1   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - - - - - - - - - - - - - x

3   UNITED STATES,   :

4   Petitioner   :   No. 12-418

5   v.   :

6   ANTHONY JAMES KEBODEAUX   :

7   - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Wednesday, April 17, 2013

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 10:15 a.m.

14   APPEARANCES:

15   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

16   Department of Justice, Washington, D.C.; on behalf of

17   Petitioner.

18   M. CAROLYN FUENTES, ESQ., Assistant Federal Public

19   Defender, San Antonio, Texas; on behalf of

20   Respondent.

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1   C O N T E N T S

2   ORAL ARGUMENT OF   PAGE

3   MICHAEL R. DREEBEN, ESQ.

5   ORAL ARGUMENT OF

6   M. CAROLYN FUENTES, ESQ.

8   REBUTTAL ARGUMENT OF

9   MICHAEL R. DREEBEN, ESQ.

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

 2                                  (10:15 a.m.)

 3            CHIEF JUSTICE ROBERTS:  We'll hear argument

 4    first this morning in Case 12-418, United States v.

 5    Kebodeaux.

 6                 Mr. Dreeben.

 7            ORAL ARGUMENT OF MICHAEL R. DREEBEN

 8               ON BEHALF OF THE PETITIONER

 9            MR. DREEBEN:  Mr. Chief Justice, and may it

10    please the Court:

11            Convicted sex offenders pose a serious

12    threat to public safety.  When those convictions are

13    entered under Federal law, Congress has the authority to

14    impose both a criminal and a civil sanction for that

15    conduct in order to protect the public.

16            The Fifth Circuit in this case applied a per

17    se rule that once Respondent had completed his military

18    sentence, Congress lost authority to apply a civil

19    sanction for that violation of Federal law.

20            That per se rule is wrong.

21            Nothing in Article I prevents Congress from

22    legislating retroactively with respect to civil remedies

23    for past violations of Federal law.  The Ex Post Facto

24    Clause, the Due Process Clause, and Article I analysis

25    under the Necessary and Proper Clause all provide some
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1 degree of protection against retroactive provisions, but

2 no per se rule bars Congress from applying sex offender

3 registration requirements, which this Court has held to

4 be civil remedies not barred by the Ex Post Facto Clause

5 to past Federal criminal convictions.

6   Now --

7   JUSTICE SOTOMAYOR: What's the limit of that

8 power? How -- for any Federal conviction, whether it's

9 related to sex offense or anything else, Congress could

10 impose any kind of registration requirement?

11   MR. DREEBEN: Well, certainly, Justice

12 Sotomayor --

13   JUSTICE SOTOMAYOR: Could it ask every

14 convicted Federal felon to come in for a DNA test

15 because we know that people who have been convicted of a

16 crime are more likely to be recidivists?

17   MR. DREEBEN: Well, Justice Sotomayor, there

18 are independent constitutional limits both outside of

19 Article I and within Article I that mean that I will

20 answer your question no, it's not the case that my

21 position today means there are no limits. There are

22 limits. If we --

23   JUSTICE SOTOMAYOR: So what -- what is the

24 limit? Is it just safety? It can't be just safety of

25 the public because you just said that it doesn't apply

1 to recidivist Federal offenders, generally.

2   MR. DREEBEN: The -- the principal

3 limitation on retroactive legislation is the Ex Post

4 Facto Clause. Indeed, there would have been no need for

5 an Ex Post Facto Clause if the Fifth Circuit were

6 correct.

7   JUSTICE SOTOMAYOR: I don't understand. I

8 just posited a civil registration for Federal offenders

9 of any kind. That's not ex post facto under your

10 theory, so --

11   MR. DREEBEN: So if -- if the Court agrees

12 that it's not a punitive measure and it is a remedial

13 measure --

14   JUSTICE SOTOMAYOR: Well, I don't know if I

15 agree with that, but accept -- accepting that

16 hypothetical.

17   MR. DREEBEN: Well, if you don't agree with

18 it, then you'll be going on the Ex Post Facto Clause,

19 and you won't be getting to Article I.

20   JUSTICE SOTOMAYOR: No, you know, that's

21 settled law. Whether it's right or wrong is a different

22 issue.

23   MR. DREEBEN: It is settled law, and that

24 means that sex offender registration provisions aren't

25 punitive. The question here is, are they within

1 Article I. And the Court in United States v. Comstock

2 went through an elaborate Necessary and Proper Clause

3 analysis --

4   CHIEF JUSTICE ROBERTS: Well, in Comstock,

5 it was very different than the situation here because

6 the analysis was that the Federal government basically

7 was the source of the problem in incarcerating sex

8 offenders away from the State so that no State felt an

9 obligation to do something with the problem of their

10 release.

11   You don't have anything of that sort here.

12   MR. DREEBEN: No. This provision, Mr. Chief

13 Justice, rests on a different analysis than Comstock.

14 In Comstock, the problem was caused by Federal custody

15 that, as Your Honor has said, broke the relationship

16 between the individual and some State that might take

17 cognizance of him for purposes of sex offender civil

18 commitment.

19   The basis for the statute in Comstock was

20 that people in Federal custody, regardless of the nature

21 of their prior convictions, might pose threats if

22 released. The basis for the statute in this case is not

23 that the individual was in Federal custody. Federal

24 custody is irrelevant to it. The basis for the statute

25 in this case is that this is a sex offender in violation

1   of Federal law, and Congress has the authority to

2   impose, as was done in this case, criminal punishment,

3   but it also has the authority to impose civil regulatory

4   sanctions.

5   JUSTICE SCALIA: I assume that applies to

6   all Federal crimes, right? Anyone convicted of any

7   Federal crime can thereafter be subjected to whatever

8   civil restraints Congress later decides are -- are a

9   good idea in order to prevent that crime, that type of

10   crime from reoccurring, right? I mean, nothing peculiar

11   here about sex crimes. Any -- any crime Congress can

12   later decide, you know, it would be a good idea if

13   when -- when a person has committed, I don't know, crime

14   with the use of a gun, we -- we impose retroactively all

15   sorts of different civil limitations.

16   MR. DREEBEN: Well, Justice Scalia, there is

17   no per se rule in Article I that forbids retroactive

18   civil regulations imposed on a Federal offender. So the

19   question --

20   JUSTICE SCALIA: No, no, that's not the

21   point, that it's -- that it's retroactive. The point is

22   that it is not in execution of a Federal power.

23   MR. DREEBEN: Well, I think the whole point

24   in this case is that it's retroactive because there

25   isn't any serious dispute that if somebody commits a

1 Federal sex offense they can be placed on supervised

2 release for life so --

3   JUSTICE SCALIA: That would be an execution

4 of a Federal power --

5   MR. DREEBEN: Well, so is this.

6   JUSTICE SCALIA: -- the power -- the power

7 to prevent that crime and to punish it.

8   MR. DREEBEN: Well, but Congress's power is

9 not limited to preventing and punishing crimes through

10 criminal law. Except for a brief interlude under United

11 States v. Halper where this Court viewed double jeopardy

12 as precluding multiple criminal and civil sanctions, the

13 Court has recognized that when someone violates Federal

14 law they're exposed both to criminal punishment and to

15 civil sanctions. The criminal punishment has to comply

16 with the Ex Post Facto Clause. The civil sanctions do

17 not. So what the --

18   JUSTICE SCALIA: But they have to be imposed

19 simultaneously as -- as the punishment for the crime of

20 which the individual has been convicted. Here, the

21 trial is over, the conviction is over, and then some

22 years later the Federal government decides, oh, it would

23 be a good idea if people who have committed sex crimes

24 are -- are subjected to these limitations. That's quite

25 different from imposing that simultaneously as -- as a

1 punishment for the crime. This is not a punishment for

2 the crime, right?

3   MR. DREEBEN: That's precisely --

4   JUSTICE SCALIA: Yes.

5   MR. DREEBEN: -- what makes it a civil

6 sanction. But, Justice Scalia, Your Honor is

7 presupposing that Congress can only react to a sex crime

8 through the criminal law and that it must have those

9 laws in place at the time of the punishment, and there

10 is no such Article I precept.

11   CHIEF JUSTICE ROBERTS: So your argument

12 depends in no way on the fact that he was convicted of a

13 Federal offense or -- or incarcerated for that offense,

14 nothing at all? We're just here arguing about the

15 retroactivity under -- whether they have the authority

16 under Article I to impose punishment for not registering

17 under State law?

18   MR. DREEBEN: This case turns entirely on

19 the fact that the defendant is a Federal offender. The

20 source of power in question was the power to regulate

21 the armed forces. This is an individual who committed a

22 sex crime while in the armed forces. And Congress's

23 power to address that and to prescribe remedies for it

24 both civil and criminal is entirely tied to the Federal

25 nature of the offense.

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1   JUSTICE ALITO: Well, we start out with the

2   power under the Constitution to make rules to regulate

3   the military and we end up with a registration

4   requirement that applies to someone who's not in the

5   military and perhaps is not even living anywhere near

6   any military installation. So what would be helpful for

7   me is to start out with the constitutional provision,

8   identify a purpose of that that is served by this civil

9   registration that is imposed later, and trace this whole

10 progress through the Necessary and Proper Clause.

11   MR. DREEBEN: Justice Alito, I think the

12 most helpful way to do that would be for me -- for me to

13 progress through a series of examples that illustrate

14 how protecting the public against a Federal sex offender

15 is a legitimate aim under the Necessary and Proper

16 Clause to implement the underlying constitutional

17 authority.

18   JUSTICE ALITO: Yes.

19   MR. DREEBEN: So start with a sex offender

20 who commits a sex offense in the military, is tried,

21 court-martialed, and sentenced. Subject to cruel and

22 unusual punishment limitations, due process limitations,

23 et cetera, that individual can be incarcerated, placed

24 on supervised release potentially up to life. A

25 condition of supervised release, well-recognized and now

1   mandated by Federal law, is that that individual

2   register as a sex offender. And the reason that that is

3   tied to Federal law is that when an individual violates

4   Federal law it is a legitimate purpose of Congress to

5   protect the public against recidivism by that

6   individual. So that's the criminal example that I

7   believe is undisputed.

8   Now, suppose that the Federal government

9   didn't actually get the sex offender while he was in the

10   military. It missed the crime, but later information

11   comes to light still within the statute of limitations

12   that shows that while this person was in the military

13   they committed a sex offense. This court in United

14   States ex rel. Toth v. Quarles made clear that that

15   individual can be tried in an Article III court for his

16   criminal violation even though he's out of the military.

17   It's enforcing the rules that were impressed upon him at

18   the time while he was in the military.

19   Now let me give a civil example and then I

20   will bring it right back to this case. Suppose that

21   Congress concludes that sex offenses in the military are

22   a very serious problem and that there are a lot of

23   people who have escaped prosecution because of lax

24   interest in pursuing those crimes. And after a period

25   of years, it sets up a board of inquiry and it says this

1 board of inquiry is going to look into sex offenses that

2 were committed at the time that people were in the

3 military, even if they're out of the military, and we're

4 going to subpoena people to testify, and if individuals

5 are determined in a civil proceeding to have committed

6 sex offenses they may have their military records

7 revised, they may lose military benefits, and they may

8 have other civil sanctions imposed upon them.

9   JUSTICE SCALIA: When you say in a civil

10 proceeding, you mean?

11   MR. DREEBEN: Yes, noncriminal.

12 Noncriminal.

13   JUSTICE SCALIA: So it's just by a

14 preponderance of the evidence we think this guy

15 probably, you know, 51/49, committed a sex crime.

16   MR. DREEBEN: Not going to be a criminal

17 punishment that's imposed at the end of the day.

18   JUSTICE SCALIA: So just -- just more --

19 more likely than not is the test.

20   MR. DREEBEN: That's an acceptable level of

21 proof for the civil law.

22   And if Congress can do that in order to

23 protect the integrity of the military and to promote

24 confidence in the military, then it's a very small step,

25 if any step at all, to SORNA.

1   CHIEF JUSTICE ROBERTS: Yeah, but if they can

2   do that. But that's not what they've done here. Your

3   argument, as you told me a while ago, is linked to the

4   Federal offense and the incarceration.

5   MR. DREEBEN: Yes, absolute -- well,

6   Mr. Chief Justice, it's not linked to the incarceration.

7   This is the difference between this case and Comstock,

8   and this is why the Solicitor General's concession in

9   Comstock on which the Fifth Circuit heavily relied has

10   no applicability here.

11   In Comstock, it was irrelevant what offense

12   the individual had been committed. The problem was he

13   was in Federal custody, he was sexually dangerous at the

14   time he would be released. Ties had been broken between

15   him and the community, and if he were released it would

16   pose a threat to public safety that the Federal

17   government had power to protect against.

18   CHIEF JUSTICE ROBERTS: It's because the

19   States were not doing anything about it.

20   MR. DREEBEN: Right.

21   CHIEF JUSTICE ROBERTS: Here you have a

22   situation where I think at the time every State dealt

23   with the issue of whether the sex offenders should have

24   to register or not.

25   MR. DREEBEN: That's correct. But Federal

1 law did as well and Federal law provided encouragement.

2 This is actually a primary example of partnership

3 between State governments and the Federal government.

4 The Federal government offers financial support, it

5 offers logistical assistance, it offers tremendous

6 resources of the U.S. marshals to track down sex

7 offenders.

8   And as this Court said in Carr v. United

9 States, it was entirely reasonable for Congress to have

10 assigned a special responsibility for prosecuting

11 Federal sex offenders who failed to register. This was

12 integral to this Court's reasoning in Carr, where the

13 Court was confronted with two provisions of 2250, the

14 criminal sex offense provision under SORNA. For State

15 offenders, there had to be travel in interstate

16 commerce, for Federal offenders there didn't.

17   The government argued that the provisions

18 ought to be given as co-extensive a reach as possible so

19 that the coverage of the statute would be equally

20 comprehensive for both State and Federal. And this

21 Court --

22   JUSTICE KENNEDY: The discussion so far has

23 assumed, your discussion primarily, that there's this

24 line between civil and criminal, we don't need to worry

25 about ex post facto. Is that line made clear in our

1 precedents or is there some room to argue that if the

2 line is somewhat blurred that there may be ex post facto

3 concerns here and that that in turn is a reason for

4 constitutional avoidance when we evaluate your argument?

5   Is that -- is the civil -- a criminal

6 distinction with reference to Ex Post Facto Clause

7 absolutely foreclosed and clear in the facts of this

8 case?

9   MR. DREEBEN: Yes, it is, I believe, Justice

10 Kennedy. In an opinion that you wrote for the Court,

11 Smith v. Doe, which considered the retroactivity of

12 Alaska's sex offender registration and notification

13 provisions, which are similar but not identical, to the

14 Federal provisions, the Court went through the

15 established analysis to determine whether the

16 legislature had intended a punitive effect and if it

17 didn't, whether there was the clearest proof that it was

18 punishment in purpose and effect.

19   Notwithstanding the legislature's intent,

20 the Court upheld the retroactive applicability of sex

21 offender registration and notification, making clear

22 that it is not governed by the Ex Post Facto Clause.

23   Now, that's not to say that an individual

24 couldn't argue that SORNA is different or an individual

25 couldn't argue that the Due Process Clause makes it

1   either irrational or substantively off limits to impose

2   this kind of civil remedy. The individual can also

3   argue that running this through the Comstock factors,

4   it's not reasonably adapted to fulfilling Congress's

5   aim.

6   But what the Fifth Circuit did is apply a

7   per se rule that it drew, I think, from the Solicitor

8   General's statement in Comstock that once an individual

9   got out of custody and was back in the control of the

10   State and within its jurisdiction and population, then

11   the Federal government couldn't reach out and commit him

12   as a sex offender.

13   And there are two main distinctions between

14   that concession and this case. The first is, as I've

15   already alluded to, the government's argument in

16   Comstock was based on custody. This case is based on

17   the consequences of the conviction itself. The second

18   distinction is that committing somebody civilly is a

19   massive intrusion on that individual's relationship with

20   the State.

21   The individual has been brought within

22   Federal custody, they have no relationship with the

23   State anymore. Whereas sex offender notification is far

24   more accommodating of State interests.

25   JUSTICE KAGAN: Mr. Dreeben --

1   JUSTICE SCALIA: To -- to what does this

2 civil -- civil-criminal line apply? Suppose instead of

3 a registration requirement, Congress just decided, you

4 know, our past punishments for sex offenses have not

5 been -- have not been severe enough, and so we are now

6 going to impose a civil fine on all -- all persons who

7 have been convicted in Federal court of sex crimes.

8 It's a civil -- it's a civil penalty, not a criminal

9 penalty. That's okay?

10   MR. DREEBEN: It's not per se barred by

11 Article I, Justice Scalia. The question of whether it's

12 constitutional is really a question of individual rights

13 analysis and whether it passes through the necessary and

14 proper gate under the considerations similar to what the

15 Court looked at in Comstock.

16   JUSTICE SCALIA: I find that difficult to

17 believe that --

18   MR. DREEBEN: Well, there's no --

19   JUSTICE SCALIA: -- that whether it's ex

20 post facto and impermissible or not is simply

21 eliminated, that issue was eliminated by simply calling

22 it civil.

23   MR. DREEBEN: Well, it's not eliminated. It

24 still is available for an individual to argue, as

25 Respondent did in this case in the district court but

1 abandoned long before he got to the court of appeals,

2 that it violates due process, that it violates ex post

3 facto.

4   JUSTICE SCALIA: I'm talking about the -- ex

5 post facto.

6   MR. DREEBEN: He can argue that. I submit

7 that he will lose.

8   JUSTICE SCALIA: Because it's civil.

9   MR. DREEBEN: If it in fact is civil and

10 passes through this Court's analysis, then yes.

11   JUSTICE SCALIA: I -- I find that difficult

12 to grasp.

13   MR. DREEBEN: Well, it's actually quite well

14 established as a principle of double jeopardy law in

15 cases like Hudson v. United States and United States v.

16 Ursery. It's established in ex post facto law as a

17 consequence of Smith v. Doe. It's the foundation for

18 deciding whether a proceeding requires preponderance of

19 the evidence versus proof beyond a reasonable of doubt.

20 The Court has articulated this line in a variety of

21 contexts.

22   CHIEF JUSTICE ROBERTS: Your argument

23 based -- your argument based on Congress's authority

24 with respect to the military, your Article I argument,

25 and you say it doesn't make a difference that he's no

1 longer in the military, does that -- do you come out

2 differently if the basis for jurisdiction is asserted to

3 be inter -- interstate commerce?

4   MR. DREEBEN: No. As long --

5   CHIEF JUSTICE ROBERTS: The fact that

6 somebody at some time in their life traveled across

7 State lines means that the Federal government can go

8 back, even though their activity that's challenged in

9 the particular instance is only intrastate, and still

10 assert jurisdiction over them?

11   MR. DREEBEN: Well, that would probably fail

12 a Necessary and Proper Clause analysis, in which there

13 has to be a showing that the measure is plainly adapted

14 to furthering the underlying power. This is not a

15 difficult problem that the Court has never confronted

16 before. It has resulted in difficult permutations on

17 particular facts, but the Court has always recognized

18 that there is broad Necessary and Proper Clause

19 authority subject to limits. Those limits --

20   JUSTICE SOTOMAYOR: As broad as that

21 authority is, perhaps I'm going back to Justice Alito's

22 question, which is if you put aside that it's part of

23 the punishment because you say it's not part of the

24 punishment, you want us not to look at it as punishment

25 because otherwise you'd run into the ex post facto

1 problem, you're saying we have a need today. Outside of

2 protecting the public from a recidivist, what's the

3 interest? Because that wasn't enough in Comstock. We

4 made it very clear that wasn't enough.

5   So if you take out all of the punishment

6 aspects of this, which you should have done at the time

7 he was sentenced and not now, what remains in terms of

8 the Federal interest?

9   MR. DREEBEN: Justice Sotomayor --

10   JUSTICE SOTOMAYOR: What's promoted?

11   MR. DREEBEN: There is a sufficient Federal

12 interest in protecting the public from someone who

13 committed a Federal crime. Supervised release

14 essentially performs that function.

15   JUSTICE SOTOMAYOR: But that was -- why did

16 we even bother going through anything in Comstock? If

17 that stands alone as a Federal interest, then anything

18 we do at any point with respect to any person who's

19 violated a Federal law would stand in the same shoes.

20   MR. DREEBEN: It's a valid --

21   JUSTICE SOTOMAYOR: You could do whatever

22 civil penalties you want for as long as you want. We go

23 back to my initial question and Justice --

24   MR. DREEBEN: Justice Sotomayor, really, the

25 answer to your question is the same. The answer to all

1 of your questions is the same, which is that there is an

2 analysis that the Court went through in Comstock where

3 it took into consideration history, it took into

4 consideration the nature of the fit between the purpose

5 of Congress and the activity that it was regulated. It

6 took into account the degree to which the State

7 interests were accommodated, and it took into account

8 the degree of attenuation between the regulation and the

9 underlying offense. And it -- it didn't open up

10 Congress to say any offense you've ever committed means

11 Congress owns you for life, it can do whatever you want.

12 It has to pass through an analysis.

13   But the Fifth Circuit never conducted that

14 analysis except for believing that once the individual

15 had completed military service, once the individual had

16 completed his criminal sentence, Congress lost all

17 authority.

18   CHIEF JUSTICE ROBERTS: I'm getting confused

19 between two different assertions of a Federal interest.

20 Earlier you talked about the integrity of the military

21 forces. They go back later, they think they should

22 address the fact that people were engaging in criminal

23 activities when in the military, they weren't -- they

24 weren't found out, they weren't prosecuted. Later on

25 they can go back.

1   But then you say that the interest that's at

2   issue here is preventing recidivism, and that doesn't

3   seem to have anything to do with the integrity of the

4   military force.

5   MR. DREEBEN: Well, it does because when the

6   criminal law finds someone who has violated Federal law,

7   many of the purposes of the sanctions that are imposed

8   on that individual are public protection purposes and

9   anti-recidivism purposes. Most of the things that are

10   done on supervised release fulfill those purposes. If

11   those purposes were not validly connected to taking

12   someone who's violated criminal law and imposing a suite

13   of sanctions on them, then supervised release would

14   apparently be beyond Congress's authority.

15   JUSTICE SCALIA: It -- it seems to me that

16   when -- when you say that as your answer to the Chief

17   Justice, you're -- you're no longer relying on -- on the

18   power to regulate the military. You're relying on -- on

19   some general Federal power to protect citizens against

20   people who have committed any Federal crimes. And I --

21   I don't see that enumerated power in the Constitution.

22   Yes, I see a power to regulate the military, but your

23   description, it has nothing to do with regulating the

24   military. It has to do with protecting the -- the

25   public at large from people who have committed Federal

1   crimes, military or not.

2   MR. DREEBEN: As the Court has pointed out

3   numerous times, including in Comstock, there is very

4   little authority in the Constitution in an enumerated

5   way for criminal law at all. All of criminal law, with

6   the exception of a handful of instances that are

7   specified in the Constitution, comes in by virtue of the

8   Necessary and Proper Clause.

9   JUSTICE SCALIA: That's right because it

10 protects Federal functions. The Federal -- the criminal

11 applicability to the armed forces protects the function

12 of regulating the armed forces.

13   MR. DREEBEN: But part --

14   JUSTICE SCALIA: But how does protecting the

15 public at large from people who have committed a crime

16 in the armed forces, how does that have anything to do

17 with regulating the armed forces?

18   MR. DREEBEN: That is inherent in taking

19 somebody who violated Federal law and imposing

20 appropriate sanctions on them for that violation.

21   JUSTICE KAGAN: Mr. Dreeben, it would help

22 me in answering some of these questions if you went

23 through the analysis on the assumption that this was

24 instead a Commerce Clause case. So take the military

25 out of it, what would the necessary and proper analysis

1   look like?

2   MR. DREEBEN: It would look essentially the

3   same, Justice Kagan. Somebody who violates a Federal

4   law that's premised on the Commerce Clause, say a sex

5   offender who travels in interstate commerce with the

6   intent to commit a sex offense, has placed himself

7   within the regulatory authority of the Federal

8   government. Now, that individual can be criminally

9   prosecuted for that violation, and that violation

10   furthers Congress's interests in regulating interstate

11   commerce.

12   Congress could also decide, you know, for

13   some of these sex offenders, criminal punishment is not

14   the right approach. The right approach is mandate sex

15   offender rehabilitative counseling. And it might

16   discover that that's so effective for a class of

17   offenders that it's going to apply that even to people

18   whose offenses were committed before the law in question

19   is passed. It can't punish those people based on

20   retroactive legislation, but it can reach them with a

21   civil remedial measure so long as it passes through the

22   Comstock-type analysis of the Necessary and Proper

23   Clause.

24   JUSTICE GINSBURG: Mr. Dreeben, you say

25   nothing about the -- what was the opening argument in --

1   in your brief, that the assumption that SORNA is

2   something new added after is wrong because there were

3   these predecessor laws that established a Federal

4   requirement to register.

5   MR. DREEBEN: Justice Ginsburg, I believe

6   that the Fifth Circuit was wrong on that too. As we

7   describe in our brief, Title 42 Section 14072(i)(3) and

8   (4) did, in our view, impose criminal punishment on

9   Respondent for failing to register as a sex offender at

10 the time he was in the military.

11   We think the Fifth Circuit was wrong on that

12 statutory analysis, but, more fundamentally, the Fifth

13 Circuit was wrong in thinking that it mattered whether

14 he was under some sort of Federal criminal jurisdiction

15 at the time that he was released from Federal custody.

16   And if I could reserve the rest of my time.

17   CHIEF JUSTICE ROBERTS: Thank you,

18 Mr. Dreeben.

19   Ms. Fuentes.

20   ORAL ARGUMENT OF M. CAROLYN FUENTES

21   ON BEHALF OF THE RESPONDENT

22   MS. FUENTES: Yes. Mr. Chief Justice, and

23 may it please the Court:

24   The government asks this Court to go beyond

25 its holding in United States v. Comstock to allow the

1 Federal government to reach back, after a Federal

2 sentence has expired, to bring back into Federal control

3 a person who has returned to the authority of the State.

4   And I'm quite surprised to hear the

5 government say that this is not a Comstock analysis.

6 I'm not sure they stuck with that throughout the

7 argument, but I think the -- the Comstock factors are

8 factors that this Court looks at quite frequently in

9 doing any kind of a necessary and proper analysis.

10   JUSTICE SOTOMAYOR: Could I bo back to -

11 to a primary question, are you challenging - you

12 didn't on appeal, but it seems as if you're accepting

13 that the Federal government has the power to impose this

14 requirement as part of a Federal sentence.

15   MS. FUENTES: I think that's correct.

16   JUSTICE SOTOMAYOR: All right. Are you --

17 if it's not part of a Federal sentence, but part of

18 release, it's not announced at the sentence, but it's

19 announced at the time the prisoner is put into

20 supervised release or release from jail, do you think

21 the government has the power to impose it then?

22   MS. FUENTES: In this case, on these facts,

23 and based on the Federal statutes that exist today, the

24 answer is yes. And the illustration, I think, is the

25 way that SORNA works today. As the government

 1   mentioned --

 2   JUSTICE SOTOMAYOR: Well, SORNA today

 3   becomes part of the supervised relief terms.

 4   MS. FUENTES: Correct.

 5   JUSTICE SOTOMAYOR: I'm not talking about

 6   SORNA today.

 7   MS. FUENTES: Okay.

 8   JUSTICE SOTOMAYOR: I'm talking about just

 9   any prisoner who has been in jail, but it's not made,

10   has not been paid, part of the punishment.

11   MS. FUENTES: I think the law permits a

12   sentencing judge -- I'm not talking about Congress, but

13   a sentencing judge -- to go back and impose additional

14   conditions of supervised release.

15   JUSTICE SOTOMAYOR: I -- I don't know of

16   that power, but do you have a statutory --

17   MS. FUENTES: It's 18 -- 18 United States

18   Code Section 3583. And 3583 permits the sentencing

19   judge to change conditions of supervised release based

20   on the factors that are considered important in

21   sentencing in 18 United States Code Section 3553.

22   JUSTICE SOTOMAYOR: All right. So that

23   power -- I guess then what the government is saying, as

24   I understand their argument, if you have the power to do

25   it at that point, why can't you have the power to do it

1   later?

2   MS. FUENTES: Well --

3   JUSTICE SOTOMAYOR: Are the same factors

4   that compel permission for the government to do it then?

5   MS. FUENTES: It's because the way the

6   statute works, even though it wasn't announced at

7   sentence, supervised release is considered to be part of

8   the sentence. So if I understand the question

9   correctly, the reason the court can go back and impose

10   those conditions and possibly the reason that Congress

11   can go back and do it is because those statutes that

12   I've mentioned, 3583 and 3553, have given notice to the

13   individual.

14   JUSTICE ALITO: We are not talking -- I'm

15   sorry.

16   MS. FUENTES: That's all right.

17   JUSTICE ALITO: I didn't mean to interrupt

18   your question.

19   MS. FUENTES: It's all right.

20   JUSTICE ALITO: We're not talking about

21   statutory authorization. We are talking about

22   constitutional power. So if we start out with the

23   example of registration for life being imposed as part

24   of supervised release, part of the criminal sentence,

25   then we go to an example where it is not part of the

1   criminal sentence, but it is a civil requirement

2   triggered by a separate civil proceeding for every

3   Federal -- every person convicted of a sex offense under

4   Federal law.

5   Now, if that were the setup statutorily,

6   would that fall within Congress's power under Article 1?

7   MS. FUENTES: I think not, but I want to

8   qualify that because it depends on what powers Congress

9   is relying on.

10   And let me give an example. I know the

11   government was -- a lot of the government's argument

12   relies on this difference between criminal and civil

13   consequences.

14   JUSTICE ALITO: Well, we know what -- and we

15   know what power they are relying on. Let's just look at

16   the power that they're relying on here. It's the power

17   to make rules for the regulation of the military. So

18   part of their -- in the exercise of their power to make

19   rules for the regulation of the military, they impose a

20   civil sex offender registration requirement for someone

21   convicted of a sex offense under the Uniform Code of

22   Military Justice. That does not, in your judgment, fall

23   within Article I?

24   MS. FUENTES: It does if the person is still

25   in the military or if he has been -- or if he has

1   committed a criminal offense and the prosecutorial

2   power, the Federal power to prosecute him for that

3   offense, has not been exhausted, yes, that can be done.

4   JUSTICE KAGAN: How about if he is on

5   supervised release? He is not in the military, but his

6   entire sentence has not been completed.

7   MS. FUENTES: I think if he is still being

8   supervised by the military, then I think it's likely

9   that power exists.

10   JUSTICE BREYER: Okay. Then why not this?

11   MS. FUENTES: Because Mr. Kebodeaux was not

12 on supervised release. No, I'm sorry --

13   JUSTICE BREYER: Well -- why not? I mean,

14 look, this is -- Thomas Reed Powell once said, "If you

15 can think of a thing that is inextricably related to

16 another thing without thinking of the other thing, then

17 you have the legal mind," and that seems to be this

18 case. All right?

19   MS. FUENTES: Yes, it does.

20   JUSTICE BREYER: So somehow I have to get

21 out of my mind the ex post facto part, the potential

22 violation of due process part, the equal protection

23 part, take that aside. Now I've got to just think about

24 whether it has, Congress has the power under the

25 provision that Justice Alito said. I'm trying to do

1   that, and I've dissented in other cases on other

2   grounds.

3   All right. But in -- in just trying to do

4   that, I think, well, the military, suppose they found a

5   certain number of -- of individuals, men or women, have

6   unfortunate problems in the military. They discover

7   there is a mental illness problem. The person's out of

8   the military. But the law says you can go and tell the

9   local mental health authorities about this person even

10   though he's no longer there.

11   And suppose the person had a criminal

12   problem in the military and was in prison and suppose

13   the law said, you know, you're the ones who got the

14   situation where he unfortunately got into that problem,

15   and you, later on, can -- can go and tell authorities

16   about his problems so they can take appropriate action.

17   Now, if they can do that, why can't they

18   have the power under Article I to say really, you all

19   have to register. Now, maybe there are other things,

20   but you got this problem in the military. You were

21   convicted in the military. You did it in the military.

22   We turned you loose and there you are, and we want, as

23   part of our military regulation, to be able to tell

24   authorities about you and to make you register according

25   to State law.

1   Now, no due process problem, I have to

2 assume that away. No punishment, bad punishment

3 problem, none of those. But it's a power, all right?

4   Why not?

5   MS. FUENTES: Well, the power can't go to

6 both of the examples that you've given. I don't see any

7 problem with them giving notice. That does not impose a

8 Federal obligation on an individual. So there is no

9 power being exerted on the individual. They can have a

10 public -- a public protection purpose and they can

11 tell -- tell authorities who need to deal with the

12 individual, and those authorities may have the power

13 through State power --

14   JUSTICE BREYER: Where you're leading me

15 because I'm not so worried about this case, but where

16 you're leading me is down in Commerce Clause cases and

17 all kinds of other cases. Suddenly a distinction arises

18 that Congress can, in fact, do all kinds of things

19 having Federal authorities do this and that, but you

20 couldn't make someone in a State -- you know, you can

21 imagine a few that are coming into my mind -- and so

22 what I'm worried about is following this distinction

23 into other areas.

24   MS. FUENTES: I don't think that is a

25 problem, and I think the reason is I disagree

1 fundamentally with the government. I think necessary

2 and proper analysis is important in each case and it

3 does bear similarities in each case. But depending on

4 the power being relied upon, the analysis can be quite

5 different. Commerce Clause is a very broad power.

6   I can't say whether this sort of thing,

7 depending on the Commerce Clause, would be right or

8 would be wrong. Look at the power to make a uniform

9 rule of naturalization.

10   JUSTICE ALITO: Well, let me -- let me try

11 this chain of reasoning out on you and -- and get your

12 reaction. We're starting out with the power of Congress

13 to make rules for the regulation of the military. And

14 one of the things that they want to do in making those

15 rules is to make military installations acceptable to

16 the local communities where they are located.

17   They know from experience, for example,

18 what's happened in Okinawa, that when have you military

19 personnel who go -- who commit sex offenses with people

20 off base, it can cause tremendous opposition. And this

21 is what happened here, not the opposition, but an

22 offense involving a 15-year-old girl who lived off the

23 base.

24   So in order to ensure that there -- we don't

25 have excessive civilian opposition to the location of

1   military bases, we are going to do a number of things.

2   One thing is we're going to criminally prosecute members

3   of the military who commit these offenses. This will

4   deter. This will incapacitate. But also, to provide

5   further assurance to the community that these people are

6   not going to be dangerous, we are going to require them

7   to register.

8   Now, maybe that's too attenuated, but I'd

9   like to get your reaction. Why could Congress not do

10 that under the Necessary and Proper Clause?

11   MS. FUENTES: Well, I think while that

12 person is still within the criminal jurisdiction, or any

13 Federal jurisdiction, it could be done. I think that

14 once that jurisdiction has been exhausted, once the

15 criminal prosecution power has been exhausted, once the

16 person has returned to the authority of the State, and I

17 think that analysis is important always.

18   JUSTICE SCALIA: You don't have to go that

19 far though to -- to distinguish the example that Justice

20 Alito just gave. This is not a statute which only

21 requires him to registrate -- to register if he hangs

22 around the military installation. This requires him to

23 register anywhere, you know, in the -- in the wilds of

24 Alaska where -- it's just not this case.

25   And even -- even if you would allow that,

1   and say it is a reasonable -- it has a reasonable

2   connection to the power to regulate the military, to say

3   wherever he goes he has to register is -- is a different

4   question, isn't it?

5   MS. FUENTES: I think it may well be.

6   JUSTICE BREYER: But yet, now that's exactly

7   the problem for me because the -- the wilds of

8   Alaska you think I think, and I think I think, that --

9   that sure, if there's a post office there -- there's a

10 post office there, then what -- the military is all

11 right, they can mail a letter to the -- to be delivered

12 to the local doctor to say, look, he has a problem.

13 That seems to be okay.

14   But you say it's not going to be okay to

15 tell him he has to go and make that registration. At

16 that point what you've done is like Madison. I mean,

17 it's an interpretation of the Commerce Clause that I

18 think Madison might have wanted, which is you're reading

19 a lack of power because of a civil rights problem.

20   I mean, it's -- the difference between the

21 two cases is really not the need because we have to

22 assume the need. The difference is the restriction on

23 the individual. And it's that part that I'm suddenly

24 worried about the Commerce Clause and every power in

25 Article I being read with exceptions in the civil rights

1 area even though we have the amendments to protect the

2 civil rights problems.

3   MS. FUENTES: I haven't thought of it that

4 way and that really isn't the argument that I'm making.

5 I think that the military has jurisdiction. It's gotten

6 information about this individual when it had power over

7 him and they can talk to whomever they care to about

8 him, or whether --

9   JUSTICE SCALIA: We've never -- we've never

10 held, have we, that what the Federal government can

11 itself do under the Necessary and Proper Clause it can

12 impose upon individuals to do under the Necessary and

13 Proper Clause. Aren't there two different -- what is

14 necessary and proper for the Federal government itself

15 to do is not necessarily necessary and proper for the

16 Federal government to require private individuals to do.

17   MS. FUENTES: I absolutely agree with that.

18 And I think that this goes back to something that the

19 government -- well, it gives me an opportunity to

20 address something the government has said about the

21 Fifth Circuit's opinion. That it is a per se rule, and

22 that is just incorrect. I -- I have to disagree with

23 that. And I have to disagree with it because the --

24 everything the Fifth Circuit said was limited by these

25 facts.

1   These facts are what controls the case. And

2   the Fifth Circuit took great care to make a very narrow

3   ruling. And that ruling, the Fifth Circuit said, is

4   that it's unconstitutional, SORNA's requirements, as

5   applied to Mr. Kebodeaux and others like him. It has no

6   effect on Congress's ability to impose conditions on a

7   prisoner's release from custody or on Congress's ability

8   to effect the registration requirements for anyone who

9   has been convicted after SORNA's enactment.

10   So really, it is not a per se rule. It is a

11 rule, maybe you call it per se as it -- as it affects

12 people in Mr. Kebodeaux's position, but I think that is

13 very different from what the government is arguing.

14   JUSTICE KAGAN: I guess, Ms. Fuentes, what I

15 don't quite understand about the argument, this goes

16 back to Justice Alito's original question. You seem to

17 say that if this -- if Congress passed a civil statute

18 like this one within the time that Mr. Kebodeaux was in

19 custody or within the time that he was under supervised

20 release, that that would be appropriate.

21   But I guess what I don't get is why the

22 Federal interests change, whether it's the day before he

23 gets out of supervised release or the day after he gets

24 out of supervised release. What in the Federal

25 interests shift based on that?

1   MS. FUENTES: I'll answer that question

2   first, then come back to another.

3   It's not a question, I don't think, of

4   Federal interest. It's a question of Federal power.

5   And you have to look at the individual power being

6   exercised. And so the way I look at it is what's the

7   difference if the Federal government makes a rule for a

8   person in the military before -- when he's in the

9   military or after he gets out of the military? That's

10   all the difference in the world. In -- in -- that's our

11   argument. That is all the difference in the world.

12   JUSTICE KAGAN: Well, I wasn't assuming that

13   he was in the military while he was on supervised

14   release.

15   MS. FUENTES: I'm sorry. I didn't hear.

16   JUSTICE KAGAN: I was assuming that he was

17   out of the military in both these cases, but that you

18   said while he was still serving his sentence, it would

19   be appropriate for Congress to add this additional

20   thing, but not after.

21   MS. FUENTES: I think --

22   JUSTICE KAGAN: In both cases, he's not in

23   the military anymore.

24   MS. FUENTES: Constitutionally, it -- it can

25   be all right constitutionally, depending on the

1 statutory procedures that govern it. And the way that

2 the Federal law operates now, the statutes that I

3 mentioned, 3583 and 3553, the way those statutes --

4 statutes operate is they -- they give someone notice

5 that their conditions of supervised release can be --

6 can be changed. And so there isn't an ex post facto

7 problem with that.

8   And there isn't a power problem with that

9 because the criminal -- the power to make the criminal

10 offense and punish it still exists while that person is

11 on supervised release. It has expired with respect to

12 Mr. Kebodeaux, and I think that is one of the most

13 important points in this case, and it goes along with

14 the Comstock analysis.

15   JUSTICE ALITO: Is it your argument that

16 Congress lacks the power to impose supervised release

17 after the date when the person leaves the military?

18   MS. FUENTES: No. After the criminal

19 sentence is served.

20   I'm sorry. Maybe I didn't understand the

21 question. Congress --

22   JUSTICE ALITO: Someone is sentenced to

23 prison --

24   MS. FUENTES: Right.

25   JUSTICE ALITO: -- under the UCMJ, released,

1 dishonorably discharged from the military. Can Congress

2 say the person has to remain on supervised release for a

3 longer period of time after he is returned to civilian

4 status?

5   MS. FUENTES: Not if -- not unless it was --

6 that provision was imposed as part of the sentence or

7 while he was still within the Federal power, before the

8 Federal criminal jurisdiction expires.

9   JUSTICE ALITO: See, I understand -- I can

10 understand why that might create -- that might raise all

11 sorts of constitutional arguments about notice and so

12 forth.

13   But I don't see how that -- how that

14 connects with the question whether Congress has the

15 power to do it under -- under Article I --

16   MS. FUENTES: Well, I'm not sure --

17   JUSTICE ALITO: -- under the power to

18 regulate the military.

19   MS. FUENTES: Yes. I'm not sure I'm

20 answering the question correctly, but that power doesn't

21 last forever. The powers -- there are some powers in

22 the Constitution which may last longer than others, and

23 the example I raised before was the rule of making

24 uniform naturalization. That's a broader power, I

25 think, than the military power.

1   And we see that in the cases the

2 government's mentioned and we've mentioned, the Toth

3 case and the Kinsella case.

4   JUSTICE ALITO: Well, you could be making

5 the argument that the power to make rules for the

6 military applies only to people who are in the military,

7 and that once you're out of the military that power does

8 not permit Congress to do anything special to you.

9   But you're not making that argument, I

10 gather.

11   MS. FUENTES: No. No, I'm not making that

12 argument. And again, it goes to the individual facts

13 and the power asserted and the way the power operates

14 always makes a difference.

15   The example that the government gave with

16 that board of inquiry and being able to bring people

17 back in, I find that whole scenario very questionable.

18 But there -- there were people who were -- were

19 receiving military benefits, if I understood it --

20   JUSTICE SOTOMAYOR: How would you write this

21 opinion if you wanted to protect against what Justice

22 Breyer was concerned about, constricting the Commerce

23 Clause, which has been since Madison more broadly

24 defined than he did, or Justice Alito's example of

25 ensuring that you're not closing off other things that

1 can be done after someone leaves, that might be related

2 to, like punishing a crime that you find out about

3 afterwards. How would you write this opinion?

4   MS. FUENTES: Just the way the Fifth Circuit

5 did in its en banc opinion.

6   JUSTICE SOTOMAYOR: Well, it wasn't really

7 helpful because it -- it doesn't give us a limiting

8 principle like -- I don't know if it's possible -- that

9 if you're relying on just recidivism, Congress has to

10 have an independent basis, a power for the imposition

11 of -- of criminal or civil sanctions on someone.

12   MS. FUENTES: I'm not certain an opinion

13 like that could be written. I think that the limits,

14 the limitations that exist, are on the narrowness of the

15 way the opinion is written. But future cases I don't

16 think can be decided that way.

17   Certainly, principles can be articulated

18 which help to limit. And I think the -- the best you

19 can say in terms of limiting principles is it's going to

20 depend on the enumerated power upon which the government

21 relies to impose this obligation.

22   CHIEF JUSTICE ROBERTS: Well, how -- I'm not

23 sure that makes much sense. You're saying if they're

24 relying on the enumerated power with respect to the

25 military, they can do more than if they're relying on

1   the enumerated power over interstate commerce?

2   MS. FUENTES: No. And if that's your

3   understanding --

4   CHIEF JUSTICE ROBERTS: So in what sense --

5   MS. FUENTES: -- I -- I apologize. I did not

6   mean that.

7   CHIEF JUSTICE ROBERTS: Well, in what sense

8   does it then depend on which enumerated power they're

9   invoking?

10   MS. FUENTES: Well, let -- let me give an

11   example that goes to the collateral consequence cases

12   that the government raised.

13   The government raises, for example, the

14   Hudson case, where a person who is convicted of bank

15   fraud both can be punished criminally and then can be

16   debarred civilly from participating any more with

17   Federal government contracts. I think the words that

18   were used in the Hudson case were, "no longer may have

19   business doings with an insured bank."

20   Okay, that has to be, I think, the spending

21   power. The government can decide with whom it wants to

22   do business. If it's dealing with an insured bank, then

23   it can impose that civil consequence. And it can do

24   it -- I don't want to use the word "independently" of.

25   They may do it by reason of the criminal conviction, but

 1 there is an independent power to do it.

 2   That power doesn't exist here, and so it

 3 would have to be --

 4   CHIEF JUSTICE ROBERTS: They say -- they say

 5 it exists by virtue of the enumerated power to regulate

 6 the military forces.

 7   MS. FUENTES: Well, I don't think it does.

 8 Perhaps I don't understand the question --

 9   CHIEF JUSTICE ROBERTS: Well, I'm trying to

10 see why you're saying the enumerated power under the

11 Spending Clause allows them to take this subsequent

12 action, but the enumerated power under the Military

13 Clause does not.

14   MS. FUENTES: Well, because the -- I'm

15 sorry.

16   CHIEF JUSTICE ROBERTS: I would have thought

17 that if you're arguing under the Necessary and Proper

18 Clause, that you need an enumerated power that the

19 Necessary and Proper Clause is going to serve.

20   But I don't see how it makes a difference

21 which enumerated power you're talking about.

22   MS. FUENTES: I think it all -- I think it

23 does turn on the nature of the power. I mean, could you

24 use the military power to say you, Mr. Bank Fraud

25 Client, cannot contract with the government any more?

1   No.

2   CHIEF JUSTICE ROBERTS: I get to ask the

3   questions. You don't.

4   (Laughter.)

5   MS. FUENTES: Sorry. You are so correct on

6   that. I apologize.

7   JUSTICE BREYER: No, but it's the

8   military -- look, it's the military that they are

9   mostly -- that they're relying on.

10   MS. FUENTES: Yes. And it --

11   JUSTICE BREYER: So they say -- I mean, the

12 famous statement -- I looked it up -- "Let the end be

13 legitimate, let it be within the scope of the

14 Constitution, and all means which are appropriate and

15 not forbidden are -- fall within the Necessary and

16 Proper Clause."

17   All right? The end is to protect the

18 communities from those individuals in respect to those

19 matters that they became dangerous with when they were

20 in the military, okay? That's the end.

21   And is the means appropriate? They say yes.

22 They say, after all, the means here is, notify them when

23 we're -- you're moving around. And therefore, is it

24 forbidden?

25   Well, we're not supposed to consider that

1 part, but -- so leave that out. But the -- the others,

2 they say is okay. So that's the basic.

3   Do you think maybe we should send this back

4 to the -- to the Fifth Circuit? The government suggests

5 that --

6   MS. FUENTES: Well --

7   JUSTICE BREYER: -- because they didn't get

8 it right in respect to what the previous statutes

9 require.

10   What about all that?

11   MS. FUENTES: Well, the Fifth Circuit did

12 get it right with respect to the previous statutes. And

13 the reason that the government wants to send it back is

14 because they say that the Fifth Circuit relied on the

15 fact that Mr. Kebodeaux was unconditionally released.

16 And as a matter of fact, he was unconditionally

17 released. But they equate unconditional release with

18 release free from a registration requirement.

19   We have gone over that in great length in

20 our brief. The government is simply wrong about that,

21 for the reasons that we state in our brief. And I can

22 go into those, if you want, if you'd like.

23   JUSTICE BREYER: I just want to know what to

24 do if I end up thinking they are right.

25   MS. FUENTES: Yes. They are --

1   JUSTICE BREYER: What's your recommendation

2   there on that assumption? I'm not saying I would, but

3   I'm just saying on that assumption.

4   MS. FUENTES: I -- I guess it depends on

5   which assumption. The Fifth Circuit would not have

6   changed its opinion in this case because Mr. Kebodeaux,

7   as a matter of fact, whether the government agrees or

8   not, was not released on condition that he comply with

9   sex offender registration requirements.

10   You can see the difference between

11   Mr. Kebodeaux's release and the release of a person who

12   is released on conditions that he comply with

13   requirements, and that is in 35 --

14   JUSTICE SOTOMAYOR: Your argument is he was

15   released on condition of State registration. Isn't your

16   argument dependent only on that there was no Federal

17   registration requirement?

18   MS. FUENTES: No. It is dependent on

19   whether that release was conditioned on his

20   registration, and it wasn't. Today, when a person is

21   released from custody on supervised release, it is a

22   condition of that release, under 3583, that he comply

23   with sex offender registration requirements. What

24   happens if he doesn't comply?

25   He can go back to prison on the original

1 conviction because he was released on condition that he

2 comply with Federal sex offender requirements. It just

3 goes to -- to the judge. It's by preponderance of the

4 evidence.

5   That is not what happened here.

6 Mr. Kebodeaux was released, not on any conditions. Now,

7 the State may have imposed an independent obligation to

8 register, but that was not a condition of his release.

9 And so it is not the case, as a matter of fact, that he

10 was released on condition.

11   JUSTICE SOTOMAYOR: The bottom line is you

12 don't think the Wetterling Act applied to him. Is that

13 your point?

14   MS. FUENTES: I'm sorry?

15   JUSTICE SOTOMAYOR: The Wetterling

16 Act didn't apply to him; is that --

17   MS. FUENTES: No. I don't think the

18 Wetterling Act applied to him.

19   JUSTICE SOTOMAYOR: At all?

20   MS. FUENTES: Correct. But even if it did,

21 it was -- it's far removed from a registration

22 requirement. It is a penalty, not a registration

23 requirement.

24   The State imposed a registration

25 requirement. Wetterling did not.

1   And if you'd just read -- and I think that's

2   what the Fifth Circuit did. They just read the statute,

3   14072(i)(3) and (i)(4). It doesn't say a person who is

4   required to register will follow -- will suffer the

5   following punishment. It says a person described in

6   4042(d), a person who's been into a court-martial.

7   If you look at the rest of 14072 and parts

8   of 14071, there are provisions that say such and such

9   person shall register. That is a registration

10   requirement.

11   JUSTICE KAGAN: I -- I guess what I'm not

12   understanding, Ms. Fuentes, is -- I understand the

13   difference between a requirement of registration and a

14   penalty for failing to register, but it's a little bit

15   cutting -- slicing the baloney thin.

16   And if you think that he was in any event

17   while he was undergoing his sentence subject to a

18   penalty, it's a pretty minor exercise of Federal power,

19   isn't it, to say that, instead of making you just

20   subject to a penalty for doing something, we're going to

21   tell you, you have to do it?

22   MS. FUENTES: I guess I don't. And the

23   reason is it's not the degree of power exerted, it's

24   whether the power exists. And once Mr. Kebodeaux

25   completed his Federal sentence, the military power,

1 which permitted him to be prosecuted and punished, had

2 expired.

3   And so in some ways it's like there's

4 Federal enclave jurisdiction on this side of the street

5 where the base exists, where the Navy yard exists, and

6 things that happened here can be punished by the Federal

7 government, but just across the street the exact same

8 things can occur and the Federal government cannot

9 punish it.

10   So I think it is very careful to draw those

11 fine lines, and I think it is essential when discussing

12 issues of the enumerated powers because they are

13 limited.

14   I don't mean to move on fast. I did want to

15 mention -- I know my time is almost up -- that we have

16 offered an alternative ground for deciding the

17 constitutional questions here, the effective date

18 argument. I know we didn't raise it in the Fifth

19 Circuit, but this Court has the authority to consider

20 it, and we have put into our brief all the reasons that

21 Mr. Kebodeaux is not covered by SORNA to begin with.

22   In the Sixth, Ninth and Third Circuits, he

23 could not be prosecuted under SORNA, and so that is an

24 alternative basis that I think the Court can decide this

25 case on.

1   And if there are no other questions, I will

2   cede the rest of my time.

3   CHIEF JUSTICE ROBERTS: Thank you, counsel.

4   Mr. Dreeben, you have three minutes

5   remaining.

6   REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

7   ON BEHALF OF THE PETITIONER

8   MR. DREEBEN: Thank you, Mr. Chief Justice.

9   As I understand Respondent's argument,

10   Respondent concedes that he could have been put under a

11   lifetime requirement to register with State authorities

12   and punished federally if he did not, if only that

13   requirement had been imposed on him either at the time

14   of sentencing or in a parallel civil proceeding that

15   occurred while he was in the military.

16   This case, therefore, reduces to a question

17   of timing. The essential argument that Respondent is

18   making is that Congress had its -- had its authority

19   expire because it didn't exercise it. There's some sort

20   of notion that Congress must speak now or forever hold

21   its peace.

22   JUSTICE SCALIA: But that's not unusual.

23   When you're released from the military, for example,

24   you're no longer subject to -- to Congress's

25   jurisdiction over the military. That's a matter of

1 timing too, isn't it?

2   MR. DREEBEN: Well, that's just wrong,

3 Justice Scalia, because this Court made clear in United

4 States ex rel Toth v. Quarles that if an individual has

5 left the military, but hasn't been prosecuted, they

6 can't be court-martialed, but they can be prosecuted in

7 an Article III clause.

8   JUSTICE SCALIA: Not for something that

9 they've done after they left the military. That's a

10 question of timing. Had they left the military when

11 they committed this crime?

12   If so, they can't be prosecuted under --

13 under that power of the Federal government.

14   MR. DREEBEN: But sex offender registration

15 is a consequence of the military crime. That was

16 committed while they were in the military. It's a civil

17 remedy that may, consistent with other constitutional

18 provisions, be imposed retroactively.

19   And this case comes down not to whether any

20 member of the Court agrees with the Ex Post Facto

21 Doctrine analysis in Smith v. Doe or whether there might

22 be due process or other concerns out there, it comes

23 down to whether Congress has Article I authority to

24 say --

25   CHIEF JUSTICE ROBERTS: And that's not

1 limited. You've limited it to sex offenses, but the --

2 Congress could say it's important to us that people who

3 serve in the military behave correctly even after

4 they're released.

5   So it is a Federal offense to do anything

6 that violates State law for the rest of their lives, and

7 your argument would say, well, that's part of their

8 authority to regulate the military and so it's okay.

9   MR. DREEBEN: Let me make two points about

10 that, Mr. Chief Justice. First of all, a standard

11 condition of Federal supervised release is that the

12 individual shall not violate any Federal, State or local

13 law, and for many sex offenders, supervised release runs

14 for life.

15   JUSTICE SCALIA: That's part of his

16 sentence. That's part of the punishment imposed. You

17 assert that this is not part of the punishment imposed.

18   MR. DREEBEN: I don't see any relevance that

19 has to Article I authority. It has relevance to other

20 constitutional provisions.

21   So insofar as supervised release does

22 contemplate this longstanding, continuous jurisdiction,

23 that's a feature of Federal law that the Court ought to

24 keep in mind in the way that it writes this opinion.

25   But, second, if Congress passed such a law,

1   it's not that it has carte blanche to do that, it's just

2   that there's no per se rule that says it can't. The

3   Court would --

4   CHIEF JUSTICE ROBERTS: So your answer to my

5   question is yes, Congress can do that. It can say

6   anyone in the military is subject for the rest of their

7   life to Federal jurisdiction. Whatever is a State law

8   crime is a Federal crime.

9   MR. DREEBEN: Mr. Chief Justice, I'm not

10   going to say no to that question because I don't want to

11   foreclose options that Congress may decide it's

12   appropriate to pass, but the Court --

13   JUSTICE SCALIA: Right. Who knows what

14   they'll do, right?

15   MR. DREEBEN: But the Court does not have to

16   agree that that is constitutional -- may I complete my

17   sentence?

18   CHIEF JUSTICE ROBERTS: Sure.

19   MR. DREEBEN: -- in order to uphold this

20   narrowly focused, tailored law that looks at a specific

21   crime and imposes a specific requirement that's directly

22   tied to the nature of that crime.

23   CHIEF JUSTICE ROBERTS: Thank you, counsel,

24   counsel.

25   The case is submitted.

1   (Whereupon, at 11:14 a.m., the case in the

2   above-entitled matter was submitted.)

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