CURRENT DEVELOPMENTS IN THE LAW

A Survey of Cases which Involve the Federal Enforcement of State-Imposed Child Support Payment Orders

This section presents a broad selection of cases recently decided in the federal court system, but it is not intended to be a comprehensive collection.

Blessing v. Freestone, 117 S. Ct. 1353 (1997). THE SUPREME COURT HELD THAT TITLE IV-D'S CHILD SUPPORT PROGRAM DOES NOT GIVE INDIVIDUALS A FEDERAL RIGHT TO COMPEL STATE CHILD SUPPORT PROGRAMS TO COMPLY SUBSTANTIALLY WITH TITLE IV-D'S MANDATE.

I. INTRODUCTION

The plaintiffs, five mothers of children eligible to receive state child support services, invoked § 1983 against the Director of Arizona's Department of Economic Security seeking declaratory and injunctive relief and arguing that defendant had violated their federal rights by failing to compel the state's child support program to comply substantially with Title IV-D obligations.[1] Anyone acting under the color of state law who denies a person "of any rights, privileges, or laws" is subject to liability under § 1983.[2] The Supreme Court found that Title IV-D[3] did not give rise to the federal right asserted by the plaintiffs. However, the Court acknowledged that other enforceable federal rights may arise under Title IV-D and that Title IV-D's remedial scheme did not foreclose § 1983 actions.[4]

II. BACKGROUND

In order for state child support agencies to qualify for funds from the federal Aid to Families with Dependent Children ("AFDC") program,[5] the agencies must follow guidelines established by Title IV-D.[6] Title IV-D prescribes the services and structure for states' comprehensive child support enforcement pro-

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[1] Blessing v. Freestone, 117 S. Ct. 1353, 1358 (1997).

[2] 42 U.S.C. § 1983.

[3] 42 U.S.C.A. §§ 651-669b (Nov. 1996 Supp.).

[4] *See Blessing*, 117 S. Ct. at 1362.

[5] *See* Social Security Act, Title IV-A, 42 U.S.C. §§ 601-617 (1994).

[6] 42 U.S.C.A. §§ 651-669b.

grams.[7] The Secretary of Health and Human Services ("Secretary") oversees state compliance and is authorized to penalize state agencies not in substantial compliance.[8]

The plaintiffs asserted that structural defects in the defendant's ("Director's") Title IV-D program violated their rights under the program.[9] The plaintiffs based their § 1983 claim on a federal right to compel the Director's agency to "substantially comply" with Title IV-D requirements.[10]

In examining the state's performance reviews conducted between 1984 and 1989, the Secretary found that Arizona failed to implement fundamental program requirements.[11] The Secretary repeatedly imposed and waived penalties as Arizona attempted to comply.[12] The plaintiffs filed suit based these findings that Arizona failed to comply substantially with Title IV-D requirements.[13]

The District Court for the District of Arizona granted summary judgment in favor of defendant.[14] The Ninth Circuit Court of Appeals reversed and held that Title IV-D created individual rights in the plaintiffs that entitled them to seek relief pursuant to § 1983.[15]

III. ANALYSIS

A. *Plaintiffs' § 1983 Burden*

The Court stated that in order for the plaintiffs to invoke § 1983[16] they must assert that the Director, under the color of law, violated a federal right rather than a federal law.[17] The Court found that although the plaintiffs alleged viola-

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[7] *See* Blessing, 117 S. Ct. at 1356. Title IV-D requires states to form a comprehensive system to establish paternity, locate absent parents, and obtain support payments. These systems are required to have separate units, minimum staff levels, detailed recordkeeping, and a comprehensive computer system.

[8] *See id.* at 1357. Substantial compliance is "(a) full compliance with requirements that services be offered statewide . . . (b) 90 percent compliance with case opening and closing (c) 75 percent compliance with most remaining program requirements.' 45 CFR § 305.20 (1995).

[9] *See id.* at 1358.

[10] *See id.* at 1357. A State that does not "substantially comply" with Title IV-D requirements is subject to penalties determined by the Secretary of Health and Human Services. 42 U.S.C. § 609(a)(8).

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.* at 1354.

[15] *See id.* at 1356.

[16] *See id.* at 1359. A person may invoke § 1983 against anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C.A. § 1983.

[17] *See id.* (citing Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989)).

tion of a federal right, they failed to specify which right.[18] The Court requires well-defined claims when determining whether rights arise from federal statutes.[19] Therefore, the Court found that the Ninth Circuit erred by stating in "sweeping terms" that Title IV-D granted rights to the plaintiffs.[20]

The Court subsequently set forth a three-prong test to determine whether Title IV-D gives rise to the right asserted by the plaintiffs.[21] The test requires that: "(1) Congress must have intended that the provision in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence; [and] (3) the statute must unambiguously impose a binding obligation on the States."[22]

In applying the first prong, the Court concluded that Congress did not intend that the state operate its child support program in "substantial compliance" with Title IV-D in order to benefit individual children and custodial parents.[23] Therefore, Title IV-D did not give the plaintiffs the right to compel the state agency to comply with the Title IV-D mandate.

The Court labeled the "substantial compliance" requirement a "yardstick" for the Secretary in evaluating the state's program with regard to federal requirements.[24] The Court noted that under Title IV-D, a state's program would be in "substantial compliance" if it met only seventy-five percent of certain requirements.[25] This fact supported the Court's classification of the requirement.

The Court concluded by positing that some provisions of Title IV-D could give rise to individual rights.[26] Therefore, the Court remanded the case to the District Court for *de novo* review of the specific allegations in the plaintiffs' complaint.[27]

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[18] *See id.* at 1360 (citing Golden State, 493 U.S. at 106).

[19] *See id.* (citing Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 430 (1987)) (finding that tenants of public housing had a right to include utility costs in their rental payment under the specific statutory provision limiting "rent" to thirty percent of a tenant's income).

[20] *See id.*

[21] *See id.* at 1358.

[22] *See id.* (citing Wright, 479 U.S. at 430-32).

[23] *See id.* at 1361.

[24] *See id.* The Court gave examples of Title IV-D requirements clearly unintended to give rise to individual rights, such as establishment of a computer system or compliance with staffing levels. 42 U.S.C. § 654a (Nov. 1996 Supp.); 45 CFR § 307.10 (1995); 42 U.S.C. § 654(3).

[25] *See id.*

[26] *See id.* at 1362. The Court noted that § 657, requiring "pass through" to recipients of the first fifty dollars of support payments obtained by the program, may give rise to a federal right to receive that portion of money collected. 42 U.S.C. § 657(b)(1).

[27] *See id.*

B. *Defendant's Contention of § 1983 Preclusion*

The Court proceeded to address defendant's contention that the remedial scheme within Title IV-D precluded § 1983 claims.[28] The Court placed the burden on defendant to demonstrate that a § 1983 action would be "inconsistent with the Congress" carefully tailored scheme'[29] because defendant had failed to specify an express provision of Title IV-D proscribing § 1983 actions.[30]

The Court remarked that in the past it has found only two remedial schemes adequately comprehensive to preclude § 1983 actions.[31] In addition, the Court stated that the "availability of administrative mechanisms" would not deny plaintiff access to § 1983.[32] The Court affirmed the Ninth Circuit's decision that Congress did not intend to foreclose § 1983 liability under Title IV-D.[33] It found that Title IV-D did not provide for a private remedy[34] and that the Secretary's authority extended only to auditing and imposing limited penalties.[35]

C. *Concurrence*

Justice Scalia, joined by Justice Kennedy, agreed with the Court's application of the three-pronged test as well as its final determination that Title IV-D did not grant the plaintiffs the right to compel the state agency to "substantially comply" with the Title IV-D mandate.[36] However, it found that the Court did not need to address the potential availability of § 1983 suits to beneficiaries of federal-state funding agreements like Title IV-D.[37]

In addition, the concurrence noted that at the time § 1983 was enacted, contract law did not permit third-party beneficiaries to sue to enforce contracts.[38] Nevertheless, it found it unnecessary at this time to reject third-party beneficiary use of § 1983 to enforce federal-state contracts because the Court did not raise the issue.[39]

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[28] *See id.* (citing Wilder v. Virginia Hospital Assn., 496 U.S. 498, 521 (1990) (quoting Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 20 (1981)).

[29] *See id.* (citing Golden State, 493 U.S. at 107).

[30] *See id.*

[31] *See id.* (citing Sea Clammers, 453 U.S. 1 (finding remedial scheme of the Federal Water Pollution Control Act sufficiently comprehensive); Smith v. Robinson, 468 U.S. 992 (1984) (finding remedial scheme of the Education of the Handicapped Act thorough enough to supplant § 1983 actions)).

[32] *See id.* at 1363 (citing Golden State, 493 U.S. at 106).

[33] *See id.*

[34] *See id.* (citing Sea Clammers and Smith).

[35] *See id.* Title IV-D permits the Secretary to penalize noncomplying States by reducing AFDC grants "by up to five percent." 42 U.S.C. §609 (a)(8).

[36] *See id.* at 1363-4.

[37] *See id.* at 1364.

[38] *See id.* (citing Brief for Council of State Governments et al., as *Amici Curiae* 10-11 n.6).

[39] *See id.*

IV. CONCLUSION

The Supreme Court held that Title IV-D did not give the plaintiffs a federal right to invoke § 1983 to compel the State's child support program to substantially comply with Title IV-D. However, the Supreme Court did find that other provisions of Title IV-D might give rise to federal rights and that Title IV-D's remedial scheme did not foreclose § 1983 actions. Therefore, the Court remanded the case to the District Court for *de novo* review of the plaintiffs' claims.

Karin Church

United States v. Black, Nos. 96-3890, 97-1144, 1997 WL 549577 (7th Cir. Sept. 3, 1997). THE CIRCUIT COURT FOUND THAT THE CHILD SUPPORT RECOVERY ACT, WHICH ENFORCES PAST-DUE CHILD SUPPORT OBLIGATIONS AGAINST PARENTS WHO MOVE OUT OF STATE TO AVOID PAYING THEM, IS A CONSTITUTIONAL EXERCISE OF THE COMMERCE CLAUSE POWER AND COMPORTS WITH THE TENTH AMENDMENT.

I. INTRODUCTION

Plaintiffs Gerald Black and Stephen R. Davis appeal their convictions under the Child Support Recovery Act ("the Act, the CSRA") for willfully failing to pay past-due child support obligations.[1] The plaintiffs first contend that Congress unconstitutionally exceeded its power under the Commerce Clause in enacting the CSRA.[2] The plaintiffs also contend that the CSRA violates the Tenth Amendment by interfering with the traditional state regulation of domestic relations.[3] The Seventh Circuit Court of Appeals affirmed the plaintiffs' convictions, finding that the Commerce Clause grants sufficient power to Congress to enact the CSRA, and that by doing so, the Act comports with the Tenth Amendment.[4]

II. BACKGROUND

After divorcing their spouses and relocating to states different from their children, both plaintiffs failed to comply with their child support obligations.[5] In November 1994, the U.S. Attorney charged Black with violating the CSRA by willfully and unlawfully failing to pay past due child support obligations exceeding $5,000 while residing in a state different from his children.[6] After a bench trial, the federal magistrate sentenced Black to six months imprisonment.[7] The magistrate suspended the sentence, but placed Black on probation for 18 months

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[1] United States v. Black, Nos. 96-3890, 97-1144, 1997 WL 54977 (7th Cir. Sept. 3, 1997) at *1.

[2] *See id.*

[3] *See id.* at *1.

[4] *See id.*

[5] *See id.* at *2.

[6] *See id.* at *1.

[7] *See id.* at *2.

and ordered him to pay $500 each month until he fulfilled his child support obligation.[8] Davis, after a federal magistrate formally charged and convicted him of violating the CSRA in December 1995, was sentenced to six months imprisonment and ordered to pay restitution of $111,800.[9] Both plaintiffs appealed.

III. ANALYSIS

A. *The Case for Federal Action*

The court began its discussion by emphasizing that states face significant obstacles to effective enforcement of child support obligations when parents move across state lines.[10] The ease with which the delinquent parent may avoid child support obligations by moving to a different state results in an annual deficit of $5 billion in child support payments.[11] Congress enacted the CSRA to supplement the state power to enforce child support obligations against parents who avoid paying their obligations by moving to states away from their children.[12] The court noted that every circuit court that had addressed the constitutionality of the CSRA upheld the Act as a valid exercise of federal power.[13]

B. *The Commerce Clause*

Traditionally, courts interpreted the Commerce Clause as a positive power to pass laws that "help the states solve problems that defy local solutions."[14] The court acknowledged that judicial review of Congress' power under the Commerce Clause is limited and deferential, requiring a two-step analysis.[15] First, a court must inquire whether Congress provides a rational basis for invoking its Commerce Clause powers to enact the CSRA.[16] Second, a court must determine whether the CSRA reasonably fulfills its purpose of apprehending parents who avoid their child support obligations by moving across state lines.[17]

The court found that the CSRA passed the rational basis inquiry because it falls into one of the three categories of regulation permitted by the Commerce Clause. In *United States v. Lopez,* the Supreme Court restricted the permissible exercise of Congress' commerce power to three categories of regulation: channels of interstate commerce, instrumentalities of interstate commerce, and anything that "substantially affects" interstate commerce.[18] Child support payments

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[8] *See id.* at *2.

[9] *See id.*

[10] *See id.* at *3 (citing H.R. Rep. No. 102-771).

[11] *See id.*

[12] *See id.* (citing 138 Cong. Rec. H7324-01 (daily ed. Aug. 4, 1992)).

[13] *See id.* at *4

[14] *Id.* (citing United States v. Sage, 92 F.3d 101, 105 (2d Cir. 1996)).

[15] *See id.* at *4 (citing United States v. Kenney, 91 F.3d 884, 886 (7th Cir. 1996) and Hodel v. Virginia Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981)).

[16] *See id.* at *4.

[17] *See id.* at *4.

[18] *Id.* at *5 (citing United States v. Lopez, 514 U.S. 549 (1995)).

sent by a parent residing in a different state than the children typically travel through the instrumentalities of interstate commerce by mail, wire, or electronic transfer.[19] Child support payments fall within the category of an instrumentality of interstate commerce, illustrated by the practice of many states of equating child support payments with interstate contracts or with the regulation of the non-payment of debts in which the judgment creditor and judgment debtor live in different states.[20] Furthermore, the CSRA requires one parent to live in a state different from his children, which provides a multijurisdicitonal element that triggers the power of the Commerce Clause.[21] On these grounds, the CRSA passes the rational basis inquiry.[22]

C. *The Tenth Amendment*

Congress automatically complies with the Tenth Amendment when it acts within its enumerated powers.[23] Because the court found that Congress legitimately exercised its power to regulate interstate commerce under the Commerce Clause, an enumerated power, when it enacted the CSRA, the CSRA comports with the Tenth Amendment.[24] The plaintiffs argued that the CRSA intrudes upon traditional state territory in family law.[25] The court pointed out that the CRSA merely enforces the state-imposed child support obligation. It does not infringe on traditional state functions of regulating domestic relations. The CSRA seeks to "strengthen, not to supplant, State enforcement efforts."[26]

D. *Other Considerations*

1. The Court Arrearage Order

The plaintiffs argued that an order to pay child support creates a continuing obligation, and they cannot violate the CSRA until the court issues a final judgment for the exact amount owed.[27] The court replied that parents violate the CSRA when either the court or an administrative order determines the amount of delinquent child support payments owed, since the statute's plain language requires only that there be a state court order determining the delinquent child support obligation.[28] Even though there remains a possiblility that the court will change its order, the possibility of a later change does not allow the person to

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[19] *See id.* at *6 (citing United States v. Parker, 108 F.3d 28, 31 (3d Cir. 1997)).

[20] *See id.* at *6 (citing United States v. Sage, 92 F.3d 101, and United States v. Hampshire 955 F.3d 999 (10th Cir. 1996)).

[21] *See id.* at *7.

[22] *See id.* at *8.

[23] *See id.* at *8.

[24] *See id.*

[25] *See id.* at *9.

[26] *Id.* at *9 (citing 138 Cong. Rec. H7324, H7326 (daily ed. Aug. 4, 1992)).

[27] *See id.* at *10.

[28] *See id.* at *11.

ignore it until the court does change it.[29]

2. Willfulness

The plaintiff Davis argued that the goverment failed to prove willfulness beyond a reasonable doubt, a requirement for any criminal conviction.[30] He claimed that because he had remained in Texas since 1986 and had not attempted to move to avoid child support payments, he could not be charged with a willful violation of his child support obligation.[31] The court reasoned that the CSRA does not require that the parent willfully intend to move out of state to avoid child support payments, only that he or she does so, and willfully refuses to pay the child support.[32] In addition, the district court found that Davis told his wife he intended to move out-of-state in order to avoid paying child support, providing sufficient evidence of willfulness in itself.[33]

3. The Ex Post Facto Clause

The plaintiff Davis argued that past-due child support obligations cannot be enforced with a criminal or contempt action once the youngest child is no longer dependent.[34] Davis argued that when Congress passed the Act on October 25, 1992, all of his children were emancipated, so the Ex Post Facto Clause precludes the court from calculating his past-due child support obligations before 1992, and because his children were emancipated after 1992, he was no longer required to pay child support after 1992.[35] The court first held that Davis' past-due child support obligations met the minimum threshold under the CSRA of $5,000 even before his children turned sixteen.[36] Emancipation does not automatically erase delinquent child support obligations accrued before emancipation.[37] The court then held that Davis' punishment to pay over $100,000 accrued since the time of his divorce, not since the time of passage of the Act in 1992, did not violate the Ex Post Facto Clause because he was "punished in accordance with the law as it existed at the time of his offense."[38] It is irrelevant that a portion of the plaintiff's debt accrued before the Act was passed and before his children were emancipated. The plaintiff remains responsible for them.[39]

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[29] *See id.*

[30] *See id.* at *12.

[31] *See id.* at *12.

[32] *See id.* at *12 (citing 18 U.S.C. § 228(a)).

[33] *See id.* at *13.

[34] *See id.* at *13.

[35] *See id.*

[36] *See id.* at *17.

[37] *See id.* at *16.

[38] *Id.* at *14 (quoting United States v. Crawford, 115 F.3d 1397, 1402 (8th Cir. 1997)).

[39] *See id.* at *14.

IV. CONCLUSION

The Court of Appeals found that Congress acted within the constraints of the Commerce Clause and the Tenth Amendment when it enacted the Child Support Recovery Act. Congress may supplement state power with the CSRA in order to apprehend parents who seek to avoid child support obligations by moving across state lines.

Elisabeth C. Hendricks

United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997). THE COURT OF APPEALS FOUND THAT (1) THE ENACTMENT OF THE CHILD SUPPORT RECOVERY ACT OF 1992 WAS NOT AN UNCONSTITUTIONAL EXERCISE OF CONGRESS' COMMERCE POWER; (2) THE CSRA DOES NOT VIOLATE THE TENTH AMENDMENT; (3) THE DISTRICT COURT'S DECISION DID NOT VIOLATE THE EX POST FACTO CLAUSE OF THE CONSTITUTION; (4) VENUE IN CHILD SUPPORT ENFORCEMENT CASES IS PROPER IN EITHER THE STATE OF THE OBLIGOR-PARENT OR THE STATE OF THE OBLIGEE-CHILD; AND (5) THERE WAS SUFFICIENT EVIDENCE TO SUPPORT CRAWFORD'S CONVICTION.

I. INTRODUCTION

Defendant Lynn Crawford was found guilty of violating the Child Support Recovery Act of 1992[1] ("the CSRA, the Act") after failing to make child support payments for more than three years.[2] Crawford contended that the District Court should have dismissed the indictment against him, on the grounds that: (1) Congress exceeded its Commerce Clause powers when enacting the CSRA; (2) the CSRA violates the Tenth Amendment; (3) his rights under the Ex Post Facto Clause were violated; (4) venue in the Eastern District of Missouri was improper; and (5) there was insufficient evidence to support his conviction.[3] The Court of Appeals rejected Crawford's arguments and affirmed his conviction.

II. BACKGROUND

Defendant Lynn T. Crawford and his wife, Mona Tague, were married in Missouri in 1984 and soon after moved to Texas.[4] They had two daughters, born in 1985 and 1986.[5] They separated in 1988, and Tague, who retained custody of the couple's children, returned to Missouri.[6] They divorced in November 1990.[7] In both the temporary order and the final divorce decree, Crawford was ordered to make monthly child support payments of $1,000.[8] Crawford complied with

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[1] 18 U.S.C. § 228.

[2] *See* United States v. Crawford, 115 F.3d 1397, 1399 (8th Cir. 1997).

[3] *See id.*

[4] *See id.* at 1398.

[5] *See id.*

[6] *See id.*

[7] *See Crawford*, 115 F.2d at 1402.

[8] *See id.* at 1398-1399.

the orders briefly, but failed to make any payments between October 1992 and February 1996.[9]

The District Court denied Crawford's motion to dismiss the indictment,[10] and the case proceeded to trial. Crawford was found guilty of violating the CSRA, sentenced to six months imprisonment, and ordered to pay restitution in the amount of $91,547.14 plus interest.[11] Crawford appealed.

III. ANALYSIS

A. *The Exercise of Congressional Power under the Commerce Clause*

Upon *de novo* review,[12] the court found that the CSRA was not an unconstitutional exercise of Congress's Commerce Clause power.[13] The constitutionality of the Act does not depend upon the fact that the obligor-parent and the obligee-child reside in different states, because the exchange of money between households, or the debt resulting from the non-payment of such an obligation, bears a substantial relation to interstate commerce.[14]

The court deferred to *United States v. Lopez*[15] as the governing rule of Commerce Clause power.[16] *Lopez* established "three broad categories of permissible regulation under Congress's Commerce Clause power."[17] Crawford contended that the CSRA failed to comply with any one of those categories.[18] The court found that the payment of child support does indeed comply with the first category established in *Lopez* because the payment of child support to a child who resides out-of-state necessarily requires the use of channels of interstate commerce.[19] The court also found that such a transaction also complies with either the second or the third category.[20]

Crawford also argued that the payment of child support is completely unrelated to interstate commerce, and that the mere fact that he and his former wife resided in different states was not enough to bring them within congressional control.[21] The Supreme Court has held that although the contribution of one per-

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[9] *See id.*

[10] *See* United States v. Crawford, No. 4:96CR42 (E.D. Mo. May 30, 1996) (order).

[11] *See id.* (July 2, 1996) (judgment).

[12] *See Crawford*, 115 F.3d at 1400 (citing United States v. McMasters, 90 F.3d 1394, 1397 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 718, 136 L. Ed. 2d 636 (1997)).

[13] *See id.*

[14] *See id.*

[15] 514 U.S. 549 (1995).

[16] *See Crawford*, 115 F. 3d at 1399.

[17] *See id.* at 1399-1400. The three categories are "(1) the regulation of the use of channels of interstate commerce; (2) regulation and protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) regulation of activities having a substantial relation to interstate commerce." *Id.*

[18] *See id.* at 1400.

[19] *See id.*

[20] *See id.*

[21] *See id.* (citing Brief for Appellant at 7).

son to interstate commerce may seem insignificant in itself, an activity will fall within the scope of federal regulation if it would impact interstate commerce when conducted by multiple persons in similar situations.[22]

The court rejected Crawford's argument that he should not be subject to the CSRA because he did not change his residence, while his wife moved out of state.[23] The court noted that "the constitutionality of the CSRA is based upon the relationship between the regulated activity and interstate commerce, irrespective of the fact that the parent-defendant's own performance, or nonperformance, has remained locally confined."[24]

B. *Tenth Amendment Arguments*

Crawford argued that the court should hold the CSRA unconstitutional under the Tenth Amendment.[25] Alternatively, he claimed that the court should have refused to enforce the CSRA on grounds that it "interferes with the states' traditional sovereignty over matters involving domestic relations and enforcement of their criminal laws."[26] The court rejected both of these arguments.[27]

The Tenth Amendment provides that all powers not granted to the federal government are reserved to the states or to the people.[28] Because the court determined that the CSRA falls within a power granted to the federal government by the Constitution (i.e., the power to regulate interstate commerce), Crawford's Tenth Amendment argument necessarily failed.[29]

Next, the court determined that the sovereignty contention did not apply to this case, because the CSRA does not interfere with state laws or judicial proceedings.[30] The CSRA does not regulate state law. Instead, it assists the states in enforcing their judgments.[31]

The court found Crawford's reliance on the domestic relations exception to the exercise of federal jurisdiction to be misplaced, because this exception applies only to cases of divorce and alimony which are based on diversity jurisdiction.[32] Because the court's jurisdiction in this case was not based on diversity of citizenship, the domestic relations exception did not apply.[33] The court further noted that the CSRA does not regulate domestic relations, but the enforcement of judgments and decrees.[34]

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[22] *See id.* (citing Wickard v. Filburn, 317 U.S. 111, 127-28 (1942)).

[23] *See id.*

[24] *See id.* (citing Wickard, 317 U.S. at 125).

[25] *See id.* at 1401.

[26] *See* Younger v. Harris, 401 U.S. 37, 91 (1971).

[27] *See id.*

[28] U.S. CONST. amend. X.

[29] *See Crawford*, 115 F.3d at 1401.

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.* at 1401-02.

[34] *See id.* at 1402.

C. *The Ex Post Facto Clause of the Constitution*

Crawford argued that the CRSA can only be used to enforce judicial decrees issued after October 25, 1995.[35] Alternatively, he argued that his restitution order violated the Ex Post Facto Clause of the Constitution because it required him to make payments which were due prior to the enactment of the CSRA.[36] The court rejected both of Crawford's arguments.[37]

The court found that the district court's order did not violate the Ex Post Facto Clause of the Constitution.[38] The Ex Post Facto clause prohibits the imposition of a punishment for an act which was not punishable at the time it was committed, or additional punishment to that mandated at the time the act was committed.[39] The nonpayment of child support, however, was illegal even prior to the enactment of the CSRA.[40] The CSRA did not augment the punishment for this offense,[41] but provided a means of enforcement of child support decrees.[42] The court stated that because Crawford was punished according to a law which was effective at the time he violated the child support order, his punishment did not violate the Ex Post Facto Clause of the Constitution.[43]

Similarly, the court rejected Crawford's argument regarding payments which were due prior to the enactment of the CSRA.[44] This argument failed because the District Court ordered Crawford to pay restitution, an amount which he already owed to his children, without imposing any additional damages.[45]

D. *Venue*

Crawford argued that venue in this case was improper because he had no connection with the Eastern District of Missouri, other than the fact that his children resided there.[46] The court examined *Murphy v. United States*,[47] the only other case which then addressed this type of venue challenge. In *Murphy*, a magistrate judge vacated a judgment similar to Crawford's on grounds that the venue was improper.[48]

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[35] *See Crawford*, 115 F.3d at 1403.

[36] *See id.*

[37] *See id.* at 1402-03.

[38] *See id.* at 1402.

[39] *See id* at 1402 (citing Weaver v. Graham, 450 U.S. 24, 28 (1981)).

[40] *See id.* at 1403.

[41] *See id.*

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] 934 F. Supp. 736, 737-38 (W.D. Va. 1996).

[48] In *Murphy*, the district court focused on the operative verb phrase in the CSRA ("willfully fails to pay"), and determined that proper venue is where the defendant is required to make his or her payments. The court noted that the statute was directed at parents who fled a jurisdiction in order to avoid payment of child support. It declined to af-

The Crawford Court focused on 18 U.S.C. §3237(a), which provides that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."[49] Crawford claimed that he had not begun, continued, or completed any crime in the Eastern District of Missouri.[50] He further claimed that all of his acts (or omissions) were committed in his home states of Texas and Louisiana.[51] The support order was rendered by a Texas court, and he was required to make his payments through the Dallas County Child Support Office.[52]

The government argued that *Murphy* was decided incorrectly, and that the court wrongly focused on the location of the defendant at the time he failed to pay child support, instead of the expectation of the out-of-state child that went unmet.[53] The court accepted this argument, and concluded that the District Court properly focused upon "the unfulfilled expectation which Crawford's children experienced in Missouri" when determining whether venue was proper.[54]

The venue rights of a criminal defendant require that the trial take place where the crime was committed.[55] The court reviewed the question of whether a defendant's venue rights are violated when the defendant's trial is held in the place of his children's residence and determined that this choice of venue was proper.[56]

The court determined that the failure to make a child support payment does "not necessarily occur in only one place."[57] Because this crime involved an omission rather than an overt act, the court had difficulty determining where the crime was begun, continued, or completed.[58] The court ultimately decided that the crime occurred "where there [wa]s an absence of the required payment," in addition to the place "where the payment was to be deposited."[59] In other words, the court found that Crawford was subject to venue in both his home states and in the state where his children resided.[60] The greatest effects of the failure to pay child support will be felt by the child, in the child's home state.[61] In addition, the state of the child is one of the places where interstate commerce will be affected when a parent fails to pay child support.[62]

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fix the residence of the child as the proper place of venue.

[49] 18 U.S.C. §3237(a).

[50] *See Crawford*, 115 F.3d at 1404.

[51] *See id.*

[52] *See id.*

[53] *See id.*

[54] *See id.* at 1405.

[55] *See id.*

[56] *See id.*

[57] *See id.* at 1405.

[58] *See id.* at 1406.

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See id.*

The court held that the District Court did not err when it refused to grant Crawford dismissal on the grounds that venue in the Eastern District of Missouri was improper.[63]

E. *Evidence*

Crawford finally contended that the government lacked sufficient evidence to prove that his failure to pay child support was willful, as required by the CSRA.[64] Under its "well-established standard for reviewing claims of insufficient evidence, [the court] view[s] the evidence in the light most favorable to the government, giving the government the benefit of all reasonable inferences."[65]

There was ample evidence that Crawford was aware of his financial obligation to his children.[66] Crawford's earnings of $230,000 during the years he failed to pay child support indicated that he was capable of making the payments.[67] The court therefore found a legally sufficient amount of evidence to support the government's claim that Crawford willfully failed to make child support payments during the years in question.[68] The court rejected Crawford's argument that the government's evidence was insufficient.[69]

IV. CONCLUSION

The Eighth Circuit-Court of Appeals found that Congress did not exceed its powers under the Commerce Clause in enacting the CSRA. It also found that the CSRA does not violate the Tenth Amendment. Finally, it held that venue in CRSA enforcement actions is proper in either the state of the obligor-parent or the state of the obligee-child.

Tara Lewis

United States v. Murphy, 117 F.3d 137 (4th Cir. 1997). THE COURT OF APPEALS HELD THAT THE DISTRICT WHERE THE DEFENDANT'S CHILD RESIDED WAS A PROPER VENUE IN WHICH TO PROSECUTE THE DEFENDANT FOR FAILURE TO PAY CHILD SUPPORT IN VIOLATION OF THE CHILD SUPPORT RECOVERY ACT.

I. INTRODUCTION

The plaintiff Murphy appealed his conviction for violating the Child Support Recovery Act ("the CSRA"), contending that he was prosecuted in an improper venue.[1] Murphy claimed that his prosecution in the Western District of Virginia

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[63] *See id.* at 1406-07.
[64] *See id.* at 1407.
[65] *See id.*
[66] *See id.*
[67] *See id.*
[68] *See id.*
[69] *See id.*
[1] *See* U.S. v. Murphy, 117 F.3d 137, 138 (4th Cir. 1997).

violated Fed.R.Crim.P. 18 and the constitutional commands it reflects.[2] The United States argued that the language of 18 U.S.C. § 228 and the policies underlying the CSRA dictate that the Western District of Virginia was indeed a proper venue in which to prosecute Murphy.[3] The Court of Appeals agreed that the Western District of Virginia was a proper venue in which to prosecute Murphy under the CSRA.[4]

II. BACKGROUND

Linda Murphy ("Linda") and James Murphy ("Murphy") divorced in Oklahoma in 1985.[5] Pursuant to their divorce decree, Murphy was obligated to pay $100 per month in child support for his daughter Erin.[6] Subsequently Murphy moved to Texas and Linda and Erin moved to Roanoke, Virginia.[7]

When Murphy failed to make child support payments, Linda sought assistance from the Virginia Department of Social Service, Division of Child Support Enforcement ("Virginia DCSE").[8] The Virginia DCSE contacted Texas and requested it take action under the Uniform Reciprocal Enforcement Support Act ("URESA").[9] As a result, a URESA action was filed against Murphy by the Texas Attorney General on behalf of the state of Virginia and Linda Murphy.[10]

In July 1990, the Texas court held that Murphy owed child support payments to "the State of Virginia and/or the petitioner."[11] The court required Murphy to make payments to the Johnson County Child Support Office in Cleburne, Texas, and instructed that office to forward those payments to the Virginia DCSE.[12]

Murphy made the payments through July 1991.[13] He then quit his job and left Texas, after which payments ceased.[14] Virginia DCSE tried to track Murphy down and collect the past due child support payments but could not due to his frequent relocation.[15]

Murphy contacted the Virginia DCSE in January of 1993, which told him that his case had been referred to the United States Attorney for criminal prosecu-

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[2] *See id.* at 138 (citing U.S. CONST. art. III, § 2, cl. 3, which guarantees right to be tried where crime was committed); U.S. CONST. amend. VI (stating that criminal defendants have the right to be tried in "the State and district wherein the crime shall have been committed").

[3] *See Murphy*, 117 F.3d at 138.

[4] *See id.* at 141.

[5] *See id.* at 138.

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *Id.*

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.* at 138-139.

tion.[16] Murphy still made no child support payments and on December 28, 1994, the U.S. Attorney filed a criminal complaint and arrest warrant for Murphy in the United States District Court for the Western District of Virginia.[17] Murphy was arrested in Florida in January 1995.[18]

Murphy was tried for violations of the CSRA in the United States District Court for the Western District of Virginia.[19] The court found him guilty of willful refusal to make child support payments and sentenced him to five years probation on the condition that he make the required child support payments.[20] In a pretrial motion, Murphy's counsel objected that the case was being tried in an improper venue, but the magistrate rejected the argument.[21]

The District Court agreed with Murphy that venue was improper in the Western District of Virginia[22] and remanded the case with instructions to dismiss for improper venue.[23] The United States appealed.[24]

III. ANALYSIS

A. *Constitutional Principles*

The Fourth Circuit Court of Appeals began its discussion by noting that the United States Constitution offers various guidelines for determining proper venue.[25] Article III of the United States Constitution guarantees an accused the right to be tried where a crime was committed, while the Sixth Amendment states that defendants have a right to be tried in the state and district where the crime was committed.[26] Fed.R.Crim.P. 18 reflects these constitutional principles by providing that "[e]xcept as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."[27]

The court also noted that the Constitution does not limit venue to a single district.[28] The Constitution only requires that venue be determined from the type of crime and the acts involved in committing the crime.[29] When Congress has not expressly provided for venue in a criminal statute, this circuit looks to the verbs defining the offense and the underlying purpose of the statute to determine

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[16] *See id.* at 139.

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See* Murphy v. United States, 934 F. Supp. 736, 738 (W.D.Va. 1996) ("Because Murphy was directed to pay the child support in Texas and was never ordered to make payments in Virginia").

[23] *See id.* at 740.

[24] *See Murphy*, 117 F.3d at 139.

[25] *See id.*

[26] *See id.* at 139 (citing U.S. CONST. art. III, § 2, cl. 3; and U.S. CONST. amend. VI).

[27] *See id.*

[28] *See id.* (citing U.S. v. Newsom, 9 F.3d 337, 338 (4th Cir. 1993)).

[29] *See id.* (citing U.S. v. Cofield, 11 F.3d 413, 419 (4th Cir. 1993)).

proper venue.[30] Here, the verbs of the CSRA indicate that venue would be proper in more than one place.[31]

B. *Legal Arguments*

Murphy argued that because the offense is "failure to pay," it can only occur in two places: the state where the payment originated or the state to whose court order he was subject.[32] This would limit proper venue to Florida, the state from which he failed to make payments, and Texas, the state to which he was required to make payments under the court order.[33]

The court rejected this argument.[34] Specifically, the Court drew attention to the statute's use of the word "resides," which makes it clear that the failure to pay is with respect to "a child who resides in another state."[35] Furthermore, the statute's verbs indicate that the duty to pay child support runs to the defendant's child.[36] According to the statute's language, then, Murphy failed to pay child support with respect to his daughter, and his daughter resides in another state.[37] The court stated that the statute's language "supports the conclusion that the child's residence is a proper venue for prosecution . . . ."[38]

Furthermore, the court noted that Murphy's reliance on other "failure to act" cases was misplaced.[39] In these cases, the only two possible venues were in the jurisdiction where the defendant could be found and where defendant was required to complete the performance of a legal obligation.[40] The court stated that the present situation presented different venue considerations because the "action at issue is payment to an intermediary whose function is to forward the payment to a third party."[41]

The court pointed out that Texas served only as an intermediary in the collection of overdue child support payments.[42] The ultimate destination of the payments was Virginia.[43] As such, the court held that it would be improper to say that Texas' role as a collection point for the payments compels the conclusion that venue was improper in the district for which those payments were destined: the Western District of Virginia.[44]

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[30] *See id.* (citing U.S. v. Cofield, 11 F.3d 413).
[31] *See id.* at 140.
[32] *See id.* at 139.
[33] *See id.* at 139-140.
[34] *See id.* at 140.
[35] *Id.*
[36] *See id.*
[37] *See id.*
[38] *Id.*
[39] *See id.*
[40] *See id.*
[41] *Id.*
[42] *See id.*
[43] *See id.*
[44] *See id.*

C. *Policy Arguments*

The court noted that its circuit has held that proper venue must promote the aims of the statute, not defeat them.[45] Applying this principle to Murphy's argument, the court found the idea of limiting venue to Texas troublesome.[46] The result of such a limitation would have to required all of the witnesses in this case to travel to Texas.[47] Such a result would make enforcement of the CSRA burdensome and would frustrate Congress' intention in passing the Act.[48]

D. *Concurrence*

In his concurring opinion Judge Williams agreed that venue was proper in the Western District of Virginia, but wrote separately to express his views on two points.[49] First, he did not read the majority opinion as holding that venue is proper under the CSRA wherever the child resides.[50] Instead, venue was proper in the Western District of Virginia in this case because the child support payments were designated for disbursement in the State of Virginia.[51] Second, Judge Williams wrote that the court should not allow legislative purpose to circumvent the constitutional requirement that venue lies where the crime is committed.[52] In determining where the crime is committed, Judge Williams advocate an exhaustive inquiry into the precise conduct proscribed by Congress rather than examining the legislative history of the statute in order to discern its purpose.[53] He conclude that proper venue analysis should only consider congressional purpose to the extent that it is given effect in the statutory text.[54]

IV. CONCLUSION

The Fourth Circuit Court of Appeals held that the district in which the defendant's child resides was the proper venue in which to prosecute the defendant for willful failure to make child support payments in violation of CSRA. Venue is not limited to the state from which the defendant failed to pay child support and the state to which he was required to make support payments pursuant to a court order. Instead, the language of the CSRA allows for the defendant

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[45] *See id.*

[46] *See id.* at 141.

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] *See id.* at 142.

[52] *See id.* at 141.

[53] *See id.* at 142.

[54] *See id.*

to be prosecuted in the district in which his child resides, which furthers the aims of the criminal statute.

Rebecca L. Andrews

United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997). THE COURT OF APPEALS HELD THAT THE CHILD SUPPORT RECOVERY ACT, WHICH MAKES THE FAILURE TO PAY A PAST-DUE SUPPORT OBLIGATION FOR A CHILD WHO RESIDES IN ANOTHER STATE A FEDERAL CRIME, IS CONSTITUTIONAL AND DOES NOT EXCEED CONGRESS' COMMERCE CLAUSE POWER.

I. INTRODUCTION

The Government charged the defendant Keith Douglas Bailey with a violation of the Child Support Recovery Act ("the CSRA, the Act")[1] for failing to pay court-ordered child support payments for the benefit of a child residing in another state.[2] The District Court for the Western District of Texas found that the CSRA exceeds Congress' authority under the Commerce Clause and dismissed the charges.[3] The government appealed the dismissal, and the Fifth Circuit Court of Appeals found that the CSRA is constitutional and does not exceed Congress' Commerce Clause power.[4]

II. BACKGROUND

In May 1994, the defendant Keith Douglas Bailey was ordered by a Texas court to pay $500 per month in child support for his four-year old son.[5] Thereafter, the defendant moved to Tennessee and discontinued payments in violation of the state court order.[6] The defendant challenged the constitutionality of the CSRA on several grounds.[7] First, the defendant contended that the Act violates Congress' Commerce Clause authority because: (a) it lacks a jurisdictional nexus to interstate commerce;[8] it impermissibly allows the federal courts to exercise jurisdiction over his failure to use the channels of interstate commerce (in the

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[1] 18 U.S.C. § 228(a). The CSRA was enacted in part due to the growing poverty in single-family homes and the observation by Congress that financial support from noncustodial parents could combat that poverty. The CSRA punishes the "willful failure to pay a past due child support obligation with respect to a child who resides in another state." The Act defines "past due support obligation" as "any amount determined under a court order or an order of an administrative process pursuant to the law of a state to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living; and that has remained unpaid for a period longer than one year, or greater than $5,000." *Id.*

[2] United States v. Bailey, 115 F.3d 1222 (5th Cir. 1997).

[3] *See id.* at 1224.

[4] *See id.*

[5] *See id.*

[6] *See id.* at 1224.

[7] *See id.*

[8] *See id.* at 1226.

defendant's failure to comply with a state court order); and it is a "jurisdictional bootstrap," meaning that instead of regulating already existing commerce, it forces individuals to use interstate commerce.[9] Second, the defendant contended that the CSRA violates the domestic relations exception to diversity jurisdiction.[10] Third, the defendant argued that the Act violates federalism in calling for federal review and application of state court orders.[11]

III. ANALYSIS

A. *The CSRA does not Exceed Congress' Commerce Clause Power*

The court began its discussion by stating that they did not need to consider the defendant's argument that diversity of citizenship between the parent and child is not enough to give Congress the power to regulate the relationship under the Commerce Clause.[12] It explained that in CSRA litigation not only are the parties diverse in residence, but an interstate debt obligation exists between them. These factors together satisfy the jurisdictional requirement.[13]

The court then discussed the extent of Congress' power under the Commerce Clause.[14] One category of regulation under the Commerce Clause is the "channels of interstate commerce" category the which Congress may regulate "the interstate transportation routes through which persons and goods move."[15] The court found that the CSRA falls within this category because "the payment obligation and the payment itself will be placed in the flow of interstate commerce as they invoke the channels or instrumentalities of commerce among the several states."[16] As long as the transaction contemplated by the state court order flows in interstate commerce, Congressional authority will continue to exist over defendants in CSRA litigation.[17]

A second category of regulation, "the instrumentalities of interstate commerce, or persons or things in interstate commerce," includes "regulation or protection pertaining to instrumentalities or things as they move in interstate commerce."[18] The court found that the child support obligation itself is a thing of interstate commerce and continues to move in interstate commerce as long as the obligee and obligor reside in different states and the debt continues to exist.[19]

The court then addressed the defendant's argument that the CSRA impermissibly allows the federal courts to exercise jurisdiction over his failure to use chan-

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[9] *See id.* at 1228.
[10] *See id.* at 1231.
[11] *See id.* at 1232.
[12] *See id.* at 1226.
[13] *See id.*
[14] *See id.*
[15] *See id.* (citing United States v. Parker, 911 F. Supp. 830 (E.D. Pa. 1995)).
[16] *See id.* at 1227.
[17] *See id.*
[18] *See id.* (citing United States v. Kirk, 105 F.3d 997 (5th Cir. 1995)).
[19] *See id.* at 1228.

nels of interstate commerce.[20] The court found that the defendant himself placed his child support debt in the flow of interstate commerce by moving away from Texas,[21] and thus, the CSRA is not a regulation of the non-use of interstate channels.[22] The court also noted that the acceptance of the defendant's non-use argument would permit Congress to regulate parents who underpay their child support payments, but not those who fail to pay their child support obligations at all.[23] The court concluded that the CSRA properly allows federal courts to exercise jurisdiction over the defendant's use of the channels of interstate commerce.[24]

Last, the court addressed the defendant's "jurisdictional bootstrap" argument. The defendant argued that the CSRA gives the federal courts jurisdiction over his failure to use the channels of interstate commerce, and in essence, forced the use of interstate channels of commerce.[25] The court stated that the defendant himself placed the debt obligation in interstate commerce the moment he moved away from Texas without fulfilling his child support obligation.[26] The court noted that Congress did not impose the obligation to pay child support on the defendant, but rather that the state court order obligated the defendant to make these payments.[27] The defendant's obligation to send money across state lines placed him in interstate commerce.[28] The court held that the CSRA falls within Congress' Commerce Clause authority and also noted that the CSRA would be constitutional even if it regulated the non-use of interstate channels of commerce.[29]

B. *The Domestic Relations Exception to Diversity Jurisdiction does not Apply to CSRA Litigation*

Federal courts do not accept diversity jurisdiction in cases involving the issuance of divorce, alimony and child custody decrees.[30] The rationale for this "domestic relations exception" to federal jurisdiction is that these are matters that should be decided by state courts.[31] The court stated that the domestic relations exception has no application in CSRA cases because they arise under federal question jurisdiction due to the express grant of jurisdiction under the statute.[32] The court further stated that any analogy to the domestic relations exception

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[20] *See id.*
[21] *See id.*
[22] *See id.*
[23] *See id.* (citing United States v. Lewis, 936 F. Supp. 1093 (D.R.I. 1996)).
[24] *See id.*
[25] *See id.*
[26] *See id.*
[27] *See id.* at 1230.
[28] *See id.* at 1229.
[29] *See id.*
[30] *See id.* at 1231 (citing Ankenbrandt v. Richards, 504 U.S. 689 (1992)).
[31] *See id.*
[32] *See id.*

fails in this case.[33] The only aspect of domestic relations implicated in a CSRA case is the family law character of the underlying support order, which is insufficient to invoke the exception.[34]

C. *The CSRA does not Offend Principles of Federalism and Comity*

The defendant argued that the Act upsets the federal-state balance in calling for federal review and application of state court orders.[35] The court rejected this argument, noting that a CSRA prosecution only turns on the defendant's violation of the state court order, not on the federal court's evaluation of the underlying order.[36] In addition, CSRA litigation does not require relitigation of any family law issue, and there is nothing in the Act allowing the federal court to look beyond the "four corners" of the state court order.[37]

The court then addressed the defendant's contention that the CSRA intrudes on the states' dominion to enact criminal laws.[38] It concluded that because the CSRA survives a commerce clause challenge, it does not intrude on the states' power to criminalize the willful failure to pay child support.[39]

Finally, the court addressed the defendant's argument that the Act violates the Tenth Amendment.[40] The court found that because Congress acted pursuant to its delegated powers under the Commerce Clause power in enacting the CSRA and did not usurp the states' police power, it was not a violation of the Tenth Amendment.[41]

D. *The Dissent's Argument*

The dissent argued that the CSRA should be overruled because it contains no reference to interstate commerce, regulates an activity that is not commercial, and invades the field of family law which is a traditionally an area of exclusive state sovereignty. According to the dissent, under the *Lopez* doctrine,[42] child support payments do not substantially affect interstate commerce. The dissent also rejected majority's argument that child support payments are commercial.[43] Finally, the dissent concluded that the CSRA did not validly regulate the channels or instrumentalities of interstate commerce, and therefore the statute exceeded the Commerce Clause and is unconstitutional.[44]

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[33] *See id.*
[34] *See id.*
[35] *See id.* at 1232.
[36] *See id.*
[37] *See id.*
[38] *See id.*
[39] *See id.*
[40] *See id.*
[41] *See id.* at 1233.
[42] *See id.* (citing United States v. Lopez, 514 U.S. 549, 558 (1995)).
[43] *See id.* at 1235.
[44] *See id.*

IV. CONCLUSION

The Fifth Circuit Court of Appeals found that the Child Support Recovery Act does not exceed Congress' power under the Commerce Clause and does not encroach on matters within the province of state sovereignty.[45] The court therefore held that federal jurisdiction was proper and reversed and remanded the case.[46] This case affirmed the constitutionality of the CSRA and provided that prosecutions under the Act are to be allowed by the lower courts.

Jessica J. Nagle

United States v. Johnson, 114 F.3d 476 (4th Cir. 1997). THE DISTRICT COURT FOUND THAT THE CHILD SUPPORT RECOVERY ACT WAS A VALID EXCERCISE OF BOTH THE COMMERCE CLAUSE AND THE TENTH AMENDMENT AND THAT THE GOVERNMENT NEED NOT PROVE A CHILD'S PARENTAGE IN ORDER TO CONVICT A PARENT OF VIOLATING THE CHILD SUPPORT RECOVERY ACT.

I. INTRODUCTION

The defendant Gary Nelson Johnson appealed his conviction for willfully failing to pay child support in violation of the Child Support Recovery Act ("the CSRA," "the Act"), 18 U.S.C. § 228.[1] The defendant argued that the CSRA exceeded Congress' authority under the Commerce Clause and the Tenth Amendment[2] and that the Government failed to prove his paternity, which he argues is

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[45] *See id.*

[46] *See id.*

[1] *See* United States v. Johnson, 114 F.3d 476, 479 (4th Cir. 1997) (citing 18 U.S.C. § 228).

18 U.S.C. § 228 provides in relevant part:

(a) Offense. Whoever willfully fails to pay a past due support obligation with respect to a child who resides in another state shall be punished as provided in subsection.

(b) Punishment. The punishment for an offense under this section is-

(1) in the case of a first offense under this section, a fine under this title, imprisonment for not more than 6 months, or both; and

(2) in any other case, a fine under this title, imprisonment for not more than two years, or both.

(c) Restitution. Upon a conviction under this section, the court shall order restitution under section 3663 in an amount equal to the past due support obligation as it exists at the time of sentencing.

(d) Definitions. As used in this section-

(1) The term "past due support obligation" means any amount-

(A) determined under a court order or an order of an administrative process pursuant to the law of a State to be due from a person for the support and maintenance of a child or of a child and the parent with whom the child is living; and

(B) that has remained unpaid for a period longer than one year, or is greater than $5,000.

Id.

[2] *See Johnson*, 114 F.3d at 478.

an essential element of the offense.[3] The district court held that the CSRA's enactment was a valid exercise of Congress' Commerce Clause powers and did not violate the Tenth Amendment.[4] In addition, the court found that paternity is not an element of the offense and affirmed his conviction.[5]

II. BACKGROUND

Gary Nelson Johnson and Mary Rauss married on May 25, 1985.[6] While Johnson remained in New York, Rauss moved to Virgina where their daughter was born in 1988.[7] Johnson and Rauss divorced in 1989 by a final decree of the circuit court of Prince William County, Virginia.[8] The decree required that Johnson pay $25 per week in child support.[9] That decree was the basis of an order for that level of child support by a New York family court.[10] After Johnson failed to comply with the New York court's order, it filed contempt orders against him[11] and issued a warrant for his arrest.[12] Johnson evaded arrest by moving to Florida.[13]

On September 6, 1995, the Government charged Johnson with knowingly and intentionally failing to pay child support from June 1991 to December 1995 in violation of the CSRA.[14] On June 20, 1995 the FBI arrested him.[15]

In a pretrial motion, Johnson argued that that the CSRA charges filed against him exceeded Congress' power under the Commerce Clause and violated the Tenth Amendment.[16] At trial, Johnson defended his charge on a claim of nonparentage.[17] Johnson asserted that parentage was an essential element of the CSRA offense.[18] The magistrate judge rejected the paternity defense, holding that paternity was not an element of the offense.[19] Rejecting Johnson's constitutional claims, the court also found him guilty of the CSRA offense.[20]

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[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.* The court entered contempt orders against Johnson on May 26, 1989, December 26, 1989, March 20, 1990, June 27, 1990, September 26, 1990, and on May 14, 1991.

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.* The court also found that if it were necessary, paternity had been proven.

[20] *See id.* at 479. The court sentenced him to 60 days imprisonment, imposed a fine of $1,000, and ordered restitution in the amount of $6,813.90.

The district court affirmed Johnson's sentence and conviction on appeal.[21] Johnson appealed the district court's ruling, arguing that: (1) the CSRA is not a constitutional exercise of Congress' Commerce Power and violates the Tenth Amendment, and (2) that parentage is an essential element of the CSRA offense.[22]

III. ANALYSIS

A. *The CSRA is Consistent with the Commerce Clause*

The defendant argued that the CSRA is an unconstitutional enactment of the Commerce Clause. This court as well as five other circuits, using the tripartite test outlined in *Perez v. United States*, found that the CSRA did not violate the Commerce Clause.[23] The District Court held that the CSRA is a constitutional exercise of Congress power to regulate the "persons and things in interstate commerce, or person and things in interstate commerce . . . ."[24] The "thing in interstate commerce" is the financial obligation of a parent to their dependent child living in another state.[25] Because the obligation to pay child support entails interstate commerce, the CSRA is a valid exercise of Congress' power under the Commerce Clause.

B. *The CSRA does not Violate the Tenth Amendment*

The court of appeals concluded that the CSRA does not violate the Tenth Amendment.[26] The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."[27] The Supreme Court's Tenth Amendment analysis requires a court to assess whether the regulation the statute embodies is within Congress' power as enumerated in the Constitution and whether the means of employing the regulation restrict state sovereignty.[28] Because this court had already held that the CSRA is a valid enactment of Congress' enumerated Commerce Power, it concluded that the first prong of the Tenth Amendment analysis was satisfied.[29]

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[21] *See id.* at 479.

[22] *See id.*

[23] *See id.* (citing Perez v. United States, 402 U.S. 146, 150 (1971)). The CSRA has been upheld as constitutional. *See* United States v. Parker, 108 F.3d 38 (3d Cir. 1997); United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997); United States v. Mussari, 95 F.3d 787 (9th Cir. 1996); United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996); and United States v. Sage, 92 F.3d 101 (2d Cir. 1996).

[24] *Id.* at 479 (citing United States v. Lopez, 514 U.S. 549, 561 (1995)).

[25] *Id.* at 480 (citing Bongiorno, 106 F.3d at 1032).

[26] *See id.*

[27] *See id.* (citing U.S. CONST. amend X).

[28] *See id.* at 480.

[29] *See id.*

Under the second prong of its analysis, the court concluded that the CSRA does not infringe upon state sovereignty because the CSRA supplements rather that displaces state law enforcement of domestic relations[30] and because the CSRA does not infringe upon the state *parens patriae* doctrine.[31] Because Johnson has not suggested that a quasi-sovereign interest exists, the CSRA does not violate the Tenth Amendment.[32]

C. *Paternity is not an Essential Element of the Offense*

Johnson argued that the district court erred by ruling that paternity is not an essential element of the CSRA offense.[33] The court looked to the statutory language of 18 U.S.C. § 228 to determine its plain meaning.[34] The plain language of the CSRA does not include parentage as an essential element of the offense.[35] The essential elements of the offense are: "(1) a willful (2) failure to pay (3) a past due support obligation, defined as any amount . . . determined under a court order of an administrative process pursuant to the law of a state to be due . . . (4) with respect to a child who resides in another state."[36] The plain language of the statute neither states nor implies that parentage must be proved by the government. The third element of the CSRA offense requires that the government prove the existence of the court or administrative order compelling the support obligation.[37] Proving the existence of that order, however, does not require the government to prove parentage. The government only needs to authenticate the record, as it did in Johnson's case.[38] Furthermore, a defendant may not raise non-parentage as a defense to a support obligation, nor can a defendant demand relitigation of the issue.[39] A defendant can attack the authenticity of the record and if such an attack were to succeed, the prosecution would fail to carry its burden of proof.[40]

Johnson was also incorrect in attacking the elements of the CSRA offense by invoking a due process challenge affording him the right to relitigate the parentage issue. Johnson incorrectly sought support from *United States v. Mendoza-Lopez* in which the Supreme Court held that the defendant was entitled to make

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[30] *See id.* at 481 (citing Hampshire, 95 F.3d at 1004 and Sage, 92 F.3d at 107).

[31] *See id.* at 481. *Parens patriae* means that,under appropriate circumstances, a state may sue on behalf of its citizens when a separate quasi-sovereign interest is at stake. *See id.* (citing Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600-01 (1982)). The doctrine is limited as it only confers such standing to a state when an independent state sovereign interest is at stake. No such interest is at stake here.

[32] *See id.* at 481.

[33] *See id.* at 482.

[34] *See id.* (citing United States v. Johnson, 32 F.3d 82, 84 (4th Cir. 1994)).

[35] *See id.* at 482.

[36] *See id.* (citing 18 U.S.C. § 228).

[37] *See id.* at 482.

[38] *See id.*

[39] *See id.*

[40] *See id.*

a due process challenge to a prior administrative deportation order.[41] *Mendoza-Lopez*, however, provides only a narrow due process challenge of the constitutional validity of the predicate deportation order.[42] Even if the court had given *Mendoza-Lopez* a broad scope and invoked numerous assumptions, it could not justify Johnson's due process challenge.[43] He failed to assert that he was deprived a fair opportunity to challenge the support obligation within the state court system.[44] Johnson did not exploit any other opportunity to challenge the CSRA order within the Virginia state court system.[45] Because Johnson was unsuccessful in challenging the CSRA on due process grounds, the court concluded that "Johnson is not entitled to reversal of his conviction for failure of the Government to prove parentage, nor to challenge for fundamental unfairness the predicate Virginia court order which imposed the child support obligation at issue."[46]

IV. CONCLUSION

The court reaffirmed five other circuits in holding that the CSRA does not exceed Congress' power under the Commerce Clause, nor does it violate the Tenth Amendment. Most importantly, the court held that in challenging a CSRA support obligation, paternity is not an essential element of the offense, nor may it be raised as a defense to compel relitigation. Furthermore, a due process challenge to the fundamental unfairness of a state court order may not be asserted until all state remedies are exhausted.

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United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997). THE FIRST CIRCUIT COURT OF APPEALS HELD THAT: (1) THE CHILD SUPPORT RECOVERY ACT IS CONSTITUTIONAL UNDER THE COMMERCE CLAUSE AND TENTH AMENDMENT, (2) THE DISTRICT COURT COMMITTED NO PLAIN ERROR IN SENTENCING THE DEFENDANT TO ONE YEAR OF INTERMITTENT CONFINEMENT, AND (3) A RESTITUTION ORDER PURSUANT TO THE CSRA IS NOT "DEBT" UNDER THE FEDERAL DEBT COLLECTION PROCEDURE ACT.

I. INTRODUCTION

The defendant, Frank P. Bongiorno, argued that the Child Support Recovery Act ("the CSRA") which purports to enforce court-imposed child support obli-

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[41] *See id.* (citing United States v. Mendoza-Lopez, 481 U.S. 828 (1997)).

[42] *See id.*

[43] *See id.* The assumptions that must be made to consider Johnson's claim include that the principle in *Mendoza-Lopez* also apples to CSRA violations and that the CSRA prosecution applies to both judicial and administrative orders.

[44] *See id.*

[45] *See id.* Johnson could have challenged the CSRA order by direct appeal or by collateral attack.

[46] *See id.* at 483.

gations owed by the defendant to a child domiciled in another state, does not fall within the constitutional grant of the Commerce Clause and is prohibited by the Tenth Amendment.[1] In addition, the defendant argued that the one-year "intermittent confinement" condition of appellant's five-year probation sentence exceeded the maximum imprisonment term authorized by the statute of conviction.[2] Finally, the defendant argued that a restitution order issued pursuant to the CSRA is not a "debt" within the scope of the Federal Debt Collection Procedure Act ("FDCPA").[3] In response, the First Circuit Court of Appeals held that: (1) the CSRA was constitutional under the Commerce Clause and Tenth Amendment; (2) the District Court committed no plain error regarding the "intermittent confinement" condition of probation; and (3) the government could not invoke the FDCPA for collecting restitution from the defendant because the restitution order was not governmental "debt" under the FDCPA.[4]

II. BACKGROUND

In October 1990, a Georgia state court formally ended Bongiorno's marriage to his wife, Taylor ("Taylor").[5] The court also granted custody of the couple's daughter to Taylor and directed the defendant to pay $5,000 per month in child support.[6] Not long afterwards, the mother and daughter moved to Massachusetts.[7] In September 1992, following the defendant's unsuccessful attempt to modify the child support award and Taylor's successful counterclaim, the Georgia court found the defendant in contempt for failing to pay in excess of $75,000 in mandatory child support and directed his incarceration until he had purged the contempt.[8] However, the contempt order did not operate extraterritorially, and because Bongiorno had recently relocated to Michigan, he escaped incarceration.[9]

While in Michigan, the defendant continued to make sporadic child support payments.[10] In March 1993, a Michigan state court authorized garnishment of the defendant's wages.[11] Shortly thereafter, the defendant quit his job and paid only $500 each month from June to December 1993.[12] In early 1994, the defendant accepted a new job with the State of Michigan.[13] In May 1994, a Michigan state court ordered the defendant to pay $300 per week to satisfy the Georgia

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[1] *See* United States v. Bongiorno, 106 F.3d 1027, 1029 (1st Cir. 1997).
[2] *See id.* at 1034.
[3] *See id.* at 1037.
[4] *See id.* at 1027.
[5] *See id.* at 1029.
[6] *See id.*
[7] *See id.*
[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *See id.*

support award.[14] Bongiorno failed to pay this amount.[15]

One year later in the Massachusetts District Court, the United States charged the defendant Bongiorno with violating the CSRA.[16] The CSRA makes the willful failure "to pay a past due support obligation with respect to a child who resides in another State" a federal crime.[17] The defendant moved to dismiss the indictment on the ground that the CSRA amounted to an unconstitutional exercise of Congressional authority under the Commerce Clause.[18] The court denied the defendant's motion and found the defendant guilty of willful failure to pay child support.[19] As a condition of the defendant's five-year probation sentence, the court imposed a work-release arrangement for one year, directing the defendant to spend up to twelve hours per day in the Bureau of Prisons' custody.[20] In addition, the court ordered the defendant to pay $220,000 in restitution.[21] The United States then successfully sought civil remedy under the FDCPA to enforce the order of restitution.[22] Subsequently, the court granted a motion to attach the defendant's wages and disburse the proceeds.[23] The defendant appealed in both cases and the Court of Appeals for the First Circuit heard the appeals in tandem.[24]

III. ANALYSIS

A. *The CSRA under the Commerce Clause*

The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States."[25] The court found that the Commerce Clause authorizes Congress to regulate activities that "implicate the instrumentalities of interstate commerce (including persons or things in interstate commerce)."[26] Because the "paying [of] court-ordered child support occurs in interstate commerce," the court found that Congress may constitutionally regulate the underlying support obligation under the Commerce Clause.[27]

The defendant contended that "the obligation to pay child support is not 'commerce' in any meaningful sense."[28] The court responded that the Supreme

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[14] *See id.*
[15] *See id.*
[16] *See id.*
[17] 18 U.S.C. § 228(a).
[18] *See Bongiorno*, 106 F.3d at 1030.
[19] *See id.*
[20] *See id.*
[21] *See id.*
[22] *See id.*
[23] *See id.*
[24] *See id.*
[25] U.S. CONST., art. I, § 8, cl. 3.
[26] *See Bongiorano*, 106 F.3d at 1031.
[27] *See id.*
[28] *See id.*

Court has often used broad definitions of commerce.[29] The court further noted that, in the Commerce Clause context, "commerce" is a term of art which includes transactions that might appear "noncommercial."[30] Consequently, Congress might meaningfully construe the obligation to pay child support as "commerce."

The defendant further contended that "a support obligation is an intangible and therefore not a 'thing' in interstate commerce."[31] The court responded that the Commerce Clause reaches transactions involving intangibles.[32] The court held that because compliance with child support orders implicates money and communications regularly flowing across state lines, under the Commerce Clause, Congress may pass legislation to prevent the frustration of such transactions.[33] The court further held that child support obligations that stretch across state boundaries are "functionally equivalent to interstate contracts."[34] Interstate contracts are also "things" that Congress may constitutionally regulate.[35] Thus, the court found that Congress may constitutionally regulate interstate child support obligations as "things" in interstate commerce.

The defendant argued that, unlike the regulated "things" in opposing cases,[36] the underlying child support obligation is "a creature of state law."[37] The court responded that "the state-law origins of an obligation do not preclude the exercise of congressional power under the Commerce Clause."[38] Like a fire insurance transaction across state lines where the insurance policy was "a personal contract subject to state law,"[39] a state-created child support obligation requiring payments from parent to child across interstate boundaries creates an interstate

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[29] *See id.* (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-96 (1824); and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253-58 (1964) (for the more recent jurisprudence)).

[30] *See id.* (citing United States v. Simpson, 252 U.S. 465, 466 (1920) (defining commerce to include transporting whiskey, though for personal consumption); Champion v. Ames, 188 U.S. 321, 354, (1903) (defining commerce to include carrying lottery tickets).

[31] *See id.*

[32] *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 549-50 (1944) (transactions may constitute commerce although the transaction involves nothing more tangible than the flow of electrons and information); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. (6 Otto) 1, 11, 24 L. Ed. 708 (1877) (the transmission of intelligence over telephone lines); United States v. Shubert, 348 U.S. 222 (1955) (involving money and communications in a "continuous and indivisible stream of intercourse among the states").

[33] *See Bongiorno*, 106 F.3d at 1032.

[34] *Id.*

[35] *Id.*

[36] *Id. But cf.* United States v. Hampshire, 95 F.3d 999 (10th Cir.1996); United States v. Mussari, 95 F.3d 787 (9th Cir. 1996); United States v. Sage, 92 F.3d 101 (2d Cir. 1996).

[37] *Id.*

[38] *Id.*

[39] *Id.* (citing South-Eastern Underwriters, 322 U.S. at 546-47).

nexus subject to Congress's constitutional regulation.[40] The court concluded that the child support obligation's state-law origin fails to affect the constitutionality of the CSRA.

In addition, the defendant argued that the tenuous impact of uncollected child support payments on interstate commerce fails to justify congressional regulation under *Lopez v. United States*.[41] The court disagreed stating that "*Lopez* is inapposite here"[42] and held that the CSRA does not implicate the Supreme Court's articulated concerns in *Lopez*.[43] For these reasons, the court found the defendant's reliance on *Lopez* unpersuasive.

B. *The CSRA under the Tenth Amendment*

The contended "the CSRA falls beyond Congress' competence because it concerns domestic relations (an area traditionally within the states' domain)."[44] The court responded that the Tenth Amendment does not apply to situations where, as here, "Congress properly exercises its authority under an enumerated constitutional power."[45] The court further stated that the defendant had not proved all the necessary components for a successful Tenth Amendment attack on a federal statute.[46] Because the CSRA applies only if a state court issues a child support order[47] and "does not authorize a federal court to revise the underlying decree,"[48] the defendant failed to meet the requirements of a Tenth Amendment

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[40] *See id.*

[41] *See id.* (citing United States v. Lopez, 514 U.S. 549 (1995)).

[42] *Id.* at 1032-33 (citing Lopez, 514 U.S. at 555-559. The court noted that the Lopez majority concerned itself with the third category of valid commerce regulation. Hence, because this court bases its opinion on the second category, the court need not decide the Lopez question of "whether unpaid child support substantially affects interstate commerce."

[43] *Id.* at 1033. (citing Lopez, 514 U.S. at 559-563. By its terms the Gun-Free School Zones Act ("GFSZA") did not relate to an economic enterprise and its history did not contain any Congressional finding of the regulated activity's impact on interstate commerce. Unlike the GFSZA, the CSRA obviously relates to "economic transactions" and Congress made "explicit, well-documented findings regarding the economic effect of unpaid child support upon interstate commerce." Moreover, the GFSZA did not contain language that linked its regulation of state activity to an interstate transaction. By the CSRA's terms, the CSRA applies only if the child support obligation crosses state lines. Hence, the "jurisdictional element" absent in the GFSZA is "conspicuously present" in the CSRA. *See id.*

[44] *Id.*

[45] *Id.* (citing New York v. United States, 505 U.S. 144, 156 (1992)).

[46] *See id.* at 1033 (citing Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc., 452 U.S. 264, 287-288 (1981) (stating that: "(1) the statute must regulate the 'States as States,' (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state's ability 'to structure integral operations in areas of traditional governmental functions").

[47] *See id.* at 1034.

[48] *Id.*

attack.

The court found that the appellant's analogy to "the domestic relations exception to the federal courts' diversity jurisdiction" fails because the CSRA applies to criminal prosecutions where jurisdiction runs nationwide.[49] Thus, by extending the appellant's analogy, the court found that "CSRA cases are cases 'arising under' a federal statute, and thus more evocative of 28 U.S.C. § 1331 than of 28 U.S.C. § 1332."[50]

Though the defendant raised questions of federalism and comity, the court noted that these concerns are invalid grounds for declaring federal statutes unconstitutional.[51]

C. *The Legality of Defendant's Sentence*

The defendant contended that the "intermittent confinement" condition of his probation exceeds the statute of conviction's maximum six-month term of imprisonment.[52] The court found that although a first offender under the CSRA cannot be imprisoned for more than six months,[53] the one-year intermittent confinement condition of the defendant's probation does not exceed the six month maximum. The court noted that the federal sentencing guidelines' "Schedule of Substitute Punishments"[54] does not apply to a first offense for a willful failure to pay child support.[55] Moreover, the court held that defendant's interpretation of § 288(b)(1) fails because his construction ignores the defendant's actual number of hours in confinement, thus rendering the statutory language, "totaling no more than," meaningless.[56] Therefore, the court held that the one-year intermittent confinement condition requiring the appellant to spend twelve hours each night in the Bureau of Prisons' custody does not exceed the six-month statutory maximum.[57]

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[49] *Id.*

[50] *Id.*

[51] *See id.*

[52] *Id.*

[53] 18 U.S.C § 228(b)(1).

[54] U.S.S.G § 5c1.1(e)(1) (Nov. 1995).

The relevant provision states:

One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement credited as one day of intermittent confinement, provided, however, that *one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours*) . . . .

Id.

[55] *See Bongiorno*, 106 F.3d at 1035 (citing U.S.S.G. § 2J1.1, cmt. 2).

[56] *Id.* (citing United States Dep't of Treasury v. Fabe, 508 U.S. 491, 504 n.6 (1993), and United States v. Ven-Fuel, Inc., 758 F.2d 741, 751-752 (1st Cir. 1985)) (stating that the appellants' argument violates the maxim that "all words and clauses in a statute are intended to have meaning and ought to be given effect").

[57] *See id.*

D. *The Scope of the FDCPA*

The court agreed with defendant's contention that a restitution order issued pursuant to the CSRA does not fall within the FDCPA's meaning of "debt."[58] The court stated that in order to determine the FDCPA's scope regarding debts, a court must inquire into the legal status of the person owed and to whom the benefit of the debt's proceeds will inure.[59] The FDCPA excludes debt incurred under "a contract originally entered into by only persons other than the United States."[60] Moreover, the court held that, unlike the case where the law empowers only some federal agency to enforce the backpay award,[61] the instant parties who will receive the collected money may enforce the debt.[62] The court also found that the restitution order does not fall within FDCPA's meaning of debt owing to the United States since the federal sovereign has neither a direct nor indirect pecuniary interest in the restitution order.[63] Finally, the court found that although the FDCPA specifically characterizes "restitution" as debt,[64] the statute limits the statute's applicability to restitution that "implicates a 'source of in-

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[58] *Id.* at 1036; 28 U.S.C. § 3002(3) defining "debt" under the FDCPA as:

(A) an amount that is owing to the United States on account of a direct loan, or loan insured or guaranteed, by the United States; or

(B) an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States . . . .

Id.

In 28 U.S.C. § 3002(15), the statute defines the "United States" as:

(A) a Federal corporation;

(B) an agency, department, commission, board, or other entity, of the United States;

(C) an instrumentality of the United States.

Id.

[59] *See Bongiorno*, 106 F.3d at 1037.

[60] *Id.* (citing 28 U.S.C. § 3002(3)). Congress has a "clear intent to exclude private transactions — debts created under (and thus governed by) state law, and to which the United States was not an original party — from the grasp of the FDCPA,"citing H.R. Rep. No. 101 736, 990 U.S.C.C.A.N. at 6631).

[61] *See id.* at 1038 (discussing National Labor Relations Board v. E.D.P. Med. Computer Sys., Inc., 6 F.3d 951 (2d Cir. 1993)).

[62] *See id.* The court observed in a footnote that "the appellant's ex-wife and minor daughter have available mechanisms to enforce the CSRA restitution order as well as the child support order underlying [the restitution order]." *Id.* (citing 18 U.S.C. § 3663(h) (1994) (providing that either the United States or 'a victim named in the order' may enforce a restitution order in a CSRA case).

[63] *See id.* at 1039. The court discussed a similar argument that was made and rejected in a comparable case, Nathanson v. NLRB, 344 U.S. 25 (1952).

[64] *See id.*

debtedness *to the United States*.' "[65] For these reasons, the court found that the restitution ordered under the CSRA was not governmental "debt" within the scope of the FDCPA.

IV. CONCLUSION

The First Circuit Court of Appeals held that the CSRA was constitutional under the Commerce Clause and Tenth Amendment because the paying of child support occurs in interstate commerce.[66] In addition, the court stated that the Tenth Amendment does not apply to situations where "Congress properly exercises its authority under an enumerated constitutional power."[67] Even so, the defendant failed to meet the requirements of a Tenth Amendment attack. The court also held that the district court committed no plain error regarding the "intermittent confinement" condition of the defendant's probation. Moreover, the court found that the defendant's reliance on the federal sentencing guidelines' "Schedule of Substitute Punishments"[68] fails because the guidelines do not apply to the appellant's class of offense.[69] Last, the court held that the government could not invoke the FDCPA for collecting restitution from the defendant.[70] This case resolves that the CSRA is constitutional under at least one class of Commerce Clause activity. The court also suggests that another class might also sustain its constitutionality,[71] and although the government probably cannot use the FDCPA to enforce restitution orders pursuant to a CSRA violation, the court noted other remedies available to the prospective collector.[72]

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[65] *Id.*

[66] *See id.* at 1031.

[67] *Id.* at 1033 (citing New York v. United States, 505 U.S. 144, 156 (1992)).

[68] U.S.S.G. § 5c1.1(e)(1) (Nov. 1995).

[69] *See Bongiorno*, 106 F.3d at 1035 (citing U.S.S.G. § 2J1.1, cmt. 2).

[70] *See id.* at 1027.

[71] *See id.* at 1031 ("[T]he CSRA is likely supportable under more than one of these rubrics.").

[72] *See id.* at 1040. The court indicates in a paragraph some of the possible civil remedies for the future.