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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 08-1224, United States v.
5 Comstock.

6 General Kagan.

7 ORAL ARGUMENT OF GEN. ELENA KAGAN

8 ON BEHALF OF THE PETITIONER

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

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

15 To see why, to understand the basis for this
16 statute, it might be helpful to go all the way back to
17 1945, when what this Court later called "a
18 conspicuously able committee of Federal judges"
19 recommended that Congress pass section 4246, a very
20 similar civil commitment law that has been on the
21 books for some 60 years.

22 The committee there wrote that the law was
23 necessary to deal with what it called the serious
24 problem of what to do with insane criminals -- and I'm
25 quoting now -- "upon the expiration of their terms of

1 confinement, where it would be dangerous to turn them
2 loose upon society and where no State will assume
3 responsibility for their custody."

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

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

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

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

1 beforehand -- to go to two States, the State of
2 domicile and the State of prior conviction.

3 JUSTICE KENNEDY: Why would a State want to
4 incur that extra expense if --

5 GENERAL KAGAN: Well --

6 JUSTICE KENNEDY: -- if the Federal
7 Government is going to do it for them?

8 GENERAL KAGAN: What Congress found was that
9 States often were not willing to incur that extra
10 expense, even if the Federal Government was not going
11 to do that for them, and what this legislation was,
12 was a response to that reality. It was --

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

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

22 GENERAL KAGAN: I think it is unusual,
23 Justice Ginsburg. It's not the usual course that the
24 State does take responsibility. But the Federal
25 statute commits the Attorney General and the Bureau of

1 Prisons to try to persuade a State to take custody, to
2 defer to the State if a State has some reason to take
3 custody, but -- but makes sure that the Federal
4 Government is a kind of backstop, so that if the State
5 does not take responsibility and does not take
6 custody, the Federal Government will ensure that the
7 person will not be released, the person who has been
8 found to be both mentally ill and sexually --

9 JUSTICE GINSBURG: But the likelihood is
10 that the person will stay in Federal custody?

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

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

24 GENERAL KAGAN: I think the power, Justice
25 Scalia, is the power to run a responsible criminal

1 justice system, to run a criminal justice system that
2 does not itself endanger the public.

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

11 GENERAL KAGAN: Without the person having
12 entered the criminal justice system in any way.

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

17 GENERAL KAGAN: That has been the
18 government's case throughout this litigation, that it
19 has always depended on the fact of Federal custody, on
20 the fact that this person has entered the criminal
21 justice system, has been -- four of the five of these
22 people --

23 CHIEF JUSTICE ROBERTS: Yes.

24 GENERAL KAGAN: -- have been convicted and
25 have served prison terms. And the question really is,

1 well, given that, given that the Federal Government
2 has custody of these people, that it's difficult for
3 the States to -- to take responsibility for these
4 people after the prison term is finished.

5 CHIEF JUSTICE ROBERTS: Well, why doesn't
6 the Federal Government's authority to have custody
7 because of the criminal justice system end when the
8 criminal justice system is exhausted? In other words,
9 when the sentence is done?

10 GENERAL KAGAN: Because the Federal
11 Government has a responsibility to ensure that release
12 of the people it has in its custody is done
13 responsibly, is done in such a way --

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

20 GENERAL KAGAN: I think that the power to
21 run a responsible criminal justice system extends to
22 the way in which the Federal Government releases these
23 prisoners. And --

24 JUSTICE KENNEDY: Could the Federal
25 Government order a commitment of anyone who's been in

1 Federal custody over the last 10 years?

2 GENERAL KAGAN: Justice Kennedy, I think
3 that that would be a much harder case. There are some
4 people, of course, who are on supervised release and,
5 for example --

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

8 (Laughter.)

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

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

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

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

1 GENERAL KAGAN: I think that that's not
2 right, Justice Scalia. I think that there is a
3 transition period, and what this statute is designed
4 to do is to deal with that transition period and to
5 make sure that sexually dangerous, mentally ill people
6 don't fall through the cracks between Federal custody
7 and the reestablishment of State control.

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

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

24 JUSTICE SOTOMAYOR: Under your theory --
25 under the theory that you are proposing, then, any

1 dangerous person, whether it's because of mental
2 illness or any other reason, could be held
3 indefinitely --

4 GENERAL KAGAN: No --

5 JUSTICE SOTOMAYOR: -- under a civil
6 commitment statute, because what you're saying is that
7 the Federal Government, merely because of their --
8 their time in control of the individual, has an
9 unlimited constitutional power to then civilly commit
10 this dangerous person.

11 GENERAL KAGAN: I think what would prevent
12 that, Justice Sotomayor, is the Due Process Clause.
13 It is obviously the case that there are other
14 constraints on governmental action than Article I.

15 JUSTICE SOTOMAYOR: Well, what -- what
16 constrains the government under the Due Process Clause
17 from invoking a dangerousness merely because someone
18 has a long history. We have many criminal defendants
19 with long histories of violent behavior. Many of them
20 continue that violent behavior in prison, and some of
21 them at the end of their term are let out, because
22 their term has been completed. So what -- what in
23 the Due Process Clause protects --

24 GENERAL KAGAN: Well, I think that the
25 history of this Court's cases would suggest that if

1 this were a person without mental illness that the
2 civil commitment statutes --

3 JUSTICE SOTOMAYOR: But that's where I'm
4 trying to understand --

5 GENERAL KAGAN: Yes, that the civil --

6 JUSTICE SOTOMAYOR: -- the connection
7 between the nature of the mental illness and the
8 constitutional power that you are claiming. What --
9 what is it that gives you that power?

10 GENERAL KAGAN: Well, if you go back to a
11 case like Kansas v. Hendricks, which is of course
12 where this Court thought about civil commitment
13 statutes with relation to sexually dangerous
14 offenders, I think the Court made clear that it was
15 important in that case that there be not only sexual
16 dangerousness, but also mental illness, in order to
17 invoke the civil commitment statutes.

18 JUSTICE GINSBURG: Are you saying that as
19 far as those limitations, the question that Justice
20 Sotomayor was asking, the limitations on the Federal
21 Government would be the same as they are on the
22 States? But that's a different question from whether
23 the Federal Government has any power at all.

24 GENERAL KAGAN: You said it better than I
25 did, Justice Ginsburg. That's exactly right, that of

1 course there are constraints on the Federal Government
2 in using civil commitment statutes, that they are the
3 same as the -- the constitutional constraints on the
4 States when they use that power. But this is a
5 different question. The question presented here is
6 only whether -- assuming that the Federal Government
7 is acting within other constitutional constraints in
8 making this civil commitment, whether Article I
9 enables it to do so because of the special custodial
10 role in these cases. And --

11 JUSTICE SCALIA: General Kagan, you are
12 relying on the Necessary and Proper Clause, right?
13 You say: But "necessary and proper" doesn't mean it's
14 necessary and proper for the good of society. It
15 means it's necessary and proper for the execution of
16 another power that the Federal Government is given by
17 the Constitution.

18 Now, why is this necessary for the execution
19 of any Federal power? The Federal criminal proceeding
20 has terminated. The individual is released. You
21 could say it's necessary for the good of society, but
22 that's not what the Federal Government is charged
23 with. Why is it necessary to any function that the
24 Federal Government is performing? It has completed
25 its performance of the function of incarcerating this

1 individual until he has served his punishment.

2 GENERAL KAGAN: The Court has always said,
3 Justice Scalia, that the Necessary and Proper Clause,
4 the question is, is it necessary and proper to the
5 beneficial exercise of Federal powers? And so this
6 is, that it is necessary and proper to the beneficial
7 or, what I said before, the responsible exercise of
8 the Federal power to operate a criminal justice
9 system, which includes the responsibility to ensure
10 that those people who have been in custody in that
11 Federal -- in that criminal justice system are not
12 released irresponsibly.

13 JUSTICE ALITO: Isn't it the case that --

14 JUSTICE KENNEDY: But the brief -- excuse
15 me.

16 JUSTICE ALITO: Well, I was going to ask, is
17 it the case that the unwillingness of States to step
18 into this area in these instances is a consequence, at
19 least in part and perhaps in large part, of the
20 Federal incarceration, that as a result of the Federal
21 incarceration, the person is no longer viewed by the
22 State as -- as having domicile within the State, the
23 State of prior domicile has no way of knowing whether
24 that person would return to a domicile in the prior
25 State? Is that -- do you think that is a fair

1 understanding of the reason for the enactment of this?

2 GENERAL KAGAN: Just to make sure that I
3 understand the question, that the reason for the
4 enactment in part has to do with the fact that the
5 Federal Government has assumed custodial
6 responsibility and has disrupted the relationship
7 between the State and the citizen, I think that that's
8 exactly right, Justice Alito.

9 But in some sense, it's not just that the
10 Federal system finds itself in possession and custody
11 of these people, but the Federal -- what Congress
12 could reasonably find is that the Federal Government
13 knows that there's nobody else to take appropriate
14 custody and care and that the reason that there's
15 nobody else to take appropriate custody and care has
16 to do with the Federal action itself.

17 JUSTICE GINSBURG: So, is the prisoner --

18 CHIEF JUSTICE ROBERTS: So, if there were --

19 JUSTICE GINSBURG: Is it -- is it a prisoner
20 who has served his time in, say, a Federal
21 penitentiary in Ohio but is a domiciliary of Arizona,
22 what happens when the prisoner is released, say, after
23 10 years? Released to Ohio, sent back to Arizona?
24 What?

25 GENERAL KAGAN: The default position is that

1 the prisoner is released to the place where the
2 prisoner was convicted. Now, that -- the prisoner may
3 or may not have any relationship with that State. The
4 person may have lived there, may not have lived there.

5 The -- the Federal prison system does
6 sometimes make other arrangements. The idea behind
7 any release is to try to make sure that the person is
8 released to the place where a -- a future lawful life
9 will be most likely. But in many of these cases, the
10 prisoner ends up being released to a State that has no
11 current relationship with the -- with the prisoner,
12 sometimes has had -- never had any relationship with
13 the prisoner, and at any rate doesn't now, because the
14 period of Federal custody has disrupted that
15 relationship.

16 And what the Federal Government is doing
17 here is essentially to deal with this transition
18 problem to make -- to make sure these people don't
19 fall between the -- the cracks, and to ensure that
20 where there is a sexually violent and mentally ill
21 person who one has reason to believe will commit
22 further offenses, that appropriate care and custody of
23 those people is ensured.

24 Now, this is no different from what Congress
25 has done on other occasions as well. This is not the

1 first such Federal civil commitment statute. This is
2 not a newfangled thing. Section 4248 is identical in
3 -- in all relevant constitutional respects to section
4 4246, which is the general civil commitment statute
5 for mentally ill, dangerous people generally, not with
6 any sexual --

7 CHIEF JUSTICE ROBERTS: But, General --

8 GENERAL KAGAN: -- component to it.

9 CHIEF JUSTICE ROBERTS: I understood you in
10 your response to Justice Alito to say, if I remember,
11 that it was not just the fact of Federal custody, but
12 the fact that there are no States or there may well
13 often be no States willing. What if every State is
14 willing; I mean, every State is willing to take the
15 people on out of a concern to protect their citizens.
16 Does that somehow mean there's no necessary and proper
17 power?

18 GENERAL KAGAN: I think when we are dealing
19 with the Necessary and Proper Clause, we are asking
20 ourselves whether Congress reasonably acted in a given
21 situation --

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

24 GENERAL KAGAN: Well, if -- if -- that's
25 exactly right, that if the facts before Congress were

1 such that there were no difficulty with this
2 transition period and that nobody ever fell between
3 the cracks, an entirely different question would be
4 presented, and then there would be some kind of
5 argument that at that point, in those circumstances
6 State police power would be the appropriate default
7 position. But --

8 JUSTICE SCALIA: General Kagan, I -- I find
9 it difficult to believe that if the Federal Bureau of
10 Prisons wrote the governor of the State into which
11 this person is to be released, and they try to release
12 him in the State where he -- he will in the future
13 reside, and said, we are about to release this person
14 in 60 days or whatever, in our view there are serious
15 mental problems, and we think the State ought to
16 consider commitment proceedings, I find it difficult
17 to believe that an elected governor or an elected
18 attorney general would ignore that letter.

19 GENERAL KAGAN: I do believe, Justice
20 Scalia, that Congress reasonably could have found that
21 there were difficulties in making this transition.
22 The cost of commitment of these people is very high,
23 much higher than standard incarceration. I believe
24 the States say in their amicus brief that it's some
25 \$65,000 a year per person per year, and -- and the

1 State may feel as though it shouldn't have
2 responsibility over this person --

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

6 GENERAL KAGAN: Well, I think people -
7 people make judgments --

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

9 GENERAL KAGAN: People make judgments all
10 the time. And I think there's -- there's no evidence
11 to suggest that Congress was not acting reasonably in
12 understanding this as a significant problem. And --

13 JUSTICE GINSBURG: Was it -- was that a
14 consideration? You mentioned that this originated,
15 4246, with a -- with a committee of judges who said,
16 we have a problem. Did they --

17 GENERAL KAGAN: That is exactly right,
18 Justice Ginsburg, and maybe that's the -- the best
19 answer to Justice Scalia, is history, and it's history
20 on two separate occasions, which this Court has noted.

21 It's history when -- when this committee of
22 Federal judges chaired by Calvert Magruder, including
23 Learned Hand, said we have a real problem here with
24 people being let go out of the Federal system and the
25 States not stepping forward and taking responsibility

1 for them. And the Court confronted and -- and thought
2 about the exact same problem when Congress passed in
3 1984 section 4243, which is the civil commitment
4 statute that applies to insanity acquittees, people
5 who are acquitted on the basis of insanity.

6 And this Court in Shannon said that, I think
7 the -- the language is, "Federal courts decried time
8 and again the gaping statutory hole," that is the hole
9 that -- that existed because people were acquitted on
10 the basis of insanity and -- and States were not
11 willing to step forward and take custody of those
12 people in the way that they would have taken custody
13 of those people if they had been acquitted of insanity
14 in the State court systems.

15 JUSTICE SCALIA: I must say I'm -- I'm not
16 terribly impressed with -- with the argument --

17 GENERAL KAGAN: I can tell, Justice Scalia.

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

19 (Laughter.)

20 JUSTICE SCALIA: I mean, this -- this is a
21 recipe for the Federal Government taking over
22 everything.

23 GENERAL KAGAN: No, I --

24 JUSTICE SCALIA: The States won't do it;
25 therefore, we have to do it. It has to be done, and

1 therefore the Federal Government steps in and does it.

2 GENERAL KAGAN: I don't think so, Justice
3 Scalia. I think, in fact, that -- that Congress on
4 each of these three occasions has limited the civil
5 commitment power only to people who have been -- who
6 are in the custody of the Federal Government and over
7 whom the Federal Government has a distinctive
8 responsibility.

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

19 Would anybody say that the Federal
20 Government would not have Article I power to effect
21 that kind of public safety measure? And the exact
22 same thing is true here. This is exactly what
23 Congress is doing here, is to make sure that mentally
24 ill, sexually dangerous --

25 JUSTICE KENNEDY: Well, when I was thinking

1 about your hypothetical, I thought, well, that's a
2 pretty easy commerce power argument. I -- I notice
3 that in -- in the government's position, you don't
4 argue the Commerce Clause very much, and I -- we've
5 got Morrison v. Brzonkala looking at you and Printz
6 and so forth.

7 But it -- suppose Congress said there is a
8 class of committable, dangerous sex offenders that are
9 crossing State lines and using interstate facilities,
10 and made those findings. Would that be sufficient to
11 establish a Federal commitment law?

12 GENERAL KAGAN: Well, as you say, Justice
13 Kennedy, the government has never argued the Commerce
14 Clause here in the sense that it has never argued that
15 these activities have a substantial effect on
16 interstate commerce, and it hasn't done so because of
17 the Morrison -- the Morrison precedent.

18 The Commerce Clause I think is relevant in
19 two ways. It's relevant first because, of course,
20 it's often the Commerce Clause that gives rise to the
21 power to criminalize conduct and to punish people for
22 that conduct. So I think in -- in three of the five
23 of these cases, the initial power to criminalize the
24 conduct is based on the Commerce Clause.

25 The Commerce Clause is also relevant here

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

11 And the reason they are most likely is
12 because all of them have done it once before, and all
13 of them have been found to have the kind of mental
14 illness that makes it --

15 JUSTICE SOTOMAYOR: But that's -- but that's
16 an easier case, because at least you have an
17 interstate connection to the offensive conviction and
18 the ground for future commitment. But these statutes
19 don't depend on that element being a part of the
20 commitment process. There's no -- there's no
21 congressional -- there's no tie to a congressional
22 power that justifies the commitment other than that
23 the person is sexually dangerous.

24 GENERAL KAGAN: The -- the essential tie to
25 a congressional power is the tie of these people to

1 the Federal criminal justice system because they are
2 in Federal custody.

3 JUSTICE SOTOMAYOR: It's that special
4 relationship.

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

12 JUSTICE STEVENS: But isn't it true that
13 this statute applies even if a person has not been a
14 sexual offender in the past?

15 GENERAL KAGAN: It -- it does, Justice
16 Stevens. There have been 103 --

17 JUSTICE STEVENS: So that argument doesn't
18 take care of that --

19 GENERAL KAGAN: Just to put some numbers on
20 the table, there have been 103 people who have been
21 certified under these laws. Eight under -- under this
22 law. Eighty-three of them have committed sexual
23 offenses; 20 --

24 JUSTICE STEVENS: No, but my point is the
25 law applies to a person who is convicted of armed

1 robbery or bank robbery, and just before the end of
2 his term in prison the authorities decide he is in
3 fact a potential sexual offender. They can detain
4 him.

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

9 JUSTICE STEVENS: Right.

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

12 JUSTICE STEVENS: But that's not -- that's
13 not a necessary element of the -- of the statute --
14 under the statute, is it?

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

1 JUSTICE SCALIA: What about release from the
2 Army? Would that -- would that also -- if I want to
3 turn this -- this person after discharge at -- you
4 know, loose upon the society, could the Federal
5 Government commit that person?

6 GENERAL KAGAN: Mr. Chief -- excuse me,
7 Justice Scalia -- I didn't mean to promote you quite
8 so quickly.

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Thanks for thinking
11 it was a promotion.

12 (Laughter.)

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

14 (Laughter.)

15 GENERAL KAGAN: Justice Scalia, I -- I do
16 think that the military has special responsibilities
17 with respect to those people in it. In general, I
18 would say that the relationship between a prisoner and
19 a -- and a jailer is more comprehensive than any other
20 kind of relationship that one can name.

21 But I do think that the military
22 relationship approaches that. And in the military, I
23 think the military indeed would take this kind of --
24 these kinds of facts extremely seriously, probably
25 would commit such a person and -- and try very hard to

1 transfer that person eventually to State custody.

2 If I can reserve the balance of my time.

3 CHIEF JUSTICE ROBERTS: Thank you, General.

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

5 MR. DUBOIS: It is, Your Honor.

6 CHIEF JUSTICE ROBERTS: Mr. DuBois.

7 ORAL ARGUMENT OF G. ALAN DUBOIS

8 ON BEHALF OF THE RESPONDENTS

9 MR. DUBOIS: Mr. Chief Justice, and may it
10 please the Court:

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

17 The power to enforce the law which brought
18 the defendants into Federal custody in the first place
19 has been exhausted. The defendant has been tried and
20 convicted, and he's sentenced and he's served his
21 sentence. That law has been fully vindicated. At
22 that point, any further detention must stand on an
23 independent constitutional footing. It cannot --

24 JUSTICE GINSBURG: Do you -- Mr. DuBois, do
25 you take that same position with respect to not guilty

1 by reason of insanity? Someone is convicted, say, in
2 the District of Columbia -- say, John Hinckley is
3 found by the jury to be not guilty by reason of
4 insanity, must he then be allowed out of Federal
5 custody, and it depends if his home State or any other
6 State wants to pick him up?

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

19 The other distinction, of course, is that
20 not guilty by reason of insanity must be pled by the
21 defendant, and in some sense the commitment is in lieu
22 of punishment; it's not an additional punishment
23 tacked on at the end of the sentence. So I don't
24 think that the infirmities of 4248 are at play at all
25 in --

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

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

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

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

24 JUSTICE STEVENS: Right.

25 MR. DUBOIS: -- or something of that nature,

1 I don't think would -- would call for that type of --
2 of Federal Government --

3 JUSTICE STEVENS: It may not call for it.

4 My question is would it have the power --

5 MR. DUBOIS: I would say --

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

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

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

22 MR. DUBOIS: I was about to say, Your Honor,
23 you know, that's the -- that's the other I think
24 significant difference that Justice Kennedy pointed
25 out, that there is a clear hook to interstate commerce

1 when we are talking about communicable diseases, and
2 that hook is simply not present.

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

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

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

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

24 MR. DUBOIS: It doesn't have the power to
25 detain individuals as a result of their mental illness

1 based on the fear that they are going to go out and
2 commit a crime.

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

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

17 JUSTICE SCALIA: Try the Tenth Amendment.

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

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

24 MR. DUBOIS: That would certainly not be the
25 case here, Your Honor. All of these individuals --

1 there is no claim that these individuals became
2 mentally ill while in the custody of the Bureau of
3 Prisons. These are all, as far as I understand,
4 illnesses which predate their entry into the Federal
5 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: Well, Your Honor, I think they
13 have a power, but it's not an unlimited power. That
14 power is addressed by statute --

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

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 who
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,
23 however, that commitment must end at the end of their
24 sentence, and I think that would be the extent of the
25 government's power.

1 JUSTICE KENNEDY: Because the government --

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
7 person into custody. They have fully vindicated the -
8 - the criminal law that brought them into -- into the
9 prisons.

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

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

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

21 MR. DUBOIS: Because he has -- he has caught
22 some disease --

23 JUSTICE KENNEDY: Yes.

24 MR. DUBOIS: -- while in the system? Again,
25 I think -- first, as a practical matter, I don't think

1 any prisoner would take that deal. They would rather
2 be treated in the community. So it becomes a question
3 of whether the person can be held for the safety of
4 others, and again, I think the answer is no.

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

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

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

25 JUSTICE BREYER: Well, once you're down that

1 road -- I was rather surprised, but not too surprised,
2 that, I think perhaps with prompting, I heard you say,
3 I think, that the Tenth Amendment would prohibit the
4 Federal Government from setting up a system of mental
5 care, which you'd better tell the people across the
6 street, if that's your view.

7 The -- the -- is that what you are actually
8 saying?

9 MR. DUBOIS: That the Federal Government
10 cannot set up a system of --

11 JUSTICE BREYER: Of national mental care for
12 mentally ill people.

13 MR. DUBOIS: Well, again, that would have to
14 --

15 JUSTICE BREYER: Because you either think
16 that the Constitution prohibits that or you think it
17 permits it.

18 MR. DUBOIS: Well, I think it would have to
19 relate to an enumerated power, and it would have to be
20 --

21 JUSTICE BREYER: Yes, probably the Commerce
22 Clause power.

23 MR. DUBOIS: -- in furtherance of an
24 enumerated power.

25 JUSTICE BREYER: So it's fine --

1 JUSTICE SCALIA: No, no.

2 (Laughter.)

3 JUSTICE SCALIA: The government can spend
4 money on whatever it wants. That's the spending
5 power. They can set up hospitals. The issue is
6 whether they can force somebody into a hospital, not
7 whether they can set up hospitals.

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

15 MR. DUBOIS: Absolutely, Your Honor.

16 JUSTICE SCALIA: And it seems to me that
17 statute, combined with a letter to the elected
18 governor, who probably wants to be re-elected, or the
19 elected attorney general, will make it pretty certain
20 that the State will take over the responsibility for
21 the individual.

22 MR. DUBOIS: Well, that's absolutely
23 correct, Your Honor, and that -- and that option,
24 which we -- we definitely believe is the best option -
25 -

1 JUSTICE STEVENS: But, of course, that goes
2 to -- that goes to the question of the wisdom of the
3 statute. I think, as the case comes to us, we have to
4 assume that there are cases out there in which there
5 will be no solution such as the one Justice Scalia
6 proposes.

7 MR. DUBOIS: Well, I don't know --

8 JUSTICE STEVENS: I think that's why
9 Congress acted, because they think there are such
10 cases.

11 MR. DUBOIS: Well, I don't know that you can
12 make that assumption, and to the extent that the --
13 the fear is that the State will decline
14 responsibility, I do not think that Federal power can
15 expand or contract based on a State's willingness or
16 unwillingness to accept a responsibility --

17 JUSTICE STEVENS: But we are asked to decide
18 a question on the assumption that there are States and
19 there are governors who will not react to the problem
20 of particular prisoners who are released in Arizona or
21 some place when they originally came from Michigan or
22 whatever it is. I think we have to assume that there
23 are cases in which the statute would -- would play a
24 role.

25 MR. DUBOIS: Well, Your Honor -- Your Honor,

1 I think that may be right, but there -- but there are
2 -- the question is: What's a constitutional response
3 to that problem? We can imagine plenty of
4 unconstitutional responses. For instance, a person --

5 JUSTICE STEVENS: Absolutely, and that's why
6 it seems to me that the constitutional answer is the
7 same in this statute as in the case of somebody who
8 incurs a very communicable disease and the government
9 wants to prevent him from infecting the community.
10 Why is it a different constitutional question?

11 MR. DUBOIS: Well, I think the different
12 constitutional question is -- again, I do not believe
13 the Federal government has a general quarantine power
14 that doesn't -- that would allow it to hold prisoners
15 past their release date.

16 I think that is a public health problem,
17 except for -- to the extent that there may be a closer
18 nexus to a forward-looking Commerce Clause hook that
19 doesn't exist in this case. The government's argument
20 is purely backwards looking. They -- they locate the
21 power to commit --

22 JUSTICE STEVENS: I understand. It's purely
23 backwards looking, and it takes care of the case that
24 -- the premise of the government's argument is that
25 the release itself is a Federal act that has to be

1 done responsibly, and the very release, if it causes
2 harm to the community, can be prevented.

3 MR. DUBOIS: And it seems to me that the
4 government's argument essentially collapses into the
5 notion, well, if it's a good idea, it must be
6 necessary and proper to do it. I think that's just
7 simply not correct. It's very -- we're going --

8 JUSTICE GINSBURG: It's more than the
9 question of good idea. You're talking about
10 endangering the health and safety of people, so it's -
11 -

12 MR. DUBOIS: Well, there --

13 JUSTICE GINSBURG: The government has some
14 responsibility, doesn't it?

15 MR. DUBOIS: Absolutely, the government --
16 the government has a responsibility, but they have
17 certain constitutional limits that also must be
18 respected. So the statute --

19 JUSTICE GINSBURG: Yes, but you say, if the
20 State is unwilling to take the person, and apparently,
21 that is the problem that precipitated 4246 and, now,
22 4248, and that -- you -- the Federal government is
23 just helpless short of passing a spending measure and
24 saying, State, if you do this, we'll give you the
25 money.

1 MR. DUBOIS: Right. And -- and -- well, I
2 think there's -- there's a number of weapons in the
3 Federal Government's arsenal. First of all, there's
4 the Federal spending power. Second of all, there is
5 already, in the statute of 4042, a specific duty to
6 warn, just as Justice Scalia was positing. It already
7 exists.

8 Any time the Federal Government is going to
9 release a person they believe to be violent or
10 dangerous, they are required to warn the attorney
11 general of the State within a certain period of time
12 before their release.

13 At that point, I do believe it becomes a
14 problem of the State polity. If the State governor is
15 going to be cavalier about that type of release, then
16 I think the answer for that lies in the voters of that
17 State, to say, no, we want you to take this problem
18 seriously and --

19 CHIEF JUSTICE ROBERTS: Well, he's not going
20 to be cavalier. He doesn't have -- he's going to say:
21 Don't do it. This is a dangerous person, the Federal
22 government; don't release him.

23 MR. DUBOIS: And he's going to --

24 CHIEF JUSTICE ROBERTS: And you want the
25 Federal Government to have to be in the position of

1 saying, well, we have to.

2 MR. DUBOIS: Exactly. The Federal
3 Government has to, and at that point, the State must
4 make that hard political decision. Do we want to take
5 this person on, spend the money necessary to --

6 CHIEF JUSTICE ROBERTS: Well, it may be the
7 Federal Government's hard political position. They
8 are the person holding them, and the attorney general
9 is saying, don't release him, and then the Federal
10 government is going to make the decision, well, we
11 have to.

12 MR. DUBOIS: And so, in that sense, it's no
13 decision at all because the Constitution requires that
14 they be released.

15 JUSTICE BREYER: The -- go back once more
16 because I am obviously getting nowhere with this, but
17 I thought that, if you set up a set of hospitals, as I
18 think the government could do, there will be a few
19 people, sometimes, who have to be restrained in those
20 hospitals for themselves or others' benefit.

21 If you set up a system of mental hospitals,
22 that's even more true. If you set up a university,
23 some people will be sick, and they will be in the
24 infirmary, and occasionally, you will come across a
25 person who has to be restrained, et cetera.

1 Now, once you are down the road where you
2 admit the government can do that, how is a prison any
3 different?

4 MR. DUBOIS: Well, I --

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

10 Maybe there's a better way, but why isn't
11 this just a normal part of running this institution,
12 just as it is in the other cases?

13 MR. DUBOIS: Well, we'll just start -- I
14 think, a couple of responses. First of all, this is -
15 - that is no part of the government's argument in this
16 case. Their -- their argument is a backward-looking
17 argument that locates its power in the fact that they
18 have had these people in their custody, and they can't
19 responsibly let them go.

20 What you are positing is more of a forward-
21 looking argument that would essentially create a
22 Federal parens patriae power, that the Federal
23 government has --

24 JUSTICE BREYER: No, I'm not, actually. I'm
25 just showing you the connection between running an

1 institution, which, for whatever set of reasons in the
2 Constitution, you have the authority to do, and then
3 it becomes, as part of that institution, part of the
4 job to take care of people in a certain way.

5 Sometimes that requires a restraint, and
6 sometimes that restraint could last beyond the period
7 where in the absence of that need the person would no
8 longer be part of the institution. That's true of a
9 hospital, of a mental hospital, and of a prison.
10 Whether they rest on the same power or a different
11 power, the government has the power, Federal, to
12 establish all of those institutions.

13 I'm just drawing institutional connections.
14 That's -- that's what I'm saying. Maybe that's an
15 unnecessarily complex argument, but I was just seeing
16 it that way.

17 MR. DUBOIS: Well, it -- it is complex,
18 Justice Breyer, and it's also, I think, historically -
19 - the Federal Government has not historically thought
20 to have been able to have the sort of general parens
21 patriae power that -- that the States do enjoy to take
22 care of the health and well-being of its citizens. I
23 think it would be quite a step for the Federal
24 Government to embark on an enterprise of that nature.

25 JUSTICE SCALIA: Don't -- don't States have

1 involuntary commitment procedures?

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

3 JUSTICE SCALIA: Now, couldn't the Federal
4 Government fund a Federal -- would you find a
5 constitutional problem in the Federal Government
6 funding an office which brings involuntary commitment
7 proceedings in a State where a prisoner is released
8 when the Federal Government believes --

9 MR. DUBOIS: There would have --

10 JUSTICE SCALIA: -- the prisoner is unsafe?

11 MR. DUBOIS: There would be absolutely no
12 problem with that, Your Honor. The Congress, with
13 spending power, would have clear ability to fund that
14 type of program run -- run and administered by the
15 States.

16 JUSTICE SCALIA: And I presume the State
17 couldn't -- if the -- if the Court says commitment is
18 proper, the State would have to accept the commitment,
19 no?

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

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

22 MR. DUBOIS: They should do that. I mean,
23 what they are doing here is what they can't do. Just
24 --

25 JUSTICE STEVENS: I guess we can all think

1 of a lot of different statutes Congress might have
2 enacted. We have to decide whether this one is
3 constitutional.

4 MR. DUBOIS: And, Your Honor, I think that's
5 absolutely right.

6 JUSTICE SCALIA: Yes, but most of the
7 argument for why this is constitutional is simply it's
8 necessary, and therefore it's constitutional. But I'm
9 not even sure it's necessary.

10 MR. DUBOIS: Well, I think that's right,
11 Your Honor.

12 And to answer your question, Justice
13 Stevens, you are absolutely right. And I think there
14 -- there are many tools that Congress has at its
15 disposal to address this problem. The spending power
16 is one. Every one of these individuals would be on
17 Federal supervised release.

18 JUSTICE GINSBURG: Yes, that's one of the
19 things that you mention in your brief. You said you
20 could vary the conditions of supervised release, but
21 you were not at all specific about that. You said the
22 Federal Government -- the person has gotten out, they
23 know the person is dangerous, so what -- what are the
24 measures that they would take to do what you said in
25 the brief the Federal Government could do; that is,

1 set the terms of supervised release in order to
2 account for sexual dangerousness?

3 MR. DUBOIS: Well, the first thing they can
4 do is act as a liaison between the individual and the
5 State. Every one of these individuals will have a
6 Federal probation officer who will be responsible for
7 their supervision during the period of supervised
8 release. They also have the ability to go back to the
9 court of conviction and seek modifications of the
10 terms of supervised release, that they have certain
11 concerns --

12 JUSTICE GINSBURG: Well, what would the
13 modification be?

14 MR. DUBOIS: Those modifications could
15 include things like mandating mental health treatment
16 during the term of supervised release, certain
17 limitations on travel, certain limitations on
18 activities with computers. A fairly large range of --

19 JUSTICE SOTOMAYOR: But that doesn't take
20 care of the fact that the prisoner would be released
21 before there was a cure found for the alleged mental
22 illness, meaning supervised release generally has a
23 term limit.

24 MR. DUBOIS: That's correct, Your Honor.
25 And I think that concern, the -- the fact that we want

1 to do something before the release is addressed by
2 4042, which is the duty to warn statute.

3 JUSTICE SOTOMAYOR: Could -- what would
4 happen if Congress said, as part of a sentence, a
5 judge could incorporate a civil commitment finding and
6 say: You are going to serve X amount in jail and Y
7 amount, and then we are going to civilly commit you
8 indefinitely, because as of today, I am finding you a
9 sexual predator subject to a mental illness.

10 Would that be constitutional, and if not,
11 why not?

12 MR. DUBOIS: Well, that would not be
13 constitutional, Justice Sotomayor, because of the
14 indefinite nature of the commitment. You can envision
15 a system -- and we had that type of system in the
16 '50s, '60s, and '70s -- of indeterminate sentencing,
17 where --

18 JUSTICE SOTOMAYOR: Well, I -- let's assume
19 it incorporates all the protections of -- of this
20 statute with respect to periodic review.

21 MR. DUBOIS: So if we have an indeterminate-
22 type sentence where you -- you get a sentence of 10
23 years and you are periodically reviewed to see if you
24 are safe to be released, of course that's
25 constitutional.

1 JUSTICE SOTOMAYOR: So it's constitutional
2 because it's part of the sentence?

3 MR. DUBOIS: That's exactly right, Your
4 Honor.

5 JUSTICE SOTOMAYOR: All right. Because it's
6 --

7 MR. DUBOIS: It's a part of the sentence.
8 It's part of the punishment for the crime which
9 brought you into custody.

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

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

23 JUSTICE SOTOMAYOR: All right --

24 MR. DUBOIS: That's why in this case it's --

25 JUSTICE SOTOMAYOR: But what you're saying

1 is, then, that the nexus is -- the nexus with the need
2 for the criminal justice system or the proper and
3 necessary power to address this problem ends at the
4 point of sentencing, is what you're saying?

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

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

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

19 MR. DUBOIS: And -- and that really is, I
20 think, historically, sort of an anomalous argument in
21 the sense that civil commitment has never been thought
22 to be part of the criminal justice system. They are
23 two separate spheres of government control and
24 government authority. And while they may intersect at
25 the State level, a State doesn't civilly commit its

1 citizens based on the fact that it's running a prison
2 system or the fact that it has them in custody. It
3 commits these people based on their parens patriae and
4 general police powers.

5 JUSTICE GINSBURG: What about someone who is
6 incompetent to stand trial? I take it you think that
7 that's a perfectly 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
13 has now been in custody for three times longer than
14 the maximum sentence?

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

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

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

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

15 JUSTICE ALITO: Could 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
20 statute or at the end of the particular term that is
21 given to this prisoner?

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

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

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

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

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

24 MR. DUBOIS: Well, Your Honor, I think
25 Congress does have almost unlimited authority to set

1 statutory maximums for different crimes based on their
2 estimation of the severity of the crime. I -- I don't
3 see that that causes a problem. The problem here is
4 that there is no necessary connection between the --
5 say, the regulation of interstate commerce and the
6 desire to prevent primarily local sex offences. It's
7 very difficult to say how preventing general, State-
8 type violent crimes has anything to do with the
9 regulation of interstate commerce. And that's what
10 this --

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

15 MR. DUBOIS: Well, I really think that that
16 argument the government raises is a bit of a red
17 herring. I have been practicing as a Federal defender
18 for a very long time. I have never yet had a
19 defendant where the Bureau of Prisons didn't know
20 where to send them. And there has never been a case
21 where a defendant did not have a State to go to, and -
22 -

23 JUSTICE SCALIA: Where do they send them?
24 The last residence where --

25 MR. DUBOIS: The -- the default is -- as the

1 government indicated, is the court of conviction, the
2 place of conviction, which is probably about 90
3 percent of the time their home State, anyway. But if
4 -- if they are from a different home State, generally
5 the Bureau of Prisons tries to come up with a release
6 plan to release them to their State of domicile. And
7 --

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

17 MR. DUBOIS: And every -- and then,
18 following that examination, they could be then
19 detained indefinitely?

20 JUSTICE STEVENS: Right. And it says so in
21 the statute.

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

1 JUSTICE STEVENS: One of the elements of the
2 punishment is that you are subjected to this
3 examination that otherwise you wouldn't have to take.
4 It seems to me maybe your case boils down to the fact
5 that -- that Congress hasn't written the right
6 statute.

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

16 So it really is -- there's almost a complete
17 de-linking of the crime which brought you into Federal
18 custody and your subsequent commitment. Can we
19 imagine hypotheticals that -- that create a link, that
20 rolls it into the punishment? Perhaps, but that's not
21 this statute, and this statute must fail for that
22 reason.

23 If there's no further questions, Your Honor,
24 I thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 DuBois.

2 General Kagan, you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF GEN. ELENA KAGAN

4 ON BEHALF OF THE PETITIONER

5 GENERAL KAGAN: Thank you, Mr. Chief
6 Justice.

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

18 Justice Scalia has several times suggested
19 that maybe there is no experience of this, but I think
20 that the facts of the Judicial Conference Committee
21 report, stating that there were these problems with
22 respect to mentally ill people generally, rebuts that.
23 So, too, this Court's view in Shannon, that section
24 4243 was necessary because there was a gaping
25 statutory hole where States were not willing to step

1 forward, rebuts that as well.

2 In fact, it is not and has never been the
3 case that the test here is whether a government action
4 is absolutely necessary to aid or effect a
5 governmental or congressional power. The wisdom of
6 the statute here is not what's at issue: Maybe this
7 is the right statute; maybe there might be a better
8 one. The only question is the constitutionality of
9 the statute. That sort of wisdom, whether there might
10 be a better statute, that's for Congress to decide.

11 Thank you, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you, General.
13 Thank you, counsel.

14 The case is submitted.

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

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