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SORNA: An Abridged Legal Analysis of 18 U.S.C. §2250 (Failure to Register as a Sex Offender)

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Summary

Section 2250 of Title 18 of the United States Code outlaws an individual's failure to comply with federal Sex Offender Registration and Notification Act (SORNA) requirements. SORNA demands that an individual—previously convicted of a qualifying federal, state, or foreign sex offense—register with state, territorial, or tribal authorities. Individuals must register in every jurisdiction in which they reside, work, or attend school. They must also update the information whenever they move, or change their employment or educational status. Section 2250 applies only under one of several jurisdictional circumstances: the individual was previously convicted of a qualifying federal sex offense; the individual travels in interstate or foreign commerce; or the individual enters, leaves, or resides in Indian country. The Supreme Court in *Nichols v. United States* held that SORNA, as originally written, had limited application to sex offenders in the United States who relocated abroad. The International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders [Act], P.L. 114-119 (H.R. 515), however, anticipated and addressed the limit identified in *Nichols*.

Individuals charged with a violation of Section 2250 may be subject to preventive detention or to a series of pre-trial release conditions. If convicted, they face imprisonment for not more than 10 years and/or a fine of not more than $250,000 as well as the prospect of a post-imprisonment term of supervised release of not less than 5 years. An offender guilty of a Section 2250 offense, who also commits a federal crime of violence, is subject to an additional penalty of imprisonment for up to 30 years and not less than 5 years for the violent crime.

The Attorney General has exercised his statutory authority to make SORNA applicable to qualifying convictions occurring prior to its enactment. The Supreme Court rejected the suggestion of the United States Court of Appeals for the Fifth Circuit that Congress lacks the constitutional authority to make Section 2250 applicable, on the basis of a prior federal offense and intrastate noncompliance, to individuals who had served their sentence and been released from federal supervision prior to SORNA's enactment, *United States v. Kebodeaux*, 134 S. Ct. 2496 (2013).

The Fifth Circuit's *Kebodeaux* opinion aside, the lower federal appellate courts have almost uniformly rejected challenges to Section 2250's constitutional validity. Those challenges have included arguments under the Constitution's Ex Post Facto, Due Process, Cruel and Unusual Punishment, Commerce, Necessary and Proper, and Spending Clauses.

This report is in an abridged version of CRS Report R42692, *SORNA: A Legal Analysis of 18 U.S.C. §2250 (Failure to Register as a Sex Offender)*, without the footnotes or the attribution or citations to authority found in the parent report.

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Introduction

Federal law punishes convicted sex offenders for failure to register as the Sex Offender Registration and Notification Act (SORNA) demands. The offense consists of three elements: (1) a continuing obligation to report to the authorities in any jurisdiction in which the individual resides, works, or attends school; (2) the knowing failure to comply with registration requirements; and (3) a jurisdictional element, *i.e.*, (a) an obligation to register as a consequence of a prior qualifying federal conviction or (b)(i) travel in interstate or foreign commerce, (ii) travel into or out of Indian country, or (iii) residence in Indian country. Violators face imprisonment for not more than 10 years. If an offender also commits a federal crime of violence, the registration transgression carries an additional penalty of imprisonment for not more than 30 years, but not less than 5 years.

The Adam Walsh Child Protection and Safety Act created SORNA. SORNA called for a revision of an earlier nationwide sex offender registration system. Its predecessor, the Jacob Wetterling Act, encouraged the states to establish and maintain a registration system. Each of them had done so. Their efforts, however, though often consistent, were hardly uniform. The Walsh Act preserved the basic structure of the Wetterling Act, expanded upon it, and made more specific matters that were previously left to individual state choice. The Walsh Act contemplated a nationwide, state-based, publicly available, contemporaneously accurate, online system. Jurisdictions that failed to meet the Walsh Act's threshold requirements faced the loss of a portion of their federal criminal justice assistance grants. The Walsh Act vested the Attorney General with authority to determine the extent to which SORNA would apply to those with qualifying convictions committed prior to enactment. He promulgated implementing regulations imposing the registration requirements on those with pre-enactment convictions.

Conscious of the legal and technical adjustments required of the states, the Walsh Act afforded jurisdictions an extension to make the initial modifications necessary to bring their systems into compliance. Thereafter, states not yet in compliance have been allowed to use the penalty portion of their federal justice assistance funds for that purpose. The Justice Department indicates that 17 states, 3 territories, and numerous tribes are now in substantial compliance with the 2006 legislation.

Elements

Section 2250 convictions require the government to prove (1) that the defendant had an obligation under SORNA to register and to maintain the currency of his registration information; (2) that the defendant knowingly failed to comply; and (3) that one of the section's jurisdictional prerequisites has been satisfied.

Obligation to Register and Maintain Registration: SORNA directs anyone previously convicted of a federal, state, local, tribal, or foreign qualifying offense to register and to keep his registration information current in each jurisdiction in which he resides, or is an employee or student. Initially, he must also register in the jurisdiction in which he was convicted if it is not his residence. Registrants who relocate or who change their names, jobs, or schools have three days to appear and update their registration in at least one of the jurisdictions in which they reside, work, or attend school. SORNA defines broadly the terms "student," "employee," and "resides." For example, "[t]he term 'resides' means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives."

SORNA's use of the phrase "resides ... in a [U.S.] jurisdiction," led the Supreme Court to conclude recently in *Nichols v. United States* that the maintenance requirement of Section 16913(c) does not apply to offenders who relocated abroad, *i.e.*, outside of any U.S. "jurisdiction." Anticipating the limit identified in *Nichols*, Congress passed the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders [Act], which among other things, amends SORNA to compel offenders to supplement their registration statements with information relating to their plans to travel abroad.

Qualifying Convictions: Only those who have been convicted of a qualifying sex offense need register. There are five classes of qualifying offenses: (1) designated federal sex offenses; (2) specified military offenses; (3) crimes identified as one of the "special offenses against a minor"; (4) crimes in which some sexual act or sexual conduct is an element; and (5) attempts or conspiracies to commit any offense in one of these other classes of qualifying offenses. (A more specific list is attached). Certain foreign convictions, juvenile adjudications, and offenses involving consensual sexual conduct do not qualify as convictions that require the offender to register under SORNA.

Knowing failure to register: Section 2250's second element is a knowing failure to register or to maintain current registration information as required by SORNA. The government must show that the defendant knew of his obligation and failed to honor it; the prosecution need not show that he knew he was bound to do so by federal law generally or by SORNA specifically.

Jurisdictional elements: Section 2250 permits conviction on the basis of any three jurisdictional elements: a prior conviction of one of the federal qualifying offenses; residence in, or travel to or from, Indian country; or travel in interstate or foreign commerce.

Federal crimes: Interstate travel is not required for a conviction under §2250. An individual need only have a knowing failure to register and a prior conviction for a qualifying sex offense under federal law or the law of the District of Columbia, the Code of Military Justice, tribal law, or the law of a United States territory or possession. Federal jurisdiction flows from the jurisdictional basis for the underlying qualifying offense.

Indian country: Travel to or from Indian country, or living there, will also satisfy Section 2250's jurisdictional requirement. "Indian country" consists primarily of Indian reservations, lands over which the United States enjoys state-like exclusive or concurrent legislative jurisdiction.

Interstate travel: Interstate travel is the most commonly invoked of Section 2250's jurisdictional elements. It applies simply to anyone who travels in interstate or foreign commerce with a prior federal or state qualifying offense who fails to register or maintain his registration. In the case of foreign travel it also applies to anyone who fails to supplement his registration with information concerning his intent to travel abroad. The qualifying offense may predate SORNA's enactment; the travel may not.

Consequences

Venue and Bail: Although the question may not be beyond dispute, a Section 2250 prosecution involving interstate travel may be brought either in the state of origin or the state of destination. Federal bail laws permit the prosecution to request a pre-trial detention hearing prior to the pre-trial release of anyone charged with a violation of Section 2250. The individual may only be released prior to trial under condition, among others, that he be electronically monitored; be subject to restrictions on his personal associations, residence, or travel; report regularly to authorities; and be subject to a curfew.

Imprisonment: Upon conviction, the individual may be sentenced to imprisonment for a term of not more than 10 years and/or fined not more than $250,000. Section 2250 also sets an additional penalty of not more than 30 years, but not less than 5 years, in prison for the commission of a federal crime of violence when the offender has also violated Section 2250.

Supervised release: As a general rule, when a court sentences a defendant to prison, it may also sentence him to a term of supervised release. Supervised release is a parole-like regime under which a defendant is subject to the oversight of a probation officer following his release from prison. In the case of a conviction under Section 2250, the court must order the defendant to serve a life-time term of supervised release or in the alternative a term of 5 years or more. The statute and the Sentencing Guidelines establish an array of mandatory and discretionary conditions for those on supervised release. The mandatory conditions require the defendant to (1) avoid committing any additional federal, state, or local offenses; (2) refrain from the unlawful possession of controlled substances; (3) participate in a domestic violence rehabilitation program, he has been convicted of domestic violence; (4) submit to periodic drug tests, unless the court suspends the condition because the defendant poses a low risk of future substance abuse; (5) pay installments to satisfy any outstanding fines or special assessments; (6) satisfy any outstanding restitution requirements; (7) comply with any SORNA registration demands; and (8) submit to the collection of a DNA sample. A sentencing court may also impose any condition from the statutory inventory of discretionary conditions for probation. In addition, the Sentencing Guidelines specify thirteen "standard" conditions; eight "special" conditions; and "additional" special conditions. Finally, the district court may impose any "specific" condition that is no greater impairment of liberty than necessary and that is reasonably related to the nature of the offense, the offender's criminal history, and various general statutory sentencing factors. The court may modify the conditions of supervised release at any time. It may also revoke the defendant's supervised release and sentence him to prison for violations of the conditions of supervised release.

Constitutional Considerations

Much of the litigation relating to Section 2250 relates to constitutional challenges involving either Section 2250 or SORNA. The attacks have taken one of two forms. One argues that SORNA or Section 2250 operates in a manner which the Constitution specifically forbids, for example in its clauses on Ex Post Facto laws, Due Process, and Cruel and Unusual Punishment. The other argues that the Constitution does not grant Congress the legislative authority to enact either Section 2250 or SORNA. These challenges probe the boundaries of the Commerce Clause, the Necessary and Proper Clause, and the Spending Clause, among others.

Constitutional prohibitions: The Supreme Court addressed two of the most common constitutional issues associated with sex offender registration before the enactment of SORNA. One addressed the Ex Post Facto Clause implications of sex offender registration, *Smith v. Doe*; the other the Due Process Clause implications, *Connecticut Department of Public Safety v. Doe*. Neither the states nor the federal government may enact laws that operate Ex Post Facto. The prohibition covers both statutes that outlaw conduct that was innocent when it occurred and statutes that authorize imposition of a greater penalty for a crime than applied when the crime occurred. The prohibitions, however, apply only to criminal statutes or to civil statutes whose intent or effect is so punitive as to belie any but a penal characterization. In *Smith*, the Supreme Court dealt with the Ex Post Facto issue in the context of the Alaska sex offender registration statute. It found the statute civil in nature and effect, not punitive, and consequently its retroactive application did not violate the Ex Post Facto Clause. "Relying on *Smith*, circuit courts have

consistently held that SORNA does not violate the Ex Post Facto Clause," with one apparently limited exception.

The Supreme Court's assessment of state sex offender registration statutes has been less dispositive of due process issues because of the variety of circumstances in which they may arise. Neither the federal nor state governments may deny a person of "life, liberty, or property, without due process of law." Due process requirements take many forms. They preclude punishment without notice: "[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." They bar restraint of liberty or the enjoyment of property without an opportunity to be heard: "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." They proscribe any punishments or restrictions that are so fundamentally unfair as to constitute a violation of fundamental fairness, that is, substantive due process. In *Connecticut Dept. of Public Safety v. Doe*, the Court found no due process infirmity in the Connecticut sex offender registration regime in spite of its failure to afford offenders an opportunity to prove they were not dangerous. Doe suffered no injury from the absence of a pre-registration hearing to determine his dangerousness, in the eyes of the Court, because the system required registration of all sex offenders, both those who were dangerous and those who were not. *Connecticut Dept. of Public Safety* forecloses the assertion that offenders are entitled to a pre-registration "dangerousness" hearing; the relevant question under SORNA is prior conviction not dangerousness.

In *Lambert v. California*, the Court dealt with the issue of sufficiency of notice. There, the Court held invalid a city ordinance that required all felony offenders to register within five days of their arrival in the city. The Court explained that "[w]here a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process." Since "by the time that Congress enacted SORNA, every state had a sex offender registration law in place," attempts to build on *Lambert* have been rejected, because the courts concluded that offenders knew or should have known of their duty to register. Vagueness challenges have fared no better. To qualify as a violation of substantive due process, a governmental regime must intrude upon a right "deeply rooted in our history and traditions," or "fundamental to our concept of constitutionally ordered liberty." Perhaps because the threshold is so high, Section 2250 and SORNA have only infrequently been questioned on substantive due process grounds.

"The right to travel ... embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." Section 2250, it has been contended, violates the right to travel because it punishes those who travel from one state to another yet fail to register, but not those who fail to register without leaving the state. The courts have responded, however, that the right must yield to compelling state interest in the prevention of future sex offenses.

The Eighth Amendment bars the federal government from inflicting "cruel and unusual punishment." A punishment is cruel and unusual within the meaning of the Eighth Amendment when it is grossly disproportionate to the offense. The courts have refused to say that sentences within Section 2250's 10-year maximum are grossly disproportionate to the crime of failing to maintain current and accurate sex offender registration information. They have also declined to hold that SORNA's registration regime itself violates the Eighth Amendment, either because they

do not consider the requirements punitive or because they do not consider them grossly disproportionate.

Legislative authority: The most frequent constitutional challenge to SORNA and Section 2250 is that Congress lacked the constitutional authority to enact them. Some of these challenges speak to the breadth of Congress's constitutional powers, such as those vested under the Tax and Spend Clause, the Commerce Clause, or the Necessary and Proper Clause. Others address contextual limitations on the exercise of those of those powers imposed by such things as the non-delegation doctrine or the principles of separation of powers reflected in the Tenth Amendment.

The federal government enjoys only such authority as may be traced to the Constitution; the Tenth Amendment reserves to the states and the people powers not vested in federal government. Challengers of Congress's legislative authority to enact SORNA or the Justice Department's authority to prosecute failure to comply with its demands on Tenth Amendment grounds have had to overcome substantial obstacles. First, several of Congress's constitutional powers are far reaching. Among them are the powers to regulate interstate and foreign commerce, to tax and spend for the general welfare, and to enact laws necessary and proper to effectuate the authority the Constitution provides. Second, although a particular statute may implicate the proper exercise of more than one constitutional power, only one is necessary for constitutional purposes. Third, "while SORNA imposes a duty on the sex offender to register, it nowhere imposes a requirement on the State to accept such registration." Finally, until recently some courts have held that the individual defendants had no standing to contest the statutory validity on the basis of constitutional provisions designed to protect the institutional interests of governmental entities rather than to protect private interests. Several earlier courts rejected SORNA challenges under the Tenth Amendment on the grounds that the defendants had no standing. Standing refers to the question of whether a party in litigation is asserting or "standing" on his or her own rights or only upon those of another. At one time, there was no consensus among the lower federal appellate courts over whether individuals had standing to present Tenth Amendment claims. More specifically, at least two circuits had held that defendants convicted under Section 2250 had no standing to challenge their convictions on Tenth Amendment grounds.

Those courts, however, did not have the benefit of the Supreme Court's *Bond* and *Reynolds* decisions. In *Bond*, the Court pointed out that a defendant who challenges the Tenth Amendment validity of the statute under which she was convicted "seeks to vindicate her own constitutional rights.... The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the State." In *Reynolds*, the Court implicitly recognized the defendant's standing when at his behest it held that SORNA did not apply to pre-enactment convictions until after the Attorney General had exercised his delegated authority. Yet, the fact a defendant's Tenth Amendment challenge may be heard does not mean it will succeed.

The Spending Clause states that "the Congress shall have Power To lay and collect Taxes ... to pay the Debts and provide for the common Defence and general Welfare of the United States.... " "Objectives not thought to be within Article I's enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." In *National Federation of Business v. Sebelius*, seven members of a highly divided Court concluded that the power of the Spending Clause may not be exercised to coerce state participation in a federal program. Congress may use the spending power to induce state participation; it may not present the choice under such circumstances that a state has no realistic alternative but to acquiesce. SORNA establishes minimum standards for the state sex offender registers and authorizes the Attorney General to enforce compliance by reducing by up to 10% the funds a non-complying state would receive in criminal justice assistance funds. Some defendants have

suggested that this impermissibly commandeers state officials to administer a federal program and therefore exceeds Congress's authority under the Spending Clause. As a general matter, while Congress may encourage state participation in a federal program, it is not constitutionally free to require state legislators or executive officials to act to enforce or administer a federal regulatory program. To date, the federal appellate courts have held that SORNA's reduction in federal law enforcement assistance grants for a state's failure to comply falls on the encouragement rather than directive side of the constitutional line. The fact that most states do not feel compelled to bring their systems into full SORNA compliance may lend credence to that assessment.

The Commerce Clause declares that "the Congress shall have Power ... To regulate Commerce … among the several States." The Supreme Court explained in *Lopez* and again in *Morrison* that Congress's Commerce Clause power is broad but not boundless.

> Modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce.

The lower federal appellate courts have rejected Commerce Clause attacks on Section 2250 in the interstate travel cases, because there they believe Section 2250 "fits comfortably with the first two *Lopez* prongs[, i.e. the regulation of (1) the "channels" of interstate commerce and (2) the "instrumentalities" of interstate commerce]." They have also rejected Commerce Clause attacks on SORNA ("§16913 [SORNA] is an unconstitutional exercise of Congress's Commerce Clause power and because lack of compliance with §16913 is a necessary element of §2250, §2250 is also unconstitutional") based on the Necessary and Proper Clause.

The Supreme Court in *Comstock* described the breadth of Congress's authority under the Necessary and Proper Clause in the context of another Walsh Act provision. The Walsh Act authorizes the Attorney General to hold federal inmates beyond their release date in order to initiate federal civil commitment proceedings for the sexually dangerous. Comstock and others questioned application of the statute on the grounds that it exceeded Congress's legislative authority under the Commerce and Necessary and Proper Clauses. The Court pointed out that the Necessary and Proper Clause has long been understood to empower Congress to enact legislation "rationally related to the implementation of a constitutionally enumerated power." Moreover, be the chain clear and unbroken, the challenged statute need not necessarily be directly linked to a constitutionally enumerated power. The *Comstock* "statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws [(to carry into effect its Commerce Clause power for instance)], to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others."

The first section of the first article of the Constitution declares that "[a]ll legislative Powers herein granted shall be vested in Congress of the United States.... " This means that "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested." This non-delegation doctrine, however, does not prevent Congress from delegating the task of filling in the details of its legislative handiwork, as long as it provides "intelligent principles" to direct the effectuation of its legislative will. The circuit courts have yet to be persuaded that Congress's SORNA delegation to the Attorney General violates the non-delegation doctrine.

Appendix. SORNA Qualifying Convictions

Federal Qualifying Offenses

- 18 U.S.C. §1591 (sex trafficking of children or by force or fraud)
- 18 U.S.C. §2241 (aggravated sexual abuse)
- 18 U.S.C. §2242 (sexual abuse)
- 18 U.S.C. §2243 (sexual abuse of ward or child)
- 18 U.S.C. §2244 (abusive sexual contact)
- 18 U.S.C. §2245 (sexual abuse resulting in death)
- 18 U.S.C. §2251 (sexual exploitation of children)
- 18 U.S.C. §2251A (selling or buying children)
- 18 U.S.C. §2252 (transporting, distributing or selling child sexually exploitive material)
- 18 U.S.C. §2252A (transporting or distributing child pornography)
- 18 U.S.C. §2252B (misleading Internet domain names)
- 18 U.S.C. §2252C (misleading Internet website source codes)
- 18 U.S.C. §2260 (making child sexually exploitative material overseas for export to the U.S.)
- 18 U.S.C. §2421 (transportation of illicit sexual purposes)
- 18 U.S.C. §2422 (coercing or enticing travel for illicit sexual purposes)
- 18 U.S.C. §2423 (travel involving illicit sexual activity with a child)
- 18 U.S.C. §2424 (filing false statement concerning an alien for illicit sexual purposes)
- 18 U.S.C. §2425 (interstate transmission of information about a child relating to illicit sexual activity).

Military Qualifying Offenses

Offenses Defined on or after June 28, 2012

- UCMJ art. 120: Rape, Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact
- UCMJ art. 120b: Rape, Sexual Assault, and Sexual Abuse, of a Child
- UCMJ art. 120c: Pornography and Forcible Pandering.

Specified Offenses Against a Child Under 18

- An offense against a child (unless committed by a parent or guardian) involving kidnapping.
- An offense against a child (unless committed by a parent or guardian) involving false imprisonment.
- Solicitation to engage in sexual conduct with a child.
- Use of a child in a sexual performance.
- Solicitation to practice child prostitution.
- Video voyeurism as described in section 1801 of title 18 committed against a child.
- Possession, production, or distribution of child pornography.

- Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
- Any conduct that by its nature is a sex offense against a minor.

Crimes with a Sex Element

Any federal, state, local, military, or foreign "criminal offense that has an element involving a sexual act or sexual contact with another" qualifies.

Attempt or Conspiracy

Any attempt or conspiracy to commit one of the other qualifying offenses also qualifies.

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