MEMORANDUM

TO: Defenders
FR: Amy Baron-Evans, Sara Noonan
RE: Adam Walsh Act - Part I
DA: October 19, 2006

The Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act" or "Act") was signed into law on July 27, 2006. It established a complex and onerous national sex offender registry law (which will be the subject of a forthcoming Adam Walsh Act - Part II), and made significant changes to sexual abuse, exploitation and transportation crimes, including creating new substantive crimes, expanding federal jurisdiction over existing crimes, and increasing (often by a factor of two or greater) statutory minimum and/or maximum sentences. The Act did away with the statute of limitations altogether for most sex crimes, placed unfair and unworkable restrictions on discovery in child pornography cases, created new barriers to and strict conditions for pretrial release, added searches without probable cause as a discretionary condition of probation and supervised release for persons required to register as sex offenders, expanded the government's authority to take DNA from persons not convicted of any crime, and added a new provision for civil commitment of "sexually dangerous persons." It also enacted certain victim rights in state prisoner habeas proceedings and a right of sex crime victims to receive damages of $150,000 in civil actions.

Rep. Mark Foley (R.Fl.), one of the bill's primary sponsors and (now former) Chair of the House Caucus on Missing and Exploited Children, photographed with Adam Walsh's father.

This paper gives a brief overview of the Adam Walsh Act and suggests *some* (certainly not all) legal challenges that can be raised to its provisions. The sex offender registry provisions and new offenses for persons required to register under federal or state law will be the subject of a further memo, Adam Walsh Act - Part II, to be distributed shortly. Please let us know of anything we've missed or misconstrued, and of any important developments in your cases that might be helpful to others.

TABLE OF CONTENTS

I. Changes to Crimes, Penalties and Procedures

A. New and Expanded Crimes

The Act establishes new crimes or expands federal jurisdiction over existing crimes in nine areas, including child abuse, kidnapping, obscenity, child pornography, use of the Internet to distribute obscenity or drugs, and record-keeping.

1. Expansions of Federal Jurisdiction

Felony Child Abuse and Neglect. The Act adds felony child abuse and neglect to the Major Crimes Act's list of offenses that are subject to federal prosecution when committed by an Indian against the person or property of another Indian or other person "within the Indian country." *See* 18 U.S.C. § 1153(a). Thus, felony child abuse or neglect within Indian country is now a federal crime, the precise definition and punishment of which depends on the law of the state in which the reservation is located. *See* 18 U.S.C. § 1153(b).

Like other aspects of the Adam Walsh Act, *see* Part I, B, *infra*, this expansion of the Major Crimes Act, if enforced, will have a disproportionate impact on the American Indian population. Though Indians constitute only about 1.5% of the population, they have the third highest rate of reported child abuse and neglect nationally.[1] In South Dakota, for example, almost half of all child abuse and neglect reports are for Indian children, despite the fact that Indians comprise only around 14% of the state's population. Keep in mind that Major Crimes Act offenses not defined and punished under federal statutes are defined *and punished* in accordance with state law. *See* 18 U.S.C. § 1153(b).

Kidnapping. The Act expands federal jurisdiction to reach any kidnapping in which the defendant crossed state lines or used an instrumentality of interstate commerce during the commission or in furtherance of the crime, even if the kidnapping itself is accomplished wholly intrastate. *See* 18 U.S.C. § 1201(a)(1). This provision will likely be applied to cases where the defendant used the Internet or made a telephone call during the course of the kidnapping, thereby effectively federalizing virtually all kidnapping offenses. *See, e.g., United States v. Giordano*, 442 F.3d 30, 39 (2nd Cir. 2006) (telephone, even when used on wholly intrastate basis, constitutes instrumentality of interstate commerce under 18 U.S.C. § 2425); *United States v. MacEwan*, 445 F.3d 237, 245 (3rd Cir. 2006) (Internet is an instrumentality of interstate commerce for purposes of 18 U.S.C. § 2252A(a)(2)(B) regardless of whether images were transmitted across state lines).[2]

Obscenity. The Act expands the obscenity statutes to reach anyone who produces obscene matter with the intent to transport the matter in interstate commerce for the purpose of selling or distributing it, 18 U.S.C. § 1465, as well as anyone who is engaged in the business of producing with the intent to distribute or sell obscene matter, 18 U.S.C. §, 1466. The practical effect of these changes is to relieve the government of having to prove that the defendant actually transported, transferred or sold obscene material. Because of this, depending on the government's proof, a prosecution under either statute may raise Commerce Clause problems. *See United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

You should also note that expanding sections 1465 and 1466 to cover the act of "producing" obscene material with intent to transport, transfer or sell will have a different impact on the statutory rebuttable presumptions depending upon the statute at issue. Under section 1465, the government would still have to prove that the defendant actually transported the obscene material in order to obtain the

---

[1] *See* Administration on Children, Youth and Families, *Child Maltreatment 2004*, Table 3-12 (2004), available at http://www.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf.

[2] In addition to expanding federal jurisdiction, the Act establishes a new mandatory minimum sentence of twenty-five years for kidnapping a person under the age of eighteen. *See* 18 U.S.C. 3559(f)(2); Part I, B, *infra.*

benefit of the rebuttable presumption. This is not so for section 1466, which creates a rebuttable presumption only upon proof of an *offer* to sell or transfer, irrespective of whether the material was actually transported by the defendant.

2. New Crimes

a. Child Exploitation Enterprise

The Adam Walsh Act creates five new crimes relating to the sexual exploitation of children. One is the new "child exploitation enterprise," which carries a mandatory minimum of twenty years for any defendant who "violates section 1591, section 1201 if the victim is a minor, or chapter 109A (involving a minor victim), 110 (except for sections 2257 and 2257A), or 117 (involving a minor victim), as a part of a series of felony violations constituting three or more separate incidents and involving more than one victim, and commits those offenses in concert with three or more other persons." Note that the list of predicate offenses includes sex trafficking involving an *adult* under section 1591(b)(1), which is perhaps a drafting error, and statutory rape, as well as rape, abusive sexual contact, kidnapping, possession of child pornography, and coercing or transporting a minor to engage in prostitution or other criminal sexual activity.

It is hard to tell how this statute will be used by prosecutors. Theoretically, it could encompass a fact pattern where a defendant used an Internet chat room on three separate occasions to solicit images involving sexually explicit depictions of a male and a female child from at least three other chat room participants, even if the defendant never actually possessed any child pornography at any time and even if the images discussed did not even exist. *See* 18 U.S.C. §§ 2252A(a)(3), 2252A(g)(2). It may be charged against people who did not themselves commit "a series of felony violations constituting three or more separate incidents" or know that they were members of a "child exploitation enterprise." If so, recall that the RICO statute withstood fair warning and vagueness challenges because it requires each defendant to commit a minimum of two criminal predicates that constitute a pattern of related and continuous acts of racketeering, in connection with a group associated for a common purpose.[3] A statute violates the fair warning requirement of the Due Process Clause and is void for vagueness, if people of ordinary intelligence would not know that they were violating it and/or it invites arbitrary or discriminatory enforcement. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979)*; City of Chicago v. Morales*, 527 U.S. 41 (1999); *Kolendar v. Lawson*, 461 U.S. 352, 357 (1983); *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

As with all offense-based mandatory minimums, defense counsel can challenge the twenty-year mandatory minimum on constitutional grounds, including separation of powers, equal protection, due process, and grossly disproportionate punishment. *See* Part I, B, *infra*.

b. Internet-Based Crimes

Two new crimes require use of the Internet as an element. The first carries a ten year maximum penalty for any person who knowingly embeds words or digital images into the source code of a website (meaning both the viewable and nonviewable content of a webpage) with the intent to deceive a person into viewing obscene material. *See* 18 U.S.C. § 2252C(a). If the intent was to deceive a minor into viewing material harmful to minors, the maximum penalty is twenty years. *Id.* at § 2252C(b).

The Act also criminalizes the knowing use of the Internet to distribute a date rape drug with knowledge or reasonable cause to believe either (A) that the drug would be used to engage in "criminal sexual conduct" or (B) that the person receiving the drug is not an "authorized purchaser," subject to a twenty-year maximum. *See* 21 U.S.C. § 841(g)(1)(A)-(B).

Section 841(g) lists three specific drugs designated as "date rape drugs" by Congress: gamma

---

[3] *See, e.g., United States v. Bennett*, 984 F.2d 597, 605-06 (4th Cir. 1993); *United States v. Dischner*, 974 F.2d 1502, 1510-11 (9th Cir. 1992); *United States v. Swiderski*, 593 F.3d 1246, 1249 (D.C. Cir. 1979); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975).

hydroxybutyric acid ("GHB") and its analogues, ketamine, and flunitrazepam. *See* 21 U.S.C. § 841(g)(2)(A)(i)-(iii). Note that ketamine is not listed in the Drug Quantity Table in U.S.S.G. § 2D1.1. It is a Schedule III drug, sometimes known as "Special K." *See* 21 C.F.R. 1308.13. Schedule III drugs have a marijuana equivalence of 1 gram per unit, capped at 59.99 kilograms of marijuana. *See* Drug Equivalency Table.

Section 841(g) also authorizes the Attorney General to designate "any substance" as a date rape drug pursuant to the rulemaking procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553. *See* 18 U.S.C. § 841(g)(2)(A)(iv). A defendant charged under section 841(g) for distributing any substance so classified by the Attorney General can argue that section 841(g)(2)(A)(iv)'s delegation of authority is a violation of the non-delegation doctrine. "Congress is manifestly not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). It may only leave to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." *Id*. This is possible only where Congress "lay(s) down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform . . . ." *Touby v. United State*s, 500 U.S. 160, 165 (1991) (*citing J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (brackets in original) (upholding 21 U.S.C. § 811, which sets forth specific steps pursuant to which the Attorney General can amend the controlled substance schedules in the Controlled Substances Act). In section 841(g), Congress has not defined "date rape drug" or otherwise provided the procedural safeguards that saved section 811 from being an unconstitutional delegation. *Cf. Touby*, 500 U.S. at 165 (discussing numerous safeguards set forth in section 811, only one of which addressed the procedural mechanism of agency rulemaking).

You should look at *Gonzales v. Oregon*, 126 S. Ct. 904 (2006), where the Supreme Court held that the Attorney General had exceeded his rule-making authority under the Controlled Substances Act in criminalizing doctor-assisted suicide because it was beyond his expertise and inconsistent with the statutory purpose and design, and *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), where the Court upheld the Controlled Substances Act as applied to intrastate distribution of marijuana for medical reasons against a Commerce Clause challenge. These cases do not address the non-delegation doctrine, but you may find something relevant there, whether helpful or harmful. That is beyond the scope of this paper.

c. Record-Keeping Requirements

Finally, the Adam Walsh Act creates two new crimes related to record-keeping requirements for those working in the sex industry. The first expands 18 U.S.C. § 2257's existing record-keeping requirements, which require that anyone producing visual depictions of "actual sexually explicit conduct" maintain records on each performer's name, date of birth, and other identifying information, to include depictions consisting of digital images or digitally-manipulated images of real people. It also requires information regarding the location of those records to be posted on every page of a website, and adds the refusal to permit the Attorney General to inspect the records as grounds for criminal liability. The second statute applies section 2257's requirements and criminal provisions to anyone who produces images of "simulated sexual conduct." *See* 18 U.S.C. § 2257A. Penalties include imprisonment of up to one year for a first offense, and a minimum of two and maximum of ten years for subsequent offenses. Unlike section 2257, section 2257A also provides for a five-year maximum penalty if a defendant violates section 2257A's record-keeping requirements in an effort to conceal a substantive offense involving child pornography or sex trafficking. *See id.* at § 2257A(i)(2).

d. Sex Offender Registry Crimes

The Adam Walsh Act established a new offense of Failure to Register as a sex offender, with a 10-year maximum, or a consecutive mandatory minimum of 5 years for committing a crime of violence while being required to register and failing to register. *See* 18 U.S.C. § 2250. It also created a new consecutive mandatory minimum of 10 years for being required by Federal or other law to register as a sex offender and committing an enumerated felony offense involving a minor, including kidnapping and various sex offenses. *See* 18 U.S.C. § 2260A. These offenses will be discussed in more detail in the forthcoming Adam Walsh Act - Part II.

B. New Penalties

In addition to the changes described above, the Adam Walsh Act creates a staggering number of sentence increases – including new or higher mandatory minimums for more than fifteen separate offenses.

1. New Mandatory Minimums and Statutory Maximums

- New mandatory minimums for a "crime of violence against the *person* of an individual who has not attained the age of 18." Murder carries a mandatory minimum of life for death-eligible murder and thirty years otherwise. 18 U.S.C. § 3559(f)(1). Kidnapping and maiming carry a mandatory minimum of 25 years. *Id.* at § 3559(f)(2). All other crimes of violence against the person of a minor resulting in serious bodily injury or committed with a dangerous weapon (which is not defined in the code and therefore could be anything from a firearm to a foot to a pencil) carry a mandatory minimum of 10 years in prison. *Id.* at § 3559(f)(3).

- New mandatory minimum of 15 years for sex trafficking accomplished through force, fraud, or coercion or involving a minor under 14 (no mandatory minimum in former statute); statutory maximum remains at life. 18 U.S.C. § 1591(b)(1). For sex trafficking without force, fraud, or coercion involving a person between 14 and 17, the Act imposes a new mandatory minimum of 10 years and increases the statutory maximum to life. *Id.* at § 1591(b)(2).

- New mandatory minimum of 30 years for aggravated sexual abuse where the victim is less than 12, or where the victim is between 12 and 15 (and is at least 4 years younger than the defendant) and the crime is accomplished by force, threat, rendering the victim unconscious, or impairing the victim's ability to appraise or control conduct (no mandatory minimum in former statute). *See* 18 U.S.C. § 2241(c).

- Sexual abuse now carries a statutory maximum of life, up from twenty years. *See* 18 U.S.C. § 2242.

- Tripled the mandatory minimum for sexually abusing a ward to 15 years, *see* 18 U.S.C.§ 2243(b), up from the 5-year mandatory minimum Congress enacted seven months prior in the Violence Against Women Act.

- New statutory maximum of life (up from 10 years) for sexual contact that would have violated section 2241(c) had it been a sexual act. *See* 18 U.S.C.§ 2244(a)(5).

- Doubled the mandatory minimum for coercing or transporting a minor to engage in criminal sexual activity to 10 years (up from 5) and increased the statutory maximum from 30 years to life. *See* 18 U.S.C.§§ 2422(b), 2423(a)

- Increased mandatory minimum for child pornography-related charges to thirty years if death results. *See* 18 U.S.C. § 2251(e).

- More than doubled the statutory maximum to 10 years (previously 4 years) for using a misleading domain name on the Internet with intent to deceive a minor into viewing material harmful to minors. *See* 18 U.S.C. § 2252B.

- Increased penalties for using a minor outside of the United States to produce a sexually explicit depiction of a minor with the intent that it be imported into the United States to a minimum of 15, maximum of 30 years for a first offense (formerly no minimum, 10-year maximum), a minimum of 25, maximum of 50 years for second offense, and a minimum of 35, maximum life for subsequent offenses (formerly no minimum, 20-year maximum). *See* 18 U.S.C. § 2260(c)(1). Transporting, receiving, shipping, distributing, selling or

possessing a sexually explicit depiction of a minor with the intent that it be imported into the United States now carries a minimum of 5, maximum of 20 years for the first offense, and a minimum of 15, maximum of 40 years for subsequent offenses. *Id.* at § 2260(c)(2).

- Increased punishment for failure to report child abuse from a class B misdemeanor to a Class A misdemeanor, meaning it is now punishable by up to 1 year imprisonment. *See* 18 U.S.C. §2258.

- Extended 18 U.S.C. § 2245 to authorize the death penalty where the defendant murders a person in the course of committing an enumerated sex crime. Remarkably, despite adding new predicate offenses to section 2245, the Act added a new requirement that the defendant commit "murder" in the course of committing the predicate offense. This *narrows* the statute from its prior version, which had authorized the death penalty merely if "death resulted."

2. Potential Challenges to Mandatory Minimums

Given the courts' growing discomfort with existing mandatory minimums (and negative attention in the press), defense counsel should raise constitutional challenges to the new and increased mandatory minimums contained in the Adam Walsh Act. Obviously, these arguments are not slam dunk winners, but you should raise and preserve them (or others that come to mind) nonetheless.

The following arguments are for offense-based mandatory minimums, *i.e.*, where the mandatory minimum is based on jury-found facts or the defendant's guilty plea. Mandatory minimums based on judicial factfinding (which the Adam Walsh Act does not contain) should be challenged on the basis that *Harris v. United States*, 536 U.S. 545 (2002) is no longer good law. *See* Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule Harris*, 18 Fed. Sent. Rep. 4, 2006 WL 2433749 (April 2006).

Eighth Amendment -- Mandatory minimums *should* violate the Eighth Amendment where the harshness of the penalty is grossly disproportionate to the gravity of the offense. *See Ewing v. California*, 538 U.S. 11, 20 (2003) (O'Connor, J., concurring in the judgment) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (Kennedy, J., concurring in part and concurring in the judgment). District courts and individual appeals court judges have increasingly expressed impassioned disgust over the irrational, inhumane and absurd results wrought by mandatory minimum and consecutive mandatory minimum sentences, though no federal court has yet refused to impose or uphold them. *See United States v. Hungerford*, __ F.3d __, 2006 2923703 ** 5-9 (9th Cir. Oct. 13, 2006) (Reinhardt, J., concurring in the judgment) (concurring in the judgment affirming 159-year sentence under 924(c) for mentally ill 52-year-old woman with no record who never touched a gun because precedent required it, but the sentence is cruel, unjust, irrational and shocks the conscience); *United States v. Angelos*, 345 F.Supp.2d 1227 (D. Utah Nov. 16, 2004) (sentence for twenty-four-year-old first offender to a consecutive mandatory minimum term of 55 years based on three convictions in the same trial for possessing a firearm was "grossly disproportionate . . . unjust, cruel, and even irrational" but court nevertheless imposed sentence), *aff'd* 433 F.3d 738 (10th Cir. Jan. 9, 2006); *United States v. Ezell*, 417 F.Supp.2d 667, 672-73 (E.D. Penn. 2006) (sentence of 125 years for six armed robbery convictions was "unduly harsh" where guideline range would be between 168 and 210 months but court nevertheless imposed sentence); *United States v. Ciskowski*, 430 F.Supp.2d 1283 (M.D. Fla. 2006) (similar concerns, same result).

In what may be a harbinger of federal constitutional jurisprudence to come, however, the Arizona Supreme Court held in 2003 that the state's mandatory consecutive minimum law subjected the defendant to grossly disproportionate punishment and was unconstitutional as applied. *See State v. Davis*, 79 P.3d 64 (Ariz. 2003) (vacating 52-year mandatory sentence for engaging in sexual intercourse with two different pre-pubescent girls based on underlying facts), *cert. denied, Arizona v. Davis*, 541 U.S. 1037 (2004); *but see State v. Berger*, 134 P.3d 378, 385 (Ariz. 2006) (upholding 200-year sentence resulting from mandatory 10-year consecutive sentences imposed for twenty counts of possession of child pornography where defendant's conduct manifested a long-term interest in gruesome exploitation of children). *Davis* and *Berger* together demonstrate that the underlying facts are *critical* when considering a fair and appropriate sentence for a sex crime. It is easy to imagine, for example, a defendant who on several

occasions viewed child pornography, but did not purposefully target (through search terminology or otherwise) or actively download it, being subjected to a child exploitation enterprise charge under section 2252A(g) by an over-zealous prosecutor eager to try out the new law (and its accompanying mandatory minimum of 20 years for a first-time offender). In such a case, where the defendant lacks virtually all of the characteristics of a child predator (at which Adam Walsh is purportedly aimed), there may be some room to successfully argue that the Act imposes a "grossly unfair" sentence as applied to his particular case.

Equal Protection -- Congress has been informed for years that mandatory minimums are costly, have little effect on crime control, and have a disparate impact on minorities.[4] Justice Kennedy recently spoke out against mandatory minimums as unjust and unwise.[5] Even the Director of the Office of National Drug Control Policy told Congress that the current policy of imprisoning low-level offenders for years is ineffective in reducing crime and only breaks generation after generation of poor minority young men.[6]

The evidence is clear that federal sexual abuse prosecutions have a disproportionate impact on Native Americans, who comprise only 4.5 percent of all federal defendants but 56 percent of those sentenced for sexual abuse.[7] Between October 2005 and June 2006, the average sentence for sexual abuse was 102.3 months, the third highest of all, with only murder and kidnapping higher.[8] The vast majority of non-Indians who commit similar offenses do so under circumstances in which there is no federal jurisdiction, and therefore are subject to prosecution and sentencing only in state court, where they are subject to significantly lower sentences. In November 2003, the Native American Advisory Group reported (based on data obtained by the Sentencing Commission) that the average sentence for state sex offenses in South Dakota was 81 months, for state sex offenses in New Mexico was 25 months, and for state sex offenses in Minnesota was 53 months.[9] The Adam Walsh Act's 30-year mandatory minimum for § 2241(c) (and any increases the Sentencing Commission adopts for sexual abuse crimes in response to Adam Walsh) will exacerbate the disparate impact on this group. Given the mounting evidence against mandatory minimums in general, and the well documented disparate impact on Indians of federal sexual

---

[4] *See* Constitution Project's Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005); American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 21-22 (2004); U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy* (May 2002); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991); Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee*, 103rd Cong., 1st Sess. 64-80 (1995) (Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission); Statement of John R. Steer Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (May 11, 2000); Leadership Conference on Civil Rights, *Justice on Trial* (2000).

[5] Report of the ABA Justice Kennedy Commission, Summary of Recommendations, http://www.abanet.org/media/kencomm/summaryrec.pdf; Associate Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

[6] Kris Axtman, *Signs of Drug-War Shift*, Christian Science Monitor, May 27, 2005.

[7] U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, Table 4 (2005), available at http://www.ussc.gov/ANNRPT/2005/table4.pdf.

[8] Sentencing Commission, Preliminary Quarterly Data Report, Table 18 (FY 2006 through June 30, 2006), http://www.ussc.gov/Blakely/Quarter_Report_3Qrt_06.pdf.

[9] *See* Report of the Native American Advisory Group at 21-22 & n.38 (Nov. 4, 2003).

abuse prosecutions in particular, mandatory minimums should be challenged as failing even the rational basis test under the Equal Protection Clause.

Due Process Right to Individualized Sentencing – The death penalty is prohibited as the mandatory punishment for any crime, *Woodson v. North Carolina*, 428 U.S. 280 (1976), and the sentencer in a capital case must be able to give effect to all mitigating circumstances. *Lockett v. Ohio*, 438 U.S. 586, 602-04 (1978). These principles may be able to be extended to mandatory minimum sentencing, at least where the result is mandatory life, or effectively mandatory life.

Separation of Powers – The prosecutor has sole power to charge an offense that carries a mandatory minimum sentence and sole power to lower that sentence. Offense-based mandatory minimums therefore unite the power to prosecute and the power to sentence within the Executive Branch, aggrandizing the power of the Executive and encroaching upon the Judiciary's constitutionally assigned sentencing function. *See Mistretta v. United States*, 488 U.S. 361, 382, 391 n.17 (1989). (In enticement and certain child pornography cases, the government also *creates* the offense. AFPDs Dennis Terez and Vanessa Malone recently argued to the Sixth Circuit that the vast majority of these cases are government stings in which no actual minor is involved. It may be wise for Defender Offices to start keeping track of the number of sting v. real minor cases, as it is not a statistic that the government is likely to reveal.)

An article by Professor Rachel Barkow argues, *inter alia*, that "the danger of mandatory sentencing laws is that they allow the expansion of legislative and executive power without a sufficient judicial check. That is, . . . the key problem with these laws is their *mandatory* nature, not whether they set a floor or ceiling. Thus, under a formalist analysis that looked to the criminal jury's role in the separation of powers [which Prof. Barkow encourages], the Court would reject not only those laws that require judges (not juries) to increase a defendant's maximum sentence but also those laws that require judges (not juries) to set a minimum sentence."[10]

C. Other Lowlights, Other Challenges

1. Statute of Limitations

There is no longer a statute of limitations for any felony listed in Chapter 109A (Sexual Abuse), Chapter 110 (Sexual Exploitation and Other Abuse of Children) except for violations of the record-keeping requirements set forth in sections 2257 and 2257A, and Chapter 117 (Transportation for Illegal Sexual Activity and Related Crimes), or for charges under sections 1201 (kidnapping of a minor) or 1591 (sex trafficking).

This will violate the *Ex Post Facto* Clause in any case in which the statute of limitations ran before the law was enacted. *See Stogner v. California*, 539 U.S. 607, 611, 617-18 (2003) (holding that application of a California law permitting prosecution for sex-related child abuse within one year of the victim's report to police to an offense whose prosecution was time-barred at the time the law was enacted was unconstitutionally *ex post facto*).

The lack of any statute of limitations for sex crimes can also be challenged under the Equal Protection Clause. Statutes of limitations "protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). Currently, the most serious and difficult to detect offenses in the criminal code are subject to a five-year statute of limitations. *See* 18 U.S.C. § 3282. Terrorism offenses are subject to an eight-year statute of limitations. *See* 18 U.S.C. § 3286. There seems to be no rational justification for subjecting defendants in sex offense cases to extraordinary unfairness.

The lack of any statute of limitations may create a due process problem, assuming that the

---

[10] Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1043 (Feb. 2006).

defendant proves actual prejudice to the defense *and* the reason for the delay is not sufficiently justifiable. *See United States v. Lovasco*, 431 U.S. 783, 789-90 (1979) (actual prejudice from a delayed charge is not enough to establish a due process violation). Most circuits, however, have interpreted *Lovasco* to require a showing that the government acted in bad faith in delaying the indictment.

2. Bail

Added to the list of offenses for which the court must hold a hearing upon motion of the government to determine whether there are conditions of release that will reasonably assure the person's appearance and the safety of any person and the community are "any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any dangerous weapon [not defined anywhere], or involves a failure to register [as a sex offender] under section 2250." *See* 18 U.S.C. § 3142(f)(1)(E). In regard to the "nature and circumstances of the offense charged," the court must now consider "whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device." *See* 18 U.S.C. § 3142(g)(1).

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, 2425, or 2250 (failure to register), any pretrial release order must contain a condition of electronic monitoring and each of the conditions at (iv)-(viii). *Id.* at § 3142(c)(1). Because the Act would impose these requirements without a finding that it is necessary to assure the defendant's appearance or the safety of anyone, this requirement may violate due process. *See United States v. Salerno*, 481 U.S. 739, 749 (1987) (upholding pretrial detention against due process challenge only because the Bail Reform Act specifically requires individualized assessment and proof of defendant's dangerousness by clear and convincing evidence).

Perhaps spurred on by the Supreme Court's recent decision in *Samson v. California*, 126 S.Ct. 2193 (2006) (suspicionless search of parolee pursuant to written consent does not violate Fourth Amendment), we hear that prosecutors are demanding consent to warrantless searches as a condition of their agreement to pretrial release. The Adam Walsh Act did not create such a condition. In *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), the Ninth Circuit held that this was an "unconstitutional condition," and thus warrantless searches imposed as a condition of pretrial release require a showing of probable cause, despite the defendant's consent. *Scott* appears to be the only case in which this issue has been decided.

3. DNA Collection from Persons Arrested, Facing Charges, Convicted, or Detained, regardless of Type of Offense.

Since 2001, BOP has been required to collect a DNA sample from each individual in its custody who "is, or has been" *convicted* of a "qualifying Federal offense," which are "the following Federal offenses, as determined by the Attorney General:" any felony, any offense under chapter 109A, any crime of violence as defined in 18 U.S.C. § 16, or any attempt or conspiracy to commit such an offense. *See* 42 U.S.C. 14135a(a)(1), (d) (2005). The AG promulgated a regulation designating offenses that appear to be within the listed categories (though we have not checked). *See* 28 C.F.R. § 28.2. Failure to cooperate in such collection is a misdemeanor. *See* 42 U.S.C. 14135a(a) (5) (2005).

Effective January 5, 2006 (through the Violence Against Women Act (VAWA)), Congress added to the above that the "Attorney General may, as prescribed by the Attorney General in regulation, collect DNA samples from individuals who are arrested or from non-United States persons who are detained under the authority of the United States." Demonstrating Congress' increasing willingness to hand over legislative power to the Executive at the expense of individual rights, the AG is apparently free to collect DNA from these unconvicted persons regardless of the type of offense of which they have been accused. The only limit is that they must be "in custody." Failure to cooperate in such collection is a misdemeanor. *See* 42 U.S.C. 14135a(a)(1)(A), (B), (a)(5), (d) (2006).

The Adam Walsh Act broadened this yet again. The Attorney General may collect DNA samples,

"as prescribed by the Attorney General in regulation," from individuals who are "facing charges, or convicted." Failure to cooperate in such collection is a misdemeanor. *See* 42 U.S.C. 14135a(a)(1)(A), (B), (a)(5), (d) (as amended July 27, 2006). "Facing charges" apparently adds persons who are currently charged by indictment, information or complaint, but are not currently under arrest. "Convicted" apparently adds persons convicted of offenses that are not felonies, violations of chapter 109A, or crimes of violence. Again, they must at least be "in custody."

It does not appear that the Attorney General has promulgated any regulation to implement the broadened DNA collection power created by VAWA and SORNA. Until a regulation is promulgated, it should be argued that the power may not be exercised.

DNA collection has been upheld against Fourth Amendment challenge because the individuals from whom samples were collected were already proven guilty of a crime, thus heightening the government's legitimate interest in monitoring them and diminishing their expectation of privacy. *E.g., United States v. Kincade*, 379 F.3d 813, 833-36 (9th Cir. 2004) (en banc). *See also Samson v. California*, 126 S. Ct. 2193, 2197-2202 (2006) (upholding suspicionless search of parolee based on diminished liberty interest at least where parolee was clearly informed this would be a condition of parole, and state's interest in supervision). This rationale does not apply to persons "arrested" or "facing charges." Nor should the "special needs" test for suspicionless searches support DNA collection under this law, since a general interest in crime control does not constitute a "special need." *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Illinois v. Lidster*, 540 U.S. 419 (2004).

4. Discovery

The Act requires that any material that "constitutes" child pornography "remain in the care, custody, and control of either the Government or the court." It is not to be copied, photographed, duplicated or otherwise reproduced for defense counsel, so long as the government provides "ample opportunity for inspection, viewing, and examination." *See* 18 U.S.C. § 3509(m)(1)-(2).

Note: This issue is being fully litigated before Judge Robert Payne in *United States v. Knellinger*, No. 3:06CR00126 (E.D. Va.) with *amicus* briefing by the Federal Defender Office in E.D. Va. and NACDL (due October 19, 2006), and a hearing the week of November 6, 2006, which will include expert testimony from national technical and legal experts. Judge Payne has ordered *amici* to address whether and the extent to which section 3509(m) restricts the rights of defendants under the Due Process Clause, the Confrontation Clause, the Compulsory Process Clause, and the right to Assistance of Counsel. Defense counsel in the case, **Ian Friedman**, has consented to giving out his phone number and email address for those who want to obtain copies of briefs and (possibly) transcripts: **ifriedman@inflaw.com, (216) 928-7700**. Without having reviewed those materials, our thoughts are as follows.

If the concern were really to prevent distribution of child pornography as the Act claims, that concern could easily be remedied through a protective order from the court limiting disclosure and requiring all copies to be returned at the end of the case. In fact, you can argue that a protective order is consistent with section 3509(m), in that the evidence would remain in the "care, custody, and control" of the court at all times via the protective order.

The alternative to a protective order is not to accept compliance with the Act – which would hinder the preparation of the defense by forcing counsel to review often highly technical evidence such as hard drive images without their own equipment and constrained by time, and would require divulging the identity of potential defense experts before counsel even has an opportunity to know whether the expert will be helpful or harmful to the case - but to challenge its constitutionality.

In cases before the Adam Walsh Act, federal courts found that restrictions on providing copies of alleged child pornography to defense counsel would hinder the preparation of the defense and thus ordered the material produced pursuant to Rule 16. *See, e.g., United States v. Fabrizio*, 341 F.Supp.2d 47 (D. Mass. 2004) (Rule 16 requires that computer image be produced to enable defense experts to conduct thorough analysis of computer records and to recreate government's analysis); *United States v. Hill*, 322 F.Supp.2d 1081 (D.C. Cal. 2004). Since the Act nullifies Rule 16 with respect to this kind of evidence,

defense counsel should seek a ruling that the "no discovery" provision is unconstitutional. *See, e.g., Westerfield v. Superior Court*, 121 Cal.Rptr.2d 402, 404-05 (Cal. App. Ct. 2002) (Construing state statute prohibiting the dissemination of child pornography to prohibit defense counsel from receiving copies of alleged pornographic images "exalts absurdity over common sense." "[R]equiring the defense to view-and apparently commit to memory-the 'thousands' of images at the computer crimes office obviously impacts Westerfield's right to effective assistance of counsel and his right to a speedy trial.").

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that due process required that a defendant be given funds to retain a psychiatrist in order to raise a defense of mental impairment. *Id*. at 84. Underlying the Court's holding was the principle that, in some cases, a "fair opportunity" to defend oneself includes the opportunity to present expert testimony. *Id.* at 74-76. Of course, the first step toward presenting expert testimony is for the expert to form an opinion, and to do that, the expert needs to examine the evidence. In defending a charge involving child pornography, this means that an expert will need to examine the hard drive in order to determine, for example, whether the images are in fact child pornography, were purposely downloaded, or were placed there by someone else, a time-consuming process that requires highly specialized forensic equipment. *Fabrizio*, 341 F.Supp.2d at 49. An expert will also want to recreate the government's search to identify challenges to its evidence. *Id.*

Forcing defense experts and counsel to conduct their work on government computers would unfairly constrain them in terms of time and equipment. It would leave a roadmap of the process and its results which the government could then access for its own trial preparation. And it would necessarily force defendants to disclose to the government the fact that an expert had been retained to assist the defense investigation. These effects likely violate the Fifth Amendment Due Process Clause and the Sixth Amendment right to effective assistance of counsel. The right to effective assistance of counsel includes the right to have counsel conduct a reasonable investigation. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). Due process includes the right to use an expert where necessary to assist with that investigation. *See Smith v. McCormick*, 914 F.2d 1153, (9th Cir. 1990) (due process and equal protection right to psychiatric assistance set forth in *Ake* "means the right to use the services of the psychiatrist in whatever capacity defense counsel deems appropriate – including to decide, with the psychiatrist's assistance, *not* to present to the court particular claims of mental impairment") (emphasis added). Obviously, defense counsel cannot use an expert to assist in understanding what arguments *not* to present – and thus cannot adequately investigate possible defenses – if the identity of all defense experts is automatically disclosed to the government well before they have even had the opportunity to formulate an opinion. Indeed, requiring defense counsel to disclose an expert's identity necessarily trammels on the right to maintain confidentiality over attorney work product: "[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The Court in *Ake* implicitly recognized this in referring to the indigent defendant's right to "make an ***ex parte*** threshold showing" that expert psychiatric testimony will be relevant in his or her case. *See Ake*, 470 U.S. at 82-83 (emphasis added); *see also Williams v. State*, 958 S.W.2d 186, 193-96 (Tex. Crim. App. 1997) (right to *ex parte* application for expert funds grounded in rights to due process and attorney work product). Enforcement of the Act would thus violate defendants' due process right to have an expert assist in their defense under *Ake*, along with their right to the effective assistance of counsel in investigating viable defenses under *Strickland*.

Finally, enforcement of section 3509 would violate the presumption of innocence by assuming that what the government alleges is child pornography is, in fact, child pornography. *Cf. United States v. Turner*, 367 F.Supp.2d 319, 325-26 (E.D. N.Y. 2005) (identifying "crime victims" for purposes of according them rights under the Crime Victim Rights Act before there is a conviction would infringe upon the defendant's presumption of innocence).

Defense counsel should raise all of these issues with the court, submit a strong expert affidavit setting forth what investigation needs to be done in the case and why it cannot reasonably be done at a government office, and request access to copies of the evidence pursuant to a protective order. *See Fabrizio*, 341 F.Supp.2d at 48-49.

5. Probation/Supervised Release

For a defendant required to register under the Sex Offender Registration and Notification Act (to be covered in Adam Walsh Act Part II), it is now a discretionary condition of probation or (if the person is also a "felon") of supervised release, that s/he submit his/her person, property, house, residence, vehicle, papers, computer, electronic communications 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/supervised release or unlawful conduct, *and* otherwise in the lawful discharge of the officer's duties. *See* 18 U.S.C. §§ 3563(b)(23); 3583(d)(3).

6. Sex Offender Management and Treatment Programs

BOP is required to make available "appropriate treatment to sex offenders who are in need of and suitable for treatment," including both sex offender management programs and sex offender treatment programs. *See* 18 U.S.C. §3621(f)(1). These are not the same. Sex offender management programs monitor sex offenders' mail, phone calls, and behavior for things that BOP deems inappropriate for someone convicted of a sex crime. They do not provide treatment or counseling, do not count towards lower security classifications, and do nothing to protect incarcerated sex offenders from the general prison population. Keep this in mind in case the government tries to sell the court a bill of goods at sentencing that BOP's sex offender management program will provide "treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D).

While sex offender treatment programs offer therapeutic help to incarcerated sex offenders, at present BOP has only one such program. It is located in Butner, North Carolina and has only 112 beds.[11] This is far from home for most of the Indian population who comprise the majority of federal sex abuse offenders. Unless and until BOP creates more sex offender treatment programs, prison will continue to offer little to nothing in the way of rehabilitation and treatment for sex offenders.

Counsel should be aware that the sex offender treatment program requires participants to admit guilt as a precondition to entering the program, something defendants with active appeals cannot do, and, apparently, to admit other sexual misconduct in the course of treatment.[12]

7. Civil Commitment

For any person who is in the custody of the Bureau of Prisons ***or*** deemed incompetent ***or*** against whom all criminal charges have been dismissed solely because of the person's mental condition, the Attorney General and/or the Director of the Bureau of Prisons may certify that the person is a "sexually dangerous person." *See* 18 U.S.C. § 4248(a). Under the Act, "sexually dangerous" means that the defendant has engaged or attempted to engage in sexually violent conduct or child molestation and that he suffers from a serious mental illness, abnormality or disorder resulting in serious difficulty refraining from sexually violent conduct or child molestation if released. *See* 18 U.S.C. § 4247(a)(5)-(6). The Act does not set forth any standards upon which the Attorney General or the Director must base their certification of a person's "sexual dangerousness" beyond this definition.

Once a certificate has been filed, the defendant is entitled to an adversarial hearing, but must

---

[11] *See* Statement of Andres E. Hernandez before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives at 1-2, available at http://energycommerce.house.gov/108/Hearings/09262006hearing2039/Hernandez.pdf. *See also* Legal Resources Guide to the Bureau of Prisons at 33-34, available at http://www.bop.gov//news/PDFs/legal_guide.pdf.

[12] Statement of Andres E. Hernandez at 2-3. *And* Dr. Hernandez keeps at least data on the number of unreported sex crimes that participants admit in the course of treatment. He does this for scientific research purposes, but one wonders if and when he will be required to turn specific admissions over to law enforcement.

remain in the custody of either the Attorney General or the Bureau of Prisons pending resolution of the issue. *See* 18 U.S.C. §§ 4247(d), 4248(a)-(b). The court is authorized to order that a psychiatric or psychological assessment examination be conducted and a report submitted before the hearing. *See* 18 U.S.C. § 4248(b). If, after the hearing, the court finds by clear and convincing evidence that the defendant is sexually dangerous, the Attorney General must either commit him to state custody for treatment or place him in a "suitable facility" until either the state agrees to take him or he no longer qualifies as "sexually dangerous." *See* 18 U.S.C. § 4248(d). This finding and the subsequent discharge of the commitment can be made only by order of the court and only when the director of the facility to which the defendant has been committed certifies that he is no longer sexually dangerous. If the government or the court wishes, a hearing on the matter must be held prior to discharge, after which the court can order the defendant discharged only upon a finding by a preponderance of the evidence that the person will not be sexually dangerous to others if released. *See* 18 U.S.C. § 4248(e)(1). Alternatively, a person may be conditionally discharged under the same procedures subject to the defendant's compliance with a specific treatment regimen; he will then be subject to arrest and evaluation following his release if probable cause exists to believe that he is not following the prescribed treatment regimen. *See* 18 U.S.C. §§ 4248(e)(2), 4248(f).

The Act also increases the time in which a person can be deemed incompetent. Whereas section 4241 used to allow competency to be raised at any time prior to sentencing, it now allows it to be raised at any time after the commencement of any term of probation or supervised release and prior to the completion of the sentence, which means that the government can wait until a defendant has finished serving his prison term to move for a competency (or "sexually dangerous") determination. *See* 18 U.S.C. § 4241(a).

Importantly, if charges against a defendant who has been committed to a facility are dismissed for reasons not related to his mental condition, and the director of the facility certifies that the defendant is sexually dangerous, the state in which the person is domiciled or was tried has 10 days to initiate state civil commitment proceedings. *See* 18 U.S.C. § 4248(g). Otherwise, the person must be released. *See id.*

8. Victim Rights

The Act permits civil actions brought by minor victims of sex crimes regardless of whether the person suffered an injury while he or she was a minor, and triples the statutory damages from $50,000 to $150,000. *See* 18 U.S.C. § 2255(a).

It also purports to permit victims certain rights in state prisoner habeas proceedings: the right not to be excluded, the right to be reasonably heard, the right to proceedings free from unreasonable delay, and the right to be treated with fairness and respect. *See* 18 U.S.C. § 3771(b)(2)(A). The right not to be excluded and the right to be reasonably heard apply only in "public" court proceedings. In most habeas cases, there will be one or two public hearings at most. If it is an evidentiary hearing, a victim in a rare case *may* be a fact witness but otherwise will have nothing relevant to say. This is because habeas proceedings involve the legal question of whether the petitioner is in custody in violation of the Constitution or laws of the United States. Victim allocution is not relevant to that question. Thus, an asserted right to be heard will typically not be "reasonable" within the meaning of section 3771(b)(2)(A). Habeas counsel should be prepared to object on relevance grounds to a request to be heard from a victim or victim advocate. *See United States v. Marcello*, 370 F.Supp.2d 745 (N.D. Ill. 2005) (holding that victim's proposed testimony at a detention hearing was not relevant to the issues).

It is unclear whether the right to proceedings free of unreasonable delay applies only to "public" proceedings. If not, victims can cause problems for habeas petitioners by filing petitions for mandamus. For some insights on mandamus proceedings and other aspects of the Crime Victims' Rights Act, *see* Amy Baron-Evans, *Some Issues Likely to Arise Under the Crime Victim Rights Act* (Oct.3, 2006), available at www.fd.org.

9. Forfeiture

Property subject to criminal forfeiture for offenses involving obscene material, child pornography, or using misleading domain names, includes the obscene or pornographic material, any property constituting

or traceable to gross profits from the offense, and any property constituting or traceable to the means for committing or promoting the offense. *See* 18 U.S.C. §§ 1467, 2253. Criminal forfeiture is now governed by the procedures set forth in 21 U.S.C. § 853, *see id.*; civil forfeiture is governed by Chapter 46, *see* 18 U.S.C. § 981 *et seq.*

10. Rules of Evidence

The Act directs the Rules Committee to study the "necessity and desirability" of amending the Federal Rules of Evidence to remove the confidential marital communications privilege and the adverse spousal privilege in any case in which a spouse is charged with a crime against a child of either spouse or any child under the custody or control of either spouse. It is unclear at this time what action if any will be taken with respect to amending the Rules. If you have any insights or examples that might be presented to the committee in opposition to such a change, please let us know.

MEMORANDUM

TO: Defenders
FR: Amy Baron-Evans, Sara E. Noonan
RE: Adam Walsh Act - Part II (Sex Offender Registration and Notification Act)
DA: November 20, 2006

Title I of the Adam Walsh Act, P.L. 109-248, entitled the Sex Offender Registration and Notification Act (hereinafter SORNA), creates a new sex offender registry law at 42 U.S.C. §§ 16901-16962 and prospectively repeals the current sex offender registry law at 42 U.S.C. §§ 14071-73 (hereinafter Wetterling Act) as of July 27, 2009. It also creates new offenses directed at persons required to register, including failure to register, subject to stiff sentences, including in some cases consecutive mandatory minimum sentences.

Defenders will have to deal with the new sex offender registry law when a client is charged with an offense that may require registration, has an old offense that may require registration, or is charged with one of the new offenses directed at persons required to register.

This memo describes SORNA's complex requirements, tries to predict how the law might operate, and suggests some challenges it appears to invite. Note that, in many cases, whether SORNA applies will depend on regulations yet to be promulgated by the Attorney General. The delegation to the Attorney General itself, and any regulations pursuant to that delegation, can be challenged under a variety of theories. So be sure to check whether any regulations have been promulgated and scrutinize their content.

Please let us know of anything we've missed or misconstrued, and of any important developments in your cases that might be helpful to others.

Table of Contents

A. What is the Effective Date?

The short answer is that it's hard to say. The registration and notification requirements are set forth in 42 U.S.C. §§ 16911-16929. Those requirements, along with the rest of the Adam Walsh Act, were signed into law on July 27, 2006. However, Congress did not name a precise date upon which the sex offender provisions are to be effective, other than to state a deadline for implementation by all jurisdictions of July 27, 2009. Instead, Congress delegated to the Attorney General "the authority"

1. "to specify the applicability of this subchapter to sex offenders"
    a. who are "convicted before July 27, 2006"
    b. who are "convicted before . . . its implementation in a particular jurisdiction"
2. "to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable [to register] before completing a sentence of imprisonment for the offense giving rise to the registration requirement [or] not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment," and
3. to "prescribe rules for the notification of sex offenders who *cannot* be registered" in the required way, that is, by an "appropriate official" who "shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register – (1) inform the sex offender of the duties of a sex offender under this title and explain those duties; (2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and (3) ensure that the sex offender is registered."

See 42 U.S.C. §§ 16913(b), (d), 16917(a), (b).

As of the date of this memo, there are no regulations. By delegating to the Attorney General the authority to specify SORNA's applicability to offenders in category 1(a), Congress recognized that there were *ex post facto* implications, but passed the problem off to the Executive Branch. If the Act is applied to persons who *committed* the offense before the effective date of SORNA (whether that means July 27, 2006, the date the defendant's jurisdiction implements SORNA, the date the Attorney General promulgates a regulation saying it applies retroactively to any class of persons, or July 27, 2009), this can be challenged under the *Ex Post Facto* Clause and (if pursuant to a regulation) the non-delegation doctrine. *See* Part G(3), *infra.*

As to category 1(b), all of the states have sex offender registries now as required by the Wetterling Act, but (to our knowledge) no "jurisdiction" (which includes both states and jurisdictions other than states, see 42 U.S.C. §§ 16911(9), 16912, 16927) has yet implemented the broader, more detailed and more onerous provisions of the SORNA.[1] In consultation with the jurisdictions, the Attorney General is required to develop and support software to enable them to establish and operate uniform sex offender registries and Internet sites, and to make the first edition of this software available by July 27, 2008. *See* 42 U.S.C. § 16923. The deadline for implementation of SORNA in all jurisdictions is the later of July 27, 2009 or one year after the Attorney

[1] SORNA and the state sex offender registries under the Wetterling Act are not identical. As compared to many and possibly most states, the SORNA will reach more offenders, be more burdensome in its requirements on offenders and jurisdictions, and be more severe in its consequences. *See* Appendix A (Summary of Wetterling Act); Appendix B (Regulation Issued Under Wetterling Act).

General makes the software available. *See* 42 U.S.C. § 16924. So, it appears, the deadline for implementation in all jurisdictions is July 27, 2009. The date of the repeal of the Wetterling Act is the same date, July 27, 2009. *See* P.L. 109-248 § 129(b) (42 USC 14071 note).

Categories 2 and 3 may include federal sex offenders who are being released from prison or who are sentenced to probation. Under 18 U.S.C. § 4042(c) as amended by SORNA, BOP or the supervising Probation Officer must notify a "sex offender" as defined in SORNA who is released or sentenced to probation of SORNA's requirements as they apply to him, and must provide notice to the authorities in the jurisdiction where the person will reside that he is required to register as required by SORNA. *See* 18 U.S.C. § 4042(c)(3). But, like everyone else, federal offenders are required to register in the jurisdiction(s) in which they reside, work and/or go to school. *See* 42 U.S.C. § 16913(a)-(c). Thus, they will not be able to register before completing a sentence, and if sentenced to probation may not be able to register within 3 business days of sentencing. Further, section 4042 says nothing about BOP or the supervising probation officer having the person read and sign a form or ensuring that the person is registered, presumably because the person must register in his/her jurisdiction. Categories 2 and 3 may also include "sex offenders entering the United States." *See* 42 U.S.C. § 16928.

Since the AG has not yet prescribed any rules pursuant to the directives in SORNA, it would seem that SORNA does not *yet* apply to "sex offenders" (1) who are "convicted before July 27, 2006," *or* (2) who are "convicted before . . . its implementation in a particular jurisdiction," *or* (3) "for other categories of sex offenders who are unable [to register] before completing a sentence of imprisonment for the offense giving rise to the registration requirement [or] not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." *See* 42 U.S.C. § 16913(b), (d). Moreover, there are no rules for notifying sex offenders of their duties under SORNA who cannot be registered shortly before release from custody or immediately after sentencing if not in custody.

But, on the other hand, under the probation and supervised release statutes as amended by SORNA on July 27, 2006, compliance with SORNA is a mandatory condition. *See* 18 U.S.C. §§ 3563(a)(8), 3583(d). In a case in which the defendant is sentenced to probation or supervised release for a crime of which s/he was convicted before July 27, 2006, or for a crime of which s/he was convicted before his/her jurisdiction of residence, employment or school implemented SORNA, or who is otherwise not given notice and registered in the relevant jurisdiction(s) in compliance with SORNA, must s/he comply with SORNA? Should s/he comply with SORNA? How can s/he comply with SORNA? The same problem arises for federal prisoners who were convicted before July 27, 2006 and are being released now. BOP may tell them and their local jurisdiction that they are subject to SORNA, but no regulation says so thus far.

Note that a person cannot be prosecuted or sentenced for the new federal offense of knowingly failing to comply with SORNA's registration requirements (subject to a maximum of 10 years with a consecutive mandatory minimum of 5 years if a crime of

violence was committed during the period s/he knowingly failed to comply) unless s/he was in fact required to register under the SORNA, and was provided notice in accordance with SORNA. *See* Part F(1), *infra*. If the person knowingly failed to comply with a state sex offender registry law with which s/he was required to comply based on an offense listed in the Wetterling Act, the federal penalty (assuming there is federal jurisdiction) would be not more than one year, or not more than 10 years for a second or subsequent offense. *See* 42 USC 14072(i). We found no case in which anyone has been prosecuted federally for failing to register under the Wetterling Act. Under the Adam Walsh Act, however, there is a new federal crime of being required to register under federal *or* "other law" *and* committing one of a list of federal offenses against minors, subject to a consecutive 10-year mandatory minimum. *See* Part F(2), *infra*.

B. Who is a "Sex Offender" Subject to SORNA?

A person is a "sex offender" under SORNA if s/he "was convicted of a sex offense," 42 U.S.C. § 16911(1), which is:

- a state, local, tribal, foreign (but not if it was obtained without sufficient fundamental fairness and due process under guidelines or regulations established by the Attorney General), or military (as specified by the Secretary of Defense under section 115(a)(8)(C)(i) of P.L. 105-119 (10 U.S.C. 951 note)) "criminal offense" or "other criminal offense," including attempt or conspiracy, *see* 42 U.S.C. § 16911(5)(A)(v), (5)(B), (6), that:
    - has an "element involving a sexual act or sexual contact with another," *see* 42 U.S.C. § 16911(5)(A)(i),
    - is a "specified offense against a minor," which is an offense against a minor (*i.e.*, under 18), *see* 42 U.S.C. § 16911(5)(A)(ii), (14):
        - "involving kidnapping" (unless committed by a parent or guardian)
        - "involving false imprisonment" (unless committed by a parent or guardian)
        - solicitation to engage in sexual conduct
        - use in a sexual performance
        - solicitation to practice prostitution.
        - video voyeurism as described in 18 U.S.C. 1801
        - possession, production, or distribution of child pornography
        - criminal sexual conduct involving a minor
        - use of the Internet to facilitate or attempt criminal sexual conduct involving a minor
        - "[a]ny conduct that by its nature is a sex offense against a minor," *see* 42 U.S.C. § 16911(7),
    - is a Federal offense (including an offense prosecuted under the Major Crimes Act, 18 U.S.C. §§ 1152-53) under 18 U.S.C. § 1591, or chapter 109A, 110 (but not §§ 2257, 2257A or 2258) or 117, *see* 42 U.S.C. § 16911(5)(A)(iii),

- is 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), *i.e.*, "sex offenses" as defined in the SORNA "and such other conduct as the Secretary deems appropriate." *See* 42 U.S.C. § 16911(5)(A)(iv).

- a person adjudicated delinquent, ***but only if*** s/he was at least 14 years old at the time of the offense *and* the offense was comparable to or more severe than aggravated sexual abuse (as described in 18 U.S.C. 2241) or attempt or conspiracy to commit aggravated sexual abuse. *See* 42 U.S.C. § 16911(8).

- ***But not*** "consensual sexual conduct" if:
  - the victim was an adult and not under the offender's "custodial authority"
  - the victim was at least 13 years old and the offender was not more than 4 years older. *See* 42 U.S.C. § 16911(5)(C).

  Neither of these "consensual" sex exceptions appears to be a crime under federal law, but may be under the law of some other jurisdictions. *See, e.g.*, R.I. Gen. Laws § 111-37-6 (1997) (criminalizing sexual conduct between a person who is eighteen or older with a person under sixteen).

Beware of substantive offenses purportedly added by regulation. Under the prior version of 18 U.S.C. § 4042(c)(4), since amended by SORNA, the Attorney General could designate "any other offense . . . as a sexual offense" for purposes of requiring the BOP or the supervising Probation Officer to give notice of the release or sentencing to probation of a person to the authorities in the jurisdiction where the person would reside, such notice to include that the person "shall be subject to a registration requirement as a sex offender." The Attorney General took the opportunity to promulgate a regulation that included old convictions for which the person was not in BOP custody, including old state convictions, and offenses in addition to those specified in the Wetterling Act. *See* Appendix C (28 C.F.R. § 571.72). As explained in Part G(2), *infra*, several courts held the regulation invalid and enjoined its use. However, it is still in the Code of Federal Regulations and may well be used on your client. In the past, prisoners litigated the invalidity of the regulation when they were denied privileges based on being classified as "sex offenders" or when BOP informed them their local jurisdiction was going to be notified that they were required to register as sex offenders. Now, you may encounter this in a prosecution for failure to register.

SORNA amended § 4042(c) to require notice to local authorities regarding "a person who is released from prison [or] sentenced to probation . . . and required to register under the Sex Offender Registration and Notification Act," "or any other person in a category specified by the Attorney General," and such notice shall include "that the person shall register as required by the Sex Offender Registration and Notification Act." Congress clearly intended the phrase, "any other person in a category specified by the Attorney General," to mean only the categories specified in 42 U.S.C. § 16913(d) (persons convicted before July 27, 2006, or before implementation in the jurisdiction), and *not* that the Attorney General could expand on the list of substantive crimes Congress

listed in SORNA. Given past history, the Attorney General is likely to do so. If so, it should be challenged as unauthorized lawmaking and in the alternative as a violation of Separation of Powers. *See* Part G(2), *infra.*

C. Tier Classifications

Sex offenders are classified as Tier I, II or III with increasingly onerous requirements and consequences, though they are quite severe even for the limited class of people in Tier I. *See* Parts D, E, F(1), *infra*.

A Tier III "sex offender" is a "sex offender" whose offense:

- is punishable by imprisonment for more than one year *and*

- is comparable to or more severe than the following or an attempt or conspiracy to commit such an offense
    - aggravated sexual abuse (as described in 18 U.S.C. § 2241), sexual abuse (as described in 18 U.S.C. § 2242) whether against an adult or a minor
    - abusive sexual contact (as described in 18 U.S.C. § 2242) against a minor under the age of 13, *or*
- "involves kidnapping of a minor" (unless committed by a parent or guardian), *or*
- occurred after s/he became a Tier II sex offender.

See 42 U.S.C. § 16911(4).

A Tier II "sex offender" is a "sex offender" other than a Tier III "sex offender" whose offense:

- is punishable by imprisonment for more than one year *and*

- is comparable to or more severe than the following offenses or an attempt or conspiracy to commit such an offense *and* is committed against a minor
    - sex trafficking (as described in 18 U.S.C. § 1591)
    - coercion and enticement (as described in 18 U.S.C. § 2422(b))
    - transportation with intent to engage in criminal sexual activity (as described in 18 U.S.C. § 2423(a))
    - abusive sexual contact (as described in 18 U.S.C. § 2244), *or*
- "involves"
    - use of a minor in a sexual performance
    - solicitation of a minor to practice prostitution
    - production or distribution of child pornography, *or*
- occurred after s/he became a Tier I sex offender.

See 42 U.S.C. § 16911(3).

A Tier I "sex offender" is a "sex offender" other than a Tier II or Tier III "sex offender." *See* 42 U.S.C. § 16911(2). This would include, for example, a person convicted any number of times of offenses punishable by imprisonment for one year or

less, or a person convicted of *possession* of child pornography who was not already a Tier I sex offender, or an 18-year-old boy who had consensual sex with his 13-year-old girlfriend and was not already a Tier I sex offender.

Oddly, a person who was convicted of sexual abuse of a minor or ward under 18 U.S.C. § 2243, which is essentially consensual sex that is unlawful because of the age of the victim or the custodial relationship, would be in Tier I, while a person convicted of abusive sexual *contact* under 18 U.S.C. § 2244(a)(3) or (4) for conduct that would have violated 18 U.S.C. § 2243 had the contact been an act, would be in Tier II. *See* 42 U.S.C. § 16911. This is probably a drafting error. Given the seriousness of the other offenses in Tier II, contact offenses under 18 U.S.C. § 2244(a)(1), (2) and (5) might fit there, but it is hard to see any rational basis for placing contact offenses under subsections (a)(3) and (a)(4) in Tier II rather than in Tier I along with their analogous sexual act offenses. However, SORNA provides no mechanism for challenging a tier classification. A tier classification might nonetheless be challenged under the Due Process Clause and/or state constitutional law. *See* Part G(1).

D. Initial Registration, Periodic In Person Verification, Updating Changed Information

1. Where

A sex offender must register and keep the registration current in each jurisdiction (*see* Part G(4), *infra*, for list of jurisdictions) in which s/he resides (home or where habitually lives), is employed (including self employment and whether or not gets paid), and/or is a student (enrolled in or attending). For initial registration purposes only, the offender must register in the jurisdiction in which s/he was convicted if different from the jurisdiction in which s/he resides. *See* 42 U.S.C. §§ 16911(11), (12), (13), 16913(a).

2. When and How: Duty of Appropriate Official to Give Notice and to Ensure Registration

A sex offender must initially register before completing a sentence of imprisonment for the offense giving rise to the registration requirement, or if not sentenced to prison, no more than 3 business days after sentencing. *See* 42 U.S.C. § 16913(b).

Shortly before release from custody, or if not in custody, immediately after sentencing, an "appropriate official" must (1) inform the offender of and explain his/her duties under SORNA, (2) require the offender to "read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement," and (3) ensure that the sex offender is registered. *See* 42 U.S.C. § 16917(a).

The Attorney General shall prescribe rules for notifying offenders who cannot be registered in the manner set forth in section 16917(a) of their duties under SORNA. *See* 42 U.S.C. § 16917(b).

The Attorney General has the authority (1) to specify the applicability of SORNA to (a) sex offenders convicted before July 27, 2006 and (b) sex offenders convicted before the particular jurisdiction implements SORNA, and (2) to prescribe rules for registration of "any such sex offenders and for other categories of sex offenders who are unable" to register before completing a sentence or within 3 business days of sentencing. *See* 42 U.S.C. § 16913(d).

As to federal offenders, "the Bureau of Prisons shall inform a person who is released from prison and required to register under the Sex Offender Registration and Notification Act of the requirements of that Act as they apply to that person and the same information shall be provided to a person sentenced to probation by the probation officer responsible for supervision of that person." *See* 18 U.S.C. § 4042(c)(3). It is a mandatory condition of federal probation and of federal supervised release that persons who are required to register under SORNA comply with its requirements. *See* 18 U.S.C. §§ 3563(a)(8), 3583(d). Section 4042 says nothing about BOP or the supervising probation officer having the person read and sign a form or ensuring that the person is registered, presumably because the person must register in his/her jurisdiction (and not in a BOP facility or U.S. Probation Office).

3. Frequent In Person Verification in Each Jurisdiction

Offenders must appear *in person* in *each* jurisdiction where they are required to be registered, allow a photograph to be taken, and verify the information in the registry, once a year for Tier I offenders, once every 6 months for Tier II offenders, and once every 3 months for Tier III offenders. *See* 42 U.S.C. § 16916.

4. Updating Changed Information in Person

No more than 3 business days after any change of name, residence, employment, or student status, a sex offender must inform *at least one of the jurisdictions* where s/he resides, is employed or is a student of the change *in person*. *See* 42 U.S.C. § 16913(c).

5. Duration of Reporting Requirements and Public Notification

Sex offenders must keep their registration current and remain posted on local and national websites, *see* Part E, *infra*:

- For Tier I offenders, 15 years, reduced by 5 years if "clean record" for 10 years
- For Tier II offenders, 25 years, no relief for "clean record"
- For Tier III offenders, LIFE, or 25 years if "clean record" for that long *and* the offense was a delinquent adjudication

A "clean record" means (A) no conviction for an offense punishable by more than one year, (B) no conviction for any "sex offense" as defined in 42 U.S.C. § 16911(5)-(8), (C) successful completion of "any periods" of supervised release, probation and parole, and (D) successful completion of "an appropriate sex offender treatment program" certified by a jurisdiction or the Attorney General.

See 42 U.S.C. § 16915.

E. What Information Will Be in the Registry, Published on the Internet, and/or Otherwise Provided to the "Community"?

1. Jurisdiction's Registry

The offender must provide to the "appropriate official" for inclusion in the registry: (1) name and any alias, (2) social security number, (3) address, (4) name and address of employer, (5) name and address of school, (6) license plate number and description of any vehicle owned or operated, (7) any other information required by the Attorney General. *See* 42 U.S.C. § 16914(a).

In addition, the jurisdiction must ensure inclusion in the registry: (1) a physical description of the offender, (2) text of the law defining the offense for which s/he is registered, (3) criminal history, including dates of all arrests and convictions; status of parole, probation or supervised release; registration status; existence of any outstanding arrest warrants, (4) current photograph, (5) fingerprints and palm prints, (6) DNA sample, (7) photocopy of driver's license or ID card issued by the jurisdiction, (8) any other information required by the Attorney General. *See* 42 U.S.C. § 16914(b).

2. Jurisdiction's Website

Each jurisdiction must make all information in the registry available on its own Internet website, *except* for the following mandatory and optional exemptions from disclosure:

> Mandatory exemptions: (1) victim identity, (2) offender's social security number, (3) arrests that did not result in conviction, (4) any other information exempted from disclosure by the Attorney General.
>
> Optional exemptions: (1) any information about a Tier I offender convicted of an offense other than a "specified offense against a minor," (2) employer's name, (3) school name, (4) any other information exempted from disclosure by the Attorney General.

The site must include instructions about how to seek correction of information that "any individual" contends is erroneous, and must state that the use of the information to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address is subject to civil or criminal

penalties. *See* 42 U.S.C. § 16918. (Such a notice has been posted by the states for years and has not prevented harassment and violence, including murder.)

3. National Registry

There will also be a National Sex Offender Registry maintained by the FBI for each "sex offender" (as defined in SORNA) and "any other person required to register in a jurisdiction's sex offender registry." The latter apparently refers to the fact that some states require registration for offenses that SORNA would not. For example, Louisiana requires those convicted of urinating in public to register as sex offenders. Public urinators from Louisiana will now be in the FBI database as well. The FBI will "immediately" transmit updated information about a "sex offender" to "all relevant jurisdictions." Since "sex offender" is a term defined in SORNA, it seems that this immediate transmission requirement *should not* apply to those whose offenses are not covered by SORNA. *See* 42 U.S.C. § 16919.

4. National Website

SORNA also establishes the Dru Sjodin National Sex Offender Public Website to be maintained by the Attorney General, which will include "relevant information for each sex offender and other person listed on a jurisdiction's website," and make "relevant information" publicly accessible. *See* 42 U.S.C. § 16920. Each jurisdiction must include in the design of its own website all field search capabilities needed for full participation in the Dru Sjodin Website and "shall participate in that website as provided by the Attorney General." *See* 42 U.S.C. § 16918.

The statute does not specify whether "relevant information" excludes information exempted from publication on the jurisdiction's website under 42 U.S.C. § 16918. However, the phrase "other person listed on a jurisdiction's website" indicates that information about public urinators from Louisiana and others whose offenses are not "sex offenses" under SORNA *will be* posted on the Dru Sjodin Website.

5. "Community" Notification

SORNA establishes a Community Notification Program, which requires an "appropriate official in the jurisdiction," immediately after an offender registers or updates information, to provide "information in the registry (other than information exempted from disclosure by the Attorney General)" to:

(1) the Attorney General who shall include it in the National Sex Offender Registry "or other appropriate databases,"
(2) "appropriate" law enforcement agencies including probation agencies, and *each* school and public housing agency, in *each* area where the offender resides, is an employee, or is a student,

(3) each jurisdiction where the offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs,
(4) any agency responsible for conducting employment-related background checks under 42 U.S.C. § 5119a,
(5) child welfare social service entities,
(6) volunteer organizations in which contact with minors "or other vulnerable individuals" might occur,
(7) "*[a]ny organization, company, or individual who requests such notification* pursuant to procedures established by the jurisdiction."

The last two kinds of entities may opt to receive the information no less frequently than every 5 business days. *See* 42 U.S.C. § 16921.

Since the only information exempted from disclosure under the Community Notification Program is "information exempted from disclosure by the Attorney General," it is unclear whether information the *statute* exempts from disclosure on a jurisdiction's website, *see* 42 U.S.C. § 16918, may nonetheless be provided under the Community Notification Program.

6. National Crime Information Databases

The Attorney General must ensure access to the national crime information databases as defined in 28 U.S.C. § 534 by (1) the National Center for Missing and Exploited Children, to be used only within the scope of its duties and responsibilities under Federal law to assist or support law enforcement (not for television, one would hope), and (2) governmental social services agencies with child protection responsibilities, to be used only in connection with investigating or responding to reports of child abuse, neglect or exploitation. 42 U.S.C. § 16961.

F. New Crimes and Penalties

1. Failure to Register (Federal)

a. The Statute

The Adam Walsh Act creates the new federal offense of failure to register, 18 U.S.C. § 2250, which provides as follows:

(a) In general.--Whoever--
(1) is <u>required to register under the Sex Offender Registration and Notification Act</u>; [and]

(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.

(b) Affirmative defense.--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.

(c) Crime of violence.--

(1) In general.--An individual described in subsection (a) 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).

b. Sentencing Guidelines

The Sentencing Commission is directed to promulgate guidelines for this offense, which will likely be published for comment in early 2007 and go into effect in November 2007. Congress directed the Commission to take into consideration, among other things, whether the defendant committed another sex offense or offense against a minor in connection with or during the period of failure to register, the seriousness of the offense that gave rise to the duty to register, including its tier level, whether the defendant voluntarily attempted to correct the failure to register, and whether the defendant has any criminal history, including convictions or juvenile adjudications, other than the offense that gave rise to the duty to register. Pub. L. 109-248 § 141(b).

c. Immigration Consequences

Conviction under 18 U.S.C. §2250 for failure to register as a sex offender is a deportable offense. *See* 18 U.S.C. §1227(a)(2)(A)(v).

d. Elements of the Basic Offense

i. "is required to register under the [SORNA]"

An essential element is that the defendant "is required to register under the Sex Offender Registration and Notification Act." Thus, the person must (1) stand (validly) convicted (2) of a "sex offense" as defined in SORNA (3) that occurred at a time (legally) covered by SORNA.

Does the person stand convicted?

Not if, for example, a prior conviction has been overturned or expunged, the person was pardoned, or a conviction is on the books as a result of clerical or administrative error. The SORNA provides no mechanism for relief, but to use a non-existent conviction as a basis for prosecution would violate the Due Process Clause. *See* Part G(1)(a), *infra*.

Is the conviction invalid?

If it is a foreign conviction, was it obtained without procedures that comply with American standards of due process? The Supreme Court recently declined to read the felon-in-possession statute as including a foreign conviction in part because it "would include a conviction from a legal system that is inconsistent with an American understanding of fairness." *Small v. United States*, 544 U.S. 385, 389 (2005). SORNA excludes foreign convictions obtained without "sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established" by the Attorney General. 42 U.S.C. § 16911(5)(B). Thus far, there are no such regulations. Assuming there will be, they may set standards too low. If so, applying them would violate both the Bill of Rights, and Separation of Powers (because the Judicial Branch, not the Executive, decides constitutional law).

Similarly, tribal convictions should be challenged as invalid if obtained without basic constitutional protections. The Bill of Rights does not apply to Indian tribal governments, and the Indian Civil Rights Act does not include a right to appointed counsel.[2] Some tribal courts provide counsel to the indigent, but most do not. As a result, most defendants in tribal court are without a lawyer. It would violate the Due Process Clause and the Sixth Amendment for a tribal conviction obtained without basic constitutional protections to be used as a predicate for a serious federal crime.

Recognizing the unreliability of convictions obtained without fundamental due process, the Sentencing Commission does not count foreign convictions, tribal

[2] 25 U.S.C. § 1302(2); *Duro v. Reina*, 495 U.S. 676, 693 (1990).

convictions, or convictions resulting from summary court martial in the criminal history score. U.S.S.G. § 4A1.2(g), (h), (i).

Is the conviction for a "sex offense" as defined in SORNA?

The offense may not be a "sex offense" as defined in SORNA for a variety of reasons. You should contend that the indictment must specify which subsection the conviction allegedly meets. That citation is part and parcel of the essential element that the defendant is required to register under the SORNA. Without it, it will be impossible to defend against that element, or for the court or jury to find whether it exists. (Note that almost any offense involving sex, and some that don't, will fit under at least one of the subsections. If a motion to dismiss under one subsection is successful, the government can charge under a different subsection. You may therefore want to save the challenge for the jury or a directed verdict.)

- The conviction may not be for a "criminal offense," *see* 42 U.S.C. § 16911(5)(A), though it is hard to think of what that might be.

- If alleged to qualify under § 16911(5)(A)(i), the offense may not have an element involving a sexual act or sexual contact with another.

- If alleged to qualify under § 16911(5)(A)(iii) or (iv), the offense may not be one of the enumerated Federal or military offenses.

- If alleged to qualify under § 16911(5)(A)(ii) and (7), the offense may not be a "specified offense against a minor." Subsection (7) defines "specified offense against a minor" as "an offense against a minor that involves" one of a list of offenses.

    - The offense may not have been "against a minor," either because the victim was not in fact a minor or the offense was not in fact "against" anyone. Or, in *Taylor/Shepard* terms, the victim of the offense of conviction was not *necessarily* a minor or the offense of conviction was not *necessarily* against anyone. *Cf. United States v. Hargrave*, 416 F.3d 486, 494-499 (6th Cir. 2005) (defendant's conviction under Ohio sexual battery statute was not a crime of violence under ACCA because it criminalized sex with a stepchild regardless of age and regardless of consent); *United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006) (defendant's conviction under North Carolina indecent liberties with a child statute was not "sexual abuse of a minor" under § 2L1.2 because, *inter alia*, it could be committed with "mere words," outside the victim's presence, and even without the victim's knowledge); *United States v. Sawyers*, 409 F.3d 732, 742 (6th Cir. 2005) (statutory rape under Tennessee law criminalizing sex with a person at least 13 but less than 18 if the defendant was at least four years older not categorically a crime of violence because it includes consensual sex); *Xiong v. INS*, 173 F.3d 601, 607 (7th Cir. 1999) (statutory rape of a fifteen-year-old is not categorically

a crime of violence because it includes consensual sex); *United States v. Thomas*, 159 F.3d 296, 299 (7th Cir. 1998) (statutory rape of a 16-year-old not a crime of violence because it includes consensual sex); *Dickson v. Ashcroft*, 346 F.3d 44, 51-52 (2d Cir. 2003) (unlawful imprisonment of a minor or incompetent adult not a crime of violence because it can be accomplished with victim's acquiescence).

- A "specified offense against a minor," as the word "specified" indicates, does not mean any offense against a minor. It means the specific ones listed. It does not involve, for example, assault against a minor, and it would not include "annoying" a minor. *See United States v. Palares*-Galan, 359 F.3d 1088 (9th Cir. 2004) (California statute prohibiting molesting or annoying a child).

- The least specific on the list is "[a]ny conduct that by its nature is a sex offense against a minor." This can be read one of two ways. The one that makes most sense (despite the poor drafting) would require the prior offense to have an element of a sexual act or sexual contact against a minor. Alternatively, you can argue that the phrase "involves . . . conduct that by its nature was a sex offense against a minor" requires a look at the actual conduct, and that the actual conduct involved was *not* "by its nature" a sex offense against a minor. *See* pp. 19-20, *infra*.

- If it is one of the named offenses, *e.g.*, kidnapping, false imprisonment, solicitation to engage in sexual conduct, does the offense as defined by the convicting jurisdiction reach more broadly than the elements of the "generic" offense? What are the elements of the "generic" offense? Certainly, they cannot be broader than an analogous federal offense.

- The government may claim that a prior offense that is not listed in subsection (7) nonetheless qualifies because some part of the conduct in the event that gave rise to the conviction "involved" kidnapping, possession of child pornography, etc. For example, where a defendant was convicted of assault, the government may say that "false imprisonment" was "involved." This cannot be. In this particular subsection, Congress was listing offenses under the law of any jurisdiction. It could not provide a list of code sections as it did for federal offenses, but instead identified categories of offenses. It used the word "involving" to narrow the list to certain "specified" categories of offenses of which the defendant "was convicted." 42 U.S.C. § 16911(1). Congress could not possibly have intended to create a system requiring persons to register as sex offenders based on unconvicted conduct allegedly "involved" in an event that gave rise to a conviction. That would be entirely unworkable. No one, including putative registrants or public officials, could know who was required to register.

- If it is a juvenile adjudication, it does not count if the defendant was under the age of 14, or if the offense was not "comparable or more severe than aggravated sexual abuse" as described in 18 U.S.C. § 2241. *See* 42 U.S.C. § 16911(8).

- If it was consensual, it does not count if the victim was an adult not under the defendant's custodial authority, or if the victim was at least 13 years old and the difference in age was not more than four years. *See* 42 U.S.C. § 16911(5)(C). This would exclude some offenses under state law. *See, e.g.,* R.I. Gen. Laws § 111-37-6 (1997) (criminalizing sexual conduct between a person who is eighteen or older with a person under sixteen).

- The offense may not be listed in SORNA at all, but only in a regulation promulgated by the Attorney General. If so, argue that the plain language of the statute lists what are "sex offenses" subject to SORNA, and contains no authorization of the Attorney General to add any substantive crimes to this list. To the extent the Attorney General purports to do so, it is unauthorized lawmaking. Reading the statute as permitting the Attorney General to do so would mean that Congress violated Separation of Powers under the non-delegation doctrine. *See* Part G(2), *infra*. The court must construe the statute to avoid constitutional doubt. *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

Did the conviction occur at a time covered by SORNA?

If the conviction alleged to be a qualifying conviction occurred before July 27, 2006, and the Attorney General has not yet promulgated a regulation "specify[ing] the applicability of this subchapter to sex offenders convicted before July 27, 2006," 42 U.S.C. § 16913(d), then the defendant is not "required to register under the Sex Offender Registration and Notification Act."

If the conviction occurred on or after July 27, 2006, and no jurisdiction in which the defendant resides, works or goes to school has yet implemented SORNA, and the Attorney General has not yet promulgated a regulation "specify[ing] the applicability of this subchapter to sex offenders convicted before . . . its implementation in a particular jurisdiction," 42 U.S.C. § 16913(d), then the defendant is not "required to register under the Sex Offender Registration and Notification Act."

If the conviction occurred before July 27, 2009, you can argue that the statute is at least ambiguous as to whether it is in effect anywhere before July 27, 2009, the deadline for implementation in all jurisdictions, 42 U.S.C. §§ 16923(c), 16924, P.L. 109-248 § 129(b) (42 USC 14071 note), and must be interpreted by the rule of lenity. This also goes to the "knowingly" element. *See* subsection iii, *infra*.

If applied to any person who *committed* the offense before the effective date of SORNA (whether that means July 27, 2006, the date the defendant's jurisdiction implements SORNA, the date the Attorney General promulgates a regulation saying it applies retroactively to any class of persons, or July 27, 2009), there is a strong argument that this violates the *Ex Post Facto* Clause. *See* Part G(3), *infra.*

Who makes these findings and how? Does the judge or jury make the finding that the defendant "is required to register under the SORNA"?

Obviously, you can seek dismissal of the indictment, or a directed verdict, on the basis that, even if the conviction exists, its nature or timing did not require the defendant to register as a matter of law. The defendant could enter a conditional guilty plea, and ask the judge to decide. Or, if there is no question that the conviction qualifies (for example, it is one of the listed federal offenses and there is no legal or factual question about the timing), you can stipulate to the fact of a qualifying conviction and defend on some other basis. *Old Chief v. United States*, 519 U.S. 172 (1997) ("prosecution's need" for "evidentiary depth to tell a continuous story has . . . virtually no application when the point at issue is a defendant's legal status").

But, since whether the defendant is required to register under the SORNA is an element, the defendant has a right to demand that a jury make the finding. *Apprendi v. New Jersey*, 530 U.S. 466 (1999). It is not a sentencing enhancement based on the fact of a prior conviction, so *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) does not apply.

The defendant has the "right . . . to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." *United States v. Gaudin*, 515 U.S. 506, 513 (1995). Under *Gaudin*, when an element involves a mixed question of law and fact, the jury must find the ultimate fact (here, is the defendant required to register?) and the subsidiary facts (does the defendant stand convicted of a "sex offense" as defined in SORNA that occurred at a time covered by SORNA?). The judge can instruct the jury as to what the law is, *i.e.*, what SORNA says is a "sex offense," and what it says about the timing of a conviction in order to qualify, but cannot instruct the jury that the offense *is* covered by SORNA or that the defendant *is* required to register.

In an analogous context, the Fifth Circuit held that it was error for the judge to decide as a matter of law, and to so instruct the jury, that an unregistered firearm was required to be registered under the relevant statute and regulation. This was an element, a mixed question of law and fact, and so was for the jury to decide, with instructions on what the law required for a firearm to be required to be registered. *United States v. Bryan*, 373 F.2d 403 (5th Cir. 1967).

In some cases, whether the defendant was required to register will be a simple question of whether the defendant was in fact convicted of violating one of the federal statutes listed in 42 U.S.C. § 16911(5)(A)(iii). Whether the defendant was convicted of an offense "that has an element involving a sexual act or sexual contact with another" may be less clear, as in statutes that can be violated in different ways, with or without a sexual act or sexual contact. Where the offense is alleged to be one of the "specified offenses against a minor," the offense may or may not qualify for a variety of legal or factual reasons, some of which are noted above. Where the offense was a juvenile adjudication, whether it was "comparable to or more severe than aggravated sexual abuse" as described in 18 U.S.C. § 2241, *see* 42 U.S.C. § 16911(8), could be litigated as

a matter of law or fact. And, if the victim was an adult and not under the defendant's custody, or was at least 13 and not more than four years younger than the defendant, you may want to litigate whether the conduct was consensual as a factual matter, or was not necessarily non-consensual as a legal matter. *See* 42 U.S.C. § 16911(5)(C).

The most obvious way to decide is the categorical approach, in which the decision-maker may "look only to the fact of conviction and the statutory definition of the prior offense," and "not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600, 602 (1990); *Shepard v. United States*, 544 U.S. 13, 17 (2005). If the statutory elements of the offense, or the caselaw of the jurisdiction interpreting the statute, reaches both a "sex offense" as defined in SORNA and other conduct that does not qualify as a "sex offense" under SORNA, then the decision-maker must decide whether the offense of conviction *necessarily* involved findings (in the case of a trial) or admissions of fact (in the case of a plea) equating to the elements of a qualifying offense under SORNA. In doing so, the decision-maker may look at (and only at) the indictment or information and the jury instructions (if conviction was obtained by jury trial), the indictment or information and bench-trial judge's rulings of law and findings of fact (if conviction was obtained by bench trial), or the indictment or information, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented (if conviction was obtained by guilty plea).[3] *Taylor*, 495 U.S. at 602; *Shepard*, 544 U.S. at 16, 20-21, 24.

Another way to decide is based on the actual facts. If the government wants to put in the actual conduct through witnesses, police reports, or the like, and it is more advantageous for the defendant to rely on the categorical approach, you should have no trouble convincing the court to go your way under current law. Like the ACCA at issue in *Taylor* and *Shepard*, which refers to "the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions," *Taylor*, 495 U.S. at 600-01, *Shepard*, 544 U.S. at 23, the SORNA states that a "sex offender" subject to its terms is "an individual who was convicted of a sex offense," 42 U.S.C. § 16911(1), as defined in the categories set forth in 42 U.S.C. § 16911(5)-(8).

On the other hand, you may want to show that the actual conduct was not a "sex offense" under SORNA. For example, in a case where the government alleges that a statutory rape conviction based on consensual sex between an 18-year-old boy and his 13-year-old girlfriend "involve[d] . . . conduct that by its nature was a sex offense

---

[3] *Taylor* and *Shepard*, which involved a sentencing enhancement under ACCA that is found by a judge, did not decide *who* decides but *how* to decide. The primary reason the Court adopted the categorical approach was as a matter of statutory interpretation, *i.e.*, because § 924(e) requires a finding regarding whether the defendant was convicted of a crime in a specified category. *Taylor*, 495 U.S. at 600-01. There really should be no barrier to a jury applying the categorical approach, but if the categorical approach is favorable to the defendant, then the defendant would probably want the judge to dismiss the indictment or direct a verdict on that basis, rather than take his chances with a jury.

against a minor," 42 U.S.C. § 16911(7)(I), and the categorical approach is unlikely to go your way, you may prefer to argue to the jury that the actual conduct involved was not by its nature a sex offense *against* a minor. Though SORNA explicitly excludes from the definition of "sex offense" consensual conduct if the victim was at least 13 years old and the difference in age was not more than four years, *see* 42 U.S.C. § 16911(5)(C), this does not mean that all consensual sex outside those age parameters is "by its nature a sex offense *against* a minor." You could argue that:

> (1) *Gaudin* requires the jury to make this finding when the defendant so demands.
>
> (2) Whether the defendant was convicted of a "sex offense" as defined in SORNA is an element of a crime in a case being tried to a jury. Thus, *Taylor*'s concerns about the practical difficulties of litigating the facts before a judge under a sentencing statute are not implicated. *See Taylor*, 495 U.S. at 601.
>
> (3) The Court in *Taylor* emphasized that 18 U.S.C. § 924(e) referred only to "convictions . . . for a violent felony or a serious drug offense," 495 U.S. at 600**,** while this statute refers to "an offense against a minor" of which the defendant "was convicted" that "*involves* . . . [a]ny *conduct* that by its nature is a sex offense against a minor." 42 U.S.C. § 16911(1), (7)(I). While the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B) also includes a residual "involves conduct" clause, that clause was not at issue in *Taylor*. At oral argument in *James v. United States*, No. 05-9364, on November 7, 2006, Justice Scalia pointed this out and suggested that an offense alleged to be a violent felony under the residual clause be determined on the actual facts. *See* Transcript at 20, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-9264.pdf.
>
> (4) For the judge to make a finding that the offense "*involve[d] . . . conduct* that by its nature was a sex offense against a minor" is "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*." *Shepard*, 544 U.S. at 25; *see also id.* at 26 n. 5 (saying nothing to dispel dissent's charge that the Court's decision "may portend the extension of *Apprendi* . . . to proof of prior convictions," including "evidence of those burglaries at trial," other than to say that "any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions."). *Cf.* William R. Maynard, *"Statutory" Enhancement By Judicial Notice of Danger: Who needs legislators or jurors?* (arguing that it violates the Sixth Amendment and Separation of Powers for judges to determine that an offense is a "crime of violence" under a clause of a statute that defines "crime of violence" or "violent felony" as an offense that "by its nature, involves" a risk of injury or force), forthcoming in the January 2007 issue of The Champion and/or in the next issue of the Liberty Legend.
>
> (5) The judge can instruct the jury that if it finds the defendant was convicted of the offense, it must then decide whether it "involve[d] . . . conduct that by its

nature is a sex offense against a minor." To add meaning to the statutory phrase, you could propose instructions based on cases finding that certain statutory rape offenses are not categorically crimes of violence where they cover consensual sex that involves no force or risk of force.

Alternatively, in such a case, you can argue to the jury that the defendant did not "knowingly" fail to register because he believed that his conduct was not "by its nature a sex offense against a minor." *Cf. United States v. Bryan*, 373 F.2d 403, 406 (5th Cir. 1967) (it was not error to exclude defendant's testimony that he believed the firearm was of a type not subject to registration because the offense had no state of mind element).

A word of caution: Whether the judge should decide based on a categorical approach or the jury should decide based on the actual facts *should* be the defendant's choice by virtue of his right to have each and every element proved to a jury, or to choose not to exercise that right. However, the courts have taken the position that the categorical approach applies across the board whether the defendant objects or not. The categorical approach does seem to benefit defendants in more cases than it hurts them, so we would not like to see its demise. As noted above, Justice Scalia suggested at oral argument in *James v. United States* that the residual category under 924(e) be determined on the basis of the actual facts, but that does not always help defendants either.

Before taking the actual conduct route, make sure that the categorical approach is a dead end. To decide how to proceed, we suggest the following:

- Get the records of the prior conviction, the statute defining the offense, and the caselaw interpreting it.
    - Does a valid conviction exist?
    - If the statute defining the offense of conviction reaches only one kind of conduct, has the offense been determined not to be a "sex offense" under SORNA in your circuit or other circuits, or is it likely to be given the law in other contexts? If so, move for dismissal or a directed verdict.
    - Does the statute under which the defendant was convicted reach any conduct that is not or not likely to be a "sex offense" under SORNA?
    - Have the courts in the jurisdiction interpreted the statute to reach any conduct that is not or not likely to be a "sex offense" under SORNA? *See Hargrave* and *Baza-Martinez*, *supra*, for examples of courts using the caselaw of the jurisdiction to find that the statute reaches more broadly.
    - If the offense of conviction reaches conduct that is and is not covered by SORNA, and the documents allowed by *Taylor* or *Shepard* show that the defendant was convicted of the non-SORNA type, or they don't say, move for dismissal or a directed verdict.
    - Has the offense of conviction been determined to be a "sex offense" under SORNA in your circuit or other circuits, or is it likely to be given the law in other contexts, *e.g.*, the law concerning whether statutory rape is a crime of violence? If so, are the actual facts such that a jury is likely to

find it does not qualify as a "sex offense" under SORNA? If so, argue that the jury must decide. If not, consider stipulating under *Old Chief* and defending on a different basis.

ii. jurisdictional element

Section 2250(a)(2) requires that one of two elements be found to establish federal jurisdiction. The defendant either (A) "is a sex offender as defined for the purposes of [SORNA] 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."

Under (B), the conviction can have been obtained under the law of any jurisdiction, if the person "travels in interstate or foreign commerce." The statute does not even say that such travel must be during the period the person was required to but failed to register. Even if it were applied that way, a jurisdictional challenge might successfully be raised. The Travel Act, 18 U.S.C. § 1952, was perfunctorily upheld against Commerce Clause challenge three decades ago by a few courts of appeals, but that statute requires travel with intent to commit a specified crime and performing a specified crime thereafter. Thus, the travel is at least arguably in furtherance of a crime that affects interstate commerce. The Failure to Register statute requires no connection between the travel and any crime or any effect on commerce. It may not fare so well as the Travel Act did, especially under modern Commerce Clause jurisprudence. *See Jones v. United States*, 529 U.S. 848 (2000); *United States v. Morrison*, 529 U.S. 598, 614 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

Whether there is some problem with jurisdiction in cases involving Indians is well beyond our expertise. We note only the following. Under (A), the conviction can have been obtained under tribal law. It is not a violation of the Double Jeopardy Clause for an Indian to be prosecuted by both the tribe and the federal government for the same act. *See United States v. Lara*, 541 U.S. 193 (2004). Under (B), an Indian can have been convicted under state law,[4] or tribal law, and never left Indian country. This may be inconsistent with 18 U.S.C. § 1153 (the Major Crimes Act).

However, to the extent this might be in conflict with 18 U.S.C. §§ 1152 or 1153, a later, specific, statute presumably would take precedence. But that later statute would have to be within Congress' constitutional power. In *Ex Parte Crow Dog*, 109 U.S. 556 (1883), the Court held that there was, at the time, no statutory authority for the federal government to exercise criminal jurisdiction on Indian Reservations for a murder committed by one Indian on another Indian. Subsequently, Congress enacted § 1153. The Indian Commerce Clause, which confers on Congress the power "to regulate

[4] An Indian on the reservation cannot be convicted by a state unless the state has assumed criminal jurisdiction under Public Law 280 (Pub. L. 83-280). Public Law 280 is complicated. It mandated that certain states assume criminal jurisdiction and allowed others to do so.

Commerce . . . with the Indian Tribes," Const. Art. I § 8, cl. 3, was the implied constitutional basis, and these statutes have long been upheld against constitutional challenges. In *United States v. Kagama*, 118 U.S. 375 (1886), however, the Supreme Court rejected the Indian Commerce Clause as the essential basis for federal criminal jurisdiction in Indian Country. It may be worthwhile to research whether the Failure to Register Statute, § 2250, as written or as applied, exceeds Congress' power under the Indian jurisdiction statutes and the various Supreme Court rulings defining the nature and extent of federal criminal jurisdiction in Indian Country.

iii. "knowingly fails to register or update a registration as required by the [SORNA]"

Failure to verify not a crime? The statute prohibits only a failure to "register" and a failure to "update," the requirements for both of which are set forth at 42 U.S.C. § 16913. It does not explicitly refer to a failure to appear for "periodic in person verification," which is described separately at 42 U.S.C. § 16916. This is worth a try where the only failure was not showing up for periodic verification.

Notice. In a prosecution for failure to register, the government should have the burden of proving notice beyond a reasonable doubt. In *Lambert v. California*, 355 U.S. 225 (1958) (cited with approval in *Ring v. Arizona*, 536 U.S. 584, 607 (2002)), the Supreme Court invalidated a prosecution for failure to register as a felon as required by a city ordinance under the Due Process Clause. The Court stated: "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. . . . [T]he principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case." *Id*. at 228. Thus, "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance." *Id*. at 229. In short, the Court held that the Constitution requires an element of willfulness for such an offense. Knowledge that one is a felon is not enough. There must be proof of actual knowledge of a duty to register or at least proof that the defendant received notice.

The structure of the statute further supports that the government must prove notice. It prohibits knowingly failing to register or update "as required by the [SORNA]." The SORNA imposes explicit duties on local and federal officials to give notice of and explain the precise registration requirements:

- As noted in Parts A and D, *supra*, SORNA creates interlocking notice and registration requirements directed at "appropriate officials," the Attorney General, and "sex offenders." *See* 42 U.S.C. §§ 16911, 16913, 16915, 16916, 16917; 18 U.S.C. § 4042(c)(3). It requires an "appropriate official," shortly before release from custody, or if not in custody, immediately after sentencing, to (1) inform the offender of and explain his/her duties under SORNA, (2) require the offender to "read and sign a form stating that the duty to register has been explained and that

the sex offender understands the registration requirement," and (3) ensure that the sex offender is registered. *See* 42 U.S.C. § 16917(a).

- Under 18 U.S.C. § 4042(c) as amended, the BOP or the supervising probation officer are to notify the person "of the requirements of that Act as they apply to that person." Section 4042 says nothing about BOP or the supervising probation having the person read and sign a form or ensuring that the person is registered, presumably because the person must register in his/her jurisdiction.

- The Attorney General is required to prescribe rules for the notification and registration of persons who are not able to be notified and registered in accordance with § 16917(a). *See* 42 U.S.C. §§ 16917(b); 16913(d). Such rules (not yet promulgated) will apply to persons who were convicted before July 27, 2006 or before SORNA was implemented in the jurisdiction if the Attorney General deems those persons to be subject to SORNA, and will apply to others who are unable to be notified and registered as required by § 16917(a), such as federal prisoners and federal defendants sentenced to probation.

Thus, to prove that the defendant "knowingly" failed to register in the context of SORNA's imposition of a duty on officials to give notice, the government cannot rely on proof of knowledge of the prior conviction or the maxim that ignorance of the law is no excuse. It must prove beyond a reasonable doubt that the defendant received notice and had actual knowledge of SORNA's precise requirements as required by the Act. *See Lambert*, *supra*; *United States v. Ratzlaff*, 510 U.S. 135 (1994); *Cheek v. United States*, 498 U.S. 192 (1991).

There are many ways a defendant may not receive notice or know that he is required to register. His conviction may be years old, he has moved, and whatever notice the Attorney General deems appropriate does not reach him. He may be mentally ill, mentally retarded, or unable to read. The sheer complexity of the system combined with human error will result in many sex offenders not receiving notice.

A slightly more farfetched scenario is possible if, as described in Part G(2), *infra*, the Attorney General maintains its current regulation or promulgates a new one listing sex offenses that purportedly require registration that are not listed in SORNA. In that event, BOP or Probation must give notice to the state or local chief law enforcement officer and sex offender registry of a person who is being released who is *not* required to register under SORNA, but is in some broader "category specified by the Attorney General." The person need not have been given notice of his duty to register under § 4042(c)(3) because that subsection applies only to offenders required to register under the SORNA. When the person does not show up to register at the local registry, local authorities then notify the Attorney General and "other appropriate law enforcement agencies," 42 U.S.C. § 16922, the Attorney General deploys Federal law enforcement to assist and locate the person, who is now deemed a "fugitive," 42 U.S.C. § 16941, and your new client is charged with failure to register.

The absence of a signed form will support an absence of *mens rea*. If there is a signed form, do not despair, there are factual and legal challenges. The statute *requires* the person to sign the form stating that s/he "understands the registration requirement," whether or not s/he understands. The defendant may not actually understand because, for example, s/he cannot read or is mentally impaired. In any case, defense counsel should resist introduction of such a form as evidence of knowledge. Because signing the form is mandatory, and may itself be prosecutable as a failure to comply with registration requirements, it is coerced and therefore meaningless. This scheme only pretends to comply with due process by stating that knowledge is an element, while relieving the government of its burden of proving that element, and shifting the burden of proving lack of knowledge to the defendant, in violation of the Due Process Clause. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970).

e. Affirmative Defense

The affirmative defense requires the defendant to prove that (1) uncontrollable circumstances prevented him from complying; (2) he did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and (3) he complied as soon as such circumstances ceased to exist. Congress did not say who bears the burden of proving or disproving the affirmative defense, but it is likely that the defendant must prove it by a preponderance of the evidence. *See United States v. Dixon*, 126 S. Ct. 2437, 2445-46 (2006).

A lack of notice may establish the affirmative defense, as it is an "uncontrollable circumstance" to which the defendant did "not contribute." However, the burden of proof would likely rest with the defendant, so it would be preferable for notice to be treated as an element. If the court declined to treat notice as an element, would a defendant who had no notice until he was arrested then have to comply in order to establish the affirmative defense? In *Lambert*, the Court assumed that once arrested there was no opportunity to comply. Rather, the defendant "could but suffer the consequences of the ordinance, namely, conviction with the imposition of heavy criminal penalties thereunder," and this violated due process. 335 U.S. at 229.

Would a defendant have to comply if "uncontrollable circumstances" such as hospitalization, illness, mental impairment or family needs did not "cease to exist"? If there is no question that the defendant is required to register under SORNA, it would probably be wise to "comply" ASAP. But if there is a question about whether the defendant is subject to SORNA (*e.g.*, the prior offense is not listed in the Act, it is not a "sex offense" under the *Taylor/Shepard* analysis, or the conviction has been overturned), or there is a strong legal challenge (*e.g.*, the AG's regulation is *ex post facto* as applied to the defendant), it may be better to litigate those legal issues first before having the client register in order to establish the affirmative defense. Registering would essentially forfeit any challenge to the duty to register, and subject the defendant to severe lifelong burdens.

f. Crime of Violence.

The new offense described in § 2250(c) is similar to § 924(c), and like § 924(c) is subject to *Apprendi v. New Jersey*, 530 U.S. 466 (1999). Thus, all of the elements must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.

The offense might be charged alone or together with § 2250(a), § 2260A (*see* subsection 2, *infra*), or some other code section defining a crime of violence. If charged with one or more of these other offenses, check to see if this violates double jeopardy under the test of *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.").

Because of the similarities between § 924(c) and § 2250(c), the former can provide clues as to how to approach the latter. Section 2250(c), however, differs from § 924(c) in ways that can both cause confusion and provide litigation opportunities.

First, § 924(c) requires proof that the defendant used, carried or possessed a firearm. The analogous element in § 2250(c) is that the defendant was a person described in subsection (a), *i.e.*, a person required to register under SORNA who knowingly failed to register or update a registration as required by SORNA and who meets one of the jurisdictional requirements.

Second, § 924(c) requires proof that the use or carrying was during and in relation to, or that the possession was in furtherance of, a crime of violence or drug trafficking crime. Section 2250(c) says nothing about the relationship between the failure to register and the crime of violence. To make any sense, it should be read to require at least that the crime of violence was committed during the period when the defendant was knowingly failing to comply with registration or update requirements. You may also want to press for an "in relation to" or "in furtherance" interpretation, though it doesn't fit so well as under § 924(c).

Third, § 924(c) requires proof of a "crime of violence," and defines "crime of violence" in subsection (c)(3), the same as it is defined in 18 U.S.C. § 16 (except that in 924(c)(3), it must be a felony and in 16, it need not be a felony if it has an element of physical force). Section 2250(c) requires proof of a "crime of violence," but does not provide a definition of "crime of violence."

Fourth, § 924(c) says that the crime of violence or drug trafficking crime must be one "for which the person may be prosecuted in a court of the United States." That is clear enough, but section 2250(c) says that it must be 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." (emphasis supplied) To make any sense, this must mean "for which a person may be prosecuted in" a court of one of the listed jurisdictions. It cannot mean that the person engaged in conduct in New York for which he could not be prosecuted there but which happens to be defined as a crime "under" tribal law.

Obviously, the defendant has a right to have the elements of the "crime of violence" charged in an indictment, and to have a jury decide if he committed that crime. Judges will have to instruct juries on the elements of the crime under the law of the jurisdiction, be it federal, military, tribal, the District of Columbia, a territory or a possession.

Who decides if the crime is a "crime of violence" and how? Obviously, the defendant can ask the court to decide in a motion to dismiss or for a directed verdict. The defendant, however, may want a jury to decide based on his actual conduct, particularly if the courts have decided as a categorical matter that the charged offense is a crime of violence, or a look at the elements alone is likely to go that way. For example, in *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995), the defendant wished the jury to decide whether his possession of an unassembled and unloaded sawed-off shotgun was a crime of violence. Instead, the district court instructed the jury that if it found the defendant possessed the gun, it was a crime of violence based on Ninth Circuit precedent under the categorical approach that possession of such guns is a crime of violence.

Before the *Apprendi-Shepard* line of cases, courts of appeals held in § 924(c) cases that whether the offense was a "crime of violence" was a pure question of law for the judge and the judge could so instruct the jury over the defendant's objection. *See United States v. Jennings*, 195 F.3d 795 (5th Cir. 1999); *United States v. Meachum*, 182 F.3d 923 (7th Cir. 1999); *United States v. Amparo*, 68 F.3d 1222 (9th Cir. 1995); *United States v. Moore*, 38 F.3d 977 (8th Cir. 1994); *United States v. Weston*, 960 F.2d 212 (1st Cir. 1992). Those decisions do not appear to have been revisited. *But see* Pattern Crim. Jury Instr. 5th Cir. § 2.48 (cautioning that *Apprendi* may alter the Fifth Circuit's holding in *Jennings*, which was decided shortly before *Apprendi*).

There are good arguments that if the defendant wants the jury to decide, the court may not take the decision from the jury:

> (1) *Gaudin* requires the jury to make this finding of mixed law and fact if the defendant so demands.
>
> (2) Because the "crime of violence" is itself an element, the jury must hear the facts of the alleged crime of violence anyway so *Taylor*'s concerns about the practical difficulties and unfairness of litigating facts about a *prior conviction* before a judge under a sentencing statute are not implicated. *See Taylor*, 495 U.S. at 601.
>
> (3) *Taylor* said that it was adopting the categorical approach because § 924(e) "refers to 'a person who . . . has three previous convictions' for – *not a person who has committed* – three previous violent felonies or drug offenses," *Taylor*, 495 U.S. at 600 (emphasis supplied), while here it is *commission* that is at issue.

(4) For the judge to make a finding that the conduct was a "crime of violence" is "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*." *Shepard*, 544 U.S. at 25; *see also id.* at 26 n. 5 (saying nothing to dispel dissent's charge that the Court's decision "may portend the extension of *Apprendi* . . . to proof of prior convictions," including "evidence of those burglaries at trial," other than to say that "any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions.").

(5) If the offense is allegedly a "crime of violence" because it "involves conduct that presents a serious potential risk of physical injury to another," it may violate the Sixth Amendment and Separation of Powers for the judge to determine that it is a "crime of violence." *See* William R. Maynard, *"Statutory" Enhancement By Judicial Notice of Danger: Who needs legislators or jurors?*, forthcoming in the January 2007 issue of The Champion and/or in the next issue of the Liberty Legend. *See also James v. United States*, No. 05-9364, Transcript of Oral Argument at 20, November 7, 2006 (Justice Scalia suggesting that offense alleged to be a violent felony under the residual clause of 924(e) be determined on the actual facts), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-9264.pdf.

(6) The court can instruct the jury that if it finds the defendant committed the offense, it must then decide whether it was a "crime of violence," and then instruct on the law defining what is a "crime of violence," using whatever statutory definition may apply, language from *Leocal v. Ashcroft*, 543 U.S. 1 (2004), and/or from other relevant caselaw. *See, e.g., Larin-Ulloa v. Gonzales*, 462 F.3d 456, 465 (5th Cir. 2006) (after *Leocal*, relevant inquiry under 18 U.S.C. § 16(b) is whether there is "a substantial risk that *intentional physical force* will be used in the commission of the crime.").

If the categorical approach is more advantageous (as it often is) and the government wants the jury to decide, you can rely on the cases under § 924(c) cited above. In addition, section 2250(c) refers to a "crime of violence under" the "law" of the jurisdiction, which can be read as further supporting a categorical approach.

You will have to decide whether the categorical or the factual approach is most advantageous. If the circuit has already decided the offense is not a "crime of violence," move for dismissal (or a directed verdict if there is a danger the government could re-indict for a different crime of violence). If the offense is defined by the statute or interpretive caselaw to cover conduct that is a "crime of violence" and conduct that is not, and the documents allowed by *Taylor* and *Shepard* show that the defendant was convicted of the non-"crime of violence" or they don't say, then move for dismissal or directed verdict. If your circuit (or another) has already decided that the offense is a "crime of violence" under the categorical approach (and the court is unlikely to revisit the decision in light of *Leocal* or the upcoming *James* decision), but a jury would likely find

the actual facts do not amount to a "crime of violence," argue that the jury should decide based on the actual facts.

What definition of "crime of violence" should be used? Section 2250(c) refers to 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," and provides no further definition. If the charged "crime of violence" is "under" federal law, presumably you would use the definition in 18 U.S.C. § 16. Some states or other non-Federal jurisdictions may classify offenses as violent or non-violent or have their own definition of "crime of violence" in statutes or caselaw. *E.g.*, Code of Laws of South Carolina §§ 16-1-60, 16-1-70. If so, you can argue that the alleged offense is not a crime of violence "under" the law of the jurisdiction. If the charged "crime of violence" is under the law of a jurisdiction without its own definition, 18 U.S.C. § 16 would seem to be the definition by default.

18 U.S.C. § 16 defines "crime of violence" as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

If the law defining the offense does not have as an element the use, attempted use, or threatened use of physical force against the person or property of another, and the offense is not a "felony" *either* because it is not a felony under the law of the jurisdiction, *e.g.*, *Singh v. Gonzales*, 432 F.3d 532, 538 (3d Cir. 2006), *or* because it is not punishable in the jurisdiction by more than one year, argue that it does not qualify.

Under *Leocal v. Ashcroft*, 543 U.S. 1 (2004), a "crime of violence" under 18 U.S.C. § 16 requires "active employment" of "physical force" or a "risk that the use of physical force against another might be required in committing [the] crime." *Id*. at 9-11. Some favorable decisions of the lower courts before and after *Leocal* are as follows: *Larin-Ulloa v. Gonzales*, 462 F.3d 456 (5th Cir. 2006) (Kansas statute requiring that the defendant "intentionally caus[e] physical contact with another person" under circumstances where "great bodily harm, disfigurement or death" can result is not a crime of violence); *United States v. Hull*, 456 F.3d 133 (3d Cir. 2006) (possession of a pipe bomb not crime of violence); *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006) (New York reckless assault in the second degree not a crime of violence); *Valencia v. Gonzales*, 439 F.3d 1046 (9th Cir. 2006) (California felony sexual intercourse with a person under 18 who was more than three years younger not categorically a crime of violence because it includes consensual sex between a twenty-one-year-old and a minor one day shy of 18, who is capable of consent); *United States v. Penuliar-Gonzalez*, 435 F.3d 961 (9th Cir. 2006) (recklessly or negligently evading an officer is not crime of violence); *Oyebanji v. Gonzalez*, 418 F.3d 260 (3d Cir. 2005) (vehicular homicide through reckless driving is not a crime of violence); *United States v. Hargrave*, 416 F.3d 486, 494-499 (6th Cir. 2005) (Ohio sexual battery not categorically a crime of violence under ACCA because it criminalizes sex with a stepchild regardless of age and regardless of consent); *Tran v.*

Gonzales, 414 F.3d 464 (3d Cir. 2005) (reckless burning or exploding not a crime of violence); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir. 2006) (involuntary manslaughter not a crime of violence); *United States v. Sawyers*, 409 F.3d 732, 742 (6th Cir. 2005) (statutory rape under Tennessee law criminalizing sex with a person at least 13 but less than 18 if the defendant was at least four years older not categorically a crime of violence); *United States v. Johnson*, 399 F.3d 1297 (11th Cir. 2005) (possession of a firearm not a crime of violence); *Xiong v. INS*, 173 F.3d 601, 607 (7th Cir. 1999) (statutory rape of a fifteen-year-old is not categorically a crime of violence); *United States v. Thomas*, 159 F.3d 296, 299 (7th Cir. 1998) (statutory rape of a 16-year-old girl not a crime of violence); *United States v. Cruz*, 805 F.2d 1464 (11th Cir. 1986) (drug trafficking is not a crime of violence); *Dickson v. Ashcroft*, 346 F.3d 44, 51-52 (2d Cir. 2003) (unlawful imprisonment of a minor or incompetent adult not a crime of violence because it can be accomplished with victim's acquiescence); *United States v. Barnett*, 426 F. Supp.2d 898 (N.D. Iowa 2006) (possession of an unregistered sawed-off or short-barreled shotgun not a crime of violence).

At oral argument in *James v. United States*, No. 05-9364, November 7, 2006, Justice Breyer suggested that there should be a burden on the government to prove that the percentage of cases under the state statute at issue (there, Florida attempted burglary) in which someone was injured is high enough to amount to a "serious potential risk of physical injury to another," and that there should be a presumption against the government where it is a statistical question and the government does not have any statistics. The question is then what percentage of cases involving injury is high enough to amount to a "serious potential risk of physical injury to another." Some of the justices seemed to think it might be a percentage as high or higher than that involving injury in the enumerated offenses (burglary, arson, extortion and use of explosives). Justice Stevens thought that Congress may have meant to include the enumerated offenses whether or not they actually involved a serious potential risk of physical injury. In *Tennessee v. Garner*, 471 U.S. 1, 21 (1986), the Court said that only 3.8% of burglaries between 1973 and 1982 involved violent crime. Justice Stevens said he expected attempted burglary to be less than that. Justice Roberts said attempts are more dangerous because someone showed up to interrupt the burglary. Justice Souter said it would be close to zero if you looked only at the substantial step in the attempt. Justice Scalia said the percentage of attempted burglary cases involving force should be compared to the least dangerous of the enumerated offenses, which he believed was extortion.[5]

It seems unlikely that the Court will ultimately adopt a statistical approach unless it also holds that the determination of whether an offense is a violent felony under the residual clause of 924(e)(2)(B) must be proved to a jury, because the statistical proof goes well beyond the mere fact of conviction. Time will tell, but in the meantime, you can argue that there should be a burden on the government to prove that the percentage of cases under the statute at issue is high enough to amount, under 18 U.S.C. § 16, to "a substantial risk that physical force against the person or property of another may be used

[5] *See* Transcript, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-9264.pdf.

in the course of committing the offense." Or, the defense could prove that it is not by coming up with a percentage based on the facts of reported cases. *Cf. United States v. Golden*, 466 F.3d 612, 615-16 (7th Cir. 2006) (concurring that failing to report for jail service is a crime of violence, but observing that the government "has given us no statistics to support a conclusion that failure to report to jail presents a serious potential risk to the public or to the officers involved in the subsequent capture." "Now that we have found that failure to report constitutes a violent felony, we are on the path to determining that comparable crimes, a probation violation, for example, might qualify as well. If statistics do not bear out the assumption that persons who fail to report pose a serious potential risk of physical harm to others, we may have to reconsider our approach.").

2. Being a Person Required to Register as a Sex Offender by Federal or Other Law, Commits an Enumerated Offense Involving a Minor

In a section labeled "penalties for registered sex offenders," 18 U.S.C. § 2260A creates the following new offense:

> Whoever, being required by Federal or other law to register as a sex offender, commits a felony offense involving a minor under section 1201, 1466A, 1470, 1591, 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2260, 2421, 2422, 2423, or 2425, shall be sentenced to a term of imprisonment of 10 years in addition to the imprisonment imposed for the offense under that provision. The sentence imposed under this section shall be consecutive to any sentence imposed for the offense under that provision.

This bizarre statute that will raise many problems and questions. We only skim the surface here.

Being required to register: If the defendant is allegedly required to register under Federal law, it could be SORNA, or conceivably the Wetterling Act. If SORNA, *see* subsection 1(d)(i), *supra*. If the Wetterling Act, *see* Appendix A, B and C. If "other" law, it will depend on that law.

Double Jeopardy: If charged along with § 2250(a), § 2250(c), and/or one of the enumerated offenses, check to see if this violates double jeopardy under the test of *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."). If charged in addition to section 2250(c) and the "crime of violence" there is the same as the charged offense under section 2260A, the section 2260A charge will have no element not contained in the section 2250(c) charge.

Status offense: Argue that this is a status offense. *See Robinson v. California*, 370 U.S. 660 (1962).

3. Failure to Register (State)

Each state and other designated jurisdiction, other than a federally recognized Indian tribe, is required to enact legislation making it a crime to fail to comply with SORNA's registration requirements and to make it punishable by a term of imprisonment of more than one year, *i.e.*, a felony. *See* 42 U.S.C. §§ 16913(e). The Supreme Court has held that possession of a firearm within 1,000 feet of a school, *United States v. Lopez*, 514 U.S. 549 (1995), arson of a private residence, *Jones v. United States*, 529 U.S. 848 (2000), and gender-motivated violence, *United States v. Morrison*, 529 U.S. 598, 614 (2000), are beyond the reach of the commerce power. The Court in each case emphasized that the States have primary authority to define and enforce criminal law. The very fact of this directive is an admission that there is no federal jurisdiction over a failure to register other than under the circumstances set forth in 18 U.S.C. § 2250(a)(2). It seems highly unlikely that Congress has the power to require the states to enact specific criminal legislation with a specific penalty as a condition of avoiding a reduction in federal funds. *See New York v. United States*, 505 U.S. 144, 188 (1992); Part G(4), *infra*.

4. False Statements

18 U.S.C. § 1001(a) is amended to raise the statutory maximum from 5 to 8 years for false statements, concealment, etc., in connection with a "matter relating to an offense" under chapter 109A, 109B (which includes new 18 U.S.C. § 2250), 110, or 117, or section 1591, the same statutory maximum for matters related to "domestic or international terrorism." Allegedly false statements must be "material" to the government inquiry, which is a question for the jury. The jury must decide, at minimum, what statement was made, what decision the agency was trying to make, and whether the statement was material to that decision. *See United States v. Gaudin*, 515 U.S.506 (1995).

5. Supervised Release

Under amended 18 U.S.C. § 3583(k), those convicted of violating 18 U.S.C. § 1201 involving a minor, or of any offense under 18 U.S.C. §§ 1591, 2241, 2242, 2243, 2244, 2245, 2250 (failure to register), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423 or 2425 must be placed on supervised release for a mandatory minimum term of 5 years with a maximum of life.

If a defendant who is required to register commits while on supervised release any criminal offense under chapter 109A, 110, 117 or section 1201 or 1591 which is punishable by more than one year, the court *shall* revoke supervised release and require the defendant to serve in prison all or part of the term of supervised release authorized by the statute that resulted in the term of supervised release, and that term must be at least 5 years.

G. Challenges to SORNA and the Attorney General's Regulations

1. Federal Due Process/ State Constitutions/State Statutes

SORNA imposes automatic sex offender status, tier level classification, and public notification on the Internet based on the mere fact of conviction of an enumerated offense. This is done without a hearing to assess risk of recidivism or current dangerousness. (Section 637 of P.L. 109-248 requires the AG to put together a task force to study risk-based systems and report back within 18 months. Whether a risk-based system will be adopted is unknown.) The statute provides no opportunity to petition for relief for any reason (other than a "clean record" for 10 or 25 years in a narrow set of cases). In some instances, this will violate the Due Process Clause or conflict with state constitutional or statutory law.

a. Federal Due Process

In *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1 (2003), the Supreme Court held that it did not violate the procedural component of the Due Process Clause for Connecticut to publish information about registered sex offenders without first affording them a hearing to determine if they were currently dangerous. Like SORNA, sex offender status under Connecticut law was based only on the fact and type of previous conviction and not current dangerousness. Procedural due process did not entitle petitioner to a hearing on a fact that was not material. *Id*. at 4-7. The Court specifically did not decide whether Connecticut's law violated substantive due process. *Id*. at 7-8.

A person may be subjected to registration and public notification requirements, or prosecuted for failing to register, when he was not in fact convicted (or does not currently stand convicted) of an offense that Congress listed as a qualifying "sex offense" in the SORNA. This may occur when a prior conviction is overturned or expunged, the person is pardoned, through clerical or administrative error, or through regulations currently on the books or to be promulgated by the Attorney General adding sex offenses that are not on the list of sex offenses in SORNA. This would violate the statute itself, and the Due Process Clause, both procedurally and substantively. *See Branch v. Collier*, 2004 WL 942194 (N.D. Tex. Apr. 30, 2004) (state authorities' subjection of parolee to sex offender registration and public notification requirements when he was never convicted of an enumerated sex offense under state law violated the Due Process Clause); *Coleman v. Dretke*, 409 F.3d 665 (5th Cir. 2005) (same). *See also People v. Bell*, 3 Misc.3d 773, 778 N.Y.S.2d 837 (2003) (application of sex offender registry act to person who was not convicted of a sex offense violated the Due Process Clause and the Equal Protection Clause of both the state and federal constitutions); *Doe v. State*, 92 P.3d 398, 404-12 (Alaska 2004) (Alaska law requiring person to submit to sex offender registration and notification requirements after conviction was set aside violated the due process clause of the state constitution).

b. State Constitutional and Statutory Law

The states have been operating sex offender registries for years. Many have developed classification systems that distinguish dangerous from non-dangerous offenders based on multiple relevant factors, and set the offender's registration and public notification requirements accordingly. Many states, by statute or as a matter of state constitutional law, provide due process hearings to determine risk level, and an opportunity to petition for relief for good reason, including clerical errors, erroneous criminal records, overturned convictions, and other compelling circumstances that warrant either a reduction in risk level or release from registration and notification requirements. Some states do not publish information for low-risk offenders, or for offenders when the victim is a family member, because of the harsh consequences for the victim and other innocent family members.

SORNA's automatic registration and publication/no relief aspects do conflict with numerous state statutes (not listed here) and the constitutional law of many states. *E.g.*, *In re J.G.*, 169 N.J. 304 (2001) (registered sex offender may petition court to end future registration); *Doe v. Poritz*, 142, N.J. 1 (1995) (state constitution requires hearing before final decision regarding risk determination); *People v. Ross*, 169 Misc.2d 308, 312, 646 N.Y.S.2d 249, 251-52 (Sup. Ct. N.Y. Co. 1996) ("Due process requires that the offender be given notice of the proposed classification, the basis for the Board's determination and an opportunity to present evidence at the determinative hearing."); *Doe v. Attorney General*, 426 Mass. 136, 686 N.E.2d 1007 (1997) (Massachusetts Declaration of Rights requires hearing to determine whether individual, though convicted, is required to register); *State v. Bani*, 36 P.2d 1255, 1268 (Hawaii 2001) (state constitutional right to notice and an opportunity to be heard prior to public notification of status as a sex offender); *Brummer v. Iowa Dept. of Corr.*, 661 N.W.2d 167 (Iowa 2003) (offender entitled as a matter of state and federal due process to evidentiary hearing as part of risk assessment process); *State v. Guidry*, 96 P.3d 242 (Hawaii 2004) (state due process clause requires hearing on future dangerousness under statute mandating lifetime registration).

SORNA requires all "jurisdictions" to "substantially implement" its terms, "as determined by the Attorney General," subject to being penalized in the amount of 10% of Edward Byrne Memorial Criminal Justice Assistance Grant funds they would otherwise receive. *See* 42 U.S.C. § 16925(a). The Attorney General may determine that a state cannot substantially implement its terms because to do so would violate the state constitution "as determined by a ruling of the jurisdiction's highest court," after consulting with the jurisdiction's "chief executive and chief legal officer" regarding the "jurisdiction's interpretation of [its] constitution and rulings thereon by [its] highest court." If there is a problem in implementing SORNA because of the state's constitutional law, the state must still implement "reasonable alternative procedures or accommodations" consistent with SORNA, or forfeit funding it would otherwise receive. *See* 42 U.S.C. § 16925(b).

Where due process is required by state statute but there is no constitutional ruling to that effect because the state legislature provided for due process hearings by statute, SORNA does not provide an out. Lawyers who represent sex offenders in those states

might seek a declaratory judgment under the state constitution from the state's highest court.

2. Unauthorized Lawmaking/Unconstitutional Delegation in Violation of Separation of Powers

Under § 4042(c)(3) as amended, "the Bureau of Prisons shall inform a person who is released from prison and required to register under the Sex Offender Registration and Notification Act of the requirements of that Act as they apply to that person and the same information shall be provided to a person sentenced to probation by the probation officer responsible for supervision of that person."

Under § 4042(c)(1) and (c)(2) as amended, BOP or Probation must give notice to the chief law enforcement officer and the state or local sex offender registry in the jurisdiction where the person will reside concerning a person released from prison or sentenced to probation who is "required to register under the [SORNA]," "or any other person in a category specified by the Attorney General," such notice to include "that the person shall register as required by the [SORNA]."[6]

BOP or Probation may give notice that a person who is *not* required to register under SORNA is required to register, because he is in some broader "category specified by the Attorney General." The Attorney General has a history of exceeding its lawful authority in this area, and the offending regulation is still in the Code of Federal Regulations. In 1994, in 18 U.S.C. § 4042(a), Congress directed the "Bureau of Prisons, under the direction of the Attorney General," to "provide notice of release of prisoners in accordance with subsections (b) and (c)." Subsection (b) required (and still requires) notice to local authorities if the prisoner "was convicted of . . . a drug trafficking crime, as that term is defined in section 924(c)(2)" or a "crime of violence (as defined in section 924(c)(3))." Subsection (c) required (before SORNA) notice to local law enforcement and sex offender registry authorities if the prisoner "was convicted" of an offense under 18 U.S.C. § 1201 involving a minor, under chapters 109A, 110 or 117, or of "[a]ny other offense designated by the Attorney General as a sexual offense for purposes of this subsection." Subsection (d) stated (and still states) that this section "shall not apply to military or naval penal or correctional institutions or the persons confined therein."

Purporting to act pursuant to section 4042, the Bureau of Prisons promulgated a regulation and program statements under which it notified local authorities of any current *or past* conviction of a sex offense under the law of *any jurisdiction*, as well as any current *or past* federal drug trafficking offense or federal *or state* crime of violence.[7]

---

[6] Section 4042(c)(4), which previously provided that such notice was required if the person "was convicted" of an offense under 18 U.S.C. § 1201 involving a minor, under chapters 109A, 110 or 117, or of "[a]ny other offense designated by the Attorney General as a sexual offense for purposes of this subsection," is stricken.

[7] 28 C.F.R. § 571.72; BOP P.S. 5110.15 (superseding P.S. 5110.12); BOP P.S. 5141.02.

Deeming it to be "necessary for the protection of the public," and to "ensure that notifications can be made for *military offenders*, for *District of Columbia Code offenders*, and for these and other federal inmates *with a sex offense in their criminal history*," BOP adopted the sex offender regulation "without the prior notice and comment period ordinarily required by 5 U.S.C. 553."[8]

The courts have held that BOP's regulations and related program statements are an impermissible interpretation of section 4042, finding, according to the statute's plain language and its overall scheme, that Congress did not intend that BOP notify local authorities based on state offenses or past offenses, and that doing so was invalid. *See Henrikson v. Guzik*, 249 F.3d 395 (5th Cir. 2001) (enjoining BOP from notifying local jurisdiction under 4042(b)(3) of release of prisoner serving federal felon in possession sentence based on 1977 arson conviction); *Fox v. Lappin*, 409 F. Supp.2d 79 (D. Mass. 2006) (enjoining BOP from notifying local jurisdiction under section 4042(c) of release of prisoner serving federal felon in possession sentence based on 1981 state sex offense); *Simmons v. Nash*, 361 F.Supp.2d 452 (D.N.J. 2005) (enjoining BOP from notifying local jurisdiction under section 4042(c) of release of prisoner serving federal drug sentence based on 1983 state offense of attempting to promote adult prostitution).

In addition, the regulation includes a number of offenses that the Wetterling Act excludes,[9] and some that the SORNA excludes. For example, the regulation includes statutory rape under all circumstances, while SORNA excludes statutory rape if the victim was at least 13 years old and the offender was not more than 4 years older. The regulation includes juvenile adjudications, while SORNA excludes them unless the offender was at least 14 years old and the offense was comparable to or more severe than aggravated sexual abuse. The regulation lists "any offense under the law of any jurisdiction," but SORNA excludes foreign convictions obtained without sufficient fundamental fairness and due process.

If a defendant is told that he is subject to the SORNA based on an offense designated by the Attorney General but not listed by Congress in the statute, it should be challenged in a declaratory judgment action. If prosecuted for failure to register based on such an offense, a motion to dismiss should be filed. The legal grounds would be the

---

[8] 63 FR 69386-01, 1998 WL 869405 (Dec. 16, 1998).

[9] For example, the Wetterling Act specifically excludes conduct that is criminal only because of the age of the victim if the defendant was under 18, *see* 42 U.S.C. §§ 14071(a)(3)(A), but the BOP regulation includes statutory rape regardless of the defendant's age in its regulation. *See* 28 C.F.R. § 571.72(a)(3). The Wetterling Act includes only production or distribution of child pornography under state law, *see* 42 U.S.C. § 14071(a)(3)(A)(viii), but the BOP regulation includes simple possession of child pornography under the law of any jurisdiction. *See* 28 C.F.R. § 571.72(a)(2). The Wetterling Act excludes attempts to commit state offenses unless the state makes such attempts a criminal offense and chooses to include them for purposes of the sex offender registry, *see* 42 U.S.C. § 14071(a)(3)(A)(ix), but the BOP regulation includes attempts to commit an offense under the laws of any jurisdiction under any circumstances. *See* 28 C.F.R. § 571.72(a)(5).

same in either posture. The indictment would fail to state a crime/BOP should be enjoined insofar as the alleged duty to register would rest on an invalid regulation. When Congress gives an agency "limited powers, to be exercised in specific ways," a regulation that exceeds those powers, or is otherwise inconsistent with the specifics of the statute, is invalid. *Gonzales v. Oregon*, 126 S. Ct. 904, 916-22 (2006). *See also Henrikson v. Guzik, Fox v. Lappin*, and *Simmons v. Nash, supra*.

Argue in the alternative that if the statute is read as giving the Attorney General the power to designate sex offenses giving rise to a duty to register, it would be an unconstitutional delegation of lawmaking to the Executive in violation of Separation of Powers. "Congress is manifestly not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). Congress may only leave to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." *Id*. In *Panama Refining* and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court held that Congress had unconstitutionally authorized the Executive to make laws. In *Schechter*, it was to prescribe codes of fair competition the violation of which would be a misdemeanor; in *Panama Refining*, it was to prohibit transportation of excess petroleum, subject to fine or imprisonment. Here, it would be to decide what offenses are subject to onerous registration and public notification requirements and stiff criminal penalties for failure to comply. *See Fahey v. Mallonee*, 332 U.S. 245, 249 (1947) (it would be an unconstitutional delegation "to make federal crimes of acts that had never been such before and to devise novel rules of law in a field in which there had been no settled law or custom"). The courts must construe the statute to avoid constitutional doubt. *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

3. Retroactive Regulations

a. Non-Delegation

Congress explicitly did not decide whether SORNA would apply retroactively to persons convicted before July 27, 2006 or before SORNA was implemented in their jurisdiction, but instead authorized the Attorney General to make that decision. *See* 42 U.S.C. § 16913(d). If, as can be expected, the Attorney General does make SORNA retroactive, Congress' delegation of that decision should be challenged as an unconstitutional delegation for the reasons stated in subsection 2, *supra*. This delegation seems particularly offensive to Separation of Powers. Retroactive laws are highly disfavored because, *inter alia*, they fail to give notice and upset settled expectations. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994). A retroactive sex offender law can ruin families, subject persons to job loss, harassment, homelessness, violence, and even murder. It can threaten public safety by destabilizing the lives of those posted on the Internet, creating a risk of recidivism in those who would not otherwise recidivate, and making it more difficult for authorities to keep track of and supervise those who would. If Congress intends any law, particularly one like this, to have retroactive effect, it must "follow[] the path charted in Article I, § 7, cl. 2, of the Constitution." *Id*. at 263. Here,

Congress explicitly handed this quintessentially legislative function to an official in the Executive branch.

b. *Ex Post Facto*

If applied to any person who committed the offense before the effective date of SORNA (whether that means July 27, 2006, the date SORNA was implemented in the defendant's jurisdiction, the date the Attorney General promulgates a regulation saying it applies retroactively to any class of persons, or July 27, 2009), there is a strong argument that this violates the *Ex Post Facto* Clause.

To violate the *Ex Post Facto* Clause, the law must be punitive. The Alaska sex offender registry law, which applied by its terms to persons convicted before its enactment, was upheld against *ex post facto* challenge by a deeply divided court in *Smith v. Doe*, 538 U.S. 84 (2003). The majority opinion was authored by Justice Rehnquist (now gone) and joined in full only by Justices O'Connor (now gone), Kennedy and Scalia. Justice Thomas joined the opinion but disagreed with some of its reasoning, which may be relevant to a challenge to the SORNA. Justice Souter concurred only in the judgment and substantially disagreed with the majority's conclusions for reasons quite relevant to a challenge to the SORNA. Justices Stevens, Ginsburg and Breyer dissented. Given the arguably poor reasoning and naivete of the majority opinion, current knowledge about the effects on sex offenders and society of an indiscriminate public notification system,[10] the re-composition of the Court, and significant differences between Alaska's sex offender registry law and SORNA, the *ex post facto* issue is worth pursuing.

The majority framed the issue as, first, whether the Alaska legislature intended the law to be punitive or a regulatory scheme that was civil and non-punitive. If punitive, the law would be *ex post facto*. If non-punitive, the question was then whether the law was so punitive in purpose or effect to negate the legislature's intent to deem it civil. *Id*. at 92-93.

The majority first found the Alaska legislature intended to create a civil, non-punitive regulatory scheme. *Id*. at 93-96. First, the legislature stated that its purpose was to protect the public based on legislative findings that sex offenders have a high risk of re-offense and that public disclosure would protect the public. The majority concluded, "an imposition of restrictive measures on sex offenders deemed to be dangerous is a 'legitimate nonpunitive governmental objective.'" *Id*. at 93 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)). In the SORNA, Congress said that the purpose was to "protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below." Pub. L. 109-248 § 102. It made no finding that sex offenders have a high risk of re-offense or that public notification (without any risk assessment) would promote public

[10] For some recent discussion of this on Berman's blog, see http://sentencing.typepad.com/sentencing_law_and_policy/2006/10/the_challeges_o.html.

safety. In fact, it had substantial evidence before it that sex offenders are amenable to treatment, are less likely to re-offend than non-sex offenders, and that public disclosure without a risk assessment threatens public safety without a corresponding benefit.[11] Congress made no general finding of dangerousness, but required registration and public broadcasting on the Internet mandatory without any individualized finding of dangerousness.

Second, the majority analyzed in what part of Alaska's code the sex offender law was placed, finding that some of it was in the Health, Safety and Housing Code, some of it was in the Criminal Code, and some of it was in the Rules of Criminal Procedure. This, then, was deemed "not dispositive." *Id*. at 94. Similarly, the SORNA is in both Title 42 (Public Health and Welfare) and Title 18 (Crimes and Criminal Procedure).

Third, the majority's conclusion that the law was non-punitive was strengthened by the fact that, "aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety, . . . an agency charged with enforcement of both criminal *and* civil regulatory laws." *Id*. at 96. The SORNA contains some very detailed procedures, and where it does not, it vests the authority to prescribe them in the Attorney General, who is the head of the Department of Justice, the primary federal criminal investigation and enforcement agency, and chief law enforcement officer of the United States, whose primary responsibility is enforcing criminal laws. The responsibility for enforcing purely civil regulatory laws lies with other federal agencies.

The majority then found that the effects of the law did not negate the Alaska legislature's intent to establish a civil, non-punitive regulatory scheme, after looking at the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Id*. at 97-106. First, quite unconvincingly, it found that posting on the Internet was not akin to shaming punishments from colonial times, so did not operate in a manner traditionally regarded as punitive. *Id*. at 97-99. This position would be hard to maintain in light of growing violence stemming from Internet publication, including the recent murder of a man posted as a sex offender for the offense of having sex with his 15-year-old girlfriend when he was 19 years old. *See* John R. Ellement and Suzanne Smalley, *Sex Crime Disclosure Questioned*, The Boston Globe, April 18, 2006.

Second, the law did not subject sex offenders to an affirmative disability or restraint, because the "act's obligations are less harsh than the sanctions of occupational

[11] What Congress had before it is relevant to show what its purpose was. Congress received substantial factual information from various organizations and individuals demonstrating the dangers of a sex offender registry system that does not take into account future dangerousness. *See* http://www.nacdl.org/public.nsf/legislation/sexoffender. These materials do not appear to be in the congressional record. This law was negotiated in conference behind closed doors, without a hearing, and without floor debate. We have been told that individual congresspeople can decide to make such information part of the record, or consign it to oblivion, and that even files that are "public" may be "not published."

debarment," it leaves them "free to change jobs or residences," and it was pure "conjecture" that the law led to substantial occupational or housing disadvantages. *Id*. at 99-100. This rationale should be impossible to maintain in light of SORNA's requirements of publication on multiple public websites, community notification program including access by "any organization, company, or individual who requests such notification," and the growing evidence that public notification leads to vigilante justice, homelessness and joblessness, which in turn creates recidivism, makes sex offenders more difficult to supervise, and threatens public safety. *See*, *e.g.*, Richard Roesler, *Sex offenders without addresses throw notification system for a loop*, Spokesman Review, The (Spokane), September 6, 2005. *See* also NACDL, Sex Offender Resources, http://www.nacdl.org/__85256BE4005CBECB.nsf/0/DBD8F2CC2BD6E899852570D6005223A7?Open. To refute this rationale, you may also want to check other federal laws and regulations for disabilities imposed on registered sex offenders. For example, as of now, public and Indian housing must be denied if any member of a household is subject to lifetime registration under a state sex offender registry. *See* 24 C.F.R. §§ 5.856, 960.204.

Further, the Court said, the requirement of periodic updates did not impose an affirmative disability because it did not need to be done in person. *Id*. at 101. The SORNA requires frequent in person reporting at multiple locations (assuming the person has a home, and a job or goes to school). And though the argument that the registration system was akin to probation or supervised release had "some force," the majority rejected it because sex offenders are "free to move where they wish and to live and work as other citizens, free from supervision." *Id*. at 101-02. SORNA imposes much harsher disabilities and restraints on sex offenders than the Alaska law. When a person charged with failure to register is released pretrial, electronic monitoring is mandatory. It requires a term of imprisonment up to 10 years for failure to register, followed by a possible consecutive mandatory minimum of 5 years, followed by a mandatory minimum of five years supervised release up to life. If there were any doubt that the law is punitive in intent and effect, any person "required by Federal or other law to register as a sex offender" is punished for that status by a consecutive mandatory minimum of 10 years when he or she commits an enumerated felony offense involving a minor.

Third, with a series of *non sequiturs*, the majority rejected the argument that the law promoted the traditional goals of punishment. Though the state conceded the law had a deterrent purpose, deeming it punitive on that basis would undermine the state's ability to engage in effective regulation. *Id*. at 102. While it was true that the law may look retributive because the length of the reporting requirement was based on the extent of wrongdoing (aggravated or non-aggravated) rather than the risk posed, it was "reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Id*. Actually, the stigma and harassment stemming from Internet publication adds tremendously to the instability of sex offenders and increases their risk of recidivism. Hanson, R. Karl and Morton-Bourgon, Kelly, *Predictors of Sexual Recidivism: An Updated Meta-Analysis* (2004); Association for the Treatment of Sex Offenders, *The Registration and Community Notification of the Adult Sex Offender* at 3 (2005); NACDL, Sex Offender Resources,

http://www.nacdl.org/__85256BE4005CBECB.nsf/0/DBD8F2CC2BD6E899852570D6005223A7?Open.. That leaves retribution as the sole apparent purpose.

Fourth, the law had a rational connection to the non-punitive purpose of public safety, which it advanced by alerting the public to the "risk of sex offenders in their community." Even though it was not narrowly drawn to advance that purpose, presumably because like SORNA it was not risk-based but offense-of-conviction based, it was not a sham or mere pretext. *Id*. at 102-03. Given the growing evidence noted above (and that was before Congress) that public notification without any risk assessment threatens rather than advances public safety, SORNA does not bear a rational connection to a non-punitive purpose. *See also Losing Track of Sex Offenders*, Dallas Morning News, October 1, 2006 (Texas sex offender registry is filled with thousands of phony or outdated addresses, in part because politicians are adding more and more offenders to the registry, as a result of which police cannot effectively enforce the law, citizens cannot accurately determine where dangerous offenders live, and innocent homeowners are targeted because their address mistakenly appears on the registry), http://www.nacdl.org/sl_docs.nsf/freeform/sex_offender009?OpenDocument.

Fifth, the law was not excessive in relation to its public safety purpose even though it applied to all convicted sex offenders without regard to future dangerousness and placed no limit on the breadth of public access to the information. This was because the legislature made a finding that sex offenders had a high rate of recidivism and were dangerous as a class. *Id*. at 103-04. Congress made no such finding in SORNA and such a finding would be inaccurate. Studies, including DOJ studies, show that sex offenders are less likely to re-offend than non-sex offenders, that reoffense rates vary with specific characteristics of the offender and the offense,[12] and that sex offender treatment cuts recidivism by more than half.[13] It is well-established in the scientific literature that "the variation in recidivism rates suggests that not all sex offenders should be treated the

---

[12] CSOM, Office of Justice, Department of Justice, *Myths and Facts About Sex Offenders* (August 2000), http://www.csom.org/pubs/mythsfacts.html; Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* at 2.

[13] Looman, Jan *et al.*, *Recidivism Among Treated Sexual Offenders and Matched Controls: Data from Regional Treatment Centre (Ontario)*, Journal of Interpersonal Violence 3, at 279-290 (Mar. 2000) (reduction from 51.7 percent to 23.6 percent with treatment); *Ten-Year Recidivism Follow-up of 1989 Sex Offender Releases*, State of Ohio Department of Rehabilitation and Correction (April 2001) (sex-related recidivism after basic sex offender programming was 7.1% as compared to 16.5% without programming); Center for Sex Offender Management, *Recidivism of Sex Offenders* 12-14 (May 2001) (charts showing 18% with treatment v. 43% without treatment; 7.2% with relapse prevention treatment v. 13.2% of all treated offenders v. 17.6% for untreated offenders); Orlando, Dennise, *Sex Offenders*, Special Needs Offenders Bulletin, a publication of the Federal Judicial Center, No. 3, Sept. 1998, at 8 (analysis of 68 recidivism studies showed 10.9% for treated offenders v. 18.5% for untreated offenders, 13.4% with group therapy, 5.9% with relapse prevention combined with behavioral and/or group treatment; a Vermont Department of Corrections study showed 7.8% recidivism rate for those who participated in treatment, .5% for those who completed treatment).

same." Harris, Andrew J. and Hanson, Harl R., *Sex Offender Recidivism: A Simple Question* (2004).

Finally, the majority dispatched the final two factors – whether the regulation comes into play only on a finding of *scienter* and whether the behavior to which it applies is already a crime – with a tautology. They were "of little weight" because a crime was a "necessary starting point." *Id*. at 105.

Justice Thomas joined the opinion but wrote separately to say that the effects of Internet publication should play no part in the analysis because the statute itself did not require Internet publication. *Id*. at 106-07. This suggests that Justice Thomas may have turned a blind eye to the evidence in the record regarding the problems that indiscriminate Internet publication creates. Perhaps he would vote differently on a law like SORNA that requires Internet publication.

Justice Souter concurred only in the judgment. *Id*. at 107-110. He found "considerable evidence" pointing to the conclusion that the law was punitive. First, the Alaska legislature did not label the law as "civil," thus distinguishing it from the Court's past cases relying on the legislature's stated label. Second, several of the provisions were placed in the criminal code, which did not force a criminal characterization, but stood in the way of asserting that the statute's intended character was clearly civil. Third, the fact that the law used past crime as the touchstone and swept in a significant number of people who pose no real threat to the community "serves to feed the suspicion that something more than regulation of safety is going on; <u>when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones</u>." *Id*. at 109. Fourth, Internet publication did bear a resemblance to shaming punishments designed to disable offenders from living normally in the community. He cited examples in the record of damage to reputation, exclusion from jobs and housing, harassment and physical harm. *Id*. at 109 & n*. The punitive and civil indicators were in rough equipoise, but what tipped the scale allowing Justice Souter to concur in the judgment, was the presumption of constitutionality of state laws, which gives the state the benefit of the doubt in close cases. *Id*. at 110.

Justice Stevens dissented, finding that the law unquestionably affected a constitutionally protected liberty interest in that it was akin to supervised release or parole, and had a severe stigmatizing effect that resulted in threats, assaults, loss of housing and loss of jobs. The law was punitive because it (1) constituted a severe deprivation of liberty, (2) was imposed on everyone convicted of certain offenses, and (3) was not imposed on anyone else. The law added punishment based on past crimes to the punishment of persons already tried and convicted of those crimes, and so violated the *Ex Post Facto* Clause. *Id*. at 110-14.

Justices Ginsburg and Breyer also dissented. Like Justice Souter, they recognized that the legislature's intent was unclear and so they would neutrally evaluate the law's purposes and effects. They would hold the law punitive in effect, and therefore in

violation of the *Ex Post Facto* Clause, for the reasons identified by Justices Souter and Stevens. The law was excessive in relation to its nonpunitive purpose by applying to all offenders convicted of enumerated crimes without regard to future dangerousness, by keying the duration to whether the offense was aggravated rather than risk of reoffense, by requiring quarterly reporting in perpetuity even if personal information had not changed, and most important, "the Act makes no provision whatever for the possibility of rehabilitation . . . . However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation." *Id*. at 116-17.

4. Jurisdiction

Jurisdictions that are required to maintain a jurisdiction-wide sex offender registry "conforming" to the requirements of SORNA and guidelines and regulations issued by the Attorney General are:

> (A) All states
> (B) District of Columbia
> (C) Puerto Rico
> (D) Guam
> (E) American Samoa
> (F) Northern Mariana Islands
> (G) U.S. Virgin Islands
> (H) A federally recognized Indian tribe (1) that elects to carry out the SORNA functions, (2) that elects to delegate its functions to the jurisdiction or jurisdictions within which its territory is located and provides access, cooperation and assistance, or (3) is imputed to have elected to delegate its functions because (a) it is subject under 18 U.S.C. § 1162 to the law enforcement jurisdiction of a state, or (b) does not make an election within one year or rescinds such election, or (c) the AG determines the tribe has not substantially complied and is unlikely to become capable of doing so.

See 42 U.S.C. §§ 16911(9), 16912, 16927.

SORNA requires these jurisdictions to "substantially implement" its blunt and burdensome terms (and supplant the more nuanced state sex offender registry programs in place in many states), "as determined by the Attorney General," subject to being penalized in the amount of 10% of Edward Byrne Memorial Criminal Justice Assistance Grant funds they would otherwise receive. *See* 42 U.S.C. § 16925(a). They must do so before the later of July 27, 2009, or one year after the Attorney General makes available the software which is supposed to be by July 27, 2008, though the Attorney General may grant up to two one-year extensions. *See* 42 U.S.C. §§ 16923, 16924. The Act says that the provisions "that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section." *See* 42 U.S.C. § 16925(d).

This appears designed to get around *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997). In *New York*, the Supreme Court held that the Low-Level Radioactive Waste Policy Amendments Act of 1985, which gave states a choice either to enact legislation providing for disposal of radioactive waste pursuant to Congress' directions, or to take title to and possession of the waste and become liable for all damages, crossed the line between encouragement and coercion, was not within any of Congress' enumerated powers, and contravened the Tenth Amendment. The Court said:

> Whatever the outer limits of [State] sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program. . . . The Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests, and it permits the Federal Government to hold out incentives to the States as a means of encouraging them to adopt suggested regulatory schemes. It does not, however, authorize Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders.

Id. at 188.

In *Printz*, the Supreme Court struck down the Brady Handgun Violence Prevention Bill, which commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers and perform related tasks. Relying on the principle of dual state/federal sovereignty evidenced in the Tenth Amendment and elsewhere in the structure of the Constitution, the Court held that Congress could not enlist state officials in the enforcement of federal law. In answer to the dissent's view that the Brady Bill was a law "necessary and proper" to execute Congress's Commerce Clause power to regulate handgun sales, the majority said that a law that violates the state sovereignty principle is not a law that is "proper" for carrying out any congressional power.

In *United States v. Lifshitz*, 98 Fed. Appx. 26 (2d Cir. Mar. 30, 2004), the Second Circuit held that a condition of probation ordering the defendant to register as a sex offender in New York state did not violate the Tenth Amendment because it merely ordered the defendant to comply with a pre-existing state scheme, did not order the state to do anything, and so did not commandeer the state's executive branch.

Arguments might be made that by penalizing states for non-compliance by taking away funds they otherwise would get, SORNA is not a proper exercise of the spending power through "encouragement" but an improper exercise of "coercion." With respect to SORNA's order to the states to enact a specific criminal statute for failure to register, *New York* suggests this is not within Congress' power.

The following article criticizes the broad use of the spending power to exceed Congress' enumerated powers. *See* Richard W. Garnett, *The New Federalism, the*

Spending Power, and Federal Criminal Law, 89 Cornell L. Rev. 1 (November 2003). This one discusses the issue from a historical (as in Madison and Hamilton) perspective. *See* Jeffrey T. Renz, *What Spending Clause? (or the President's Paramour)*, 33 J. Marshall L. Rev. 81 (Fall 1999).

Appendix A
Summary of Wetterling Act

Under 42 U.S.C. §§ 14071, 14072 and 14073, only States (not tribes, Guam, etc.) are required to establish a sex offender registry. The deadline was within three years of September 13, 1994, with the possibility of a two-year extension. A State would lose 10% of funds otherwise allocated under 42 USC 3756 (formula grants) for failure to comply. Any State submitting an application stating that it is in compliance or making a good faith effort is *required* to be given a grant to offset costs.

Among the requirements of States are that a responsible official notify the person of the duty to register and to report changes and have the person read and sign a form saying the duty to register "has been explained." The State is required to verify the address of any registrant at least annually, to report the information to the law enforcement agency with jurisdiction where the person expects to reside, to enter it into the State's "records or data system," and to transmit conviction data and fingerprints to the FBI. The State "may" disclose the information for any purpose permitted under state law, and "shall release *relevant information that is necessary to protect the public concerning a specific person* required to register," which shall include maintenance of an Internet site for such information. See 42 USC 14071(b)(2), (e).

The Attorney General (AG) is directed to set up a "national database at the Federal Bureau of Investigation to track the whereabouts and movement" of persons convicted of a listed offense or determined to be a sexually violent predator (described below). See 42 USC 14072(b). States participate in the "national database" by transmitting current address and other information as required by AG guidelines. See 42 USC 14071(b)(2)(B). The FBI "may" release "*relevant information concerning a person* required to register under subsection (c) of this section [requiring direct registration with FBI if state does not have "minimally sufficient" program] *that is necessary to protect the public*." See 42 USC 14072(f).

The FBI "shall" release information in its database "(1) to Federal, State, and local criminal justice agencies for-- (A) law enforcement purposes; and (B) community notification in accordance with section 14071(d)(3) of this title [which does not exist]; and (2) to Federal, State, and local governmental agencies responsible for conducting employment-related background checks under section 5119a of this title." See 42 USC 14072(j).

On April 30, 2003, Congress enacted Pub. L. 108-21, Title VI, § 604(c), which directed the Crimes Against Children Section of the Criminal Division of the Department of Justice to "create a national Internet site that links all State Internet sites established pursuant to this section."

There appears to be no provision under current law for automatic publication on a State or national website based on the mere fact of conviction of one of a list of offenses. Rather, it is up to the States to decide what information is "relevant" and "necessary to

protect the public concerning a specific person." Many states do this through a risk classification system, in which level of risk is determined in a due process hearing, and the breadth and method of release of information about the specific offender varies by risk level. *See* 64 Fed. Reg. 572, 582 (Jan. 5, 1999).

To be required to register in a State where one resides, is employed or is a student, one must be convicted of a State "criminal offense against a victim who is a minor," or a State "sexually violent offense," or be a "sexually violent predator," see 42 USC 14071(a)(1), or be convicted of a Federal offense described in 18 USC 4042(c)(4), or be "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." See 42 USC 14072(i).

The listed State offenses do not include adjudications of juvenile delinquency; do not include simple possession of child pornography; do not include conspiracies; include attempts only if the State makes it a crime and chooses to include it as a criminal offense against a minor; instead of "any sex offense" punishable by more than one year, includes only a "sexually violent offense," which is a criminal offense under state law comparable to or more serious than aggravated sexual abuse, 18 USC 2241, sexual abuse, 18 USC 2242, or sexual contact with intent to commit aggravated sexual abuse or sexual abuse; and does not include misdemeanor sex offenses. See 42 USC 14071(a)(3)(B). Conduct that is criminal solely because of the age of the victim if the perpetrator is 18 years old or younger does not count.

A "sexually violent predator" must also register. This determination is made by a court after considering a recommendation of a Board, or is made in an alternative state procedure. See 42 USC 14071(a)(2). Only sexually violent predators must verify registration every 90 days. See 42 USC 14071(b)(3).

Registration and updates are pursuant to State law, which must ensure that the information goes to the law enforcement agency with jurisdiction where the person resides. See 42 USC 14071(b)(4), (5). A person must comply with registration and update requirements for 10 years, or for life if s/he has one or more priors, or was convicted of an aggravated offense, or has been determined to be a sexually violent predator and that determination has not been terminated. See 42 USC 14071(b)(6), (a)(1)(B).

States are required to provide for registration of persons convicted of Federal Offenses. See 42 USC 14071(b)(7). If the State does not have a "minimally sufficient" sex offender registration program as described in 42 USC 14072(a)(3), and the person has been convicted of one of the listed offenses or been determined to be a sexually violent predator, s/he must register with the FBI. See 42 USC 14072(c).

The States are to provide unspecified "criminal penalties" for failure to register. The federal penalty is not more than one year, or not more than 10 years for a second or subsequent offense. See 42 USC 14072(i). There is no guideline for this offense.

Appendix B
Regulation Issued Under Wetterling Act

The following regulation promulgated by the Attorney General, 64 Fed. Reg. 572, 582 (Jan. 5, 1999) essentially recognizes that disclosure of registration information regarding some people classified as "sex offenders" is not necessary for public safety purposes:

> "States do, however, retain discretion to make judgments concerning the circumstances in which, and the extent to which, the disclosure of registration information to the public is necessary for public safety purposes and to specify standards and procedures for making these determinations. Several different approaches to this issue appear in existing state laws.
>
> One type of approach, which is consistent with the requirements of the Act, involves particularized risk assessments of registered offenders, with differing degrees of information release based on the degree of risk. For example, some states classify registered offenders in this manner into risk levels, with registration information limited to law enforcement uses for offenders in the "low-risk" level; notice to organizations with a particular safety interest (such as schools and other child care entities) for "medium risk" offenders; and notice to neighbors for "high risk" offenders.
>
> States also are free under the Act to make judgments concerning the degree of danger posed by different types of offenders and to provide information disclosure for all offenders (or only offenders) with certain characteristics or in certain offense categories. For example, states may decide to focus particularly on child molesters, in light of the vulnerability of the potential victim class, and on recidivists, in light of the threat posed by offenders who persistently commit sexual offenses.
>
> Another approach by which states can comply with the Act is to make information accessible to members of the public on request. This may be done, for example, by making registration lists open for inspection by the public, or by establishing procedures to provide information concerning the registration status of identified individuals in response to requests by members of the public. As with proactive notification systems, states that have information-on-request systems may make judgments about which registered offenders or classes of registered offenders should be covered and what information will be disclosed concerning these offenders."

64 Fed. Reg. 572, 582 (Jan. 5, 1999).

Appendix C
28 C.F.R. § 571.72 Additional Designated Offenses

The following offenses are designated as additional sexual offenses for purposes of 18 U.S.C. 4042(c):

(a) Any offense under the law of any jurisdiction that involved:

(1) Engaging in sexual contact with another person without obtaining permission to do so (forcible rape, sexual assault, or sexual battery);

(2) Possession, distribution, mailing, production, or receipt of child pornography or related paraphernalia;

(3) Any sexual contact with a minor or other person physically or mentally incapable of granting consent (indecent liberties with a minor, statutory rape, sexual abuse of the mentally ill, rape by administering a drug or substance);

(4) Any sexual act or contact not identified in paragraphs (a)(1) through (3) of this section that is aggressive or abusive in nature (rape by instrument, encouraging use of a minor for prostitution purposes, incest);

(5) An attempt to commit any of the actions described in paragraphs (a)(1) through (4) of this section.

(b) The following Defense Incident Based Reporting System (DIBRS) Code offenses under the Uniform Code of Military Justice:

(1) 120A (Rape);

(2) 120B1/2 (Carnal knowledge);

(3) 125A (Forcible sodomy);

(4) 125B1/2 (Sodomy of a minor);

(5) 133D (Conduct unbecoming an Officer [involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping of a minor]);

(6) 134-B6 (Prostitution involving a minor);

(7) 134-C1 (Indecent assault);

(8) 134-C4 (Assault with intent to commit rape);

(9) 134-C6 (Assault with intent to commit sodomy);

(10) 134-R1 (Indecent act with a minor);

(11) 134-R3 (Indecent language to a minor);

(12) 134-S1 (Kidnaping of a minor (by a person not a parent));

(13) 134-Z (Pornography involving a minor);

(14) 134-Z (Conduct prejudicial to good order and discipline (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping of a minor));

(15) 134-Y2 (Assimilative crime conviction (of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnaping of a minor)).

(16) 080-A (Attempt (to commit any offense listed in paragraphs (b)(1)--(15) of this section));

(17) 081-A (Conspiracy (to commit any offense listed in paragraphs (b)(1)--(15) of this section));

(18) 082-A (Solicitation (to commit any offense listed in paragraphs (b)(1)-- (15) of this section)).

(c) The following District of Columbia Code offenses:

(1) § 22-501 (Assault) if it includes assault with the intent to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse;

(2) § 22-2012 (Sexual performances using minors--prohibited acts);

(3) § 22-2013 (Sexual performances using minors--penalties);

(4) § 22-2101 (Kidnaping) where the victim is a minor;

(5) § 22-2401 (Murder in the first degree) if it includes murder while committing or attempting to commit first degree sexual abuse;

(6) § 22-2704 (Abducting or enticing child from his or her home for purposes of prostitution; harboring such child);

(7) § 22-4102 (First degree sexual abuse);

(8) § 22-4103 (Second degree sexual abuse);

(9) § 22-4104 (Third degree sexual abuse);

(10) § 22-4105 (Fourth degree sexual abuse);

(11) § 22-4106 (Misdemeanor sexual abuse);

(12) § 22-4108 (First degree child sexual abuse);

(13) § 22-4109 (Second degree child sexual abuse);

(14) § 22-4110 (Enticing a child);

(15) § 22-4113 (First degree sexual abuse of a ward);

(16) § 22-4114 (Second degree sexual abuse of a ward);

(17) § 22-4115 (First degree sexual abuse of a patient or client);

(18) § 22-4116 (Second degree sexual abuse of a patient or client);

(19) § 22-4118 (Attempts to commit sexual offenses);

(20) § 22-4120 (Aggravating circumstances).

(21) § 22-103 (Attempts to commit crime) if it includes an attempt to commit any offense listed in paragraphs (c)(1)-(20) of this section.