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In Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009), the Court reiterated the necessity of establishing personal immediate injury in fact. Earth Island and other environmental interest groups challenged the validity of the Forest Service's regulations that exempt small fire-rehabilitation and timber salvage projects from notice, comment, and appeal processes that generally apply to Forest Service land use regulations. One member of the plaintiff organizations successfully established that he had a personal injury in fact with respect to an exempt project to be undertaken in a discrete area known as Burnt Ridge. After the Burnt Ridge controversy had been settled and was no longer at issue the plaintiffs continued to assert that they had standing "to challenge the regulations in the absence of a live dispute over a concrete application of those regulations." The Ninth Circuit upheld a district court's nationwide injunction of the regulations that had been at issue in the Burnt Ridge project. The Supreme Court reversed.

The regulations "neither require nor forbid any action on the part of respondents [but] govern only the conduct of Forest Service officials engaged in project planning." To establish injury in fact the plaintiffs were required to show that "application of the regulations by the Government will affect *them*." They were unable to do so because they could not point to any interest of any of their members that would be immediately threatened by the regulations. The mere statistical probability that some unknown number of the plaintiff organizations' members would suffer personalized injury in some unknown place at some unknown future time was insufficient.

Nor was there a sufficient procedural injury. The fact that the plaintiff organizations had lost the ability to comment on small fire-rehabilitation and

timber salvage projects was irrelevant because "deprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing." While Congress can "can loosen the strictures of the redressability prong of our standing inquiry — so that standing existed with regard to the Burnt Ridge Project, for example, despite the possibility that Earth Island's allegedly guaranteed right to comment would not be successful in persuading the Forest Service to avoid impairment of Earth Island's concrete interests [—] the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."

c. *Organizational Standing*

Page 96: Insert at the end of the section:

In Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009), the Court repeated the requirement that organizations must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." The dissent proposed that "a statistical probability that some of those members are threatened with concrete injury" should suffice, a contention that the majority said would "replace the requirement of 'imminent' harm . . . with the requirement of 'a *realistic* threat that reoccurrence of the challenged activity would cause [the plaintiff] harm in the reasonably near future.' "

Chapter 3

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A. Implementing Enumerated Powers and "Default" Rules

1. Implementing Enumerated Powers: The "Necessary and Proper Clause"

Page 141: Insert at the end of section 1, following note 3:

UNITED STATES v. COMSTOCK
130 S. C.t _____, 2010 U.S. LEXIS 3879

JUSTICE BREYER delivered the opinion of the Court.

[Federal law permits a district court to order the civil commitment of federal prisoners, even after they have completed their prison sentence, if they have "engaged or attempted to engage in sexually violent conduct or child molestation," currently "suffer[] from a serious mental illness, abnormality, or disorder," and are "sexually dangerous to others." To obtain a civil commitment order, the U.S. Government must prove these facts by clear and convincing evidence. When a civil commitment order is entered, the Attorney General must make "all reasonable efforts" to cause the state of the prisoner's domicile or where he was tried to "assume responsibility for his custody, care, and treatment." Should those efforts fail, the Attorney General is commanded to "place the person for treatment in a suitable [federal] facility" until either the prisoner is deemed no longer to be dangerous or a state assumes responsibility for his custody, in which case the prisoner is to be transferred to the custody of that state. 18 U.S.C. § 4248.]

. . . We have previously examined similar statutes enacted under state law to determine whether they violate the Due Process Clause. See Kansas v. Hendricks, 521 U.S. 346, 356-358 (1997); Kansas v. Crane, 534 U.S. 407 (2002). But this case presents a different question. Here we ask whether the Federal Government has the authority under Article I of the Constitution to enact this federal civil-commitment program or whether its doing so falls beyond the reach of a government "of enumerated powers." [*McCulloch.*] We conclude that the

Constitution grants Congress the authority to enact § 4248 as "necessary and proper for carrying into Execution" the powers "vested by" the "Constitution in the Government of the United States." Art. I, § 8, cl.18.

[Among other claims, respondent prisoners contended that Congress, by enacting § 4248 (which authorized their civil commitment),] exceeded the powers granted to it by Art. I, § 8 of the Constitution, including those granted by the Commerce Clause and the Necessary and Proper Clause. The District Court . . . agreed that . . . Congress exceeded its Article I legislative powers. On appeal, . . . the Fourth Circuit [affirmed on this ground.]

II. The question presented is whether the Necessary and Proper Clause . . . grants Congress authority sufficient to enact the statute before us. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution — such as the Due Process Clause — do not prohibit civil commitment in these circumstances. . . . On that assumption, we conclude that the Constitution grants Congress legislative power sufficient to enact § 4248. We base this conclusion on five considerations, taken together.

First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," [*McCulloch*], which means that "[e]very law enacted by Congress must be based on one or more of" those powers. But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." [*McCulloch.*] Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the authority's "beneficial exercise." [In] determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. Sabri v. United States, 541 U.S. 600, 605 (2004). [The] relevant inquiry is simply "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power" or under other powers that the Constitution grants Congress the authority to implement. We have also recognized that the Constitution . . . "leaves to Congress a large discretion as to the means that may be employed in executing a given power."

Thus, the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to "counterfeiting," "treason," or "Piracies and Felonies committed on the high Seas" or "against the Law of Nations," nonetheless grants Congress broad authority to create such crimes. And Congress routinely exercises its authority to enact criminal laws in furtherance of, for example, its enumerated powers to regulate interstate and foreign commerce, to enforce civil rights, to spend funds for the general welfare, to establish federal courts, to establish post offices, to regulate bankruptcy, to regulate naturalization, and so forth.

Similarly, Congress, in order to help ensure the enforcement of federal criminal laws enacted in furtherance of its enumerated powers, "can cause a prison to be erected at any place within the jurisdiction of the United States, and direct that all persons sentenced to imprisonment under the laws of the United States shall be confined there." Ex parte Karstendick, 93 U.S. 396, 400 (1876). Moreover, Congress, having established a prison system, can enact laws that seek to ensure that system's safe and responsible administration by, for example, requiring prisoners to receive medical care and educational training, and can also ensure the safety of the prisoners, prison workers and visitors, and those in surrounding communities by, for example, creating further criminal laws governing entry, exit, and smuggling, and by employing prison guards to ensure discipline and security. Neither Congress'[s] power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of "carrying into Execution" the enumerated powers "vested by" the "Constitution in the Government of the United States" — authority granted by the Necessary and Proper Clause.

Second, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. We recognize that even a longstanding history of related federal action does not demonstrate a statute's constitutionality. A history of involvement, however, can nonetheless be "helpful in reviewing the substance of a congressional statutory scheme," and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests.

Here, Congress has long been involved in the delivery of mental health care to federal prisoners, and has long provided for their civil commitment. [Between 1855 and 1882] Congress created a national, federal civil-commitment program under which any person who was either charged with or convicted of any federal offense in any federal court could be confined in a federal mental institution. These statutes did not raise the question presented here, for they all provided that commitment in a federal hospital would end upon the completion of the relevant "terms" of federal "imprisonment" as set forth in the underlying criminal sentence or statute. But in the mid-1940's that proviso was eliminated [and in 1949 indefinite civil commitment was authorized if the person was proven to be a danger to the public and no state would assume custody of the person.] In 1984, Congress modified these basic statutes [by, among other things,] directing the Attorney General to seek alternative placement in state facilities, [but retaining the authorization of indefinite civil commitment if no state was willing to assume custody.] In 2006, Congress enacted the particular statute before us, [which] differs from earlier statutes in that it focuses directly upon persons who, due to a mental illness, are sexually dangerous. . . . Aside from its specific focus on sexually dangerous persons, § 4248 is similar to the provisions first enacted in 1949. [It] is a modest addition to a longstanding federal statutory framework, which has been in place since 1855.

Third, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. [Because] the Federal Government is the custodian of its prisoners, . . . it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose. . . . If a federal prisoner is infected with a communicable disease that threatens others, surely it would be "necessary and proper" for the Federal Government . . . to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic). And if confinement of such an individual is a "necessary and proper" thing to do, then how could it not be similarly "necessary and proper" to confine an individual whose mental illness threatens others to the same degree?

Moreover, § 4248 is "reasonably adapted" to Congress'[s] power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority). Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct" would pose an especially high danger to the public if released. And Congress could also have reasonably concluded . . . that a reasonable number of such individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to "legal residence in any State" by incarcerating them in remote federal prisons. [This] supports the conclusion that § 4248 satisfies . . . the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority.

Fourth, the statute properly accounts for state interests. [The statute does not] invade state sovereignty or otherwise improperly limit the scope of "powers that remain with the States." To the contrary, it requires *accommodation* of state interests: The Attorney General must inform the State in which the federal prisoner "is domiciled or was tried" that he is detaining someone with respect to whom those States may wish to assert their authority, and he must encourage those States to assume custody of the individual. He must also immediately "release" that person "to the appropriate official of" either State "if such State will assume [such] responsibility." And either State has the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to State custody.

Fifth, the links between § 4248 and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not "pile inference upon inference" in order to sustain congressional action under Article I, [*Lopez*], respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress'[s] authority can be no more than one step removed from a specifically enumerated power. But this argument is irreconcilable with our precedents. . . .

For example, in *Sabri* we observed that "Congress has authority under the Spending Clause to appropriate federal moneys" and that it therefore "has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars" are not "siphoned off" by "corrupt public officers." We then further held that, in aid of that implied power to criminalize graft of "taxpayer dollars," Congress has the *additional* prophylactic power to criminalize bribes or kickbacks even when the stolen funds have not been "traceably skimmed from specific federal payments." . . .

Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release. Of course, each of those powers . . . is ultimately "derived from" an enumerated power. [While] every . . . statute must . . . be legitimately predicated on an enumerated power[,] the same enumerated power that justifies the creation of a federal criminal statute, and that justifies . . . additional implied federal powers . . . , justifies civil commitment under § 4248 as well. Thus, we . . . reject [the] argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress. . . .

* * *

We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.

JUSTICE KENNEDY, concurring in the judgment.

. . . Respondents argue that congressional authority under the Necessary and Proper Clause can be no more than one step removed from an enumerated power. This is incorrect. When the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain. [But this] is merely the beginning, not the end, of the constitutional inquiry. The inferences must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum* in a veritable game of