No. 08-1224

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GRAYDON EARL COMSTOCK, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Congress had the power under Article I of the Constitution to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following four individuals were parties in the court of appeals proceeding, which consolidated five cases from the district court: Shane Catron; Thomas Matherly; Markis Revland; and Marvin Vigil.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 551 F.3d 274. The opinion of the district court (Pet. App. 22a-95a) is reported at 507 F. Supp. 2d 522.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2009. A petition for rehearing was denied on March 10, 2009 (Pet. App. 96a). The petition for a writ of certiorari was filed on April 3, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Necessary and Proper Clause of the United States Constitution, Article I, Section 8, Clause 18, pro-

vides: "The Congress shall have Power * * * [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Relevant statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

Respondents in this case challenge Congress's power to authorize the United States Government to seek court-ordered civil commitment of "sexually dangerous person[s]" who are serving terms of imprisonment because of federal criminal convictions or who have been found mentally incompetent to stand trial on federal criminal charges. In 2006, Congress provided for such commitment proceedings when it added 18 U.S.C. 4248 to the longstanding statutory framework for civil-commitment procedures that apply to persons in federal custody.

1. Federal law began to provide in the middle of the nineteenth century for the United States to assume special control over and responsibilities for some mentally ill persons, including members or former members of the military, residents of the District of Columbia, and individuals who are "in its custody and undergoing imprisonment under its authority." *Government Hosp. for the Insane*, 17 Op. Att'y Gen. 211, 213 (1881). See, *e.g.*, Act of Feb. 7, 1857, ch. 36, §§ 5 and 6, 11 Stat. 158; Act of June 23, 1874, ch. 465, § 1, 18 Stat. 251; Act of Aug. 7, 1882, ch. 433, 22 Stat. 330. Such statutes were seen as vindicating a "duty of the United States" to appropriately treat and superintend, among others, "convicts

who may become insane while in her custody." 17 Op. Att'y Gen. at 212-213 (emphasis omitted).

In instances involving federal prisoners, Congress did not make explicit whether federal custody was to continue beyond the end of the underlying criminal sentence that had caused an individual to come into the government's custody. Largely because the statutes lacked any mechanism for "notice and proper hearing" about whether such a prisoner's mental condition justified "[l]onger detention," the Attorney General construed those statutes as authorizing federal commitment only until the expiration of the criminal sentence. *Commitment to Gov't Hosp. for the Insane*, 30 Op. Att'y Gen. 569, 571 (1916); see also *Care of Insane Convict After Expiration of Term of Imprisonment*, 35 Op. Att'y Gen. 366, 367-369 (1927) (relying on both the 1916 opinion and additional evidence of congressional intent). At that point, it was assumed that the convict would be returned to the place of his former residence, where new commitment proceedings could be initiated under local authority. *Id.* at 368-369; see also Act of May 13, 1930, ch. 254, §§ 6 and 8, 46 Stat. 271, 272 (providing for federal hospitalization of an insane federal prisoner until his maximum sentence was served, and then for "deliver[y] into the custody of the proper authorities of the State, District, or Territory" if the prisoner remained "insane or a menace to the public" when his sentence expired).

The States were not, however, always able and willing to assume custody of mentally ill criminals whom the federal government might release—either before any trial had occurred or at the end of a term of imprisonment. Against that backdrop, in September 1942, the United States Judicial Conference authorized the Chief Justice "to appoint a committee to study * * * the

treatment accorded by the federal courts to insane persons charged with crime." J.A. 61. In discharging its task, that committee of federal judges considered how to respond to the "serious problem" of "what to do with insane criminals upon the expiration of their terms of confinement, where it would be dangerous to turn them loose upon society and where no [S]tate will assume responsibility for their custody." J.A. 73. The committee also addressed a similar problem that had arisen with regard to individuals who were in federal custody because they had been charged with federal offenses but found mentally unfit for trial, and for whom no State would "assume responsibility," even though it was "not safe" for them to be "let at large." J.A. 69.[1]

Responding to the Judicial Conference's recommendations, Congress enacted a comprehensive framework for the court-ordered commitment of various categories of persons in federal custody. See Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (18 U.S.C. 4244-4248 (1952)). Those categories, as currently identified in governing statutory provisions, include persons found to be mentally incompetent to stand trial or to undergo postrelease proceedings (18 U.S.C. 4241, 4246); persons found not guilty by reason of insanity (18 U.S.C. 4243); persons determined to be suffering from a mental disease or defect either before sentencing (18 U.S.C. 4244) or while imprisoned (18 U.S.C. 4245); and federal prisoners whose terms of imprisonment are about to expire but who suffer from a mental disease or defect that would cause their release to create a substantial risk of bodily injury or serious property damage (18 U.S.C. 4246).

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[1] The committee's 1945 report is reprinted at J.A. 61-88.

The procedural safeguards for commitment hearings conducted under this statutory framework are set out in 18 U.S.C. 4247. They include provisions for a court-ordered psychiatric or psychological examination, representation by counsel (including appointed counsel), and the opportunity to testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses who appear at the hearing. 18 U.S.C. 4247(b)-(d).

2. That regime for civil commitment of persons in federal custody was amended and supplemented by Title III of the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act), Pub. L. No. 109-248, 120 Stat. 617. As relevant here, the Adam Walsh Act added 18 U.S.C. 4248, which expressly authorizes the federal government to seek the court-ordered civil commitment of certain "sexually dangerous person[s]" already in its custody. § 302(4), 120 Stat. 620.[2] Section 4248 incorporates the pre-existing procedural safeguards that Section 4247 provides for other forms of federal civil commitment. And, like its analogue in Section 4246, Section 4248 applies, *inter alia*, to persons who are completing terms of federal imprisonment in the custody of the Bureau of Prisons (BOP) and to persons who have been

[2] The Adam Walsh Act also contained various other provisions dealing with sex offenders, including, for example, registration and notification requirements. See §§ 101-146, 120 Stat. 590-607. None of those provisions is implicated by this case, which deals only with civil commitment by the federal government (and possible commitment by the States, to the extent they choose to assume responsibility for the custody, care, and treatment of individuals to whom Section 4248 applies, see 18 U.S.C. 4248(d)).

found mentally incompetent to stand trial on federal criminal charges.[3]

A commitment proceeding under Section 4248 is initiated when the Attorney General, the Director of the BOP, or one of their designees or delegees certifies to the federal district court for the district in which a person is confined "that the person is a sexually dangerous person." 18 U.S.C. 4248(a). As defined by the statute, the term "sexually dangerous person" requires the government to make two showings by "clear and convincing evidence." 18 U.S.C. 4248(d). First, the government must prove that the respondent has previously "engaged or attempted to engage in sexually violent conduct or child molestation." 18 U.S.C. 4247(a)(5). Second, the government must prove "that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6).[4]

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[3] The two categories of persons mentioned in the text are the categories represented by the facts of respondents' cases. In full, Section 4248—like Section 4246—applies to persons who are in the custody of the BOP, who have been committed to the custody of the Attorney General because they have been determined to be mentally incompetent either to stand trial or to undergo postrelease proceedings, or who have had all criminal charges against them dismissed solely for reasons relating to their mental condition. See 18 U.S.C. 4248(a); see also 18 U.S.C. 4248(g) (specifying that if federal criminal charges are dismissed "for reasons not related to the mental condition of the person," continued federal detention is not authorized under Section 4248).

[4] The scope of Section 4248 differs from that of Section 4246 in two principal respects. First, Section 4248 is limited to a specific kind of dangerousness—"sexually violent conduct or child molestation"—whereas Section 4246 addresses those who would pose "a substantial risk of bodily injury to another person or serious damage to property

Once the government has initiated a commitment proceeding in federal district court by filing a certificate of sexual dangerousness, the statute "stay[s] the release" of the respondent from federal custody "pending completion of procedures contained in [Section 4248]." 18 U.S.C. 4248(a). Those procedures—which incorporate some pre-existing provisions from Section 4247 that apply to other parts of the civil-commitment framework—include an opportunity for the district court to order a psychiatric or psychological examination (to be followed by the filing of a report with the court), and a mandatory district court "hearing to determine whether the person is a sexually dangerous person." 18 U.S.C. 4248(a)-(c); see 18 U.S.C. 4247(b). At the hearing, the respondent is entitled to be "represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him." 18 U.S.C. 4247(d); see 18 U.S.C. 4248(c). The respondent must be given "an opportunity to testify, to present evidence, to

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of another," 18 U.S.C. 4246(a). Second, the two sections use different language to describe the mental condition from which the person suffers. The legislative history of Section 4248 describes concern that the definition of "mental disease or defect" in prior statutes like Section 4246 had been applied too narrowly to reach some "sex offenders with mental disorders who are clearly dangerous." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 29, 54 (2005). Similar concerns had caused many States to supplement their civil-commitment provisions for the mentally ill with provisions directed specifically at sexually violent predators. See *Kansas* v. *Hendricks*, 521 U.S. 346, 351-352 (1997). The legislative history reflects Congress's intention that the standards and procedures in Section 4248 be "substantively similar to those approved" by this Court in *Hendricks* and in *Kansas* v. *Crane*, 534 U.S. 407 (2002). See H.R. Rep. No. 218, *supra*, at 29, 55; see also *Hendricks*, 521 U.S. at 358 (noting that this Court has "sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality' ").

subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing." 18 U.S.C. 4247(d). The government bears the burden of proving "by clear and convincing evidence that the person is a sexually dangerous person." 18 U.S.C. 4248(d).

If the district court finds, after the hearing, that the government has carried its burden of proving sexual dangerousness, the respondent is committed to the custody of the Attorney General. 18 U.S.C. 4248(d). At that point, the statute requires that "[t]he Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment." *Ibid.* To that end, the Attorney General is required to "make all reasonable efforts to cause such a State to assume such responsibility." *Ibid.* The statute further provides:

> If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—
>
> > (1) such a State will assume such responsibility; or
> >
> > (2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;
>
> whichever is earlier.

Ibid.; see 18 U.S.C. 4247(a)(2) (defining a "suitable facility" as one that "is suitable to provide care or treatment given the * * * characteristics of the defendant").

Once a person is committed to a federal facility under Section 4248, the director of that facility must "prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment." 18 U.S.C. 4247(e)(1)(B). Those reports are to be "submitted to the court" that ordered the commitment. *Ibid*. The director must also inform the committed person of "any rehabilitation programs that are available" in the facility. 18 U.S.C. 4247(e)(2). If the director determines that the committed person "is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, [the director] shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment." 18 U.S.C. 4248(e). The court must then either order the person's discharge or hold a hearing to determine whether he should be released and, if so, under what conditions. *Ibid*.

Even if the director has not determined that a committed person is no longer sexually dangerous, that person's "counsel" or "legal guardian may, at any time during [that] person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from [the federal] facility," so long as no court has ordered his commitment within the preceding 180 days. 18 U.S.C. 4247(h).

Finally, Congress has specified that nothing in Section 4248 precludes a committed person from "establishing by writ of habeas corpus the illegality of his detention." 18 U.S.C. 4247(g).

3. This case comprises five civil-commitment proceedings that were initiated by the United States in the District Court for the Eastern District of North Carolina. The United States commenced proceedings against each of the five respondents pursuant to Section 4248 in November or December 2006. See J.A. 1, 7, 12, 18, 24.

When the proceedings against them began, respondents Comstock, Matherly, Vigil, and Revland were each about to complete a prison term in BOP's custody, which was to be followed by a three-year period of supervised release. Pet. App. 24a-25a & n.2. Respondent Vigil had been sentenced to a 96-month term of imprisonment after pleading guilty to one count of sexual abuse of a minor; respondents Comstock, Matherly, and Revland had been sentenced, respectively, to 37-month, 41-month, and 60-month terms of imprisonment after pleading guilty to one count each of possession of child pornography. *Ibid.* In addition to those most recent federal convictions, each respondent had a prior history of sex-related offenses.[5]

When the proceeding against the fifth respondent, Catron, was initiated, he was in federal custody pursuant to 18 U.S.C. 4241(d), because he had been found mentally incompetent to stand trial in federal court on four counts of aggravated sexual abuse of a minor under

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[5] For example, it is a matter of public record that Comstock had a conviction for taking aggravated indecent liberties with a child; Matherly had been convicted of traveling in interstate commerce to engage in a sexual act with a minor; Vigil had been convicted of sexual abuse of a minor; and Revland had been convicted of indecent exposure. At the time of certification, the government also had additional information about each respondent that was not reflected in prior convictions but could be used to establish his history of sexually violent conduct or child molestation.

the age of 12 (in violation of 18 U.S.C. 1153 and 2241(c)) and one count of abusive sexual contact (in violation of 18 U.S.C. 1153 and 2244(a)(1)). Pet. App. 25a n.2. In accordance with Section 4241(d), he was held for treatment and evaluation to determine whether he was likely to attain capacity to proceed to trial in the foreseeable future.[6] After concluding that there was no substantial probability that he could be restored to competency and that he would be dangerous to others if released, the United States initiated a civil-commitment proceeding against him under 18 U.S.C. 4246. The Adam Walsh Act was then enacted, and the government concluded, in light of Catron's history and diagnoses, that it should instead seek his commitment under the new provision in Section 4248 dealing specifically with sexually dangerous persons. Accordingly, the government withdrew its Section 4246 certificate and filed a certificate pursuant to Section 4248. J.A. 41-43.

Each of the five respondents moved to dismiss the civil-commitment proceeding against him on several constitutional grounds. They claimed that Section 4248 exceeds Congress's powers under the Commerce Clause; that the clear-and-convincing standard of proof it requires is inadequate to satisfy due process; that Section 4248 violates substantive due process and the equal protection component of the Fifth Amendment; and that a commitment under Section 4248 is a criminal proceeding that violates the Ex Post Facto Clause, the Double Jeop-

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[6] See 18 U.S.C. 4241(d) (allowing the government to hospitalize a defendant for a reasonable period for treatment and evaluation, and then for an additional period if there is a substantial probability that he will attain capacity during that period; and further providing that, if the defendant is not expected to improve sufficiently, he "is subject to the provisions of sections 4246 and 4248").

ardy Clause of the Fifth Amendment, the right to a jury trial under the Sixth Amendment, and the Eighth Amendment's prohibition on cruel and unusual punishments. Pet. App. 27a-28a.

On September 7, 2007, the district court granted respondents' motions to dismiss in a single opinion. Pet. App. 22a-95a. The district court did not address respondents' substantive due process and equal protection claims, *id.* at 94a, and it rejected all of respondents' arguments that were predicated on the proposition that Section 4248 commitment proceedings are criminal rather than civil, *id.* at 29a-32a. But the court held Section 4248 unconstitutional on its face on two grounds.

First, the district court held that Section 4248 is beyond Congress's powers under the Commerce Clause and the Necessary and Proper Clause. The court concluded that to sustain the statute under those Clauses "would allow Congress to take steps to 'prevent' all kinds of conduct that it has no ability to criminalize in the first place," because a person's tendency to engage in sexually dangerous acts does not show a "likelihood" that he "will commit a *federal* crime." Pet. App. 51a, 53a. The court sought to distinguish Section 4248 from Section 4246, which authorizes the commitment of certain mentally ill persons in federal custody when their release would create a substantial risk of bodily injury or property damage. In particular, the court found it significant that Section 4246 requires the Attorney General to certify that "suitable arrangements for State custody and care of the person are not available" before initiating federal commitment proceedings, while Section 4248 requires an inquiry into suitable state arrangements only after a federal court has authorized commitment. *Id.* at 63a-72a. The court concluded that this as-

pect of Section 4248 failed to incorporate sufficient "deference to the [S]tates' police and *parens patriae* powers." *Id.* at 68a.

Second, the district court held that Section 4248 fails to satisfy procedural due process, because it requires the government to prove the commission of prior acts or attempts to engage in sexually violent conduct or child molestation by "clear and convincing evidence," rather than beyond a reasonable doubt. Pet. App. 76a-93a.

The district court stayed implementation of its order pending the government's appeal. See Pet. App. 94a; J.A. 5-6, 11, 16-17, 22-23, 28-29.

4. The court of appeals affirmed. Pet. App. 1a-21a. The court held that Section 4248 is unconstitutional because it exceeds Congress's enumerated powers "to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any federal law." *Id.* at 3a-4a. The court of appeals did not reach any of respondents' other constitutional challenges to the statute, including their argument based on procedural due process. *Id.* at 4a n.1.

a. The court of appeals rejected the government's contention that Congress had the constitutional authority to enact Section 4248 incident to its undisputed authority to establish and provide for the operation of the federal criminal-justice and penal systems and to assume custodial responsibilities for its prisoners, dismissing that argument as a "novel theory" without precedential support. Pet. App. 13a. The court acknowledged that "Congress may establish and run a federal penal system," and that "consistent with its role in maintaining a penal system, the federal government possesses broad powers over persons *during* their prison sen-

tences." *Id.* at 13a-14a. But the court concluded that those "powers are far removed from the indefinite civil commitment of persons *after* the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly." *Id.* at 14a. The court further declared that "[t]he fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls." *Ibid.* The court quoted the district court's conclusion that custody is not a basis for commitment "*after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted," and "where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the [S]tates, actually has the authority to criminalize." *Id.* at 14a-15a (quoting *id.* at 76a).

The court of appeals also rejected the government's contention that Section 4248's civil-commitment procedures further a legitimate government interest in preventing future federal offenses related to the sexual exploitation of children and sexual violence generally. Pet. App. 15a-18a. The court recognized that the federal government has the power to take reasonable steps to prevent federal crimes. The court, however, concluded that Section 4248 "sweeps far too broadly to be a valid effort to prevent *federal* criminal activity," because it "targets 'sexual dangerousness' generally" and "many commitments under [Section] 4248 would prevent conduct prohibited *only* by *state law*." *Id.* at 15a-16a. The court observed that the total number of federal prisoners is small compared to state prisoners, and that the number of prisoners in state custody for sexual assaults

is much larger than the number in federal prisons for sexual crimes. *Id.* at 15a n.8.

b. The court of appeals noted that the circumstances of respondent Catron's case "differ greatly" from those of the other respondents because Catron was indicted for federal offenses but, because of his mental incompetency, has not yet been tried. Pet. App. 19a n.10. As the court of appeals recognized, in *Greenwood* v. *United States*, 350 U.S. 366 (1956), this Court explicitly upheld the federal government's authority to seek and secure the indefinite commitment of persons found incompetent to stand trial under the predecessor version of Section 4246. Pet. App. 18a-19a n.10. Accordingly, the court of appeals acknowledged that the commitment of Catron under Section 4246 "would lie within [the federal government's] constitutional authority." *Id.* at 19a n.10. The court did not explain why the same authority could not justify commitment under Section 4248, which likewise applies to persons found incompetent to stand trial. Rather, the court declined "to bifurcate Catron's unique challenge to [Section] 4248" because, it said, "no party" had asked "for such 'finely drawn' relief." *Ibid.*

c. The United States filed a timely petition for rehearing en banc, which was denied on March 10, 2009. Pet. App. 96a.

5. The United States filed a petition for a writ of certiorari on April 3, 2009.[7] Respondents generally opposed certiorari, but also argued in the alternative that,

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[7] Because the court of appeals had stayed its mandate only until April 7, 2009, the United States sought a further stay from this Court. On April 3, 2009, the Chief Justice ordered a stay of the mandate of the court of appeals' decision pending the disposition of the petition for a writ of certiorari and, in the event the petition were granted, until "the sending down of the judgment of this Court." J.A. 91.

if certiorari were granted, the Court should "exercise judicial economy" by "order[ing] the parties to address whether the Due Process Clause mandates the application of the reasonable doubt standard to the factual determination required by [Section] 4248" (Br. in Opp. 17) —a question that was decided by the district court but not by the court of appeals. The United States opposed the addition of a due process question, because that question was entirely separate from the question presented in the petition and because it had not been addressed by the court of appeals in this case or by any other court of appeals. Reply Br. 8-10.

On June 22, 2009, this Court granted the government's petition for a writ of certiorari, without accepting respondents' invitation to add a due process question to the case. See 129 S. Ct. 2828.

6. While the petition for a writ of certiorari was pending, the Eighth Circuit became the second appellate court to address the constitutionality of Section 4248. It upheld the statute's application to an individual who was about to complete a term of federal imprisonment, describing Section 4248 as "a rational and appropriate means to effectuate legislation authorized by the Constitution." *United States* v. *Tom*, 565 F.3d 497, 504 (8th Cir. 2009), petition for cert. pending, No. 09-5818 (filed Aug. 6, 2009).

SUMMARY OF ARGUMENT

A. The Necessary and Proper Clause authorizes Congress to pursue "legitimate" constitutional ends with any non-prohibited "means" that it determines to be "appropriate" for carrying into execution its other powers. U.S. Const. Art. I, § 8, Cl. 18; *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). It is undis-

puted that, under Article I of the Constitution, Congress may enact criminal laws addressed to subjects within its enumerated powers, provide for the operation of a federal penal system for the punishment of offenses under those laws, and assume for the United States custodial responsibilities for its prisoners. In this case, the civil-commitment proceedings authorized by 18 U.S.C. 4248 are a rational incident to those powers.

Since the mid-nineteenth century, many federal statutes have provided for the custody and treatment of mentally ill persons in whom the federal government has a special interest, such as members of the military, beneficiaries of the Bureau of Indian Affairs, and United States citizens adjudged insane in Canada. Similar statutes applied to federal convicts who became insane while imprisoned and to insane persons charged with federal crimes. The latter statutes were not used to commit prisoners beyond the end of their criminal sentences because the statutes made no provision for notice or a hearing, and local authorities were thought able to deal with the dangerously mentally ill. In time, however, it became clear that States were not always willing and able to assume responsibility for persons who could not be held by the federal government but who would pose a danger to the public if left at large.

In 1949, Congress sought to address that problem. In response to a lengthy study by a committee of the Judicial Conference, it provided for the court-ordered commitment of various categories of persons in federal custody. The covered categories included persons who were found to be mentally incompetent to stand trial or to be suffering from a mental disease or defect while imprisoned, if they would present a danger to others upon release. Those statutes reflected Congress's judg-

ment that the exercise of federal custody over an individual—pursuant to an indictment or conviction as part of the federal criminal-justice process—makes it appropriate to take steps to mitigate significant dangers to the public that might follow from the release of an inmate with a serious mental condition.

Decades of case law concerning the civil-commitment framework from the 1940s support the proposition that Congress operates within the sphere of its legitimate authority when it provides for such steps in conjunction with the government's custodial role in operating the federal penal system. See, *e.g.*, *Greenwood* v. *United States*, 350 U.S. 366 (1956) (upholding commitment under 18 U.S.C. 4246 (1952) of a person indicted on federal charges but incompetent to stand trial); *Jackson* v. *Indiana*, 406 U.S. 715, 732-733 (1972) (describing indefinite commitment in *Greenwood* as justified because the individual was mentally incompetent and posed a danger to the public); *Jones* v. *United States*, 463 U.S. 354, 368-369 (1983) (holding that an insanity acquittee could be detained beyond the maximum sentence that would have followed a conviction because civil commitment rests on the person's "continuing illness and dangerousness").

The provision at issue in this case, 18 U.S.C. 4248, is tailored to individuals with mental disorders that make them likely to engage in acts of sexual violence or child molestation, but it serves the same legitimate ends as prior federal civil-commitment statutes. Section 4248 fulfills the responsibilities that Congress concluded the United States properly assumes as the custodian of federal prison inmates and persons charged with federal offenses, and is thus an appropriate means of executing Congress's Article I powers.

B. Much of the court of appeals' reasoning turned on its conclusion that Section 4248 is inconsistent with this Court's decisions in *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995), because, in the court of appeals' view, the statute "would encroach on the police and *parens patriae* powers reserved to the sovereign [S]tates, conflating what is truly national and what is truly local." Pet. App. 12a (internal quotation marks omitted). Section 4248, however, is readily distinguishable from the statutes at issue in *Morrison* and *Lopez*. Unlike those statutes, Section 4248 includes a kind of jurisdictional element ensuring that each individual case implicates an identifiable federal interest. Section 4248(a) limits the statute's application to individuals who are already "in the custody of the Bureau of Prisons" or "committed to the custody of the Attorney General pursuant to [18 U.S.C.] 4241(d)" or "against whom all criminal charges have been dismissed * * * for reasons relating to the [person's] mental condition." As a result, the section applies only when there is a legitimate federal interest in the case. Congress thus respected the distinction between the national and the local and refrained from asserting anything like "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

Section 4248 also pays due respect to "the etiquette of federalism," *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring), by allowing a State to assume responsibility for the custody and treatment of a federal prisoner who was domiciled or tried in that State, and by requiring the federal government to surrender custody whenever a State chooses to assume such responsibility. 18 U.S.C. 4248(d).

The court of appeals erred in concluding otherwise based on an assumption that the federal government has no legitimate continuing interests in the prisoners subject to commitment under Section 4248. In the first place, as a result of the federal government's incarceration of those persons, Congress could reasonably conclude that the government has a special responsibility to protect the public from the dangers that could ensue from the government's own release of them. Moreover, the federal government often has a continuing relationship with prisoners who are released from federal prison (as in the case of four of respondents here) as a result of provisions for supervised release, which include the requirement "that the defendant not commit another Federal, *State*, or *local* crime during the term of supervision." 18 U.S.C. 3583(d) (emphases added). Finally, many acts that constitute the "sexually violent conduct" or "child molestation" associated with the relevant statutory definitions of "sexually dangerous" are in fact federal crimes, and there is accordingly no small likelihood that individuals eligible for commitment under Section 4248 would engage in future conduct in violation of federal criminal law.

C. The court of appeals also erred in affirming the dismissal of the civil-commitment proceeding against respondent Catron without articulating any reason that the statute is unconstitutional in cases involving individuals, like him, who have been indicted on federal criminal charges but found to be incompetent to stand trial. The court of appeals acknowledged that civil commitment of such individuals "would lie within [the federal government's] constitutional authority" if it were pursued under Section 4246 (Pet. App. 19a n.10), and did not identify any constitutionally significant difference

between Section 4246 and Section 4248. Instead, the court based its decision on its belief that the government failed to point to any basis for treating Catron's case differently from the others. In fact, however, the government specifically argued that Section 4248 would be constitutional as to Catron even under the approach that the court of appeals adopted. See J.A. 56-59, 89-90.

ARGUMENT

CONGRESS MAY PROVIDE FOR THE CIVIL COMMITMENT OF SEXUALLY DANGEROUS PERSONS WHO ARE ALREADY IN FEDERAL CUSTODY BECAUSE THEY HAVE BEEN CONVICTED OF FEDERAL CRIMES OR HAVE BEEN FOUND INCOMPETENT TO STAND TRIAL ON PENDING FEDERAL CHARGES

Section 4248 was enacted to protect against threats posed by the release of federal inmates who suffer from a serious mental illness, abnormality, or disorder and are sexually dangerous to others. The United States' authority over persons lawfully in its custody stands on a different footing than do its powers regarding the general population. In enacting Section 4248, Congress reasonably determined that the initiation of civil-commitment proceedings against a person already in federal custody is an appropriate—and therefore necessary and proper—component of Congress's unquestioned power to enact criminal laws prohibiting conduct within the scope of its Article I powers, to operate a federal penal system for the punishment of offenses under those laws, and to place persons convicted of or pending trial for violating those laws in federal custody.

A. Section 4248 Appropriately Furthers The Discharge Of The Custodial Powers And Responsibilities Arising From Congress's Undisputed Authority To Establish A Federal Penal System

The Necessary and Proper Clause vests in Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, Cl. 18. The Necessary and Proper Clause gives Congress "discretion" to choose the "means by which the powers [the Constitution] confers are to be carried into execution," so long as those means are "appropriate" and "not prohibited," and so long as the end they serve is "legitimate" and "within the scope of the [C]onstitution." *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). The clause thus ensures Congress's ability to legislate on a "vast mass of incidental powers." *Id.* at 420-421. And when Congress legislates in furtherance of a legitimate end, its choice of means is accorded broad deference. See *Sabri* v. *United States*, 541 U.S. 600, 605, 609 (2004) (explaining that *M'Culloch* established "review for means-ends rationality under the Necessary and Proper Clause"); see also *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be '*absolutely* necessary' to the exercise of an enumerated power."); *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934) ("If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to

be attained, are matters for congressional determination alone.").

Pursuant to its power under the Necessary and Proper Clause, Congress has carried into execution various of its enumerated powers—*e.g.*, to lay and collect taxes, to regulate interstate commerce, to establish post offices, to make rules for the regulation of the armed forces, and to exercise jurisdiction over the District of Columbia and federal territories and enclaves, U.S. Const. Art. I, § 8, Cls. 1, 3, 7, 14 and 17—by enacting criminal statutes prohibiting and punishing certain conduct. See *M'Culloch*, 17 U.S. (4 Wheat.) at 416-418 (locating Congress's power to punish most federal crimes in the Necessary and Proper Clause). Those powers encompass the ability to imprison or otherwise provide for the custody or supervised release of indicted or convicted offenders. The authorization of judicial proceedings for the civil commitment of a person who has come into the custody of the United States for violation of federal criminal laws, when such a person is mentally ill and dangerous, is a rational incident to Congress's Article I powers to enact criminal laws, provide for the operation of a penal system, and assume for the United States custodial responsibilities for its prisoners. Thus, that authorization too is within Congress's powers.

1. The federal government has long exercised civil-commitment powers over individuals with whom it has a special relationship

Although a general power of civil commitment is one component of the States' police powers or *parens patriae* powers, civil commitment is not forbidden to the federal government. Indeed, civil-commitment authority over certain persons has long been regarded as prop-

erly incident to the exercise of various federal powers. When the United States assumes special authority over or responsibility for an individual, it may also assume an obligation to protect both the individual and the public from the risk of harm resulting from that person's mental illness.

a. Numerous federal statutes have provided for the custody and treatment of mentally ill persons in whom the federal government has a special interest. In 1855, Congress established a government hospital in Washington, D.C.—later named "Saint Elizabeths Hospital"[8]—in order to provide "the most humane care and enlightened curative treatment of the insane of the army and navy of the United States, and of the District of Columbia." Act of Mar. 3, 1855, ch. 199, 10 Stat. 682. That statute provided for the hospital to receive insane persons belonging to the Army or Navy, under order of the Secretary of War or the Secretary of the Navy, as well as indigent insane persons residing in the District of Columbia. *Id.* §§ 4 and 5, 10 Stat. 682, 683. With regard to military personnel, the authority to assume custody was later extended not only to active members of the armed forces, but also to indigent recent retirees who had become insane "from causes which arose during and were produced by [military] service." Act of July 13, 1866, ch. 179, § 2, 14 Stat. 94.

Additional statutes similarly provided for federal custody and treatment of other categories of insane persons with whom the federal government had some special relationship—*e.g.*, Foreign Service personnel and overseas employees of the Foreign Service adjudged insane in a foreign country, inmates of federal institu-

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[8] See Act of July 1, 1916, ch. 209, 39 Stat. 309.

tions like the Soldiers' Home and the National Home for Disabled Volunteer Soldiers, beneficiaries of the Bureau of Indian Affairs, and United States citizens adjudged insane in Canada, the Panama Canal Zone, or the Virgin Islands.[9] Most of those statutes have been replaced with general laws providing for the hospitalization of mentally ill U.S. nationals returned from foreign countries, see 24 U.S.C. 321-329, or for the use of the District of Columbia's mental-health system to provide services (at federal expense) to "individuals entitled to mental health services under Federal law." 24 U.S.C. 225(a)(5)(i) and 225g(b); see 24 U.S.C. 225(a)(4)(iv) (recognizing the role of Saint Elizabeths since 1855 in providing "patient care and related services for designated classes of individuals entitled to mental health benefits under Federal law, such as certain members and employees of the United States Armed Forces and the Foreign Service, and residents of American overseas dependencies").

The original federal statutes providing for commitment of certain categories of mentally ill persons were understood as vindicating responsibilities the government owed both to the committed individuals and to the public. The District of Columbia Circuit observed in *White* v. *Treibly*, 19 F.2d 712 (1927), in upholding the government's statutory authority to commit a retired naval officer, that the individual maintained connections with the Navy while in retired status and his "care and protection" were a "concern and duty of the government." *Id.* at 713; see also *Government Hosp. for the*

[9] See 24 U.S.C. 191a (1946) (repealed 1960); 24 U.S.C. 194 (1925) (repealed 1984); 24 U.S.C. 195 (1925) (repealed 1984); 24 U.S.C. 195a (1952) (repealed 1984); 24 U.S.C. 196 (1925) (repealed 1984); 24 U.S.C. 196a (1934) (repealed 1960); 24 U.S.C. 196b (1940) (repealed 1984); 42 U.S.C. 222 (1946) (repealed 1984).

Insane, 17 Op. Att'y Gen. 211, 212-213 (1881) (referring to the "duty of the United States to take care of convicts who may become insane while in her custody") (emphasis omitted).

Other decisions affirmed the government's responsibility to protect the public as an incident of its other statutory responsibilities. In *De Marcos* v. *Overholser*, 122 F.2d 16 (D.C. Cir.), cert. denied, 314 U.S. 609 (1941), the court of appeals considered the application of a statute authorizing the Secretary of the Interior, upon the application of the Secretary of State, to transfer to Saint Elizabeths Hospital any United States citizen legally adjudged insane in Canada when residence in a State, a territory, or the District of Columbia could not be established. See Act of Mar. 2, 1929, ch. 509, 45 Stat. 1495 (24 U.S.C. 196a (1934)). In denying the petition for release of a detainee held pursuant to that statute, the court observed that Tennessee, the State to which the detainee sought to be transferred, appeared from the record to be unwilling to accept him, and that therefore the result of "granting his petition would be to set at large a person found in the District of Columbia to be of unsound mind and who had previously been convicted of a serious crime." *De Marcos*, 122 F.2d at 17. The court declared:

> This country, having accepted petitioner from the Canadian Government as an insane citizen of the United States and the court having upon a hearing found him to be incapable of taking care of himself, had the duty to confine him in one of its own institutions for his own safety and for the protection of the public until he could be transferred to one in the state of his residence[.]

Ibid. The court explained that, because there appeared to be no State to which the petitioner could be transferred, he would need to be kept at the federal facility "until cured of his mental disease." *Ibid*.; see also *Howard* v. *Overholser*, 130 F.2d 429, 432 (D.C. Cir. 1942) (holding that an inmate at Saint Elizabeths could not obtain a transfer to his State of legal residence "without regard to its willingness to receive him," because the statute contemplated that transfer would be made only if the inmate could be "delivered into the hands of the state officials who are charged with the custody of its insane residents").

b. Shortly after establishing a federal hospital for the insane of the military and the District of Columbia, Congress recognized that a similar civil-commitment authority was a necessary adjunct to the federal government's role as the operator of a penal system. In 1857, Congress authorized the confinement of "any person, charged with [a federal] crime, * * * found * * * to be an insane person," or "[a]ny person becoming insane during the continuance of his sentence in the United States penitentiary." Act of Feb. 7, 1857, ch. 36, §§ 5 and 6, 11 Stat. 158. Although that provision was sometimes construed as limited to persons charged in the District of Columbia (see *Government Hosp. for the Insane*, 17 Op. Att'y Gen. at 212-213; but see J.A. 71), later statutes provided for the commitment not only of federal convicts who became insane while imprisoned (without regard to where they were imprisoned), but also of persons who had been charged with federal offenses, so long as they were "in the actual custody of [federal] officers." Act of June 23, 1874, ch. 465, § 1, 18 Stat. 251; Act of Aug. 7, 1882, ch. 433, 22 Stat. 330.

As noted above (see p. 3, *supra*), those statutes were not used to hold prisoners in federal custody past the end of their original criminal sentences, because they contained no procedures to authorize such extended detention. But that gap was filled in 1949, when Congress enacted more comprehensive legislation dealing with the civil commitment of persons in federal custody for criminal prosecution or punishment.[10] As discussed above (see pp. 3-4, *supra*), that legislation was based on the recommendations of the Judicial Conference of the United States, the proposals of which were the "product of a long study, by a committee of the Judicial Conference * * * working in close cooperation with representatives of the Department of Justice, of the problem of the care and custody of insane persons charged with or convicted of offenses against the United States." H.R. Rep. No. 1319, 81st Cong., 1st Sess. 1 (1949) (*1949 House Report*); see also *Greenwood* v. *United States*, 350 U.S. 366, 373 (1956) (noting that the bill was proposed "after long study by a conspicuously able committee, followed by consultation with federal district and circuit judges").

The committee of the Judicial Conference had found that there were many cases in which the lack of federal procedures for the ongoing custody of certain dangerous and mentally ill persons in federal custody based on criminal charges or convictions was deeply problematic, because States were not always willing to assume re-

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[10] See Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (18 U.S.C. 4244-4248 (1952)). Those provisions—together with 18 U.S.C. 4241-4243 (1952), which had recodified earlier provisions, see Act of June 25, 1948, ch. 645, 62 Stat. 855—were revised and reorganized in 1984. See Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 403(a), 98 Stat. 2057-2065 (18 U.S.C. 4241-4247).

sponsibility for persons "who would be a menace to be left at large." *Care and Custody of Insane Persons Charged With Federal Offenses: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. 5 (1948) (*1948 Senate Hearing*) (statement of Judge Magruder, chairman of the Judicial Conference Committee); see also J.A. 67-69, 73-74.

Congress responded by enacting comprehensive legislation "virtually identical with that approved by the Judicial Conference." *United States* v. *Alvarez*, 519 F.2d 1036, 1043 (3d Cir. 1975). The legislative history repeatedly articulated the same concerns about the dangers associated with releasing mentally ill individuals whom the States would not themselves commit. As the superintendent of Saint Elizabeths had succinctly explained during the Senate hearings:

> It sounds very simple to say that a man's term has expired, you shall send him back to the State he came from, but not all States are complacent about allowing to be returned Federal prisoners who are alleged to be residents of that State[.]
>
> [Y]ou may fall into a situation in which a prisoner might be a menace to the community if he were not kept under Federal control.

1948 Senate Hearing 14.[11] The House Report further

[11] See also, *e.g.*, *1949 House Report* 2 (noting the need to address the "appreciable number" of former federal prisoners who are not accepted by state institutions for "lack of legal residence in any State but who ought not, however, to be at large because they constitute a menace to public safety") (quoting statement submitted by James V. Bennett, BOP Director); *ibid*. (referring to the "need for specific statutory authority to deal with those cases * * * where [a] mental condition exists upon expiration of sentence, with no constituted authorities able or willing to assume custody, and outright release would be incompatible with

observed that requiring the release of such persons upon completion of their terms of imprisonment could place an "unfair burden upon the community where release [wa]s effected" (which was generally the place of conviction). *1949 House Report* 2 (quoting BOP Director Bennett).

The new statute expressly addressed persons whose prison terms were expiring or who could not be tried because of their mental condition. For an individual in either of those categories, it authorized a federal court to conduct a hearing concerning the individual's mental condition and to "commit him to the custody of the Attorney General until restored to sanity, or sufficiently improved to remove any danger, or accepted by State authorities for safe custody." *1949 House Report* 2-3. The statute also set out a procedure for determining competency to stand trial (including a post-conviction proceeding to determine competency of prisoners whose mental incompetency had not been disclosed at trial), and provided for the commitment of persons found incompetent pursuant to those procedures. Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (18 U.S.C. 4244-4248 (1952)).

2. The federal government's custodial role over persons charged with or convicted of federal crimes justifies steps to protect them and the public from potential harm caused by their mental illness

As the background of the 1949 statute makes clear, Congress recognized that the exercise of federal custody

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public safety"); S. Rep. No. 209, 81st Cong., 1st Sess. 2 (1949) ("A most serious problem arises, however, when the legal residence of an insane prisoner cannot be determined or when the State authorities refuse to accept custody or fail to accord him proper care and treatment.") (quoting letter from Peyton Ford, Assistant to the Attorney General).

alters the relationship of the government to an individual, conferring upon the government a greater degree of authority over the inmate himself and the management of his relationship to society. Having assumed plenary control over and responsibility for an inmate, the federal government becomes obliged to consider the implications of terminating physical custody. In furtherance of the government's custodial role, it is appropriate to take steps to mitigate significant dangers to the public that might follow from the release of an inmate with a serious mental condition. Decades of case law concerning Section 4246 support the proposition that Congress operates within the sphere of its legitimate authority when it provides for such steps in conjunction with the government's custodial role in operating the federal penal system.

a. Civil commitment beyond the term of a prison sentence serves two general purposes necessary and proper to the operation of the prison system, which is unquestionably within the authority of Congress to establish for the punishment of crimes falling within its Article I powers. The first of those purposes is to meet responsibilities to the inmate, including for psychiatric treatment, incurred when the federal government removes him from society. As courts of appeals have observed in addressing civil commitment under 18 U.S.C. 4246, the government's role in that setting "is not that of punitive custodian of a fully competent inmate, but benign custodian of one legally committed to it for medical care and treatment—specifically for psychiatric treatment." *United States* v. *Steil*, 916 F.2d 485, 488 (8th Cir. 1990) (quoting *United States* v. *Charter*s, 863 F.2d 302, 312 (4th Cir. 1988), cert. denied, 494 U.S. 1016 (1990)).

Second, civil commitment protects against the release of a person in government custody whose mental condition is known to pose a danger to the public. A primary purpose of commitment statutes is "to avert the public danger likely to ensue from the release of mentally ill and dangerous detainees"; and, in applying those statutes, courts assume "an awesome responsibility to the public to ensure that a clinical patient's release is safe." *United States* v. *S.A.*, 129 F.3d 995, 999 (8th Cir. 1997) (citation omitted) (applying Section 4246 to authorize indefinite commitment of a juvenile offender beyond his scheduled release date), cert. denied, 523 U.S. 1011 (1998). The statutes thus reflect the understanding—also embodied in the common law—that a custodian properly assumes responsibilities to third parties when he takes charge of a person who is likely to cause harm if not controlled. See Restatement (Second) of Torts § 319 (1965) ("One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."). Cf. *Hinckley* v. *United States*, 163 F.3d 647, 656 (D.C. Cir. 1999) (noting that that principle provides strong incentives for mental hospitals to act responsibly in deciding whether to authorize their patients' releases); *Smith* v. *Hope Vill., Inc.*, 481 F. Supp. 2d 172, 197-199 (D.D.C. 2007) (holding that the duty is not extinguished upon an inmate's release from a facility).[12]

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[12] See also *Lipari* v. *Sears, Roebuck & Co.*, 497 F. Supp. 185, 190 n.5 (D. Neb. 1980) (explaining that Section 315 of the Restatement sets out the "special relationship" that may give rise to a "duty to control the conduct of a third person" and that following sections, including Section

b. This Court in *Greenwood* v. *United States*, 350 U.S. 366 (1956), addressed a statutory provision pertaining to both a short-term civil commitment based on incompetency to stand trial and a potentially longer term of commitment based on findings of mental illness and dangerousness. The provision then codified at Section 4246 (the predecessor to 18 U.S.C. 4246 as it stands today) provided that persons like Greenwood who were indicted on federal charges but incompetent to stand trial could be civilly committed "until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." 18 U.S.C. 4246 (1952); see *Greenwood*, 350 U.S. at 368 n.2. Under the terms of the statute, those persons could also be subjected to the same commitment provisions that applied to convicted prisoners reaching the end of their sentences, which provided for longer-term commitment on the basis of mental illness and dangerousness. See *id.* at 373-374 (explaining that 18 U.S.C. 4246 (1952) provided for the application of 18 U.S.C. 4247 and 4248 (1952) to an individual like Greenwood, who had not yet been tried).

In *Greenwood*, the Court upheld—as "plainly within congressional power under the Necessary and Proper Clause"—the continued commitment under Section 4246 of a person charged with but incompetent to be tried for a federal offense, upon a finding that he satisfied the conditions then specified in Section 4247. 350 U.S. at 375. The Court did so even though it recognized that, in view of the individual's medical condition, there was "little likelihood" that a federal criminal trial would ever

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319, "present specific examples of special relationships giving rise to an affirmative duty").

take place. *Id.* at 375; see also *id.* at 372 (psychiatric report concluded that Greenwood "will probably require indefinite hospitalization to insure his own safety and that of society"). Although the Court cautioned that it was deciding "no more than the situation before us presents" and thus did not "imply an opinion on situations not now before us," it nevertheless held that, in the absence of certainty that "the power that put [Greenwood] into [federal] custody * * * [had been] exhausted," Congress retained a "constitutional power of commitment." *Id.* at 375, 376.

In reaching that conclusion, the Court affirmed a decision of the Eighth Circuit, and rejected decisions of the Ninth and Tenth Circuits that had held the federal government to lack authority to commit an incompetent pretrial detainee who would apparently never be tried because of his mental condition. Compare *Greenwood* v. *United States*, 219 F.2d 376, 387 (8th Cir. 1955) (en banc) ("The national government has the undoubted right to define federal crimes; to provide for the administration and enforcement of its criminal laws; to prescribe the penalties which will be incurred by those violating them; to furnish institutions where such violators can be confined; and generally to do whatever reasonably and lawfully can be done to protect society against such offenders."), aff'd, 350 U.S. 366 (1956), with *Higgins* v. *United States*, 205 F.2d 650 (9th Cir. 1953), abrogated by *Greenwood*, 350 U.S. at 375, and *Wells* v. *Attorney Gen.*, 201 F.2d 556 (10th Cir. 1953), abrogated by *Greenwood*, 350 U.S. at 375.[13]

[13] The *Greenwood* Court's reference to an "unexhausted" power to prosecute echoed the language of the dissenting opinion in the Tenth Circuit's decision in *Wells*, which had explained that "when the federal government has taken one into lawful custody, under the exercise of

In this case, the court of appeals' analysis turned on its view that indefinite commitment was authorized in *Greenwood* only because the respondent had been indicted but not convicted of a federal crime. Pet. App. 18a-20a. Citing the observation in *Greenwood* that the commitment power at issue was "auxiliary to" the government's unexhausted "power to prosecute," 350 U.S. at 375, the court of appeals concluded that the power to commit a person on the basis of his mental condition and dangerousness was upheld solely as a means of protecting the possibility of a future prosecution. Pet. App. 18a-20a.[14]

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valid power, charged with the responsibility of exhausting its jurisdiction over the subject matter as well as the person," the government also assumes a "duty to adequately care and provide for" that person if he is found to be insane. *Wells*, 201 F.2d at 561 (Huxman, J., dissenting).

[14] The district court suggested (Pet. App. 37a & n.7) that *Greenwood* could also be distinguished from this case because the commitment statute upheld there required a "potential harm to the 'interests of the United States,'" while Section 4248 includes no specific reference to federal interests. When *Greenwood* was decided, the statute referred to a finding that a prisoner's release would "probably endanger the safety of the officers, the property, or other interests of the United States." 18 U.S.C. 4247 (1952). Although this Court did not elaborate on that statutory reference, see *Greenwood*, 350 U.S. at 375, later cases construed the statute as authorizing commitment when "release would endanger the safety of persons, property or the public interest in general—not merely the interests peculiar to the United States as such." *United States* v. *Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969) (citing *Royal* v. *United States*, 274 F.2d 846, 851-852 (10th Cir. 1960)). As amended in 1984, Section 4246 is consistent with that broader understanding of federal interests. See 18 U.S.C. 4246(a) (referring to a finding that "release would create a substantial risk of bodily injury to another person or serious damage to property of another"); Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 403(a), 98 Stat. 2063.

The court of appeals' conclusion misperceives the basis for civil commitment and overlooks the way this Court has described the statutory provisions at issue in *Greenwood*. As this Court subsequently explained in *Jackson* v. *Indiana*, 406 U.S. 715, 732-733 (1972), the commitment procedures reviewed in *Greenwood* comported with due process because they were linked to a finding of dangerousness, not just of incompetence to stand trial. The Court in *Jackson* noted that indefinite commitment based solely on mental incompetence likely would not survive constitutional scrutiny. *Ibid*. But, as the Court explained, *Greenwood* did not approve indefinite commitment on that basis. Rather, the *Greenwood* Court had held that commitment was proper under the same provision (and thus the same procedures and conditions) applicable "to those about to be released from sentence." *Jackson*, 406 U.S. at 732. "Accordingly," the *Jackson* Court stressed, "Greenwood was entitled to release when no longer dangerous * * * even if he did not become competent to stand trial[.]" *Ibid*. (citing *Greenwood*, 350 U.S. at 374).

Applying that principle, this Court and others have recognized that the indefinite civil commitment of a mentally incompetent person who has been charged with a federal offense, or one who has been acquitted on the basis of mental illness, must be based on a showing of mental illness and dangerousness—a basis that applies equally to a convicted prisoner who is otherwise due for release. See, *e.g.*, *Jones* v. *United States*, 463 U.S. 354, 368-369 (1983) (holding that an insanity acquittee may be detained indefinitely, without regard for the "acquittee's hypothetical maximum sentence," because no "correlation between severity of the offense and length of time necessary for recovery" is required; noting that

ongoing civil commitment "rests on [a detainee's] continuing illness and dangerousness"); *United States* v. *DeBellis*, 649 F.2d 1, 3 (1st Cir. 1981) (holding that the ongoing and indefinite commitment of a defendant could be justified only by a finding that he posed a danger to himself or others by reason of his mental illness).

Similarly, in *United States* v. *Sahhar*, 56 F.3d 1026, cert. denied, 516 U.S. 952 (1995), the Ninth Circuit rejected an equal protection challenge to the "potentially indefinite commitment" under 18 U.S.C. 4246 of a defendant judged incompetent who had already been committed for a period longer than the maximum penalty for the charged offenses. 56 F.3d at 1028-1029. The court observed that "civil commitment of a dangerous and mentally ill person [was justified] because he was in *federal* custody, not because he was in *pretrial* custody. The fact that an indictment is no longer in place is irrelevant to the governmental interests at stake." *Id.* at 1029. The court identified the federal government's "substantial" interests in "treating Sahhar's mental illness and protecting him and society from his potential dangerousness," *id.* at 1028, 1029, and concluded that—as in *Jones*—the defendant's "confinement rest[ed] on his continuing illness and dangerousness." *Sahhar*, 56 F.3d at 1029 (quoting *Jones*, 463 U.S. at 369).

Under the court of appeals' decision in this case (Pet. App. 18a-20a), the federal government would have had no interest at all in the continued commitment of the insanity acquittees in *Sahhar* and *DeBellis*, because its prosecutorial powers would, by definition, have been exhausted upon acquittal. But—consistent with the special responsibilities that arise from the government's custody over mentally ill persons who pose a danger to themselves or the public—neither the acquittees in

those cases nor the courts ruling on their challenges even suggested that civil commitment in the circumstances present there would violate Article I.

c. Even outside the context of mental illness, the federal government often has a direct interest in the activities of recently released federal prisoners. A period of incarceration of more than 12 months is generally followed by a period of supervised release. See 18 U.S.C. 3583, 3624; see also Sentencing Guidelines § 5D1.1(a) (a sentencing court "shall order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute"). Indeed, terms of supervised release were included in the sentences of respondents Comstock, Matherly, Vigil, and Revland. Pet. App. 24a, 25a n.2.

The conditions associated with supervised release routinely extend beyond the kinds of regulations that the federal government could impose on members of the general population; they include, for example, the requirement "that the defendant not commit another Federal, *State*, or *local* crime during the term of supervision." 18 U.S.C. 3583(d) (emphases added). A violation of those conditions can result in revocation of supervised release and a return to federal prison. 18 U.S.C. 3583(e)(3). Although the terms of supervised release are authorized as part of the original criminal sentence and do not depend on any additional civil-commitment authority, they underscore the federal government's distinct relationship with prisoners convicted of federal crimes, as well as its ability to take special measures to protect the public from harm that might result upon these prisoners' release, even when that harm might

arise from conduct that is otherwise beyond the general regulatory powers of the federal government.

3. Section 4248 serves the same legitimate ends as prior federal civil-commitment statutes

Against this historical background, Section 4248 is correctly understood as a modest expansion of a settled framework for federal civil commitment of dangerous mentally ill persons in federal custody. Section 4248, like the entire framework of which it is a part, adopts appropriate means related to Congress's power to establish a penal system and assume custodial responsibilities over those charged with or convicted of federal offenses.

In the 1990s, in response to "the problem of managing repeat sexual offenders" (*Kansas* v. *Hendricks*, 521 U.S. 346, 350 (1997)), States began to adopt civil-commitment statutes specifically tailored to individuals with mental disorders that made them likely to engage in sexually violent acts. By 2005, Congress was also considering how to amend and supplement the pre-existing framework for federal civil commitment (18 U.S.C. 4241-4247) as part of its efforts to "to address the growing epidemic of sexual violence against children." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20 (2005). Like the similar state legislation, the resulting Adam Walsh Act created a form of civil commitment specifically focused on individuals with a mental illness, abnormality, or disorder that made them sexually dangerous. 18 U.S.C. 4248(a). And, like the federal provisions enacted in the 1940s, the Adam Walsh Act targeted federal prisoners who "ought not * * * to be at large because they constitute a menace to public safety" but whom state institutions will not accept. *1949 House Report* 2 (quoting BOP Director Bennett).

Indeed, for all purposes of constitutional analysis relevant here, Section 4248 parallels Section 4246, which provides for the civil commitment of a prisoner or incompetent accused suffering "from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another." 18 U.S.C. 4246(a). Like Section 4246, Section 4248 provides for civil commitment until the individual in question is sufficiently improved to avoid being a danger or until state authorities are willing to accept custody over him. Compare 18 U.S.C. 4248(d)(1)-(2) (federal treatment lasts until a State "will assume * * * responsibility" or the person "is no longer sexually dangerous to others"), with 18 U.S.C. 4246(d)(1)-(2) (federal treatment lasts until a State "will assume * * * responsibility" or the person can be released without creating "a substantial risk of bodily injury to another person or serious damage to property of another"). Like Section 4246, Section 4248 was tailored to particular concerns associated with the federal government's role as the operator of a criminal justice and penal system.

Moreover, the concerns addressed by Congress in enacting Section 4246 remain at least as significant in supporting Section 4248 today. With the expansion of federal criminal law, the federal government has become responsible for a larger number of federal prisoners, who may be incarcerated for extended periods and in far-flung locations.[15] The period of incarceration severs,

[15] The federal government prosecutes and takes custody of prisoners on behalf of the Nation, placing them in federal facilities that may be far from and unrelated to any prior place of residence. See 18 U.S.C. 3621(b) (authorizing BOP to "designate the place of the prisoner's imprisonment"); Federal Bureau of Prisons, U.S. Dep't of Justice, *Pro-*

at least temporarily and in some cases permanently, the prisoner's direct connection to earlier places of residence (which may not always rise to the level of legal domicile). As was the case in the 1940s, a federal prisoner, upon release, is typically returned to his former place of residence or the place in which he was convicted. See 18 U.S.C. 3624(d)(3). And as in the 1940s, there can be no assurance that a State will be willing or able to assume responsibility for a person upon his release from federal prison—particularly a person with whom the State may have had only limited connections and who might thus be likely to travel to, and pose a threat to the public in, other States.

In finding an absence of constitutional authority to enact such legislation, the court of appeals gave no weight to the responsibilities the United States assumes as the custodian of prisoners in the criminal-justice system. Instead, the court mistakenly rejected as "novel" the proposition that the power to civilly commit a mentally ill and dangerous federal convict beyond his term of criminal incarceration may be necessary and proper to the government's authority to administer a criminal-justice and prison system. Pet. App. 13a.

Because the court of appeals believed that respondents' status as federal inmates was irrelevant to its constitutional analysis (Pet. App. 13a-15a), it addressed the validity of Section 4248 as if federal civil commitment authority were being asserted over members of the general population. As explained below, proceeding

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gram Statement 5100.08 (Sept. 9, 2006) (outlining classification system used in deciding which facilities are appropriate for an inmate). Pursuant to 18 U.S.C. 3621(f)—which was added by § 622 of the Adam Walsh Act, 120 Stat. 634—BOP has established sex-offender management and treatment programs at one facility in each of its six regions.

on that erroneous premise, the court concluded that this case is not meaningfully distinguishable from *United States* v. *Morrison*, 529 U.S. 598 (2000): in holding Section 4248 unconstitutional, it was sufficient, in the court of appeals' view, to conclude that the federal government has no general authority to regulate sexually violent conduct or child molestation. Pet. App. 10a-11a, 15a-17a.

The court of appeals' reasoning marks a sharp and unwarranted break with the longstanding recognition that the federal government's relationship with federal prison inmates or those charged with federal offenses creates interests and responsibilities that would not exist if they had not come into federal custody—and that some of those interests and responsibilities should not terminate automatically at the close of a prison term.

B. Because Section 4248 Is Limited To Persons Already In Federal Custody, It Does Not Inappropriately Intrude On The States' Police Powers

1. The court of appeals relied extensively on this Court's decisions in *Morrison* and *United States* v. *Lopez*, 514 U.S. 549 (1995), which invalidated federal statutes on the ground that they appeared to grant limitless powers to the federal government and would have erased the distinctions between state and federal regulatory spheres. Thus, the court of appeals concluded that, "[a]t its core, the Government's argument [in defense of Section 4248] attempts to * * * 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.'" Pet. App. 17a (quoting *Lopez*, 514 U.S. at 567). The court also stated that Section 4248 "would encroach on the police and *parens patriae* powers reserved to the

sovereign [S]tates, conflating 'what is truly national and what is truly local.'" *Id.* at 12a (quoting *Morrison*, 529 U.S. at 617-618). Those concerns, however, are unfounded. In fact, the ways in which this case differs from *Lopez* and *Morrison* help to demonstrate that Section 4248 does not deploy means that are "prohibited" or otherwise inconsistent "with the letter and spirit of the constitution." *M'Culloch*, 17 U.S. (4 Wheat.) at 421.

In both *Lopez* and *Morrison*, this Court stressed that the statutes under review provided no assurance that the conduct to be regulated in an individual case—either the knowing possession of a firearm within 1000 feet of a school, or a crime of violence motivated by gender—had any direct, as opposed to attenuated, connection with a proper subject of federal regulation. See *Lopez*, 514 U.S. at 563-567; *Morrison*, 529 U.S. at 612-613. As the Court explained, neither statute contained a "jurisdictional element which would ensure, through case-by-case inquiry," that the conduct in question affected interstate commerce. *Lopez*, 514 U.S. at 561; see also *Morrison*, 529 U.S. at 613. In the absence of any such statutory element or other limiting principle, the Court found itself "hard pressed to posit any activity by an individual" that would be beyond the federal government's regulatory powers, and determined that invalidation of the statutes was necessary to preserve the Constitution's "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 564, 567-568; see also *Morrison*, 529 U.S. at 615, 617-618.

Section 4248 does not present the problems identified in *Lopez* and *Morrison*. The statutory text includes a form of the jurisdictional element that was missing in each of those cases. Rather than authorizing civil commitment of "any person" who is found to be sexually

dangerous, Section 4248(a) applies only to individuals who are already "in the custody of the Bureau of Prisons" or "committed to the custody of the Attorney General pursuant to [S]ection 4241" or "against whom all criminal charges have been dismissed * * * for reasons relating to the [person's] mental condition." As a result, there is nothing attenuated about the connection between the federal government and the persons to whom Section 4248 may be applied. By limiting the statute's applicability to a subset of persons who are already in federal custody, Congress has respected the distinction between the national and the local, and refrained from asserting anything like "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.[16]

2. Of course, the direct connections that exist between the federal government and individuals in its custody do not preclude a State from having its own concurrent interest in, for example, a federal inmate who is one of its residents. But Section 4248 accommodates those concurrent interests and does so without violating "the etiquette of federalism." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Under the section, Congress does not *direct* any State to take responsibility for someone

[16] The connection between the federal government and persons who are already in its custody is closer than the connection that was held to satisfy the Necessary and Proper Clause in *Sabri* v. *United States*, 541 U.S. 600 (2004). There, the Court upheld a federal prosecution for attempts to bribe a local official, even though such crimes were "in an area historically of state concern." *Id.* at 608 n.* The Court did not require there to be a direct connection between federal funds and the subject of the bribes. See *id.* at 605-608. Instead, the Court found it sufficient that the corrupt transactions were intended to influence an agent of an entity that had received more than $10,000 in federal benefits in a one-year period. See *ibid.*; 18 U.S.C. 666(a)(2) and (b).

in the federal government's custody. Cf. *Printz* v. *United States*, 521 U.S. 898, 925-933 (1997). Instead, the legislation requires the Attorney General to make "reasonable efforts to cause" the State "in which [a] person is domiciled or was tried" to "assume responsibility for his custody, care, and treatment." 18 U.S.C. 4248(d). As a result, States are free to choose whether to "assume such responsibility," and federal custody under Section 4248 will cease whenever a State chooses to do so.[17] *Ibid.*

Respondents argued below (Resp. C.A. Br. 32-35) that Section 4248's procedure for allowing a State to assume responsibility is constitutionally infirm because it provides that option only after a federal court has held a hearing to determine whether the person is "sexually dangerous." 18 U.S.C. 4248(d). They contrasted that provision with Section 4246, which prescribes the same procedures after a commitment hearing for the Attorney

[17] The statute does not permit a State both to refuse responsibility for a person subject to Section 4248 and to strip the federal government of its powers over that person, but that is unremarkable. The boundaries of Congress's Article I powers do not expand or contract on the basis of States' acquiescence or objection. See, *e.g., Gonzales* v. *Raich*, 545 U.S. 1, 29 (2005) ("Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, so too state action cannot circumscribe Congress' plenary commerce power.") (citation omitted).

Moreover, this Court's decision in *Greenwood* establishes that a State's decision that one of its residents should not be committed does not prevent the federal government from seeking commitment of that person. In *Greenwood*, the petitioner, an Ohio resident, had initially been transferred to Ohio authorities, who determined that he was not insane and released him. See 350 U.S. at 369, 371. The Court nevertheless sustained the determination in a later federal proceeding that the petitioner was insane and subject to federal civil commitment. *Id.* at 375-376.

General to "make all reasonable efforts to cause" a State to assume responsibility for the person's custody and treatment, 18 U.S.C. 4246(d), but also requires the certificate that initiates a federal commitment proceeding under Section 4246 to state "that suitable arrangements for State custody and care of the person are not available." 18 U.S.C. 4246(a).[18] Respondents have characterized Section 4246 as "recognizing the federalism concerns involved in federal civil commitment" and as containing "appropriate safeguards" that Congress could have used "if it wanted to recognize its constitutional obligation to defer to [S]tates' authority and responsibility." Resp. C.A. Br. 32, 35; see also Pet. App. 19a, 63a-67a. But the existence of federal power does not depend on a State's declination of responsibility—and a State cannot prevent the federal government from retaining custody unless it assumes responsibility itself. See note 17, *supra*. It therefore cannot be of constitutional significance whether the relevant States are consulted before or after the federal government has undertaken to prove in court that a person in federal custody is in fact mentally ill and sexually dangerous. Furthermore,

[18] The timing of States' involvement under Section 4248, although different from that used in Section 4246, is not novel. In cases involving a person found not guilty of federal charges by reason of insanity, Section 4243 similarly requires consideration of state arrangements only after the federal court has ordered commitment. See 18 U.S.C. 4243(e). In addition to mimicking that prior example, the sequence in Section 4248 may reflect Congress's recognition that some States are in the process of adopting civil-commitment regimes specifically designed to address sexually dangerous persons. The Adam Walsh Act itself encouraged that process, by authorizing the Attorney General to award federal grants to States "for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons." § 301(a), 120 Stat. 617-618 (42 U.S.C. 16971(a)).

nothing in Section 4248 would prohibit the federal government from acting on an expression of interest by a relevant State in assuming custody before the federal government makes the discretionary decision to initiate proceedings under that section.

3. Finally, the court of appeals erred in concluding that any interests the federal government has in an individual who is released from federal imprisonment are necessarily overwhelmed by the States' more general regulatory interests. See, *e.g.*, Pet. App. 14a (distinguishing between the "broad powers" the federal government "possesses * * * over persons during their prison sentences," and the lack of "any [federal] authority to regulate future conduct that occurs outside of the prison walls"); *id.* at 15a-16a ("many commitments under [Section] 4248 would prevent conduct prohibited *only* by *state law*").

In the first place, the court of appeals' analysis overlooks the federal government's explicit interest, arising from the conditions of supervised release applicable to most prisoners, of ensuring that individuals it releases will comply with state and local, as well as federal, statutes. See pp. 38-39, *supra*. Moreover, as discussed above (see pp. 36-38, *supra*), the government's interest in preventing future crimes by mentally ill persons in the federal government's custody has never turned on whether future harm to persons or property is more likely to be criminalized by federal law or state law. Indeed, when upholding the constitutionality of pretrial incarceration of persons under federal indictment in *United States* v. *Salerno*, 481 U.S. 739 (1987), this Court found that power was justified by the pendency of certain charges combined with the threat that those individuals posed to public safety, without considering whe-

ther they were more likely to violate federal than state law. See *id.* at 747, 750, 755 (referring to Congress's "legitimate" interest in "preventing danger to the community," Congress's interest in preventing "dangerous acts in the community," Congress's concern about a person who "presents a demonstrable danger to the community," "society's interest in crime prevention," and every government's "concern for the safety and indeed the lives of its citizens").

Nevertheless, federal law does criminalize many acts that constitute the "sexually violent conduct" or "child molestation" associated with the definitions of the term "sexually dangerous" in 18 U.S.C. 4247(a)(5) and (6). For example, when acts of sexual abuse occur within the special maritime and territorial jurisdiction of the United States or in Indian Country—as was true of the offenses that caused respondents Vigil and Catron to be in federal custody (Pet. App. 25a n.2)—those acts violate federal criminal law. See, *e.g.,* 18 U.S.C. 2241-2245. So too sexual exploitation of a minor and solicitation of a minor to engage in prostitution or sexual activity, when the Internet or interstate travel is involved, count as federal offenses. See, *e.g.,* 18 U.S.C. 2251.[19]

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[19] Of course, individuals who engage in sexually violent conduct or child molestation—a condition for commitment under Section 4248—are also often likely to commit other types of sex-related crimes subject to federal jurisdiction, such as those involving child pornography on the Internet. See, *e.g., Child Pornography and Pedophilia: Report by the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, S. Rep. No. 537, 99th Cong., 2d Sess. 9 (1986) (discussing the frequency of child pornography use by persons engaged in child molestation, and noting one estimate that more than 50% of arrested child molesters possessed child pornography); Nat'l Ctr. for Missing & Exploited Children, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile On-*

C. Section 4248's Application To Individuals Charged With Federal Offenses But Found Incompetent To Stand Trial Is Constitutional Even Under The Court Of Appeals' Reasoning

In holding Section 4248 unconstitutional in the case of respondent Catron—who was deemed incompetent to stand trial after being charged with four counts of aggravated sexual abuse of a minor under the age of 12 and one count of abusive sexual contact—the court of appeals inexplicably invalidated an application of the statute that survives scrutiny even under that court's erroneous view of Congress's authority.

As discussed above, the court of appeals erred in reading *Greenwood* as limiting the federal government's civil-commitment authority to persons still under indictment for federal crimes. Yet, even under the court of appeals' own reasoning, Catron, who has not yet been tried on the federal charges against him, could properly be subjected to civil-commitment proceedings under Section 4246, because the government's prosecutorial powers against him have not been exhausted. Indeed, the court expressly acknowledged that a commitment of "Catron pursuant to [Section] 4246 * * * would lie within [the United States'] constitutional authority." Pet. App. 19a n.10.[20] The court nevertheless concluded

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line Victimization Study 16 (2005) (finding significant overlap between child pornography possession and sexual victimization of children); Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Special Report, Federal Prosecution of Child Sex Exploitation Offenders, 2006, NCJ 219412*, at 1-2 (Dec. 2007) (prosecutions for "child sex exploitation" crimes increased on average by 15% per year between 1994 and 2006, largely due to increases in child-pornography offenses).

[20] See also Resp. C.A. Br. 56 ("[T]he federal government's power to prosecute, as described in *Greenwood*, remains solely for Catron. For

that a commitment of Catron under Section 4248 would not be constitutional. In doing so, it did not identify any distinction between Section 4246 and 4248 that would be relevant to its constitutional analysis. Instead, it declared: "Because no party asks us to bifurcate Catron's unique challenge to § 4248, we decline to do so." *Ibid.*

The court of appeals' premise that the government did not separately defend custody under Catron's different circumstances is incorrect. Catron's case was one of five separate cases that the government had appealed and that the court of appeals had consolidated. J.A. 53-54. The government's briefs in the court of appeals included separate discussions of the constitutionality under *Greenwood* of Section 4248 as applied to "individuals, like respondent Catron, found incompetent to stand trial and committed to federal custody under § 4241(d)." J.A. 56 (capitalization modified); see also J.A. 56-59; J.A. 89-90. Thus, the lack of "bifurcat[ion]" for Catron's case (Pet. App. 19a n.10) was not a product of any failure by the government to note the different circumstances of his confinement and to argue that Section 4248 could be constitutionally applied, at a minimum, to him.

The court of appeals thus erred in ordering Catron's case to be dismissed on constitutional grounds without examining whether his civil commitment under Section 4248 would, in fact, be unconstitutional.

[the other] respondents * * * the power to prosecute for the federal offenses that resulted in their current custody is exhausted.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 4241 provides:

Determination of mental competency to stand trial to undergo postrelease proceedings[1]

(a) MOTION TO DETERMINE COMPETENCY OF DEFENDANT.— At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

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[1] So in original. Probably should be "stand trial or to undergo postrelease proceedings".

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

(e) DISCHARGE.—When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial or other proceedings. Upon discharge, the defendant is subject to the provisions of chapters 207 and 227.

(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.

2. 18 U.S.C. 4246 provides:

Hospitalization of a person due for release but suffering from mental disease or defect

(a) INSTITUTION OF PROCEEDING.—If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psy-

chiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause

such a State to assume such responsibility for the person's custody, care, and treatment.

(e) DISCHARGE.—When the director of the facility in which a person is hospitalized pursuant to subsection (d) determines that the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on the motion of the attorney for the Government or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person has recovered from his mental disease or defect to such an extent that—

(1) his release would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall order that he be immediately discharged; or

(2) his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that

has been prepared for him, that has been certified to the court as appropriate by the director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a medical facility responsible for administering a regimen imposed on a person conditionally discharged under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that, in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, his continued release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of a facility in which a person is hospitalized pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than ten days after certification by the director of the facility.

(h) DEFINITION.—As used in this chapter the term "State" includes the District of Columbia.

3. 18 U.S.C. 4247 provides:

General provisions for chapter

(a) DEFINITIONS.—As used in this chapter—

(1) "rehabilitation program" includes—

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and sex offender treatment programs, and other treatment programs that will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others; and

(D) organized physical sports and recreation programs;

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant;

(3) "State" includes the District of Columbia;

(4) "bodily injury" includes sexual abuse;

(5) "sexually dangerous person" means a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others; and

(6) "sexually dangerous to others" with respect a person, means that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION.—A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a

licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245, 4246, or 4248, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, and under section 4242, 4243, 4246, or 4248 for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, 4246, or 4248 upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) PSYCHIATRIC OR PSYCHOLOGICAL REPORTS.—A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government, and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4248, whether the person is a sexually dangerous person;

(E) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(F) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental

condition of the defendant should affect the sentence.

(d) HEARING.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) PERIODIC REPORT AND INFORMATION REQUIREMENTS.—(1) The director of the facility in which a person is committed pursuant to—

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245, 4246, or 4248 shall prepare annual reports concerning the mental condition of the person and containing recommendations concerning the need for his continued commitment. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person committed after the beginning of a prosecution of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than

carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is committed pursuant to section 4241, 4243, 4244, 4245, 4246, or 4248 shall inform such person of any rehabilitation programs that are available for persons committed in that facility.

(f) VIDEOTAPE RECORD.—Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.

(g) HABEAS CORPUS UNIMPAIRED.—Nothing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention.

(h) DISCHARGE.—Regardless of whether the director of the facility in which a person is committed has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4244, 4245, 4246, or 4248 or subsection (f) of section 4243, counsel for the person or his legal guardian may, at any time during such person's commitment, file with the court that ordered the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be committed. A copy of the motion shall be sent to the director of the facility in which the

person is committed and to the attorney for the Government.

(i) AUTHORITY AND RESPONSIBILITY OF THE ATTORNEY GENERAL.—The Attorney General—

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to, a person committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243, 4246, or 4248;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, 4246, or 4248 consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) Sections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

4. 18 U.S.C. 4248 provides:

Civil commitment of a sexually dangerous person

(a) INSTITUTION OF PROCEEDINGS.—In relation to a person who is in the custody of the Bureau of Prisons, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons relating to the mental condition of the person, the Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is a sexually dangerous person. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

(b) PSYCHIATRIC OR PSYCHOLOGICAL EXAMINATION AND REPORT.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) HEARING.—The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) DETERMINATION AND DISPOSITION.—If, after the hearing, the court finds by clear and convincing evi-

dence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall place the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment;

whichever is earlier.

(e) DISCHARGE.—When the Director of the facility in which a person is placed pursuant to subsection (d) determines that the person's condition is such that he is no longer sexually dangerous to others, or will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the person's counsel and to the attorney for the Government. The court shall order the discharge of the person or, on motion of the attorney for the Government

or on its own motion, shall hold a hearing, conducted pursuant to the provisions of section 4247(d), to determine whether he should be released. If, after the hearing, the court finds by a preponderance of the evidence that the person's condition is such that—

(1) he will not be sexually dangerous to others if released unconditionally, the court shall order that he be immediately discharged; or

(2) he will not be sexually dangerous to others if released under a prescribed regimen of medical, psychiatric, or psychological care or treatment, the court shall—

(A) order that he be conditionally discharged under a prescribed regimen of medical, psychiatric, or psychological care or treatment that has been prepared for him, that has been certified to the court as appropriate by the Director of the facility in which he is committed, and that has been found by the court to be appropriate; and

(B) order, as an explicit condition of release, that he comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

The court at any time may, after a hearing employing the same criteria, modify or eliminate the regimen of medical, psychiatric, or psychological care or treatment.

(f) REVOCATION OF CONDITIONAL DISCHARGE.—The director of a facility responsible for administering a regimen imposed on a person conditionally discharged

under subsection (e) shall notify the Attorney General and the court having jurisdiction over the person of any failure of the person to comply with the regimen. Upon such notice, or upon other probable cause to believe that the person has failed to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment, the person may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. The court shall, after a hearing, determine whether the person should be remanded to a suitable facility on the ground that he is sexually dangerous to others in light of his failure to comply with the prescribed regimen of medical, psychiatric, or psychological care or treatment.

(g) RELEASE TO STATE OF CERTAIN OTHER PERSONS.—If the director of the facility in which a person is hospitalized or placed pursuant to this chapter certifies to the Attorney General that a person, against whom all charges have been dismissed for reasons not related to the mental condition of the person, is a sexually dangerous person, the Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried for the purpose of institution of State proceedings for civil commitment. If neither such State will assume such responsibility, the Attorney General shall release the person upon receipt of notice from the State that it will not assume such responsibility, but not later than 10 days after certification by the director of the facility.