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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

REPLY BRIEF FOR THE UNITED STATES

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As explained in our opening brief (at 2-3, 24-30), Congress has recognized since the nineteenth century the need for federal commitment of certain categories of persons, in distinctive relationships with the United States, who suffer from mental illness. In 1949, guided by the recommendations of a "conspicuously able committee" of the Judicial Conference, *Greenwood* v. *United States*, 350 U.S. 366, 373 (1956), Congress enacted a comprehensive framework for civil commitment by the United States of federal prisoners reaching the end of their sentences and of persons charged with federal offenses but deemed incompetent to stand trial, when they posed a significant risk of danger because of a mental illness or defect. Pet. Br. 4. The Judicial Conference and Congress recognized that the federal government assumes special obligations by virtue of exercising plenary custodial control over such persons, both to the individuals and to the public. In particular, the enactors

understood that the federal government, in previously removing these individuals from the immediate control, and often the territory, of the States in which they had resided, often rendered those States unwilling or unable to assume responsibility for them upon release. For similar reasons, Congress expanded that framework in 1984 by providing for civil commitment of persons who are charged with federal crimes but found not guilty by reason of insanity, even though those persons are subject to neither pending federal charges nor any federal sentence. 18 U.S.C. 4243; see *Shannon* v. *United States*, 512 U.S. 573, 575-577 (1994).

Since 1990, 21 States have enacted civil-commitment statutes specifically tailored to individuals who suffer from mental disorders that make them likely to engage in sexually violent acts. Pet. Br. 39; Kansas et al. Amici Br. 1-2. In 2006, Congress followed suit, supplementing the established framework for federal civil commitment of certain individuals already in federal custody by adding 18 U.S.C. 4248, which specifically addresses the release from federal custody of persons who would, as a result of a "serious mental illness, abnormality, or disorder," have "serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6); see 18 U.S.C. 4248(a). Section 4248 authorizes the federal government to seek the court-ordered civil commitment of such persons, and—just like other provisions dating back to 1949—expressly allows commitment to extend beyond the end of the criminal sentence or beyond the custodial period otherwise permitted for persons found incompetent to stand trial.

Contrary to respondents' submission, Section 4248 falls well within Congress's powers under Article I, Section 8 of the Constitution. Pursuant to its enumerated

powers over such subjects as interstate commerce and federal taxing and spending—and its authority under the Necessary and Proper Clause to carry those powers into effect—Congress may enact laws establishing criminal offenses and may provide for a criminal justice and penal system under which the United States takes custody of persons charged with and convicted of those crimes. Respondents do not contend otherwise. Section 4248, like the statutory framework enacted in 1949 and supplemented in 1984, is a reasonable incident to the creation and maintenance of that criminal justice and penal system, ensuring that it operates to serve rather than frustrate its intended purposes. Section 4248 is therefore likewise within Congress's Article I powers.

Respondents are correct in contending that civil commitment of the mentally ill is generally a matter for the States, and not for the federal government. But respondents err in failing to recognize the unique relationship and special responsibilities that arise when the federal government indicts and takes into custody a defendant who is found incompetent to stand trial, or when it prosecutes and convicts a defendant and commits him to federal custody to serve a sentence. As the amicus brief filed on behalf of 30 States concludes in discussing the roles of the States and federal government respecting such persons (at 20): "Where the federal government has lawful custody of an individual who is both dangerous and suffering from a mental abnormality, the federal government cannot be constitutionally powerless to provide for the commitment, care, and treatment of that person[.]"[1]

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[1] One amicus brief supporting respondents (National Ass'n of Crim. Def. Lawyers 2-30) raises only due process questions about Section

A. Congress's Enumerated Powers Are Appropriately Advanced By Section 4248, Which Is A Rational Incident Of Custody Over Federal Prisoners

Respondents advance an artificially limited view of the Necessary and Proper Clause and incorrectly portray Section 4248 as too far removed from Congress's Article I powers even though it is an "appropriate" means of ensuring the "legitimate" end of operating a safe and effective criminal justice and penal system (for all the purposes such a system is designed to serve). *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). They also claim that Section 4248 is a novel expansion of federal power, but in doing so they overlook the 1949 overhaul of the statutory framework dealing with mentally ill persons in federal custody as well as similarly motivated statutes dating back to the nineteenth century. All of those historic precedents illustrate why Congress has provided for the commitment of certain federal prisoners with mental disorders "whom it is not safe to let at large" and for whom "no state will assume responsibility." *Greenwood*, 350 U.S. at 374 (quoting Judicial Conference Committee Report); see J.A. 69, 73 (reprinting report).

4248. This Court appropriately declined respondents' request to add a due process question to this case at the certiorari stage, see Br. in Opp. 17; Cert. Reply Br. 8-10, and respondents acknowledge that their Fifth Amendment claim is "not at issue before this Court" and was not reached by the court of appeals, Resp. Br. 43 n.18.

1. Congress may effectuate an enumerated power through the combination of several measures under the Necessary and Proper Clause

Respondents are of course correct in stating that the Necessary and Proper Clause must operate in conjunction with other powers granted by the Constitution. Where respondents err is in contending that there is an insufficient connection between Section 4248 and Congress's enumerated powers. A commitment under Section 4248 is justified by the Necessary and Proper Clause in combination with whatever enumerated power or powers supported the federal prosecution and custody of the individual in the first instance.

As explained in our opening brief (at 23), the Necessary and Proper Clause authorizes Congress to enact criminal statutes prohibiting and punishing certain conduct, and that power includes authority to imprison or otherwise provide for the custody or supervised release of indicted or convicted offenders. Respondents do not dispute those propositions. Instead, respondents would prevent Congress from taking the additional step—in furtherance of the operation of the federal penal system and the custodial responsibilities associated with it—of providing for the civil commitment of a federal prisoner who is mentally ill and dangerous. They claim that the connection between that measure and Congress's enumerated powers rests on "linking remote implications together" and so is too attenuated to bring the Necessary and Proper Clause into play. Resp. Br. 16.

In making that argument, respondents and one of the amicus briefs in their support invoke James Madison and Thomas Jefferson. See Resp. Br. 16; Cato Inst. & Prof. Barnett Amici Br. 18. Although those two figures are often reliable guides to the Constitution's meaning,

this Court never adopted their proposed construction of the Necessary and Proper Clause. See *M'Culloch*, 17 U.S. at 413-421; *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805); see also Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. Rev. 745, 762 (1997) ("Of course, it was the opinion of Marshall, the Supreme Court Chief Justice, not Madison, that prevailed on this question of how to interpret 'necessary.'").

Since *M'Culloch*, it has not been plausible to claim, as Madison did, that Congress lacks the power to charter a national bank because "implications" supporting the need for such a bank to effectuate Congress's enumerated powers cannot be "linked together." 2 Annals of Cong. 1899 (1791); Resp. Br. 16. Similarly, notwithstanding Jefferson's objection, quoted by amici Cato Institute and Professor Barnett (Br. 18), there can be no doubt that Congress may indeed provide for the incorporation of a mining company to produce materials to build ships to support the national defense, notwithstanding the several links in this chain between the company and the Navy.

Just as the Court has "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," *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003) (internal quotation marks omitted), it has rejected the associated view that Congress's choice of means is limited to those "which are most direct and simple," 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1240, at 115 (1833). As a result, this Court has upheld statutes that could only be justified on the basis of a chain involving more than one link, in which one implied power supported and operated in conjunction with another. For example, in *United*

States v. *Hall*, 98 U.S. 343 (1879), the Court upheld a statute making it a federal crime to embezzle or fraudulently convert funds for a military pension even after they had left the federal government's possession. The power to create the pension was implied by Congress's powers to "declare war, raise and support armies, provide and maintain a navy, and make rules for the government and regulation of the land and naval forces." *Id.* at 351. And if Congress had the implied power to create the pension, it necessarily had the further implied power to define and punish a specific kind of fraud associated with that pension. Similarly, in *Greenwood* the Court sustained the exercise of an unenumerated power of indefinite commitment pursuant to another unenumerated power to prosecute someone for a federal crime. See Resp. Br. 3-4 ("'the power to criminalize and punish certain conduct' and 'the power to prosecute'" are not enumerated") (quoting Pet. App. 34a).[2]

Congress also must have the power to take steps to address the consequences of actions that the federal government has taken pursuant to Congress's enumerated and implied powers. Thus, for instance, this Court upheld Congress's tolling of statutes of limitations governing state-law causes of action in state courts as a measure necessary to remedy consequences produced by Congress's exercise of its war powers. See *Stewart* v. *Kahn*, 78 U.S. (11 Wall.) 493, 507 (1871); see also

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[2] See also *Jacob Ruppert* v. *Caffey*, 251 U.S. 264, 282, 299-301 (1920) (upholding power to prohibit production of *non*-intoxicating liquor in aid of Congress's implied power to prohibit production of intoxicating liquor as part of implied war power to "promote the Nation's efficiency in men, munitions and supplies"; describing prior cases demonstrating there is "no basis" to distinguish "between the scope or incidents of an express power and those of an implied power").

Jinks, 538 U.S. at 462-463 (discussing same); cf. *United States* v. *Kagama*, 118 U.S. 375, 384 (1886) (holding that the federal government's "power" to protect the Indians "arises [from] the duty of protection" that was created because the federal government's "course of dealing * * * with them" led to their "helplessness").

There are, to be sure, limits on what Congress may do pursuant to the Necessary and Proper Clause, but those limits come from the requirement that the means chosen by Congress be "consist[ent] with the letter and spirit of the [C]onstitution," *M'Culloch*, 17 U.S. at 421, and that they be rationally related to a legitimate end, *Sabri* v. *United States*, 541 U.S. 600, 605 (2004). The Clause's limits cannot be defined by a formulaic insistence that a chain of implications can have only one link. As this Court has recognized: "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." *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934).

Respondents make no effort to reconcile their arguments with the means-ends-rationality standard this Court described in *Sabri*. Instead, respondents contend only that the commitment of a prisoner who is about to be released is "separate and distinct" from the power justifying federal custody in the first instance. Resp. Br. 18. But that assertion does no more than assume the conclusion, resting on characterizations and labels rather than an assessment of whether Congress could reasonably find a sufficient nexus between the criminal custody of respondents and their civil commitment.

In fact, the implied power to establish a penal system includes the powers of performing the many functions appropriate to the responsible operation of that system. Among those functions are some deriving from the assumption of custody—and removal from the purview of the States—of certain mentally ill and dangerous persons. In particular, as discussed below, Congress has for many decades taken the view that federal custody of such persons appropriately entails a mechanism enabling their civil commitment as their criminal sentences come to a close.

2. Consistent with the government's custodial responsibilities, Section 4248 reasonably addresses the release of those who pose a significant danger as a result of a serious mental condition

Respondents contend that Section 4248 marks a radical break with prior understanding of the federal government's responsibilities in operating the criminal justice and prison systems, claiming (Br. 52) that there is "no historical precedent" for the provision. But an appeal to history in fact shows the rootedness of Section 4248 in a long legislative tradition. The closely related commitment authority in Section 4246 has been on the books for 60 years. And even that provision had links to earlier statutes that provided for the custody and treatment of certain mentally ill persons for whom the federal government had special responsibilities. See Pet. Br. 2-3, 24-29.

Respondents attempt to minimize the pre-1949 statutory history by describing the provisions involved as limited to members of the military or residents of the District of Columbia. Br. 12, 50. Those statutes, however, in fact applied more broadly, to other categories of

people with whom the United States had a distinctive relationship. See Pet. Br. 24-25 & n.9 (citing statutes providing for commitment of Foreign Service personnel and employees, beneficiaries of the Bureau of Indian Affairs, and United States citizens adjudged insane in Canada); see also, *e.g.*, *De Marcos* v. *Overlholser*, 122 F.2d 16, 17 (D.C. Cir.) (approving continued federal commitment of U.S. citizen accepted from Canadian government when Tennessee was unwilling to institutionalize him), cert. denied, 314 U.S. 609 (1941); J.A. 71 (Judicial Conference Committee Report) (observing that under the pre-1949 statutory regime, "in many cases courts have acted on the broader interpretation that the sections authorize committal of any insane person charged with a federal crime"). Respondents correctly note (Br. 50-51) that the pre-1949 statutes were generally not construed as permitting federal commitment past the end of a federal criminal sentence. But that limitation derived from the language of the statutes at issue and, in particular, their failure to provide, as required by due process, for "notice and [a] proper hearing" at which to consider the necessity of further confinement. *Commitment to Gov't Hosp. for the Insane*, 30 Op. Att'y Gen. 569, 571 (1916). The limitation did not reflect a conclusion that the federal government, if acting in accord with statutory authorization and due-process requirements, lacked the power to hold individuals for non-punitive reasons. See Pet. Br. 3.

Respondents also fail to acknowledge the reasons that Congress enacted the seminal 1949 legislation, which this Court described as the product of "long study by a conspicuously able committee [of the Judicial Conference], followed by consultation with federal district and circuit judges." *Greenwood*, 350 U.S. at 373. The

committee's report explained the "serious problem" that had arisen in many instances when the federal government was due to release from lawful custody an individual "whom it is not safe to let at large." J.A. 73, 69; see *Greenwood*, 350 U.S. at 373-374 (discussing the committee's report). That "serious problem" arose in part from special attributes of the federal penal system, which can sever the ties between an inmate and his prior residence. See Pet. Br. 40-41. As the House Report accompanying the 1949 legislation observed, an "appreciable number" of federal prisoners were too dangerous to be released but "lack[ed] * * * legal residence in any State." H.R. Rep. No. 1319, 81st Cong., 1st Sess. 2 (1949) (quoting statement submitted by James V. Bennett, BOP Director). Noting that federal prisoners are generally released at the place of conviction, the House Report observed that requiring the release of persons who "constitute a menace to public safety" in those places, where prisoners might lack any connection, could place an "unfair burden upon the community." *Ibid*. (quoting BOP Director Bennett).

Congress again responded to similar concerns 35 years later, when it enacted 18 U.S.C. 4243, which authorized the commitment of federal defendants (outside the District of Columbia) who were found "not guilty only by reason of insanity." See Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 403(a), 98 Stat. 2059-2061. As the Senate Report explained, up to that point, the only way for federal officials to "obtain civil commitment" of such acquittees was "by urging local authorities to institute such proceedings." S. Rep. No. 225, 98th Cong., 1st Sess. 241 (1983). But "such efforts [we]re rarely successful largely due to a lack of sufficient contacts between the acquitted defendant and

the individual State for the latter to be willing to undertake responsibility for him." *Ibid.*; see also *Shannon*, 512 U.S. at 575-577 ("Reliance on state cooperation was at best a partial solution to a serious problem * * * and federal courts time and again decried this gaping statutory hole.") (internal quotation marks and modifications omitted).[3] Congress thus again determined that the function of federal law enforcement entailed certain authorities relating to civil commitment.

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[3] As respondents' brief quotes at length (at 49-50), several years before Section 4243 was enacted, the House Judiciary Committee explained its decision not to propose a general provision for federal commitment of federal defendants acquitted on grounds of insanity. The committee, in addition to identifying constitutional concerns, prominently relied on the argument that "[o]nce the Federal Government takes on the task of caring for the dangerously mental ill that become involved in the Federal criminal system, Congress would most likely be asked to expand the Federal role even further." H.R. Rep. No. 1396, 96th Cong., 2d Sess. 561 (1980). Although the D.C. Circuit later described that committee report as a "well considered analysis," the court expressly noted that the committee had "draw[n] no firm conclusion" about "whether Congress has the constitutional authority to provide for a nationwide federal commitment procedure." *United States* v. *Cohen*, 733 F.2d 128, 137 (1984) (en banc) (Scalia, J.). In enacting Section 4243 in 1984, Congress effectively rejected the conclusion of the 1980 House Committee. A quarter of a century later, no court—including this Court in *Shannon*—appears to have questioned Congress's power to provide for federal civil commitment of insanity acquittees, even though that commitment cannot rest on any unexhausted power to prosecute. And the practical consequences that the committee feared have not come to pass: The federal government has not been allowed, as the committee feared, "to take over State mental health institutions, or to accept the transfer of those incarcerated there, when the State is allegedly not doing a satisfactory job." H.R. Rep. No. 1396, *supra*, at 561. Nor could the addition of Section 4248—which is carefully limited to persons already in federal custody, 18 U.S.C. 4248(a)—permit such a takeover.

As explained in our opening brief, the factors that tend to diminish States' responsibility for federal prisoners remain significant today. See Pet. Br. 40-41 (describing features of federal custody, including placement in facilities around the country, release in place of former residence or place of conviction, and risks of statelessness). Even today, 14 States have no federal BOP facilities. And individuals who suffer from mental defects requiring special treatment must often be transferred within the federal system, because only five Federal Medical Centers within the BOP provide psychiatric services and only six facilities have sex-offender management and treatment programs.[4] See Pet. Br. 41 n.15; see also *United States* v. *Tom*, 565 F.3d 497, 506 (8th Cir. 2009) ("We must also consider the fact that many, if not most, federal sex offenders are * * * incarcerated outside the state of their domicile or the state in which they were convicted."), petition for cert. pending, No. 09-5818 (filed Aug. 6, 2009).

In enacting Section 4248, Congress reasonably addressed those and other consequences of the federal government's decision to place certain individuals in custody. And, as in 1949 and 1984, Congress did so by providing that the federal government would continue to provide care and custody for individuals with serious mental problems who were dangerous and for whom no States were willing to assume responsibility.

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[4] In addition, sex offenders have a proclivity for "mov[ing] across state lines following their release from federal custody" (Kansas et al. Amici Br. 11-12), which may diminish any particular State's willingness to assume responsibility for them.

3. Section 4248 is consistent with traditional understandings of the duties associated with a custodial role

It is unsurprising that Congress has recognized so often that the federal government's decision to take an individual into custody triggers special obligations. That view is consistent with traditional notions of custodial responsibility reflected in common-law principles. See Pet. Br. 32 (citing 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.")).

Respondents contend (Br. 24) that such principles are inapplicable to a custodian's release of a dangerous, mentally ill person, relying on cases holding that when a custodian has no lawful authority to confine, he also has no duty of care. But here the very question is whether Congress has permissibly conferred that authority because of the inmate's mental condition and capacity to harm. The common-law principle set forth in the Restatement reflects a widely shared understanding of responsible conduct, which also underlies Congress's enactment of Section 4248. That understanding demonstrates why Congress could find it appropriate—and therefore necessary and proper—to provide the federal government with certain civil-commitment authority incidental to its custodial responsibilities.[5]

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[5] One of the cases respondents cite (Br. 24) in fact underscores the special nature of the relationship between a prisoner and his custodian. See *Lamb* v. *Hopkins*, 492 A.2d 1297, 1302 (Md. 1985) (concluding probation officers owed no duty of care because they "did not meet the

Respondents thus mistake the government's reference to tort principles as an argument that "[c]ommon law duties * * * create federal power." Resp. Br. 9. Instead, the common-law principles are relevant here because they illustrate the common-sense basis of Congress's conclusion that the federal government's custodial relationship with an ill and dangerous person may require it to assume special responsibilities for the conduct of that person, including if he were to be released. Other illustrations come from this Court's cases, which recognize that the government has a constitutional "duty to assume responsibility for [an individual's] safety and general well-being" when it takes him "into its custody and holds him there against his will," and acknowledge the force of additional "affirmative duties" that can arise under tort law when the government has a "special relationship[]" with an individual. *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200, 201-202 (1989) (internal quotation marks and citation omitted); see also Pet. Br. 25-26 (quoting cases and Attorney General opinion referring to the federal government's "duty" to care for insane persons in its custody).

Respondents purport (Br. 27-28) to discern no differences in kind or degree between the relationship of the federal government with an ill and dangerous prisoner it is about to discharge and its relationship with a recipient of Social Security, Medicare, or Medicaid benefits, or a federal employee. Although Congress may protect the beneficiaries of its programs and its employees in

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threshold requirement of taking charge of the probationer within the meaning of [Restatement] § 319," which is "typically" met when an individual is placed in "custody," as with "a correctional institution incarcerating a dangerous criminal, or a mental institution confining a dangerous patient") (citation omitted).

certain ways,[6] the federal government's connection to them—and particularly, its responsibility for their custody and conduct—are worlds apart from the relationship between a jailor and prisoner. There is no common-law or common-sense understanding that providing a financial benefit to someone triggers the same kinds of duties (to that person or to others) that taking someone into involuntary custody does—or indeed that it triggers any extensive set of responsibilities at all. See *DeShaney*, 489 U.S. at 201 ("[T]he State does not become the permanent guarantor of an individual's safety by having once offered him shelter."). Congress surely can make such sensible distinctions in undertaking the analysis for means-ends rationality prescribed in *Sabri* and determining what measures are necessary and proper to effectuate Congress's enumerated powers.[7]

4. This Court's decision in Greenwood *supports the constitutionality of Section 4248*

As discussed in our opening brief (Pet. Br. 33-35), *Greenwood* upheld the indefinite commitment of a defendant who had never been convicted of a federal crime and who would, in all likelihood, never be competent to stand trial. 350 U.S. at 370, 374-375 (noting that mental

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[6] See, *e.g.*, *Hall*, *supra* (upholding a statute making it a federal crime to embezzle funds from a military pension); 18 U.S.C. 111, 1114 (making it a federal crime to kill or assault federal employees or officers).

[7] Contrary to respondents' contention (Br. 27), *Reid* v. *Covert*, 354 U.S. 1 (1957), did not "reject[]" the proposition that the government can "regulate [an] activity when it is done by a person with 'connections' to the federal government." Instead, *Reid* rejected only a specific means of regulation—courts-martial for civilians who were not members of the armed forces—on the basis of several constitutional provisions, including the Grand Jury Clause of the Fifth Amendment. 354 U.S. at 22-23 (plurality opinion).

condition was not merely temporary). The Court approved that commitment pursuant to the 1949 statute that authorized the commitment of a mentally ill and dangerous prisoner "whose sentence [wa]s about to expire," 18 U.S.C. 4247 (1952), which the Court construed to apply as well to persons held under 18 U.S.C. 4246 (1952) based on mental incompetence. See 350 U.S. at 368-369, 374. In accordance with 18 U.S.C. 4247 and 4248 (1952), Greenwood was entitled to release if and only if his mental condition improved such that he no longer posed a danger. See *Jackson* v. *Indiana*, 406 U.S. 715, 732 (1972) (explaining that "Greenwood was entitled to release when no longer dangerous").

Under respondents' reading of *Greenwood*, civil commitment extending beyond the end of a prison term or maximum potential sentence may be proper when a defendant has been found incompetent to stand trial and charges against him remain pending, but is outside Congress's authority once a defendant has been tried and convicted. (Respondents do not address whether federal commitment is permissible after a defendant has been acquitted on grounds of insanity, as authorized by 18 U.S.C. 4243.)

Respondents' reading is supported neither by *Greenwood* nor by subsequent cases. As the Court explained in *Jackson*, indefinite commitment based exclusively on incompetency likely could not "survive constitutional scrutiny."[8] 406 U.S. at 733. The commitment in *Greenwood* survived because it relied on the finding "that Greenwood would be dangerous if not committed." *Id.*

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[8] The Court later held that, under the Due Process Clause, "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom." *O'Connor* v. *Donaldson*, 422 U.S. 563, 576 (1975).

at 732. The disputed commitment in this case relies on a similar finding. Indeed, as the brief of the amici States points out (Kansas et al. 20), the federal government's appropriate authority over the "person in custody is, if anything, much *stronger* in the current case" than in *Greenwood*, because four of the respondents have been convicted of federal crimes and served federal prison sentences.[9]

Courts of appeals have followed *Greenwood* and *Jackson* in sustaining the federal civil commitment of defendants held prior to trial for longer periods than their maximum potential terms of imprisonment. Those holdings have been based on a showing of the illness and dangerousness of the person in custody. See *United States* v. *Sahhar*, 56 F.3d 1026 (9th Cir.), cert. denied, 516 U.S. 952 (1995) (sustaining commitment on the basis of federal custody and a finding of future dangerousness); *United States* v. *DeBellis*, 649 F.2d 1, 2-3 (1st Cir. 1981) (holding that the ongoing civil 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).[10] Section 4248 authorizes civil commit-

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[9] Congress carefully calibrated the extent of the federal government's duties and interests with respect to different categories of individuals, declining to provide for continued commitment when a defendant is not convicted and charges are dismissed for reasons unrelated to his mental condition. 18 U.S.C. 4246(g), 4248(g).

[10] Unlike the defendant in *Jones* v. *United States*, 463 U.S. 354 (1983), the defendants in *Sahhar* and *DeBellis* were, as respondents note (Br. 21 n.6), not insanity acquittees. But, as explained in our opening brief (at 37), those decisions were not premised on the non-exhaustion of federal prosecutorial power. The court in *Sahhar* found that the defendant's commitment was justified "because he was in *federal* custody, not because he was in *pretrial* custody." 56 F.3d at 1029. And the court in *DeBellis* "express[ed] no opinion" about whether the power to prose-

ment of persons in custody for reasons and in circumstances not materially different. Longstanding caselaw thus supports the actions at issue.

B. Section 4248 Does Not Improperly Intrude On The States' Police Powers

1. Respondents contend (Br. 34) that Section 4248 is tantamount to a congressional assertion of a "general power to regulate all sexual violence." As discussed in our opening brief (at 43-44), however, that assertion is fundamentally mistaken. Section 4248 includes a kind of jurisdictional element ensuring that each case brought under it is an appropriate subject for the exercise of federal power. 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 [federal] criminal charges have been dismissed * * * for reasons relating to the [person's] mental condition." As a result, the section applies only when the federal government has a close connection to the person committed and a strong interest in and responsibility for regulating that person's conduct. In enacting Section 4248, Congress thus respected the Constitution's underlying distinction between the national and the local, included a federal jurisdictional nexus to maintain that distinction, and refrained from asserting anything like "a general police power." *United States* v. *Lopez*, 514 U.S. 549, 567 (1995).

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cute had been exhausted by the length of pretrial detention. 649 F.2d at 2. Moreover, as discussed above (see note 3, *supra*), we are aware of no case concluding that Congress lacks the power to provide for federal civil commitment of those found not guilty by reason of insanity, even though the power to prosecute is necessarily exhausted at that point.

2. a. Respondents' implicit invocation of the Tenth Amendment is equally inapposite. Resp. Br. 37-47. It is of course true that Congress may not "commandeer" a State's legislative process, *New York* v. *United States*, 505 U.S. 144, 161 (1992), or "conscript[]" state officers to implement federal directives, *Printz* v. *United States*, 521 U.S. 898, 935 (1997). But Section 4248 does not "authorize[]" the federal government "to regulate the police" of a state or locality. Resp. Br. 36 (quoting Alexander Hamilton's Opinion on the Constitutionality of a National Bank). To the contrary, like earlier federal civil-commitment provisions, it seeks to prevent the dangers posed by the release of a sexually dangerous federal inmate and avoid placing an "unfair burden upon the community where [his] release is effected," H.R. Rep. No. 1319, *supra*, at 2 (quoting statement of BOP Director Bennett), while preserving the ability of the State in which the person was convicted or previously resided to assume responsibility for him and his conduct. As 30 amici States conclude in their brief: "[T]he federal program at issue in this case in no way intrudes on traditional state police power prerogatives." Kansas et al. 6-7.[11]

b. Respondents' suggestion (Br. 40-41) that Section 4248 does not accord with the "etiquette of federalism" is particularly misplaced. Both Section 4246 and Section 4248 require that the Attorney General transfer an individual to state custody if the State in which he was tried

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[11] When Congress enacted Section 4248, it also provided for funding to States "for the purpose of establishing, enhancing, or operating effective civil commitment programs for sexually dangerous persons." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 301, 120 Stat. 617-618 (42 U.S.C. 16971).

or resided is willing to provide appropriate care. 18 U.S.C. 4246(d); 18 U.S.C. 4248(d).

Respondents find that structure constitutionally flawed because state law might not provide for the detention of mentally ill and sexually dangerous persons. Thus, respondents declare that "States are powerless to prevent the detention of their citizens under [Section] 4248, even if detention is contrary to the States' policy choices." Resp. Br. 11; see also *id.* at 41-43.

That objection seems, at best, highly conjectural. It has not been previously raised in this litigation, and no State has criticized the statute on that basis. To the extent the argument has any bite, it comes from the suggestion that in enacting Section 4248, Congress has attempted to supplant generally applicable state law. But in fact Congress has done nothing of the kind. Section 4248 applies in limited circumstances, to persons who are distinctively situated in relation to both federal and state authorities. Any individual in this class is not merely "one of [a State's] citizens." Resp. Br. 42. Indeed, it is precisely because federal custody often removes individuals from and severs their connections with their States that Congress first enacted civil-commitment provisions for persons reaching the end of their federal sentences. Such provisions ensure that States need not choose between assuming responsibility for a dangerous person with whom they have no substantial connection and allowing that person to be released into the general population.[12]

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[12] Respondents also misapprehend the operation of Section 4248(d), which requires that a committed person be turned over to state custody when an appropriate authority will assume responsibility. Contrary to respondents' suggestion (Br. 40-41), even a State that has received an inmate pursuant to a conditional release need not detain him indefi-

Moreover, as explained in our opening brief (at 46 & n.18), there is nothing novel or constitutionally significant about asking a State whether it is willing to assume responsibility for an individual after a court has determined, at the federal government's behest, that he is subject to commitment. The federal government would indeed impose a greater burden on the State by requiring a decision before commitment proceedings had taken place. In that event, the State would have to shoulder the burden of proving to the relevant court that the individual meets the standards for commitment. It is especially reasonable to reject that distribution of labor when the individual has been in federal custody, removed from the general population of the State, and subjected to psychological evaluations by federal personnel.

c. Respondents acknowledge that Section 4248 and the longstanding Section 4246 alike apply to persons (such as respondents) who are completing federal prison sentences or who have been charged with federal crimes and held for the maximum period allowed by 18 U.S.C. 4241 on account of mental incompetence. They nonetheless attempt to "contrast" Section 4248 with Section 4246, pointing out that Section 4248 "is not limited to individuals who have been hospitalized and certified as mentally ill, and it does not require the federal government to seek appropriate state care before pursuing

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nitely if it concludes that other treatment alternatives will not jeopardize the public safety. The State can propose an alternative to the court that authorized commitment and take any steps approved by the court. See 18 U.S.C. 4248(e). Moreover, if a State has been authorized to commit the person under state law, the federal government cooperates in seeking to dismiss the Section 4248 action, thus ceding jurisdiction to the State.

federal commitment." Resp. Br. 12; see also *id*. at 54-55. But Section 4248 requires proof of a "serious mental illness, abnormality, or disorder," see 18 U.S.C. 4247(a)(6), of the kind warranting commitment when combined with proof of dangerousness, see *Kansas* v. *Hendricks*, 521 U.S. 346, 357-360 (1997); see also Pet. Br. 6 n.4 (explaining Congress's intention that the standards under Section 4248 be substantively similar to those approved in *Hendricks*). And respondents offer no reason to think that the extent of Congress's Article I powers hinges on the difference between a Section 4246(a) certification by "the director of a facility in which [the] person is hospitalized" and a Section 4248(a) certification by an individual authorized by the Attorney General or the Director of the BOP. In practice, the certification processes under Section 4248 and Section 4246 are equally focused on medical concerns.[13]

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[13] When BOP identifies an inmate as a potential candidate for commitment under Section 4246, he is evaluated at one of BOP's psychiatric referral centers. Four Federal Medical Centers provide psychiatric services to male inmates, and one treats female inmates. Based on the reports of medical personnel, the warden (as the "director" of the facility) may certify an individual for commitment under Section 4246. When BOP identifies an inmate as a potential candidate for commitment under Section 4248, he is ordinarily evaluated at one of BOP's facilities in Butner, North Carolina. The individual authorized by the BOP Director to make certifications under Section 4248(a) is the Chairperson of the Certification Review Panel (CRP), which manages review of relevant materials, including psychological reports. See J.A. 40, 43, 46, 49 (certifications by Dr. William T. Bickart, a psychologist and Interim Chairperson of the CRP); J.A. 52 (certification by Dr. Paul Sahwell, also a psychologist and Interim Chairperson).

C. Section 4248's Application To Individuals Charged With Federal Offenses But Found Incompetent To Stand Trial Is Constitutional

Respondent Catron was not nearing the end of a federal term of imprisonment when the Section 4248 proceeding against him began. Instead, he had been charged with multiple counts of aggravated sexual abuse of a minor and then found incompetent to stand trial. Pet. App. 25a n.2. As a result, the Section 4248 proceeding against him was based on the statute's application to persons "who ha[ve] been committed to the custody of the Attorney General pursuant to [S]ection 4241(d)." 18 U.S.C. 4248(a); see J.A. 43 (certification).

1. The court of appeals described Catron's circumstances as "seemingly unique" and "differ[ing] greatly from those" of the other respondents. Pet. App. 19a n.10. Nevertheless, it "decline[d]" to "bifurcate Catron's unique challenge to [Section] 4248," on the purported ground that "no party" had "ask[ed] for such 'finely drawn' relief." *Ibid*. (quoting *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 330-331 (2006)).

Respondents contend (Br. 55) that this Court should not consider Section 4248's application to Catron because, in the court of appeals, "the government did not make a separate argument with respect to Mr. Catron or ask that he be treated differently from the other Respondents." As explained in our opening brief (at 50), however, that characterization of the government's position in the court of appeals is incorrect. The government appealed a district court decision holding the statute unconstitutional as applied to Catron, and the court of appeals consolidated Catron's case with those of the other respondents. J.A. 53-54. In the court of appeals, the government's briefs 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).[14] And in this Court, the second part of the question on which certiorari was granted is specifically devoted to the constitutionality of Section 4248 as applied to persons—such as Catron—"who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial."

2. On the merits, respondents' attempt to distinguish Catron's case from *Greenwood* fails. Respondents contend (Br. 56) that *Greenwood* allowed for commitment "to treat the disease that stood as an obstacle" to prosecuting Greenwood but did not permit commitment "for any other purpose." That theory rests on a misreading of *Greenwood* and the underlying statutes. Although the petitioner in *Greenwood* was found incompetent to stand trial, his continued commitment was based on the separate determination that, "if released, he would probably endanger the safety of the officers, property, or other interests of the United States." 350 U.S. at 372; see also *id.* at 369 n.4 (quoting 18 U.S.C. 4248 (1952)). As this Court later explained in *Jackson*, "Greenwood was entitled to release when no longer dangerous * * * even if he did not become competent to stand trial[.]" 406 U.S. at 732. Accordingly, respondents err in claiming that *Greenwood* allowed continued custody only for the purpose of enabling future prosecution.

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[14] The relevant portions of the government's briefs are reprinted at J.A. 56-59 (opening brief) and J.A. 89-90 (reply).

Like the court of appeals (Pet. App. 19a n.10), respondents apparently concede (Br. 57) that Catron can be constitutionally committed pursuant to 18 U.S.C. 4246. There is, however, no distinction between Sections 4246 and 4248 with regard to the length of a potential commitment. Under both provisions, the individual is to be placed in a suitable facility for treatment until the "earlier" of two events occurs: (1) a State agrees to assume responsibility; or (2) a court determines that his release or conditional release would no longer pose the danger to others that led to the commitment. 18 U.S.C. 4246(d)(1) and (2), 4248(d)(1) and (2). And if the individual is restored to competency prior to that time, the prosecution may proceed and any future custody would then depend on the course of the prosecution.[15] Commitment under Section 4248 of Catron—as an individual found incompetent to stand trial—is therefore constitutional.

* * * * *

The only issue in this case concerns federal power. Respondents acknowledge (Br. 43 n.18) that no due process claims are before this Court. Were respondents presently confined under a state statute directly analogous to Section 4248, they would now have no constitutional complaint. The question therefore is whether the federal government can exercise powers of civil commit-

[15] If the custodian of the facility in which the individual is detained submits "a report stating that the defendant is presently competent to stand trial," the court could "treat the report as a certification filed pursuant to [S]ection 4241(e)." S. Rep. No. 225, *supra*, at 237. That would enable the court to terminate hospitalization and "set the date for trial or other proceedings." 18 U.S.C. 4241(e). But that is not a possibility for Catron at this time, because respondents acknowledge he "is currently incompetent to stand trial." Resp. Br. 56.

ment of mentally ill and sexually dangerous persons of the kind any State could exercise, when (but only when) those persons are currently in the custody of the federal government for being charged with or convicted of committing federal criminal offenses.

The answer to that question is yes. Necessary and proper to the enforcement of federal criminal law and to the operation of a federal penal system are certain incidental powers, including resort to civil commitment of ill and dangerous persons who could pose a threat to the public if released. That authority, far from resembling any general police power, is tied to a specific federal responsibility and interest in the condition and conduct, present and future, of persons held in the federal penal system. And the exercise of that authority imposes no burden—indeed, is specifically designed to alleviate an otherwise significant burden—on the States. Respondents should be subject to the civil commitment standards and procedures of Section 4248.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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