

# MEMORANDUM

TO: Defenders  
FR: Amy Baron-Evans  
RE: Supplement to Adam Walsh Act - Part II (Sex Offender Registration and Notification Act)  
DA: May 7, 2007

There have been some new developments since the Memorandum, Adam Walsh Act - Part II (Sex Offender Registration and Notification Act), dated November 20, 2006. The Attorney General published an “interim rule” which purports to make SORNA retroactive. AFPDs in Detroit received a great decision from Judge Borman holding that 18 U.S.C. § 2250 does not apply by its plain language to a person who traveled in interstate commerce before SORNA was enacted, and that doing so would violate the *Ex Post Facto* Clause. The Sentencing Commission sent guidelines for failure to register (and other Adam Walsh Act provisions) to Congress on May 1, which will be effective November 1, 2007.

## I. The AG’s Helpfully Cynical “Interim Rule”

Congress delegated to the Attorney General (1) the authority to decide whether the SORNA is retroactive to persons convicted before July 27, 2006 and persons convicted before the implementation of SORNA in their jurisdictions (the deadline for which is July 27, 2009), and (2) if so, to promulgate regulations to ensure that they and anyone else who cannot receive notice of their duties under SORNA and be registered by an “appropriate official” before completion of sentence or within three days of sentencing, does receive notice and is registered. *See* 42 U.S.C. §§ 16913(b), (d), 16917(a), (b).

Months passed and many defendants charged with Failure to Register under 18 U.S.C. § 2250 based on old convictions raised the claim that SORNA did not apply to them because there was no regulation from the AG saying that it did.

On February 28, 2007, the AG promulgated an “interim rule” (meaning the rule is in effect *before* public comment, bypassing ordinary APA procedure because it was suddenly a pressing emergency) which (1) deems SORNA retroactive to anyone convicted of an offense listed in SORNA at any time, but (2) declines to provide any procedures for notice and registration of such persons.<sup>1</sup>

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<sup>1</sup> The rule, at 28 C.F.R. § 72.3, states as follows:

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. § 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and

The *ex post facto*, non-delegation and notice arguments are now front and center. The content of the AG's notice and request for comment can be useful in challenging the regulation on those and other grounds, as it highlights and confirms the many weaknesses in the statute and the rule. *See* Rules and Regulations, Department of Justice, 28 C.F.R. Part 72, February 28, 2007, 72 FR 8894-01, 2007 WL 594891 (F.R.).

Not yet implemented in any jurisdiction: Acknowledging that the states, D.C., the territories and Indian tribes have three years to implement SORNA, the AG does not attempt to claim that *any* jurisdiction has implemented it so far. *Id.* at 8895. It states only that: "All states currently have sex offender registration and notification programs and have endeavored to implement the Wetterling Act standards in their existing programs." *Id.*

No notice or registration mechanism: The AG does not attempt to claim that there is *any* mechanism for informing persons of registration requirements other than the BOP's obligation to inform persons being released from federal prison, federal Probation Officers' obligation to inform persons currently being sentenced to probation; and registration being mandatory for persons currently being placed on supervised release. *Id.* at 8895. In short, there is no mechanism for notifying *any* state offender of the applicability of SORNA to them, or for notifying federal offenders who have already been released from prison and are not being placed on supervised release. In *Lambert v. California*, 355 U.S. 225 (1958), the Supreme Court invalidated a prosecution for failure to register as a felon as required by a city ordinance under the Due Process Clause, stating: "Engrained in our concept of due process is the requirement of notice. . . . Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." Nor does the AG attempt to claim that there is any mechanism for actually registering people (since no jurisdiction has implemented SORNA), even those

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could be held criminally liable under 18 U.S.C. § 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. § 2250 for the violation because he traveled in interstate commerce.

In these two examples, the persons were required to register in their states under the Wetterling Act, violation of which is a misdemeanor. Other defendants being prosecuted under section 2250(a) were never required to register or are no longer required to register as a matter of state law or the Wetterling Act.

currently being released from federal prison, being sentenced to probation in federal court, or being placed on federal supervised release.

The Purpose of the Interim Rule is *Not* to Provide Notice and Ensure Registration of People for Whom it is Not Possible to Register as Required by SORNA, and Therefore is *Not* About Public Safety. The AG gives an example of a person who was convicted of an offense covered by SORNA and sentenced to probation before SORNA was enacted, and who did not register because the offense was not subject to a registration requirement under state or federal law at the time. *Id.* at 8896. Registration within three business days after sentencing is “not possible” because “that time is past.” *Id.* Guess what? “The purpose of this interim rule is not to address” the statutory directive “to prescribe rules for the registration of [sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction] and for other categories of sex offenders who are unable to comply with subsection (b) of this section,” 42 U.S.C. § 16913(d). *Id.* at 8896.

The Purpose of the Rule is to Ensure that DOJ Can Continue to Prosecute People Who Do Not Have Notice and for Whom it Is Not Possible to Register as Required by SORNA. This rule “serves the narrower, immediately necessary purpose of foreclosing any dispute as to whether SORNA is applicable where the conviction for the predicate offense occurred prior to the enactment of SORNA.” *Id.* at 8896. This frightful situation must end: “sex offenders with predicate convictions predating SORNA who do not wish to be subject to the SORNA registration requirements, or who wish to avoid being held to account for having violated those requirements, have not been barred from attempting to devise arguments that SORNA is inapplicable to them, e.g., because a rule confirming SORNA’s applicability has not been issued. This rule forecloses such claims . . . .” *Id.*

Non-Delegation: Although non-delegation challenges are rarely successful, the AG is clearly worried about a non-delegation challenge here. *See* Adam Walsh II at 37-38. The statute states:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

42 U.S.C. § 16913(d). In the category of “who are you going to believe, me or your own eyes?” the AG baldly asserts that “SORNA’s direct federal law registration requirements . . . took effect when SORNA was enacted on July 27, 2006, and currently apply to all offenders in the categories for which SORNA requires registration.” *Id.* at 8895. The next paragraph asserts that Congress merely directed the AG to supplement the statutory text with helpful administrative guidance (attempting to squeeze within the requirement that executive regulations are “valid only as subordinate rules,” and may not make “policy,” which is an exclusively legislative function, *see Panama Refining Co. v. Ryan*, 293 U.S. 388, 415, 429, 430 (1935)). *Id.* Several paragraphs later is the amazing

assertion that “facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions with no exception for sex offenders whose convictions predate the enactment of SORNA.” *Id.* at 8896. The AG characterizes the directive in 42 U.S.C. § 16913(d) as a “specific context[] in which clarification or supplementation of the statutory provisions by the Attorney General is contemplated,” and that it merely ensures that the AG will “fill any gaps” and resolve “questions that may arise concerning the retroactive applicability . . . to sex offenders convicted prior to its enactment.” *Id.* at 8895. Then there is the bobbing and weaving between claiming that it is necessary to “mak[e] it indisputably clear that SORNA applies to all sex offenders . . . regardless of when they were convicted,” and that it would apply even “absent this rule.” *Id.* at 8896.

*Ex Post Facto*: After claiming that SORNA “facially” applies retroactively, the AG states: “Nor is there any *ex post facto* problem . . . because the SORNA sex offender registration and notification requirements are intended to be non-punitive, regulatory measures adopted for public safety purposes, and hence may validly be applied (and enforced by criminal sanctions) against sex offenders whose predicate convictions occurred prior to the creation of these requirements.” *Id.* at 8896, citing *Smith v. Doe*, 538 U.S. 84 (2003). If the purpose were public safety, and not just protecting DOJ’s ability to prosecute and punish people who had no notice or practical way to register, the AG obviously would have attended first and foremost to Congress’ directive “to prescribe rules for the registration of [sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction] and for other categories of sex offenders who are unable to comply with subsection (b) of this section,” 42 U.S.C. § 16913(d).<sup>2</sup> As described in Adam Walsh II at 38-43, the registration and notification requirements of SORNA alone (aside from the criminal provision) are far more punitive than the Alaska law at issue in *Smith v. Doe*. Most importantly, the issue before the Court in *Smith v. Doe* was whether the registration requirement was a retroactive punishment prohibited by the *Ex Post Facto* Clause, not, as here, a criminal statute that in some cases subjects people to federal prosecution based on conduct that was not formerly a crime at all, and in other cases increases the federal penalty for their conduct from one to ten years. *See United States v. Bobby Smith*, \_\_\_ F.Supp.2d \_\_\_, 2007 WL 735001 (E.D. Mich., Mar. 8, 2007).

*Commerce Clause*: The AG contends that “creation of these requirements for sex offenders is within the constitutional authority of the Federal Government . . . [b]ecause circumstances supporting federal jurisdiction – such as conviction for a federal offense as the basis for registration, or interstate travel by a state sex offender who then fails to register in the destination state – are required predicates for federal enforcement of the SORNA registration requirements.” *Id.* at 8895. In other words, there is no Commerce Clause authority for SORNA’s registration and notification requirements as applied to persons with state offenses who do not travel in interstate commerce. Even as to persons with state offenses who do travel and then fail to register, and persons with federal

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<sup>2</sup> This is not to say that making the registration requirements retroactive actually protects the public, but only that that would have to be DOJ’s position. Those who treat or represent sex offenders know that making SORNA retroactive makes the public less safe because it destabilizes people who have been leading a law abiding life.

offenses for that matter, what is the effect on interstate commerce? *See Jones v. United States*, 529 U.S. 848 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). The Travel Act, 18 U.S.C. § 1952, has been upheld against Commerce Clause challenge, but that statute requires travel with intent to commit a specified crime and committing a specified crime thereafter, and therefore the travel is in furtherance of a crime and there is an interstate nexus. *See also* Federalism, below.

Spending Clause: The AG contends that requiring non-federal jurisdictions to implement SORNA within three years subject to a 10% reduction in funding if they do not “is also within the constitutional authority of the Federal government” because SORNA’s provisions are “cast as directions” to jurisdictions and their officials, and are “only conditions to avoid this funding reduction.” SORNA’s requirements are “only partial funding eligibility conditions in relation to the states,” and D.C., Indian tribes and territories “are generally subject to federal legislative authority” anyway. *Id.* at 8895. SORNA, however, crosses the line between encouragement and coercion, clearly enlists the states in enforcing federal law, and therefore violates the Tenth Amendment. *See Adam Walsh II* at 43-45 (citing *Printz* and *New York*); *see also FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982). In any event, the Spending Clause allows the federal government to use conditional funding to encourage the states to take certain actions. It does not give the federal government any power to require individuals to register as sex offenders.

Federalism: In *In re Rahrer*, 140 U.S. 545 (1891), the Court held that it was unconstitutional for the federal government to make either criminal laws or laws that would “impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity,” which is “a power originally and always belonging to the States.” *Id.* at 554. The Court thus confirmed that the “police power” remains with the states, and that the state have the right to control their “internal affairs,” and in so doing, “to protect the health, morals and safety of their people.” *Kansas v. Mugler*, 123 U.S. 623 (1897); *State Board of Insurance et al. v. Todd Shipyards Corp.*, 370 U.S. 451, 455-58 (1962).

On August 4, 1999, President Clinton issued Executive Order 13132, which requires strict attention to federalism concerns in a number of specific ways by agencies when promulgating rules and regulations. *See* Exec. Order No. 13,132, 1999 WL 594172 (Pres.Exec.Order), 64 FR 43255. Though the AG claims that this rule comports with Executive Order 13132, that is highly doubtful. The Executive Order provides another basis for challenging the rule.

**II. *United States v. Bobby Smith*, \_\_\_ F.Supp.2d \_\_\_, 2007 WL 735001 (E.D. Mich., Mar. 8, 2007) (Borman, J.)**

Thanks to AFPD Jim Gerometta in the Eastern District of Michigan, we have an *ex post facto* decision that makes the AG’s regulation irrelevant if the defendant traveled before July 27, 2006. It also makes the point, not covered in our memo of November 20, 2006, that 18 U.S.C. § 2250(a), unlike the Alaska statute at issue in *Smith v. Doe*, 538 U.S. 84

(2003), not only *is* a criminal statute and therefore undeniably punitive but raises the penalty from one year under the Wetterling Act to ten years.

Judge Borman begins by finding, as a matter of statutory construction, that SORNA does not apply to a defendant who traveled in interstate commerce before July 27, 2006 because 18 U.S.C. § 2250 says “travels,” which is forward-looking, not “traveled,” which is backward-looking. Three weeks later, in *United States v. Jackson*, 480 F.3d 1014 (9th Cir. 2007), the Ninth Circuit applied the same analysis of the word “travels” to conclude that an indictment charging a defendant with violating 18 U.S.C. § 2423(c) was properly dismissed because the defendant’s travel ended before the statute was enacted. Note that Example 2 in the AG’s regulation, *see* footnote 1, attempts to establish that a person is guilty under 18 U.S.C. § 2250 “because he traveled in interstate commerce,” regardless of when. Under *Smith* and *Jackson*, that interpretation is unavailing where the defendant traveled before July 27, 2006.

Judge Borman also concluded that applying 18 U.S.C. § 2250 to a defendant who traveled in interstate commerce before July 27, 2006 would violate the *Ex Post Facto* Clause because SORNA increased the maximum sentence for the offense applicable to the defendant’s conduct from one year under the Wetterling Act to ten years under 18 U.S.C. § 2250. *Smith v. Doe*, 538 U.S. 84 (2003) is not comparable (even aside from all the other ways in which the Alaska statute was less punitive than SORNA) because the issue there was whether the “civil” requirement to register was a retroactive punishment in violation of the *Ex Post Facto* Clause. Here, the government sought to apply a *criminal* statute with an increased penalty to a person who traveled in interstate commerce before July 27, 2006.

### **III. Sentencing Guidelines**

The new guidelines for 18 U.S.C. § 2250(a) and (c), and for 18 U.S.C. § 2260A, are attached to this memorandum. For ideas on how to challenge a guideline sentence in such cases, and under the other new sex offense guidelines as well, *see* Defenders’ Letter to USSC Regarding Proposed Amendments Relating to Adam Walsh Act, March 6, 2007, [http://www.fd.org/pdf\\_lib/Sex\\_offense\\_amend\\_comments3607.pdf](http://www.fd.org/pdf_lib/Sex_offense_amend_comments3607.pdf)

**§2A3.5. Failure to Register as a Sex Offender**

(a) Base Offense Level (apply the greatest):

- (1) **16**, if the defendant was required to register as a Tier III offender;
- (2) **14**, if the defendant was required to register as a Tier II offender; or
- (3) **12**, if the defendant was required to register as a Tier I offender.

(b) Specific Offense Characteristics

(1) (Apply the greatest):

If, while in a failure to register status, the defendant committed—

- (A) a sex offense against someone other than a minor increase by **6** levels;
- (B) a felony offense against a minor not otherwise covered by subdivision (C), increase by **6** levels; or
- (C) a sex offense against a minor, increase by **8** levels.

(2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by **3** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2250(a).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.*

*"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5).*

*"Tier I offender", "tier II offender", and "tier III offender" have the meaning given those terms in 42 U.S.C. § 16911(2), (3) and (4), respectively.*

2. Application of Subsection (b)(2).—

(A) In General.—*In order for subsection (b)(2) to apply, the defendant's voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.*

(B) Interaction with Subsection (b)(1).—*Do not apply subsection (b)(2) if subsection (b)(1) also applies.*

**§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender**

If the defendant was convicted under—

(a) 18 U.S.C. § 2250(c), the guideline sentence is the minimum term of imprisonment required by statute; or

(b) 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2250(c), 2260A.

Application Notes:

1. In General.—*Section 2250(c) of title 18, United States Code, provides a mandatory minimum term of five years' imprisonment and a statutory maximum term of 30 years' imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. § 2250(a). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.*

2. Inapplicability of Chapters Three and Four.—*Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).*

3. Inapplicability of Chapter Two Enhancement.—*If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(c) or 2260A.*

4. *Upward Departure.—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(c) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.*