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Sexual Offender Registration Acts: Supreme Court Review of the Connecticut and Alaska Statutes in Connecticut Dept. of Public Safety v. Doe and Smith v. Doe

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Summary

The United States Supreme Court has rejected constitutional challenges to two state sex offender registration and notification statutes (SORA), *Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1140 (2003); *Smith v. Doe*, 123 S.Ct. 1160 (2002). In one, it concluded that as a matter of due process registrants under the Connecticut statute need not be afforded the opportunity of a hearing to establish that they should be released from the burdens of the statute because they are not currently dangerous. In the other, it held that the ex post facto clause does not ban application of the Alaska statute to convictions for misconduct occurring prior to enactment of the statute. The Justices left open the possibility that such statutes might be subject to constitutional attack on substantive due process grounds and possibly on equal protection grounds.

Background. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. 14071, imposes a ten percent reduction in federal law enforcement assistance funds upon any state whose registration and notification statute fails to meet the Act's minimum standards, 42 U.S.C. 14071(g). All fifty states and the District of Columbia have registration and notification statutes that differ greatly from jurisdiction to jurisdiction.[1]

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[1] ALA.CODE §§13A-11-200 to 13A-11-203; ALASKA STAT. §12.63.010 to 12.63.100; ARIZ.REV. STAT.ANN. §§13-3821 to 13-3826; ARK.CODE ANN. §§12-12-901 to 12-12-920; CAL. PENAL CODE §§290 to 290.95; COLO.REV.STAT. §§18-3-412.5; CONN.GEN.STAT.ANN. §§54-250 to 54-261; DEL.CODE ANN. tit.11 §§4120 to 4122; D.C.CODE §§22-4001 to 22-4017; FLA.STAT.ANN. §§775.21, 944.606; GA. CODE ANN. §§42-1-12, 42-9-44.1; HAWAII REV.STAT. §§846E-1 to 846E-9; IDAHO CODE §§18-8301 to 18-8326; ILL.COMP.LAWS ANN. ch.730 ¶150 §§1-12; IND. CODE ANN. §§5-2-12-1 to 5-2-12-13; IOWA CODE ANN. §§692A.1 to 692A.16; KAN.STAT. ANN. §§22-4901 to 22-4912; KY.REV.STAT.ANN. §§17.500 to 17.540; LA.REV.STAT.ANN. §§15:540 to 15:549; ME.REV.STAT.ANN. tit.34-A §§11201 to 11256; MD. CODE ANN. art.27 §792; MASS.

Smith v. Doe. One of the complainants in *Smith*, the Alaska case, was convicted of sexually abusing his minor daughter. After his release from prison, a state court awarded him custody of his daughter based in part upon psychiatric evidence that he was not a pedophile and was "a very low risk of re-offending," 259 F.3d at 983. Alaska then passed its sexual offender registration law. He and his wife sued state officials in federal court under 42 U.S.C. 1983, alleging that application of the statute would constitute a violation of the ex post facto and due process clauses of the United States Constitution. The district court granted the state's motion for summary judgment. The Ninth Circuit reversed, holding that the Alaska statute had to be considered punitive and that consequently the ex post facto clause barred the law's retroactive application, 259 F.3d at 985-95. The finding made resolution of the due process issues unnecessary, 259 F.3d at 995. The United States Supreme Court granted certiorari, 534 U.S. 1126 (2002), and rejected the Ninth Circuit conclusion that retroactive application of the Alaska SORA statute would offend the ex post facto clause.

Justice Kennedy in the opinion for the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, held the ex post facto clause inapplicable because the statute in question was intended to create a civil regulatory scheme and not as punishment and because it was not so punitive in purpose or effect as to negate that intent, 123 S.Ct. at 1154. Justice Thomas, although joining the opinion of the Court, submitted a concurring opinion to emphasize his view that ex post clause analysis should be limited to the terms of the statute and should not weigh the punitive impact of administrative decisions made for its implementation, like the decision here to provide notification through the Internet, 123 S.Ct. at 1154.

Justice Souter concurred in the result, but found the question of punitive purpose or effect so closely stated that only the presumption of constitutionality to which state law is entitled saved the Alaska SORA from ex post facto infirmity, 123 S.Ct. at 1156. Justice Ginsburg, with whom Justice Breyer agreed, and Justice Stevens in a separate opinion, consider the Alaska SORA scheme punitive and therefore would have held that the ex post facto clause precluded its retroactive application, 123 S.Ct. at 1158 (Stevens, J., dissenting); 123 S.Ct. at 1160 (Ginsburg & Breyer, JJ., dissenting).

The Court began its examination with the observation that the ex post facto clause obviously applies only to the criminal statutes, 123 S.Ct. at 1147. The matter of whether a statute is criminal or civil and regulatory in nature may be discerned by its language and

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GEN.LAWSANN. ch.6, §178C to 178*O*; MICH.COMP.LAWS ANN. 28.721 to 28.732; MINN.STAT. ANN. §243.166; MISS.CODE ANN. §§45-33-1 to 45-33-19; MO.ANN.STAT. §§589.400 to 589.425; MONT.CODE ANN. §§46-23-501 to 46-23-520; NEB.REV.STAT. §29-4001 to 29-4013; NEV.REV. STAT. §§179D.400 to 179D.620; N.H.REV. STAT.ANN. §§651-B:1 to 651-B:9; N.J.STAT.ANN. §§2C:7-1 to 2C:7-19; N.MEX.STAT.ANN. §29-11A-1 to 29-11A-8; NEW YORK CORRECT.LAW §§168-a to 168-v; N.C.GEN.STAT. §§14-208.5 to 208.32; N.D.CENT. CODE §12.1-32-15; OHIO REV.CODE ANN. §2950.1 to 2950.99; OKLA.STAT.ANN. tit.57 §§581 to 589; ORE.REV.STAT. §181.585 to 181.606; PA.STAT.ANN. tit. 42, §§9791 to 9799.7; R.I.GEN.LAWS §11-37.1-1 to 11-37.1-19; S.C. CODE ANN. §§23-3-400 tp 23-3-530; S.D.COD.LAWS ANN. §§22-22-31 to 22-22-41; TENN.CODE ANN. §§40-39-101 to 40-39-110; TEX.CRIM.PRO. CODE ANN. Arts. 62.01 to 62.13; UTAH CODE ANN. §77-27-21.5; VT.STAT.ANN. tit.13, §§5401 to 5413; VA. CODE ANN. §§19.2-390.1, 19.2-390.2; WASH.REV.CODE ANN. §§9A.44.130 to 9A.44.140; W.VA.CODE ANN. §§15-12-1 to 15-12-10; WIS.STAT.ANN. §§301.45, 301.46; WYO. STAT. §§7-19-301 to 7-19-307.

other indicia of legislative intent such as its placement within the Code and the extent of discretion afforded administrative officials. In the eyes of the Court the Alaska legislature marked its intent to create a civil, regulatory scheme by its statutory statement of purpose (protection of public safety), by its divided placement of the Act's provisions within the state's health and safety code as well as its criminal procedure code, and by the broad implementing authority it vested in one of the state's regulatory agencies, 123 S.Ct. at 1147-149.[2]

In order to judge whether the statute's purpose and effect might be so punitive as to belie this apparent regulatory intent, the Court considered the factors used to test for the presence of punitive features in double jeopardy cases, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

> The factors most relevant . . . 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. 123 S.Ct. at 1149.

Each of the colonial punishments thought most analogous the punitive impact of administrative decisions made for its implementation – public shaming, humiliation, banishment – involved more than the mere notification found in the Alaska procedure. "The process [in Alaska] is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality," at least in the eyes the Court, 123 S.Ct.at 1151. The statute calls for neither imprisonment nor any other physical restraint and its burdens might be considered less onerous than occupational debarment or some of the other disqualifications which have been accepted as components of a regulatory scheme in the past, 123 S.Ct. at 1151.[3]

The Court did not consider the fact that the statute might have a deterrent effect dispositive, but thought "the Act's rational connection to a nonpunitive purpose . . . a most significant factor in [the] determination that the statute's effects are not punitive," 123 S.Ct. at 1152. And it had been conceded that it had a valid and rational nonpunitive purpose of "public safety . . . advanced by alerting the public to the risk of sex offenders in their community," S.Ct. at 1152. Finally, the Court refused to accept the contention that the Act was excessive by virtue either of its application to all sex offenders no matter

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[2] Justice Souter "not only agree[d] with the court that there is evidence pointing to an intended civil characterization of the act, but also [saw] considerable evidence pointing the other way," The legislature had not designated the procedure "civil," and its obligations turned exclusive upon a prior criminal conviction, and in Justice Souter's mind its burdens were severe, 123 S.Ct. at 1155-156.

[3] Justices Ginsburg and Breyer applied the *Mendoza-Martinez* factors with a different result. They considered the Act's burdens both onerous and intrusive and involving affirmative disabilities and restraints; they saw them mirrored in the colonial forms of punishment the majority found distinguishable; they too noted that only the criminal convicted were exposed to the Act's burdens; and they felt that the Act's burdens without regard to future dangerousness or rehabilitation were too excessive to be justified in the name protecting public safety by public notification, 123 S.Ct. at 1159-160.

how dangerous or because of the breadth of disclosure triggered by use of the Internet as medium of notification, 123 S.Ct. 1152-154.

Connecticut Dept. of Public Safety v. Doe. The Ninth Circuit in *Smith* was troubled by the fact that even a judicial determination that a potential registrant was no longer dangerous would not free him from the grasp of the Alaska statute. The Second Circuit in *Connecticut* was troubled by the fact that the Connecticut statute afforded no opportunity for such a determination. The Ninth Circuit's concern was insufficient to render the Alaska statute punitive and thus subject to ex post facto limitations; the Second Circuit's concern was irrelevant since SORA obligations turned upon conviction not upon dangerousness or the want thereof, *Connecticut Dept. of Public Safety v. Doe*, 123 S.Ct. 1160, 1163 (2003).

The complainants in *Connecticut* had sued under 42 U.S.C. 1983 claiming that the Connecticut sexual offender registration and notification statute violated the ex post facto and due process clauses. The district court rejected their ex post facto claim, but agreed that due process required a current "dangerousness" hearing before information about a registrant could be disseminated, *Doe v. Lee*, 132 F.Supp.2d 57 (D.Conn. 2001). The Court of Appeals for the Second Circuit affirmed, 271 F.3d 38 (2d Cir. 2001). The United States Supreme Court granted certiorari, 122 S.Ct. 1959 (2002), and reversed.

In a brief opinion of a near unanimous Court, Chief Justice Rehnquist observed:

> In *Paul v. Davis*, 424 U.S. 693 (1976), we held that mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest. Petitioners urge us to reverse the Court of Appeals on the ground that, under *Paul v. Davis*, respondent has failed to establish that petitioners have deprived him of a liberty interest. We find it unnecessary to reach this question however, because even assuming, *arguendo,* that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute. 123 S.Ct. 1164.

There is nothing procedurally unfair about statute which demands registration of those convicted of certain crimes – regardless of the offenders are dangerous or harmless – while denying them a hearing to prove they are not dangerous. There might be something substantively unfair about a statute which imposes substantial burdens upon registrants in the name of protecting the public from the dangerous but which affords no mechanism for those ensnarled to prove they are not dangerous. The question of substantive due process, however, was not before the Court, and the Court explicitly declined to address it, 123 S.Ct. at 1164-165.

Justice Stevens, the only member of the Court not to join the opinion of the Court, nonetheless concurred in the result:

> Because I believe registration and publication are a permissible component of the punishment of this category of crimes, however, for those convicted of offenses committed after the effective date of such legislation, there would be no separate procedural due process violation so long as a defendant is provided a constitutionally adequate trial. 123 S.Ct. at 1158-159 (Stevens, J., dissenting in *Smith* and concurring in the result in *Doe)*.

Justices Scalia and Souter offered separate concurrences. Justice Scalia wrote to emphasis that from his perspective enactment of the Connecticut statute would have provided all the process that was due even if had deprived registrants of a liberty interest, 123 S.Ct. at 1165. Justice Souter, with whom Justice Ginsburg agreed, suggested that not only did the Court's opinion left the door open for subsequent substantive due process challenges but that the SORA "is, like all legislative choices affecting individual rights, open to challenge under the equal protection clause," 123 S.Ct. at 1166.

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