IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 08-1224

GRAYDON EARL COMSTOCK, :

JR., ET AL. :

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Washington, D.C.

Tuesday, January 12, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

GEN. ELENA KAGAN, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

G. ALAN DUBOIS, ESQ., Assistant Federal Public Defender, Raleigh, N.C.; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

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

General Kagan.

ORAL ARGUMENT OF GEN. ELENA KAGAN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

GENERAL KAGAN: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Yes.

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

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

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

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

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

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

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

Federal custody over the last 10 years?

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

GENERAL KAGAN: No --

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

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

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

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

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

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

GENERAL KAGAN: Yes, that the civil --

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

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

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

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

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

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

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

individual until he has served his punishment.

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

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

JUSTICE KENNEDY: But the brief -- excuse me.

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

understanding of the reason for the enactment of this?

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

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

JUSTICE GINSBURG: So, is the prisoner --

CHIEF JUSTICE ROBERTS: So, if there were --

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

GENERAL KAGAN: The default position is that

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

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

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

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

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

CHIEF JUSTICE ROBERTS: But, General --

GENERAL KAGAN: -- component to it.

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

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

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

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

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

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

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

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

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

GENERAL KAGAN: Well, I think people – people make judgments --

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

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

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

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

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

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

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

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

GENERAL KAGAN: I can tell, Justice Scalia.

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

(Laughter.)

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

GENERAL KAGAN: No, I --

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

therefore the Federal Government steps in and does it.

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

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

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

JUSTICE KENNEDY: Well, when I was thinking

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

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

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

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

The Commerce Clause is also relevant here

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

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

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

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

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

JUSTICE SOTOMAYOR: It's that special relationship.

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Right.

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

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

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

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

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

(Laughter.)

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

(Laughter.)

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

(Laughter.)

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

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

transfer that person eventually to State custody.

If I can reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, General.

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

MR. DUBOIS: It is, Your Honor.

CHIEF JUSTICE ROBERTS: Mr. DuBois.

ORAL ARGUMENT OF G. ALAN DUBOIS

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Right.

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

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

JUSTICE STEVENS: It may not call for it. My question is would it have the power --

MR. DUBOIS: I would say --

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Try the Tenth Amendment.

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

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

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

there is no claim that these individuals became mentally ill while in the custody of the Bureau of Prisons. These are all, as far as I understand, illnesses which predate their entry into the Federal prison --

JUSTICE ALITO: What about the general proposition that if -- if the incarceration causes a problem, then the Federal Government has the power, ancillary to the power to operate the -- the criminal justice system, to remedy the problems that it has caused by the incarceration?

MR. DUBOIS: Well, Your Honor, I think they have a power, but it’s not an unlimited power. That power is addressed by statute --

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

MR. DUBOIS: They have a power, but it's not an unlimited power. There is a statute, 4245, which allows the government to transfer an individual who becomes ill while in the custody of the Bureau of Prisons, to a psychiatric facility for care and treatment. Now, by the terms of that statute, however, that commitment must end at the end of their sentence, and I think that would be the extent of the government's power.

JUSTICE KENNEDY: Because the government --
JUSTICE ALITO: Why as a matter of constitutional law does it end at that point?
MR. DUBOIS: Because at that point, the government has no live Federal interest. They are -- they have effectuated the power which brought the person into custody. They have fully vindicated the -- the criminal law that brought them into -- into the prisons.
JUSTICE KENNEDY: Well, suppose, in Justice Alito's hypothetical, he caught the communicable disease in the prison as a result of poor prison conditions.
MR. DUBOIS: Well, and I'm sure stuff like that does happen, Justice Kennedy, and, again, the government does, while the person is in the custody of Bureau of Prisons, is entitled to --
JUSTICE KENNEDY: No, no. The hypothetical is that his sentence ends, and they want to commit him to a Federal health facility.
MR. DUBOIS: Because he has -- he has caught some disease --
JUSTICE KENNEDY: Yes.
MR. DUBOIS: -- while in the system? Again, I think -- first, as a practical matter, I don't think

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

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

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

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

JUSTICE BREYER: Well, once you're down that

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

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

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

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

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

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

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

JUSTICE BREYER: Yes, probably the Commerce Clause power.

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

JUSTICE BREYER: So it's fine --

JUSTICE SCALIA: No, no.

(Laughter.)

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

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

MR. DUBOIS: Absolutely, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DUBOIS: Well, there --

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

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

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

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

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

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

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

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

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

saying, well, we have to.

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

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

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

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

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

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

MR. DUBOIS: Well, I --

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

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

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

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

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

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

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

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

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

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

involuntary commitment procedures?

MR. DUBOIS: Every State does, Your Honor.

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

MR. DUBOIS: There would have --

JUSTICE SCALIA: -- the prisoner is unsafe?

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

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

MR. DUBOIS: Yes, absolutely, Your Honor.

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

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

JUSTICE STEVENS: I guess we can all think

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: Well, what would the modification be?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: All right --

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

JUSTICE SOTOMAYOR: But what you're saying

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

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

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

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

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

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

JUSTICE GINSBURG: What about someone who is incompetent to stand trial? I take it you think that that's a perfectly proper application of 4246?

MR. DUBOIS: I believe that is correct. I think under Greenwood that type of commitment is appropriate.

JUSTICE GINSBURG: Does it matter that the person who has been found incompetent to stand trial has now been in custody for three times longer than the maximum sentence?

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

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

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

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

JUSTICE ALITO: Could you explain why the constitutional power that provides the basis for a Federal criminal conviction is exhausted at the end of the -- either the maximum term of imprisonment that Congress chooses to establish when it enacts the statute or at the end of the particular term that is given to this prisoner?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr.

DuBois.

General Kagan, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF GEN. ELENA KAGAN

ON BEHALF OF THE PETITIONER

GENERAL KAGAN: Thank you, Mr. Chief Justice.

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

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

forward, rebuts that as well.

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

Thank you, Mr. Chief Justice.

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

The case is submitted.

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