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SORNA: An Abridged Legal Analysis of 18 U.S.C. § 2250 (Failure to Register as a Sex Offender)

Updated November 5, 2021

Congressional Research Service

<https://crsreports.congress.gov>

R42691



R42691

November 5, 2021

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SORNA: An Abridged Legal Analysis of 18 U.S.C. § 2250 (Failure to Register as a Sex Offender)

Section 2250(a) of Title 18 of the United States Code outlaws an individual’s failure to comply with federal Sex Offender Registration and Notification Act (SORNA) requirements. SORNA demands that an individual—previously convicted of a qualifying federal, state, or foreign sex offense—register with state, territorial, or tribal authorities. Individuals must register in every jurisdiction in which they reside, work, or attend school. They must also update the information whenever they move, or change their employment or educational status. For some offenders, the obligation to register and to periodically refresh their registration information may be subject to a term limit whose duration is based on the severity of the sex offense that triggered the obligation to register.

Section 2250 applies only under one of several jurisdictional circumstances: the individual was previously convicted of a qualifying federal sex offense; the individual travels in interstate or foreign commerce; or the individual enters, leaves, or resides in Indian Country. The Supreme Court in *Nichols v. United States* held that SORNA, as originally written, had limited application to sex offenders in the United States who relocated abroad. The International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders [Act], P.L. 114-119, however, anticipated and addressed the limitation identified in *Nichols* by adding a new offense, Section 2250(b), that replicates the attributes of the earlier prohibition.

Individuals charged with a violation of Section 2250 may be subject to preventive detention or to a series of pre-trial release conditions. If convicted, they face imprisonment for not more than 10 years and/or a fine of not more than \$250,000, as well as the prospect of a post-imprisonment term of supervised release of not less than 5 years. An offender guilty of a Section 2250 offense, who also commits a federal crime of violence, is subject to an additional penalty of imprisonment for up to 30 years and not less than 5 years for the violent crime.

The Attorney General exercised statutory authority to make SORNA applicable to qualifying convictions occurring prior to its enactment. The Supreme Court in *United States v. Kebodeaux*, 570 U.S. 387 (2013), rejected the suggestion that Congress lacks the constitutional authority to make Section 2250 applicable, because of a prior federal offense and intrastate noncompliance, to individuals who had served their sentence and been released from federal supervision prior to SORNA’s enactment. The Supreme Court in *Gundy v. United States*, 139 S. Ct. 2116 (2019), also rejected the argument that SORNA’s grant of authority to the Attorney General constituted an unguided delegation of legislative authority.

The lower federal appellate courts have rejected other challenges to Section 2250’s constitutional validity. Those challenges have included arguments under the Constitution’s Ex Post Facto, Due Process, Cruel and Unusual Punishment, Commerce, Necessary and Proper, and Spending Clauses.

Contents

Introduction	1
Elements	1
Expired Obligation	3
Constitutional Considerations	6

Contacts

Author Information.....	10
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Introduction

Federal law punishes convicted sex offenders if they fail to register or to update their registration as the Sex Offender Registration and Notification Act (SORNA) demands.¹ The basic offense under Section 2250(a) consists of three elements: (1) a continuing obligation to report to the authorities in any jurisdiction in which the individual resides, works, or attends school; (2) the knowing failure to comply with registration requirements; and (3) a jurisdictional element, *i.e.*, (a) an obligation to register as a consequence of a prior qualifying federal conviction or (b)(i) travel in interstate or foreign commerce, or (ii) travel into or out of Indian Country, or (c) residence in Indian Country. Violators face imprisonment for not more than 10 years. The registration offense carries an additional penalty of imprisonment for not more than 30 years, but not less than 5 years, if the offender is also guilty of a federal crime of violence.

Federal law also punishes overseas travel coupled with a failure to register that intent. The elements of this shadow or supplemental offense, Section 2250(b), are: (1) an obligation to register; (2) a knowing failure to report an intent to travel internationally; and (3) engaging in or attempting to engage in international travel. The affirmative defense and sentencing provisions are the same as those that apply to the original offense.

The Justice Department indicates that 18 states, 4 territories, and numerous tribes are now in substantial compliance with the 2006 legislation.

Elements

Obligation to Register and Maintain Registration

SORNA directs anyone previously convicted of a federal, state, local, tribal, or foreign qualifying offense to register and to keep his registration information current for as long as SORNA requires in each jurisdiction in which he resides or is an employee or a student. Initially, he must also register in the jurisdiction where the conviction occurred if different from his residence.

Registrants who relocate or who change their names, jobs, or schools have three business days to appear and update their registration in at least one of the jurisdictions in which they reside, work, or attend school. The courts have said that the obligation runs from the time of departure rather than arrival; that is, from when the offender leaves his former residence, job, or school rather than when he acquires a new residence or a new job or enrolls in a different school.

In *Nichols v. United States*, the Supreme Court found that SORNA's requirements in place at the time did not apply when offenders relocated abroad. Anticipating the problem, Congress passed the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders [Act], which among other things, amends SORNA to compel offenders to supplement their registration statements with information relating to their plans to travel abroad.

Qualifying Convictions

Only those convicted of a qualifying sex offense need to register. There are five classes of qualifying offenses: (1) designated federal sex offenses; (2) specified military offenses; (3) crimes

¹ 18 U.S.C. § 2250. This is an abridged version of CRS Report R42692, *SORNA: A Legal Analysis of 18 U.S.C. § 2250 (Failure to Register as a Sex Offender)*, without the footnotes or the attribution or citations to authority found in the unabridged report.

identified as one of the “special offenses against a minor”; (4) crimes in which some sexual act or sexual conduct is an element; and (5) attempts or conspiracies to commit any offense in one of these other classes of qualifying offenses. Certain foreign convictions, juvenile adjudications, and offenses involving consensual sexual conduct do not qualify as offenses that require offenders to register under SORNA. SORNA does not provide an avenue to challenge the validity of a qualifying domestic conviction.

Federal Qualifying Offenses

Federal qualifying offenses “(including an offense prosecuted under section 1152 or 1153 of title 18)” consist of those “under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18.”

Military Qualifying Offenses

The list of military qualifying offenses varies according to the date of the offense. For offenses committed on or after June 28, 2012, the inventory includes conviction under: (1) Uniform Code of Military Justice (UCMJ) art.120 (Rape, Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact); (2) UCMJ art. 120b: (Rape, Sexual Assault, and Sexual Abuse (of a Child)); (3) UCMJ art.120c (Pornography and Forcible Pandering); (4) UCMJ art.134 (General article – Prostitution and Child Pornography); (5) UCM J art. 80 (Attempt (to commit a qualifying offense)); (6) UCMJ art. 81 (Conspiracy (to commit a qualifying offense)); (7) UCMJ art. 82 (Solicitation (to commit a qualifying offense)).

Specified Offenses Against a Child Under 18

Other federal, state, local, tribal, military, or foreign offenses qualify when they involve: (a) an offense against a child (unless committed by a parent or guardian) involving kidnaping; (b) an offense against a child involving false imprisonment (unless committed by a parent or guardian); (c) solicitation to engage in sexual conduct with a child; (d) use of a child in a sexual performance; (e) solicitation to practice child prostitution; (f) video voyeurism as described in section 1801 of title 18 (committed against a child); (g) possession, production, or distribution of child pornography; (h) criminal sexual conduct involving a minor or the use of the Internet to facilitate or attempt such conduct; (i) any conduct that by its nature is a sex offense against a minor.

Crimes with a Sex Element

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

Attempt or Conspiracy

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

Juvenile Adjudications

Beyond conviction as an adult for a qualifying offense, juvenile adjudications that involve qualifying offenses trigger SORNA’s reporting requirements (1) if the individual was 14 years or older at the time of the misconduct and (2) the misconduct “was comparable to or more severe than” the federal crime of aggravated sexual abuse (as defined in 18 U.S.C. § 2241) or was an attempt or conspiracy to engage in such misconduct. The federal aggravated sexual abuse

offenses include sexual acts committed by force, threat, or incapacitating the victim. Although the Federal Juvenile Delinquency Act limits disclosure of federal judicial delinquency proceedings, it does not excuse compliance with SORNA's registration requirements.

Consensual Sex Offenses

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

Foreign Convictions

Qualifying foreign convictions consist only of those "obtained with sufficient safeguards for fundamental fairness and due process of the accused." The *National Guidelines* state that "[s]ex offense convictions under the laws of any foreign country are deemed to have been obtained with sufficient safeguards for fundamental fairness and due process if the U.S. State Department, in its Country Reports on Human Rights Practices, has concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial in that country during the year in which the conviction occurred." They go on to point out, however, that SORNA establishes only minimum requirements. States and other jurisdictions remain free to require registration based on any foreign conviction.

Expired Obligation

Section 2250 applies only to those with an obligation to register or to periodically refresh their registration information, and the duration of those obligations under SORNA vary according to the classification of an offender's qualifying offense of conviction. SORNA classifies offenders in tiers, with Tier III reserved for offenders convicted of the most serious federal sex offenses or their equivalents under state law. SORNA assigns offenders with somewhat less serious federal sex offenses or their equivalents under state law to Tier II. Tier I consists of all other offenders required to register.

Absent a reduction for a clean record, Tier I offenders have a registration period of 15 years; Tier II offenders have a registration period of 25 years; and Tier III offenders have a registration period of life. Tier I offenders with a clean record for 10 years are eligible for a 5-year reduction of their registration period. Tier II offenders have no opportunity of a clean-record reduction. Offenders classified as Tier III offenders by virtue of a juvenile adjudication with a clean record for 25 years are eligible for reduction of their life-time registration period to 25 years.

Jurisdictional Elements

Section 2250(a) permits prosecution and conviction on the basis of any of three jurisdictional elements: travel in interstate or foreign commerce; residence in, or travel to or from, Indian Country; or a prior conviction of one of the federal qualifying offenses.

Travel: Interstate travel is the most commonly invoked of Section 2250(a)'s jurisdictional elements. It applies to anyone who travels in interstate or foreign commerce with a prior federal or state qualifying offense who knowingly fails to register or maintain his registration. Section 2250 does not "require[] that a defendant's interstate travel not be legally compelled." In the case of foreign travel, it also applies to anyone who fails to supplement his registration with

information concerning his intent to travel abroad. The qualifying offense may predate SORNA's enactment; the travel may not.

Indian Country: Travel to or from Indian Country, or living there, will also satisfy Section 2250(a)'s jurisdictional requirements. "Indian Country" consists primarily of Indian reservations, lands over which the United States enjoys state-like exclusive or concurrent legislative jurisdiction.

Federal Crimes: Travel is only one of Section 2250(a)'s jurisdictional elements; prior conviction of a federal qualifying offense will also suffice. An individual need only have a knowing failure to register and a prior conviction for a qualifying sex offense under federal law or the law of the District of Columbia, the UCMJ, tribal law, or the law of a United States territory or possession. Federal jurisdiction flows from the jurisdictional basis for the underlying qualifying offense.

Knowing Failure to Register

Section 2250(a)'s third element, after the jurisdictional element and an obligation to register or update, is a knowing failure to register or to maintain current registration information as required by SORNA. The government must show that the defendant knew of his obligation and failed to honor it. The prosecution need not show that he knew he was bound to do so by federal law generally or by SORNA specifically.

Affirmative Defense

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

Other Attributes

Venue: Although some courts remain to be convinced, it seems that a Section 2250 prosecution involving interstate travel may be brought in either the state of departure or the state of arrival.

Bail: Federal bail laws permit the prosecution to request a pre-trial detention hearing prior to the pre-trial release of anyone charged with a violation of Section 2250. The individual may only be released prior to trial under conditions, which may include among others, that he be electronically monitored; be subject to restrictions on his personal associations, residence, or travel; report regularly to authorities; and be subject to a curfew.

Fine and Imprisonment: Upon conviction, the individual may be sentenced to imprisonment for a term of not more than 10 years and/or fined not more than \$250,000. Section 2250(d) also sets an additional penalty of imprisonment for not more than 30 years, but not less than 5 years, for the commission of a federal crime of violence when the offender has also violated Section 2250. Section 16(a) defines "crime of violence" for purposes of title 18 as "[a]n offense that has as an

element the use, attempted use, or threatened use of physical force against the person or property of another.”

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

Sections 2A3.5 and 2A3.6 of the *Sentencing Guidelines* provide the initial guidelines for Section 2250 offenses. Section 2A3.5 applies to cases other than those under the aggravated sentencing provisions of 18 U.S.C. § 2250(d), and sets a defendant’s base offense level according to SORNA’s tier classifications. A SORNA Tier III sex offender for sentencing purposes is:

- [A] sex offender whose offense is punishable by imprisonment for more than 1 year and-
 - (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
 - (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or
 - (ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;
 - (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
 - (C) occurs after the offender becomes a tier II sex offender.

A SORNA Tier II sex offender is:

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

A SORNA Tier I sex offender is any sex offender who is not a Tier II or III sex offender.

As noted, the courts use a “categorical approach” to determine whether a prior state, military, or foreign conviction qualifies a defendant as a Tier I, II, or III sex offender. Under the categorical approach, courts examine the elements of the state offense. Here, too, courts favor the categorical approach when SORNA describes the qualifying state statute of conviction by reference to a particular federal statute or statutes; or when it refers to “elements” rather than “conduct”; or to

“convictions” rather than “conduct committed.” Under the categorical approach, the statutory elements of the prior state offense must fit completely within the footprint created by the elements of the federal statute or statutes. There is no match if the state statute sweeps more broadly than its federal counterpart, in which case the state conviction may not serve as a SORNA predicate for tier-classification purposes.

Section 2A3.6 of the *Sentencing Guidelines* applies to offenses under the aggravated sentencing provisions of 18 U.S.C. § 2250(d). Section 2A3.6 sets the guideline sentence at the minimum (imprisonment for 5 years), but acknowledges that upward departure may be warranted in a particular case.

Section 2A3.6 also supplies the sentencing guidance for a second offense whose existence may help to explain why section 2259(d) is so infrequently invoked. Regardless of whether a sex offender has failed to register, a sex offender who is required to register under federal or any other law faces a sentencing enhancement of 10 years’ imprisonment, 18 U.S.C. § 2260A, when he commits any of a list of sex offenses. Moreover, recidivist federal sex offenders face the prospect of mandatory life imprisonment.

Supervised Release: Generally, when a court sentences a defendant to prison, it may also sentence him to a term of supervised release. Supervised release is a parole-like regime under which a defendant is subject to the oversight of a probation officer following his release from prison. The term of supervised release for most crimes is either 1, 3, or 5 years depending on the severity of the crime of conviction.

The statute and the *Sentencing Guidelines* establish an array of mandatory and discretionary conditions for those on supervised release.

A sentencing court may also impose any condition from the statutory inventory of discretionary conditions for probation. In addition, the *Sentencing Guidelines* specify thirteen “standard” conditions; eight “special” conditions; and “additional” special conditions. Finally, the district court may impose any “specific” condition that, like the other discretionary conditions, meets the following statutory standards: “(1) is reasonably related to the factors set forth in section 3553(a)(1); (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).”

The court may modify the conditions of supervised release at any time. It may also revoke the defendant’s supervised release and sentence him to prison for violating the conditions of supervised release.

Constitutional Considerations

Much of the litigation relating to Section 2250 and SORNA involves constitutional challenges taking one of two forms. One argues that SORNA or Section 2250 operates in a manner that the Constitution specifically forbids, for example in its clauses on Ex Post Facto laws, Due Process, and Cruel and Unusual Punishment. The other argues that the Constitution does not grant Congress the legislative authority to enact either Section 2250 or SORNA. These challenges probe the boundaries of the Commerce Clause, the Necessary and Proper Clause, and the Spending Clause, among others.

The Supreme Court addressed two of the most common constitutional issues associated with sex offender registration laws before the enactment of SORNA. One addressed the Ex Post Facto

Clause implications of sex offender registration, *Smith v. Doe*; the other addressed Due Process Clause implications, *Connecticut Department of Public Safety v. Doe*.

Ex Post Facto

Neither the states nor the federal government may enact laws that operate Ex Post Facto. The prohibition covers both statutes that outlaw conduct that was innocent when it occurred and statutes that authorize imposition of a greater penalty for a crime than applied when the crime occurred. The prohibitions, however, apply only to criminal statutes or to civil statutes whose intent or effect is so punitive as to belie any but a penal characterization.

In *Smith*, the Supreme Court dealt with the Ex Post Facto issue in the context of the Alaska sex offender registration statute. It found the statute civil in nature and effect, not punitive, and consequently its retroactive application did not violate the Ex Post Facto Clause. Its analysis has colored the lower federal courts' treatment of Ex Post Facto challenges to Section 2250 and SORNA. "Relying on *Smith*, circuit courts have consistently held that SORNA does not violate the Ex Post Facto Clause," with one apparently limited exception.

Due Process

The Supreme Court's assessment of state sex offender registration statutes has been less dispositive of due process issues because of the variety of circumstances in which they may arise. Neither the federal nor state governments may deny a person of "life, liberty, or property, without due process of law." Due process requirements take many forms. They preclude punishment without notice. They bar restraint of liberty or the enjoyment of property without an opportunity to be heard. They proscribe any punishments or restrictions that are so fundamentally unfair as to violate fundamental fairness, that is, substantive due process.

In *Connecticut Dep't of Public Safety v. Doe*, the Court found no due process infirmity in the Connecticut sex offender registration regime in spite of its failure to afford offenders an opportunity to prove they were not dangerous. In *Lambert v. California*, the Court dealt with sufficiency of notice. Since "by the time that Congress enacted SORNA, every state had a sex offender registration law in place," attempts to build on *Lambert* have been rejected, because the courts concluded that offenders knew or should have known of their duty to register. Suggestions that differences between state and federal requirements result in impermissible vagueness have fared no better.

To qualify as a violation of substantive due process, a governmental regime must intrude upon a right "deeply rooted in our history and traditions," or "fundamental to our concept of constitutionally ordered liberty." Perhaps because the threshold is so high, Section 2250 and SORNA have only infrequently been questioned on substantive due process grounds.

Right to Travel

"The 'right to travel' . . . embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State."

Section 2250, it has been contended, violates the right to travel because it punishes those who travel from one state to another yet fail to register, but not those who fail to register without

leaving the state. The courts have responded, however, that the right must yield to compelling state interest in the prevention of future sex offenses.

Cruel and Unusual Punishment

The Eighth Amendment bars the federal government from inflicting “cruel and unusual punishment.” A punishment is cruel and unusual under the Eighth Amendment when it is grossly disproportionate to the offense. Section 2250’s 10-year maximum has survived the claim that is grossly disproportionate to the crime of failing to maintain current and accurate sex offender registration information. The courts have also declined to hold that SORNA’s registration regime itself violates the Eighth Amendment, either because they do not consider the requirements punitive or because they do not consider them grossly disproportionate.

Legislative Authority

The most frequent constitutional challenge to SORNA and Section 2250 is that Congress lacked the constitutional authority to enact them. Some of these challenges speak to the breadth of Congress’s constitutional powers, such as those vested under the Tax and Spending Clause, the Commerce Clause, or the Necessary and Proper Clause. Others address contextual limitations on the exercise of those powers imposed by such things as the non-delegation doctrine or the principles of separation of powers reflected in the Tenth Amendment.

Tenth Amendment: The federal government enjoys only such authority as may be traced to the Constitution; the Tenth Amendment reserves to the states and the people powers not vested in federal government. Challengers of Congress’s legislative authority to enact SORNA, or the Justice Department’s authority to prosecute failure to comply with its demands, on Tenth Amendment grounds have had to overcome substantial obstacles. First, several of Congress’s constitutional powers are far reaching and SORNA appears within their grasp. Among them are the powers to regulate interstate and foreign commerce, to tax and spend for the general welfare, and to enact laws necessary and proper to effectuate the authority the Constitution provides. Second, although a particular statute may implicate the proper exercise of more than one constitutional power, only one is necessary for constitutional purposes. Third, “while SORNA imposes a duty on the sex offender to register, it nowhere imposes a requirement on the State to accept such registration.” Finally, until recently some courts have held that individual defendants lacked standing to contest the statutory validity on the basis of constitutional provisions designed to protect the institutional interests of governmental entities rather than to protect private interests.

Standing: Several earlier courts rejected SORNA challenges under the Tenth Amendment on the grounds that the defendants lacked standing. Standing refers to the question of whether a party in litigation is asserting or “standing” on his or her own rights or only upon those of another. At one time, there was no consensus among the lower federal appellate courts over whether individuals had standing to present Tenth Amendment claims. More specifically, at least two circuits had held that defendants convicted under Section 2250 lacked standing to challenge their convictions on Tenth Amendment grounds.

Those courts, however, did not have the benefit of the Supreme Court’s *Bond* and *Reynolds* decisions. In *Bond*, the Court pointed out that a defendant who challenges the Tenth Amendment validity of the statute under which she was convicted “seeks to vindicate her own constitutional rights.... The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to the State.” In *Reynolds*, the Court implicitly recognized the defendant’s standing when, at his behest,

it held that SORNA did not apply to pre-enactment convictions until after the Attorney General had exercised his delegated authority. Yet, the fact that a defendant's Tenth Amendment challenge may be heard does not mean it will succeed.

Spending for the General Welfare: “The Congress shall have Power To lay and collect Taxes ... to pay the Debts and provide for the common Defence and general Welfare of the United States....” “Objectives not thought to be within Article I’s enumerated legislative fields, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.” In the past, the Supreme Court has described the limits on Congress in general terms:

[First,] the exercise of the spending power must be in pursuit of the general welfare... Second, ... if Congress desires to condition the States’ receipt of federal funds, it must do so unambiguously Third, ... conditions on federal grants ... [must be] [related to the federal interest in particular national projects or programs.... Finally, ... other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

Moreover, at the end of its 2011 term in *National Federation of Business v. Sebelius*, seven members of a divided Court found that the power of the Spending Clause may not be exercised to coerce state participation in a federal program. Congress may use the spending power to induce state participation; it may not present the choice under such circumstances that a state has no realistic alternative but to acquiesce.

SORNA establishes minimum standards for the state sex offender registries and authorizes the Attorney General to enforce compliance by reducing by up to 10% the criminal justice assistance funds a non-complying state would receive. Some defendants have suggested that this impermissibly commandeers state officials to administer a federal program and therefore exceeds Congress’s authority under the Spending Clause. Generally, while Congress may encourage state participation in a federal program, it is not constitutionally free to require state legislators or executive officials to act to enforce or administer a federal regulatory program. To date, the federal appellate courts have held that SORNA’s reduction in federal law enforcement assistance grants for a state’s failure to comply falls on the encouragement, rather than the directive, side of the constitutional line. The fact that most states do not feel compelled to bring their systems into full SORNA compliance may lend credence to that assessment.

Commerce Clause: “The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The Supreme Court explained in *Lopez* and again in *Morrison* that Congress’s Commerce Clause power is broad but not boundless.

Modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce.

The lower federal appellate courts have rejected Commerce Clause attacks on Section 2250 in the interstate travel cases, because there they believe Section 2250 “fits comfortably with the first two *Lopez* prongs[, i.e. the regulation of (1) the ‘channels’ of interstate commerce and (2) the ‘instrumentalities’ of interstate commerce].” They have also rejected Commerce Clause attacks on SORNA in intrastate cases based on the strength of the Necessary and Proper Clause:

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

Necessary and Proper: The Supreme Court in *Comstock* described the breadth of Congress’s authority under the Necessary and Proper Clause in the context of another Walsh Act provision. The Walsh Act authorizes the Attorney General to hold federal inmates beyond their release date to initiate federal civil commitment proceedings for the sexually dangerous. *Comstock* and others questioned application of the statute on the grounds that it exceeded Congress’s legislative authority under the Commerce and Necessary and Proper Clauses.

The Court pointed out that the Necessary and Proper Clause has long been understood to empower Congress to enact legislation “rationally related to the implementation of a constitutionally enumerated power.” Moreover, be the chain clear and unbroken, the challenged statute need not necessarily be directly linked to a constitutionally enumerated power. The *Comstock* “statute [18 U.S.C. § 4248] is a ‘necessary and proper’ means of exercising the federal authority that permits Congress to create federal criminal laws [(to carry into effect its Commerce Clause power for instance)], to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others.”

Separation of Powers/Non-Delegation: The first section of the first article of the Constitution declares that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” This means that Congress “may not transfer to another branch ‘powers which are strictly and exclusively legislative.’” This non-delegation doctrine, however, does not prevent Congress from delegating the task of filling in the details of its legislative handiwork, as long as it provides “intelligent principles” to direct the effectuation of its legislative will. In *Reynolds*, the Supreme Court read SORNA to “require[] the Attorney General to apply SORNA to all pre-Act offenders *as soon as feasible*.” The question later in *Gundy* was whether “Congress ma[de] an impermissible delegation when it instructed the Attorney General to apply SORNA’s registration requirements to pre-Act offenders as soon as feasible?” For a majority of the Court, “under [the] Court’s long-established law, that question is easy, its answer is no.” Similarly, the U.S. Court of Appeals for the Second Circuit concluded “that the Secretary [of Defense]’s discretion in designating certain military offenses as sex offenses under § 20911(5)(A)(iv) [of SORNA] has been clearly and intelligibly limited by Congress.

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