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IN THE SUPREME COURT OF THE UNITED STATES

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 UNITED STATES, :  
                   Petitioner : No. 12-418  
                   v. :  
 ANTHONY JAMES KEBODEAUX :  
 - - - - - x

Washington, D.C.  
 Wednesday, April 17, 2013

The above-entitled matter came on for oral  
 argument before the Supreme Court of the United States  
 at 10:15 a.m.

APPEARANCES:

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     Department of Justice, Washington, D.C.; on behalf of  
     Petitioner.  
 M. CAROLYN FUENTES, ESQ., Assistant Federal Public  
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     Respondent.

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P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-418, United States v. Kebodeaux.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN  
ON BEHALF OF THE PETITIONER

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

Convicted sex offenders pose a serious threat to public safety. When those convictions are entered under Federal law, Congress has the authority to impose both a criminal and a civil sanction for that conduct in order to protect the public.

The Fifth Circuit in this case applied a per se rule that once Respondent had completed his military sentence, Congress lost authority to apply a civil sanction for that violation of Federal law.

That per se rule is wrong.

Nothing in Article I prevents Congress from legislating retroactively with respect to civil remedies for past violations of Federal law. The Ex Post Facto Clause, the Due Process Clause, and Article I analysis under the Necessary and Proper Clause all provide some

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.

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 go 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 register -- 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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