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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:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

M. CAROLYN FUENTES, ESQ., Assistant Federal Public Defender, San Antonio, Texas; on behalf of 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: So 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 ALITO: 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: Yes, 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: Because the States
19 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 SOTOMAYOR: 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: Going back to -- to a
11 primary question, are you challenging -- you didn't on
12 appeal, but it seems as if you're accepting that the
13 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 3583.

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 I?

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, the 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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