

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

NO. XXX

UNITED STATES OF AMERICA

v.

JOHN DOE

RESPONDENT’S REPLY TO  
GOVERNMENT’S CONSOLIDATED  
RESPONSE TO RESPONDENT’S FIRST  
AND SECOND MOTIONS TO DISMISS  
PETITION FOR 18 U.S.C. § 4248  
HEARING

**I. Congress Lacks The Constitutional Authority to Enact § 4248.**

As explained in detail in respondent’s first motion, Congress’ wholesale entry into the fields of mental health and preventative detention encroaches upon areas “where States historically have been sovereign” and, accordingly, exceeds Congress’ limited powers under the Constitution. *United States v. Lopez*, 514 U.S. 549, 564 (1995). In response, the government “resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause.” *Printz v. United States*, 521 U.S. 898, 923 (1997). For the reasons explained below, the government’s argument fails. The Necessary and Proper Clause derives its authority from other enumerated powers—not the other way around. Once the enumerated power has been fully executed (i.e., once the criminal prosecution has ended) the underlying federal authority connected to the Necessary and Proper Clause ceases. The government’s attempt to argue that the Necessary and Proper Clause extends the reach and power of criminal laws authorized by the Commerce Clause is meritless.

Section 4248 commitment proceedings do not involve a necessary or proper execution of a limited and specifically enumerated federal right. Instead, the government broadly asserts that Congress has the authority to criminalize certain behavior—presumably through the Commerce Clause—and then jumps to the conclusion that Congress must also have the power to prevent that behavior. Government’s Response at 10 (noting that “[w]here . . . Congress has the power to criminalize and punish [certain] conduct, . . . it has the ‘necessary and proper’ authority to prevent their imminent or likely commission by persons in federal custody”). This argument fails for several reasons.

A. *The Cases The Government Cites In Support of Its Position All Involve Much More Limited Invocations of the Necessary and Proper Clause.*

First, the cases that the government cites all involve very limited, logical, necessary, and proper expansions of undisputed and enumerated federal powers. *United States v. Plotts*, 347 F.3d 873 (10<sup>th</sup> Cir. 2003), held that the government has power over defendants on supervised release. Managing a system of supervised release, of course, simply inheres in the administration of a system of criminal justice. It operates, not as an *extension* of the federal government’s control, but simply as part of the government’s control established by the criminal sentence. In addition, supervised release is necessarily cabined by the specific criminal statute that resulted in the conviction.

*United States v. Blumberg*, 136 F.Supp. 269 (E.D. Pa. 1955), involved a defendant challenging his indictment for violating a specific national security law. Passing criminal laws involving national security undisputedly falls within Congress’ powers. Respondent’s first motion does not suggest that Congress does not have the power to criminalize behaviors that directly implicate a matter of paramount national importance.

The government's reliance on *United States v. Perry*, 788 F.2d 100 (3<sup>rd</sup> Cir. 1986), highlights the implausible extension of its necessary and proper argument. *Perry* involved a defendant on pre-trial release facing specific federal charges. Similar to the powers involved in *Plotts*, the powers involved in managing a system of pre-trial release simply inhere both in the management of a system of criminal justice and in government's undisputed power over the bodies of those who have been charged with a federal crime but not yet tried. In addition, the pre-trial release at issue in *Perry* was connected to a small number of specific statutes—not the whole universe of extant and possible federal criminal law.

Fundamentally, the government's attempt to rely on *Perry* fails because the government's power over Mr. Perry *did not derive* (as it must in the present case) from the Necessary and Proper Clause. This power derived from the underlying criminal charge for which Mr. Perry had yet to be punished. *See, e.g., Greenwood v. United States*, 350 U.S. 366, 375 (1956) (“The petitioner came legally into the custody of the United States. The power that put him into such custody—the power to prosecute for federal offenses—is not exhausted.”). In stark contrast, Congress' asserted power in a § 4248 proceeding derives, not from a specific, unexhausted federal offense, but from the vague idea that the petitioner might one day commit “sexually violent conduct.” *Perry* simply does not apply to this unprecedented expansion of federal power.<sup>1</sup>

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<sup>1</sup>The government argues that the pre-trial release in *Perry* simply involved concerns about community safety and not about trial management. This argument fails for several reasons. First, Congress' power to enact the Bail Reform Act is not limited to one single justification in one single case. It is almost axiomatic that a legislature has the power to administer bail as part of a system of criminal justice. Bail is necessary and proper to a system of criminal justice; it is almost ludicrous to conceive of a world in which a sovereign has the power to arrest and punish an individual for a crime, but no power over the individual in the

*Ponzi v. Fessenden*, 258 U.S. 253 (1922), involved the custody and transfer of inmates already lawfully in federal custody for having violated a specific federal crime. Again, nothing about *Ponzi* supports an expansion of federal power to incarcerate or commit defendants *beyond* the end of their criminal sentence. *Sabri v. United States*, 541 U.S. 600 (2004), involved a law criminalizing the bribery of officials of entities that receive federal funding. In other words, it involved nothing more than Congress’ power to control federal money. This power (which no Justice disputed belonged to Congress), is self-evident and inherent in the power to tax and spend. *United States v. Berrigan*, 482 F.2d 171 (3<sup>rd</sup> Cir. 1973), a thirty-four year old Third Circuit case cited by the government, did not even involve a challenge to Congress’ power to run federal prisons, but simply Congress’ power to delegate its power over federal prisons to prison wardens. Respondent does not dispute that Congress has the power to run federal prisons and to delegate that power when appropriate. Finally, *Westfall v. United States*, 274 U.S. 256 (1927), another unremarkable case, simply holds that Congress has the power to criminalize property offenses against banks that have entered into the federal banking system.

In stark contrast to this litany of cases the Adam Walsh Act (1) does not expressly invoke an enumerated federal power, (2) does not demonstrate how a certain statutory scheme necessarily derives from that power, and (3) does not further demonstrate how § 4248 commitments necessarily and properly work in support of that enumerated power. In fact, the Adam Walsh Act *does not even define* “sexually violent conduct or child molestation,” let alone tie it to an enumerated federal power. 18 U.S.C. § 4247(a)(5). None of the cases that the

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interim. That the Third Circuit jumped through superfluous and unnecessarily complex hoops in analyzing a bail statute twenty years ago simply does not apply to the present assertion of federal power unrelated to any criminal conviction.

government cites come close to blessing the unprecedented reach of authority that the government attempts to invoke here—preventative detention based on an undefined standard imposed because the individuals detained might violate some potential state or federal law in the future.

*B. Because He has Already Been Convicted and Served His Sentence, Respondent is Not, As in Cases Cited by the Government, Under the Unquestioned Authority of the Federal Government.*

In addition, Congress is not, as in *Perry* or *Greenwood*, managing the administration of individuals who have been charged but have yet to be tried. In those instances, the government has control and power over the body of the defendant that directly flows from the specific criminal statute under which the defendant has been charged. Decisions about *how* to control a defendant over which the government *already has undisputed control* are, in fact, necessary and proper to executing that control. Indeed, it is hard to conceive of a criminal justice system that did not acknowledge a sovereign's control over an individual post-indictment but pre-trial. In contrast, Congress *no longer has any legitimate control* over the respondent in this case. He has been charged with a crime—Convicted of that crime—Sentenced for that crime—And he has served his criminal sentence. But for the present § 4248 petition, respondent would not be in federal custody. Congress has *no power* over the body of the defendant that the present § 4248 petition is attempting to execute. Instead, the present § 4248 petition operates as the genesis of the very power from which the government claims it derives. This reasoning is circular. No reading of the Necessary and Proper Clause supports the government's view of this case.

*C. The Government's Response Proves Too Much*

In short, the government's position proves too much. The government asserts that it has

the “necessary and proper authority to prevent [the] imminent and likely commission” of any activity that it has “the power to criminalize and punish.” Government’s Response at 10.

Accepting this premise ““would obliterate the distinction between what is national and what is local.”” *Lopez*, 514 U.S. at 567 (quoting *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935)(Cardozo, J. concurring)). Adopting the government’s logic necessarily implies that the federal government has the right to preventatively detain any individual that it suspects might commit an act at some point in the future, regardless of whether that act is even a crime. Nothing in the government’s logic mandates that the individual already be in federal custody, or that the individual have a psychological condition, or that the individual be likely (in the government’s view) to commit a crime that is currently on the books—let alone a sexual crime. Basically, adopting the government’s position here requires a finding that the “derivative powers” of the Necessary and Proper Clause allows Congress to engage in wholesale preventative detentions that have only the most tenuous and speculative connections to other enumerated powers.

*D. Lopez and Morrison Preempt the Government’s Argument*

Even assuming arguendo that the government’s position may have been tenable under the courts’ views of federal powers in the 1920’s, it certainly does not pass muster in a post-*Lopez*, post-*Morrison* world. First, Congress’ claim of necessary and proper powers derives, apparently, on its powers under the Commerce Clause. For reasons discussed at length in respondent’s first motion, those Commerce Clause powers have been extremely curtailed since *Lopez* and *Morrison*. Accordingly, any powers deriving from those Commerce Clause powers are likewise curtailed.

In addition, the *Lopez* Court noted that the federal government cannot “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Lopez*, 514 U.S. at 567. The Court further explained that “[t]o do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.” *Id.* at 567-68 (internal citations omitted). The government engages in the same stacking of inferences about which the Supreme Court warned in *Lopez*. The government asserts that Congress has the power to criminalize certain conduct. The government then infers that the power to criminalize certain conduct necessarily implies the power to prevent that conduct. The government then infers that the power to prevent certain conduct necessarily implies a wholesale scheme of preventative detention imposed on those deemed likely to commit some act that it has the power to criminalize. This assertion of federal power was never allowable under any era of constitutional jurisprudence, but certainly not in the current era when the courts have reaffirmed the distinction between what is truly national and truly local.

*E. The Government's Attempt To Cabin Its Broad Analysis Does Not Relate to the Statute as Written*

Perhaps realizing that its logic proves too much, the government attempts to cabin the inevitable result of its theory. It asserts that “Congress has carved out a narrow class of persons who may be committed: only those in BOP’s or Attorney General’s custody who have engaged in sexually violent conduct or child molestation and who have been certified by trained professionals to have serious difficulty in refraining from sexually violent conduct or molesting children as a result of a mental illness, abnormality, or disorder.” Government’s Reply at 10.

These artificial limiting agents, however, *have nothing to do* with the theory under which the government asserts Congress' Necessary and Proper Clause power.<sup>2</sup> The fact that § 4248 refers to those in federal custody *does not matter* because the government does not assert Necessary and Proper powers that derive from its custody over prisoners. The fact that § 4248 involves a psychological determination *does not matter* because the government does not assert Necessary and Proper powers that derive from the method through which it makes the prediction that someone will commit a crime.<sup>3</sup> The fact that § 4248 involves sexual crimes *does not matter* because the government does not assert Necessary and Proper powers that derive from the specific crimes at issue in the present case. Finally, the fact that § 4248 commitments involve a treatment component *does not matter* because the government does not assert Necessary and Proper powers that derive from a general mental health power over individuals.

As the Supreme Court expressly held, “we can think of no better example of the police

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<sup>2</sup>Respondent also challenges the idea that these factors will, in fact, limit the government's power. For example, the terms “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” and “sexually violent conduct or child molestation” are not defined in the relevant statutes. *See* 18 U.S.C. § 4247 (5)-(6). Respondent asserts that without a rational limiting mechanism, the “mental illness” inquiry of the statute will necessarily collapse into the question: does the government think that this individual will commit a forbidden act in the future.

<sup>3</sup>For example, the government has conducted sophisticated analysis to determine the relationship between criminal history and propensity to commit future crimes. *See, e.g.,* United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May, 2004). Nothing would stop the government, if the courts adopt its position in this case, from using that detailed analysis as a justification for having the necessary and proper power to civilly commit individuals based solely on their criminal history. Indeed, one could argue that two decades of administering, studying, and improving a federal sentencing system based on criminal history makes criminal history analysis, properly applied, a *better* method of predicting who will commit a crime than does the speculative science adopted by § 4248.

power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” *United States v. Morrison*, 529 U.S. 598, 618 (2000). The government’s argument under the Necessary and Proper Clause does not change this fact.

## **II. Section 4248 Violates Due Process and Equal Protection**

### *A. Section 4248 Violates Due Process*

Section 4248 also violates both the Equal Protection and the Due Process Clauses for the reasons explained in respondent’s first motion. The government’s response does not change this analysis. The government, in effect, relies on *Hendricks* and *Crane* and notes that “[t]he Supreme Court has consistently upheld involuntary commitment statutes designed to civilly commit people who are unable to control their behavior, and thus pose a danger to the public safety.” Government’s Response at 13. This argument misses respondent’s point. Respondent does not dispute that the Supreme Court has accepted some civil commitment schemes. Respondent certainly does not ask this Court to strike down civil commitment qua civil commitment. Instead, Respondent conducted detailed review of the schemes in *Hendricks* and *Crane* and the Supreme Court’s analysis (and not simply its result) relating to those schemes, and applied that analysis to the § 4248 scheme at issue in this case. For the reasons provided in respondent’s first motion, no court has tolerated anything close to a scheme with the lack of procedural protections present in § 4248. Just because the Supreme Court has blessed some civil commitment schemes does not mean that all civil commitment schemes, no matter how

conceived, satisfy due process.<sup>4</sup>

*B. Section 4248 Violates Equal Protection*

The government's attempt to distinguish the relevant Equal Protection Clause jurisprudence also fails. First, the primary case that the government cites in support of its view, *Hubbart v. Knapp*, 379 F.3d 773 (9<sup>th</sup> Cir. 2004), is not persuasive. As a court sitting in habeas, the Ninth Circuit in *Knapp* did not engage in a de novo review of the equal protection issue, but instead affirmed the judgment of the California appellate courts under the extremely deferential standards established by the Antiterrorism and Effective Death Penalty Act. *Id.* at 778-79. Even if this Court were bound by the Ninth Circuit, a habeas case—which involves weighing issues of comity and federalism along with the underlying merits of an individual case—represents an inappropriate vehicle through which to discern binding precedent.

In addition, the government disagrees that individuals who are in the custody of the Bureau of Prisons are similarly situated with individuals who are not in the custody of the Bureau of Prisons for purposes of civil commitment. This position does not accord with Supreme Court precedent. As explained in petitioner's first motion, "*there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.*" *Baxtrom v. Herold*, 383 U.S. 107, 111 (1966) (emphasis added).

The Supreme Court later held that "subjecting a [petitioner] to a more lenient commitment

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<sup>4</sup>The government also relies on the fact that Congress claims to have considered *Hendricks* and *Crane* when it considered a federal sexually dangerous person commitment scheme. Government's Response at 15 & n.5. However, Congressional declarations that an act satisfies the Constitution do not carry much weight. It is up to the courts to assess statutes for constitutionality, and Congress's declaration that a law is constitutional does not make it so. *See, e.g., Lopez* at 557 n.2.

standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, . . .deprived petitioner of equal protection of the laws under the Fourteenth Amendment.” *Jackson v. Indiana*, 406 U.S. 715, 730 (1972). In other words, the idea that, for purposes of civil commitment, people in prison and people outside of prison are similarly situated derives, not from respondent’s assertions, but from the fact that “no conceivable basis” exists for distinguishing them. *Baxtrom*, 383 U.S. at 111.

Finally, the government’s attempt to distinguish *Jackson*, *Baxtrom*, and *Humphrey* fails. The government asserts that, because it does not create a separate civil commitment statute for those outside of federal custody, it does not violate equal protection. However, the actions taken by the government violate equal protection because the government still ends up creating an improper distinction. Persons in federal prison are subjected to a 18 U.S.C. § 4248 hearing at the pleasure of the Director of the Bureau of Prisons; persons outside of federal prison can never be subjected to a § 4248 hearing. That differing treatment violates equal protection.

If, for example, the government passed a law that imposed a certain punishment on a specific racial group with no rational basis, that law would not satisfy equal protection simply because the government did not pass a parallel law dealing with other races. Treating similarly situated groups differently violates equal protection, regardless of whether it is done through multiple statutes or (as here) done through imposing a statutory burden on one group.

### **III. Section 4248 Proceedings are Criminal Proceedings**

The government also argues that § 4248 operates as a civil, and not a criminal, statute. Respondent relies upon and re-asserts the arguments made in his first motion. In addition, respondent notes that the government’s arguments concerning the Necessary and Proper Clause

in its response belie the true purpose of the statute. The government does not attempt to justify § 4248 as a treatment scheme related to respondent's mental health. Instead, § 4248 operates as preventative detention, imposed on those who have committed criminal-like acts of violence and designed to prevent them from committing further criminal acts of violence. As such, it is a criminal statute, distinct from the other commitment statutes that the courts have held were civil.

#### **IV. Due Process Mandates the Imposition of the Reasonable Doubt Standard in § 4248 Proceedings**

Finally, the government's attempt to justify the unconstitutional imposition of the clear and convincing evidentiary standard fails. As noted in respondent's second motion, due process mandates the use of the reasonable doubt standard in § 4248 proceedings. Specifically, in *In re Winship*, the Supreme Court held that adjudicating a juvenile delinquent requires finding facts beyond a reasonable doubt. 397 U.S. 358 (1970). Because the government cannot distinguish the present § 4248 proceedings from juvenile commitment proceedings in any material way, *Winship* applies and mandates the application of the reasonable doubt standard.

The government first argues that "the commitment scheme at issue here is decidedly civil." Government's Response at 21. Even assuming *arguendo* that these proceedings are civil, that fact does not change *Winship's* applicability. *Winship* expressly noted that juvenile proceedings are not criminal trials. *Id.* at 359 & n.1. The Due Process clause applies *whenever* the government attempts to deprive an individual of life, liberty, or property—not simply in a criminal proceeding. Due process does not demand a jury trial in § 4248 proceedings because they are criminal proceedings. It demands a jury trial because § 4248 proceedings involve making factual findings that might result in a stigmatizing lifelong loss of liberty.

The government also argues that *Addington v. Texas*, 441 U.S. 418 (1979), and not

*Winship*, applies to § 4248 proceedings. This argument fails for the reasons discussed in respondent's second motion. As noted, *Addington* did *not* overrule *Winship*, but expressly preserved and distinguished it. *Id.* at 428.

Attempting to make the present commitment seem more like an *Addington* proceeding and less like a *Winship* proceeding, the government asserts that “[t]he central inquiry in § 4248 proceedings” involve mental health determinations. Government's Response at 22. This assertion does not reflect reality because it attempts to dismiss, almost as a footnote, the finding that a respondent engaged or attempted to engage in sexually violent conduct or child molestation. *Id.* This factual finding does not operate as the mere add-on that the government portrays, but as the primary distinguishing feature of a § 4248 commitment. The federal government *already has* proceedings equivalent to the *Addington* proceedings—namely, § 4245 and § 4246 commitment proceedings. Section 4248 exists precisely because the government has identified a sub-class of individuals whose mental state, standing alone, does not justify civil commitment.

The government actually acknowledges that criminal-like factual findings are “necessary” in a § 4248 proceeding, but argues that such necessity is irrelevant because “the government must additionally prove that Respondent suffers from a mental illness, disorder, or abnormality.” Government's Response at 22. This argument emphasizes an irrelevancy. *Winship* demands that courts apply the reasonable doubt standard to proceedings in which factual findings of criminal acts determine whether an individual should suffer a loss of liberty. These findings are central to a § 4248 hearing. Any additional allegations that the government must prove in a § 4248 hearing do not eviscerate *Winship's* clear analysis and holding.

For example, the very juvenile commitment proceedings at issue in *Winship* involve mental health determinations, but no one suggests that these additional determinations somehow eliminate *Winship*'s clear constitutional directive that courts apply the reasonable doubt standard. See Lynda E. Frost & Robert E. Shepherd, Jr., *Mental Health Issues in Juvenile Delinquency Proceedings* (1996) available at <http://www.abanet.org/crimjust/juvjus/cjmental.html> (discussing the insanity defense and noting that "[t]he mental health of a juvenile is relevant to a number of issues in a delinquency proceeding."). Adopting the government's position would allow the government to make a mockery of *Winship* by simply tacking on a pro forma state of mind determination to any *Winship*-like proceeding in order to lower the standard of proof and increase the chance of erroneous adjudications.

Finally, the government attempts to engage in a balancing test, arguing that "the clear and convincing burden of proof serves properly to allocate the risk of an erroneous commitment" between the parties and that post-deprivation proceedings exist to cure any erroneous commitment. *Id.* at 22-24. Respondent disagrees with the government's weighing of the equities. More fundamentally, however, the Supreme Court disagrees with the government's weighing of the equities. *Winship* balanced the needs of the government against the rights of the individual in proceedings such as these and decided that the reasonable doubt standard properly achieved that balance. It is not up to this court or the present litigants to disturb that analysis.<sup>5</sup>

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<sup>5</sup>Respondent also disagrees with the government's assertion that an individual who has erroneously been branded as an uncontrollable child molester and involuntarily committed against his will should take comfort in the fact that he might have family or friends who will be concerned about him and that he only has to wait for half a year before he can petition to have the mistake corrected. Government's Response at 23. Respondent would prefer his

The Supreme Court has never sanctioned the clear and convincing standard of proof in a sexually violent predator commitment proceedings. The government now asks this court to be the first federal court to hold, in the face of *Winship*, that such proceedings do not require the reasonable doubt standard. This Court should decline the government's invitation and, applying *Winship*, dismiss the present proceedings.

## **V. Conclusion**

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Constitutional right to the application of the proper burden of proof to prevent his erroneous commitment in the first instance.

For the reasons discussed in respondent's first and second motions to dismiss and this reply, the present § 4248 proceeding violates the constitution. Accordingly, respondent moves to dismiss the present § 4248 proceeding. Respondent respectfully requests a hearing on these motions.

Respectfully requested this 13th day of September, 2007.

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