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Update

Practitioner's Guide to the Adam Walsh Act

By Lori McPherson¹

The Adam Walsh Child Protection and Safety Act of 2006 was signed into law on July 27, 2006, and its impact is already being felt across the country by state and local prosecutors. This article is intended to give a brief overview of what the practitioner needs to know about this new federal legislation and its potential impact on local prosecutions.

Sex Offender Registration and Notification Act (SORNA) Background

Title I of the Adam Walsh Act, also known as the Sex Offender Registration and Notification Act (SORNA), has been codified in large part at 42 U.S.C. §16911 *et. seq.* and is intended to be a full replacement of the Jacob Wetterling sex offender registration requirements—and its subsequent amendments—which were enacted during the 1990s. Those Wetterling provisions, located at 42 U.S.C. §14071 *et. seq.*, established a baseline for state-level sex offender registration programs.² By the late 1990s every state had enacted some kind of sex offender registration procedure to comply with the requirements of the Jacob Wetterling legislation, including its "Megan's Law" public notification provisions.

In response to a number of high-profile cases where egregious crimes were committed by individuals with prior sex offense convictions—but who were not required to register as sex offenders—Congress revised the federal requirements for sex offender registration. These changes were finalized in SORNA.

SORNA did not create a federal sex offender registry. The legislation did two things of note for the local prosecutor. First, the Adam Walsh Act created a new federal felony offense for failing to register as a sex offender as required by SORNA.³ This new criminal offense will be discussed further below. Second, it

established a new *baseline* sex offender registry standard for the jurisdictions to achieve, but they are free to enact more stringent requirements. Failure to come into "substantial compliance" with SORNA's requirements in a timely manner will result in an annual 10% reduction the jurisdiction receives through Byrne Grants.⁴ In other words, to avoid the loss of that money, every jurisdiction may have to overhaul its sex offender registration statutory and/or regulatory scheme so that it meets SORNA's minimum requirements. These revisions must be accomplished no later than July 27, 2009.⁵ A number of jurisdictions have already passed such legislation,⁶ and those new schemes will be reviewed by the newly-established Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART) office to determine whether they in fact comply with SORNA.⁷

The Department of Justice has issued two sets of proposed guidelines to help elucidate SORNA. The first was issued on February 28, 2007, and addressed questions of retroactivity.⁸ The second set of guidelines was issued May 17, 2007, and contained a detailed account of how SORNA is to be implemented in and operated by the jurisdictions.⁹

General Requirements

As the requirements of SORNA are discussed, keep in mind that each individual jurisdiction will be required to make whatever changes are necessary to come into compliance. The nuances of exactly what variations, if any, from the "black-letter" requirements of SORNA might be tolerated and still considered "substantial compliance" is simply unknown at this time.¹⁰

Speaking very generally, SORNA establishes three

tiers of sex offenders. Offenders are classified based on the severity of the offense(s) for which they were convicted. Every jurisdiction will have to determine which of their state statutes correlate to the tiered offenses listed in SORNA itself. Each tier of offenses has its own registration and public notification requirements. Jurisdictions are not required to establish a tier system that mirrors SORNA. Substantial compliance can be achieved by employing a different system, as long as registerable offenses carry the same or greater sex offender registration and notification guidelines as SORNA.

(1) *Tier Designation and Frequency of Registration.* Tier I sex offenders, convicted of the “least serious” offenses in this statutory scheme, are required to register for 15 years, renewing their registration once annually.¹¹ Tier I is the least serious classification that a sex offender can receive, and is essentially a “catch-all” category for sex offenses which do not fall under Tier II or Tier III. It includes misdemeanor and felony offenses, which meet the definition of “sex offense” in 18 U.S.C. §16911 (5), that do not qualify for a higher tier classification.¹²

Tier II sex offenders are required to register for 25 years, renewing their registration every six months. A person previously convicted of a Tier I sex offense who is subsequently convicted of a felony sex offense (regardless of its tier) will be classified as at least a Tier II sex offender.¹³ For those with no prior sex offense convictions, Tier II offenses will generally cover the following felony¹⁴ crimes under a state’s statutory scheme:

- offenses involving the use of minors in prostitution;
- offenses against minors involving sexual contact;
- offenses involving the use of a minor in a sexual performance; and
- offenses involving the production or distribution of child pornography.¹⁵

Tier III sex offenders are required to register for life, renewing their registration every three months. A person previously classified as a Tier II sex offender who is subsequently convicted of a felony sex offense (regardless of its tier) will be classified as a Tier III sex offender.¹⁶ Tier III sex offenses are those punishable by more than one year incarceration and are comparable to the following crimes:

- sexual acts with another by force or threat;
- engaging in a sex act with another who has been rendered unconscious or involuntarily drugged, or who is otherwise incapable of appraising the nature of the conduct or declining to participate;
- sexual acts with a child under the age of 12; and
- non-parental kidnapping of a minor.¹⁷

Common to all tiers are the following requirements:

(2) *Information Required.* Any sex offender required to register will, at a minimum, have to provide the registering authority with the following: his or her name, social security number, home, work, and school addresses, as well his or her license plate number and a description of any vehicle the offender owns or operates.¹⁸ According to the May 2007 proposed guidelines, offenders will also have to provide the following information in addition to that which is specifically authorized by the legislation: nicknames; pseudonyms; actual and purported dates of birth; purported social security numbers; e-mail addresses; IM “handles”; passport number and immigration document information; cell phone numbers; and land line phone numbers, as well as additional information.¹⁹

These guidelines also address how state registry officials are required to handle a number of living situations in which offenders might find

themselves. To address the issue of homeless or transient sex offenders, SORNA will require that when a sex offender has no fixed address, the sex offender will have to provide a “more or less specific description” concerning the place or places where the sex offender normally lives.²⁰ Sex offenders who take vacations or long trips will also have to advise their residency registering jurisdiction of any place where they will be “staying for seven or more days” so that the destination jurisdiction can be notified.²¹

(3) *Location of Registration.* All offenders are required to register, and maintain their registration as required, in the jurisdictions where they live, work, and attend school. They are also required to register initially in the jurisdiction where they were convicted prior to release from custody or within three days of conviction if they are not incarcerated.²²

(4) *DNA, Fingerprints, Palm Prints.* In addition to the other requirements mentioned above, any jurisdiction in which a sex offender registers will, at a minimum, have to maintain the following: the offender’s criminal history; fingerprints; palm prints; DNA sample; and, a copy of the violated law which requires their registration.²³ The SMART office is in the process of developing a state-by-state historical database of state sex offender statutes that may be accessed from any jurisdiction.²⁴

(5) *Public Notification.* A great deal of registry information will be made available on a publicly-accessible online database. Exceptions to this public availability of information include data containing the victim’s identity, offender’s social security number, passport and immigration documents, and arrests that did not result in convictions.²⁵ At the option of the jurisdictions, they may also exclude the name of an offender’s employer or school.

(6) *Removal from Sex Offender Registry.* One facet of many jurisdictions’ current sex offender registration laws is a mechanism by which a sex offender can be removed from the sex offender registry and/or public notification database. Offenders can have their names removed from the sex offender registry established under SORNA. However, the wait is a long one: Tier I offenders have to wait 10 years, and Tier III sex offenders who were required to register on the basis of a juvenile delinquency adjudication must wait 25 years.²⁶ There are no other means by which a sex offender may remove his or her name from the sex offender registry.

(7) *Retroactivity.* A jurisdiction will be deemed to have “substantially implemented” SORNA with respect to sex offenders whose convictions predate the enactment or implementation of SORNA if that jurisdiction registers the following offenders: (1) those who are incarcerated or under supervision for the registration offense or for some other crime; (2) those who are already subject to a pre-existing sex offender registration requirement; [and] (3) those who reenter the “jurisdiction’s justice system because of a conviction for some other crime.”²⁷ From the date of the jurisdiction’s implementation of SORNA, these “retroactive” sex offenders must be “recaptured” and registered within the following time frames: Tier I offenders within one year; Tier II offenders within six months; and, Tier III offenders within three months.²⁸

Application to Juveniles

Unlike the requirements of the Jacob Wetterling Act, SORNA does require that certain juveniles register as sex offenders. This requirement applies to juveniles convicted as adults *and* juveniles adjudicated delinquent in juvenile court, so long as the juvenile is 14 years of age or older and is convicted of an offense similar to or more serious than the

federal aggravated sexual assault statute, 18 U.S.C. §2241. In addition to offenses such as forcible rape, this statute covers *any* offense involving a sex act with a victim under the age of 12.

There are no provisions for a risk assessment hearing in the case of juveniles adjudicated delinquent and subject to registration under SORNA. There are no exceptions for intrafamilial cases of sexual abuse. The only exception is the so-called “Romeo and Juliet” clause, whereby the law makes clear that jurisdictions will not be required to register persons convicted of sex offenses involving “consensual” sexual activity between a victim who is at least 13 years old and an offender not more than four years older than the victim.²⁹

SORNA creates a strict liability scheme whereby the discretion of the judge and prosecutor are taken away. In the case of juveniles this presents particular challenges. Recent social science research indicates that there is a marked difference between juveniles and adults in their amenability to sex offender treatment.³⁰ Generally speaking, juveniles stand to benefit much more so than adults from sex offender treatment.³¹ Nevertheless, under the statutory scheme as it now stands, juveniles adjudicated delinquent of offenses which subject them to SORNA’s requirements will be classified as Tier III sex offenders and will be subject to lifetime registration.

Miscellaneous Provisions

Tucked away in the Adam Walsh legislation are some important provisions regarding discovery in child pornography cases, bail in federal prosecutions, and immigration law.

Discovery in Child Pornography Cases

Prosecutors will find some very helpful language contained in the congressional findings laid out prior to the discovery provisions of the Adam Walsh Act. Section 501 provides as follows:

- (2)(A) The vast majority of child pornography prosecutions involve images contained on computer hard drives, computer disks, and related media; ...
- (C) The government has a *compelling State interest* in protecting children from those who sexually exploit them;
- (D) Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse;
- (E) *Child Pornography constitutes prima facie contraband*, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys.³²

Section 504 of the Adam Walsh Act was codified at 18 U.S.C. §3509(m) and applies to discovery in child pornography cases in the federal courts:

Notwithstanding Rule 16 of the FRCP, a court *shall* deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography, so long as the Government makes the property or material reasonably available to the defendant.³³

The statute goes on to explain that materials will be deemed to be “reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or material by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial.”³⁴

This discovery provision was the subject of a flurry of litigation soon after the enactment of the Adam Walsh Act. In *U.S. v. Butts*,³⁵ the court found that the evidence in question was “reasonably available” because the government agreed to make extensive accommodations for the defense forensics expert, even though there was nearly a terabyte of information to review.³⁶ However, in *U.S. v. Knellinger*,³⁷ the court held that defense counsel was entitled to a mirror copy of the defendant’s hard drive because of the exorbitant cost of performing the forensic video analysis on-site at the government’s facilities. Should the practitioner be presented with a similar case, it is important to know that the exact same argument, with the exact same attorney and exact same transcripts as *Knellinger* was rejected in *U.S. v. O’Rourke*.³⁸ There have also been a series of constitutional challenges to the statute, all of which were defeated at the district court level.³⁹

The most promising language in the opinions addressing discovery issues in child pornography cases is a procedural caveat: “Discovery orders are not final appealable orders under 28 U.S.C. §1291.”⁴⁰ State and local prosecutors should refer to their respective state’s provisions regarding interlocutory appeals to determine whether discovery orders can be appealed pre-trial.

Bail

18 USC §3142(c) was amended by the Adam Walsh Act to require certain mandatory bail conditions in certain offenses where minors are victims.⁴¹ This particular section has only been addressed by one appellate-level court and was held to be unconstitutional.⁴²

Immigration Law

The Adam Walsh Act amended 8 U.S.C. §1227(a)(2)(A) by adding section (v) which makes a conviction under 18 U.S.C. §2250 a deportable offense.⁴³ The law also prohibits “U.S. citizens and lawful permanent resident aliens who have been convicted of any ‘specified offense against a minor’ from filing a family-based immigrant petition...on behalf of any beneficiary.”⁴⁴ As described above, “specified offenses against a minor” include most computer-facilitated crimes against children, including any child pornography offense and any use of the Internet to lure a child for sexual contact.⁴⁵ In addition, the Immigration and Naturalization Act was amended to “remove spouses or fiancés of U.S. citizens convicted of these offenses from eligibility for ‘K’ nonimmigrant status.”⁴⁶

Constitutionality and Retroactivity of 18 USC §2250

The new federal felony offense of failure to register as a sex offender is codified at 18 U.S.C. §2250. To understand the bases of the challenges to prosecution under this statute it is helpful to review the text of the law:

... 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 [10 USC § 801 et seq.]), 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.⁴⁷

The first enforcement effort for SORNA was Operation FALCON (Federal and Local Cops Organized Nationally) which ran from October 22–28, 2006, largely in the Eastern United States.⁴⁸ As a part of this initiative, 971 individuals were arrested for failure to register as a sex offender and some of these arrests resulted in the first federal prosecutions under SORNA.⁴⁹

The majority of district courts to address prosecutions under 18 U.S.C. §2250 have held that it is constitutional on its face and in its application. The first district court opinion issued regarding 18 U.S.C. §2250 was *United States v. Madera*⁵⁰ out of the Middle District of Florida. Madera had been convicted of a state misdemeanor sex offense in New York in November of 2005 and had signed a sex offender registration form in May of 2006 which stated that “if you move to another state you must register as a sex offender.”⁵¹ Madera moved to Florida by June of 2006 and failed to register as a sex offender upon his arrival.⁵² He was arrested as part of Operation FALCON on October 23, 2006, and indicted for a violation of 18 U.S.C. §2250.

The *Madera* court rejected defendant’s constitutional challenges to his prosecution.⁵³ The court also specifically held that SORNA should have retroactive application. From this case of first impression, a body of case law has begun to develop around the issues attendant to a prosecution under 18 U.S.C. §2250.

1. Ex Post Facto.⁵⁴ The prohibition against federal ex post facto laws⁵⁵ addresses a number of different concerns. Two of those concerns are relevant for our purposes: the ex post facto clause will serve to prohibit a prosecution (1) when a law “makes an action done before the passing of the law, and which was innocent when done, criminal...” or (2) when a law “changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.”⁵⁶ Even though a number of district courts have muddied the waters on this issue, it is the *criminal* statute, and not the *sex offender registry scheme*, which is most appropriate for challenge under the ex post facto clause.⁵⁷

a. Retroactivity. The applicability of 18 U.S.C. §2250 to persons convicted prior to the enactment of SORNA is an issue which was specifically delegated to the Attorney General.⁵⁸ Guidelines concerning the retroactive application of SORNA were issued on February 28, 2007, and provide as follows: “[t]he 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 the Act.”⁵⁹ This has closed the question of retroactivity in and of itself, but leaves open—at a minimum—questions regarding defendants who had those “retroactive” convictions and were arrested for violating 18 U.S.C. §2250 prior to the issuance of the guidelines.

As will be discussed below, this open question has provided fertile ground for district courts in recent months.

b. Travel prior to July 27, 2006. For persons required to register as sex offenders based on state convictions, they must travel in interstate commerce to trigger criminal liability under 18 U.S.C. §2250. Is the statutory language requiring interstate travel a proper *element of the offense* or is it simply a *jurisdictional hook* that our Constitutional analysis can overlook? If it is an element of the offense, then ex post facto problems loom large. If it is simply a method to acquire jurisdiction, then the timing of its occurrence will not pose any constitutional problems.

In support of the argument that it is not an element of the criminal offense, comparisons can be drawn to the jurisdictional hooks contained in the statutes prohibiting the possession of firearms⁶⁰ or child pornography.⁶¹ In those cases the interstate language contained in the statute is

simply jurisdictional, and the timing of its occurrence is irrelevant.

Continuing this argument, however, we have to acknowledge that those statutes, and the opinions interpreting them, did not address the specific “element” here: that a *defendant* traveled in interstate commerce (as opposed to firearms, or the means to make child pornography).

The leading case taking the position that interstate travel *subsequent* to the enactment of SORNA is required for conviction under 18 U.S.C. §2250 is *United States v. Smith*.⁶² Smith was convicted in New York in 1989 and released from custody in 2004, and was properly notified of his obligation to register as a sex offender. He moved to Michigan later in 2004. New York sent him a letter in 2006 “reminding” him of his registration requirement. He did not subsequently register in either state, and was charged with a felony violation of 18 U.S.C. §2250.

The Eastern District of Michigan dismissed this indictment for two reasons. First, it found that the use of the word “travels” in §2250(2)(A) was significant. The language does not say “traveled” and, as such, means that “the law would apply to one who travels in interstate commerce after July 27, 2006 and thereafter fails to register” as required by SORNA. Second, it concluded that the *ex post facto* clause is violated by the application of 18 U.S.C. §2250 in this case as it is *not* similar to the situation in *Smith v. Doe*, 538 U.S. 84 (2003). According to *Smith*, 18 U.S.C. §2250 is *criminal*—not civil—by its language and a retroactive elevation of punishment from the misdemeanor violation of 42 USC §14072(g) is unconstitutional “insofar as the government seeks to apply it to a defendant who traveled in interstate commerce prior to July 27, 2006” and thereafter failed to register as required by SORNA.

c. Travel between July 27, 2006 and February 28, 2007. A number of district courts have dismissed indictments brought against defendants who were alleged to have “traveled” between the federal enactment date of SORNA (July 27, 2006) and the date that the Attorney General guidelines regarding retroactivity were issued (February 28, 2007). In a number of cases, the courts have found that SORNA simply did not apply to individuals who (1) had convictions predating SORNA; and (2) traveled prior to the issuance of the retroactivity guidelines.⁶³

d. Continuing Offense. If it can be established that the defendant did, in fact, travel in interstate commerce, then we can move to another issue: is the offense of failing to register as a sex offender “complete” on the day which registration was required, or is it a “continuing offense” which continues on until the defendant either remedies the noncompliance or is charged? Every state to consider the question under their state sex offender registration noncompliance statutes has concluded that failure to register *is* a continuing offense.⁶⁴ However, in §2250 cases, the district courts have been split on the question.⁶⁵

e. Relationship with 42 USC §14072. Prior to the enactment of SORNA it *was* a criminal offense to travel in interstate commerce and fail to register as a sex offender as required by the states.⁶⁶ It is a federal misdemeanor offense, however, and will be repealed once SORNA is fully implemented.⁶⁷ The law remains active, however, and is a helpful backup strategy in prosecuting cases under 18 U.S.C. §2250. Unfortunately, there is no meaningful case law interpreting 42 USC §14072 to help guide our analysis under 18 USC §2250.

2. Commerce Clause. The Commerce Clause⁶⁸ is the mechanism by which the United States Congress has the authority to legislate matters such as those addressed by SORNA. In *United States v. Lopez* the Supreme Court defined three categories that Congress may regulate pursuant to its commerce clause authority:

- (1) “the use of channels of interstate commerce;”
- (2) “the instrumentalities of interstate commerce, or persons or

things in interstate commerce...” or

(3) “activities having a substantial relation to interstate commerce.”⁶⁹

Most of the litigation focusing on the Commerce Clause and 18 U.S.C. §2250 has focused on the *third* prong of *Lopez*. Defense arguments typically follow this pattern: since the registration of sex offenders is not a commercial activity, and because it appears that Congress did not issue a statement regarding the impact of unregistered sex offenders on interstate commerce, and the founders “did not cede to Congress a general police power,” then the activity regulated by SORNA is inappropriate for Congressional action. None of the arguments under this third prong have been successful based largely on the decision in *Gonzales v. Raich*,⁷⁰ where the Supreme Court held that activities may be regulated by Congress where a rational basis exists for concluding that the activity “exerts a substantial economic effect on interstate commerce.”⁷¹

Although this argument has prevailed thus far, there is a stronger argument available for prosecutors. Under the second prong of *Lopez*, Congress “may regulate those individuals...that travel in interstate commerce without regard to the reason for their movement.”⁷² In other words, travel across state lines is sufficient to qualify as ‘travel in interstate commerce’ and, therefore, is enough to authorize Congress to act.⁷³

3. Non-Delegation. The principle of non-delegation is rooted in the separation of powers doctrine and is simply this: where the authority to act has been vested in one branch of the government it cannot—or should not—be re-delegated to another branch of government. In 42 U.S.C. §19613(d) Congress⁷⁴ specifically delegated authority to enact certain regulations to the Attorney General⁷⁵ concerning SORNA. Given the administrative nature of our modern governmental system, however, this kind of delegation is fairly common.

The Supreme Court has only found the non-delegation doctrine to be violated in two cases, both decided in 1935. The governing case for prosecutors is *Mistretta v. United States* where the Court held that the “non-delegation doctrine will not be violated so long as Congress sets forth an *intelligible principle* to which those exercising the delegated authority are directed to conform.”⁷⁶ This is a very low bar and ought not to be too troublesome for prosecutors on the front lines.

4. Due Process. As applied to the states via the fourteenth amendment, there are two questions to ask in a traditional procedural due process analysis. “First, is the interest affected a state or federally recognized right? If yes, the second question is, ‘how much process is due?’”⁷⁷ If it is determined that a protected right is affected, the “minimum process due is notice and opportunity to be heard.”⁷⁸

Insofar as 18 USC §2250(a) prosecutions are concerned, there have been multiple due process challenges to prosecutions under the new federal statute. These challenges have been disjointed at best. Most have argued that it is a procedural due process violation for a person being prosecuted under 18 USC §2250 to have not received *due process* notice of their requirement to register under SORNA.⁷⁹ All but one of the courts to consider the question under the constraints of a due process analysis have concluded that there was *not* a constitutional violation.

The one case to conclude otherwise was *United States v. Barnes*.⁸⁰ Barnes was alleged to have moved from New York to New Jersey in 2005 and thereafter failed to register as a sex offender as required by his 2001 conviction in New York State.⁸¹ He was indicted under 18 USC §2250 for failure to register as a sex offender with the offense dates listed as January through February 28, 2007.⁸² February 28, as it turns out, was the day the retroactivity guidelines were issued by the Attorney General.⁸³ The court in *Barnes* held that his arrest under these circum-

stances was a due process violation, citing the notice and “fair warning” provisions developed in *Lambert v. California*, 355 U.S. 225 (1957) and *U.S. v. Lanier*, 520 U.S. 259 (1997).

Regarding the registration requirements of SORNA as they will be enacted by the states, only time will tell what, if any, due process challenges might arise. Similar issues on the state level have been ripe for litigation in the past⁸⁴ and the detailed demands of SORNA are likely to face similar scrutiny.

Conclusion

The Adam Walsh Child Protection and Safety Act was enacted last year with much fanfare. However, it has taken a fair amount of time for state and local prosecutors to begin to digest just how much the legislation might affect their daily practice. The repercussions of the legislation are many, and its effects will be with us for years to come.

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² 64 Fed. Reg. 572, *Megan’s Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as amended* (Part II) (January 5, 1999).

³ 18 U.S.C. §2250.

⁴ 42 U.S.C. §16925(a).

⁵ There is the possibility of receiving a total of two one-year extensions of this deadline. 42 U.S.C. §16924(b).

⁶ Mississippi, 2007 MS H.B. 1015 (2007), Delaware, 2007 DE S.B. 60 (2007), Ohio, 152 v S 10 (2007), and Florida, 2007 Fla. Laws 143 & 209, are among the states which have enacted such legislation.

⁷ 42 U.S.C. §16945.

⁸ 28 C.F.R. §72.3 (2007).

⁹ 72 Fed. Reg. 103 (May 30, 2007). These guidelines are available online at http://www.ojp.gov/smart/pdfs/053007_fedreg.pdf.

¹⁰ As such, when this article references SORNA “establishing” or “requiring” certain things, what is meant throughout is that “in order to come in to compliance with SORNA, a state will be required to...” The short form is utilized to save words and, hopefully, to improve understanding.

¹¹ 42 U.S.C. §16915. All of the information regarding duration of registration requirements is contained in this section of Title 42.

¹² As defined by SORNA, 42 U.S.C. §16911, “sex offense” means: Except as limited by subparagraph (B) or (C), the term “sex offense” means—
(i) a criminal offense that has an element involving a sexual act or sexual contact with another;
(ii) a criminal offense that is a specified offense against a minor;
(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18, United States Code [18 USC § 1152 or 1153]) under section 1591 [18 USC § 1591], or chapter 109A [18 USC §§ 2241 et seq.], 110 [18 USC §§ 2251 et seq.] (other than section 2257, 2257A, or 2258 [18 USC §§ 2257, 227A, or 2258]), or 117 [18 USC §§ 2421 et seq.], of title 18, United States Code;
(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or
(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

According to this same section, “specified offense against a minor” means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

- (D) Use in a sexual performance.
- (E) Solicitation to practice prostitution.
- (F) Video voyeurism as described in section 1801 of title 18, United States Code [18 USC § 1801].
- (G) Possession, production, or distribution of child pornography.
- (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
- (I) Any conduct that by its nature is a sex offense against a minor.
- 13 18 U.S.C. §16911(3). There does not appear to be a cut-off date for how far back a jurisdiction may look in determining whether someone has a prior conviction for a sex offense. This also applies to the Tier III recidivist classification, discussed below.
- 14 Or any crime subject to more than one year incarceration.
- 15 72 Fed. Reg. 30,219.
- 16 18 U.S.C. §16911(4).
- 17 72 Fed. Reg. 30,219.
- 18 72 Fed. Reg. 30,222.
- 19 72 Fed. Reg. 30,220 *et. seq.*
- 20 72 Fed. Reg. 30,221.
- 21 *Id.*
- 22 *Id.* at 30,226.
- 23 *See Id.* at 30,223.
- 24 Discussion at the 2007 National Symposium on Sex Offender Management and Accountability, Indianapolis, Indiana (July 2007).
- 25 72 Fed. Reg. 30,223-24. For the full list of exempted information, consult the May 2007 guidelines.
- 26 *Id.* at 30,232-33. Offenders must maintain a “clean record” during this period of time. 42 U.S.C. §16915(b).
- 27 *Id.* at 30,212-13.
- 28 *Id.* at 30,228.
- 29 18 U.S.C. §16911(5)(c).
- 30 Carpentier, Melissa Y., *et. al.*, *Randomized Trial of Treatment for Children with Sexual Behavior Problems: Ten-Year Follow-Up*, *Journal of Consulting and Clinical Psychology*, 74(3), (June 2006) 482-488.
- 31 *Id.*
- 32 Emphasis added, §501.
- 33 18 U.S.C. §3509(m).
- 34 *Id.*
- 35 2006 U.S. Dist. LEXIS 90165 (D. Ariz. Dec. 6, 2006).
- 36 The accommodations included an empty office, locked at all times, 24/7 access, a safe, cell phone and Internet access.
- 37 471 F. Supp. 2d 640 (E.D. Va. 2007).
- 38 470 F. Supp. 2d 1049 (D. Ariz. 2007).
- 39 U.S. v. Knellinger, 471 F. Supp. 2d 640 (E.D. Va. 2007), U.S. v. O’Rourke, 470 F. Supp. 2d 1049 (D. Ariz. 2007), U.S. v. Butts, 2006 U.S. Dist. LEXIS 90165 (D. Ariz. Dec. 6, 2006), U.S. v. Johnson, 456 F. Supp. 2d 1016 (N.D. Iowa 2006).
- 40 U.S. v. Butts, 2007 U.S. Dist. LEXIS 10966 (D. Ariz. Feb. 15, 2007), *quoting* Fauber v. Brown, 175 Fed. Appx. 132 (9th Cir. 2006).
- 41 “In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title [18 USC § 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), (2), (3), 2252A(a)(1), (2), (3), (4), 2260, 2421, 2422, 2423, or 2425], or a failure to register offense under section 2250 of this title [18 USC § 2250], any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).” 18 U.S.C. §3142(c).
- 42 U.S. v. Crowell, *et. al.*, 2006 U.S. Dist. LEXIS 88489 (W.D.N.Y. December 7, 2006).
- 43 8 U.S.C. §1227(a)(2)(A)(v).
- 44 8 U.S.C. §1154(a)(viii). The Secretary of Homeland Security, however, may grant exceptions to this requirement in certain cases. *Id.*
- 45 42 U.S.C. §16911.
- 46 8 U.S.C. §1154(b)(i)(II). Again, the Secretary of Homeland Security may grant exceptions to this requirement in certain cases. *Id.*
- 47 18 U.S.C. §2250.
- 48 “*More than 1,600 Sex Offender Arrests by U.S. Marshals’ “Operation Falcon III,*” Department of Justice Press Release (November 2, 2006), available online at http://www.usdoj.gov/marshals/falcon3/news_releases/national_news_release.pdf (last accessed September 17, 2007).
- 49 *Id.*
- 50 474 F.Supp. 2d 1357 (M.D. Fla. 2007). For a more thorough analysis of this threshold case, see “*Retroactivity of the Sex Offender Requirements of the Adam Walsh Act: United States v. Madera,*” available online at http://www.ndaa-apri.org/apri/programs/ncpa/update_express_jan_2007.html.
- 51 Madera at 1260. Madera had been convicted of a violation of New York Penal Code §130.60 (sexual abuse in the second degree) and was not incarcerated upon his conviction. *Id.* He was sentenced to six years of probation. *Id.*
- 52 Madera would have been required to register under Florida’s sex offender registration scheme. FLA. STAT. ANN. §943.0435(1)(a)(2).
- 53 Madera at 1260 *et. seq.* Madera challenged his prosecution on non-delegation, ex post facto, due process, and commerce clause grounds.
- 54 Other cases to address similar ex post facto challenges include U.S. v. Stinson, 2007 U.S. Dist. LEXIS 66429 (S.D. W.Va. Sept. 7, 2007), U.S. v. Sawn, 2007 U.S. Dist. LEXIS 59382 (W.D. Va. Aug. 14, 2007), U.S. v. Marcantonio, 2007 U.S. Dist. LEXIS 55645 (W.D. Ark. July 31, 2007), U.S. v. Husted, No. CR-07-105-T (W.D. Okla., June 29, 2007), U.S. v. Lang, No. CR-07-0080-HE (W.D. Okla., June 5, 2007), U.S. v. Muzio, 2007 U.S. Dist. LEXIS 40294 (E.D. Mo. June 4, 2007), U.S. v. Mason, 2007 U.S. Dist. LEXIS 37122 (M.D. Fla. May 22, 2007), U.S. v. Markel, 2007 U.S. Dist. LEXIS 27102 (W.D. Ark. April 11, 2007), U.S. v. Smith, 2007 U.S. Dist. LEXIS 16350 (E.D. Mich. March 8, 2007), U.S. v. Manning, 2007 U.S. Dist. LEXIS 12932 (W.D. Ark. February 23, 2007), U.S. v. Templeton, 2007 U.S. Dist. LEXIS 8930 (W.D. Okla. Feb. 7, 2007).
- 55 U.S. Const. art. I, §9, cl. 3.
- 56 Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).
- 57 As such, any reference to Smith v. Doe, 538 U.S. 84 (2003) and similar case law is inapposite. *See* U.S. v. Smith, 2007 U.S. Dist. LEXIS 16350 (E.D. Mich. March 8, 2007).
- 58 42 U.S.C. §16913(d).
- 59 28 C.F.R. §72.3.
- 60 18 U.S.C. §922(g).
- 61 18 U.S.C. §2252.
- 62 2007 U.S. Dist. LEXIS 16359 (E.D. Mich. March 8, 2007). *See also* U.S. v. Heriot, 2007 U.S. Dist. LEXIS 54807 (D. S.C. July 27, 2007).
- 63 U.S. v. Stinson, 2007 U.S. Dist. LEXIS 66429 (S.D. W.Va. Sept. 7, 2007), U.S. v. Muzio, 2007 U.S. Dist. LEXIS 54330 (E.D. Mo. July 26, 2007), U.S. v. Smith, 2007 U.S. Dist. LEXIS 43040 (S.D. W.Va. June 13, 2007), U.S. v. Kapp, 2007 U.S. Dist. LEXIS 38849 (M.D. Pa. May 16, 2007); *but see* U.S. v. Gonzales, 2007 U.S. Dist. LEXIS 58035 (N.D. Fla. Aug. 9, 2007), U.S. v. Mason, *supra* n. 53, U.S. v. Hinen, 2007 U.S. Dist. LEXIS 36003 (W.D. Va. May 12, 2007).
- 64 State v. Goldberg, 819 So. 2d 123 (Ala. Crim. App. 2001), State v. Helmer, 53 P.3d 1153 (Ariz. Ct. App. 2002), Wright v. Superior Court, 936 P.2d 101 (Cal. 1997), People v. Lopez, 140 P.3d 106 (Colo. Ct. App. 2005), Lieble v. State, 933 So.2d 119 (Fla. Dist. Ct. App. 2006).

- ⁶⁵ U.S. v. Husted, No. CR-07-105-T (W.D. Okla., June 29, 2007); *see also* U.S. v. Roberts, 2007 U.S. Dist. LEXIS 54646 (W.D.Va. July 27, 2007), U.S. v. Stinson, Case 3:07-cr-00055 (S.D. W.V. June 21, 2007).
- ⁶⁶ A person who is—
- (1) required to register under paragraph (1), (2), or (3) of subsection (g) of this section and knowingly fails to comply with this section;
 - (2) required to register under a sexual offender registration program in the person's state of residence and knowingly fails to register in any other state in which the person is employed, carries on a vocation, or is a student;
 - (3) described in *section 4042(c)(4) of title 18, United States Code*, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; or
 - (4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of *Public Law 105-119* [10 USCS § 951 note], and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.
- ⁶⁷ Pub. L. Nos. 108-248, Title I §129, 120 Stat. 600 (2006).
- ⁶⁸ U.S. Const. art. I, § 8, cl. 3.
- ⁶⁹ U.S. v. Lopez, 514 U.S. 549 (1995).
- ⁷⁰ 545 U.S. 1 (2005).
- ⁷¹ Madera, 474 F.Supp.2d at 1265.
- ⁷² U.S. v. Mason, 2007 U.S. Dist. LEXIS 37122 (M.D. Fla. May 22, 2007) at *21.
- ⁷³ *See* U.S. v. Tykarsky, 446 F.3d 458 (3d Cir. 2006) (analyzing 18 U.S.C. §2423). There are numerous District Court cases that have engaged in a Commerce Clause analysis in prosecutions under 18 U.S.C. §2250. *See* U.S. v. Sawn, 2007 U.S. Dist. LEXIS 59382 (W.D.Va. Aug. 14, 2007), U.S. v. Lang, No. CR-07-0080-HE (W.D. Okla., June 5, 2007), U.S. v. Mason, 2007 U.S. Dist. LEXIS 37122 (M.D. Fla. May 22, 2007), U.S. v. Templeton, 2007 U.S. Dist. LEXIS 8930 (W.D. Okla. Feb. 7, 2007).
- ⁷⁴ Part of the legislative branch.
- ⁷⁵ Part of the executive branch.
- ⁷⁶ 488 U.S. 361 (1989).
- ⁷⁷ Karen J. Terry & John S. Furlong, *SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION: A 'MEGAN'S LAW' SOURCEBOOK*, 2d ed. (Civic Resource Institute: 2004) at I-40.
- ⁷⁸ *Id.* at I-41.
- ⁷⁹ U.S. v. Roberts, 2007 U.S. Dist. LEXIS 54646 (W.D.Va. July 27, 2007) at *5 (ignorance of the law is no excuse, no due process violation), U.S. v. Barnes, 2007 U.S. Dist. LEXIS 53245 (S.D.N.Y. July 23, 2007) at *16 (because no interim rule regarding retroactivity was promulgated after he moved, there was a due process violation), U.S. v. Stinson, Case 3:07-cr-00055 (S.D. W.V. June 21, 2007) at *9 (fair notice of state-level registration requirement is sufficient for due process notice under SORNA), Mason at *15 (no violation of procedural or substantive due process), U.S. v. Hinen, 2007 U.S. Dist. LEXIS 36003 (W.D.Va. May 12, 2007) at *13 (because there was notice of the state requirement to register, there was no requirement of actual notice of SORNA).
- ⁸⁰ 2007 U.S. Dist. LEXIS 53245 (S.D. N.Y. July 23, 2007).
- ⁸¹ *Id.* at *7.
- ⁸² *Id.* at *4.
- ⁸³ *See supra* n. 8.
- ⁸⁴ *See* "MEGAN'S LAW," *supra* n.77 at I-40 and cases cited therein.

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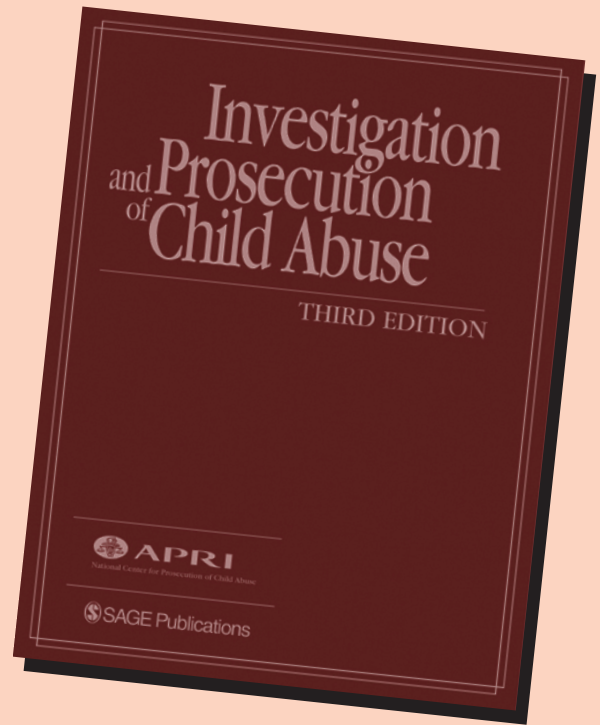
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