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Subject: [Discussion] Sex Offender Commitment Ruled Unconstitutional

Sex-Offender Commitment Law Ruled Unconstitutional

Rich Daly

A federal appellate court rules that the section of the Adam Walsh Child Protection and Safety Act regarding prolonged federal civil commitment of sexual offenders is unconstitutional.

A federal appeals court has struck down a 2006 federal law that allows indefinite civil commitment of "sexually dangerous" inmates beyond the length of their prison terms.

The 4th U.S. Circuit Court of Appeals in Richmond ruled in January in the case *U.S. v. Comstock* that Congress intruded on powers reserved for the states through civil-commitment provisions it included in the Adam Walsh Child Protection and Safety Act of 2006 (PL 109-248). The ruling, which affirmed a lower court ruling in the case, was the first time a federal appeals court addressed the legality of the federal commitment law.

The ruling is binding only in Virginia, North Carolina, South Carolina, West Virginia, and Maryland.

The law allows the U.S. attorney general's office to obtain a stay prolonging federal detention of people convicted of certain sex-related offenses through a certification alleging sexual dangerousness.

The three-judge appeals panel noted that "no evidence or preliminary showing is required" as part of the preliminary certification of sexual dangerousness to automatically remand the inmate for indefinite detention in a federal prison hospital. The law allows a federal court to rule on the petition but the court can use only the standard of "clear and convincing evidence" instead of the higher bar of "beyond a reasonable doubt."

"The Constitution does not empower the federal government to confine a person solely because of asserted 'sexual dangerousness' when the government need not allege (let alone prove) that this 'dangerousness' violates any federal law," Judge Diana Gribbon Motz wrote in the unanimous opinion.

The law defines a "sexually dangerous person" as someone 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 to the extent that the person would "have serious difficulty in refraining from sexually violent conduct or child molestation if released."

The ruling noted that the law does not define either "sexually violent conduct" or "child molestation."

Motz wrote that the perceived need for a federal civil-commitment statute did not create the constitutional power for the government to create one, and Congress could seek alternative and constitutional means of achieving the possibly "commendable objectives" of civil commitment.

The ruling by the appeals court upheld much of the 2008 decision by U.S. District Judge W. Earl Britt of Raleigh, N.C., which was similar to a previous ruling by a federal district judge in Minnesota. The appeals court ruling, however, is at odds with the decisions of federal district courts in Hawaii, Oklahoma, and Massachusetts, which have upheld the commitment law.

Federal prosecutors may appeal the ruling to the U.S. Supreme Court or seek a rehearing before the full 4th U.S. Circuit Court of Appeals.

The ruling came on the appeals of five inmates convicted of receiving online child pornography, including Graydon Earl Comstock. All of the inmates have been kept in custody for at least two years beyond the end of their sentences in a North Carolina federal prison hospital.

The ruling is explicitly limited to the federal civil-commitment law and does not affect the legality of state civil-commitment measures. Motz said federal authorities were still free to contact state officials about potentially dangerous inmates about to be released, and state officials could then bring their own civil-commitment proceedings. The federal law specifically directs the U.S. attorney general to make "all reasonable efforts" to transfer responsibility for sexually dangerous offenders to an appropriate state authority at the conclusion of their federal sentences, but until a state assumes that responsibility, inmates are held in federal confinement for as long as they remain "sexually dangerous."

The ruling noted that the civil-commitment power is among the most "severe" wielded at any level of government.

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"The Framers, distrustful of such authority, reposed such broad powers in the states, limiting the national government to specific and enumerated powers," Motz wrote.

Also unaffected by the ruling are provisions of federal law that fund state civil-commitment programs. The Adam Walsh law authorizes \$10 million each year for state civil-commitment programs through Fiscal 2010.

By March 2007 20 states had enacted laws regarding civil commitment of sexual offenders. Such state laws have been upheld by the U.S. Supreme Court as constitutional in part because their aim is to ensure that inmates receive treatment, not be punished twice for the same crime. Despite this, only a small fraction of committed offenders have ever completed treatment to the point where they could be released without additional mandated oversight.

The federal appeals court ruling will have a limited impact because many such prisoners will simply be transferred to state control, said forensic psychiatrist Paul Appelbaum, M.D., a member of APA's Council on Psychiatry and Law, in an interview with *Psychiatric News*. The only individuals likely to be affected are people held on federal sex crime charges in states without civil-commitment statutes, he said.

APA's Committee on Persons With Mental Illness in the Criminal Justice System provided a written statement on the court ruling to *Psychiatric News* that described civil commitment for sexual offenders as "incarceration under the guise of treatment."

"The court ruled against indefinite commitment because it determined this to be a states' rights issue and not a power controlled by Congressional statute," said the committee statement. "However, in our opinion the legal tests defining 'sexual dangerousness,' 'severe mental illness,' and 'difficulty from refraining from future sexual violence or child molestation' are difficult to translate into psychiatric decision making."

The committee pointed out that the burden of a societal remedy for sexual violence should not rest with psychiatry. "By obliging psychiatrists to participate in the indefinite detention of individuals, their role as treating clinicians is transformed into that of a jailer," the committee statement said.

Instead, the committee's members suggested that the complex forensic issue of predicting sexually violent dangerousness is better handled through criminal-justice proceedings and sentencing rather than through the psychiatric civil-commitment process.

The ruling is posted at <http://pacer.ca4.uscourts.gov/opinion.pdf/077671.P.pdf>.

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