PRESENTATION TO THE HOUSE APPROPRIATIONS COMMITTEE REGARDING UNITED STATES V. COMSTOCK

Pamela A. Sargent
Senior Assistant Attorney General & Section Chief
Sexually Violent Predators Civil Commitment Section
Office of the Attorney General

I. The holding in Comstock

United States v. Comstock, ___ U.S. ___, 130 S.Ct. 1949, 2010 LEXIS 3879 (2010), was decided by the Supreme Court of the United States on May 17, 2010. It reversed earlier rulings by the United States District Court for the Eastern District of North Carolina, and the United States Court of Appeals for the Fourth Circuit, and held that the Congress had power under the Necessary and Proper Clause to enact a federal

sexually violent offender detainment statute, 18 U.S.C. § 4248.

The Supreme Court upheld the law as valid under the Necessary and Proper Clause under a five part test: 1) whether there is means/ends rationality between the enumerated power and the means chosen; 2) whether the activity is one of long-standing; 3) if the reach of a longstanding practice is being extended, whether it is a reasonable one; 4) whether the statute properly accounts for state interests; and 5) whether the links between the means chosen and an enumerated power are too attenuated.

The Supreme Court found that the particular facts in Comstock met the requirements of the five part test. Specifically, the Supreme Court upheld the federal civil commitment statute because of

(1) the breadth of the Necessary and Proper Clause, (2) the long history of Federal involvement in this area, (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.

II. The effect of Comstock upon Virginia.

To put it as plainly as possible, Comstock has no effect upon the Virginia Civil Commitment of Sexually Violent Predators Act ("SVP Act"), § 37.2-900.

Comstock, by its express terms, applies only to sexually dangerous persons within the custody of the federal government, who have committed federal crimes or who have been charged with federal crimes but are unreasonably incompetent to stand trial. The only potential connection arises under § 4248(d), when the United States Attorney General could notify Virginia

that he is holding a federal prisoner who lived or was tried in Virginia. At that point, Virginia has the sole, unfettered discretion as to whether or not to accept custody. And unless the federal government is willing to pay Virginia to accept and treat such prisoners, there would appear to be no reason to do so.

III. The Virginia SVP Act

Currently, the Virginia SVP Act would not permit Virginia to accept a federal prisoner and place him/her in mental health treatment within Virginia. § 37.2-903(A) requires the Director of the Virginia Department of Corrections to maintain a database of prisoners "in his custody" who have a sentence or concurrent sentence for a sexually violent offense committed in Virginia. Section 37.2-904(A) provides an alternate route to SVP consideration: the receipt of an order from

a Virginia court pursuant to § 19.2-169.3 referring a person who is unrestorably incompetent to stand trial ("URIST") for review under the SVP Act. Nowhere in the SVP Act is there legislative permission to review persons with federal convictions/charges for consideration under the SVP Act.

As of September 15, 2010, over 250 persons have been determined to be SVP's and committed to the custody of the Commissioner of the Department of Behavioral Health and Developmental Services. The current facility was built to house 300 residents, 100 to a building. It is equally clear that there is no incentive, financial or otherwise, for the Commonwealth to accept the burden of treating federal sexually dangerous persons.