

Legal Memorandum



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Get SMART: Complying with Federal Sex Offender Registration Standards

Charles D. Stimson and Maya Noronha

Abstract: *Just before Christmas 2009, 11-year-old Sarah Haley Foxwell was brutally raped and murdered by a convicted high-risk sex offender, Thomas J. Leggs. Although Leggs was classified as a high-risk offender in Delaware, because of inconsistencies in sex offender classification between states, Maryland identified Leggs as “compliant.” Congress passed the Sex Offender Registration and Notification Act (SORNA) in 2006 to provide minimum registration and notification standards for all jurisdictions. Yet, for several years, jurisdictions have made flimsy excuses—often the product of misinformation—for not implementing SORNA. The time for excuses is past. Not only are the reasons for delaying implementation of SORNA invalid, but the dangers of allowing this nation’s sex offender laws to remain so inconsistent are extraordinary.*

On December 23, 2009, Sarah Haley Foxwell’s grandfather walked into her bedroom to wake her for school.¹ Sarah was gone. Three days later, on Christmas day, 11-year-old Sarah’s burned and lifeless body was found in a field near the Maryland–Delaware border.

Thomas J. Leggs was ultimately convicted for Sarah’s rape and murder. Leggs was identified as a “high-risk” sex offender in Delaware but was only listed as “compliant” in Maryland—an inconsistency that allowed his presence in Maryland to attract little attention.

In order to resolve this inconsistency between the states, Maryland Governor Martin O’Malley urged² the state of Maryland to comply³ with the federal

Talking Points

- Attorney General Eric Holder should refuse to grant jurisdictions any more extensions in implementing the Sex Offender Registration and Notification Act (SORNA).
- The Act is not an unfunded mandate that penalizes jurisdictions. Rather, it is resourced and funded, even if jurisdictions chose to forgo some federal grant money. Many jurisdictions have already proven that SORNA is not inflexible or unachievable, and courts have noted that the Act is constitutional.
- The old patchwork quilt of sex offender laws around the country is obsolete and ineffective—a reality made tangible by tragedies like the murder of Sarah Haley Foxwell. SORNA, when fully realized, will protect this nation by giving citizens and law enforcement more accurate knowledge and information about convicted sex offenders’ identities and locations.
- Congress passed SORNA to establish a minimum standard for sex offender registration nationwide. Now it is time for jurisdictions to stop making excuses and implement this legislation.

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Adam Walsh Child Protection and Safety Act of 2006.⁴ To date, Maryland has failed to substantially implement the Act, but the Old Line State is not alone: 42 other states and over 100 other jurisdictions⁵ have not yet substantially implemented Title 1 of the Adam Walsh Act, known as the Sex Offender Registration and Notification Act (SORNA).

According to the U.S. Department of Justice (DOJ):

[SORNA] provides a comprehensive set of minimum standards for sex offender registration and notification in the United States. SORNA aims to close potential gaps and loopholes that existed under prior law and generally strengthens the nationwide network of sex offender registration and notification programs.⁶

Without complete implementation of SORNA, dangerous convicted sex offenders like Thomas J. Leggs have the freedom to move across state lines⁷ and not be registered in a uniform fashion. Anecdotal evidence suggests that convicted sex offenders know that jurisdictions have inconsistent laws. Naturally, they are drawn to jurisdictions with lax sex offender registration laws. Tribal lands, for example, are often safe havens for sex offenders.

Law enforcement officials across the country often do not know the location of convicted sex

offenders.⁸ As a result of this inconsistency, jurisdictions resemble a patchwork quilt of sex offender laws. Therefore, in order to close such gaps and potential loopholes—the primary purpose of the Adam Walsh Act—all jurisdictions must fully implement SORNA.

For several years, jurisdictions have made excuses for not implementing SORNA. Unless they are exposed, those excuses will perpetuate the status quo—an inconsistent set of standards for convicted sex offenders from jurisdiction to jurisdiction that results in more tragedies like that involving Sarah Haley Foxwell. Jurisdictions have had ample time and technical assistance to substantially implement SORNA, and the Attorney General should refuse to grant any extensions past the July 27, 2011, deadline.

The Status of Implementation

Since the Act's passage in 2006, 11 jurisdictions have substantially implemented SORNA: Michigan, Nevada, Wyoming, Ohio, Delaware, Florida, South Dakota, the U.S. territory of Guam, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, and the Grand Traverse Band of Ottawa and Chippewa Indians.⁹ Despite this progress, states such as California, Arizona,¹⁰ and Texas¹¹ are con-

1. *Missing Child: Sarah Haley Foxwell Found Dead on Christmas Day, Sex Offender in Custody*, THE EXAMINER, Dec. 27, 2009, <http://www.examiner.com/amber-alerts-in-national/missing-child-sarah-haley-foxwell-found-dead-on-christmas-day-sex-offender-custody-video>.
2. Julie Scharper, *A Trail of Charges for Sex Offenses, Little Jail Time*, BALTIMORE SUN, Feb. 14, 2010, http://articles.baltimoresun.com/2010-02-14/news/bal-md.shore14feb14_1_leggs-jail-time-charges.
3. Although Maryland passed legislation in 2010 to implement the Adam Walsh Act, it was not deemed to be in substantial compliance by the Department of Justice. *Md. Not in Compliance with Adam Walsh Act*, ASSOCIATED PRESS, Feb. 2, 2011, <http://www.wboc.com/Global/story.asp?S=13866473>.
4. Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. § 16911 et seq.) (hereinafter “Adam Walsh Act”).
5. “Jurisdictions” as defined under SORNA include all 50 states, the District of Columbia, the five principal U.S. territories, and federally recognized Indian tribes that elect to function as registration jurisdictions. It does not include counties, cities, towns, or other political subdivisions located within states, tribes or territories.
6. Description of SORNA, U.S. DEP’T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <http://www.ojp.gov/smart/sorna.htm> (last visited July 5, 2011).
7. See Appendix A.
8. 152 CONG. REC. H5722 (2006) (statement of Rep. Sensenbrenner) (“There are over a half million sex offenders in the United States and up to 100,000 offenders are unregistered and their locations unknown to the public and law enforcement.”)
9. SORNA Newsroom, U.S. DEP’T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <http://www.ojp.gov/smart/newsroom.htm> (last visited July 5, 2011).
10. Cara Liu, *Legislator: AZ Won’t Comply with Federal Sex Offender Database Law*, KPHO CBS 5 NEWS, Mar. 9, 2011, <http://www.kpho.com/news/27141648/detail.html>.

sidering not complying with the Act.¹² Other jurisdictions are requesting additional extensions to delay and, in effect, derail implementation.

Extensions of time for jurisdictions to implement the minimum requirements of SORNA should not be granted. The jurisdictions currently not in compliance have already received all of the extensions that Congress built into SORNA.¹³ Furthermore, on May 26, 2009, the U.S. Attorney General granted an additional one-year extension to all 237 jurisdictions for substantial implementation,¹⁴ thereby moving the deadline from July 27, 2010, to July 27, 2011.¹⁵

Since passage of SORNA, jurisdictions have been in the process of amending and proposing new legislation so as to come into compliance with the Act.¹⁶ Providing yet another extension sends the wrong message to legislatures that they can table or delay consideration of such laws.

Some jurisdictions have complained that they have not had enough time to implement the 2006 Act because the Final Guidelines were not issued

until 2008 and Supplemental Guidelines were not issued until 2011.¹⁷ However, SORNA's original guidelines were published in 2007, and the Final and Supplemental Guidelines are not substantially different. In contrast, the final guidelines to Megan's Law—the predecessor to the Adam Walsh Act—were not promulgated until December 17, 1998, yet by 1999, all states had fully complied with the Jacob Wetterling Act and its Megan's Law amendments.¹⁸

With respect to SORNA, jurisdictions have had three years to comply with the 2008 guidelines. During this entire time period, the SMART Office¹⁹ has been working with and assisting jurisdictions to achieve substantial compliance. Jurisdictions have had nearly two years longer to implement SORNA than other sex offender registry standards from the federal government, yet instead of working to implement SORNA, some jurisdictions have requested that Congress rework the law with task forces²⁰ or modify significant portions of the law. These delaying tactics should not derail the implementation of a reasonable and sensible law that Congress has passed and the President has signed.

11. Heather Caygle, *Sex Offender List in the Middle of a Showdown*, HOUSTON CHRONICLE, Mar. 7, 2011, <http://www.chron.com/disp/story.mpl/metropolitan/7460086.html>.
12. See, e.g., Alan Greenblatt, *States Struggle to Control Sex Offender Costs*, NPR, May 28, 2010, <http://www.npr.org/templates/story/story.php?storyId=127220896>; Michael Gardner, *States Resisting Adam Walsh Act*, UNION TRIBUNE, July 9, 2010, <http://web.signonsandiego.com/news/2010/jul/09/states-resisting-adam-walsh-act>.
13. 42 U.S.C. § 16924 (2011).
14. U.S. DEP'T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SORNA EXTENSIONS GRANTED (2011), available at http://www.ojp.usdoj.gov/smart/pdfs/SORNA_Extensions_Granted.pdf.
15. U.S. DEP'T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, *Blanket Extension*, SMART WATCH NEWSLETTER, Summer 2009, http://www.ojp.usdoj.gov/smart/smartwatch/09_august/blanketextension.html (last visited July 6, 2011).
16. See Brad Iverson-Long, *Lawmakers to Consider Revamp of Idaho's Sex Offender Requirements*, IDAHO REPORTER, Mar. 8, 2011, <http://www.idahoreporter.com/2011/lawmakers-to-consider-revamp-of-idahos-sex-offender-requirements/>; *Arciero Files Bill on Sex Offenders*, WESTFORD EAGLE, Feb. 23, 2011, <http://www.wickedlocal.com/westford/features/x2089518244/Arciero-files-bill-on-sex-offenders#axzz1G74mmPft>; Ken Kolker, *MI Senate Approves Sex Offender Bill*, WOOD TV 8, Mar. 10, 2011, <http://www.woodtv.com/dpp/news/michigan/Michigan-Senate-approves-sex-offender-bill>.
17. *The Adam Walsh Reauthorization Act: Hearing Before Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. (2011) (hereinafter *Walsh Hearings*) (testimony of Rep. Patricia Colloton, Chair of Kansas Corrections and Juvenile Justice Committee).
18. Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, NATIONAL CENTER FOR THE PROSECUTION OF CHILD ABUSE UPDATE, Vol. 20, Nos. 9 & 10 (2007).
19. The SMART Office is the office within the Department of Justice charged with implementing the Adam Walsh Act. SMART is short for "Sentencing, Monitoring, Apprehending, Registering and Tracking."
20. *The Sex Offender Registration and Notification Act (SORNA): Barriers to Timely Compliance by States: Hearing Before Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (hereinafter *SORNA Hearings*) (testimony of Emma J. Devillier, Assistant Attorney General of Louisiana).

Misinformation About the Act

There is a lot of misinformation in the public domain regarding SORNA and its “requirements.”²¹ Some jurisdictions oppose implementation based on a false understanding of what SORNA contains or requires. Opponents of SORNA and the Adam Walsh Act have perpetuated these myths in order to delay or frustrate implementation.

In order to set the record straight, this paper will discuss the following 10 facts about SORNA:

1. SORNA is sufficiently funded.
2. Jurisdictions get federal grants for a reason.
3. SORNA is flexible.
4. Tiering is objective, uniform, and flexible.
5. The Department of Justice supports jurisdictions seeking compliance.
6. Teen consensual sex is not a registerable offense.
7. Juvenile convictions do not have to be publicly posted.
8. Retroactivity does not violate the *ex post facto* law.
9. The Constitution grants Congress the power to enact SORNA.
10. Registration and notification protects society.

FACT #1: The Act is sufficiently funded.

Critics of SORNA have called the Act an “unfunded mandate.”²² Even if those opponents concede that the ends of the Act are justified, they still assert

that jurisdictions do not have the means to implement such an endeavor.

Instead of finding creative ways to implement SORNA, jurisdictions have blamed the federal government for requiring too much of them. Yet some jurisdictions have achieved compliance without federal funding; of the 11 jurisdictions that implemented SORNA, four did not use any federal funding.²³

Furthermore, the federal government has already provided ample resources to jurisdictions that needed funds for training and technology. For example, the DOJ’s SMART Office provided more than \$16 million in assistance in 2007 and 2008²⁴ and gave \$13.1 million in awards to jurisdictions in 2010.²⁵ The SMART Office has offered grants of \$400,000 to jurisdictions seeking to implement SORNA in 2011.²⁶

FACT #2: Jurisdictions receive federal grants for a reason.

One of the more common misstatements about SORNA is that jurisdictions will suffer a loss of federal Byrne Grant funding if they fail to implement it. Even lawmakers and practicing attorneys, who should know better, have repeated this myth.

Such ill-informed statements ignore fundamental principles of good government and federalism. First, this is the taxpayer’s money, not the jurisdiction’s money. Second, when jurisdictions apply for federal grants, the federal government awards them the grant money with the expectation that

21. See Appendix B.

22. SORNA Hearings, *supra* note 20 (statement by Rep. Robert C. Scott). See also Laura Nicholes, *Unfunded Mandate: Sex Offender Registration Act Deadline Nears*, TEXAS ASSOCIATION OF COUNTIES, <http://www.county.org/resources/legis/dynContView.asp?cid=465>; Katy Jackman, *Adam Walsh Act Implementation*, NATIONAL CONGRESS OF AMERICAN INDIANS, http://www.ncai.org/fileadmin/ncai_events/2010_WH_Summit/3c_-_Adam_Walsh_Act_Implementation_-_FINAL.pdf; CALIFORNIA SEX OFFENDER MANAGEMENT BOARD, ADAM WALSH POSITION PAPER (2011), available at <http://www.casomb.org/docs/Adam%20Walsh%20Position%20Paper.pdf>.

23. Walsh Hearings, *supra* note 17 (testimony of Dawn Doran).

24. U.S. DEP’T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, *Myth v. Fact: Implementation of the Sex Offender Registration and Notification Act*, SMART WATCH NEWSLETTER, Winter 2009, http://www.ojp.usdoj.gov/smart/smartwatch/09_january/pfv.html (last visited July 6, 2011).

25. Press Release, U.S. Dep’t of Justice, Justice Department Announces \$13.1 Million in Awards, Supports Adam Walsh Act, Sex Offender Management (Sept. 22, 2010).

26. U.S. DEP’T OF JUSTICE, SMART FY 2011 SUPPORT FOR ADAM WALSH ACT IMPLEMENTATION GRANT PROGRAM (2011), available at <http://www.ojp.usdoj.gov/smart/funding/SMARTFY11AWA.pdf>.

the money will be used to further a federal objective. Threatening to hold back a percentage of a federal grant, contingent on specific performance under that grant, is not punishment or a “loss” to the intended recipient; it is good government and fiscally prudent. Money for nothing is a perversion of federalism.

Nonetheless, the “it’s-our-money-and-you-can’t-take-it-away” crowd continue to complain. For example, a Louisiana state prosecutor testified at a congressional hearing that “all States will lose millions of dollars in critical law enforcement funding through the Byrne Grant program when we do not meet the July deadline.”²⁷ U.S. Representative Pedro Pierluisi (D–PR) said, “Failure to comply will result in a jurisdiction’s losing 10 percent of its Byrne grant funding,”²⁸ and Congressman Robert Scott (D–VA) added that SORNA “required States, tribes, the District of Columbia, and U.S. territories to comply with its mandates by July 27, 2009, or lose ten percent of its Byrne Grant money.”²⁹

Such statements ignore a key provision of SORNA: Byrne Grant money “may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing” SORNA.³⁰ In other words, jurisdictions may still receive Byrne grants as long as the jurisdiction uses that money only for SORNA implementation. Thus, statements that jurisdictions would be deprived of such funding are incorrect.

In fact, this spring, the DOJ SMART Office began assisting states at risk of “losing” a portion

of their Byrne grant money; the DOJ provided the forms necessary to recover the funds to assist with the implementation of SORNA.³¹ SORNA does not “punish” states for failing to implement; rather, it offers them an incentive to move forward with necessary reforms in their sex offender registration systems.

FACT #3: The Act is flexible.

SORNA has been unfairly criticized as having a “one-size-fits-all approach.”³² Critics have also alleged that the Department of Justice “gave short shrift to state autonomy and ignored—and actually acted contrary to—the insights of state authorities.”³³ Neither criticism is factually correct. In fact, the opposite is true.

First, SORNA allows jurisdictions to modify the tier system as long as their modified system meets the minimum standards set by SORNA. Furthermore, the DOJ approved the use of new or existing inked fingerprints, which could be scanned and submitted to the DOJ. Thus, despite claims to the contrary, jurisdictions were not required to purchase new live scan machines in order to have the digitized copies.³⁴

Such flexibility continues to characterize SORNA. For instance, in addition to limiting retroactive application of the guidelines to felony convictions or individuals already under probation, the January 2011 Supplemental Guidelines also state that jurisdictions have the discretion not to make public their juvenile sex offender registrations.³⁵

27. *SORNA Hearings*, *supra* note 20 (testimony of Emma J. Devillier, Assistant Attorney General of Louisiana).

28. *SORNA Hearings*, *supra* note 20 (statement by Rep. Petro R. Pierluisi).

29. *SORNA Hearings*, *supra* note 20 (statement by Rep. Robert C. Scott).

30. 42 U.S.C. § 16925 (2011).

31. U.S. DEP’T OF JUSTICE, REQUEST FOR REALLOCATION OF BYRNE/JAG GRANT FUNDS (2011), *available at* <http://www.ojp.gov/smart/pdfs/reallocationform050211.pdf>.

32. Mike Lawlor, Creating Effective Sex Offender Legislation Requires Collaboration Between Lawmakers and Justice Agencies, Paper Presented at the Bureau of Justice Statistics/SEARCH Conference: National Conference on Sex Offender Registries (Apr. 1998), <http://bjs.ojp.usdoj.gov/content/pub/pdf/Ncsor.pdf>, at 86 (“One-size-fits-all’ [f]ederal requirements really do not apply...”); Wayne A. Logan, The Adam Walsh Act and the Failed Promise of Administrative Federalism, 78 GEO. WASH. L. REV. 993, 1004 (2010).

33. Logan, *supra* note 35, at 1010.

34. *SORNA Hearings*, *supra* note 20 (testimony of Laura Rogers).

35. *Walsh Hearings*, *supra* note 17 (testimony of Dawn Doran).

FACT #4: Tiering results in objectivity and uniformity.

SORNA is based on a three-tier conviction-based system. Jurisdictions are not required to look behind the elements of an offense to the facts of the case to determine what tier a sex offender falls into unless the question is the age of the victim. In fact, jurisdictions are not even required to have a three-tier system. They may choose to have a one-tier system or a two-tier system or even a four-tier system. Whatever system the jurisdiction chooses to employ, the offense must have the same or a higher minimum registration requirement as stated under SORNA.

Instead of a conviction-based tiering system, critics and commentators often suggest that SORNA use risk assessments to classify sex offenders.³⁶ Rather than looking to a person's criminal history to identify sex offenders who are likely to reoffend, risk assessments use multiple factors such as sexual preoccupations, criminal history, alcoholism, family history, and other factors to decide an offender's threat level.

However, Congress made a finding that conviction-based tiering was the more appropriate system by which to categorize sex offenders for the national sex offender registry.³⁷ Furthermore, there are variations in how risk assessments can be employed, as risk assessments are approached differently in different states.³⁸ Furthermore, there are not many qualified personnel available to administer risk assessments across the country.

Nevertheless, in an effort to be flexible, the Department of Justice allows the use of risk assessments if a jurisdiction deems them helpful. Such use comes with a single caveat: Jurisdictions may employ a risk assessment only to elevate a sex offender to a higher tier status than SORNA requires.

FACT #5: The Department of Justice supports jurisdictions seeking compliance.

According to the Department of Justice, implementation of SORNA is fully "achievable."³⁹ Not only has compliance been achieved in 11 jurisdictions, but the DOJ has offered assistance to all jurisdictions that are working to achieve compliance. Recognizing that some tribes and territories could not afford to create a sex offender Web site, the DOJ worked with the Institute for Intergovernmental Research to create the Tribal and Territory Sex Offender Registry System (TTSORS), a no-cost, online sex offender registry system for tribes and territories.⁴⁰

Similarly, the DOJ is assisting states in implementing the SORNA registry system requirements of the Adam Walsh Act sex offender management application at no cost. The Sex Offender Registry Tool (SORT) makes the registry setup and maintenance process as efficient and effective as possible. SORT serves a dual purpose: It provides local registration agencies with their own specialized public sex offender registry Web sites, and it functions as the state-level administrative registry system.

FACT #6: Teen consensual sex is not a registerable offense.

Critics of the Adam Walsh Act constantly complain about the so-called Romeo and Juliet issue. These critics claim that "the 18-year-old high school student who entices or transports a 17-year-old boyfriend or girlfriend across state lines"⁴¹ will unjustly be required to register under SORNA.

Such allegations are false. Situations in which "the victim was at least 13 years old and the offender was not more than 4 years older than the victim" are excluded from the definition of a sex offense under SORNA⁴² and do not constitute a registerable offense.

36. *SORNA Hearings*, *supra* note 20 (testimony of Det. Robert Shilling and Amy Borrer).

37. *SORNA Hearings*, *supra* note 20 (testimony of Laura Rogers).

38. *SORNA Hearings*, *supra* note 20 (testimony of Ernie Allen).

39. *SORNA Hearings*, *supra* note 20 (testimony of Laura Rogers).

40. U.S. DEP'T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, *Free Registry Technology for Tribes and Territories*, SMART WATCH NEWSLETTER, Summer 2009, http://www.ojp.usdoj.gov/smart/smartwatch/09_january/freeregistry.html (last visited July 5, 2011).

41. 152 CONG. REC. H5723 (2006) (statement of Rep. Scott).

42. 42 U.S.C. § 16911(5)(C) (2011).

FACT #7: Juvenile convictions do not have to be posted publicly.

Critics are also concerned that, under the Act, jurisdictions have to post on public Web sites information about juveniles convicted of a registerable sex offense. However, the DOJ clarified this issue, noting that “the Attorney General has exercised his authority in these supplemental guidelines to provide that jurisdictions need *not* publicly disclose information concerning persons required to register on the basis of juvenile delinquency adjudications.”⁴³

The DOJ’s position makes sense, as there is scant research on the efficacy of posting public notices on convicted juvenile offenders.⁴⁴ Given this lack of research or support, states can choose whether they wish to incorporate disclosure of juvenile offenders—another example of the Justice Department’s flexibility in the implementation process.

FACT #8: Retroactivity does not violate the *ex post facto* law.

The United States Supreme Court⁴⁵ and a number of later federal district courts⁴⁶ have held that the *Ex Post Facto* Clause⁴⁷ is not implicated by the sex offender registration laws because they are part of a civil regulatory scheme, not punitive criminal laws.⁴⁸ As Justice Kennedy wrote in *Smith v. Doe*, “an imposition of restrictive measures on sex offenders

adjudged to be dangerous is ‘a legitimate nonpunitive governmental objective and has been historically so regarded.’”⁴⁹

FACT #9: The Constitution grants Congress the power to enact this law.

Critics have characterized the Act as an “unlawful extension of federal power.”⁵⁰ The governing law, however, is not so straightforward. In general, Congress has power to condition money granted to the states under the Spending Clause.⁵¹ It may also regulate interstate commerce under its Commerce Clause power as well as other enumerated powers. In a number of cases, federal courts have upheld provisions of the Adam Walsh Act on these grounds.

The limits on the federal government’s powers must be taken seriously—especially in the area of criminal law enforcement. The Adam Walsh Act respects such limits by recognizing the primacy of the states and working with them, based on the principles of cooperative federalism, to build a national infrastructure to meet the challenges posed by sex offenders. This method is far preferable to a top-down approach, for reasons of both policy and constitutional fidelity.

At the same time, particular aspects of the Act may exceed Congress’s powers. Only recently did the Supreme Court uphold the power of the federal government to commit sex offenders

43. Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1632 (Jan. 11, 2011). Emphasis added.

44. Michael F. Caldwell, Mitchell H. Ziemke, and Michael J. Vitacco, *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCH. PUB. POL. AND L. 89, 91 (2008) (“empirically based studies of the effectiveness of sex offender policies implemented with juveniles are virtually absent from the literature.”)

45. *Smith v. Doe*, 538 U.S. 84 (2003).

46. *United States v. Torres*, No. 07-50035, 2007 WL 2343884 (W.D. Ark. Aug. 15, 2007); *United States v. Mason*, 510 F. Supp. 2d 923 (M.D. Fla. 2007); *United States v. Hinen*, 487 F. Supp. 2d 747 (W.D. Va. 2007).

47. “No state shall...pass any...ex post facto law...” U.S. CONST. art. I, § 10, cl. 1.

48. See *United States v. Hinen*, 487 F. Supp. 2d 747, 756 (W.D. Va. 2007) (Congress’s goal in the Adam Walsh Act was to create a “civil, nonpunitive regime for the purpose of public safety”).

49. *Smith*, 538 U.S. at 93.

50. Corey Rayburn Yung, *The Sex Offender Registration and Notification Act and the Commerce Clause*, 21 FED. SENTENCING REPORTER 133 (2008).

51. See *United States v. Perry*, 788 F.2d 100, 109 (3d Cir. 1986) (“Congress can use its spending powers to coerce conduct consistent with its views of the general welfare in ways that it perhaps could not otherwise command”).

after their sentences, relying on a novel application of the Necessary and Proper Clause that breaks with original meaning and precedent.⁵² In addition, parts of SORNA, including liability for failing to register under § 2250(a)(2)(A), raise questions similar to those presented in challenges to the Patient Protection and Affordable Care Act (i.e., Obamacare). Challenges to SORNA on these grounds are now working their way through the courts.

The core components of the Adam Walsh Act are beyond constitutional challenge, but Congress should revisit the Act and correct any potential infirmities. It is possible to address sex offenders at the national level without running afoul of any limits on federal power, and the Adam Walsh Act largely achieves that. In the few areas where the law raises constitutional doubts, however, Congress has an obligation to make the appropriate adjustments.

FACT #10: Uniform registration requirements and notification protect society.

According to one study, 90 percent of sex offenders imprisoned today will be released in the future.⁵³ Whatever the actual recidivism rate is, there is no doubt that delaying compliance with uniform national sex offender registration minimum standards will result in:

The commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have

been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked.⁵⁴

It is well known that convicted sex offenders move to states with less restrictive laws like the State of Washington or those close to the Mexican border such as New Mexico, Arizona, California.⁵⁵ Moreover, despite what some might think, the United States is not the only country to pass laws like SORNA. Many foreign countries, such as Australia,⁵⁶ Canada, France,⁵⁷ Ireland,⁵⁸ and the United Kingdom,⁵⁹ have sex offender registries.

Conclusion

It is past time for jurisdictions to implement SORNA. Attorney General Eric Holder should refuse to grant jurisdictions any more extensions in implementing SORNA.

The Act is not an unfunded mandate that penalizes jurisdictions. Rather, it is resourced and funded, even if jurisdictions chose to forgo some federal grant money. Many jurisdictions have already proven that SORNA is not inflexible or unachievable, and courts have noted that the Act is constitutional.

The old patchwork quilt of sex offender laws around the country is obsolete and ineffective—a reality made tangible by tragedies like the murder of Sarah Haley Foxwell. SORNA, when fully realized, will protect this nation by giving citizens and law

52. See *United States v. Comstock*, 130 S.Ct. 1949 (2010).

53. Stacy Russell, *Castration of Repeat Sexual Offenders: An International Comparative Analysis*, 19 HOUS. J. INT'L L. 425, 434 (1997).

54. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894, 8,896–97 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72).

55. Isaac Wolf, *Sex Offenders Find Loopholes, Stay Off Records*, SCRIPPS HOWARD NEWS SERVICE, Nov. 7, 2010, <http://timesrecordnews.com/news/2010/nov/07/fugitive-sex-offenders/>.

56. CRIMTRAC, ANCOR—*Australian National Child Offender Register*, http://www.crimtrac.gov.au/systems_projects/AustralianNationalChildOffenderRegisterANCOR.html (last visited July 5, 2011).

57. *European Court of Human Rights, France: Registration in French National Sex Offender Database Does Not Violate Rights*, LAW LIBRARY OF CONGRESS, Jan. 27, 2010, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401799_text.

58. *Notification Obligations of Sex Offenders*, NATIONAL CRIME COUNCIL, http://www.crimecouncil.gov.ie/sex_offenders_register.html (last visited July 6, 2011).

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enforcement more accurate knowledge and information about convicted sex offenders' identities and locations.

Congress passed SORNA to establish a minimum standard for sex offender registration nationwide. Now it is time for jurisdictions to stop making excuses and implement this legislation.

—*Charles D. Stimson is a Senior Legal Fellow in the Center for Legal & Judicial Studies at The Heritage Foundation and a former local, state, federal, and military prosecutor, defense counsel, and military judge. Maya Noronha is a 2011 graduate of Georgetown Law School and was a legal intern at The Heritage Foundation during the spring of 2011.*

APPENDIX A**NEWS REPORTS OF SEX OFFENDERS TRAVELING ACROSS STATE LINES**

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APPENDIX B**ARTICLES WITH MISLEADING STATEMENTS ABOUT THE ADAM WALSH ACT**

- Stan Moody, *Maine's Sex Offender Conundrum*, BANGOR DAILY NEWS, Mar. 31, 2011, <http://new.bangordailynews.com/2011/03/31/opinion/maine%E2%80%99s-sex-offender-conundrum/?ref=mostReadBox>.
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APPENDIX C
DISTRICT COURT CASES STRIKING DOWN SORNA CHALLENGES

United States v. Hardy, 2008 U.S. Dist. LEXIS 79931 (N.D. Okla. 2008)
United States v. Elmer, 2008 U.S. Dist. LEXIS 73220 (D. Kan. 2008)
United States v. Vasquez, 2008 U.S. Dist. LEXIS 76840 (N.D. Ill. 2008)
United States v. Stevens, 2008 U.S. Dist. LEXIS 71852 (D. Me. 2008)
United States v. Fuller, 2008 U.S. Dist. LEXIS 76183 (N.D.N.Y. 2008)
United States v. Brown, 2008 U.S. Dist. LEXIS 66285 (S.D. Ala. 2008)
United States v. Abregana, 574 F. Supp. 2d 1123 (D. Haw. 2008)
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United States v. Robinson, 2008 U.S. Dist. LEXIS 65024 (E.D. Va. 2008)
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United States v. Oakley, 2008 U.S. Dist. LEXIS 69984 (D. Neb. 2008)
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United States v. Tong, 2008 U.S. Dist. LEXIS 41589 (E.D. Okla. 2008)
United States v. Cochran, 2008 U.S. Dist. LEXIS 41588 (E.D. Okla. 2008)
United States v. David, 2008 U.S. Dist. LEXIS 38613 (W.D. N.C. 2008)
United States v. Ditomasso, 552 F. Supp. 2d 233 (D. R.I. 2008)
United States v. Mason, 2008 U.S. Dist. LEXIS 33850 (M.D. Fla. 2008)
United States v. Craft, 2008 U.S. Dist. LEXIS 33860 (D. Neb. 2008)
United States v. Holt, 2008 U.S. Dist. LEXIS 31523 (S.D. Iowa 2008)
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United States v. Adkins, 2007 U.S. Dist. LEXIS 90737 (N.D. Ind. 2007)
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United States v. Sawn, 2007 U.S. Dist. LEXIS 59382 (W.D. Va. 2007)
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