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The Fifth Amendment of the United States Constitution prohibits the federal government from denying a person “life, liberty, or property” without providing due process of law, while the Fourteenth Amendment places the same limitations on state and local governments. These amendments collectively provide the Due Process Clause, which has been used to invalidate federal, state, and local laws when the law infringes upon an individual’s right to procedural or substantive due process. Civil

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2 See, e.g., In re Winship, 397 U.S. 358, 368 (1970) (invalidating provision of New York Family Court Act assigning “preponderance of the evidence” standard in juvenile delinquency cases). The Court concluded that when a juvenile is charged with committing an act that would be considered a crime if he were an adult, he is entitled to have the “beyond a reasonable doubt” evidentiary standard applied during the adjudicatory stage. Id. at 359, 368. This allows the procedure to comport with procedural due process requirements. Id.; see, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878-89 (1992) (establishing undue burden test when evaluating validity of state abortion restrictions). The Court declared “the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society.” Casey, 505 U.S. at 834, and cases cited; see also, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (outlining balancing factors to be used when determining whether procedure comports with due process). A court must consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used,
commitment statutes, which allow for the involuntary confinement of the mentally ill, have been scrutinized over the past several decades as denying due process. In United States v. Comstock the United States Court of Appeals for the Fourth Circuit considered whether the civil commitment provision of the federal Adam Walsh Child Protection and Safety Act (“Adam Walsh Act”) violates the Due Process Clause of the Fifth Amendment by denying procedural due process to the mentally ill. The court held that the “clear and convincing evidence” standard of proof is sufficient to satisfy due process requirements when determining whether a person is mentally ill, has “engaged or attempted to engage in sexually violent conduct or child molestation,” and is “sexually dangerous to others.”

Since its enactment, the Adam Walsh Act has been challenged as unconstitutionally exceeding Congress’s powers under the Necessary and Proper Clause, and as violating due process. The respondents in United States v. Comstock are five

and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

3 See, e.g., Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (challenging Kansas Supreme Court decision that Kansas Sexually Violent Predator Act's definition of “mental abnormality” satisfied substantive due process requirements); Addington v. Texas, 441 U.S. 418 (1979) (challenging Texas Supreme Court decision declaring “preponderance of the evidence” standard of proof in civil commitment proceeding satisfied due process); United States v. Carta, 592 F.3d 34, 42 (1st Cir. 2010) (claiming Adam Walsh Act is “facially unconstitutional”). In addition to holding that the Adam Walsh Act is “facially unconstitutional,” the court also held the Act was “not a valid exercise of Congress’ authority under the Commerce Clause” and that it violates the Due Process Clause of the 5th Amendment. Id.

4 627 F.3d 513 (4th Cir. 2010).


6 Comstock, 627 F.3d at 515 (reversing district court decision that declared “clear and convincing evidence” standard unconstitutional as applied in civil commitment provision of The Act).

individuals (collectively “Comstock”) the Federal Bureau of Prisoners (“BOP”) certified as sexually dangerous persons, thus subjecting them to civil commitment under the Adam Walsh Act. Comstock initially offered several challenges to the Adam Walsh Act, contending that it falls outside Congress’s enumerated powers and violates the Due Process Clause. The district court concluded that the Adam Walsh Act is neither sufficiently tied to, nor a proper exercise of Congress’s constitutionally enumerated powers. Furthermore, the district court held the civil commitment provision violates due process because it allows the factual finding of prior conduct to be based on proof by clear and convincing evidence, instead of the more restrictive “beyond a reasonable doubt” standard. The government appealed to the Fourth Circuit, which affirmed the district court’s holding on the act’s unconstitutionality, but expressed no opinion on the

8 Comstock, 627 F.3d at 516. Earl Comstock pled guilty to “receiving material involving sexual exploitation of minors by computer.” Id. While serving the last few days of his thirty-seven month prison term, the government certified Comstock as a “sexually dangerous person” pursuant to The Act. Id. Marvin Virgil pled guilty to sexual abuse of a minor, and the government certified him as a “sexually dangerous person” on the day his ninety-six month prison sentence was set to expire. Id. at 516-17. In separate cases, Thomas Matherly and Markis Revland pled guilty to possession of child pornography, and the government certified each as a “sexually dangerous person” prior to the expiration of their prison terms. Id. at 517. Shane Catron was charged with several counts of sexual abuse of a minor and abusive sexual conduct, but was found to be suffering from a “mental disease or defect, which rendered him incompetent to stand trial on criminal charges and unable to be restored to competence in the near future.” Id. The government certified Catron as a “sexually dangerous person” pursuant to The Act. Comstock, 627 F.3d at 517. The pleadings in the five cases were “substantially identical[,]” so the district court treated the cases in the same manner, while never formally consolidating them. Id.

9 Unites States v. Comstock, 507 F. Supp. 2d 522, 528 (E.D.N.C. 2007). Comstock mounted a facial attack on The Act, claiming no set of possible circumstances existed that would render The Act valid. Id. Comstock claimed the commitment provision of the statute exceeded Congress’s authority under the Commerce Clause, and violated the double jeopardy clause, the ex post facto clause, the Eighth Amendment, the Sixth Amendment, the Due Process Clause, and the Equal Protection Clause. Id. The court only addressed the Congressional authority to enact the statute and due process issues, and found it unnecessary to address the remaining constitutional challenges. Id. at 560.

10 Id. at 559-60.

11 Id. The court drew a distinction between the three prongs of the statute. United States v. Comstock, 507 F. Supp. 2d at 555. Determining whether an individual is a “sexually dangerous person” requires the court to find that a person “has engaged or attempted to engage in sexually violent conduct or child molestation.” Id. (quoting 18 U.S.C. § 4247(a)(5)). This standard poses an explicit factual question answerable only with specific, potentially knowable facts. United States v. Comstock, 507 F. Supp 2d at 55. The court concluded this prong must be subject to the higher standard of “beyond a reasonable doubt,” and the higher standard “would not impose a burden that the federal government could not meet or that would disable or render less effective the commitment scheme.” Id.
due process issue.¹²

The Supreme Court of the United States granted certiorari and reversed the Fourth Circuit’s decision.¹³ The Supreme Court characterized the civil commitment provision in the Adam Walsh Act as a constitutional exercise of Congress’s authority under the Necessary and Proper Clause.¹⁴ The Court then remanded the case back to the Fourth Circuit to address the due process challenge.¹⁵ Upon remand, the Fourth Circuit reversed the district court’s decision and held the “clear and convincing evidence” standard of evidentiary proof as constitutionally sufficient when determining whether an individual engaged or attempted to engage in a prior bad act.¹⁶ The court ruled the criminal threshold of “beyond a reasonable doubt” is not required for civil commitment statutes.¹⁷

The involuntary civil commitment of mentally ill and sexually dangerous individuals has become an increasingly popular method employed by the government in an effort to protect public safety.¹⁸ The drafters of civil commitment statutes have historically endeavored to strike a delicate balance between the liberty interests of the mentally ill individual and the interests of the government in protecting public health and safety.¹⁹ States have taken notable care to protect the physical and mental health of

¹² United States v. Comstock, 551 F.3d 274, 276 (4th Cir. 2010).
¹⁴ Id. at 1965. Article I, Section 8 of the United States Constitution states: “The Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.
¹⁶ United States v. Comstock, 627 F.3d 513, 515 (4th Cir. 2010).
¹⁷ Id. at 524.
children—a particularly vulnerable portion of the population—by enacting statutes that allow for the involuntary civil commitment of mentally ill individuals who are sexually dangerous and pose a significant threat to children. The civil commitment of mentally ill and sexually dangerous individuals has recently gained increased attention with the enactment of the Adam Walsh Act.

Congress enacted the Adam Walsh Act in 2006 to protect children from sexually violent crimes and sexual exploitation. It contains a civil commitment provision that allows the Attorney General or Director of the BOP to certify an individual as sexually dangerous, and seek a federal district court order to civilly commit the individual. To be certified as a sexually dangerous person, the individual must be in the custody of the BOP, have been committed to the Attorney General for lacking the mental capacity to stand trial for criminal charges, or have had criminal charges dismissed because of a mental condition. The government must then establish by clear and convincing evidence each prong of the statutory requirement by showing the individual "(1) has engaged or attempted to engage in sexually violent conduct or child molestation, (2) suffers from a serious mental illness, abnormality, or disorder, and (3) as to "a long dialectic between an attitude of paternalism toward the mentally ill and ideals of personal freedom and civil liberty." Id.


23 18 U.S.C. § 4248(a) (2006). Filing the certificate with the district court “alleging that a person is ‘sexually dangerous’ automatically stays the person’s release from federal custody and triggers a hearing in which the district court determines whether the certified person is in fact ‘sexually dangerous.’” Comstock, 627 F.3d at 515 (citing section 4248(a)).

24 United States v. Comstock, 627 F.3d 513, 515 (4th Cir. 2010); 18 U.S.C § 4248(a).
a result, would have serious difficulty refraining from sexually violent conduct or child molestation if released.”

Over the past thirty years, the Supreme Court has decided cases involving state statutes authorizing the civil commitment of mentally ill individuals who are deemed to be a dangerous threat to themselves and society. In *Addington v. Texas*, the Supreme Court determined that due process does not require the use of the “beyond a reasonable

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25 *Comstock*, 627 F.3d at 515-16. The Act provides that:

[p]rior to the hearing, the court may order an expert psychiatric or psychological examination of the certified person, with the resulting report filed with the court. . . . [T]he Act mandates that an attorney represent the certified person and provides for court-appointed counsel for any indigent person. . . . Furthermore, the Act affords a certified person an opportunity to present evidence, testify, subpoena witnesses, and confront and cross-examine witnesses.

*Id.* at 515 (citations omitted). If the court orders the civil commitment:

The Attorney General must “make all reasonable efforts” to arrange for a State to assume responsibility for the person’s “custody, care and treatment.”

. . . If the Attorney General effects the transfer, federal custody ceases; but if no state will assume responsibility, then [18 U.S.C.] § 4248 authorizes the Attorney General to hold the person “for treatment in a suitable facility” until discharge.

*Id.* at 516 (quoting 18 U.S.C. § 4248(d)). If the individual remains in federal custody, the director of the custodial facility must advise the individual of available rehabilitation programs, prepare annual reports to determine the mental condition of the individual, and ultimately decide whether commitment must persist or can cease. *Comstock*, 627 F.3d at 516. When the director of the facility declares the committed individual’s “condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others” given the proper treatment, the director should file a certificate with the court, and the court should discharge the individual. *Id.* (quoting 18 U.S.C § 4248(e)). In the alternative, counsel or legal guardian for the committed individual may file a request for discharge. *Comstock*, 627 F.3d at 516. If the request is denied, they may renew the request every 180 days. *Id.* (citing 18 U.S.C § 4247(h) (2006)).


doubt” standard of proof in civil commitment proceedings in state courts.28 The Court, however, fell short of prescribing a specific level of appropriate evidentiary proof.29 Therefore, states are free to adopt, either judicially or legislatively, the criminal law standard of “beyond a reasonable doubt.”30 At the constitutional minimum, the Due Process Clause requires states to apply the “clear and convincing evidence” standard of proof.31 As a result, states differ on the level of evidentiary proof required when ascertaining whether an individual is in fact a danger to himself or society.32

28 See id. at 432-33 (concluding the reasonable doubt standard should not apply because it may impose an unfair burden).
29 Id. The Court rejected the Texas Supreme Court’s decision that the “preponderance of the evidence” standard of proof satisfied due process when used in a state civil commitment proceeding. Id. at 427. Furthermore, the “beyond a reasonable doubt” standard used in criminal cases is not required, and would be “inappropriate in civil commitment proceedings because, given the uncertainty of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment.” Id. at 433. The Court ultimately concluded that the weight of the civil commitment proceedings, combined with the individual’s significant interest in the outcome, “requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.” Id. at 427.
30 See Addington, 441 U.S. at 432-33. The Court declined to assign a required level of evidentiary proof. See id.
31 Id. at 430-31. The Due Process Clause dictates, however, the constitutional minimum requirement for state civil commitment procedures is the “clear and convincing evidence” standard of proof. Id. at 418. The intermediate standard is a middle ground that “strikes a fair balance between the rights of the individual and the legitimate concerns of the state.” Id. at 431.
The Adam Walsh Act uses a comparatively less stringent test than most state courts when certifying an individual as a sexually dangerous person.33 Most state civil commitment statutes require state courts to decide whether an individual has been charged with or convicted of a sexually violent crime, suffers from a mentally abnormality, and poses a significant danger to himself or society.34 Comparatively, the civil commitment provision of the Adam Walsh Act requires federal courts to determine by clear and convincing evidence whether the individual has “engaged or attempted to engage in sexually violent conduct or child molestation,” has a mental abnormality, and poses a significant danger to himself or society.35 The Adam Walsh Act does not require a prior criminal charge or conviction; rather, it requires the individual to have at least attempted to engage in the prior bad act.36 As a result, critics contend the act is unconstitutional because it violates an individual’s right to due process.37

person is a sexually violent person, the court shall dismiss the petition.”); IOWA CODE § 229A.7(5)(a) (2010) (asserting, “If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent person, the court shall dismiss the petition”); KAN. STAT. ANN. § 59-29a07(a) (West 2010) (purporting, “The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.”); MASS. GEN. LAWS ch.123A § 1 (2010) (requiring that a “sexually dangerous person” have been “convicted . . . of a sexual offense, adjudicated delinquent by reason of such an offense or found incompetent to stand trial for such an offense”); S.C. CODE ANN. § 44-48-30 (2010) (maintaining that a “sexually violent predator” have been “convicted of a sexually violent offense”); TEX. HEALTH & SAFETY CODE ANN. § 841.003 (Vernon 2010) (declaring that a “sexually violent predator” be a “repeat sexually violent offender”); WASH. REV CODE § 71.09.020(16) (2009) (stating that a “sexually violent predator” have been “convicted of or charged with a crime of sexual violence”); WIS. STAT. § 980.01(7) (2010) (asserting that a “sexually violent person” have been “convicted of a “sexually violent offense”).

33 18 U.S.C. § 4248(d) (2006). The Act requires the court to determine whether an individual “has engaged or attempted to engage in sexually violent conduct or child molestation.” Id. § 4247(a)(5). In contrast, the Arizona statute uses a more stringent test, requiring proof beyond a reasonable doubt that a person is a sexually violent person. ARIZ. REV. STAT. ANN. § 36-3707(A) (2011).

34 See, e.g., WASH. REV. CODE § 71.09.020(18) (2009). A sexually violent predator is a person “who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.” Id. As mentioned previously, states differ on the level of evidentiary proof necessary for establishing the statutory requirements. See supra note 32 and accompanying text (outlining examples of state statutory schemes and evidentiary requirements).


36 See id.

37 See, e.g., United States v. Carta, 592 F.3d 34, 42 (1st Cir. 2010) (claiming civil commitment provision of the Adam Walsh Act violates the Due Process Clause of the Fifth Amendment);
In *Comstock*, the Fourth Circuit ruled that the Due Process Clause does not require a federal court to employ the “beyond a reasonable doubt” standard when determining whether an individual meets the statutory requirements for civil commitment under the Adam Walsh Act. The court rejected Comstock’s argument that the prior bad act requirement constituted a factual finding of criminal conduct prior to commitment, and concluded the required finding includes but is not limited to criminal behavior. Furthermore, the court reasoned the prior bad act requirement is

Timms v. John, 700 F. Supp. 2d 764, 772 (E.D.N.C. 2010), *vacated*, 627 F.3d 525 (4th Cir. 2010) (declaring the Act unconstitutional because of the failure to define “sexually violent conduct”); United States v. Shields, 522 F. Supp. 2d 317, 334-36 (D. Mass. 2007) (challenging constitutionality of applying “clear and convincing evidence” standard to prior act requirement); see also Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HASTINGS C.R.-C.L. L. REV. 435, 468-72 (2010) (doubting “clear and convincing evidence” standard of proof is constitutionally sufficient to guarantee due process). “The move to a clear and convincing standard despite the liberty interests lost by a person in indefinite civil detention should raise substantial worries about due process, but courts have allowed commitment hearings to proceed using that standard.” *Id.* at 471; see also Emily Eschenbach Barker, Note, *The Adam Walsh Act: Un-Civil Commitment*, 37 HASTINGS CONST. L.Q. 141, 162-63 (2009) (arguing factual question of prior bad act requires “beyond a reasonable doubt” standard to comport with due process requirements). “The clear and convincing standard, though justifiable when adjudicating in terms of the regular civil commitment scheme where certainties are impossible, is not appropriate . . . where at least part of the inquiry is whether some act happened in the past.” *Id.* at 163.

38 United States v. Comstock, 627 F.3d 513, 519 (4th Cir. 2010). The court cited the *Addington* Court that held the “beyond a reasonable doubt” standard is too heavy a burden of proof for the government to overcome in a civil commitment proceeding and should be reserved for criminal proceedings. *Id.*

39 *Id.* at 520. The court reasoned that the statute does not specifically require the finding of a prior criminal act. *Id.* The court stated:

Nothing in the Act requires that the finding of past conduct constitute criminal behavior. By its terms, the Act mandates a finding that a person “has engaged or attempted to engage in sexually violent conduct or child molestation.” The Act does not define the terms “sexually violent conduct” and “child molestation,” which are broad enough to encompass noncriminal conduct such as unlawful, tortious conduct.

*Id.* The court then emphasized that the regulations promulgated pursuant to The Act provide detailed definitions of both “sexually violent conduct” and “child molestation.” *Id.* The regulations define “sexually violent conduct” as “includ[ing] any unlawful conduct of a sexual nature with another person.” 28 C.F.R. § 549.92 (2008). The regulation then lists several examples of what constitutes unlawful conduct, including:

(a) The use or threatened use of force against the victim; (b) Threatening or placing the victim in fear that the victim, or any other person, will be harmed;
merely used for evidentiary purposes—to support a finding of mental abnormality, future dangerousness, or both.40 The prior bad act is not used to affix culpability for the conduct; therefore, applying the “clear and convincing evidence” standard to the entire civil commitment statutory scheme does not violate due process.41

The Fourth Circuit was correct in rejecting Comstock’s due process challenge to the civil commitment provision of the Adam Walsh Act.42 The court properly reached the conclusion that the prior bad act requirement was not limited to criminal conduct, but included non-criminal tortious conduct as well.43 In addition, the provision is not punitive and, therefore, is not designed to affix culpability for past conduct.44

(c) Rendering the victim unconscious and thereby engaging in conduct of a sexual nature with the victim; (d) Administering to the victim, by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance, and thereby substantially impairing the ability of the victim to appraise or control conduct; or (e) Engaging in such conduct with a victim who is incapable of appraising the nature of the conduct, or physically or mentally incapable of declining participation in, or communicating unwillingness to engage in, that conduct.

Id. The regulations define “child molestation” as “any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years.” Id. § 549.93.

The court, by construing the Act and the regulations, ultimately concluded that the terms include, but are not limited to, criminal conduct. Comstock, 627 F.3d at 520. Conduct that is unlawful, tortious, but not criminal are also included in the prior bad act requirement. Id. 40 Comstock, 627 F.3d at 523; see also Kansas v. Hendricks, 521 U.S. 346, 362-63 (1997) (outlining non-retributive nature civil commitment provision of Kansas Sexually Violent Predator Act).

41 Comstock, 627 F.3d at 515. Furthermore, the court pointed to the layers of professional review and additional safeguards outlined in The Act as justification for the “clear and convincing” evidence standard. Id. at 521-22.

42 Id. at 522.

43 Id. at 520. An example of non-criminal tortious activity that could be covered by The Act is the tort of sexual battery. See, e.g., Pettit v. Erie Ins. Exch., 349 Md. 777, 786-88 (1998) (referencing cases involving tort of sexual battery).

44 United States v. Comstock, 627 F.3d 513, 523 (4th Cir. 2010). See Hendricks, 521 U.S. at 361-63. In Hendricks, the Court points out the civil commitment provision of the Kansas Sexually Violent Predator Act “does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.” Id. at 347. The Kansas act does not require a criminal conviction as a prerequisite, and those absolved of criminal wrongdoing may be subject to confinement. See id. at 363. As a result, the “absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed. Thus, the fact that the Act may be ‘tied to criminal activity’ is ‘insufficient to render the statute punitive.’” Id. at 362. (quoting United States v. Ursery, 518 U.S. 267 (1996)). But see Allen v. Illinois, 478 U.S. 364, 368-69 (1986). Even when the provision is expressly labeled “civil” in nature, that is not necessarily
behavior is used for evidentiary purposes, merely to illustrate the presence of mental illness and the potential to be dangerous in the future.\textsuperscript{45} The bad act finding is the “beginning of the inquiry”; it is a starting point for the entire process of determining whether the individual poses such a threat to himself or to the public that immediate confinement is vital.\textsuperscript{46}

Comstock’s argument was flawed for two reasons.\textsuperscript{47} First, Comstock mounted a facial challenge to the Adam Walsh Act.\textsuperscript{48} A facial challenge is a very difficult hurdle to overcome, as the party must show that no set of circumstances exists in which the statute would be valid.\textsuperscript{49} The court was correct to classify the civil commitment provision of the Adam Walsh Act as having a “plainly legitimate sweep,” which allowed it to survive the facial challenge because there are numerous circumstances in which the statute would be and is in fact valid.\textsuperscript{50} Second, Comstock relied too heavily on the Supreme Court’s decision in \textit{In re Winship}.\textsuperscript{51} In \textit{Winship}, the Supreme Court determined that juveniles in delinquency hearings are entitled to the “beyond a reasonable doubt” dispositive. \textit{Id}. An ostensibly civil statutory scheme will be considered criminal in effect if the defendant proves that the purpose or effect is so punitive that the state’s intention is negated. \textit{Id.} at 369.

\textsuperscript{45} \textit{Comstock}, 627 F.3d at 521-22, 524. The Supreme Court has previously authorized civil commitment statutes that use the proof of past conduct—criminal or otherwise—for evidentiary purposes. \textit{Id.} at 522.

\textsuperscript{46} \textit{Id.} at 523. The prior bad act requirement is the starting point in the process of determining whether the individual is mentally ill, and an important indicator of future sexually violent tendencies. \textit{Id.}; see also \textit{Addington v. Texas}, 441 U.S. 418, 429 (1979) (pointing to factual aspects of civil commitment proceedings as beginning of inquiry to determine mental illness and dangerousness).

\textsuperscript{47} See \textit{Comstock}, 627 F.3d at 518, 519-22.

\textsuperscript{48} \textit{Id.} at 518. The court outlined the inherent flaw in issuing a facial challenge to a federal statute. See \textit{id.} at 518. When a party challenges a federal statute, a court presumes Congress has fulfilled constitutional requirements. \textit{Id.} In addition, courts rarely favor facial challenges given the requirement that the party show no set of circumstances exists where the statute would be valid. \textit{Id.}

\textsuperscript{49} \textit{Id.}

\textsuperscript{50} United States v. Comstock, 627 F.3d 513, 525 (4th Cir. 2010).

\textsuperscript{51} See \textit{id.} at 519-22. The court pointed to the \textit{Addington} Court, which distinguished the juvenile delinquency proceedings in \textit{Winship} from civil commitment proceedings. See \textit{id.} at 521. Juvenile delinquency proceedings necessitate the “reasonable doubt standard . . . to minimize the risk of erroneous confinement.” \textit{Id.} In contrast, the civil commitment statute like the one in the Adam Walsh Act has safeguards present to “minimize the risk of erroneous confinement.” See \textit{id.} The director of the facility must prepare annual reports on the mental condition of the confined individual and inform the individual of appropriate rehabilitation programs. 18 U.S.C. § 4247(c)(1)(B), (2) (2006). In addition, the court shall order the individual discharged if he is deemed to no longer be a danger to others. \textit{Id.} § 4248(e).
standard when they are charged with violating a criminal law.\textsuperscript{52} The court in \textit{Comstock} properly distinguished the delinquency hearings in \textit{Winship} from the civil commitment proceedings in the Adam Walsh Act.\textsuperscript{53} The Adam Walsh Act does not require the finding of a prior criminal act by an individual, only that the individual engaged or attempted to engage in the prescribed conduct, and thus the “clear and convincing evidence” standard is constitutionally proper.\textsuperscript{54}

Furthermore, the court should have recognized that the civil commitment procedure would be constitutional even if Congress had not included the bad act requirement.\textsuperscript{55} Congress explicitly protected the liberty interests of the mentally ill by including the bad act requirement as an additional safeguard against wrongful incarceration.\textsuperscript{56} In addition, Supreme Court precedent indicates the Court’s willingness to allow the “clear and convincing evidence” standard in civil commitment statutes, particularly when the statutory requirements rest entirely on the finding of both a serious mental illness and an individual’s inability to refrain from sexually violent conduct if released.\textsuperscript{57} The “clear and convincing evidence” standard prescribed by the Adam

\textsuperscript{53} \textit{See supra} notes 51 and 52 and accompanying text.
\textsuperscript{54} \textit{See supra} note 59 and accompanying text.
\textsuperscript{55} \textit{See Addington} v. \textit{Texas}, 441 U.S. 418, 432-33 (1979). The Court declared that civil commitment proceedings must use a standard of evidentiary proof greater than “preponderance of the evidence” when determining whether the individual is mentally ill, and whether the individual requires confinement to protect the individual and others. \textit{Id.} The statute at issue did not explicitly mention a requirement of a prior bad act or prior criminal act, but the occurrence of specific acts were taken into account when determining whether the defendant was mentally ill and dangerous to himself and others. \textit{See id.} at 418-22.
\textsuperscript{56} \textit{See United States v. Comstock}, 627 F.3d 513, 524 (4th Cir. 2010). The court stated:

\begin{quote}
[T]he prior bad act finding works to minimize the risk of errantly committing an individual who has in the past successfully suppressed intense and recurrent sexual impulses. This finding provides a safeguard against commitment premised on inexact predictions of future dangerousness, tempering the uncertainty that accompanies psychiatric diagnosis. It seems clear to us that Congress mandated this finding for a legitimate \textit{evidentiary} purpose: to subject a person to civil commitment under [18 U.S.C.] \textsection{4248} only if his mental disorder will lead to sexual violence or child molestation in the future, a finding that must be reinforced by proof that the disorder has impelled bad sexual acts in the past.
\end{quote}
\textit{Id.}
\textsuperscript{57} \textit{See Addington}, 441 U.S. at 432-33 (indicating need for standard of proof greater than “preponderance of the evidence” in civil commitment statutes). The Court upheld the Texas
Walsh Act is thus sufficient, especially given the presence of the bad act requirement as an additional safeguard.\(^{58}\) Applying the more restrictive “beyond a reasonable doubt” standard would create a difficult hurdle for the government to overcome in the civil commitment procedure, and would be an unnecessary roadblock to the ultimate goal of preventing sexual violence and protecting the physical and emotional health of children.\(^{59}\)

In *United States v. Comstock*, the Fourth Circuit reversed the district court decision that the civil commitment provision of the Adam Walsh Act violated the Due Process Clause of the Fifth Amendment.\(^{60}\) The Court correctly reasoned that the prior bad act requirement does not necessitate the finding of a prior criminal act.\(^{61}\) The provision is not punitive in nature, and is not affixing culpability for criminal conduct.\(^{62}\) The “clear and convincing evidence” standard is constitutionally proper because the determination of mental illness and potential for future dangerousness is used solely for evidentiary purposes.\(^{63}\) The prior bad act requirement is a valid yet superfluous addition to the statute, given the Supreme Court’s history of upholding civil commitment statutes that consider only mental illness and future dangerousness as criteria for civil commitment.

statute that subjects an individual to civil commitment if the Court finds the individual is mentally ill and requires hospitalization to protect himself and others. *See id.* at 432-33; *see also* Kansas v. Hendricks, 521 U.S. 346, 355-56 (1997) (affirming “clear and convincing” evidentiary standard as proper in civil commitment proceedings).

\(^{58}\) Id.; *see also* Hendricks, 521 U.S. at 356 (affirming civil commitment proceedings require “clear and convincing evidence” due process standard to determine mental illness and danger to others). *But see* Yung, *supra* note 37, at 468-72 (doubting “clear and convincing evidence” standard of proof constitutionally sufficient to guarantee due process); Barker, *supra* note 37, at 162-63 (arguing factual question of prior bad act requires “beyond a reasonable doubt” standard to comport with due process requirements).

\(^{59}\) *See Addington*, 441 U.S. at 418-19. The Court stated:

The reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. The state should not be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments.

*Id.*

\(^{60}\) *Comstock*, 627 F.3d at 524.

\(^{61}\) *See supra* note 39 and accompanying text.

\(^{62}\) *See supra* note 40 and accompanying text.

\(^{63}\) *See supra* notes 40-41 and accompanying text.
commitment.\textsuperscript{64}

\textsuperscript{64} See supra note 57 and accompanying text.