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

2 (11:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 08-6261, Robertson v. United
5 States, ex rel. Watson.

6 Ms. Frankfurt.

7 ORAL ARGUMENT OF JACLYN S. FRANKFURT

8 ON BEHALF OF THE PETITIONER

9 MS. FRANKFURT: Mr. Chief Justice, and may
10 it please the Court:

11 This case presents the question whether,
12 under our Constitution, the power to prosecute criminal
13 contempt in a Federal court rests solely with the
14 sovereign. The United States now agrees that the fact
15 that a criminal offense may only be prosecuted by the
16 sovereign is a foundational premise of our Constitution.
17 Because Mr. Robertson was prosecuted for criminal
18 contempt in a private right of action, his prosecution
19 was unconstitutional, a nullity in our view, and his
20 convictions must be vacated.

21 Ms. Watson defends the lower court's ruling
22 that --

23 JUSTICE SCALIA: Excuse me. He didn't make
24 that argument, though. I mean, his -- as I recall, his
25 only complaint was that he had been promised that --

1 that he wouldn't be -- he wouldn't be prosecuted. And
2 that was his only complaint below, wasn't it?

3 MS. FRANKFURT: His complaint below was that
4 he had a plea agreement with the United States.

5 JUSTICE SCALIA: Right.

6 MS. FRANKFURT: And that the only lawful or
7 constitutional way he could have been prosecuted was in
8 an action brought by the United States; that the local
9 statute didn't authorize a private right of action, and
10 that the Constitution could not --

11 JUSTICE SCALIA: He made the constitutional
12 claim below?

13 MS. FRANKFURT: He said below that -- that a
14 private right of action was neither lawful under the
15 local statutes nor constitutional, and the parties
16 responded that it was; and the lower court held it is
17 authorized by local statute; it's constitutional; in
18 fact, this was a private right of action prosecuted by
19 Ms. Watson on her own behalf and therefore your plea
20 agreement fails.

21 We have never argued, if it was actually her
22 prosecuting, that -- that she was bound by the plea
23 agreement. We argued it can't be her prosecuting, it
24 can't be under the Constitution, it can't be under the
25 local statute. And if it's the United States, then we

1 are entitled to the benefit of the plea agreement we had
2 with the United States.

3 The -- Ms. Watson defends the lower court
4 ruling that a private right of criminal action is
5 constitutional, but really has mounted -- excuse me --
6 mounted very little attack on our constitutional
7 argument that the Constitution contemplates that crimes
8 are public wrongs brought on behalf of sovereigns.

9 JUSTICE SOTOMAYOR: Excuse me. We have
10 plenty of plea agreements jurisprudence that say if the
11 Southern District of New York prosecutes someone and
12 they sign a plea agreement and say, we're not going to
13 prosecute you for further crimes, we read that to mean
14 that the Southern District of New York won't prosecute
15 you for further crimes. We don't read it that no other
16 government agency is bound, who has jurisdiction over
17 that criminal activity, that they are equally bound.

18 So why isn't this case the same?
19 Assuming -- that you're making a broad statement, that
20 this has to be brought in the name of the government.
21 Assuming that's correct, does that mean that -- why does
22 that mean that both the U.S. Attorney's Office and the
23 Attorney General's Office, which appear to be two
24 different entities enforcing two different sets of law,
25 why would both be bound?

1 MS. FRANKFURT: Well, it's important to
2 clarify, because there is -- there is a lack of -- it is
3 not parallel to the Federal system. So even assuming --
4 and I believe there is a circuit -- that the Second
5 Circuit says when the Southern District signs it's the
6 Southern District only, and the Third, Fourth, Eighth,
7 and Ninth view it differently when something reads as
8 broadly as this, which is the government. In the
9 District of Columbia --

10 JUSTICE SCALIA: Excuse me. It's not just
11 the Southern District; it's also what, the State?

12 MS. FRANKFURT: No. No, I believe in the
13 Second Circuit they might read something signed by the
14 Southern District as not binding in the Eastern
15 District.

16 JUSTICE SCALIA: I got you.

17 MS. FRANKFURT: But in the District of
18 Columbia, only the United States Attorney prosecutes
19 criminal offenses of the type that occurred here. There
20 is a bit of a red herring here from this plea form.
21 This is a plea form that is used in Superior Court both
22 in traffic offenses, which are the type of offenses that
23 the District of Columbia prosecutes, and in criminal
24 offenses.

25 And the cross-outs are just to conform the

1 plea form, so that if you cross out "D.C." it reads
2 "United States v. John Robertson," which is how --

3 JUSTICE SCALIA: That did puzzle me. I was
4 wondering if there's -- if there's coordinate
5 jurisdiction. Can the -- can the District prosecute for
6 crimes that the Attorney General can prosecute for?

7 MS. FRANKFURT: There is -- there is not
8 coordinate jurisdiction. There is some -- some
9 provisions for consent if there are multiple offenses
10 and one goes to one, one goes to the other.

11 But all the offenses we're talking about
12 here are United States offenses. It was the United
13 States's position below that only the United States
14 prosecutes contempt. It was actually the Attorney
15 General's conviction in the lower court that it could
16 not, representing the District of Columbia, prosecute
17 contempt.

18 So that if we are construing the party to be
19 the United States as the Solicitor General now asks --
20 you know, Young and Providence Journal really apply,
21 which is then the prosecuting entity is the United
22 States, whether represented by a private prosecutor or
23 by a United States attorney. That's a very different
24 situation than different offices or -- because the
25 District of Columbia could not be prosecuting this case

1 representing the -- the Attorney General couldn't be
2 prosecuting this case representing the District of
3 Columbia government. That's not in the picture as an
4 option.

5 The -- the case -- if it's
6 prosecuted by a sovereign, it's prosecuted by the United
7 States, and the only argument that the Solicitor General
8 is now making is that that wouldn't bind if private
9 prosecutor representing the United States, as happened
10 in Young. We have a local case that says when a private
11 prosecutor in a criminal contempt case signs the plea
12 agreement on behalf of the United States, it's a binding
13 plea agreement and binds the -- the United States.

14 So the cross-out on the plea form, I
15 believe, are a bit of a red herring. The cross-out on
16 the caption just makes it read United States v. John
17 Robertson in a felony, which is the only way felonies
18 can be prosecuted. The cross-out on the signature line
19 just makes it read the United States Attorney, who is
20 the only one who can sign such a form in a felony case.
21 And it doesn't define a particular prosecuting entity
22 between Federal and State, or between two different
23 Federal jurisdictions that have concurrent jurisdiction
24 over, let's say, mail fraud or something like that.

25 JUSTICE GINSBURG: Is this law unique to the

1 District or do other States -- I mean, the problem that
2 they are trying to get a handle on is domestic violence.
3 And the prosecutors are busy prosecuting drug crimes and
4 the rest. So the District's solution is, we will allow
5 the abused person to initiate this criminal contempt.
6 Are there other States that have the same procedure?

7 MS. FRANKFURT: I -- the -- the same
8 procedure is a question of how that is defined. If the
9 question is whether there are other States that have a
10 wholly private right of action where the person is
11 construed as bringing it on her own behalf, not on
12 behalf of a sovereign, in a criminal case, we have seen
13 nothing --

14 JUSTICE GINSBURG: I -- I mean, however you
15 describe it in practical terms, are there other places
16 that say, abused person, you can initiate this and you
17 can have your lawyer present it, whether it's on behalf
18 of the State or -- but just the practical of how you go
19 through the motions; are there other States that allow
20 the victim?

21 MS. FRANKFURT: Yes, there are other --
22 there are other States that allow the complainant to
23 either bring it to the attention of the court in the
24 form of a request for an order to show cause and to
25 actually prosecute as a private prosecutor, the way,

1 let's say, in Young, they would have characterized a
2 private prosecutor --

3 JUSTICE KENNEDY: In criminal cases, because
4 I -- I -- correct me if I am wrong, but my -- my
5 recollection is that orders to show cause for contempt
6 in the civil -- on the civil side occur frequently, and
7 that allows a jail sentence in California I think of 5
8 days -- and this is civil, because it's coercive. Now,
9 you are talking about something different, I take it?

10 MS. FRANKFURT: I am. I am talking about
11 criminal contempt. For instance, in the District of
12 Columbia before this case came down there -- we had an
13 opinion, based on a local legislature's determination,
14 that said a beneficiary of a civil protection order may
15 initiate a criminal contempt proceeding and may act as
16 private prosecutor the way in -- in Young this Court
17 said as a matter of supervisory authorities they didn't
18 want interested parties.

19 There are jurisdictions, I believe, that
20 allow for interested parties to take that role. But the
21 role is the role of the lawyer on behalf of the
22 sovereign -- sovereign, whichever sovereign it is, who
23 is the ultimate party --

24 JUSTICE SCALIA: And, of course --

25 MS. FRANKFURT -- and who can nolle the case.

1 JUSTICE SCALIA: -- the States don't have
2 the same compulsion that the Federal Government has,
3 which arises from the separation of powers. And --
4 which -- which means that it is the executive that has
5 the right to prosecute, and States are not bound by such
6 a thing. And they can perhaps allow private individuals
7 to prosecute, whereas the only exception we have made
8 from the -- from the chief executive's authority to
9 prosecute is Young, which is a very narrow exception,
10 dealing with the Court's ability to protect itself from
11 contempt of its orders.

12 And here the court had nothing to do with
13 the appointment of this private party, right?

14 MS. FRANKFURT: That's absolutely true. In
15 our view to the extent there are any sort of exceptions
16 from procedural rights or the normal process in contempt
17 proceedings, they are narrowly tailored and governed by
18 the doctrine of necessity. And that -- and so while
19 Respondent's counsel indicates, well, there are a lot of
20 differences in contempt and just add one to this list,
21 they make no attempt to ground that in the document of
22 necessity, which is really the only thing that -- that
23 justifies any sort of procedural difference in the
24 contempt context.

25 JUSTICE STEVENS: Am I right that the

1 District has been following this procedure for quite
2 some time?

3 MS. FRANKFURT: Yes. Well, I guess it
4 depends on what the question what "this procedure" is.
5 The District --

6 JUSTICE STEVENS: Well, where a private
7 party initiates, the beneficiary of an order of this
8 kind, initiates a contempt proceeding against a person
9 who violates it, and seeks a punishment for it, not just
10 discontinuance.

11 MS. FRANKFURT: Yes. The -- the District
12 had a case where it said it believed itself not bound by
13 the supervisory authority of Young and it would allow
14 interested parties to prosecute contempt in the domestic
15 violence context only, not outside the domestic violence
16 context. And it has had cases prosecuted in that
17 fashion since that time, which I believe was 1984. But
18 it has -- it was not until this case that the issue
19 arose because of the plea agreement to suggest that that
20 person was prosecuting in her own name --

21 JUSTICE STEVENS: It doesn't say to me that
22 the plea agreement goes to the question of whether there
23 is sort of an inherent violation of the Constitution by
24 adopting this procedure at all.

25 MS. FRANKFURT: I -- I --

1 JUSTICE STEVENS: I have trouble figuring
2 out whether the plea agreement has any relevance to the
3 kind of basic argument you are making.

4 MS. FRANKFURT: Well, we actually see two
5 arguments, and maybe that's -- that we are making, which
6 may be part of the confusion.

7 If this proceeding really was, as the lower
8 court interpreted, the lower court -- the lower court
9 interpreted the local statute and what occurred and
10 said: This really was a private right of action brought
11 by Ms. Watson on her own behalf; no government party
12 initiated it, controlled it; and we believe that is
13 constitutional. That's what the lower court said. If
14 that's what occurred, then we believe this Court could
15 well say that is unconstitutional.

16 We -- we defer to the lower court's view of
17 what occurred pursuant to the local statute. This was a
18 private right of action, the lower court told us so, and
19 we don't think that the Constitution can tolerate such a
20 thing. And, therefore, like in Gompers where criminal
21 penalty was imposed, Gompers v. Buck's Stove, a criminal
22 penalty was imposed in an action between private
23 parties, that judgment must be set aside. She never had
24 power to invoke the authority of the court in the first
25 place. That's one way to view it. The Solicitor

1 General --

2 JUSTICE SOTOMAYOR: Or just to say the lower
3 court was wrong --

4 MS. FRANKFURT: The lower court was wrong.

5 JUSTICE SOTOMAYOR: -- on that premise.

6 MS. FRANKFURT: Well --

7 JUSTICE SOTOMAYOR: We have another option,
8 once we say they were wrong on that premise, to send it
9 back and let them look at the second question, which is
10 whether or not a private party can bring an action in
11 the name of the sovereign.

12 MS. FRANKFURT: Well, I think that the
13 second way to view it, as -- as I was going to say, is
14 what the Solicitor General of the United States now
15 agrees -- they thought below that it was Constitution,
16 but they now agree that the Constitution cannot tolerate
17 private criminal rights of action.

18 JUSTICE STEVENS: And if -- if that's true,
19 they have been following an unconstitutional practice
20 for about 25 years; is that right?

21 MS. FRANKFURT: I believe --

22 JUSTICE STEVENS: And nobody thought about
23 it in all this time?

24 MS. FRANKFURT: And certainly since, you
25 know, since they made the argument to the lower courts.

1 JUSTICE STEVENS: Because it is done many,
2 many times, as I understand it, over the years.

3 MS. FRANKFURT: It was done many times,
4 received -- when the original -- when the interested
5 prosecutor decision was made, it was made on the same
6 foundational premise as Young, which was let's look and
7 see if we are concerned about conflict of interest.

8 By the nature of asking, the court asking
9 questions of conflict of interest, the court was
10 thinking of the woman as representing the government.

11 JUSTICE SCALIA: This wouldn't be allowed
12 under Young. I mean, if Young made anything clear is
13 you couldn't appoint as a prosecutor an interested
14 party. And here is the most the interested party of
15 all.

16 MS. FRANKFURT: That's true. It certainly
17 would not be --

18 JUSTICE SCALIA: So don't -- don't -- don't
19 say that Young would have allowed it.

20 MS. FRANKFURT: No, no, no, no. It
21 certainly wouldn't be allowed under Young. But to
22 finish my -- my answer to Justice Sotomayor and Justice
23 Stevens as to the second route: If this Court -- what
24 the Solicitor General I believe is asking this Court to
25 do is to say it's not constitutional to have such an

1 action brought on behalf of a private party, therefore,
2 construe it as an action brought on behalf of the
3 sovereign.

4 This Court -- if this Court goes that route,
5 as opposed to deferring to the way the lower court
6 described it, rather says this must have been on behalf
7 of the sovereign, the sovereign was the United States,
8 then the question is whether the plea agreement barred
9 it.

10 The lower court said the plea agreement
11 didn't bar it because it was Ms. Watson's; obviously it
12 didn't bar it. Ms. Watson is not the United States.
13 But if in fact it was on behalf of the United States,
14 then the question is does the plea agreement bar it. We
15 think that the --

16 JUSTICE SCALIA: Does -- does the Justice
17 Department concede that the sovereign here is the United
18 States? Does the Justice Department concede --

19 MS. FRANKFURT: I believe --

20 JUSTICE SCALIA: -- that there can't be a
21 separate prosecutor from -- from the Assistant United
22 States Attorney and that is the prosecutor for the
23 District of Columbia?

24 MS. FRANKFURT: I -- I don't want to speak
25 for the Justice Department, but I do believe --

1 JUSTICE SCALIA: You don't understand them
2 to be saying that?

3 MS. FRANKFURT: I do believe that they --
4 that they concede that the -- the relevant sovereign is
5 the United States.

6 JUSTICE SCALIA: Okay.

7 JUSTICE GINSBURG: Well, we can ask the
8 government.

9 MS. FRANKFURT: Yes. And --
10 (Laughter.)

11 MS. FRANKFURT: But -- but I believe that's
12 what their brief said. They certainly said that below
13 and I believe that's what they are saying here because
14 they are saying it's prosecution on behalf of the United
15 States. They have given section 518 permission in this
16 case because they believe that the United States is
17 interested.

18 And so the District of Columbia's role,
19 oddly enough, all the way through this proceeding and
20 then they withdrew at the merits stage in this Court,
21 was they believed themselves representing the
22 Petitioner. They had never perceived themselves to be a
23 public prosecutor. And they in fact said in the lower
24 court that they had no authority to prosecute contempt
25 in the District of Columbia. We agree with that.

1 JUSTICE KENNEDY: Have -- have we had cases
2 that said that Federal separation of powers principles
3 are binding on territorial governments, for instance?

4 MS. FRANKFURT: You know, I -- I think that
5 the question is -- I don't think -- I disagree with the
6 government, with Respondents that this Court has said it
7 hasn't. I think in -- I think Springer appears to apply
8 separation of powers principles. I think that
9 Metropolitan Airport Authority used Springer in a
10 separation of powers -- a constitutional separation of
11 powers analysis. I think even if this Court looks at
12 Whalen, which involves D.C., we will see a separation of
13 powers analysis applicable to the District of Columbia.
14 Our --

15 JUSTICE SCALIA: Is the District a
16 territory?

17 MS. FRANKFURT: I don't think we are a
18 territory, no. No, it is Article I power that is being
19 exercised. Our focus hasn't been entirely separation of
20 powers, because in our view, you know, separation of
21 powers is about the division of powers within
22 government. Here the problem was that the problem was
23 that the -- there is no authority under the Constitution
24 to give the power to prosecute time, which has
25 historically, way back, been an attribute of sovereignty

1 and to take it entirely away from the sovereign at all.

2 Which is what -- what the lower court
3 finding was and what Ms. Watson now defends. But we see
4 a long, long history in the common law, in the English
5 common law, in our common law, and in our constitutional
6 jurisprudence of criminal actions being public wrongs
7 prosecuted acting on behalf of the sovereign and
8 criminal contempt falling right within that even more
9 so, because this is indication of public authority, and
10 to the extent there are any deviations from due process
11 or separation of powers principles, they are justified
12 only by the doctrine of necessity.

13 If the Court has no further questions, I
14 will reserve my --

15 JUSTICE STEVENS: Could I -- I have this
16 question. This -- again, I'm trying to see the case in
17 the broad -- in the broader sense.

18 Supposing there is a civil lawsuit that's
19 settled and part of the settlement is a consent decree
20 that would enjoin certain conduct, and the defendant
21 then violates the decree and engages in the prohibited
22 conduct. Are you saying that the only person who could
23 prosecute for contempt would be the sovereign?

24 MS. FRANKFURT: For criminal contempt?

25 JUSTICE STEVENS: Yes.

1 MS. FRANKFURT: Yes. Now whether -- whether
2 in some situations a private prosecutor could be
3 appointed --

4 JUSTICE STEVENS: So, no, the question would
5 be whether the lawyer for the -- the party who entered
6 into the settlement could bring a contempt proceeding
7 against the adversary who had violated the settlement.

8 MS. FRANKFURT: On their own behalf? I
9 don't -- I don't believe so. Not a criminal contempt
10 proceeding.

11 We are drawing a fairly rigid distinction
12 between who the lawyer is and who the lawyer represents.
13 In our view, the party in a criminal action has to be
14 the sovereign, the United States.

15 Now in the contempt context there is a
16 limited exception for appointment of private prosecutors
17 when the executive is declining to prosecute and the
18 judiciary needs to vindicate its authority, and if it's
19 referred to the public prosecutor in the Young situation
20 and the public prosecutor has declined but the judiciary
21 still needs to vindicate its authority, it can appoint a
22 private attorney to represent the sovereign.

23 But at root it's the sovereign that is
24 prosecuting, no matter who the lawyer is who is standing
25 in the courtroom. And the problem in this case was the

1 holding of the lower court that said -- that Ms.
2 Watson -- it was her case. The prosecutor said it was
3 her case; the lawyer said I can't control her; she gets
4 to make all the decisions.

5 JUSTICE STEVENS: What do you think the best
6 authority from this Court for your basic proposition is?
7 What is your strongest case?

8 MS. FRANKFURT: I think the strongest case
9 is Gompers v. Buck's Stove. That says fundamentally --
10 and I'm not quoting verbatim -- but it says
11 fundamentally erroneous as if a tort action of A -- for
12 battery of A versus B, a sentence of 12 months is
13 imposed. Well, that's exactly what we have here, is we
14 have a sentence of 12 months imposed for an action that
15 our lower court said was solely between private parties.

16 JUSTICE STEVENS: You think Gompers is the
17 best case?

18 MS. FRANKFURT: Yes, I do.

19 JUSTICE KENNEDY: And what is your position
20 and can you advise us -- I know it's not in your case --
21 if there is a plea bargain in the Southern District of
22 New York, does it -- does bind, do you think, the
23 prosecutor in the Eastern District? What is your view
24 of that proposition? I know it's not part of this case.

25 MS. FRANKFURT: Right. My view is this

1 Court should go with the Third and Fourth Circuits who
2 have -- expressed -- quite eloquently about the United
3 States not being a bunch of separate fiefdoms, but that
4 when the United States speaks, they speak for the
5 government at large. That is different than a case --
6 of some of the cases that were cited, where it says the
7 United States will make a recommendation to the
8 Immigration and Naturalization Service, and then the
9 criminal defendant comes back and says well, the INS is
10 down, too.

11 And people looks at the agreement and say
12 well, no one would have read that to mean that the
13 United States included INS, because they were talking
14 about a recommendation to INS.

15 But when the government has written in, my
16 view is that -- that the Third Circuit and the Fourth
17 Circuit speak eloquently to that. But I don't see that
18 that issue is presented here, given the context on which
19 it arises in D.C. where this is conduct that should only
20 be prosecuted in D.C. court by the United States. It
21 was going to be the United States Attorney or a private
22 prosecutor representing the United States. We have
23 local law that says private prosecutors do sign plea
24 agreements by the United States and I would think the
25 converse would be true.

1 I'll reserve.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MS. FRANKFURT: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Long.

5 ORAL ARGUMENT OF ROBERT A. LONG

6 ON BEHALF OF THE RESPONDENT

7 MR. LONG: Mr. Chief Justice, and may it
8 please the Court:

9 I think it's very important to be clear
10 about what is properly before the Court. This started
11 out as a case about a plea agreement, and the
12 Petitioner's claim is that his plea agreement with the
13 U.S. Attorney barred his criminal contempt proceeding.
14 He has not made the claim that a private interested
15 party may not bring a criminal contempt proceeding. He
16 has said --

17 CHIEF JUSTICE ROBERTS: Yes, but the
18 argument is that because a private interested party
19 can't bring it, the party is bringing it on behalf of
20 the United States and his plea agreement therefore is
21 with the United States.

22 MR. LONG: Well, I mean if I could,
23 Mr. Chief Justice, there are I think several questions
24 in the case, and some are actually no longer in dispute
25 so that will help to simplify a very complicated matter

1 a little bit.

2 One is according to the question presented,
3 whether the criminal contempt proceeding for violating a
4 civil protective order must be brought in the name of
5 the United States, so actually have United States in the
6 caption. And I think now all the parties agree, there
7 is no constitutional requirement that the caption of the
8 case actually say "United States." So to the extent
9 that answers the question about what does the plea
10 agreement cover, we don't have a dispute about that.
11 There's no constitutional reason why the court of
12 appeals has to be reversed.

13 So the other part of the question, as it's
14 framed in the question is does it have to be brought
15 pursuant to the power of the United States. That's not
16 language that is in the court of appeals opinion --

17 JUSTICE SOTOMAYOR: I -- I'm not sure I
18 understand your point. Yes, the caption doesn't have to
19 be styled in a particular name --

20 MR. LONG: Yes.

21 JUSTICE SOTOMAYOR: But the prosecuting
22 person --

23 MR. LONG: Yes.

24 JUSTICE SOTOMAYOR: -- the person whose name
25 is listed is acting for someone.

1 MR. LONG: Yes. Is the real party in
2 interest the United States?

3 JUSTICE SOTOMAYOR: Exactly.

4 MR. LONG: And I agree, that's mostly what
5 we have to talk about this morning, but I'm trying to
6 bracket it with issues that are really not properly in
7 dispute here.

8 One is, the caption is not a constitutional
9 issue. Another is, as Petitioner has said over and over
10 again, the actual ability of a private, interested
11 party, the question that was left open in Young, under
12 the Constitution, under the Due Process Clause or under
13 separation of powers, is that constitutional for
14 Ms. Watson to even do this, as the representative of the
15 United States or on her own behalf?

16 They have said over and over again, they are
17 not raising that question. In their reply brief to the
18 court of appeals, they say they in no way challenge
19 that. In their post-argument brief to the court of
20 appeals, they say the assertion that they are
21 challenging it is just wrong. In their supplemental
22 brief to this Court at the cert stage, they say they --
23 they decline to raise that question. And even in their
24 reply brief here, they say they have not raised the
25 issue left unresolved in Young.

1 So that is a very important issue. And I
2 think that issue is really --

3 JUSTICE SOTOMAYOR: Can you define what you
4 see as that issue? What's the issue that you think --

5 MR. LONG: That's the issue of whether a
6 private interested party, either on their own behalf or
7 as the representative of the sovereign, can bring a
8 criminal contempt action.

9 JUSTICE SCALIA: What do you mean? Not on
10 their own -- not on their own behalf. I mean, that --
11 that's a quite different issue. That's the issue that
12 was decided below, whether --

13 MR. LONG: Yes.

14 JUSTICE SCALIA: -- whether a private
15 interested party can be authorized to bring the suit on
16 behalf of the sovereign.

17 MR. LONG: Yes. What I'm trying to do is
18 narrow down to --

19 JUSTICE SCALIA: I understand, but you --
20 you covered two things. You said whether a private
21 individual can bring it on his own.

22 MR. LONG: Right.

23 JUSTICE SCALIA: Or whether a private
24 individual can be appointed to bring it on behalf of the
25 sovereign.

1 MR. LONG: Yes.

2 JUSTICE SCALIA: And I thought it was
3 only -- only the second of these that you say is out of
4 the case. You say the first is out of the case, too?

5 MR. LONG: No.

6 JUSTICE SCALIA: No.

7 MR. LONG: I think -- I think the -- all
8 they have conceded is that for purposes of this case, we
9 are going to assume that -- well, I may have given you
10 the wrong answer to you -- we are -- they have said over
11 and over again, we assume, that a private interested
12 party can bring a criminal contempt proceeding. And so
13 we think, given the importance of --

14 CHIEF JUSTICE ROBERTS: As representative of
15 the sovereign?

16 MR. LONG: Well, I -- I think that question
17 is fairly before the Court.

18 CHIEF JUSTICE ROBERTS: And nobody doubts --
19 I didn't think it was at issue that the United States,
20 rather than operating through the Assistant U.S.
21 Attorney, can appoint you to handle the prosecution.

22 MR. LONG: Exactly. Exactly.

23 CHIEF JUSTICE ROBERTS: And that's what they
24 don't dispute, right?

25 MR. LONG: Maybe a different way of making

1 the --

2 CHIEF JUSTICE ROBERTS: I'm sorry, that's --
3 they don't dispute that? That's the point you were
4 trying to make?

5 MR. LONG: Yes.

6 CHIEF JUSTICE ROBERTS: Okay.

7 JUSTICE SOTOMAYOR: I'm sorry, repeat it for
8 me. I sort of --

9 MR. LONG: The point is, they are not
10 disputing, and they've said over and over again they're
11 not disputing that a private, interested individual,
12 like Ms. Watson, the individual in this case, can bring
13 this proceeding. Now --

14 JUSTICE SOTOMAYOR: On whose behalf? That's
15 the issue that I'm trying to --

16 MR. LONG: And the issue that I think is
17 before the Court is, would that be as a representative
18 of the United States or would that be as a private
19 person?

20 JUSTICE SOTOMAYOR: Okay. Are you saying
21 that it's out of the case that if we say it's on behalf
22 of the United States, they are not challenging that they
23 can do that?

24 MR. LONG: Yes. Yes. I think they have not
25 challenged that.

1 JUSTICE SOTOMAYOR: That's so -- so if we
2 say they can act on behalf of the United States, you --

3 MR. LONG: Yes. And I will say, there is an
4 oddity to this, because in many ways, the bigger
5 question is the question that the Court left open in
6 Young, since that's not been properly raised, not
7 properly decided, by the court below, not properly
8 briefed, it is a little odd to be answering this other
9 question of: Well, assuming that the private party can
10 do this, would it be in the interest of the United
11 States?

12 JUSTICE BREYER: So in other words, if, in
13 fact -- you agree or don't agree, I don't know -- but
14 the government says and they say, the government of the
15 United States has here -- and it can, under the
16 Constitution, delegate to a private person the authority
17 to prosecute.

18 MR. LONG: Right.

19 JUSTICE BREYER: There is a big argument
20 against that.

21 MR. LONG: Yes.

22 JUSTICE BREYER: The argument is: This
23 would be the one person you can't delegate it to because
24 they are very biased.

25 MR. LONG: Right. And my --

1 JUSTICE BREYER: And that argument, you say,
2 is not in this case.

3 MR. LONG: Exactly. Exactly. So --

4 JUSTICE BREYER: Okay. So now we have what
5 is in the case, which is the question of whether,
6 leaving that argument out of it, did they hear or --

7 MR. LONG: So let me now address the point
8 that: Is it a constitutional requirement? No matter
9 what the legislature says, that any criminal contempt
10 proceeding must be brought in the interest of the
11 sovereign, not in the interest of a private party. That
12 may seem like a fairly obvious proposition, but I want
13 to submit it's actually much harder than the Court
14 actually should agree.

15 JUSTICE SCALIA: I don't know what you mean
16 by "in the interest of"? On behalf of? Is that what
17 you mean? Are you saying -- you acknowledge here that
18 it is on behalf of the United States but you say it
19 doesn't have to be in the interest of the United States,
20 is that it?

21 MR. LONG: Well, the language that the court
22 of appeals used is in the interest of the United States.
23 Who is the real party in interest?

24 JUSTICE SCALIA: I don't know what that
25 means. Are you asserting that this suit has been

1 brought on behalf of the United States by your client?

2 MR. LONG: No. I want to make an argument
3 that actually, the D.C. legislature and the D.C. courts
4 are constitutionally permitted to determine that in this
5 specific situation, the interests of the individual
6 actually predominate over the interests of the
7 government and there is not a constitutional problem.

8 JUSTICE ALITO: Why is that even relevant?
9 Why do you even get to that? Isn't the question what
10 the parties understood the plea agreement to mean?

11 MR. LONG: Well, I agree with you completely
12 Justice Alito. The ultimate question is exactly what
13 you say. And we think under any reasonable construction
14 of the plea agreement, it does not bar this proceeding.
15 As Justice Stevens said, these have gone on for.

16 JUSTICE BREYER: It's highly relevant, I
17 think, because I think you would you like to make the
18 argument, which I would like to hear, is that: Forget
19 the United States. The Constitution permits this woman
20 to bring the case as a private citizen.

21 MR. LONG: Yes.

22 JUSTICE BREYER: Now, if you are right about
23 that, the plea agreement drops out.

24 MR. LONG: Yes.

25 JUSTICE BREYER: Because nobody says made a

1 plea agreement with her. Because that is the argument
2 you want to make at some point.

3 (Laughter.)

4 MR. LONG: I will make the argument,
5 although if I am wrong, I still think the plea agreement
6 doesn't bar this prosecution. Here's --

7 JUSTICE ALITO: But, well -- well, with
8 respect, even if the Constitution permits this, if the
9 parties understood the plea agreement to mean that this
10 was going to be barred, then why isn't that the end of
11 the matter?

12 MR. LONG: Well, it's what a reasonable
13 person would have understood Justice Alito, when the
14 plea agreement says, crosses out District of Columbia,
15 crosses out corporation counsel, and we are now all
16 agreed that Ms. Watson, in her own name, can bring this
17 proceeding under a statute that authorizes it and has
18 for 20 years --

19 JUSTICE ALITO: And I suppose the argument
20 could be that the -- that the government has no
21 authority under D.C. law to enter into such an
22 agreement, as well require these two --

23 MR. LONG: Well, that's -- now we are
24 getting into statutory issues, Justice Alito. I mean,
25 this case is a constitutional case, with no such

1 statutory issue was raised or decided by the court
2 below. Typically, this Court treats the D.C. court of
3 appeals as -- as final, as a practical matter, on issues
4 of D.C. law. So, I think that is going off in a
5 completely different direction.

6 But on the issue --

7 JUSTICE SCALIA: Gee, I have really lost
8 you. What is going off in a different direction?
9 Really?

10 (Laughter.)

11 MR. LONG: The issue is, it's a matter of
12 D.C. statute. There was some problem with this
13 prosecution. I mean, that's really something else.

14 JUSTICE SCALIA: Well, okay. You're --
15 you're asserting that this agreement with the United
16 States Attorney cannot cover this case because your
17 client was not acting on behalf of the United States,
18 but rather in her private capacity.

19 MR. LONG: Yes, and let me make that
20 argument.

21 JUSTICE SCALIA: And that's perfectly okay,
22 right?

23 MR. LONG: If -- if that is a constitutional
24 requirement. It is in Blackstone, we admit that, for
25 crimes in general, but we are talking about contempt.

1 But if it's a constitutional requirement, it has got to
2 be in the Constitution someplace. Petitioners say it's
3 because the Constitution uses words like "crimes."

4 Well, you know, the Court has been very
5 cautious about implying common law rules,
6 constitutionalizing common law rules, because of words
7 in the Constitution --

8 CHIEF JUSTICE ROBERTS: Well, one way you
9 can find it in the Constitution is that we have built a
10 body of law about the obligation of people bringing
11 prosecutions that wouldn't fit within your situation.

12 For -- what are the Brady -- what's the
13 Brady obligation of your client?

14 MR. LONG: Well, if you will bear with me, I
15 think the Constitution does answer questions like the
16 Brady question, but it's not the penumbras and
17 emanations of words like crimes. It's because --

18 CHIEF JUSTICE ROBERTS: What are the Brady
19 obligations of your client?

20 MR. LONG: Well, I -- I think because the
21 way -- the way this Court has defined criminal contempt
22 does not look to the interest of the party versus the
23 interest of the sovereign; in fact, the Court has said
24 over and over again in Bagwell and Hicks and other cases
25 that in all criminal contempt cases, civil and criminal,

1 to some extent the interest of the sovereign is that --

2 CHIEF JUSTICE ROBERTS: What -- what are the
3 Brady obligations of your client?

4 MR. LONG: Due process says this is a
5 criminal proceeding, Your Honor, if I can explain in a
6 minute, and therefore, all the due process rights of a
7 -- for a petty criminal offense apply. And I would say
8 that --

9 JUSTICE SOTOMAYOR: So your client has to
10 provide the -- her husband a lawyer? Who has to provide
11 a lawyer in this criminal contempt proceeding?

12 MR. LONG: D.C. courts do provide lawyers if
13 the -- to the defendant. I mean a very important point
14 here is these are often pro se cases, where the woman
15 comes in to say -- or the petitioner; it's usually a
16 woman, it doesn't have to be --

17 JUSTICE SOTOMAYOR: I don't know if you have
18 answered the Chief's question. He has asked to have a
19 lawyer; is there a Brady obligation? What are the
20 constitutional entitlements --

21 MR. LONG: They -- they come from the Due
22 Process Clause. And if I could have just the Court's
23 indulgence for one minute, I think the answer to a lot
24 of these questions is not looking to penumbras and
25 emanations from crimes, but looking at this Court's

1 decisions deciding what is criminal contempt and what is
2 civil contempt. And as I started --

3 JUSTICE KENNEDY: But can we get to the
4 Brady? That was one of the questions I had, too. Let's
5 say we have the -- we'll call it a private person as
6 prosecuting.

7 MR. LONG: Right.

8 JUSTICE KENNEDY: Does that person have a --
9 a right to look at all the government files to see if
10 there is any exonerating evidence?

11 MR. LONG: Well --

12 JUSTICE KENNEDY: I mean, how does it work?
13 That's what we want to know.

14 MR. LONG: This is a determinate sentence,
15 so under this Court's cases, without regard to whether
16 the government's interests are -- take precedence over
17 the private interests, it's criminal. So you get all
18 the rights that the Due Process Clause gives you in a --

19 JUSTICE KENNEDY: But how does it work?
20 Does -- does the -- does the person who is bringing this
21 prosecution have the right to go in and -- and look at
22 the -- all -- all of the files that the police have --

23 MR. LONG: Well, right.

24 JUSTICE KENNEDY: -- and that the prosecutor
25 has? That's the only way Brady would work.

1 MR. LONG: In this case the court said that
2 the Brady rights did apply. I mean, this is another
3 reason why I would urge the Court not to try to decide a
4 number of very important questions about a very
5 important system that has not really been properly
6 presented in D.C.

7 JUSTICE BREYER: What do we do about that?
8 Because it's very hard for me to focus on the case --
9 the issue you want me to decide --

10 MR. LONG: Well --

11 JUSTICE BREYER: -- without thinking about
12 the one you don't.

13 MR. LONG: Yes.

14 JUSTICE BREYER: And the reasons, as I have
15 categorized this -- the --

16 MR. LONG: There are -- it may be that this
17 is the wrong case.

18 JUSTICE BREYER: So what do --- so what do
19 we do? I mean, I think of this as like Aeschylus; you
20 have the Furies gradually giving way to justice.

21 MR. LONG: Yes.

22 JUSTICE BREYER: I mean, private --

23 MR. LONG: Well --

24 JUSTICE BREYER: -- vengeance is out and
25 justice is in, and we have 3,000 years of that, and they

1 are all going to be variations of that theme and we
2 could think of 100 arguments. Boasting. Then is this
3 special?

4 MR. LONG: Well --

5 JUSTICE BREYER: Well, before I can answer
6 that question, I would like to know whether the
7 government could appoint the private person. After all
8 there is a check -- there is a check against the total
9 Furies, it's the government doing it. Now you say no,
10 the government can't do it, so -- but they can do it on
11 their own. Maybe -- I don't know.

12 MR. LONG: Well --

13 JUSTICE BREYER: How do I get my -- how do I
14 begin to answer these questions bound together in my
15 mind in some partial way?

16 MR. LONG: Well, part -- part of the answer
17 is, of course, that the court exercises control.
18 Another part of the answer is that the D.C. legislature,
19 which is exercising delegated legislative authority from
20 Congress, has determined that this is in the public
21 interest.

22 And you know, the third part of it is that
23 we are not granting these private individuals excessive
24 authority.

25 JUSTICE BREYER: But you want to do that.

1 You see, so there is no control. You are saying we want
2 the private individuals to have the authority to bring
3 criminal contempt; they are on their own; they decide
4 it. The government has nothing to say about this. It's
5 a totally private matter.

6 MR. LONG: No, but -- but you know, D.C.
7 tried for over a decade to do this with public
8 prosecutors, and there just were not enough resources.
9 So what we are allowing here, if I could take it a
10 stop --

11 JUSTICE SCALIA: Some problems have no
12 answers. I mean, that doesn't prove anything.

13 MR. LONG: Well -- there may --

14 JUSTICE SCALIA: Do you think that Congress
15 could -- could set up a private organization to expend
16 Federal funds -- we are going to abolish the Department
17 of Education. And we are going to give its function to
18 a private organization that will take care of all those
19 things. No good, right?

20 MR. LONG: Well, but there is a long, long
21 tradition of having private individuals undertake
22 prosecutions of crimes. I mean, so what you're
23 saying --

24 JUSTICE SCALIA: On -- on behalf of --

25 MR. LONG: On behalf of.

1 JUSTICE SCALIA: -- on behalf of the
2 executive.

3 You are looking for a section of the
4 Constitution; I suggest Article II, Section 1, the
5 executive power shall be vested in the President.

6 MR. LONG: Well, but --

7 JUSTICE SCALIA: And just as the executive
8 power includes the power to expend funds appropriated by
9 Congress, so also the executive power except in the --
10 in the instance of necessity acknowledged by Young,
11 which I think was wrongly decided anyway -- except in
12 that one narrow instance, the -- the power to prosecute
13 belongs to the executive.

14 MR. LONG: But -- but Justice Scalia, we are
15 dealing with the District of Columbia. The Constitution
16 does not assign any powers over the District to the
17 executive or to the judicial branch.

18 JUSTICE BREYER: All right. Now the State
19 of California, trying to save money, say we have a very
20 good idea. We are going to pass one law, abolish all
21 the prosecutors' offices and say wherever there is a
22 victim of crime, that victim will bring the prosecution.
23 Now you really are back to the Furies. Is that
24 constitutional?

25 MR. LONG: Well -- and again, there is

1 abundant historical precedent for that.

2 JUSTICE BREYER: Yes, there was, before --
3 before Aeschylus. Or whatever. But the --

4 (Laughter.)

5 JUSTICE BREYER: You would say that that is
6 constitutional --

7 MR. LONG: Well, if --

8 JUSTICE BREYER: -- to have a statute that
9 all criminal prosecutions would be brought by victims,
10 period?

11 MR. LONG: Well, I think there would be
12 today serious due process problems to work through with
13 that sort of system.

14 JUSTICE BREYER: All right. If there are,
15 then why aren't there the same here?

16 MR. LONG: Well, I would also say the
17 Framers would have understood that to be a perfectly
18 normal system. They would not have thought it was
19 unconstitutional, because private prosecutions were --
20 were common at the time of the Framers.

21 JUSTICE SCALIA: Oh, I don't think that's
22 right. Private prosecutions were common at the time of
23 the framing? You have got to go back a long way before
24 they were common.

25 MR. LONG: Well, I mean there -- that issue

1 is debated in the briefs and I think it was less common
2 in the colonies in the United States than it was in
3 Britain, but certainly wouldn't have been regarded as --
4 as unconstitutional.

5 But this is -- now we are back to the
6 question that I say really the Court should not decide
7 because it was never properly -- whether this can be
8 done by a private individual at all, even as the
9 representative of the government. So I don't think you
10 should get into that.

11 But if you do --

12 JUSTICE SOTOMAYOR: I'm not sure why -- how
13 we can avoid it.

14 MR. LONG: Well, you could wait for a case
15 that presents it -- that properly presents it, where it
16 can be decided --

17 JUSTICE SOTOMAYOR: Well, this case properly
18 presents the argument that a private party can't bring a
19 criminal prosecution on their -- in their own -- perhaps
20 their own name, they can, but on their own, in their own
21 interest. It always has to be a government interest.
22 That's what the argument is.

23 MR. LONG: Yes. And that -- that is
24 something that the Court we think could properly decide.
25 But Justice Breyer, I would --

1 JUSTICE SOTOMAYOR: You are saying the
2 answer to that is, no, they can bring a claim in their
3 own name?

4 MR. LONG: Yes, we -- we are arguing two
5 things. They can bring it in their own name, that's not
6 unconstitutional; and they can certainly -- they could
7 certainly bring it as the representative of the
8 government, that is also constitutional. And -- and so
9 there are two ways --

10 JUSTICE SOTOMAYOR: No, no. But the last
11 question is the one that they are disputing; it can't be
12 in their own interest.

13 MR. LONG: Yes, absolutely.

14 JUSTICE SOTOMAYOR: And you are saying it
15 can.

16 MR. LONG: Yes.

17 JUSTICE SOTOMAYOR: Answer why.

18 MR. LONG: Because the D.C. Council said
19 they could do it. So we have a legislature that has
20 said that the interest of a private party here takes
21 precedence, and that is not an unconstitutional
22 determination by the legislature. In this Court's
23 criminal contempt cases, the Court has said we don't
24 look to whose interest is paramount or what this -- the
25 legislature or what the Court says whose interest is

1 paramount.

2 We recognize that both kinds of contempt,
3 civil and criminal, further the sovereign's interest in
4 vindicating the court's orders and further the private
5 interest in seeing that that order which applies
6 particularly to that party is followed.

7 So you don't look to that at all. You just
8 look to the nature of the punishment. And if it's a
9 determinate sentence versus a coercive sentence, then
10 it's criminal. So that answers all the questions about
11 Brady and what sort of due process --

12 JUSTICE BREYER: You might -- you might --
13 you might say this. To answer your question that is
14 here, there are a couple of ways of doing this. One way
15 you would say is, well, don't worry about this so much.
16 If the answer is no, you can still bring your private
17 prosecution but you have got to get government
18 permission, because you are doing it in the way of the
19 government.

20 But if the answer to the question is if you
21 can't do either, then you might say, then why wouldn't
22 you say why well, aren't we back to the Eumenides, and
23 the answer is going to be this is say contempt.
24 Contempt is special.

25 I don't know whether either or both of those

1 ways would work. So what would you think, since the
2 government has changed its position, of sending this
3 back so some of these things can be worked out? At
4 least we would have some opinions that would help us.

5 MR. LONG: Well, you know, I think that
6 would be an unfortunate result in the sense that, you
7 know, the plea agreement in our view doesn't prevent
8 this prosecution on any reasonable interpretation. You
9 know, we also think for the reasons I have been trying
10 to spell out that there is no real basis for the Court
11 to hold that it is unconstitutional, only in the
12 criminal contempt setting, for the D.C. legislature to
13 find that the private interest here justifies allowing
14 the private party to bring this action but it's still
15 criminal.

16 Because it's a determinate sentence, you get
17 all the due process just as you would as -- if the
18 government brought it. You get all the due process
19 rights which in fact the defendant did get here.

20 CHIEF JUSTICE ROBERTS: Well, unless you
21 think it's a violation of due process for an interested
22 party to be able to criminally prosecute someone at
23 their -- at their discretion.

24 MR. LONG: Well, and that -- and, you
25 know --

1 JUSTICE SCALIA: You want to plea bargain
2 with a -- with an interested party?

3 MR. LONG: Well, but Mr. Chief Justice and
4 Justice Scalia, I mean, this is a system that is in all
5 the States. It's not just domestic violence. It's
6 child custody. It's child support. The amicus briefs
7 say this is --

8 JUSTICE KENNEDY: Criminal -- criminal
9 contempt prosecution or civil contempt prosecution?

10 MR. LONG: Well -- well, but -- yes.
11 Criminal contempt for violation of court orders about
12 domestic violence, about child custody, about child
13 support.

14 CHIEF JUSTICE ROBERTS: Those are in every
15 state?

16 JUSTICE KENNEDY: Well, there can be order
17 to show cause, but you are saying that every state
18 allows a private person to have a criminal prosecution
19 for criminal contempt?

20 MR. LONG: Well, the -- the amicus briefs
21 at -- 19 allow -- at this point, 19 allow you to file a
22 motion. These things are typically begun by motion, not
23 a charging document. And just say --

24 JUSTICE KENNEDY: Well, a -- a motion is
25 different.

1 MR. LONG: Yes.

2 JUSTICE KENNEDY: Then the courts decide --
3 then the court decides based on the position of the
4 defendant, of the person who is charged with contempt --

5 MR. LONG: Yes.

6 JUSTICE KENNEDY: -- whether or not to
7 proceed. And the court certainly can appoint a
8 prosecutor, and does in many states.

9 MR. LONG: Absolutely, Justice Kennedy. And
10 that's really what we're asking. I mean, if you think
11 about these situations, many thousands of cases, most of
12 these individuals have no lawyers. They are pro se. A
13 civil order is entered, about domestic violence, child
14 custody, child support. It's violated, or the
15 individual thinks it's violated.

16 What do they do? They come to the court on
17 their own, so now they are pro se, so now maybe we're in
18 the Furies and Young and Province. But this is -- to
19 make the system work, we at least, I submit, have to
20 allow those individuals to come to the court and file a
21 motion, even though they are interested in, say,
22 somebody's violating the order, Judge, you should do
23 something about it --

24 JUSTICE BREYER: Oh, well, that's a
25 different matter.

1 MR. LONG: No. No. No.

2 JUSTICE BREYER: That's -- that's -- why
3 isn't it a different matter?

4 MR. LONG: I mean, that's what -- that's
5 what happened in this case. It so happens this woman
6 was represented by the D.C. Attorney General, who is a
7 public prosecutor.

8 JUSTICE BREYER: Okay, so now you are into
9 the question of what counts as a prosecution.

10 MR. LONG: Yes, yes.

11 JUSTICE BREYER: And there again, I am at
12 sea. I don't know what the authority is.

13 MR. LONG: Well, if I could -- if I can just
14 do it step by step. I mean, in this case and in tens of
15 thousands of other cases, the first step is just
16 allowing that motion to be filed. And if you don't
17 allow that, you say that's unconstitutional, the entire
18 system will -- will blow up.

19 So if you at least get to that, then we say,
20 well -- the judge looks at it and says, well, civil's
21 not appropriate here because the violation is over; if I
22 am going to punish this, it's going to have to be a
23 determinant sentence, that's criminal. At that point,
24 under this Court's cases, due process requires all sorts
25 of things to protect the defendant.

1 He gets a lawyer, or the other -- now, it
2 would say, you don't have -- the Constitution doesn't
3 require that there be a lawyer appointed to prosecute
4 every one of these, or that would be my submission. So
5 let the individual come in and file a motion. Let the
6 court come in and look at it. Don't require a
7 prosecutor to be appointed, interested or disinterested.
8 And then at that point, if the Court is exercising
9 sufficient control over this, to say if -- if the
10 person, the woman, happens to have that lawyer, that
11 lawyer has to just stand aside and can't play any
12 role --

13 JUSTICE SCALIA: Is that the situation here
14 in D.C.? When the woman comes in, can the judge look it
15 over and say, Ah, you don't have anything here; I'm not
16 going to -- I'm not going to allow you to go ahead.

17 MR. LONG: Well, you know, we have no record
18 on any of this, Justice Scalia, because it was not --

19 JUSTICE SCALIA: How do you understand --
20 how does the statute read? As I understand it, it's not
21 up to the judge to decide whether there is enough there
22 to allow her to go forward or to appoint somebody on his
23 own. She is the prosecutor. It's up to her whether
24 there is --

25 MR. LONG: The way the statute and the court

1 rules read is you file a motion, not an indictment or an
2 information, a motion to hold the person in contempt.

3 As I understand it, it is set down for a
4 hearing. I mean, that's sort of the way the family
5 court works. So they will have a hearing and the judge
6 will look at it, will see what's going on, and --

7 JUSTICE SCALIA: A hearing on whether she
8 can prosecute or a hearing on -- on whether he's going
9 to be guilty or not.

10 MR. LONG: You know, I am very uncomfortable
11 to spend -- I have gone and observed one of these and
12 I've talked to one of the judges, but none of this is in
13 the record, Justice Scalia. I mean, I think what they
14 typically do is try to figure out what it's about,
15 whether it's civil or criminal. If it's criminal, they
16 would appoint a lawyer for the defendant and then they
17 would take it from there, but this is a --

18 CHIEF JUSTICE ROBERTS: But can your private
19 prosecutor, however you want to describe her, could she
20 enter into a plea agreement with the defendant?

21 MR. LONG: Well, they can -- they can agree
22 to withdraw.

23 CHIEF JUSTICE ROBERTS: No, she said you
24 could be subject to you 180 days; I will agree, and
25 you'll plead guilty to 30 days.

1 MR. LONG: Again, none of this is in the
2 record. My understanding is, that doesn't happen,
3 although I am honestly not sure. I think it would be up
4 to the Court to -- to --

5 JUSTICE SCALIA: Or pay \$1,000 to your
6 victim, which is me.

7 MR. LONG: Well, you know, I have no
8 information about whether that sort of thing happens or
9 how the Court would treat it. But I think my basic
10 point is, you know, this is a very important system, not
11 just to the District of Columbia, but to the whole
12 country. And the details --

13 JUSTICE BREYER: I accept that --

14 MR. LONG: And the details matter. And to
15 change it to a system where we now say there have to
16 be --

17 JUSTICE SOTOMAYOR: But a specific
18 country -- this is the point Justice Scalia was
19 making -- the rest of the country, it's a state system.

20 MR. LONG: Well, but -- but D.C., Your
21 Honor --

22 JUSTICE SOTOMAYOR: And -- and there --

23 MR. LONG: -- is like a state in the sense
24 that separation of powers --

25 JUSTICE SOTOMAYOR: Well, but that's --

1 that's the question. That's the question that I don't
2 know that we have enough information in the record
3 about. Is this really -- is this prosecution like a
4 state? That's the Solicitor General's position, which
5 is, it's on behalf of the local government, not on the
6 behalf of the Federal government as a sovereign. I
7 think that's what this case speaks to.

8 MR. LONG: If you look at them -- if you
9 look at this Court's decision in *Palmore*. I mean, we
10 are dealing with an Article I court of the District of
11 Columbia, not an Article III court, to the extent that
12 the sovereign's interest is at stake here. Let's keep
13 the interest of that Article I court.

14 JUSTICE BREYER: Is there somewhere I can
15 look to see what happens? All I can find in the long
16 law is that a violation of the order is a contempt.
17 Fine; no problem. And then the only word about the
18 Petitioner, it says the Petitioner is entitled to relief
19 under this chapter, which contains about 50 different
20 things. And it doesn't say what kind of relief. It
21 doesn't say how you get relief. It doesn't say if you
22 are just asking -- all those things you raised. So how
23 do I find out actually what is in the system.

24 MR. LONG: You mean the relief for contempt?

25 JUSTICE BREYER: It doesn't say that. It

1 says the earlier part of this statute which goes on for
2 six pages in an earlier part of this statute, which goes
3 on for six pages, seven pages. It says, a Petitioner
4 has a right to seek relief under this subchapter.

5 Now, that contains civil contempt. It
6 contains how you get protective orders. It contains a
7 lot of things that are absolutely noncontroversial. So
8 I am trying to figure out: What is the system?

9 MR. LONG: Well, I think -- I think the
10 honest answer is, Justice Breyer, you can find some of
11 these things by looking around, but since we've been
12 talking about issues that were not properly litigated
13 and not decided and we do not have a well-developed
14 record, some of these things are just not going to be
15 available.

16 And again, we think -- you know, this case
17 started out about a plea agreement. It's really a small
18 case. We are now talking about these great big issues.
19 We think the plea agreement doesn't bar this under any
20 reasonable construction, and so the right result is
21 either to dismiss the cases as improvidently granted
22 or to affirm.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 General Kagan.

25 ORAL ARGUMENT OF ELENA KAGAN

1 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING THE RESPONDENT

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

5 There are two questions, properly raised, in
6 this case. Petitioner is right about one. Respondent
7 is right about the other and the disposition. There are
8 a couple of questions that are extremely interesting --
9 I can see why the Court is interested in them -- but
10 were not properly raised in this case, and this Court
11 should not decide them.

12 What Petitioner is right about is that in
13 this criminal contempt action, Ms. Watson, the
14 Respondent, was and must have been exercising sovereign
15 power, that she was acting as a state actor for purposes
16 of the Constitution.

17 What Respondent is right about --

18 JUSTICE SOTOMAYOR: Whose state power was
19 she acting on behalf of?

20 GENERAL KAGAN: The way we understand this,
21 Justice Sotomayor, is that Respondent was exercising
22 sovereign power on behalf of the Article I court, the
23 D.C. court, which of course is partly a local court, but
24 is exercising power whose initial source, original
25 source, is Congress.

1 So she is exercising sovereign power in
2 order to vindicate the Court's order, the order of -- of
3 restraint.

4 JUSTICE SCALIA: Courts don't have the power
5 to incarcerate people. I mean, if you are prosecuting
6 for a criminal offense, you are exercising more than the
7 power of the Court.

8 GENERAL KAGAN: I -- I don't believe that is
9 the case, Justice Scalia. Imagine Respondent
10 essentially doing the same function that an appointed
11 person would do in Young. There, of course, the court
12 appointed the person to prosecute contempt. Here
13 Respondent is essentially doing the same thing, is
14 acting in order to prosecute a contempt on the court and
15 to vindicate the --

16 JUSTICE SCALIA: But nobody asserted in
17 Young that the prosecutor appointed by the court was
18 only exercising the power of the court. Surely it was
19 the power of the government that the -- that the
20 prosecutor was exercising. Now, the court was given the
21 power to appoint that prosecutor, but I would think it's
22 extraordinary to say that there's nothing but the
23 court's power in play.

24 GENERAL KAGAN: Well, the court is surely
25 part of the government, and in the end this is power of

1 the United States. The court is created through power
2 of the United States. It's an Article I court. And so
3 Respondent is no doubt exercising sovereign power and
4 exercising it on behalf of the United States ultimately.

5 JUSTICE SCALIA: Then why doesn't an
6 agreement by the United States not to prosecute carry
7 the day?

8 GENERAL KAGAN: Yes, so this goes to the
9 second question, in which I think Respondent is right.
10 And the reason is that when a single U.S. Attorney's
11 Office says that the government will decide to drop a
12 certain set of charges, that U.S. Attorney's Office we
13 believe is -- is speaking for itself, unless there is
14 some indication that it is speaking more widely in such
15 a way that will bind other parts of the government.

16 CHIEF JUSTICE ROBERTS: That's -- that's
17 absolutely startling. The different U.S. Attorneys all
18 work for your boss, right? They work for the Attorney
19 General. How can one part of the Attorney General agree
20 to something that doesn't bind the other part of the
21 Attorney General?

22 GENERAL KAGAN: The United States Government
23 is a complicated place and the fact that --

24 CHIEF JUSTICE ROBERTS: I take your word for
25 it.

1 (Laughter.)

2 GENERAL KAGAN: -- and the fact that the
3 Southern District of New York agrees to do one thing
4 does not bind, for example, the INS, does not
5 bind the --

6 CHIEF JUSTICE ROBERTS: Maybe or maybe not,
7 but surely it binds the New Jersey U.S. Attorney. If
8 you -- just think about it. The -- the U.S. Attorney
9 from the Southern District says: Look, you agree to go
10 to jail for 10 years and I will drop these 3 charges.
11 Done. Then the U.S. Attorney for New Jersey can come in
12 and prosecute under those three charges?

13 GENERAL KAGAN: Assuming that the U.S.
14 Attorney in the second office has jurisdiction and
15 assuming that the plea agreement does not say anything
16 to suggest that it should be read more broadly, I think
17 the answer is yes.

18 CHIEF JUSTICE ROBERTS: Well, how do you
19 get -- I mean, you are a defendant. You have to go to
20 all more than 50, all the U.S. Attorney's Offices and
21 say, will you agree to this and get everybody to sign
22 off?

23 GENERAL KAGAN: Well, Mr. Chief Justice,
24 even if you are right I think that we prevail. There
25 are two views in the court system. One is the Second

1 and Seventh Circuit and they take the position that I've
2 taken, which is that the default position is that the
3 contracting party binds only the contracting party and
4 that the plea agreement needs to say something in order
5 to apply more broadly.

6 CHIEF JUSTICE ROBERTS: It can't do that.
7 If the U.S. attorney in New Jersey has the authority to
8 prosecute this, the U.S. Attorney in New York can't say,
9 oh, and by the way I bind all the other U.S. Attorneys.

10 GENERAL KAGAN: Well, the U.S. Attorney in
11 New York could -- presumably that U.S. Attorney will
12 know who else might have jurisdiction over the
13 underlying conduct and would go and get an agreement
14 from those other U.S. attorneys. But unless the U.S.
15 Attorney does that, under one approach the agreement
16 bars only the contracting entity. But even if you're
17 right --

18 JUSTICE STEVENS: But do I understand your
19 position that in this particular case the U.S. Attorney
20 could have entered into a settlement agreement that
21 would have bound the Respondent?

22 GENERAL KAGAN: We actually don't think that
23 that's right, Justice Stevens. We think that in fact
24 the U.S. Attorney did not bind the Respondent, but we
25 don't think it could have bound the Respondent, and it

1 goes back to my answer to Justice Sotomayor, because
2 Respondent here is representing the D.C. court system.
3 And so the U.S. Attorney really would have had --

4 JUSTICE STEVENS: You draw a distinction
5 between the D.C. Circuit -- the D.C. and the United
6 States?

7 GENERAL KAGAN: Yes. Ultimately the D.C.
8 court system is an actor that is wielding United States
9 authority. But it's a very different --

10 JUSTICE STEVENS: But you would agree, I
11 take it, that the attorney for the District of Columbia
12 could have bound Respondent? Somebody could bind
13 Respondent without Respondent even knowing about it,
14 that's what I'm asking.

15 GENERAL KAGAN: I think only the D.C. court
16 could have prevented Respondent from going forward. I
17 think that the U.S. --

18 JUSTICE SCALIA: And I have to agree with
19 you that to accept this argument that the prosecutor
20 here is an agent just of the court, just of the D.C.
21 court, not an agent of the executive?

22 GENERAL KAGAN: If -- who would you like the
23 person be an agent of, Justice Scalia?

24 (Laughter.)

25 JUSTICE SCALIA: Well, I'm not making the

1 argument.

2 CHIEF JUSTICE ROBERTS: Usually we have
3 questions the other way.

4 GENERAL KAGAN: I apologize.

5 JUSTICE SCALIA: I don't know that courts
6 have ever asserted that they themselves have the power
7 to prosecute.

8 GENERAL KAGAN: Well, I do think that that's
9 the situation that we find in Young, where a court
10 appoints a person to prosecute a contempt on behalf of
11 the court.

12 JUSTICE SCALIA: Not on behalf of the court.
13 On behalf of the government, and that's why Young said
14 you should offer it first to the United States Attorney,
15 and only if he won't bring it, then you can appoint
16 somebody else to bring it. But the -- the prosecutor is
17 not the court. My God. What a terrible situation. The
18 prosecutor's the court, the judge is the court?

19 GENERAL KAGAN: Well, I do think Young is
20 different, Justice Scalia, because Young was a
21 separation of powers case. This case is not because it
22 arises in D.C. In Young, absolutely the judge has to go
23 to the U.S. Attorney's Office first. But that's not the
24 case here, because normal separation of powers
25 principles are not in application in D.C.

1 JUSTICE SCALIA: Isn't it the case that only
2 the U.S. Attorney can prosecute for this crime? Could
3 the D.C. attorney general or whatever the name of it,
4 what, counsel, prosecute for this felony?

5 GENERAL KAGAN: Justice Scalia, I don't
6 believe that is entirely clear. I think that the court
7 could ask the D.C. Attorney General to prosecute the
8 crime in the same way that the court in Young asked the
9 U.S. Attorney's Office.

10 JUSTICE SCALIA: Because it's all up to the
11 court; the court's the big prosecutor, right?

12 GENERAL KAGAN: Well, just as -- I know you
13 dissented in Young, Justice Scalia. But just as the
14 court in Young goes to the U.S. Attorney first and when
15 the court is told no the court can appoint its own
16 independent prosecutor, essentially that's what is
17 happening here. The court is appointing --

18 JUSTICE KENNEDY: Well, if there were a
19 finding of innocent, or not guilty, by this prosecutor,
20 could the official prosecutor then prosecute again, or
21 would there be double jeopardy? If you are saying they
22 are somehow separate, does the double jeopardy clause
23 apply?

24 GENERAL KAGAN: Well, this Court held in
25 Dixon that the double jeopardy clause does apply,

1 because they're all exercising power --

2 JUSTICE KENNEDY: Well, but that was the
3 same authority.

4 GENERAL KAGAN: Yes, and they all are
5 exercising power from the United States. Dixon involved
6 this very statute.

7 JUSTICE KENNEDY: So you don't think this is
8 a Bartkiss-like case, like Bartkiss v. Illinois?

9 GENERAL KAGAN: I -- I am not familiar with
10 that case, Justice Kennedy, but I do think that the
11 double jeopardy clause -- -

12 JUSTICE KENNEDY: That a State prosecution
13 doesn't bar a later Federal prosecution.

14 GENERAL KAGAN: Yes, that's exactly right,
15 because ultimately all of these power are exercising
16 power that comes from the same source, which is the
17 United States Government.

18 JUSTICE BREYER: Is your argument the broad
19 argument that the Chief Justice was talking about, that
20 we have a man who drives in a car from Baltimore to rob
21 a bank in Washington and the U.S. Attorney in Washington
22 gives him a piece of paper which says, I will not
23 prosecute you for this now or in the future, and
24 suddenly the U.S. Attorney in Baltimore prosecutes it.
25 Are you saying that that is barred or not barred?

1 That's the broad argument.

2 GENERAL KAGAN: Well, under several --

3 JUSTICE BREYER: Or are you making a narrow
4 argument?

5 GENERAL KAGAN: Under several circuits'
6 law --

7 JUSTICE BREYER: Well, I'm just asking you
8 your position on that. Can the -- does this piece of
9 paper from the U.S. Attorney in Washington bar
10 prosecution by the U.S. attorney in Baltimore? Yes or
11 no?

12 GENERAL KAGAN: I have a principal position
13 and I have a back-up position. My principal position is
14 yes, it does, for the reason that I gave to the Chief
15 Justice. To the extent that there is skepticism --

16 JUSTICE BREYER: It does bar?

17 GENERAL KAGAN: It does. The full rule is
18 that the bar is only as to the office that -- that
19 executes the agreement.

20 CHIEF JUSTICE ROBERTS: Counsel, could I ask
21 you could a 1983 or I guess Bivens action be brought
22 against Ms. Watson? The defendant, you know, it turns
23 out he's not guilty and he thinks there was malice.
24 Could he bring a Bivens action against her?

25 GENERAL KAGAN: Mr. Chief Justice, I have

1 not thought about that question. I am completely clear
2 as to your -- the question that you asked to Mr. Long,
3 which is does she have Brady obligations. She does have
4 Brady obligations. She was held to Brady obligations.

5 CHIEF JUSTICE ROBERTS: She's a State actor.
6 She's acting on behalf either of the United States or
7 the District of Columbia. Therefore, she can be sued
8 directly and be personally liable.

9 GENERAL KAGAN: She -- it is absolutely
10 right that she is a State actor for constitutional
11 purposes. And she was treated as such throughout this
12 litigation.

13 To go back to Justice Breyer's point -- may
14 I?

15 CHIEF JUSTICE ROBERTS: Yes, briefly.

16 GENERAL KAGAN: Justice Breyer's question,
17 the Chief Justice's question: Even circuits that apply
18 a default rule whereby the government is the entire
19 government and there needs to be limiting things in the
20 agreement, I think if you look at this agreement you
21 will find those limiting things, both in the cross-outs
22 in the caption and in the particular promises that the
23 United States Government has made, which applies really
24 only to the United States Attorney's Office.

25 Thank you, Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: Thank you, General.

2 Ms. Frankfurt, you have 7 minutes remaining.

3 REBUTTAL ARGUMENT OF JACLYN S. FRANKFURT

4 ON BEHALF OF THE PETITIONER

5 MS. FRANKFURT: Thank you.

6 I just want to say in response both to -- to
7 Mr. Long's comments, that a lack record as to what
8 actually occurred or the general comment, about whether
9 or not Ms. Watson was treated as a State actor -- I
10 actually think there is a -- a decent record in this
11 case that what occurred was not a motion to request the
12 court to issue a show cause, but in fact, a -- a motion
13 that requested -- that triggered a ministerial act,
14 which was an act -- which was used as a charging
15 document, which the judge believed she had no
16 discretion, and the Assistant Attorney General, who was
17 representing the Petitioner, believed she had no
18 discretion to control, and Ms. Watson was treated as
19 bringing the action on her own behalf.

20 That's what the lower court held as a
21 factual matter, and I think it is quite supported by the
22 record.

23 JUSTICE ALITO: Can I ask you this: The
24 District of Columbia Court of Appeals said we are
25 satisfied that no objectively reasonable person could

1 understand that Mr. Robertson's plea agreement bound
2 Ms. Watson and precluded her contempt proceeding against
3 Mr. Robertson. If we accept that, is there any other
4 issue in this case?

5 MS. FRANKFURT: If you -- yes. The issue is
6 whether she could constitutionally bring the case on her
7 own.

8 JUSTICE ALITO: And did you preserve that?
9 If -- if Mr. -- Mr. Robertson had said, I understand
10 this only means that I am not going to be charged with a
11 -- a criminal offense by the United States Attorney's
12 Office for the District of Columbia, and it has no
13 application to this civil contempt proceeding.

14 MS. FRANKFURT: We absolutely raise that
15 because our argument from -- from the very beginning was
16 she can't constitutionally be representing herself in
17 this proceeding. If this is happening constitutionally,
18 she represents the United States, and if she represents
19 the United States, then our plea agreement bars it
20 because our plea agreement was with the government.

21 It indicated the government will not -- will
22 not pursue, and any reasonable person in a --

23 JUSTICE ALITO: But that's a separate
24 question. So the first question is: What was agreed to
25 under the plea agreement, right?

1 MS. FRANKFURT: Yes, and at the time that we
2 signed the plea agreement, there was no precedent for
3 the notion of a private person bringing a criminal
4 action in her own name, interest and on her own behalf.
5 No one would have contemplated that such a thing was
6 constitutional, because you know, back until appeals of
7 felonies --

8 JUSTICE ALITO: Just so I understand what is
9 before us, you preserve -- you saying -- you are saying
10 you preserve the issue that even if your client fully
11 understood that this plea agreement had no application
12 to a criminal contempt proceeding, he preserved the
13 argument that he could contest the criminal contempt
14 proceeding on the ground that it would be
15 unconstitutional?

16 MS. FRANKFURT: I'm sorry. I am not -- I am
17 not sure that I'm understanding, or that my words
18 haven't been misinterpreted.

19 It's certainly not the case that when my --
20 that the reasonable interpretation of that plea
21 agreement was that it wouldn't apply to a criminal
22 contempt proceeding. The only --

23 JUSTICE ALITO: No, I understand that. I
24 understand there's the contract issue. But did you --
25 in the lower court, did you argue even if he gave that

1 up, under the plea agreement, the criminal contempt
2 proceeding still could not be brought?

3 MS. FRANKFURT: Even if he gave up the right
4 of a private person to prosecute on her own behalf? Any
5 agreement --

6 JUSTICE ALITO: Even if he didn't get that
7 -- a bar to that under the plea agreement, the contempt
8 proceeding would still be barred for some other reason?
9 Did you make that argument?

10 MS. FRANKFURT: I am not sure that I can
11 answer that we did, because I am not sure that I -- I
12 understand the question. I -- I know that we did make
13 the argument that it could only have lawfully been
14 brought on behalf of the sovereign, and that the
15 sovereign was the United States. And so our view was if
16 this Court views it the way the lower court did, which
17 was as an action between private parties, then it's
18 unconstitutional under Gompers.

19 JUSTICE SCALIA: You did raise, undoubtedly
20 you say, the point that the only way in which she could
21 be the prosecutor was as an agent of the United States?

22 MS. FRANKFURT: Absolutely.

23 JUSTICE SCALIA: And that it was
24 unconstitutional for her to -- to represent herself.

25 MS. FRANKFURT: Absolutely. I think we

1 wrote the word, you know, "whoever stands in the well of
2 the courtroom, it doesn't matter who that person is;
3 that person represents the sovereign." That's the only
4 constitutional way. If it's viewed that way, it's
5 barred by the plea agreement. If it's not viewed that
6 way, as the lower court construed the local statute to
7 permit, then Gompers v. Buck's Stove does -- there is no
8 authority there to impose a criminal penalty. We would
9 ask the Court to reverse.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

12 (Whereupon, at 12:27 p.m., the case in the
13 above-entitled matter was submitted.)
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