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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 08-1224

GRAYDON EARL COMSTOCK, :

JR., ET AL. :

- - - - - x

Washington, D.C.

Tuesday, January 12, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

GEN. ELENA KAGAN, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

G. ALAN DUBOIS, ESQ., Assistant Federal Public Defender, Raleigh, N.C.; on behalf of Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 08-1224, United States v. Comstock.

General Kagan.

ORAL ARGUMENT OF GEN. ELENA KAGAN

ON BEHALF OF THE PETITIONER

GENERAL KAGAN: Mr. Chief Justice, and may it please the Court:

Article I of the Constitution permits Congress to enact section 4248, which is the limited Federal civil commitment statute at issue in this case.

To see why, to understand the basis for this statute, it might be helpful to go all the way back to 1945, when what this Court later called "a conspicuously able committee of Federal judges" recommended that Congress pass section 4246, a very similar civil commitment law that has been on the books for some 60 years.

The committee there wrote that the law was necessary to deal with what it called the serious problem of what to do with insane criminals -- and I'm quoting now -- "upon the expiration of their terms of confinement, where it would be dangerous to turn them

1 loose upon society and where no State will assume
2 responsibility for their custody."

3 That is exactly what Congress concluded
4 here. Congress could reasonably find that section 4248
5 was necessary to prevent a similar problem. The Federal
6 Government has mentally ill, sexually dangerous persons
7 in its custody. It knows that those persons, if
8 released, will commit serious sexual offenses; and it
9 knows too that States are often not in a position to
10 deal with such dangers, not in a position to take
11 custody and care and responsibility for those persons
12 upon release from Federal prison.

13 This is essentially a transitional problem
14 that the Court was -- that the Congress was dealing
15 with, how to manage the transition from Federal custody
16 to State superintendence and responsibility.

17 JUSTICE KENNEDY: Well, is part of the
18 statutory scheme that you can be committed to Federal
19 custody for, say, a year and then the State takes it
20 over?

21 GENERAL KAGAN: That is correct, Justice
22 Kennedy. In fact, what the statute requires is for the
23 Attorney General really to, immediately upon commitment,
24 to go to a State, if he hasn't done so beforehand, to go
25 to two States, the State of domicile and the State of

1 prior conviction.

2 JUSTICE KENNEDY: Why would a State want to
3 incur that extra expense if the Federal Government is
4 going to do it for them?

5 GENERAL KAGAN: Well, what Congress found
6 was that States often were not willing to incur that
7 extra expense, even if the Federal Government was not
8 going to do that for them, and what this legislation was
9 was a response to that reality, was --

10 JUSTICE GINSBURG: What was the experience
11 under 4246? You pointed out that that has been on the
12 books for some time, and there efforts must be made to
13 have the State take the person.

14 When the civil commitment is used following
15 the end of a term, let's say someone is insane, how
16 often does it end up that the State takes responsibility
17 and how often is it that the person stays in Federal
18 custody?

19 GENERAL KAGAN: I think it is unusual,
20 Justice Ginsburg. It is not the usual course that the
21 State does take responsibility. But the Federal statute
22 commits the Attorney General and the Bureau of Prisons
23 to try to persuade a State to take custody, to defer to
24 the State if the State has some reason to take custody,
25 but makes sure that the Federal Government is a kind of

1 backstop, so that if the State does not take
2 responsibility and does not take custody, the Federal
3 Government will ensure that the person will not be
4 released, the person who has been found to be both
5 mentally ill and sexually --

6 JUSTICE GINSBURG: But the likelihood is
7 that the person will stay in Federal custody?

8 GENERAL KAGAN: I think that that's fair,
9 that the likelihood is that the person will stay in
10 Federal custody until such time as a court finds that
11 the reasons for that custody have lapsed. But again,
12 the State always has the ability to come in and say: We
13 would like to take control over this person. And more
14 to the point, the Attorney General has the
15 responsibility to keep going to the State and to try to
16 see if he can transfer custody to the State.

17 JUSTICE SCALIA: What -- what -- what power
18 conferred upon the Federal Government by the
19 Constitution permits the Federal Government to assure
20 that sexual predators are not at large?

21 GENERAL KAGAN: I think the power,
22 Justice Scalia, is the power to run a responsible
23 criminal justice system, to run a criminal justice
24 system that does not itself endanger the public.

25 CHIEF JUSTICE ROBERTS: So you would say

1 that the Federal Government has no such power
2 independent of the criminal conviction? In other words,
3 that Congress could not pass a law saying, just as this
4 one says, we are going to commit people who are sexually
5 dangerous until a determination that they are not or
6 until the State can take them? That power would not be
7 in Article I?

8 GENERAL KAGAN: Without the person having
9 entered the criminal justice system in any way.

10 CHIEF JUSTICE ROBERTS: Right. I understand
11 your argument to be that this power is necessary and
12 proper, given the fact that the person is in Federal
13 custody for some other reason, criminal conviction.

14 GENERAL KAGAN: That has been the
15 government's case throughout this litigation, that it is
16 always depended on the fact of Federal custody, on the
17 fact that this person has entered the criminal justice
18 system, has been -- four of the five of these people
19 have been convicted and have served prison terms. And
20 the question really is, well, given that, given that the
21 Federal Government has custody of these people, that
22 it's difficult for the States to -- to take
23 responsibility for these people after the prison term is
24 finished --

25 CHIEF JUSTICE ROBERTS: Well, why doesn't

1 the Federal Government's authority to have custody
2 because of the criminal justice system end when the
3 criminal justice system is exhausted? In other words,
4 when the sentence is done?

5 GENERAL KAGAN: Because the Federal
6 Government has a responsibility to ensure that release
7 of the people it has in its custody is done responsibly,
8 and is done in such a way --

9 JUSTICE SCALIA: But you said no. I mean,
10 there is no constitutional power on the part of the
11 Federal Government to protect society from sexual
12 predators. And, you know, once the Federal custody is
13 at an end, it seems to me that's the only power you
14 could be relying upon.

15 GENERAL KAGAN: I think that the power to
16 run a responsible criminal justice system extends to the
17 way in which the Federal Government releases these
18 prisoners.

19 JUSTICE KENNEDY: Could the Federal
20 Government order commitment of anyone who's been in
21 Federal custody over the last 10 years?

22 GENERAL KAGAN: Justice Kennedy, I think
23 that that would be a much harder case. There are some
24 people, of course, who are on supervised release and,
25 for example --

1 JUSTICE KENNEDY: No, no, no. That makes
2 your -- my hypo too easy for you.

3 (Laughter.)

4 GENERAL KAGAN: Okay. Well, I will grab
5 your difficult hypo, then. And I would say that that
6 would be a different case and that the Federal
7 Government would not have the power to commit a person
8 who is -- has been released from prison and whose period
9 of supervised release is also completed. At that point
10 the release has been -- the transfer to State
11 responsibility and State control has occurred, and the
12 Federal Government would have no appropriate role.

13 JUSTICE KENNEDY: So that must be because
14 there is a lack of Federal power.

15 GENERAL KAGAN: Yes, I think that that's
16 correct, that at that point the State police power over
17 a person has been fully reestablished.

18 JUSTICE SCALIA: But it's fully
19 reestablished once he walks out of Federal prison, at
20 least if he walks out of Federal prison into a State.

21 GENERAL KAGAN: I think that that's not
22 right, Justice Scalia. I think that there is a
23 transition period, and what this statute is designed to
24 do is to deal with that transition period and to make
25 sure that sexually dangerous, mentally ill people don't

1 fall through the cracks between Federal custody and the
2 reestablishment of State control.

3 JUSTICE SCALIA: They don't fall through the
4 cracks if the Federal Government notifies the State into
5 which this prisoner is to be released: We are going to
6 release a prisoner; we think he's sexually dangerous;
7 you should take some action to be sure that he doesn't
8 harm society. Because that's a State police function,
9 it's none of our business.

10 GENERAL KAGAN: I think Congress could
11 reasonably find that that is insufficient. Congress
12 could reasonably find that the State -- that the
13 relationship between the State and the individual has
14 been sufficiently disrupted as a result of what is in
15 many of these cases an extended period of Federal
16 custody, that it's not so easy to establish,
17 reestablishment it all at once. And I would point to
18 you as proof of this the supervised release system
19 itself.

20 JUSTICE SOTOMAYOR: Under your theory --
21 under the theory that you are proposing, then, any
22 dangerous person, whether it's because of mental illness
23 or any other reason, could be held indefinitely under a
24 civil commitment statute. Because what you're saying is
25 that the Federal Government, merely because of their --

1 their time in control of the individual, has an
2 unlimited constitutional power to then civilly commit
3 this dangerous person.

4 GENERAL KAGAN: I think what would prevent
5 that, Justice Sotomayor, is the Due Process Clause. It
6 is obviously the case that there are other constraints
7 on governmental action than Article I.

8 JUSTICE SOTOMAYOR: Well, what constrains
9 the government under the Due Process Clause from
10 invoking a dangerousness merely because someone has a
11 long history. We have many criminal defendants with
12 long histories of violent behavior. Many of them
13 continue that violent behavior in prison and some of
14 them at the end of their term are let out, because their
15 term has been completed. So what are the Due Process
16 Clause effects?

17 GENERAL KAGAN: Well, I think that the
18 history of this Court's cases would suggest that if this
19 were a person without mental illness that the civil
20 commitment statutes --

21 JUSTICE SOTOMAYOR: But that's where I'm
22 trying to understand -- because the connection between
23 the nature of the mental illness and the constitutional
24 power that you are claiming. What -- what is it that
25 gives you that power?

1 GENERAL KAGAN: Well, if you go back to a
2 case like *Kansas v. Hendricks*, which is of course where
3 this Court thought about a civil commitment statute with
4 relation to sexually dangerous offenders, I think the
5 Court made clear that it was important in that case that
6 there be not only sexual dangerousness, but also mental
7 illness, in order to invoke the civil commitment
8 statute.

9 JUSTICE GINSBURG: Are you saying that as
10 far as those limitations, the question Justice Sotomayor
11 was asking, the limitations on the Federal Government
12 would be the same as they are on the States, but that is
13 a different question from whether the Federal Government
14 has any power at all?

15 GENERAL KAGAN: You said it better than I
16 did, Justice Ginsburg. That is exactly right, that of
17 course there are constraints on the Federal Government
18 in using civil commitment statutes. That they were the
19 same as the constitutional constraints on the States
20 when they use that power. But this is a different
21 question. The question presented here is only whether,
22 assuming that the Federal Government is acting within
23 other constitutional constraints in making this civil
24 commitment, whether Article I enables it to do so
25 because of the special custodial role in these cases.

1 JUSTICE SCALIA: General Kagan, you are
2 relying on the Necessary and Proper Clause, right? You
3 say: But necessary and proper doesn't mean it is
4 necessary and proper for the good of society. It means
5 it is necessary and proper for the execution of another
6 power that the Federal Government is given by the
7 Constitution.

8 Now why is this necessary for the execution
9 of any Federal power? The Federal criminal proceeding
10 has terminated. The individual is released. You could
11 say it's necessary for the good of society, but that's
12 not what the Federal Government is charged with. Why is
13 it necessary to any function that the Federal Government
14 is performing? It has completed its performance of the
15 function of incarcerating this individual until he's
16 served his punishment.

17 GENERAL KAGAN: The Court has always said,
18 Justice Scalia that the Necessary and Proper Clause, the
19 question is is it necessary and proper to the beneficial
20 exercise of Federal powers. And so this is, that it is
21 necessary and proper to the beneficial or, what I said
22 before, the responsible exercise of the Federal power to
23 operate a criminal justice system, which includes the
24 responsibility to ensure that those people who have been
25 in custody in that Federal -- in that criminal justice

1 system, are not released irresponsibly.

2 JUSTICE KENNEDY: But the brief -- excuse
3 me.

4 JUSTICE ALITO: Well, I was going to ask, is
5 it the case that the unwillingness of States to step
6 into this area in these instances is a consequence, at
7 least in part and perhaps in large part, of the Federal
8 incarceration, that as a result of the Federal
9 incarceration the person is no longer viewed by the
10 State as -- as having domicile within the State, the
11 State of prior domicile has no way -- way of knowing
12 whether that person would return to a domicile in the
13 prior State? Do you think that is a fair understanding
14 of the reason for the enactment of this?

15 GENERAL KAGAN: Just to make sure that I
16 understand the question, that the reason for the
17 enactment in part has to do with the fact that the
18 Federal Government has assumed custodial responsibility
19 and has disrupted the relationship between the State and
20 the citizen, I think that that is exactly right,
21 Justice Alito.

22 But in some sense it's not just that the
23 Federal system finds itself in possession and custody of
24 these people, but the Federal -- but what Congress could
25 reasonably find is that the Federal Government knows

1 that there is nobody else to take appropriate custody
2 and care, and that the reason that there is nobody else
3 to take appropriate custody and care has to do with the
4 Federal action itself.

5 JUSTICE GINSBURG: So, is it --

6 CHIEF JUSTICE ROBERTS: So if there were --

7 JUSTICE GINSBURG: Is it -- is it a prisoner
8 who has served his time in, say, a Federal penitentiary
9 in Ohio but is a domiciliary of Arizona, what happens
10 when the prisoner is released, say, after 10 years?
11 Released to Ohio, sent back to Arizona? What?

12 GENERAL KAGAN: The default position is that
13 the prisoner is released to the place where the prisoner
14 was convicted. Now, that -- the prisoner may or may not
15 have any relationship with that State. The person may
16 have lived there, may not have lived there.

17 The -- the Federal prison system does
18 sometimes make other arrangements. The idea behind any
19 release is to try to make sure that the person is
20 released to the place where a -- a -- a future lawful
21 life will be most likely. But in many of these cases,
22 the prisoner ends up being released to a State that has
23 no current relationship with the -- with the prisoner,
24 sometimes has had -- never had any relationship with the
25 prisoner, and at any rate doesn't now, because the

1 period of Federal custody has disrupted that
2 relationship.

3 And what the Federal Government is doing
4 here is essentially to deal with this transition problem
5 to make -- to make sure these people don't fall between
6 the -- the cracks, and to ensure that where there is a
7 sexually violent and mentally ill person who one has
8 reason to believe will commit further offenses, that
9 appropriate care and custody of those people is ensured.

10 Now, this is no different from what Congress
11 has done on other occasions as well. This is not the
12 first such Federal civil commitment statute. This is
13 not a newfangled thing. Section 4248 is identical in --
14 in all relevant constitutional respects to Section 4246,
15 which is the general civil commitment statute for
16 mentally ill, dangerous people generally, not with any
17 sexual --

18 CHIEF JUSTICE ROBERTS: But, General --

19 GENERAL KAGAN: -- component to it.

20 CHIEF JUSTICE ROBERTS: I understood you in
21 your response to Justice Alito to say, if I remember,
22 that it was not just the fact of Federal custody, but
23 the fact that there may be no States or there may well
24 often be no States willing. What if every State is
25 willing; I mean, every State is willing to take the

1 people on out of a concern to protect their citizens.
2 Does that somehow mean there is no necessary and proper
3 power?

4 GENERAL KAGAN: I think when we are dealing
5 with the Necessary and Proper Clause, we are asking
6 ourselves whether Congress reasonably acted in a given
7 situation.

8 CHIEF JUSTICE ROBERTS: I guess it wouldn't
9 be necessary, is what you are saying?

10 GENERAL KAGAN: Well, if -- if -- that's
11 exactly right, that if the facts before Congress were
12 such that there were no difficulty with this transition
13 period and that nobody ever fell between the cracks, an
14 entirely different question would be presented, and then
15 there would be some kind of argument that at that point
16 in those circumstances State police power would be the
17 appropriate default position.

18 JUSTICE SCALIA: General Kagan, I -- I find
19 it difficult to believe that if the Federal Bureau Of
20 Prisons wrote the governor of the State into which this
21 person is to be released, and they try to release him in
22 the State where he will in the future reside, and said,
23 we are about to release this person in 60 days or
24 whatever, in our view there are serious mental problems,
25 and we think the State ought to consider commitment

1 proceedings, I find it difficult to believe that an
2 elected governor or an elected attorney general would
3 ignore that letter.

4 GENERAL KAGAN: I do believe, Justice
5 Scalia, that Congress reasonably could have found that
6 there were difficulties in making this transition. The
7 cost of commitment of these people is very high, much
8 higher than standard incarceration. I believe the
9 States say in their amicus brief that it's some \$65,000
10 a year per person per year, and -- and the State may
11 feel as though it shouldn't have responsibility over
12 this person --

13 JUSTICE SCALIA: The governor is going to
14 say that at the next election: It would have cost too
15 much to put this guy up.

16 GENERAL KAGAN: Well, I think people --

17 JUSTICE SCALIA: You know, it costs \$65,000.

18 GENERAL KAGAN: -- judgments, people make
19 judgments all the time. And I think there's -- there's
20 no evidence to suggest that Congress was not acting
21 reasonably in understanding this as a significant
22 problem. And --

23 JUSTICE GINSBURG: Was it -- was that a
24 consideration? You mentioned that this originated,
25 4246, with a -- with a committee of judges who said, we

1 have a problem. Did --

2 GENERAL KAGAN: That is exactly right,
3 Justice Ginsburg, and maybe that's the -- the best
4 answer to Justice Scalia, is history, and it's history
5 on two separate occasions, which this Court has noted.
6 It's history when -- when this committee of Federal
7 judges chaired by Calvert Magruder, including Learned
8 Hand, said we have a real problem here with people being
9 let go out of the Federal system and the States not
10 stepping forward and taking responsibility for them.
11 And the Court confronted and -- and thought about the
12 exact same problem when Congress passed in 1984 section
13 4243, which is a civil commitment statute that applies
14 to insanity acquittees, people who are acquitted on the
15 basis of insanity. This Court in Shannon said that, I
16 think the -- the language is, "Federal courts decried
17 time and again the gaping statutory hole," that is the
18 hole that -- that existed because people were acquitted
19 on the basis of insanity and -- and States were not
20 willing to step forward and take custody of those people
21 in the way that they would have taken custody of those
22 people if they had been acquitted of insanity in the
23 State court system.

24 JUSTICE SCALIA: I must say I'm -- I'm not
25 terribly impressed with -- with the argument --

1 GENERAL KAGAN: I can tell, Justice Scalia.

2 JUSTICE SCALIA: -- the States won't do it.

3 (Laughter.)

4 JUSTICE SCALIA: I mean, this -- this is a
5 recipe for the Federal Government taking over
6 everything.

7 GENERAL KAGAN: No, I --

8 JUSTICE SCALIA: The States won't do it,
9 therefore we have to do it. It has to be done and
10 therefore the Federal Government steps in and does it.

11 GENERAL KAGAN: I don't think so,
12 Justice Scalia. I think, in fact, that -- that Congress
13 in each of these three occasions has limited the civil
14 commitment power only to people who have been -- who are
15 in the custody of the Federal Government and over whom
16 the Federal Government has a distinctive responsibility.

17 I will give you an example, Justice Scalia.
18 I mean, suppose that there was some very contagious form
19 of drug-resistant tuberculosis that had -- had become
20 prevalent in the prison system, and States were not able
21 to deal with that, with quarantining these people upon
22 their release date. And Congress said: You know, the
23 best thing to do is to have the Federal Government act
24 as the appropriate quarantining authority because we
25 don't think that States are able to step up and deal

1 with this problem.

2 Would anybody say that the Federal
3 Government would not have Article I power to effect that
4 kind of public safety measure? And the exact same thing
5 is true here. This is exactly what Congress is doing
6 here, is to make sure that mentally ill, sexually
7 dangerous --

8 JUSTICE KENNEDY: When I was thinking about
9 your hypothetical I thought, well, that's a pretty easy
10 commerce power argument. I -- I notice that in -- in
11 the government's position you don't argue the Commerce
12 Clause very much, and I -- we have got at Morrison v.
13 Bronkalla looking at you and Printz, and so forth.

14 But suppose Congress said: There is a class
15 of committable, dangerous sex offenders that are
16 crossing State lines and using interstate facilities,
17 and made those findings. Would that be sufficient to
18 establish a Federal commitment law?

19 GENERAL KAGAN: Well, as you say, Justice
20 Kennedy, the Government has never argued the Commerce
21 Clause here in the sense that it has never argued that
22 these activities have a substantial effect on interstate
23 commerce, and it hasn't done so because of the
24 Morrison -- the Morrison precedent. The Commerce Clause
25 I think is relevant in two ways. It's relevant first

1 because, of course, it's often the Commerce Clause that
2 gives rise to the power to criminalize conduct and to
3 punish people for that conduct. So I think in -- in
4 three of the five of these cases, the initial power to
5 criminalize the conduct is based on the Commerce Clause.

6 The Commerce Clause is also relevant here
7 because the Commerce Clause does give rise to a set of
8 Federal laws having to do with sexual offenses, sexual
9 solicitation of a minor, sexual exploitation of a minor
10 when interstate commerce is involved, and when the
11 Internet is involved. And we do think that that
12 provides an additional basis, not a sufficient basis,
13 but an additional basis to -- to approve this law in the
14 sense that these are the people who are most likely,
15 really, to violate such Federal laws which are based on
16 the Commerce Clause in the future.

17 And the reason they are most likely is
18 because all of them have done it once before and all of
19 them have been found to have the kind of mental illness
20 that makes it --

21 JUSTICE SOTOMAYOR: But that's -- but that's
22 an easier case, because at least you have an interstate
23 connection to the offensive conviction and the ground
24 for future commitment. But these statutes don't depend
25 on that element being a part of the commitment process.

1 There's no -- there's no congressional -- there's no tie
2 to a congressional power that justifies the commitment
3 other than that the person is sexually dangerous.

4 GENERAL KAGAN: The -- the essential tie to
5 a congressional power is the tie of these people to the
6 Federal criminal justice system because they are in
7 Federal custody.

8 JUSTICE SOTOMAYOR: It's that special
9 relationship.

10 GENERAL KAGAN: That's -- that's right. And
11 in addition to that, these are the people who are most
12 likely to violate Federal laws based on the Commerce
13 Clause in the future. Most likely to violate such laws
14 because they have done so in the past, and because they
15 have mental conditions that make it extremely
16 difficult --

17 JUSTICE STEVENS: Isn't it true that this
18 statute applies even if a person has not been a sexual
19 offender in the past?

20 GENERAL KAGAN: It -- it does, Justice
21 Stevens. There have been 103 --

22 JUSTICE STEVENS: That argument doesn't take
23 care of that --

24 GENERAL KAGAN: -- just to put some numbers
25 on the table, there have been 103 people who have been

1 certified under these laws. Eight under -- under this
2 law. 83 of them have committed sexual offenses; 20 --

3 JUSTICE STEVENS: No, but my point is the
4 law applies to a person who is convicted of armed
5 robbery or bank robbery and just before the end of his
6 term in prison the authorities decide he is in fact a
7 potential sexual offender. They can detain him.

8 GENERAL KAGAN: Yes, yes, that's right. As
9 I was saying, 20 of these people fall within that
10 category, that -- that they are in prison for a
11 nonsexual offense.

12 JUSTICE STEVENS: Right.

13 GENERAL KAGAN: All of those people have had
14 prior sexual convictions in their history.

15 JUSTICE STEVENS: But that's not -- that's
16 not a necessary element of the -- of the statute --
17 under the statute, is it?

18 GENERAL KAGAN: What is necessary is two
19 things: First, that the person in fact have engaged in
20 sexually violent behavior or child molestation. So
21 there is a factual predicate there. And -- and so far,
22 the Bureau of Prisons has found that about 15,000 people
23 whom it has reviewed meet that factual predicate. Of
24 those, the Bureau of Prisons has certified only 105 of
25 those, who were also found to have the kind of mental

1 illness that made it reasonably likely that -- that they
2 would continue to commit this -- these kinds of
3 offenses.

4 JUSTICE SCALIA: If they were released from
5 the Army, would that -- would that also -- if I want to
6 turn this -- this person after discharge at -- loose
7 upon the society, could the Federal Government commit
8 that person?

9 GENERAL KAGAN: Mr. Chief -- excuse me,
10 Justice Scalia -- I didn't mean to promote you quite so
11 quickly.

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: Thanks for thinking
14 it was a promotion.

15 (Laughter.)

16 JUSTICE SCALIA: And I'm sure you didn't.

17 (Laughter.)

18 GENERAL KAGAN: Justice Scalia, I -- I do
19 think that the military has special responsibilities
20 with respect to those people in it. In general, I would
21 say that the relationship between a prisoner and a --
22 and a jailer is more comprehensive than any other kind
23 of relationship that one can name. But I do think that
24 the military relationship approaches that. And in the
25 military, I think the military indeed would take this

1 kind of -- these kinds of facts extremely seriously,
2 probably would commit such a person and -- and try very
3 hard to transfer that person eventually to State
4 custody.

5 If I can reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, General.

7 Mr. DuBois. Is it "due-BWAH" or --

8 MR. DUBOIS: It is, Your Honor.

9 CHIEF JUSTICE ROBERTS: Mr. DuBois.

10 ORAL ARGUMENT OF G. ALAN DUBOIS,

11 ON BEHALF OF THE RESPONDENT

12 MR. DUBOIS: Mr. Chief Justice, and may it
13 please the Court:

14 I really think the government gives the game
15 away a bit in its opening statement when it
16 characterized this law as a law that is necessary to
17 prevent the problem of releasing sexually dangerous
18 individuals. And I don't think that that is what the
19 Necessary and Proper Clause is designed to do.

20 The power to enforce the law which brought
21 the defendants into Federal custody in the first place
22 has been exhausted. The defendant has been tried and
23 convicted and he's sentenced and he's served his
24 sentence. That law has been fully vindicated. At that
25 point, any further detention must stand on an

1 independent constitutional footing. It --

2 JUSTICE GINSBURG: Do you -- Mr. DuBois, do
3 you take that same position with respect to not guilty
4 by reason of insanity? Someone who is convicted, say,
5 in the District of Columbia, say John Hinckley is found
6 by the jury to be not guilty by reason of insanity.
7 Must he then be allowed out of Federal custody, and it
8 depends if his home State or any other State wants to
9 pick him up?

10 MR. DUBOIS: No, Justice Ginsburg. I think
11 not guilty by reason of insanity is a -- is a different
12 case for a couple of reasons. First off, the commitment
13 that flows from a not guilty by insanity verdict is
14 directly linked to the Federal law which brought you
15 into custody in the first place. The person is found to
16 be -- to have been committed the crime, but he is only
17 -- he is only excused from punishment for that crime by
18 basis of his mental illness. So there is a direct link
19 between the -- the crime which brought you into Federal
20 custody and your subsequent commitment.

21 The other distinction, of course, is that
22 not guilty by reason of insanity must be pled by the
23 defendant, and in some sense the commitment is in lieu
24 of punishment, it's not an additional punishment tacked
25 on at the end of the sentence. So I don't think that

1 the infirmity of the 4248 are at play at all in --

2 JUSTICE GINSBURG: So what's the power that
3 the Federal Government is exercising when it commits
4 someone who has been found not guilty by reason of
5 insanity?

6 MR. DUBOIS: They are vindicating their
7 interest in the specific criminal law which brought the
8 individual into custody, which presumably in most cases
9 -- in all cases, I guess -- is supported by an
10 enumerated power. It is -- as I say, the commitment is
11 -- is a substitute for punishment, it's in lieu of
12 punishment, but it's directly linked to the crime which
13 brought the individual into Federal custody.

14 JUSTICE STEVENS: Mr. DuBois, what is your
15 answer to the hypothetical that General Kagan posited?
16 Supposing after a man has been sentenced, say, to
17 30 days for a gun possession, that 20 -- 10 days before
18 he is to be released it's determined that he has a
19 communicable disease, he would spread a disease if he
20 gets out. Could the -- could the Federal Government
21 have the power to detain him at the end of 30 days?

22 MR. DUBOIS: Well, Your Honor, I think a
23 single individual with a single communicable disease, a
24 defendant with tuberculosis --

25 JUSTICE STEVENS: Right.

1 MR. DUBOIS: -- or something of that nature,
2 I don't think would -- would call for that type of -- of
3 Federal Government --

4 JUSTICE STEVENS: It may not call for it.
5 My question is would it have the power --

6 MR. DUBOIS: I would say --

7 JUSTICE STEVENS: -- not to release him,
8 because there -- there is strong evidence that as soon
9 as he gets into the society the disease will -- will
10 pass to others?

11 MR. DUBOIS: Well, Your Honor, I would say
12 that, in the same way that mental health is a uniquely
13 State function, so too is public health. And we would
14 say that, no, the Federal Government cannot detain that
15 person past the end of his sentence, and that --

16 JUSTICE SCALIA: We -- we have a Federal
17 agency that's a -- that deals with communicable
18 diseases. It's part of the National Institute of
19 Health, I believe. Is that agency ultra vires? I mean,
20 aren't communicable -- I mean, if anything relates to
21 interstate commerce, it's communicable diseases, it
22 seems to me.

23 MR. DUBOIS: I was about to say, Your Honor,
24 you know, that's the -- that's the other I think
25 significant difference that Justice Kennedy pointed out,

1 that there is a clear hook to interstate commerce when
2 we are talking about communicable diseases, and that
3 hook simply is not present.

4 JUSTICE BREYER: Well, why -- why not? I
5 mean, is there anything to prevent the United States
6 Government to say mental illness is serious problem in
7 the United States and we feel the States sometimes do a
8 good job, sometimes they don't, but we want to set up a
9 group of Federal mental hospitals and treatment centers
10 of the most modern kind, and in these circumstances
11 there will be a handful of people who pose a threat to
12 themselves or others, in which case they must be
13 restrained.

14 There might be due process problems, whether
15 you have the right person, whether they should be
16 restrained, et cetera. But doesn't the Constitution
17 give authority to the Federal Government to set up a
18 system of mental illness prevention and cure, if in fact
19 they determine that that's a desirable use of Federal
20 money?

21 MR. DUBOIS: No, Justice Breyer, I don't
22 think the Federal Government has that power.

23 JUSTICE BREYER: It doesn't have the power
24 to set up hospitals?

25 MR. DUBOIS: It doesn't have the power to

1 detain individuals as a result of their mental illness
2 based on the fear that they are going to go out and
3 commit a crime.

4 JUSTICE BREYER: In other words, if the
5 doctors were to say there are 1,000 people here
6 suffering from mental illness, your own daughter or mine
7 or someone has a -- is threatening suicide, or
8 threatening murder? There are lots of real cases like
9 that, where people have terrible times, and there are
10 not adequate State facilities. And were the Federal
11 Government to say, this is a problem that we wish to go
12 into and help with, you are saying the Constitution
13 prohibits that? Where does it prohibit it?

14 MR. DUBOIS: Well, I think -- I think that
15 would not be a very large extension at all of the
16 holding in Morrison, that the Federal Government could
17 not do that.

18 JUSTICE SCALIA: Try the Tenth Amendment.

19 MR. DUBOIS: Or the Tenth Amendment, Your
20 Honor. And --

21 JUSTICE ALITO: But do you -- do you think
22 that the Congress has the power to remedy problems that
23 are caused by the operation of the Federal prison
24 system, caused by incarceration?

25 MR. DUBOIS: That would certainly not be the

1 case here, Your Honor. All of these individuals --
2 there is no claim that these individuals became mentally
3 ill while in the custody of the Bureau of Prisons.
4 These are all, as far as I understand, illnesses which
5 predate their entry into the Federal prison --

6 JUSTICE ALITO: What about the general
7 proposition that if -- if the incarceration causes a
8 problem, then the Federal Government has the power,
9 ancillary to the power to operate the -- the criminal
10 justice system, to remedy the problems that it has
11 caused by the incarceration?

12 MR. DUBOIS: Your Honor, I think they have a
13 power, but it is not an unlimited power. That power is
14 addressed by statute --

15 JUSTICE KENNEDY: I didn't hear. You think
16 they have a power?

17 MR. DUBOIS: They have a power, but it's not
18 an unlimited power. There is a statute, 4245, which
19 allows the government to transfer an individual if he
20 becomes ill while in the custody of the Bureau of
21 Prisons, to a psychiatric facility for care and
22 treatment. Now, by the terms of that statute, however,
23 that commitment must end at the end of their sentence,
24 and I think that would be the extent of the government's
25 power.

1 JUSTICE KENNEDY: Because --

2 JUSTICE ALITO: Why as a matter of
3 constitutional law does it end at that point?

4 MR. DUBOIS: Because at that point the
5 government has no live Federal interest. They are --
6 they have effectuated the power which brought the person
7 into custody. They have fully vindicated the -- the
8 criminal law that brought them into -- into the prisons.

9 JUSTICE KENNEDY: Well, suppose, in Justice
10 Alito's hypothetical, he caught the communicable disease
11 in the prison as a result of poor prison conditions.

12 MR. DUBOIS: Well, and I'm sure stuff like
13 that does happen, Justice Kennedy, and, again, the
14 government does, while the person is in the custody of
15 Bureau of Prisons, is entitled to --

16 JUSTICE KENNEDY: No, no. The hypothetical
17 is that his sentence ends and they want to commit him to
18 a Federal health facility.

19 MR. DUBOIS: Because he has -- he has caught
20 some disease while in the system?

21 JUSTICE KENNEDY: Yes.

22 MR. DUBOIS: Again, I think, first, as a
23 practical matter, I don't think any prisoner would take
24 that deal. They would rather be treated in the
25 community. So it becomes a question of whether the

1 person can be held for the safety of others, and again,
2 I think the answer is no.

3 JUSTICE ALITO: Well, what if the person is
4 simply injured in prison as a result of, let's say, an
5 attack by another prisoner, and now the sentence
6 expires. The Federal Government has no power to set up
7 hospitals or facilities to care for that person for the
8 duration of the -- of the injury that was -- that was
9 caused during the period of incarceration?

10 MR. DUBOIS: Your Honor, I think -- the
11 Federal Government would have no power to do that.
12 The -- while the individual is in the custody of the
13 Bureau of Prisons, the government does have a limited
14 parens patriae power to see to their care and treatment.

15 Now, I think we are getting a little bit far
16 afield from the indefinite, potential lifetime detention
17 at issue here and whether, under doctor's orders, the --
18 tells the person, well, you ought to stay in the
19 hospital for an extra week so that his leg sets
20 properly -- you know, something of that limited
21 duration, perhaps, might be a good --

22 JUSTICE BREYER: Well, once you are down
23 that road -- I was rather surprised, but not too
24 surprised, that, I think perhaps with prompting, I heard
25 you say, I think, that the Tenth Amendment would

1 prohibit the Federal Government from setting up a system
2 of mental care, which you better tell the people across
3 the street if that's your view.

4 The -- the -- is that what you are actually
5 saying?

6 MR. DUBOIS: That the Federal Government
7 cannot set up a system of --

8 JUSTICE BREYER: Of national mental care for
9 mentally ill people.

10 MR. DUBOIS: Again, that would have to --

11 JUSTICE BREYER: You either think that the
12 Constitution prohibits that or you think it permits it.

13 MR. DUBOIS: Well, I think it would have to
14 relate to an enumerated power, and it would have to
15 be --

16 JUSTICE BREYER: Yes, probably the Commerce
17 Clause power.

18 MR. DUBOIS: -- in furtherance of an
19 enumerates power.

20 JUSTICE BREYER: So it's --

21 JUSTICE SCALIA: No, no.

22 (Laughter.)

23 JUSTICE SCALIA: The government can spend
24 money on whatever it wants. That's the spending power.
25 They can set up hospitals. The issue is whether they

1 can force somebody into a hospital, not whether they can
2 set up hospitals.

3 I was going to ask you to tell us why the
4 sky will not fall if we -- if we go the way you would
5 like us to. I assume that if the problem is that the
6 States are unwilling to incur the expenses for these
7 people, that Congress could pass a statute saying the
8 Federal Government will pay the expenses of any
9 prisoners released from Federal prison.

10 MR. DUBOIS: Absolutely, Your Honor.

11 JUSTICE SCALIA: And it seems to me that
12 statute, combined with a letter to the elected governor,
13 who probably wants to be re-elected, or the elected
14 attorney general, will make it pretty certain that the
15 State will take over the responsibility for the
16 individual.

17 MR. DUBOIS: Well, that's absolutely
18 correct, Your Honor, and that -- and that option, which
19 we -- we definitely believe --

20 JUSTICE STEVENS: But, of course, that goes
21 to -- that goes to the question of the wisdom of the
22 statute. I think, as the case comes to us, we have to
23 assume that there are cases out there in which there
24 will be no solution such as the one Justice Scalia
25 proposes.

1 MR. DUBOIS: Well, I don't --

2 JUSTICE STEVENS: I think that's why
3 Congress acted, because they think there are such cases.

4 MR. DUBOIS: Well, I don't know that you can
5 make that assumption, and to the extent that the -- the
6 fear is that the State will decline responsibility, I do
7 not think that Federal power can expand or contract
8 based on a State's willingness or unwillingness to take
9 on responsibility --

10 JUSTICE STEVENS: But we are asked to decide
11 a question on the assumption that there are States and
12 there are governors who will not react to the problem of
13 particular prisoners who are released in Arizona or
14 someplace and originally came from Michigan or whatever
15 it is. I think we have to assume that there are cases
16 in which the statute would -- would play a role.

17 MR. DUBOIS: Well, Your Honor -- Your Honor,
18 I think that may be right, but there -- but there are --
19 the question is: What's the constitutional response to
20 that problem? We can imagine plenty of unconstitutional
21 responses. For instance, a person --

22 JUSTICE STEVENS: Absolutely, and that's why
23 it seems to me that the constitutional answer is the
24 same in this statute as in the case of somebody who
25 incurs a very communicable disease and the government

1 wants to prevent him from infecting the community. Why
2 is it a different constitutional question?

3 MR. DUBOIS: Well, I think the different
4 constitutional question is -- again, I do not believe
5 that the Federal government has a general quarantine
6 power that doesn't -- that would allow it to hold
7 prisoners past their release date.

8 I think that is a public health problem,
9 except for -- to the extent that there may be a closer
10 nexus to a forward-looking commerce clause hook that
11 doesn't in this case. The government's argument is
12 purely backwards looking. They -- they locate the
13 power --

14 JUSTICE STEVENS: I understand that it's
15 purely backwards looking and it takes care of the
16 case that -- the premise of the government's argument is
17 that the release itself is a Federal act that has to be
18 done responsibly, and the very release, if it causes
19 harm to the community, can be prevented.

20 MR. DUBOIS: It seems to me that the
21 government's argument essentially collapses into the
22 notion, well, if it's a good idea, it must be necessary
23 and proper to do it. I think that is just simply not
24 correct. It's very -- we're going --

25 JUSTICE GINSBURG: It's more than the

1 question of good idea. You are talking about
2 endangering the health and safety of people, so it's --
3 the government has some responsibility, doesn't it?

4 MR. DUBOIS: Absolutely, the government --
5 the government has a responsibility, but they have
6 certain constitutional limits that also must be
7 respected, so the statute --

8 JUSTICE GINSBURG: Yes, but you say, if the
9 State is unwilling to take the person, and apparently,
10 that is a problem that precipitated in -- 4246 and, now,
11 4248, and you -- the Federal government is just
12 helpless, short of passing a spending measure and
13 saying, State, if you do this, we will give you the
14 money.

15 MR. DUBOIS: Right. And -- and -- well, I
16 think there are -- there are a number of weapons in the
17 Federal government's arsenal. First of all, there is
18 the Federal spending power. Second of all, there is
19 already, in the statute of 4042, a specific duty to
20 warn, just as Justice Scalia was positing, it already
21 exists.

22 Any time the Federal government is going to
23 release these -- a person they believe to be violent or
24 dangerous, they are required to warn the Attorney
25 General of the State within a certain period of time

1 before their release.

2 At that point, I do believe it becomes a
3 problem of the State polity. If the State governor is
4 going to be cavalier about that type of release, then I
5 think the answer for that lies in the voters of that
6 State, to say, no, we want you to take this problem
7 seriously and --

8 CHIEF JUSTICE ROBERTS: Well, he's not going
9 to be cavalier. He's not going to have -- he's going to
10 say, don't do it. This is a dangerous person, the
11 Federal government, don't release him.

12 MR. DUBOIS: And he's --

13 CHIEF JUSTICE ROBERTS: And you want the
14 Federal government to be in the position to say, well,
15 we have to.

16 MR. DUBOIS: Exactly. The Federal
17 government has to, and at that point, the State must
18 make the hard political decision. Do we want to take
19 this person on, spend the money necessary --

20 CHIEF JUSTICE ROBERTS: Well, it may be the
21 Federal government's hard political position. They are
22 the person holding them, and the Attorney General is
23 saying, don't release him, and then the Federal
24 government is going to make the decision, well, we have
25 to.

1 MR. DUBOIS: And so, in that sense, it is no
2 decision at all because the Constitution requires that
3 they be released.

4 JUSTICE BREYER: The -- go back once more
5 because I am obviously getting nowhere with this, but I
6 thought that, if you set up a set of hospitals, as I
7 think the government could do, there will be a few
8 people, sometimes, who have to be restrained in those
9 hospitals for themselves or other's benefit.

10 If you set up a system of mental hospitals,
11 that's even more true. If you set up a university, some
12 people will be sick, and they will be in the infirmary,
13 and occasionally, you will come across a person who has
14 to be restrained, et cetera.

15 Now, once you are down the road where you
16 admit the government can do that, how is a prison any
17 different?

18 MR. DUBOIS: Well, I --

19 JUSTICE BREYER: You set up a prison where,
20 in fact, occasionally, people have to be restrained for
21 health reasons, et cetera, and just as in the other
22 cases, sometimes, that can last past the normal release
23 date, so can it in prison.

24 Maybe there's a better way, but why isn't
25 this just a normal part of running this institution,

1 just as it is in the other cases?

2 MR. DUBOIS: Well, we'll just start -- I
3 think, a couple of responses. First of all, this is --
4 that is no part of the government's argument in this
5 case. Their -- their argument is a backward-looking
6 argument that locates its power in the fact that they
7 have had these people in their custody and they can't
8 responsibly let them go.

9 What you are positing is more of a
10 forward-looking argument that would essentially create a
11 Federal *parens patriae* power, that the Federal
12 government has --

13 JUSTICE BREYER: No, no. I'm not, actually.
14 I'm just showing you the connection between running an
15 institution, which for whatever set of reasons in the
16 Constitution you have the authority to do, and then it
17 becomes as part of that institution part of the job to
18 take care of people in a certain way.

19 Sometimes that requires a restraint, and
20 sometimes that restraint could last beyond the period
21 where in the absence of that need the person would no
22 longer be part of the institution. That's true of a
23 hospital, of a mental hospital, and of a prison.
24 Whether they rest on the same power or a different
25 power, the government has the power, federal, to

1 establish all of those institutions.

2 I'm just drawing institutional connections.

3 That's -- that's what I'm saying. Maybe it's an
4 unnecessarily complex argument, but I was just seeing it
5 that way.

6 MR. DUBOIS: Well, it -- it is complex,
7 Justice Breyer, and it is also, I think, historically --
8 the federal government has not historically thought to
9 have been able to have the sort of general parens
10 patriae power that -- that the States do enjoy to take
11 care of the health and well-being of its citizens. I
12 think it would be quite a step for the federal
13 government to embark on an enterprise of that nature.

14 JUSTICE SCALIA: Don't States have
15 involuntary commitment procedures?

16 MR. DUBOIS: Every State does, Your Honor.

17 JUSTICE SCALIA: Now, couldn't the federal
18 government fund a federal -- would you find a
19 constitutional problem in the federal government funding
20 an office which brings involuntary commitment
21 proceedings in a State where a prisoner is released when
22 the federal government believes the prisoner is unsafe?

23 MR. DUBOIS: There would -- there would be
24 absolutely no problem with that, Your Honor. The
25 Congress, with spending power, would have clear ability

1 to fund that type of program run -- run and administered
2 by the States.

3 JUSTICE SCALIA: And I presume the State
4 couldn't -- if the Court says commitment is proper, the
5 State would have to accept the commitment, no?

6 MR. DUBOIS: Yes, absolutely, Your Honor.

7 JUSTICE SCALIA: So why don't they do that?

8 MR. DUBOIS: They should do that. I mean,
9 what they are doing here is what they can't do. Just --

10 JUSTICE STEVENS: I guess we can all think
11 of a lot of different statutes, Counsel, that might be
12 enacted. We have to decide whether this one is
13 constitutional.

14 MR. DUBOIS: And, Your Honor, I think that
15 is absolutely right.

16 JUSTICE SCALIA: But most of the argument
17 for why this is constitutional is simply: It's
18 necessary, and therefore it's constitutional. But I'm
19 not even sure it's necessary.

20 MR. DUBOIS: Well, I think that's right,
21 Your Honor.

22 And to answer your question, Justice
23 Stevens, you are absolutely right. And I think there --
24 there are many tools that Congress has at its disposal
25 to address this problem. The spending power is one.

1 Every one of these individuals would be on federal
2 supervised release.

3 JUSTICE GINSBURG: Yes, that's one of the
4 things that you mention in your briefs. You said you
5 could vary the conditions of supervised release, but you
6 were not at all specific about that. You said the
7 federal government -- person has gotten out, they know
8 the person is dangerous, so what -- what are the
9 measures that they would take to do what you said in the
10 brief the federal government could do; that is, set the
11 terms of supervised release in order to account for
12 sexual dangerousness?

13 MR. DUBOIS: Well, the first thing they can
14 do is act as a liaison between the individual and the
15 State. Every one of these individuals will have a
16 federal probation officer who will be responsible for
17 their supervision during the period of supervised
18 release. They also have the ability to go back to the
19 court of conviction and seek modifications of the terms
20 of supervised release that they have certain concerns --

21 JUSTICE GINSBURG: Well, what would the
22 modification be?

23 MR. DUBOIS: Those modifications could
24 include things like mandating mental health treatment
25 during the term of supervised release; certain

1 limitations on travel; certain limitations on activities
2 with computers. A fairly large range of --

3 JUSTICE SOTOMAYOR: But that doesn't take
4 care of the fact that the prisoner would be released
5 before there was a cure found for the alleged mental
6 illness, meaning supervised release generally has a term
7 limit.

8 MR. DUBOIS: That's correct, Your Honor.
9 And I think that concern, the -- the fact that we want
10 to do something before the release is addressed by 4042,
11 which is the duty to warn statute.

12 JUSTICE SOTOMAYOR: Could -- what would
13 happen if Congress said, as part of a sentence, a judge
14 could incorporate a civil commitment finding and say:
15 You are going to serve X amount in jail, and Y amount,
16 and then we are going to civilly commit you
17 indefinitely, because as of today, I am finding you a
18 sexual predator subject to a mental illness.

19 Would that be constitutional, and if not,
20 why not?

21 MR. DUBOIS: Well, that would not be
22 constitutional, Justice Sotomayor, because of the
23 indefinite nature of the commitment. You can envision a
24 system -- and we had that type of system in the '50s,
25 '60s, and '70s -- of indeterminate sentencing, where --

1 JUSTICE SOTOMAYOR: No, I -- let's assume it
2 incorporates all the protections of -- of this statute,
3 subject to periodic review.

4 MR. DUBOIS: So if we have an
5 indeterminate-type sentence where you -- you get a
6 sentence of ten years and you are periodically reviewed
7 to see if you are safe to be released, of course that is
8 constitutional.

9 JUSTICE SOTOMAYOR: So it's constitutional
10 because it's part of the sentence?

11 MR. DUBOIS: That's exactly right, Your
12 Honor. It's a part of the sentence. It's part of the
13 punishment for the crime which brought you into custody.

14 JUSTICE SOTOMAYOR: Well, so that would be
15 true whether or not you were convicted of a sex crime or
16 a tax crime or any other crime, so long as the judge was
17 making a finding that this was necessary to protect the
18 public?

19 MR. DUBOIS: Sure. A judge -- whether you
20 are being sentenced for bank robbery or some sort of
21 sexual offense, the judge can take into account the
22 whole of your criminal history in determining what you
23 are being sentenced for, but you are still only being
24 sentenced for the crime for which you are convicted.
25 And that would be cabined by the various statutory maxes

1 for each specific offense. And that's why this case --

2 JUSTICE SOTOMAYOR: But what you are saying
3 is, then, that the nexus is -- the nexus with the need
4 for the criminal justice system or the proper and
5 necessary power to address this problem ends at the
6 point of sentencing, is what you are saying?

7 MR. DUBOIS: That's correct, Your Honor. At
8 that point the enumerated power which supported the
9 crime has been fully effectuated. It has been
10 exhausted. There is no further backward-looking federal
11 power to be vindicated under Article I.

12 Now, there may be a forward-looking power.
13 If there is one, the government hasn't identified it.
14 But that's where the constitutional justification would
15 have to be found in this case.

16 JUSTICE SOTOMAYOR: Well, this says that it
17 exists as a result of its control over this individual,
18 its special relationship, and the fact that at the end
19 of the sentence, it has an obligation to the public.

20 MR. DUBOIS: And that really is, I think,
21 historically, sort of an anomalous argument in the sense
22 that civil commitment has never been thought to be part
23 of the criminal justice system. They are two separate
24 spheres of government control and government authority.
25 And while they may intersect at the State level, a State

1 doesn't civilly commit its citizens based on the fact
2 that it's running a prison system or the fact that it
3 has them in custody. It commits these people based on
4 their parens patriae and general police power.

5 JUSTICE GINSBURG: What about someone who is
6 incompetent to stand trial? I take it you think that
7 that is probably the proper application of 4246?

8 MR. DUBOIS: I believe that is correct. I
9 think under Greenwood that type of commitment is
10 appropriate.

11 JUSTICE GINSBURG: Does it matter that the
12 person who has been found incompetent to stand trial has
13 now been in custody for three times longer than the
14 maximum sentence?

15 MR. DUBOIS: I do not think that that is
16 constitutionally significant, because -- well, there's a
17 couple of reasons. But the first reason is: Again, you
18 have a direct link to the unexhausted power. The power
19 to prosecute still exists, and the government's interest
20 only isn't the interest in punishment. The government
21 does have an interest in obtaining a conviction, which
22 is still alive. And if the person does restore --
23 regain competency to the extent that he can be tried, he
24 can be convicted. Even if he cannot be -- he cannot be
25 punished any further, he still can be tried and

1 convicted and the government's interests can be
2 vindicated.

3 JUSTICE GINSBURG: Even though it may be
4 purely imaginary; that is, that this particular person,
5 all of the experts agree, will never be competent to
6 stand trial.

7 MR. DUBOIS: And I think that was the -- the
8 logic or the tradeoff in Greenwood, which was that we
9 were not going to require courts to make finely-grained
10 determinations about whether or not this person or that
11 person might regain competency, and just decide to have
12 a simpler test that commitment is appropriate as long as
13 the federal government's interest has not been exhausted
14 or vindicated.

15 JUSTICE ALITO: Can you explain why the
16 constitutional power that provides the basis for a
17 federal criminal conviction is exhausted at the end of
18 the -- either the maximum term of imprisonment that
19 Congress chooses to establish when it enacts the statute
20 or at the end of the particular term that is given to
21 this prisoner?

22 I understand why it's relevant for statutory
23 purposes. It may be relevant for other constitutional
24 purposes -- double jeopardy, due process -- but why as
25 a -- why does the power, the Commerce Clause power, the

1 power to make rules for federal property and so forth,
2 why is that exhausted at the end of the -- either of
3 those two periods? I don't quite understand that.

4 MR. DUBOIS: Well, I think the reason, Your
5 Honor, is that at the time of conviction and sentence,
6 the interest in -- the official regulation of interstate
7 commerce, say, has been vindicated by this person's
8 conviction for doing an activity which Congress has
9 judged to be interfering with interstate commerce. And
10 that --

11 JUSTICE ALITO: Well, only to the extent
12 that that's what the statute says. Take whatever the
13 offense is, would it be a violation of the Necessary and
14 Proper Clause? Let's say it's a commerce -- it's based
15 on the Commerce Clause. Would Congress exceed it's
16 powers under the Commerce Clause if it imposed a
17 sentence of life imprisonment without the possibility of
18 parole?

19 I mean it raises other constitutional
20 questions, but why does it raise the question as to the
21 extent of the power that is being exercised by -- by
22 Congress?

23 MR. DUBOIS: Well, Your Honor, I think
24 Congress does have almost unlimited authority to set
25 statutory maximums for different crimes based on their

1 estimation of the severity of the crime. I -- I don't
2 see that that poses the problem. The problem here is
3 that there is no necessary connection between the -- say
4 the regulation of interstate commerce and the desire to
5 prevent primarily local sex offenders. It's very
6 difficult to say how preventing general, State type
7 violent crimes has anything to do with the regulation of
8 interstate commerce? That's --

9 JUSTICE KENNEDY: Well, there is -- there is
10 in the sense that the relation between the prisoner and
11 his or her State is disrupted for say, 15 years, and
12 then this person is just a derelict.

13 MR. DUBOIS: Well, I really think that that
14 argument raises a bit of a red herring. I have been
15 practicing as a Federal -- for a very long time. I have
16 never yet had a defendant where the Bureau of Prisons
17 did not know where to send them. And there has never
18 been a case where a defendant did not have a State to go
19 to, and --

20 JUSTICE SCALIA: Where do they send item?
21 The last residence where --

22 MR. DUBOIS: The -- the default is -- as the
23 government indicated, is the court of conviction, the
24 place of conviction, which is probably about 90 percent
25 of the time their home State, anyway. But if -- if they

1 are from a different home State, generally the Bureau of
2 Prisons tries to come up with a release plan to release
3 them to their State of domicile. And --

4 JUSTICE STEVENS: I want to follow up on
5 Justice Alito's question. Supposing Congress passed a
6 statute that said at the expiration of every sentence
7 the prisoner shall be examined for certain reasons, and if
8 he fails certain tests he shall not be released for
9 another 30 days. Say he should be examined to determine
10 better he is a sexual predator. And that is in every
11 sentence at the time of the sentence?

12 MR. DUBOIS: And every -- and then,
13 following that examination, they could be then detained
14 indefinitely?

15 JUSTICE STEVENS: Right. And it says so in
16 the statute.

17 MR. DUBOIS: I do not think that that would
18 be constitutional, Your Honor, because it would still
19 have to be part of the punishment for the crime. Civil
20 commitment is a civil --

21 JUSTICE STEVENS: One of the elements of the
22 punishment is that you are subjected to this examination
23 that otherwise you would not have to take. It seems to
24 me, maybe your case boils down to the fact that -- that
25 Congress hasn't written the right statute.

1 MR. DUBOIS: We do not know that this
2 statute cannot be written constitutionally. All we know
3 is this statute is not written constitutionally, because
4 it is effectively unlimited. It effectively does
5 require no connection between the underlying criminal
6 charge and the subsequent commitment. You can be in
7 custody for any crime whatsoever. It doesn't have to be
8 sex-related, you can never have been convicted of a sex
9 offense whatsoever.

10 So it really is, there is almost a complete
11 de-linking of the crime which brought you into federal
12 custody and your subsequent commitment. Can we imagine
13 hypotheticals that -- that create a link, that rolls it
14 into the punishment? Perhaps, but that is not this
15 statute, and this statute must fail for that reason.

16 If there is no further questions, Your
17 Honor, I thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.
19 DuBois.

20 General Kagan, you have three minutes
21 remaining.

22 REBUTTAL ARGUMENT OF GEN. ELENA KAGAN,
23 ON BEHALF OF PETITIONER

24 GENERAL KAGAN: Thank you,
25 Mr. Chief Justice.

1 What Congress said here was something pretty
2 simple and very reasonable. It said if we, the Federal
3 Government, have somebody in our custody, and we know
4 that that person has the kind of mental illness that is
5 going to cause grave danger to the community; and we
6 know that there is no one else who is in a good position
7 to prevent it; and we know that we were in part
8 responsible for that vacuum, then we should be able to
9 do something about it. That's what section 4248 says,
10 and section 4248 is constitutional for that reason.

11 Justice Scalia has several times suggested
12 that maybe there is no experience of this, but I think
13 that the fact of the judicial conference committee
14 report, stating that there were these problems with
15 respect to mentally ill people generally, rebuts that.
16 So, too, this Court's view in Shannon, that section 4243
17 was necessary because there was a gaping statutory hole
18 where States were not willing to step forward, rebuts
19 that as well.

20 In fact, it is not and has never been the
21 case that the test here is whether a government action
22 is absolutely necessary to aid or effect a governmental
23 or congressional power. The wisdom of the statute here
24 is not what is at issue. Maybe this is the right
25 statute, maybe there might be a better one. The only

1 question is the constitutionality of the statute. That
2 sort of wisdom, whether there might be a better statute,
3 that's for Congress to decide.

4 Thank you, Mr. Chief Justice.

5 CHIEF JUSTICE ROBERTS: Thank you, General,
6 thank you, counsel. The case is submitted.

7 (Whereupon, at 11:04 a.m., the case in the
8 above-entitled matter was submitted.)

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