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SORNA: A 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 available in an abridged version, CRS Report R42691, *SORNA: An Abridged 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 here.

Contents

Introduction 1
Background 1
Elements 2
Obligation to Register and Maintain Registration 2
Registration Requirements 2
Qualifying Convictions 5
Foreign Convictions, Juvenile Adjudications, and Consensual Sex Acts 7
Pre-SORNA Convictions 8
Knowing Failure to Register 9
Jurisdictional Elements 10
Federal Crimes 10
Indian Country 10
Travel 10
Affirmative Defense 11
Consequences 11
Venue 11
Bail 11
Imprisonment 11
Supervised Release 14
Constitutional Considerations 16
Ex Post Facto 16
Due Process 17
Right to Travel 19
Cruel and Unusual Punishment 19
Legislative Authority 20
Tenth Amendment 20
Standing 20
Spending for the General Welfare 21
Commerce Clause 22
Necessary and Proper 23
Separation of Powers: Non-Delegation 25

Contacts

Author Information 26

Introduction

Federal law punishes convicted sex offenders for failure to register or to update their registration as the Sex Offender Registration and Notification Act (SORNA) demands.[1] 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.[2] Violators face imprisonment for not more than 10 years. The registration offense[3] carries an additional penalty of imprisonment for not more than 30 years, but not less than 5 years, if the offender is also guilty of a federal crime of violence.[4]

Background

The Adam Walsh Child Protection and Safety Act created SORNA.[5] SORNA revised an earlier nationwide sex offender registration system, the Jacob Wetterling Act. The Jacob Wetterling Act encouraged the states to establish and maintain a registration system.[6] Each of them had done so.[7] Their efforts, however, though often consistent, were hardly uniform.[8]

The Walsh Act preserves the basic structure of the Wetterling Act, expands upon it, and makes more specific matters that were previously left to individual state choice. The Walsh Act contemplates a nationwide, state-based, publicly available, contemporaneously accurate, online system.[9] Jurisdictions that fail to meet the Walsh Act's threshold requirements face the loss of a portion of their federal criminal justice assistance grants.[10]

The Walsh Act vests the Attorney General with authority to determine the extent to which SORNA would apply to those with qualifying convictions committed prior to enactment.[11] After

[1] 18 U.S.C. §2250.

[2] *Id.* §2250(a).

[3] *Id.* §2250(a).

[4] *Id.* §2250(d).

[5] P.L. 109-248, 120 Stat. 587 (2006), codified as amended 42 U.S.C. §§16901-16945 and 18 U.S.C. §2250; *see generally* CRS Report R43954, *Federal Involvement in Sex Offender Registration and Notification: Overview and Issues for Congress, In Brief*, by Lisa N. Sacco.

[6] 42 U.S.C. §§14071-14073 (repealed).

[7] Citations to the state statutes in effect at the time of the Walsh Act's enactment appear in CRS Report RL33967, *Adam Walsh Child Protection and Safety Act: A Legal Analysis*, by Charles Doyle, 1-2 n.8.

[8] Reynolds v. United States, 132 S. Ct. 975, 978 (2012) (here and throughout internal citations have generally been omitted) ("The new federal Act reflects Congress' awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems.").

[9] Office of the Attorney General, The National Guidelines for Sex Offender Registration and Notification (National Guidelines), 73 Fed. Reg. 38,030, 38,044-45 (July 2, 2008); *see also* Office of the Attorney General, Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630 (Jan. 11, 2011); Office of the Attorney General, Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 50,552 (Aug. 1, 2016).

[10] 42 U.S.C. §16925.

[11] *Id.* §16913(d).

enactment, the Attorney General promulgated implementing regulations that imposed the registration requirements on those with pre-enactment convictions.[12]

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.[13] Thereafter, states not yet in compliance have been allowed to use the penalty portion of their federal justice assistance funds for that purpose.[14] The Justice Department indicates that 17 states, 3 territories, and numerous tribes are now in substantial compliance with the 2006 legislation.[15]

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.[16]

Obligation to Register and Maintain Registration

Registration Requirements

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.[17] Initially, he must also register in the jurisdiction in which

[12] 72 Fed. Reg. 8894-897 (Feb. 28, 2007) (interim rule); 75 Fed. Reg. 18,849-853 (Dec. 29, 2010) (final rule), 28 C.F.R. pt. 72.

[13] 42 U.S.C. §16924.

[14] U.S. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Requests for Reallocation of Byrne JAG Funding Penalty*, SMART Watch (Spring 2012), available at http://www.ojp.gov/smart/smarwatch/12_spring/news-1.html (last visited Jan. 17, 2017).

[15] U.S. Dep't of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *SORNA Implementation Status*, available at http://www.smart.gov/sorna-map.htm (last visited Jan. 17, 2017). For a discussion of some of the difficulties associated with implementation in the states and the efforts of the Justice Department to facilitate the process, *see* Jennifer N. Wang, *Paying the Piper: The Cost of Compliance with the Federal Sex Offender Registration and Notification Act*, 59 N.Y. L. SCH. L. REV. 681 (2015); Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741 (2016); U.S. Gov't Accountability Off., GAO-13-211, *Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implement the Act, and Stakeholders Report Positive and Negative Effects* (Feb. 2013).

[16] 18 U.S.C. §2250(a) ("Whoever - (1) is required to register under the Sex Offender Registration and Notification Act; (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.").

Unless the registration requirement flows from a federal conviction or residence in Indian country, "the statutory sequence begins when a person becomes subject to SORNA's registration requirements. The person must then travel in interstate commerce and thereafter fail to register." Carr v. United States, 560 U.S. 438, 466 (2010); *see also* United States v. Grundy, 804 F.3d 140, 141 (2d Cir. 2015).

[17] "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.... " 42 U.S.C. §16913(a). "The term 'sex

he was convicted if it is not his residence.[18] Registrants who relocate or who change their names, jobs, or schools have three business days to appear and update their registration in at least one of the jurisdictions in which they reside, work, or attend school.[19] The courts have said that the obligation runs from the time of departure rather than arrival, that is, from when the offender leaves his former residence, job, or school rather than when he acquires a new residence or a new job or enrolls in a different school.[20]

SORNA defines broadly the terms "resides," "student," and "employee." 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."[21] The Attorney General's Guidelines observe that "[t]he scope of 'habitually lives' in this context is not self-explanatory and requires further definition."[22] The Guidelines supply the state, territorial, and tribal authorities some guidance for the task. They point out that the term "habitually lives" may encompass instances where the offender "has no home or fixed address in the jurisdiction, or no home anywhere."[23] Moreover, they state that "[t]he specific interpretation of this element of 'residence' which these Guidelines adopt is that a sex offender habitually lives in the relevant sense in any place in which … the sex offender lives in the jurisdiction for at least 30 days."[24] This 30-day ceiling, however, "does not mean that the registration of a sex offender who enters the jurisdiction to reside may be delayed until after he has lived in the jurisdiction for 30 days. Rather, a sex offender who enters a jurisdiction in order to make his home or habitually live in the jurisdiction may be required to register within three business days."[25]

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offender' means an individual who was convicted of a sex offense," 42 U.S.C. §16911(1). "[T]he term 'sex offense' means – a criminal offense ... a [designated] Federal offense ... [or] a military offense.... " 42 U.S.C. §16911(5)(A)(1). "The term 'criminal offense' means a State, local, tribal, foreign, or military offense ... or other criminal offense," 42 U.S.C. §16911(6). Under the Dictionary Act, "words importing the masculine gender include the feminine as well," 1 U.S.C. §1.

[18] 42 U.S.C. §16913(a). This requirement to register in the state of conviction does not cover pre-SORNA offenders who were already registered with authorities in the states in which they resided when the Attorney General made SORNA retroactively applicable. United States v. DeJarnette, 741 F.3d 971, 975-82 (9th Cir. 2013).

SORNA defines "jurisdiction" as "any of the following: (A) A State. (B) The District of Columbia. (C) The Commonwealth of Puerto Rico. (D) Guam. (E) American Samoa. (F) The Northern Mariana Islands. (G) The United States Virgin Islands. (H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe." 42 U.S.C. §16911(10).

[19] *Id.* at §16913(c) ("A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.").

[20] United States v. Murphy, 664 F.3d 798, 800-803 (10th Cir. 2011); United States v. Van Buren, 599 F.3d 170, 174-75 (2d Cir. 2010); United States v. Voice, 622 F.3d 870, 875 (8th Cir. 2010). Each of these cases involved a change of residence rather than employment or education, but the distinction should make no difference. Whether these cases remain good law after the Supreme Court's *Nichols* decision remains to be seen. In *Nichols*, the Court overturned the §2250 conviction of a sex offender who left Kansas for the Philippines. The Court reasoned that he could not be convicted for failure to report the move to a jurisdiction in which he "resides" when he resided in the Philippines, a nonjurisdiction. Nichols v. United States, 136 S. Ct. 1113, 1118 (2016).

[21] 42 U.S.C. §16911(13).

[22] National Guidelines, 73 Fed. Reg. 38, 030, 38,061 (July 2, 2008).

[23] *Id.*

[24] *Id.* at 38,062.

[25] *Id. See also* United States v. Thompson, 811 F.3d 717, 729-30 (5th Cir. 2016); United States v. Alexander, 817 F.3d 1205, 1214 (10th Cir. 2016) (The same registration requirements apply in the case at bar. If the jury finds that

SORNA and the Guidelines provide comparable general definitions and minimum standards for the terms "employee" and "student." An "'employee' includes an individual who is self-employed or works for any other entity, whether compensated or not."[26] The Guidelines here speak largely in terms of examples. For instance, they note that "a sex offender who resides in jurisdiction A and commutes to work in jurisdiction B must register and keep the registration current in both jurisdictions."[27] Some of the examples are designed to alert the state, local, and tribal jurisdiction of challenges to be addressed. One representative illustration suggests that with respect to interstate truck drivers:

> If a sex offender has some employment-related presence in a jurisdiction, but does not have a fixed place of employment or regularly work within the jurisdiction, line drawing questions may arise, and jurisdictions may resolve these questions based on their own judgments. For example, if a sex offender who is long haul trucker regularly drives through dozens of jurisdictions in the course of his employment, it is not required [that] all such jurisdictions must make the sex offender register based on his transient employment-related presence, but rather may treat such cases in accordance with their own policies.[28]
>
> A sex offender who is employed may not have a fixed place of employment - *e.g.*, a long-haul trucker whose 'workplace' is roads and highways throughout the country … Knowing as far as possible where such a sex offender is in the course of employment serves the same public safety purposes as the corresponding information regarding a sex offender who is employed at the fixed location. The authority under section 114(a)(7) [requiring registration employment information] is accordingly exercised to require that information be obtained and included in the registry concerning the places where such a sex offender works with whatever definiteness is possible under the circumstances, such as information about normal travel routes … in which the sex offender works.[29]

The definition of the term "student" is somewhat more confined. The term means "an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education."[30] The Guidelines explain that "enrollment or attendance in this context should be understood as referring to attendance at a school in a physical sense."[31]

In *Nichols v. United States*, the Supreme Court recently concluded that SORNA's requirements in place at the time did not apply when offenders relocated abroad.[32] Anticipating the problem, 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

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Alexander intended to make Williams' apartment his home or intended to 'habitually live' at Williams' apartment (i.e., that Alexander intended to live at Williams' apartment for thirty days or more), then it would necessarily have to find that he violated SORNA because it is undisputed that he did not register within three business days after arriving in Las Cruces."). Alexander's conviction was ultimately overturned because the jury instructions may have been confusing. *Id*. at 1215.

[26] 42 U.S.C. §16911(12).

[27] National Guidelines, 73 Fed. Reg. at 38,062.

[28] *Id*.

[29] *Id.* at 38,056.

[30] 42 U.S.C. §16911(11).

[31] National Guidelines, 73 Fed. Reg. at 38, 062.

[32] Nichols v. United States, 136 S. Ct. 1113, 1118 (2016).

things, amends SORNA to compel offenders to supplement their registration statements with information relating to their plans to travel abroad.[33]

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.[34] Certain foreign convictions, juvenile adjudications, and offenses involving consensual sexual conduct do not qualify as offenses that require offenders to register under SORNA.[35]

Federal Qualifying Offenses

Federal qualifying offenses "(including an offense prosecuted under section 1152 or 1153 of title 18)" consist of those "under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18," that is:[36]

- 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)

[33] P.L. 114-119, 130 Stat. 15 (2016), codified at. 42 U.S.C. §16914(a)(7).

[34] 42 U.S.C. §16911(1), (5), (7).

[35] Id. §16911(1), (5).

[36] Id. §16911(5)(A)(iii).

- 18 U.S.C. §2425 (interstate transmission of information about a child relating to illicit sexual activity).

Military Qualifying Offenses

The list of military qualifying offenses varies according when the offense was committed. For offenses committee on or after June 28, 2012, the inventory consists of:

- 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.[37]

Specified Offenses Against a Child Under 18

Other federal, state, local, tribal, military, or foreign offenses qualify when they involve:

- 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.[38]

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[37] U.S. Dep't of Defense, *Department of Defense Instruction 1325.07, Enclosure 2, Appendix 4* (Mar. 11, 2013), available at http://www.dtic.mil/whs/directives/corres/pdf/132507p.pdf. Covered offenses defined prior to June 28, 2012) consist of: "I. *Offenses Defined Before October 1, 2007*—UCMJ art 120: Rape and Carnal Knowledge; UCMJ art. 125: Forcible Sodomy and Sodomy of a Minor; UCMJ art. 133: Conduct Unbecoming an Officer (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor); USMJ art. 134: General Article involving: prostitution of a minor, assault with intent to commit rape, assault with intent to commit sodomy, indecent act with a minor, indecent language to a minor, kidnapping of a minor (by a person not parent), pornography involving a minor, conduct prejudicial to good order and discipline (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor), assimilative crime conviction (of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor); UCMJ art. 80: Attempt (to commit any of the foregoing); UCMJ art. 81: Conspiracy (to commit any of the foregoing); UCMJ art. 82: Solicitation (to commit any of the foregoing);" and "II. *Offenses Defined on or after October 1, 2007 and before June 28, 2012*—UCMJ art. 120: Rape, Rape of a Child, Aggravated Sexual Assault, Aggravated Sexual Conduct, Abusive Sexual Contact, Indecent Liberties and Act, Forcible Pandering, and Wrongful Sexual Contact; UCMJ art. 125: Forcible Sodomy and Sodomy of a Minor; UCMJ art. 133: Conduct unbecoming an officer (involving an offense described in Appendix 4); UCMJ art. 134: General Article involving: Prostitution involving a minor, Assault with intent to commit rape, Assault with intent to commit sodomy, Kidnapping a minor (other than by a parent), Pornography involving a minor." *Id*.

[38] 42 U.S.C. §16911((7), (5)(A)(ii), (6), (14). Courts inquire into the circumstances of a conviction in order to

Crimes with a Sex Element

In addition, any federal, state, local, military, or foreign "criminal offense that has an element involving a sexual act or sexual contact with another" qualifies.[39]

Attempt or Conspiracy

Finally, any attempt or conspiracy to commit one of the other qualifying offenses also qualifies.[40]

Foreign Convictions, Juvenile Adjudications, and Consensual Sex Acts

Juvenile adjudications involving qualifying offenses trigger SORNA's reporting requirements only (1) if the individual was 14 years of age or older at the time of the misconduct that gave rise to the finding and (2) the misconduct "was comparable to or more severe than" the federal crime of aggravated sexual abuse (as defined in 18 U.S.C. §2241) or was an attempt or conspiracy to engage in such misconduct. The federal aggravated sexual abuse offenses include sexual acts committed by force, threat, or incapacitating the victim.[41] Although the Federal Juvenile Delinquency Act limits disclosure of federal judicial delinquency proceedings,[42] it does not excuse compliance with SORNA's registration requirements.[43]

Qualifying convictions consist only of those "obtained with sufficient safeguards for fundamental fairness and due process of the accused." The *National Guidelines* state that "[s]ex offense convictions under the laws of any foreign country are deemed to have been obtained with sufficient safeguards for fundamental fairness and due process if the U.S. State Department, in its

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determine whether it constitutes a conviction for "conduct that by its nature is a sex offense against a minor" triggering the obligation to register. *See* United States v. Hill, 820 F.3d 1003, 1005-1006 (8th Cir. 2016) (discussing circumstances surrounding a state "indecent exposure" conviction); United States v. Price, 777 F.3d 700, 708-10 (4th Cir. 2015) (discussing circumstances surrounding a state "assault and battery of a high and aggravated nature" conviction); United States v. Dodge, 597 F.3d 1347, 1353-56 (11th Cir. 2010) (discussing circumstances surrounding a federal "transfer of obscene material to a child" conviction); United States v. Byun, 539 F.3d 982, 992-94 (9th Cir. 2008) (discussing circumstances surrounding importing an alien for purposes of prostitution).

[39] 42 U.S.C. §16911(5)(A)(i). SORNA defines neither "sexual act" nor "sexual contact." The terms are defined elsewhere in the United States Code as follows: "(2) the term 'sexual act' means - (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;"

"(3) the term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," 18 U.S.C. §2246(2), (3), adopted by cross reference in 20 U.S.C. §6777(e)(8); 20 U.S.C. §9134(f)(7)(E); 47 U.S.C. §254(h)(7)(H); and 47 U.S.C. §902 note (P.L. 106-554, 114 Stat. 2763A-336 (2000).

[40] 42 U.S.C. §16911(5)(A)(v).

[41] 42 U.S.C. §16911(8); 18 U.S.C. §2241. The Guidelines note that by virtue of 18 U.S.C. §2246 the "sexual acts" condemned in §2241 "include any degree of genital or anal penetration, and any oral-genital or oral-anal contact," National Guidelines, 73 Fed. Reg. 38,030, 38,050 (July 2, 2008). They do not mention that by the same token "sexual acts" for purposes of §2241 also include "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," 18 U.S.C. §2246(2)(D).

[42] 18 U.S.C. §5038(a).

[43] United States v. Under Seal, 709 F.3d 257, 261-63 (4th Cir. 2013).

Country Reports on Human Rights Practices, has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial in that country during the year in which the conviction occurred."[44] They go on to point out, however, that SORNA establishes only minimum requirements. States and other jurisdictions remain free to require registration based on any foreign conviction.[45]

SORNA excludes from its registration requirements adult consensual sexual offenses.[46] The exception does not extend, however, to instances when the victim is in the custody of the offender. It is available, however, when the victim was a child 13 years of age or older and the offender was "not more than 4 years older than the victim."[47]

Pre-SORNA Convictions

SORNA's registration requirement is time neutral. It simply states that sex offenders must register.[48] It goes on to say, however, that the "Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before [its] enactment."[49] The Supreme Court resolved a split among the lower federal courts when it declared in *Reynolds v. United States* that SORNA's "registration requirements do not apply to pre-Act offenders until the Attorney General specifies that they do apply."[50]

Yet, the Court left unresolved the question of when the Attorney General had specified that they apply. This too is a matter upon which the lower federal appellate courts disagree. The issue involves Administrative Procedure Act compliance. The Administrative Procedure Act (APA) provides that, as a general rule, the public must be given an opportunity to comment before a regulatory proposal becomes final.[51] Good cause may excuse the need to honor this "notice and comment" prerequisite.[52]

The Attorney General issued an Interim Rule on February 28, 2007, in which he announced that SORNA's requirements "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior the enactment of that Act."[53] He claimed, as good cause to dispense with notice and comment, the need to eliminate uncertainty and "to protect the public from sex offenders who failed to register."[54]

On July 2, 2008, after a notice and comment period, the Attorney General promulgated the *National Guidelines*, which cited the Interim Rule for the proposition that SORNA's date of

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[44] National Guidelines, 73 Fed. Reg. at 38,050.

[45] *Id.* at 38,051.

[46] 42 U.S.C. §16911(5)(C). The exception is also unavailable for convictions of sexual assault where the defendant induces fear and consent through misrepresentation. United States v. Alexander, 802 F.3d 1134, 1140 (10th Cir. 2015).

[47] 42 U.S.C. §16911(5)(C). For purposes of §16911(5)(C), "4 years" is 48 months or 1,461 days. *See* United States v. Brown, 740 F.3d 145, 149 (3d Cir. 2014) (holding that §16911(5)(C) did not apply when the offender was 17 and the victim 13, but the offender is 52 months older, rather than 48 months older, than the victim); *see also* United States v. Black, 773 F.3d 1113, 1115 (10th Cir. 2014) ((holding that §16911(5)(C) did not apply where the 18-year offender was 55 months older than the 14-year old victim).

[48] 42 U.S.C. §16913(a)("A sex offender shall register ...").

[49] *Id.* §16913(d).

[50] Reynolds v. United States, 132 S. Ct. 975, 978 (2012).

[51] 5 U.S.C. §553.

[52] *Id.* §553(b), (d).

[53] 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007), 28 C.F.R. §72.3.

[54] 72 Fed. Reg. 8894, 8896 (Feb. 28, 2007), 28 C.F.R. pt.72.

enactment (July 27, 2006) marked the date upon which all sex offenders, including those whose convictions predated SORNA, were bound by its dictates.[55] On December 29, 2010, the Attorney General promulgated a final rule, effective January 28, 2011, that declared the 2007 Interim Rule final with respect to SORNA's application to convictions that predate its enactment.[56]

Three circuits rejected the argument that APA noncompliance invalidated the Attorney General's effort in the 2007 Interim Rule to bring pre-enactment convictions within SORNA requirements.[57] Four others found the Attorney General had failed to meet APA standards.[58] One of these found prejudicial, reversible error.[59] Another found the error harmless.[60] The other pair concluded that the procedures used to promulgate the 2008 *National Guidelines* satisfied APA requirements.[61] In the view of these last two circuits, SORNA application to pre-enactment convictions became effective on August 1, 2008, the 30 days after valid promulgation required by the APA.[62] Whichever view the other circuits find most convincing, they are likely to settle on an application date no later than August 1, 2008.[63]

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.[64]

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[55] *National Guidelines*, 73 Fed. Reg. at 38,046 ("Rather, SORNA's requirements took effect, when SORNA was enacted on July 26, 2007, and they have applied since that time to all sex offenders, including those whose convictions predate SORNA's enactment. *See* 72 FR 8894, 8895-96 (February 28, 2007).").

[56] 73 Fed. Reg. 81,849 (Dec. 28, 2010).

[57] United States v. Dean, 604 F.3d 1275, 1278-282 (11th Cir. 2010) ("The Attorney General had good cause to bypass the Administrative Procedure Act's notice and comment requirements."); United State v. Gould, 568 F.3d 459, 470 (4th Cir. 2009) ("[T]he Attorney General had good cause to invoke the exception to providing the 30-day notice."); United States v. Dixon, 551 F.3d 578, 583 (7th Cir. 2008) (characterizing the APA argument as "frivolous").

[58] United States v. Reynolds, 710 F.3d 498, 510-14 (3d Cir. 2013); United States v. Johnson, 632 F.3d 912, 927-30 (5th Cir. 2011)("[W]e do not find the Attorney General's reasons for bypassing the APA's notice-and-comment and thirty day provisions persuasive."); United States v. Valverde, 628 F.3d 1159, 1164-168 (9th Cir. 2010); United States v. Cain, 583 F.3d 408, 419-24 (6th Cir. 2009).

[59] *Reynolds*, 710 F.3d at 514-24.

[60] *Johnson*, 632 F.3d at 933 ("Because the Attorney General's rulemaking process addressed the same issues raised by Johnson and because Johnson makes no showing that the outcome of the process would have been different ... had notice been at its meticulous best, we find it is clear that the Attorney General's APA violations were harmless error.").

[61] *Valverde*, 628 F.3d at 1164; United States v. Utesch, 596 F.3d 302, 310 (6th Cir. 2010).

[62] *Valverde*, 628 F.3d at 1169; United States v. Stevenson, 676 F.3d 557, 562-66 (6th Cir. 2012).

[63] *Cf.*, United States v. Gundy, 804 F.3d 140, 145 (2d Cir. 2016); United States v. Brewer, 766 F.3d 884, 885 (8th Cir. 2014); United States v. Whitlow, 714 F.3d 41, 45 (1st Cir. 2013).

[64] United States v. Fuller, 627 F.3d 499, 507 (2d Cir. 2010) ("[E]very Circuit to have considered the matter has held that SORNA is a general intent crime ... 'There is no language requiring specific intent or a willful failure to register such that the defendant must know his failure to register violated federal law.'") (quoting, United States v. Gould, 568 F.3d 459, 468 (4th Cir. 2004), and citing, United States v. Shenandoah, 595 F.3d 151, 159 (3d Cir. 2010), and United States v. Vasquez, 611 F.3d 325, 328-29 (7th Cir. 2010)). S*ee also* United States v. Collins, 773 F.3d 25, 29 (4th Cir. 2014) (internal citations omitted) ("[T]he government may can establish a defendant's guilty knowledge by either of two different means. The government may show that a defendant actually was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion. "); United States v. Crowder, 656 F.3d 870, 873-76 (9th Cir. 2011); United States v. Voice, 622 F.3d 870, 875-66 (8th Cir. 2010).

Jurisdictional Elements

Section 2250 permits conviction on the basis of any of 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.[65] Federal jurisdiction flows from the jurisdictional basis for the underlying qualifying offense.[66]

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.[67]

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.[68] The qualifying offense may predate SORNA's enactment; the travel may not.[69]

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[65] 18 U.S.C. §2250(a) (emphasis added) ("Whoever ... (2)(A) is a sex offender ... by reason of a conviction under Federal law ... *or* (B) travels in interstate or foreign commerce ..."); United States v. Kebodeaux, 647 F.3d 137, 142 (5th Cir. 2011), vac'd for reh'g en banc, 647 F.3d 605 (5th Cir. 2011), citing, Carr v. United States, 130 S. Ct. 2229, 2238 (2010)("[Section] 2250(a)(2)(A) does not depend on the interstate commerce jurisdictional hook. That subsection expressly deals with person convicted under federal sex offender statutes and is conspicuously lacking the interstate travel element of §2250(a)(2)(B).").

[66] United States v. George, 625 F.3d 1124, 1130 (9th Cir. 2010); *cf.*, *Kebodeaux*, 647 F.3d at 142 ("Federal sex offender statutes themselves are promulgated under various provisions of Article I [(Congress' enumerated powers)]."); United States v. Comstock, 560 U.S. 126, 149 (2010) ("[A] statute is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, 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.").

[67] 18 U.S.C. §1151 ("... [T]he term 'Indian country' ... means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government ... , (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights- of-way running through the same.").

[68] 18 U.S.C. §2250(b) ("Whoever – (1) is required to register under the Sex Offender Registration and Notification Act (42 U.S.C. 16901 et seq.); (2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and (3) engages or attempts to engage in the intended travel in formation commerce; shall be fined under this title, prisoned not more than 10 years, or both.").

[69] Carr v. United States, 560 U.S. 438, 458 (2010).

Affirmative Defense

The Walsh Act imposes the obligation to register with state authorities on convicted sex offenders, even when state law does not require registration.[70] Prior to the Walsh Act, more than a few state sex offender registration laws applied only to convictions occurring subsequent to their enactment or only to a narrower range of offenses than contemplated in the Walsh Act. As a consequence of the Walsh Act and the Attorney General's determination, states must often adjust their registration laws in order to come into compliance. Conscious of the delays that might attend this process, Section 2250(c) affords offenders an affirmative defense when they seek to register with state authorities, are turned away, and remain persistent in their efforts to register: "In a prosecution for a violation under subsection (a), it is an affirmative defense that - (1) uncontrollable circumstances prevented the individual from complying; (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and (3) the individual complied as soon as such circumstances ceased to exist."[71]

Consequences

Venue

Although the question may not be beyond dispute, it seems that a Section 2250 prosecution involving interstate travel may be brought in either the state of origin or the state of destination.[72]

Bail

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.[73] 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.[74]

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.[75] Section 2250 also sets an additional penalty of not

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[70] 42 U.S.C. §16913(a) ("A sex offender shall register ..."); United States v. Stock, 685 F.3d 621, 626 (6th Cir. 2012) ("The obligation SORNA does impose—the obligation to register—is imposed on sex offenders, not states.... That obligation exists whether or not a state chooses to implement SORNA's requirements and whether or not a state chooses to register sex offenders at all.").

[71] 18 U.S.C. §2250(b). *See also* Kennedy v. Allera, 612 F.3d 261, 269 (4th Cir. 2010) (emphasis in the original) ("Thus, while SORNA imposes a duty *on the sex offender* to register, it nowhere imposes a requirement *on the State* to accept such registration. Indeed, the criminal provisions of SORNA also recognize that a State can refuse registration in as much as they allow, as an affirmative defense to a prosecution, the claim that 'uncontrollable circumstances prevent the individual from complying.'").

[72] United States v. Kopp, 778 F.3d 986, 988-89 (11th Cir. 2015) (citing United States v. Lewis, 768 F.3d 1086, 1092-94 (10th Cir. 2014); United States v. Lunsford, 725 F.3d 859, 863 (8th Cir. 2013); and United States v. Leach, 639 F.3d 769, 771-72 (7th Cir. 2011). The Eleventh Circuit was unpersuaded by the defendant's argument to the contrary based on an unreported district court opinion from the Southern District of Ohio, *Kopp*, 778 F.3d at 989.

[73] 18 U.S.C. §3142(f)(1)(E).

[74] *Id.* §3142(c)(1)(B).

[75] *Id.* §2250(a).

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.[76]

Sentencing Guidelines

The Sentencing Guidelines heavily influence the sentences imposed for violations of Section 2250. A district court must begin by calculating the sentencing range recommended by the Sentencing Guidelines.[77] The court must then consider the recommendation along with the general statutory sentencing principles.[78] The defendant, as well as the prosecution, may appeal the sentence imposed,[79] which the appellate courts may overturn if it is either procedurally or substantively unreasonable.[80] A sentence is procedurally unreasonable when it is the product, among other things, of an erroneous Guideline calculation.[81] It is substantively unreasonable when it is "[dis]proportionate to the seriousness of the circumstances of the offense [or] offender, [or] [in]sufficient or greater than necessary to comply with the purposes of the federal sentencing statute."[82]

Sections 2A3.5 and 2A3.6 of the Sentencing Guidelines provide the initial guidelines for Section 2250 offenses.[83] Section 2A3.5 sets a defendant's base offense level according to SORNA's tier classifications.[84] A SORNA tier III sex offender is:

> [A] sex offender whose offense is punishable by imprisonment for more than 1 year and-

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[76] *Id.* §2250(d) ("(1) In general. - An individual described in subsection (a) or (b) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years. (2) Additional punishment. - The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).").

[77] Gall v. United States, 552 U.S. 38, 49 (2007).

[78] "The Guidelines are not the only consideration … [T]he district judge should then consider all of the §3553(a) factors …. *Id*. at 49-50. The §3553(a) factors include things like "(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need to for the sentence imposed – (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense …" 18 U.S.C. §3553(a)(1), (2)(A).

[79] 18 U.S.C. §3742.

[80] *Gall*, 552 U.S. at 51; *see also* United States v. Trailer, 827 F.3d 933, 936 (11th Cir. 2016); United States v. James, 792 F.3d 962, 967 (8th Cir. 2015).

[81] *Gall*, 552 U.S. at 51; *see also Trailer*, 827 F.3d at 936. Other procedural transgressions include "failing to consider the §3663(a) [general sentencing] factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence - including an explanation for any deviation from the Guidelines range." Gall, 552 U.S. at 51.

[82] United States v. Alsante, 812 F.3d 544, 551 (6th Cir. 2016); *see also* United States v. Bolling, 798 F.3d 201, 221 (4th Cir. 2015) ("In evaluating substantive reasonableness, we look to the totality of the circumstances to determine whether the district court abused its discretion in applying the standards set out in Section 3553(a)(2) … Likewise, a sentence that is greater than necessary to serve those purposes is unreasonable."); United States v. Fraga, 704 F.3d 432, (5th Cir. 2013) ("In sum, we find that in light of Fraga's criminal history and characteristics, the nine-month deviation from the Guidelines range was substantively reasonable and, in accordance with §3553(a), was 'not greater than necessary' to effectuate the goals of sentencing.").

[83] U.S.S.G. §§2A3.5, 2A3.6.

[84] Section 2A3.5 sets a base offense level of 16 for tier III defendants; 14 for tier II defendants; and 12 for tier I defendants, respectively. Without further adjustment, this would translate to a sentence of imprisonment somewhere between 24 and 30 months for a tier III defendant; between 18 and 24 months for a tier II defendant; and between 10 and 16 months for a tier I defendant. U.S.S.G. §4A1.1; *id.* Sentencing Table.

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or
(ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;
(B) involves kidnapping of a minor (unless committed by a parent or guardian); or
(C) occurs after the offender becomes a tier II sex offender.[85]

A SORNA tier II sex offender is:

[A] sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and-
(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:
(i) sex trafficking (as described in section 1591 of title 18);
(ii) coercion and enticement (as described in section 2422(b) of title 18);
(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of title 18;
(iv) abusive sexual contact (as described in section 2244 of title 18);
(B) involves-
(i) use of a minor in a sexual performance;
(ii) solicitation of a minor to practice prostitution; or
(iii) production or distribution of child pornography; or
(C) occurs after the offender becomes a tier I sex offender.[86]

A SORNA tier I sex offender is any sex offender who is not a tier II or III sex offender.[87]

The courts use one of two standards in order to determine whether a prior state conviction qualifies a defendant as a tier I, II, or III sex offender. In one, the categorical approach, they examine the elements of the state offense; in the other, the circumstance-specific approach, they examine the circumstances surrounding the offender's prior state conviction. Courts favor the categorical approach when SORNA describes the qualifying state statute of conviction by reference to a particular federal statute or statutes;[88] or when it refers to "elements" rather than "conduct";[89] or to "convictions" rather than "conduct committed."[90] Under the categorical approach, the statutory elements of the prior state offense must fit completely within the footprint created by the elements of the federal statute or statutes. There is no match if the state statute sweeps more broadly than its federal counterpart, in which case the state conviction may not serve as a SORNA predicate for tier classification purposes.

For example, the Fourth Circuit recently used the categorical approach to determine whether a defendant convicted under a state "endangering the welfare of a child" statute qualified as a tier

[85] 42 U.S.C. §16911(4).

[86] *Id*. §16911(3).

[87] *Id*. §16911(2).

[88] United States v. Berry, 814 F.3d 192, 197 (4th Cir. 2016); United States v. White, 782 F.3d 1118, 1134 (10th Cir. 2015).

[89] United States v. Rogers, 804 F.3d 1233, 1237 (7th Cir. 2015); United States v. Cabrera-Gutierrez, 756 F.3d 1125, 1133 (9th Cir. 2013).

[90] United States v. Morales, 801 F.3d 1, 5 (1st Cir. 2015).

III sex offender. It decided that he did not. The relevant portion of SORNA requires that in order to qualify as a tier III defendant there must be a conviction under a statute outlawing conduct comparable or more severe (1) than aggravated sexual abuse or sexual abused as described in 18 U.S.C. §§2241 and 2242, respectively; or (2) sexual contact as described in 18 U.S.C. §2244 committed against a child under 13 years of age. The Fourth Circuit reasoned that Sections 2241, 2242, and 2244 each require physical contact. The state courts, however, had interpreted the endangering statute to encompass conduct that did not involve physical contact. Conviction under the state endangering statute was not necessarily a conviction for conduct comparable or more severe than that outlawed in federal aggravated sexual abuse, sexual abuse, or sexual contact statutes. Therefore, the defendant could not be classified as a tier III sex offender.

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.[91] 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. The term of supervised release for most crimes is either 1, 3, or 5 years depending on the severity of the crime of conviction.[92] Congress has authorized, or insisted upon, longer terms when the crime of conviction is a particular drug, terrorist, or sex offense.[93] In the case of a conviction under Section 2250, the court must order the defendant to serve a lifetime term of supervised release or in the alternative a term of 5 years or more.[94] The Sentencing Guidelines recommend a 5-year term of supervised release.[95] Like the term of imprisonment, the term of supervised release must be procedurally and substantively reasonable.[96] A term of supervised release is procedurally unreasonable when the district court miscalculates the Sentencing Guidelines' recommendation.[97] A term of supervised release is substantively unreasonable when the district court inappropriately weighs the statutory sentencing factors in the context of the defendant and the circumstances of the case.[98]

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

- avoid committing any additional federal, state, or local offenses;
- refrain from the unlawful possession of controlled substances;
- participate in a domestic violence rehabilitation program, if he has been convicted of domestic violence;

[91] 18 U.S.C. §3583(a).

[92] *Id.* §3583(b).

[93] *E.g.*, 21 U.S.C. §841(b); 18 U.S.C. §3583(j), (k).

[94] *Id.* §3583(k); United States v. Jones, 798 F.3d 613, 619 (7th Cir. 2015).

[95] United States v. Brown, 826 F.3d 835, 839 (5th Cir. 2016); United States v. Price, 777 F.3d 700, 710-12 (4th Cir. 2015).

[96] United States v. Trailer, 827 F.3d 933, 935-36 (11th Cir. 2016); *see also Jones*, 798 F.3d at 619; United States v. James, 792 F.3d 962, 967 (8th Cir. 2015).

[97] *E.g.*, *Brown*, 826 F.3d at 839; United States v. Medina, 779 F.3d 55, 58-9 (1st Cir. 2015); United States v. Baker, 755 F.3d 515, 522-23 (7th Cir. 2014).

[98] *Trailer*, 827 F.3d at 936; *James*, 792 F.3d at 968; *see also Jones*, 798 F.3d at 619 ("In determining the length and conditions of supervised release … a court must consider the same §3553(a) factors that guide sentencing determinations generally.").

- submit to periodic drug tests, unless the court suspends the condition if the defendant poses a low risk of future substance abuse;
- pay installments to satisfy any outstanding fines or special assessments;
- satisfy any outstanding restitution requirements;
- comply with any SORNA registration demands; and
- submit to the collection of a DNA sample.[99]

A sentencing court may also impose any condition from the statutory inventory of discretionary conditions for probation.[100] In addition, the Sentencing Guidelines specify thirteen "standard" conditions;[101] eight "special" conditions;[102] and "additional" special conditions.[103] Finally, the district court may impose any "specific" condition that meets the following statutory standards:

- "(1) is reasonably related to the factors set forth in section 3553(a)(1) [the nature and circumstances of the offense and the history an characteristics of the defendant], (a)(2)(B), (a)(2)(C), and (a)(2)(D) [the need – (B) to afford adequate deterrence … (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocation training, medical care, or other correctional treatment in the most effective manner];

[99] 18 U.S.C. §3583(d), (e); U.S.S.G. §5D1.3(a)(1)-(8).

[100] 18 U.S.C. §3583(d). The discretionary conditions for probation include "that the defendant - (1) support his dependents and meet other family responsibilities; (2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)); (3) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555; (4) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment; … (16) permit a probation officer to visit him at his home or elsewhere as specified by the court; (17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment; … (23) if required to register under the Sex Offender Registration and Notification Act, submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions." 18 U.S.C. §3563(b).

[101] Under U.S.S.G. §5D1.3(c) the standard conditions require an individual on supervised release to (1) report promptly to the probation office upon release; (2) comply with directions to report thereafter; (3) remain in the judicial district unless the probation officer approves departure; (4) answer the probation officer's questions truthfully; (5) live in a place the probation officer approves; (6) permit the probation officer to engage in searches and seizures; (7) seek employment and remain employed; (8) avoid felons and those who engage in criminal activity; (9) notify probation officer of arrests or police questioning; (10) refrain from possession of firearms, ammunition, or dangerous weapons; (11) avoid becoming an informant without court approval; (12) obey probation officer instructions to notify third persons of the risks to them that defendant poses; and (13) comply with the probation officer's interpretation of the conditions imposed.

[102] Under U.S.S.G. §5D1.3(d) the special conditions require an individual on supervised release to (1) support dependents; (2) meet debt obligations; (3) provide the probation officer with access to financial information if the defendant has pending restitution, forfeiture, fine, or victim notification obligations; (4) if the court suspects controlled substance or alcohol abuse, refrain from possession of alcohol and participate in a substance abuse program if the court suspects controlled substance or alcohol abuse; (5) participate in mental health program if the court believes defendant needs treatment; (6) submit to deportation; (7) for sex offenders (the definition does not include Section 2250 offenders) participate in sex offender treatment and monitoring and limit computer use; and (8) notify the probation officer of any change in economic circumstances that might affect payment of outstanding obligations relating to restitution, fine, or special assessment.

[103] Under U.S.S.G. §5D1.3(e) the "additional" special conditions include: (1) "community confinement"; (2) "home detention"; (3) "community service"; (4) "occupational restrictions"; (5) "curfew"; and (6) "intermittent confinement."

- (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
- (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)."[104]

Restrictions on a defendant's association with children often appear among the discretionary conditions for supervised release for Section 2250 offenders. Whether the conditions survive appellate review turns upon their breadth, the district court's justification for imposing them, and the features of individual cases.[105]

The court may modify the conditions of supervised release at any time.[106] It may also revoke the defendant's supervised release and sentence him to prison for violations of the conditions of supervised release.[107]

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.

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*;[108] the other the Due Process Clause implications, *Connecticut Department of Public Safety v. Doe*.[109]

Ex Post Facto

Neither the states nor the federal government may enact laws that operate Ex Post Facto.[110] 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

[104] 18 U.S.C. §3583(d).

[105] *E.g.*, United States v. Fey, 834 F.3d 1, 4 (1st Cir. 2016) (quoting United States v. Pabon, 819 F.3d 26, 31 (1st Cir. 2016) ("'[W]e have vacated associational conditions where the defendant's prior sex offense occurred in the distant past, the intervening time was marked by lawful social activity, and the district court did not otherwise explain the need for such restrictions.' … And although the condition does not place an outright ban on Frey's association with minors, it operates not in limited contexts but in all contexts.")); *see also* United States v. Baker, 755 F.3d 515, 526-27 (7th Cir. 2014) (remanding for resentencing after the government conceded that a ban on the defendant's contact with his children should be vacated).

[106] 18 U.S.C. §3583(e)(2).

[107] *Id.* §3583(e)(3), (h).

[108] 538 U.S. 84 (2003).

[109] 538 U.S. 1 (2003).

[110] U.S. CONST. art. I, §10, cl. 1; art. I, §9, cl.3.

occurred.[111] 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.[112]

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.[113] Its analysis[114] has colored the lower federal courts' treatment of Ex Post Facto challenges to Section 2250 and SORNA. "Relying on *Smith*, circuit courts have consistently held that SORNA does not violate the Ex Post Facto Clause,"[115] with one apparently limited exception. The Ninth Circuit initially held that the SORNA obligations for pre-enactment juveniles constituted punishment, because they stripped juveniles of the confidentiality that then surrounded juvenile proceedings.[116] Thus, their enforcement against such juveniles would constitute an Ex Post Facto violation, the Ninth Circuit decided.[117] It subsequently concluded that "not all applications of SORNA to individuals based on juvenile sex offender determinations are sufficiently punitive to violate the Ex Post Facto Clause."[118] This is particularly true, the Circuit opined, when SORNA did not result in a loss of confidentiality because of the disclosure requirements that accompanied the original qualifying juvenile adjudication.[119]

Due Process

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

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[111] Stogner v. California, 539 U.S. 607, 612 (2003).

[112] Smith v. Doe, 538 U.S. 84, 92 (2003) ("This is the first time we have considered a claim that a sex offender registration and notification law constitutes retroactive punishment forbidden by the Ex Post Facto Clause. The framework for our inquiry, however, is well established. We must ascertain whether the legislature meant the statute to establish 'civil' proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.' Because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.").

[113] *Id*. at 107-108.

[114] *Id.* at 97 ("In analyzing the effects of the Act we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), as a useful framework.... The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.").

[115] United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012) (citing United States v. Guzman, 591 F.3d 83, 94 (2d Cir. 2010); United States v. Shenandoah, 595 F.3d 151, 158-59 (3d Cir. 2010); United States v. George, 625 F.3d 1124, 1131 (9th Cir. 2010); United States v. Gould, 568 F.3d 459, 466 (4th Cir. 2009); United States v. Young, 585 F.3d 199, 203-06 (5th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1207 (11th Cir. 2009)). *See also* United States v. Billiot, 785 F.3d 1266, 1269-70 (8th Cir. 2015); United States v. White, 782 F.3d 1118, 1126-27 (10th Cir. 2015); United States v. Elk Shoulder, 738 F.3d 948, 953-54 (9th 2012); United States v. Brunner, 726 F.3d 299, 304 (2d Cir. 2013); United States v. Parks, 698 F.3d 1, 4-6 (1st Cir. 2012); United States v. W.B.H., 664 F.3d 848, 852-60 (11th Cir. 2011).

[116] United States v. Juvenile Male, 590 F.3d 924, 941-42 (9th Cir. 2010), vac'd as moot, 564 U.S. 932, 933 (2011).

[117] *Id*.

[118] United States v. Elkins, 685 F.3d 1038, 1048 (9th Cir. 2012), citing, United States v. Juvenile Male, 670 F.3d 999 (9th Cir. 2012).

[119] *Elkins*, 683 F.3d at1048-49.

due process of law."[120] 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."[121] 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."[122] 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.[123] 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.[124] *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.[125]

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.[126] 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."[127] Since "by the time that Congress enacted SORNA, every state had a sex offender registration law in place,"[128] attempts to build on *Lambert* have been rejected, because the courts concluded that offenders knew or should have known of their duty to register.[129] Suggestions that differences between state and federal requirements result in impermissible vagueness have fared no better.[130]

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[120] U.S. CONST. amends. V, XIV.

[121] United States v. Williams, 553 U.S. 285, 304 (2008).

[122] Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

[123] Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003).

[124] Id. at 7-8.

[125] United States v. Ambert, 561 F.3d 1202, 1208 (11th Cir. 2009).

[126] Lambert v. California, 355 U.S. 225 (1957).

[127] Id. at 229-30.

[128] United States v. DiTomasso, 621 F.3d 17, 26 (1st Cir. 2010).

[129] United States v. Hester, 589 F.3d 86, 92-3 (2d Cir. 2009) ("In Lambert, the Supreme Court stated: 'Registration laws are common and their range is wide.... But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking.' Like out sister circuits we find this last statement – regarding 'circumstances which might move one to inquire as to the necessity of registration' – to be critical.") (citing United States v. Whaley, 577 F.3d 254, 262 (5th Cir. 2009); United States v. Gould, 568 F.3d 459, 468-69 (4th Cir. 2009); United States v. Dixon, 551 F.3d 578, 584 (7th Cir. 2009); United States v. Hinckley, 550 F.3d 926, 938 (10th Cir. 2009); and United States v. May, 535 F.3d 912, 921 (8th Cir. 2008). *See also* United States v. Gagnon, 621 F.3d 30, 33 (1st Cir. 2010); United States v. W.B.H., 664 F.3d 848, 852-60 (11th Cir. 2011); United States v. Elkins, 683 F.3d 1039, 1049-50 (9th Cir. 2012).

[130] United States v. Pendleton, 636 F.3d 78, 86 (3d Cir. 2011) ("Pendleton's federal duty to register under SORNA was not dependent upon his duty to register under Delaware law. A person of ordinary intelligence would not assume that as long as he or she complied with state law on a particular issue, there would be no risk of running afoul of federal law").

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."[131] Perhaps because the threshold is so high, Section 2250 and SORNA have only infrequently been questioned on substantive due process grounds.[132]

Right to Travel

"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."[133]

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.[134]

Cruel and Unusual Punishment

The Eighth Amendment bars the federal government from inflicting "cruel and unusual punishment."[135] A punishment is cruel and unusual within the meaning of the Eighth Amendment when it is grossly disproportionate to the offense.[136] 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.[137] 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.[138]

See also United States v. Alsante, 812 F.3d 544, 547-48 (6th Cir. 2016) ("[T]he Due Process Clause does not offer convicted defendants at sentencing [for violation of §2250] the same constitutional protections afforded defendants at a criminal trial."); United States v. Elk Shoulder, 738 F3d 948, 955 (9th Cir. 2012) (state notice that the sex offender must register with state authorities is all the Due Process Clause demands for SORNA purposes). The Sixth Circuit in *Felts* expressed a possible due process concern that it was not required to address but one that might arise "where an inconsistency between federal and non-complying state regimes would render it impractical, or even impossible, for an offender to register under federal law." United States v. Felts, 674 F.3d 599, 605 (6th Cir. 2012). The affirmative defense in §2250(c) seems designed to address this concern. *See supra* Affirmative Defense.

[131] Washington v. Glucksberg, 521 U.S. 702, 727 (1997).

[132] *See* United States v. Ambert, 561 F.3d 1202, 1208-209 (11th Cir. 2009) (rejecting a substantive due process claim).

[133] Saenz v. Roe, 526 U.S. 489, 500 (1999).

[134] United States v. Shenandoah, 595 F.3d 151, 162-62 (3d Cir. 2010); United States v. Ambert, 561 F.3d 1202, 1209-10 (11th Cir. 2009); *cf.*, Bacon v. Neer, 631 F.3d 875, 878 (8th Cir. 2011).

[135] U.S. CONST. amend. VIII.

[136] Graham v. Florida, 560 U.S. 48, 59 (2010).

[137] United States v. Martin, 677 F.3d 818, 821-22 (8th Cir. 2012).

[138] United States v. Under Seal, 709 F.3d 257, 263-66 (4th Cir. 2013) (holding that SORNA's registration requirements do not constitute punishment); United States v. Juvenile Male, 670 F.3d 999, 1010 (9th Cir 2012) ("Given the high standard that is required to establish cruel and unusual punishment, we hold that SORNA's registration requirements do not violate the Eighth Amendment."); *cf.*, United States v. May, 535 F.3d 912, 920 (8th Cir. 2008) (not punishment).

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.

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.[139] 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.[140] Second, although a particular statute may implicate the proper exercise of more than one constitutional power, only one is necessary for constitutional purposes.[141] Third, "while SORNA imposes a duty on the sex offender to register, it nowhere imposes a requirement on the State to accept such registration."[142] 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.

Standing

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.[143] More specifically, at least two circuits had

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[139] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[140] U.S. CONST. art. I, §8, cls. 1, 3, 18 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ... And To 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.").

[141] *Cf.*, U.S. CONST. art. I, §8, cl. 18.

[142] United States v. White, 782 F.3d 1118, 1128 (10th Cir. 2015) (quoting Kennedy v. Allera, 612 F.3d 261, 269 (4th Cir. 2010), and citing United States v. Richardson, 754 F.3d 1143, 1146-47 (9th Cir. 2014); United States v. Felts, 674 F.3d 599, 602 (6th Cir. 2012); United States v. Jonson, 632 F.3d 912, 920 (5th Cir. 2011); United States v. Guzman, 591 F.3d 83, 94 (2d Cir. 2010)).

[143] United States v. Johnson, 632 F.3d 912, 919 (5th Cir. 2011) ("The First, Second, Third, Eighth, and Tenth Circuits have held that private parties do not having standing to bring such claims. The Seventh and Eleventh Circuits have permitted private parties to assert Tenth Amendment claims.").

held that defendants convicted under Section 2250 had no standing to challenge their convictions on Tenth Amendment grounds.[144]

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."[145] 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.[146] Yet, the fact a defendant's Tenth Amendment challenge may be heard does not mean it will succeed.

Spending for the General Welfare

"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.... "[147] "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."[148] In the past, the Supreme Court has described the limits on Congress in very general terms:

> [First,] [T]he exercise of the spending power must be in pursuit of the general welfare.... Second, ... if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously ... Third, ... conditions on federal grants ... [must be] []related to the federal interest in particular national projects or programs.... Finally, ... other constitutional provisions may provide an independent bar to the conditional grant of federal funds.[149]

Moreover, at the end of its 2011 term 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.[150] 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.[151]

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[144] United States v. Shenandoah, 595 F.3d 151, 161-62 (3d Cir. 2010) ("Shenandoah argues that SORNA is unconstitutional because it compels New York law enforcement to accept registrations from federally-mandated sex offender programs in violation of the Tenth Amendment.... We need not tarry long on this argument, because Shenandoah lacks standing to raise this issue."); United States v. Zuniga, 579 F.3d 845, 851 (8th Cir. 2009).

[145] Bond v. United States, 564 U.S. 211, 220 (2011); *see also* United States v. Felts, 674 F.3d 599, 607 (6th Cir. 2012) ("The United States counters that Felts lacks standing to assert SORNA's alleged violation. This is no longer an accurate statement of law. The United States' brief was filed on June 6, 2011, ten days before the Supreme Court decided *Bond*.... An individual can assert that the enforcement of a law violates the Tenth Amendment, particularly when a defendant has a significant liberty interest at stake. Because Felts was prosecuted for violating SORNA, he has standing to challenge the act for being enforced in violation of the Tenth Amendment.").

[146] Reynolds v. United States, 132 S. Ct. 975, 984 (2012); *see also* United States v. Knutson, 680 F.3d 1021, 1023 (8th Cir. 2012) ("This court had previously held that pre-Act offenders lack standing to challenge SORNA. However, after the parties filed their briefs, the Supreme Court ruled that pre-Act offenders have standing to challenge SORNA under the non-delegation doctrine. *Reynolds*, 132 S. Ct. at 984.").

[147] U.S. CONST. art. I, §8, cl. 1.

[148] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[149] *Id.* at 207-208.

[150] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2601-607 (Roberts, Ch.J. joined by Breyer and Kagan, JJ.); 132 S. Ct. at 2656-67 (Scalia, J. with Kennedy, Thomas, and Alito, JJ.) (dissenting).

[151] *Cf.*, i*d.* at 2604-605 (Roberts, Ch.J.)("It is easy to see how the *Dole* Court could conclude that the threatened loss of

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.[152] 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.[153] 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.[154] The fact that most states do not feel compelled to bring their systems into full SORNA compliance may lend credence to that assessment.[155]

Commerce Clause

"The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[156] 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.[157]

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less than half of one percent of South Dakota's budget left that State with a 'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact.' The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."); *id.* at 2659 (Scalia, J.)(dissenting)("[W]hile Congress may seek to induce States to accept conditional grants, Congress may not cross the 'point at which pressure turns into compulsion, and ceases to be inducement."). *See generally* CRS Report R42367, *Medicaid and Federal Grant Conditions After NFIB v. Sebelius: Constitutional Issues and Analysis*, by Kenneth R. Thomas.

[152] 42 U.S.C. §16925(a).

[153] New York v. United States, 505 U.S. 144, 175-76 (1992); Printz v. United States, 521 U.S. 898, 935 (1997) ("We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly.").

[154] United States v. Felts, 674 F.3d 599, 608 (6th Cir. 2012) ("SORNA does not fall under the rubric of Printz, but rather relies on Congress spending power. Failure to implement SORNA results in a loss of 10% of federal funding under [the law enforcement assistance program]. Conditioning of funds in this manner is appropriate under South Dakota v. Dole (stating that Congress's power to condition the receipt of federal funds under the spending power is valid so long as (1) the spending/withholding is in the pursuit of the general welfare; (2) the conditional nature is clear and unambiguous; (3) the condition is rationally related to the purpose of the federal interest, program, or funding; and (4) the conduct required to comply with the condition is not barred by the constitution itself)."). *See also* United States v White, 782 F.3d 1118, 1127-28 (10th Cir. 2015); United States v. Smith, 655 F.3d 839, 848 (8th Cir. 2011); United States v. Johnson, 632 F.3d 912, 920 (5th Cir. 2011); Kennedy v. Allera, 612 F.3d 261, 268-70 (4th Cir. 2010); United States v. Guzman, 591 F.3d 83, 95 (2d Cir. 2010).

[155] The Justice Department indicates that fifteen states are now in substantial compliance with SORNA requirements, *Jurisdictions That Have Substantially Implemented SORNA*, available at http://www.ojp.usdoj.gov/smart/newsroom_jurisdictions_sorna.htm.

[156] U.S. CONST. art. I, §8, cl. 3.

[157] United States v. Morrison, 529 U.S. 598, 608-609 (2000) (citing inter alia United States v. Lopez, 514 U.S. 549,

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]."[158] 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:

> Requiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines. To the extent that §16913 regulates solely intrastate activity, its means are reasonably adapted to the attainment of a legitimate end under the commerce power and therefore proper.[159]

Necessary and Proper

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.[160] 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.[161]

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."[162] Moreover, be the chain clear and unbroken, the challenged statute need not necessarily be directly linked to a constitutionally enumerated power.[163] The *Comstock* "statute is a 'necessary and proper' means of exercising the federal authority that

558-59 (1995)). Of late, seven Members of the Court have explained that the Commerce Clause does not authorize Congress to punish those who elect not to engage in commerce, National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2591 (Roberts, Ch.J. joined by Breyer and Kagan, JJ.) ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'"); 132 S. Ct. at 2644 (Scalia, J. with Kennedy, Thomas, and Alito, JJ.) (dissenting) ("But that failure—that abstention from commerce—is not 'Commerce.' To be sure, purchasing insurance is 'Commerce'; but one does not regulate commerce that does not exist by compelling its existence.").

[158] United States v. Coleman, 675 F.3d 615, 620 (6th Cir. 2012) (citing United States v. George, 625 F.3d 1124, 1129-130 (9th Cir. 2010); United States v. Vasquez, 611 F.3d 325, 330-31 (7th Cir. 2010); United States v. Shenandoah, 595 F.3d 151, 160 (3d Cir. 2010); United States v. Guzman, 591 F.3d 83, 89-92 (2d Cir. 2010); United States v. Whaley, 577 F.3d 254, 259-61 (5th Cir. 2009); United States v. Gould, 568 F.3d 459, 470-75 (4th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1210-212 (11th Cir. 2009); United States v. Lawrence, 548 F.3d 1329, 1337 (10th Cir. 2008); and United States v. May, 535 F.3d 912, 911-22 (8th Cir. 2008)). *See also* United States v. White, 782 F.3d 1118, 1123-26 (10th Cir. 2015); United States v. Parks. 698 F.3d 1, 6-7 (1st Cir. 2012).

[159] United States v Thompson, 811 F.3d 717, 723-25 (5th Cir. 2016); United States v. Pendleton, 636 F.3d 78, 87-8 (3d Cir. 2011) (quoting *Guzman*, 591 F.3d at 90-1 and citing *Vasquez*, 611 F.3d at 330; *Ambert*, 561 F.3d at 1211-212; and United States v. Howell, 552 F.3d 709, 717 (8th Cir. 2009)).

[160] 18 U.S.C. §4248.

[161] United States v. Comstock, 560 U.S. 126, 132 (2010).

[162] *Id*. at 133-34, citing among others, McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316, 421 (1810), and Gonzalez v. Raich, 545 U.S. 1, 22 (2005).

[163] *Id*. at 148 ("[W]e must reject respondents' argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress").

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."[164]

The Court, however, warned that its conclusion was predicated on several factors specific to the case before it.[165] Acting on this suggestion, the Fifth Circuit, sitting en banc, erroneously concluded that SORNA, as applied to Kebodeaux, rested beyond Congress's legislative reach.[166]

Kebodeaux had been convicted by a military court for having sexual relations with a consenting fifteen-year-old while he was a twenty-one-year-old airman. He was sentenced to six months and given a bad conduct discharge in 1999. He registered as a sex offender with Texas authorities in 2007. He was convicted for violating Section 2250 in 2008, when he failed to report that he had relocated from El Paso to San Antonio.[167]

The Constitution empowers Congress to make rules for the governing and regulation of the armed forces.[168] It also vests Congress with broad implementing authority to enact legislation necessary and proper to carry into effect this military governance power and the other powers conveyed by the Constitution.[169] The Fifth Circuit believed that, unlike the *Comstock* statute, the application of SORNA was insufficiently proximate to a federal custodial interest and was sweeping in its conceptual foundation ("[t]hat reasoning opens the door ... to congressional power over anyone who was ever convicted of a federal crime of any sort").[170]

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[164] *Id.* at 149.

[165] *Id.* ("We take these five considerations together. They include (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws... ").

[166] United States v. Kebodeaux, 687 F.3d 232, 253-54 (5th Cir. 2012) (Congress lacks the legislative authority to require under SORNA "a former federal sex offender to register an intrastate change of address after he has served his sentence and has already been unconditionally released from prison and the military.").

[167] United States v. Kebodeaux, 647 F.3d 137, 138-39 (5th Cir. 2011), vac'd for reh'g en banc, 647 F.3d 605 (5th Cir. 2011), rev'd, 133 S. Ct. 2496 (2013).

[168] U.S. CONST. art. I, §8, cl. 14 ("The Congress shall have Power ... To make Rules for the Government and Regulation of the land and naval Forces."). Some of the analysis that follows was borrowed from a *Kebodeaux* legal sidebar, CRS, *SORNA Clears Constitutional Hurdle*.

[169] U.S. CONST. art. I, §8, cl. 18 ("The Congress shall have Power ... To 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.").

[170] *Kebodeaux*, 687 F.3d at 244-45 ("In summary, even taking into account 'the breadth of the Necessary and Proper Clause,' *Comstock*, 130 S. Ct. at 1965, SORNA's registration requirements and criminal penalty for failure to register as a sex offender, as applied to those, like Kebodeaux, who had already been unconditionally released from federal custody or supervision at the time Congress sought to regulate them, are not 'rationally related' or 'reasonably adapted' to Congress's power to criminalize federal sex offenses to begin with. The statute's regulation of an individual, after he has served his sentence and is no longer subject to federal custody or supervision, solely because he once committed a federal crime, (1) is novel and unprecedented despite over 200 years of federal criminal law, (2) is not "reasonably adapted" to the government's custodial interest in its prisoners or its interest in punishing federal criminals, (3) is unprotective of states' sovereign interest over what intrastate conduct to criminalize within their own borders, and (4) is sweeping in the scope of its reasoning.").

Justice Breyer, the author of the Supreme Court's *Kebodeaux* opinion, provided a two-fold response.[171] First, by operation of SORNA's predecessor, the Wetterling Act, Kebodeaux's registration requirement arose proximate to federal custody. "[A]s of the time of Kebodeaux's offense, conviction and release from federal custody, these Wetterling Act provisions applied to Kebodeaux and imposed upon him registration requirements very similar to those that SORNA later imposed."[172] Second, "[n]o one here claim[ed] that the Wetterling Act, as applied to military sex offenders like Kebodeaux, falls outside the scope of the Necessary and Property Clause. And it is difficult to see how anyone could persuasively do so."[173]

Perhaps the same might be said of federal sex offenses enacted under Congress's enumerated powers other than the military clauses. Yet, Chief Justice Roberts in his *Kebodeaux* concurrence asserted that, "[t]he fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's purely intrastate conduct."[174] Nevertheless, a subsequent circuit court opinion concluded that Congress's authority under the Necessary and Proper Clause extends to a defendant convicted of a Commerce Clause-based federal offense who was never unconditionally released from federal supervision.[175] There, the U.S. Court of Appeals for the Tenth Circuit acknowledged the *Kebodeaux* concurring views of Chief Justice Roberts and Justice Alito, but observed that, "for our purposes, the majority opinion binds us, and its analysis does not confine SORNA's constitutionality to applications involving only the Military Regulation Clause. Nothing in the major opinion isolates the Military Regulation Clause as the sole foundation of congressional authority in support of SORNA."[176]

Separation of Powers: Non-Delegation

The first section of the first article of the Constitution declares that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.... "[177] 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."[178] 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

[171] United States v. Kebodeaux, 133 S. Ct. 2496 (2013).

[172] *Id*. at 2502.

[173] *Id*. *See also* United States v. Coppock, 765 F.3d 921, 924-25 (8th Cir. 2014); United States v. Brunner, 726 F.3d 299, 303 (2d Cir. 2013).

[174] *Kebodeaux*, 133 S. Ct. at 2507 (Roberts, Ch.J., concurring); Justice Alito also concurred only in the judgment, id. at 2508 (Alito, J., concurring).

[175] United States v. Brune, 767 F.3d 1009, 1016-17 (10th Cir. 2014).

[176] *Id*.

[177] U.S. CONST. art. I, §1.

[178] Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935). *See also* A.L.A Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

legislative will.[179] The circuit courts have yet to be persuaded that Congress's SORNA delegation to the Attorney General violates the non-delegation doctrine.[180]

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[179] Hampton & Co. v. United States, 276 U.S. 294, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [perform the delegated task] is directed to conform, such legislative action is not a forbidden delegation of legislative power."); *see also* American Power Co. v. SEC, 329 U.S. 90, 105 (1946) ("The legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."); Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457, 474-75 (2001) ("The scope of discretion §109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.' ... [W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'").

[180] United States v. Goodwin, 717 F.3d 511, 516 (7th Cir. 2013) (quoting *American Power Co*., 329 U.S. at 105 ("A delegation is 'constitutionally sufficient if Congress clearly delineates [1] the general policy, [2] the public agency which is to apply it, and [3] the boundaries of this delegated authority.' Here, all three requirements are met.")); United States v. Fernandez, 710 F.3d 847, 849-50 (8th Cir. 2013) ("SORNA's broad policy statement that it was designed 'to protect the public from sex offenders and offenders against children' [is] 'sufficient to provide an intelligible principle for delegation.'"). *See also* United States v. Cooper, 750 F.3d 263, 270-72 (3d Cir. 2014); United States v. Parks, 698 F.3d 1, 7-8 (1st Cir. 2012); United States v. Felts, 674 F.3d 599, 606 (6th Cir. 2012); United States v. Guzman, 591 F.3d 83, 92-3 (2d Cir. 2010); United States v. Whaley, 577 F.3d 254, 263-64(5th Cir. 2009); United States v. Ambert, 561 F.3d 1202, 1212-214 (11th Cir. 2009).