds the Commitment Provision Constitutional Based Only on Its Own Precedents.

In contrast to the Fourth's Circuit's holding in *Comstock,* the Eight Circuit found the Commitment Provision to be within Congress's legislative authority under both the Commerce and Necessary and Proper Clauses in *United States v. Tom.*[85] The Eighth Circuit came to this conclusion, however, by relying upon its own precedents, while inexplicably failing to analyze the Commitment Provision under *Lopez* and *Morrison.*[86] After laying out the *Lopez* categories as the proper framework in which to analyze the Commitment Provision,[87] the court, without explanation, stops short and launches into an analysis based on its own precedent in *United States v. May.*[88] Yet *May* involves an analysis of a wholly distinguishable provision of the Adam Walsh Act, the Sex Offender Registration and Notification Act ("SORNA"), which criminalizes the failure to register as a sex offender.[89] The *May* court found that SORNA did not violate the Commerce Clause because by its terms, it "requires the government to prove [the individual] traveled in interstate or foreign commerce" thereby creating a sufficient jurisdictional nexus between the aims of the statute and the federal power to regulate interstate commerce.[90] The statute "thus derives its authority from each prong of *Lopez*—and most specifically, the

83. *Id.*

84. *Id.*

85. United States v. Tom, 565 F.3d 497, 502–03 (8th Cir. 2009).

86. *Id.*

87. *Id.* at 502 ("In *Lopez* the Supreme Court identified three broad categories of activity that Congress may regulate through the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." United States v. Lopez, 514 U.S. 549, 558 (1995) (internal quotations omitted)).

88. *Id.* at 502.

89. United States v. May, 535 F.3d 912, 921 (8th Cir. 2008).

90. *Tom*, 565 F.3d at 502 (quoting *May*, 535 F.3d at 921).

ability to regulate 'persons or things in interstate commerce' and 'the use of the channels of interstate commerce.'"[91] In contrast to SORNA, the Commitment Provision contains no requirement that the prisoner have moved though interstate commerce and, as a prisoner must be in federal custody to be certified, it is not readily apparent how it would be possible for the prisoner to travel at all.

To address this logical flaw, the Eight Circuit points to another one of its decisions, *United States v. Howell*,[92] where it concluded that SORNA's registration requirement was valid even when applied to sex offenders who never crossed state lines.[93] The court only came to this conclusion in *Howell*, however, because it found that SORNA's registration requirements "furthered a legitimate end under the commerce clause[sic]—the tracking of the interstate movement of sex offenders."[94] The court based this determination on the fact that "SORNA's registration requirements [were] reasonably adapted to the legitimate end of regulating persons or things in interstate commerce and the use of the channels of interstate commerce."[95] Unlike SORNA, the Commitment Provision is not reasonably adapted to the legitimate end of regulating persons in Commerce—prisoners subject to the Commitment Provision are already in the custody and control of the federal government, and there is no jurisdictional requirement creating a proper nexus between "sexual violence" and interstate commerce. Thus, the Provision does not further any apparent, legitimate federal interest.[96] The reason that SORNA falls within the scope of the Commerce Clause—that it aims to regulate movement of people through commerce—is simply not applicable to the Commitment Provision, a civil remedy aimed at sexual dangerousness.

Despite this glaring distinction, the *Tom* court held that "like . . . SORNA, . . . [the Commitment Provision] [wa]s a rational and appropriate means to effectuate legislation authorized by the Constitution."[97] This holding presumes the proposition which it is

91. *Id.*

92. United States v. Howell, 552 F.3d 709, 717 (8th Cir. 2009).

93. *See Tom*, 565 F.3d at 503.

94. *Id.* (quoting *Howell*, 552 F.3d at 715–16).

95. *Id.* (quoting *Howell*, 552 F.3d at 717).

96. The Eighth Circuit does go into a discussion of *Greenwood v. United States*, 219 F.2d 376 (1955), and the power to prosecute federal crimes; however, as section III.B of this note will show, that is not applicable here.

97. *Tom*, 565 F.3d at 504.

meant to prove: that the legislation is authorized by the Constitution. One can follow the *Howell-May* argument that (1) SORNA is constitutional because it is legislation authorized by the Constitution; and (2) that the legislation is authorized by the Constitution according to the reasoning in *Lopez* and *Morrison* because it is aimed at regulating movement of persons through commerce. However, the *Tom* court's inferential leap in applying this SORNA precedent to the Commitment Provision is untenable. The Commitment Provision is not aimed at regulating the movement of persons through commerce; thus, it is not authorized by the Commerce Clause and therefore is not constitutional.

It is worth mentioning that the district court in *Tom* relied on *Morrison* and *Lopez* when it found the Commitment Provision unconstitutional.[98] The district court held that Congress exceeded its Commerce Clause authority by enacting the Commitment Provision because the statute was "unrelated to economics but rather aim[ed] to regulate and prevent noneconomic criminal conduct that traditionally has been the province of the States [sic]."[99] Furthermore, the district court rejected the argument that the Commitment Provision was "'necessary and proper' for effectuating a constitutionally vested power."[100] The district court's holdings and reasoning thus closely parallel the Fourth Circuit's reasoning in *Comstock*. Yet, upon being presented with the district court's opinion, the Eighth Circuit chose to follow its own distinguishable precedent without analyzing either the holding of the lower court or the holding of the only other circuit court to have heard the issue.

The Eighth Circuit's reasoning is not persuasive—the Commitment Provision does not involve the instrumentalities or channels of commerce, nor does it substantially affect interstate commerce. Therefore, according to Supreme Court precedents of *Lopez* and *Morrison*, it does not come within the scope of Congress's Commerce Clause power. Because the Necessary and Proper Clause does not create any independent authority, the Commitment Provision is thus void unless it is the necessary and proper exercise of

98. United States v. Tom, 558 F. Supp. 2d 931, 935 (D. Minn. 2008), *rev'd*, 565 F.3d 497 (8th Cir. 2009).

99. *Id.* at 937.

100. *Id.* at 938.

some incontestable federal power not explicitly enumerated within the Constitution.[101]

IV. Congress Does Not Have the Authority To Enact the Commitment Provision Under Its Incontestable Federal Powers

This note has shown that enactment of the Commitment Provision was not within Congress's explicitly enumerated powers. The next pertinent inquiry is whether or not it had the authority under some other incontestable federal power.[102] For this analysis, it is instructive to look to federal civil commitment schemes that have been held constitutional as necessary and proper exercises of congressional authority, despite the fact that they were not supported by any enumerated power.

A. The Power To Prevent Federal Crimes

The Supreme Court has allowed civil commitment in the federal context based on the power to prosecute in limited circumstances. In order to fit within the framework laid out by the relevant case law, an act's commitment scheme must be narrowly tailored to address a specific federal crime which was created to protect a particularly federal interest.[103]

One such commitment scheme was established by the Bail Reform Act of 1984 ("BRA").[104] Under the BRA, a federal court may detain an arrestee pending trial if the government demonstrates by clear and convincing evidence that no release conditions "will reasonably assure . . . the safety of any other person and the community."[105] In *United States v. Perry*,[106] the Court of Appeals for the Third Circuit ("Third Circuit") explained that although the language "safety of the community" appears unqualified, this portion of the BRA only comes into play after "a finding by a judicial officer

101. *See generally* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

102. In certain circumstances, "because Congress has the power to proscribe the activities in question, it has the auxiliary authority, under the necessary and proper clause, to resort to civil commitment to prevent their occurrence." United States v. Perry, 788 F.2d 100, 111 (3d Cir. 1986).

103. *See* United States v. Salerno, 481 U.S. 739 (1987); United States v. Salerno, 481 U.S. 739 (1987); United States v. Perry, 788 F.2d 100 (3d Cir. 1986).

104. Bail Reform Act of 1984, 18 U.S.C. §§ 3141 *et seq.* (1982 ed., Supp. III).

105. 18 U.S.C. § 3142(c)(2)(B) (2009).

106. United States v. Perry, 788 F.2d 100 (3d Cir. 1986).

of probable cause to believe the defendant committed certain serious violations of the Controlled Substances Act."[107] Thus the Third Circuit found that the BRA's civil commitment provision was necessary and proper to prevent the future commission of specifically enumerated federal crimes. The *Perry* court stressed that the BRA was written in such a way as to regulate "only danger to the community from the likelihood that the defendant will, if released, commit one of the proscribed federal offenses."[108] Thus, the *Perry* court found the BRA contained a clear connection between the pretrial detentions and the government's interest in preventing a future federal crime.[109] This connection is of course critical, since the federal government, unlike the states, has no power to legislate for its citizens' general welfare. In *United States v. Salerno*,[110] the Supreme Court upheld the constitutionality of the BRA, emphasizing its "narro[w] focus on a particularly acute problem in which the Government interests are overwhelming .... The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses."[111]

The Adam Walsh Act on the other hand, does not purport to limit itself to jurisdiction of prisoners that are likely to commit specifically federal crimes. Rather it applies to any and all federal prisoners who are certified as "sexually dangerous." In *Comstock*, the government argued that the Commitment Provision constituted a necessary and proper exercise of its power to prevent "sex-related crimes."[112] However, "the federal government simply has no power to broadly regulate all sex-related crimes, as [the Commitment Provision] purports to do."[113] As the Fourth Circuit explained, "federal statutes regulating sex crimes are limited in number and breadth, specifically requiring a connection to interstate commerce, or limiting their scope to the territorial jurisdiction of the United States."[114] In contrast, the Commitment Provision "targets 'sexual dangerousness' generally, without any requirement that this undefined danger relate to conduct that the federal government may

107. *Id.* at 110.
108. *Id.* at 111.
109. *Id.* at 110.
110. United States v. Salerno, 481 U.S. 739 (1987).
111. *Id.* at 750 (citing 18 U.S.C. § 3142(f) (2009).
112. United States v. Comstock, 551 F.3d 274, 282 (4th Cir. 2009).
113. *Id.*
114. *Id.*

constitutionally regulate."[115] The Provision refers to no specific federal crime at which it is aimed and thus creates no nexus between the crimes it attempts to prevent and an established federal power. The definition of "sexually dangerous" in the Commitment Provision thus "sweeps far too broadly to be a valid effort to prevent federal criminal activity."[116] Furthermore, most crimes of sexual violence are punishable solely under state law, and thus, the commitments effected under the Adam Walsh Act will most often be directed at conduct prohibited only by state law.[117] For these reasons, the rationale found in *Perry* and *Salerno*—that Congress had the power to enact the BRA as a necessary and proper means to effectuate their power to create federal crimes—does not bring the enactment of the Commitment Provision within Congress's federal powers.

B. The Power To Prosecute Federal Crimes

The Supreme Court has found several federal civil commitment schemes constitutional under the federal power to prosecute federal crimes, but only in very limited circumstances, none of which apply here. The *Tom* court cited the Supreme Court case *Greenwood v. United States* in support of its finding that the Commitment Provision is a necessary and proper exercise of the federal power to prosecute federal crimes.[118] The holding in *Greenwood*, however, is limited to the circumstances of that case and inapplicable in the context of the Adam Walsh Act.

In *Greenwood*, the Supreme Court addressed the constitutionality of a federal civil commitment statute allowing for the commitment of mentally ill persons unable to stand trial.[119] The Court upheld the statute as a necessary and proper exercise of the federal

115. *Id.*

116. *Id.*

117. In 2004, states had in their custody approximately 153,800 prisoners convicted of rape or other sexual assault. *See* William J. Sabol et al., *Prisoners in 2006*, U.S. DEP'T OF JUSTICE 8, table 8 (Dec. 2007), http://www.ojp.gov/bjs/pub/pdf/p06.pdf. This number is approximately equal to the total number of persons in federal prison for any crime. *See id.* at 2, table 1 (indicating approximately 188,000 total federal inmates in 2005). Those convicted of sexual crimes constitute a very small percentage of the federal total. *See* Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, U.S. DEP'T OF JUSTICE 62, table 4.2 (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs03.pdf (indicating that federal convictions for violent sexual offenses, "obscene material," and "non-violent sex offenses," together constituted less than 2 percent of all federal convictions).

118. United States v. Tom 558 F. Supp. 2d. 931, 938–39 (D. Minn. 2008).

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

power to prosecute, but specifically noted that this was only because the power to prosecute had not yet expired.[120] Justice Frankfurter wrote:

> The power that put [the accused] into such custody—the power to prosecute for federal offenses—is not exhausted. Its assertion in the form of the pending indictment persists. . . . This commitment, and therefore the legislation authorizing commitment in the context of this case, involve an assertion of authority, duly guarded, auxiliary to incontestable national power. As such it is plainly within congressional power under the Necessary and Proper Clause.[121]

Unlike the statute at issue in *Greenwood*, the Adam Walsh Act's Commitment Provision is not written in such a way as to apply only to those individuals for whom a trial is pending.[122] Rather, it applies most often to those in federal custody who have already stood trial and thus for whom the power to prosecute has already expired. In such a circumstance, no authority auxiliary to the incontestable federal power to prosecute remains and therefore the Commitment Provision cannot be a necessary and proper exercise of Congress's power to prosecute.[123] The Fourth Circuit said as much in *Comstock* where it found that:

> *Greenwood* only approved the federal civil commitment of persons who had been charged with federal crimes but found incompetent to stand trial, and for whom no state would take custody. *Greenwood* certainly did not approve the federal civil commitment of persons . . . who have stood trial, been convicted, and fully served all federal prison sentences. Accordingly, because no federal prosecution has been

120. *Id.* at 375.

121. *Id.*

122. The language of the Act says that it applies to persons in federal custody. 18 U.S.C. § 4248(a), (d) (2009). Thus, it is possible that at times it could be applied to persons in federal custody awaiting trial. As of this writing, all cases addressing the constitutionality of the commitment involve prisoners serving federal criminal sentences. *See supra* note 35.

123. United States v. Perry, 788 F.2d 100, 110 (3d Cir. 1986) ("What *Greenwood* teaches, therefore, is that the federal government may resort to civil commitment when such commitment is necessary and proper to the exercise of some specific federal authority. Congress may not, however, authorize commitment simply to protect the general welfare of the community at large.").

> frustrated here, we cannot sustain [the Commitment Provision] under *Greenwood*.[124]

The *Tom* court's holding that the Commitment Provision comes within the federal power to prosecute is thus incorrect, and the its reliance on *Greenwood* is improper.

V. Even if the Commitment Provision Is a Necessary and Proper Exercise of Some Federal Power, It Is Externally Limited By the Due Process Clause

A. A Federal Civil Commitment Scheme Cannot Satisfy Due Process Under the Same Rationale As State Civil Commitment Statutes

A state has the authority, under its broad parens patriae powers, to legislate for the general good of its citizens.[125] Part of this historical parens patriae power even includes a duty to protect "persons under legal disabilities to act for themselves."[126] This power also gives states the authority to make laws to protect the community from the dangerous tendencies of its citizens who are mentally ill.[127] It is for these reasons that a state, in the exercise of its police powers, may confine individuals solely to protect society from the dangers of significant antisocial acts.[128] Unlike the states, the federal government has no general police or parens patriae power.[129] Thus, although "the federal government may resort to civil commitment when such commitment is necessary and proper to the exercise of some specific federal authority, Congress may not authorize commitment simply to protect the general welfare of the community at large."[130]

This distinction becomes important in an involuntary civil commitment proceeding where due process is satisfied by balancing an individual's interest in his or her liberty against well-recognized

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

125. 53 AM. JUR. 2D *Mentally Impaired Persons* § 7 (2009).

126. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972); *see also* The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56–58 (1889).

127. 53 AM. JUR. 2D *Mentally Impaired Persons* § 7 (2009).

128. O'Connor v. Donaldson, 422 U.S. 563, 582–83 (1975); *cf.* Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940); Jacobson v. Massachusetts, 197 U.S. 11, 25–29 (1905).

129. United States v. Lopez, 514 U.S. 549, 567 (1995).

130. United States v. Perry, 788 F.2d 100, 110–11 (3d Cir. 1986).

state interests.[131] With their parens patriae powers, states have not only the right, but also the duty to commit certain persons in order to ensure the safety of the accused as well as those in the community.[132] These rights and duties play a large part in tipping the due process balance of interests in favor of the states. A state's legitimate interests and authority in creating civil commitment schemes arise from two sources: "its police power to protect the community" at large and "its parens patriae power [to provide] care to its citizens who are unable to care for themselves because of their emotional disorders."[133] Because the federal government has no such rights or duties, a balance of interests will come out more favorably for the accused in the federal sphere.

The balance tips further toward the interests of the accused when one considers the double standard the Commitment Provision creates. States have a duty to protect their citizens and a duty to uphold the Constitution. Thus when faced with the dilemma of a dangerous person who cannot be tried because of mental incapacity, states face a serious conflict of duties which creates the need for the civil commitment procedure. However, in situations in which the Commitment Provision is asserted against federal prisoners, it is necessarily visited upon those who have already been found competent to stand trial.[134] It is a double standard to find these federal prisoners competent to stand trial in a criminal proceeding, let them serve their sentences, and then subject them to civil commitment proceedings upon release. This is especially true when these civil proceedings are historically allowed only as a last-ditch answer to an unsolvable problem particular to states—how to reconcile their duty to keep citizens safe with their duty to uphold constitutional due process. The Adam Walsh Act creates a civil commitment scheme despite a complete lack of this conflict in the federal sphere; prisoners subject to the Commitment Provision have

131. *See* AM. JUR. *supra* note 125.

132. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972); *see also* The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 56–58 (1889).

133. Addington v. Texas, 441 U.S. 418, 426 (1979).

134. *See* United States v. Comstock, 551 F.3d 274 (4th Cir. 2009); United States v. Tom, 558 F. Supp. 2d 931 (D. Minn. 2008), *rev'd*, 565 F.3d 497 (8th Cir. 2009); United States v. Abregana, 574 F. Supp. 2d 1123, 1133–34 (D. Haw. 2008); United States v. Comstock, 507 F. Supp. 2d 522, 540 (E.D.N.C. 2007); United States v. Dowell, No. CIV-06-1216-D, 2007 WL 5361304, at 7 (W.D. Okla. Dec. 5, 2007); United States v. Shields, 522 F. Supp. 2d 317, 328 (D. Mass. 2007); United States v. Carta, 503 F. Supp. 2d 405, 407–08 (D. Mass. 2007).

already been found capable to stand trial and the federal government has no broad parens patrie powers to legislate for the good of its people.

Because Congress has no general police powers—the powers upon which the constitutionality of state civil commitment schemes are predicated—it cannot create a federal civil commitment regime unless that regime is predicated upon some enumerated or incontestable federal power. As this note shows, enactment of the Commitment Provision was not within any federal power and thus its enactment violates Due Process.

B. The Commitment Provision's Process Does Not Comport with the Classic Rationale for Lower Proof Burdens in Civil Commitment Proceedings and Thus Violates Due Process

Generally, a person's liberty is only at stake in criminal proceedings where the burden of proof is the very high "beyond a reasonable doubt" standard. Civil commitment, on the other hand, requires only that the government prove by "clear and convincing" evidence that a person poses a threat to society. Still, a civil commitment is the taking of liberty and it is important to highlight the distinction, albeit a fine one, between penal incarceration aimed at retribution and civil commitment born out of necessity. Civil commitment is meant to protect the accused and/or the public from future conduct, while criminal incarceration is meant to punish past conduct. Civil commitment proceedings have a lower standard of proof than criminal proceedings, not because the end result, loss of liberty, is any less devastating in a civil commitment context, but rather because of the predictive nature of a civil commitment inquiry. Unlike a criminal inquiry, in which the finder of fact must divine the likelihood of past conduct, a civil commitment inquiry tasks the fact-finder with predicting the likelihood of the occurrence of a future event. When a court or jury must determine whether or not someone is "mentally ill," or "mentally incompetent," they are dealing with factors that "render certainties virtually beyond reach."[135] Even a jury packed with the likes of Nostradamus would be hard pressed to find the likelihood that a future event will occur to be "beyond a reasonable doubt" and the use of the clear and convincing standard in civil commitment hearings is to make the sometimes-necessary civil

135. *Id.*

commitment possible.[136] The Supreme Court has been explicit in explaining that the questions posed to a finder of fact in a civil commitment proceeding are substantially different from "straightforward factual question[s]" found in criminal proceedings.[137]

In order to make a determination of "sexual dangerousness" under the Commitment Provision, the finder of fact must decide two questions: (1) has there been some past conduct in which the person has "engaged or attempted to engage in sexually violent conduct or child molestation[?]"[138]; and (2) what is the likelihood the person will pose a "sexual [danger] to others" in the future?[139] The first of these prongs seems to be of the kind not likely to suffer the human infirmities inherent in the prediction of the future. It is merely a determination of a fact. This in and of itself makes it different from the civil commitment purpose, "which is premised on the prevention of future acts."[140] The clear and convincing standard, though justifiable when adjudicating in terms of the regular civil commitment scheme where certainties are impossible, is not appropriate in a case such as this, where at least part of the inquiry is whether some act happened in the past. When, rather than making an attempt to predict future dangerousness or to determine competence, part of the question is a straightforward factual question of a past act of the kind classically within the criminal realm, there is no justification for a lower proof standard. Therefore, the Commitment Provision's structure does not comport with the classic rationales for a lower proof burden in civil commitment proceedings and its lower burden violates due process.

136. *See* Addington v. Texas, 441 U.S. 418, 422 (1979).

137. *Id.* at 429–33.

138. 18 U.S.C. § 4247(a)(5) (2009) ("'[S]exually dangerous person' means a person who has engaged or attempted to engage in sexually violent conduct or child molestation . . . .").

139. *See id.* § 4247(a)(6) ("'[S]exually dangerous to others' with respect a person, means that the person suffers 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.").

140. New York v. United States, 505 U.S. 144, 155–57 (1992).

C. The Commitment Provision Violates Due Process Because It Makes No Provision for a Probable Cause Determination Within a Reasonable Amount of Time

A civil commitment is a seizure and may be made only with a showing of probable cause to a neutral magistrate.[141] However the statutory language of the Commitment Provision fails to provide for any probable cause determination by a neutral decision maker prior to the full-blown commitment proceeding. Rather, an individual certified under the Commitment Provision is automatically subject to detention past his scheduled date of release based solely on the submission of a certificate by the Attorney General, the Director of the Bureau, or their designee. Despite this, the Commitment Provision contains no provision for a judicial probable cause hearing before or within a reasonable time after the Bureau's initial certification of dangerousness, even if that certification causes the prisoner to be detained beyond his scheduled dates of release.[142] There is not even an evidentiary standard for the certificate.[143] Further, the certificate can be issued up until the moment that an individual is released from federal custody.[144] In fact, the general practice seems to be that the government certifies individuals very near their release dates and that these individuals spend months to years in prison between their scheduled release dates and the date of their hearings.[145] Thus, even if the Commitment Provision is found to be constitutional on its face, it does not satisfy due process as applied because it makes no requirement that the time between certification and the hearing be reasonable, and the government in fact has generally kept people incarcerated for months.

Conclusion

This note has shown that Congress lacked the authority to enact the Commitment Provision under either its enumerated or

141. Ahern v. O'Donnell, 109 F.3d 809, 815–16 (1st Cir. 1997); Villanova v. Abrams, 972 F.2d 792, 795 (7th Cir. 1992); *see also* Soldal v. Cook County, Ill., 506 U.S. 56, 69–71 (1992).

142. United States v. Shields, 522 F. Supp. 2d 317, 336 (D. Mass. 2007).

143. The proposed regulations allow certification only whenever there is "reasonable cause" to believe an individual is "sexually dangerous." *See* Civil Commitment of a Sexually Dangerous Person, 72 Fed. Reg. 43205 (proposed Aug. 3, 2007) (to be codified at 28 C.F.R. Part 549).

144. 18 U.S.C. § 4248(a) (2009).

145. *See generally* United States v. Lopez, 514 U.S. 549 (1995).

incontestable federal powers. The Provision itself does not give any guidance as to where Congress derives legislative authority over general sexual dangerousness and the clause upon which the federal government most often defends its power to regulate this subject, the Commerce Clause, is wholly inapplicable to this legislation, which is aimed at criminal law enforcement where States historically have been sovereign. Of the two circuit courts that have addressed this issue, the only one to have performed a thorough analysis of applicable Supreme Court precedents has found that the Commitment Provision does not fall within Congress's Commerce Clause authority. The civil commitment scheme contemplated by the Adam Walsh Act is not a proper exercise of Congress's power to prevent and prosecute federal crimes and fails to satisfy Due Process as well. More specifically, the structure of the Commitment Provision neither comports with the classic rationale for lower proof burdens in state civil commitment schemes nor does it provide for a probable cause hearing within a reasonable amount of time and the general practice is to keep prisoners locked for months beyond their release dates. For these reasons, the Commitment Provision of the Adam Walsh Act and Congress' enactment of it are unconstitutional.

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