NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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Re: OAG Docket No. 121

NACDL Comments on the Attorney General's National Guidelines for Sex Offender Registration and Notification

I. Introduction

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit, voluntary association of criminal defense lawyers founded in 1958 to improve the quality of representation of the accused and to advocate for the preservation of constitutional rights in criminal cases. NACDL has a membership of more than 12,800 attorneys and 92 state, local and international affiliate organizations with another 35,000 members including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

On February 24, 2007, NACDL issued a comprehensive statement on sex offender legislative policy. NACDL opposes sex offender registration and community notification laws but also believes that if such laws are passed they should classify offenders based upon true risk, with full due process of law. Community notification provisions should be reserved for offenders who are at a high risk to re-offend. Unfortunately, with the passage of the Adam Walsh Child Protection and Safety

Act of 2006 (Adam Walsh Act), Congress went in a different direction. The Adam Walsh Act includes the Sex Offender Registration and Notification Act (SORNA). SORNA sets forth a federal supervisory program that, if implemented by the states, is likely to significantly de-stabilize offenders, cause substantial confusion over registration and notification requirements and eventually make our communities less safe.

Unfortunately, in enacting SORNA Congress failed to recognize several important facts about sex offenders. Sex offenders, as a class, exhibit low recidivism rates and are less likely to re-offend than other convicted criminals[1]. Additionally, research suggests that community notification laws do little to reduce recidivism[2]. At least one study found that "the passage of sex offender registration and notification laws have had no systematic influence on the number of rapes committed" in the jurisdictions which were studied[3]. At the same time sound research demonstrates that sex offenders are not a homogeneous group[4] and come from a wide range of offenders including the rare but highly dangerous treatment-resistant offender as well as the more common offender who, once convicted, is unlikely to commit additional offenses. Requiring the same registration and notification provisions for all sex offenders diminishes the ability of the community to ascertain the truly dangerous sex offender. It also undermines the ability of the non-dangerous sex offender to maintain employment, family ties, and treatment programs. Many sex offenders report negative consequences, including physical assaults, resulting from registration and notification programs[5]. NACDL believes that a determination of offender risk must be based upon the individual characteristics of the offender and not solely on the offense for which the offender was convicted. In fact, many states now have registration and notification programs that are tiered upon the basis of individual risk assessment studies performed by competent mental health professionals. In this regard, SORNA is a step in the

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[1] *See,* Bureau of Justice Statistics, *Recidivism of Sexual Offenders Released From Prison in 1994,* November, 2003, State of Washington Sentencing Guideline Commission, *Special Sex Offender Sentencing Alternative Report (2004),* State of Ohio, *Ten Year Recidivism Follow Up of 1989 Sex Offender Releases* (2001). *See also,* Hanson R.K. and Morton Bourgon, R.K., *Predictors of Sexual Recidivism: An Updated Meta-Analysis,* Public Safety and Emergency Preparedness Canada (2004); Harris and Hanson, *Sex Offender Recidivism: A Simple Question* (2004); Hanson, R.K. and Bussiere, M., *Predicting Relapse: A Meta-Analysis of Sex Offender Recidivism Studies*, Journal of Consulting and Clinical Psychology (1998).

[2] *See,* Welchans, S., *Megan's Law: Evaluations of Sexual Offender Registries*, 16 Criminal Justice Policy Review, 123-140 (2005)

[3] *See,* Jeffrey T. Walker, et al., *The Influence of Sex Offender Registration and Notification Laws in the United States*, available at: http://www.acic.org/statistics/Research/SO_Report_Final.pdf#search=%22Walker%2C%20J.T.%20AND%20sex%20offender%20registration%22

[4] *See,* Lisa L. Sample and Timothy M. Bray, *Are Sex Offenders Different? An Examination of Re-Arrest Patterns*, 17 Crim. Justice Policy Rev. 83 (2006).

[5] *See,* Jill S. Levenson and L. Cotter, *The Impact of Megan's Law on Sex Offender Reintegration*, 21 Journal of Contemporary Criminal Justice 49 (2005); Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 Journal of Contemporary Criminal Justice 67 (2005).

wrong direction. SORNA and the regulations proposed in this docket will cause substantial confusion in the states and impose exorbitant costs for states to convert to a less safe system of registration and community notification.

Nonetheless, NACDL recognizes that the Adam Walsh Act and SORNA have become law. In these comments NACDL will highlight portions of the proposed regulations that ignore certain important constitutional rights or are otherwise inappropriate for an effective and fair registration and notification system.

II. Fifth Amendment Rights

The proposed regulations fail to allow the exercise of important Fifth Amendment privileges. The Fifth Amendment protects individuals from compelled self incrimination. The proposed regulations do not recognize or provide a means for an individual to exercise Fifth Amendment rights. The proposed regulations do not require the registration authority to advise a registrant of the Fifth Amendment right not to answer any question that may tend to cause self-incrimination. Indeed, several areas of the proposed regulations suggest that uncovering prior criminal activity of the registrant is a goal of the regulations. Additionally, certain types of registration information required under the Attorney General's "expansion authority," will compel information from the registrant that will cause self-incrimination. For instance, the proposed regulations require registrants to provide their social security numbers as well as all "purported" social security numbers. The proposed regulation specifically recognizes that such social security numbers may be false. Admitting to the use of a false social security number can expose an individual to prosecution for a number of crimes including identity theft. Similarly, the Attorney General exercises his "expansion authority" to require a homeless registrant to provide information identifying where he "habitually lives." In many jurisdictions providing such information will subject the homeless registrant to criminal prosecution for offenses such as vagrancy, loitering, public urination, indecent exposure and the like.

The regulations should require that offenders who are required to register be advised that they are not required to disclose information that may tend to incriminate themselves. Additionally the regulations should clearly state that the exercise of the Fifth Amendment privilege cannot be the basis of a criminal prosecution. Alternatively the regulations should require that the registrant be immunized from prosecution based upon information provided pursuant to the proposed regulations.

III. Principles of Federalism

The regulations, as written, infringe upon important state rights and disregard the notion that our legal system is based upon principles of federalism, which value state sovereignty especially in the area of criminal justice. The regulations disregard state sovereignty in areas pertaining to pardons, annulments, and expungement of convictions; juvenile delinquency; and state legislative discretion as to appropriate sentencing.

Many states, either constitutionally or via legislative enactment, have procedures that permit the annulment or expungement of criminal convictions for reasons other than actual innocence. Likewise, many state governors and pardon boards have the authority to pardon criminal convictions for reasons other than innocence. In most cases such annulments or pardons are based upon recognition that the former offender has been rehabilitated. State constitutions and annulment statutes place a high value on rehabilitation and the need to remove the stigma of a criminal conviction in certain rare but important cases. Section IV, A, of the proposed regulations specifically requires that a state continue to register a former offender regardless of the annulment and pardon laws of the jurisdiction except in cases where the former offender is pardoned on the ground of innocence. SORNA does not require that former offenders who are pardoned or whose convictions are annulled or expunged be included with those who must register. The proposed regulations violate fundamental notions of federalism and are well beyond the authority granted to the Attorney General to promulgate such regulations.

Similarly, the proposed regulations violate fundamental notions of federalism in the juvenile delinquency area. Juvenile delinquency is an area of the criminal justice system that, for the most part, is left to the exercise of state authority. Many states recognize the fact that juveniles are different than adults and reflect such differences in their juvenile justice systems. In many states, delinquency is not considered to be a criminal act and great emphasis is placed on rehabilitative efforts and confidentiality. In most states a juvenile delinquency finding is not considered to be a criminal conviction. Applying registration and community notification requirements to delinquent children is likely to substantially interfere with state systems designed for the rehabilitation of children. In addition registration and community notification put those children who are required to register at risk for sexual exploitation by others as their identifying information will be freely available in the public domain. In addition to the risk of exploitation, the registration and community notification provisions will unnecessarily stigmatize children and

impose impossible challenges for such children in school and in the community. In creating juvenile justice systems most states have recognized the importance of providing a rehabilitative process that is best approached in confidence. The proposed regulations disregard this important policy concern which has already been addressed in virtually every state. The proposed regulations violate fundamental notions of federalism and will likely cause unnecessary harm to a significant number of children[6]. The proposed regulations should not include registration of children. At the very least the proposed regulations should be amended to eliminate the community notification and web site requirements for delinquent children.

Another area which is constitutionally left to the sound discretion of the states is sentencing for criminal conduct. The proposed regulations, as required by the statute, lay out a specific requirement that the maximum sentencing penalty for a failure to comply with SORNA be at least greater than one year. This provision interferes with the rights of individual states to legislate appropriate criminal punishment. It is also unwise in that the complexities of the proposed regulations may force many former offenders into a technical default which is neither knowing nor intentional but nonetheless exposes them to felony prosecution.

IV. The Proposed Regulations Exceed the Statutory Authority Granted By SORNA And Will Not Foster the Real Purpose of the Legislation

The Attorney General, relying on SORNA § 114 (a) (7), expands the types of registration information that must be provided beyond that required in the statute. The "expansion authority" exercised by the Attorney General is well beyond the authority permitted by the statute, will not foster the goals of the legislation, and will subject former offenders to exploitation, vigilantism, shame and ridicule. The Attorney General indicates that he has exercised his "expansion authority" to require additional information to be provided by persons required to register as sex offenders. However, the exercise of this authority is unnecessary to the purpose of the Adam Walsh Act and is unwise policy. The stated purpose of the Adam Walsh Act is to protect the public by creating a comprehensive system for the registration of sex offenders. The act was not passed to impose a non-judicial probation or supervisory status over persons who have been convicted of sex offenses. The "expansion authority" exercised by the Attorney General to

[6] The efficacy of juvenile registration and community notification is further diminished when one considers the fact that the recidivism rate of juvenile sex offenders is very low. *See,* National Center on Sexual Behavior of Youth, Center for Sex Offender Management and U.S. Department of Justice, Office of Juvenile Justice and Delinquency Protection, (2001). *Juveniles Who Have Sexually Offended: A Review of the Professional Literature Report.* http://www.ojjdp.ncjrs.org.

require far more information than the statute requires does not enhance its purpose, which is simply to create a registry. The proposed regulations invoke the "expansion authority" to require the following information at the time of registration: remote identifiers (screen names and e-mail addresses); telephone numbers; "habitual living" places of offenders lacking fixed abodes; temporary lodging information; other employment information such as travel routes; professional licenses; additional vehicle, watercraft and aircraft information; and, date of birth.

Requiring such information will expose former offenders to exploitation, vigilantism and public shame and ridicule without any benefit to the establishment of a comprehensive system of registration. Requiring the provision of telephone numbers and dates of birth will subject former offenders to the very real possibility of identity theft. Providing information about where a homeless former sex offender may "habitually live" (e.g., a certain park bench or under a certain overpass) would expose that vulnerable individual to the likelihood of assault and battery by vigilantes in the community. Similarly, former offenders may hold professional licenses that have nothing to do with children or sex (e.g., electrician or plumber's license) and the only purpose of publishing such information is to shame and ridicule the former offender in his community. Requiring such information endangers the public rather than making it safer. Social science research demonstrates that sex offenders are more likely to re-offend when they are put into de-stabilizing situations[7]. The additional information required under the Attorney General's "expansion authority" serves to de-stabilize former offenders and may render them unemployed and unemployable, subject to vigilantism and other types of exploitation. The "expansion authority" should not be used to require this information. At the very least the regulations should mandate that none of the information obtained via the "expansion authority" shall be made available to the public in any format.

V. The Proposed Regulations Fail to Require Fundamental Due Process

The proposed SORNA regulations fail to require states to provide any due process protections to registrants so that they can contest their designation as a Tier I, Tier II, or Tier III offender. SORNA § 118(e) requires the states to include on their web sites, "instructions on how

[7] *See*, Kruttschnitt, C., et al., *Predictors of Desistance among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 Justice Quarterly 61 (2000); *See also*, Colorado Department of Public Safety, *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community*, 2004, http://dcj.state.co.us/odvsom ; Levenson, J. And Cotter, L., *The Impact of Sex Offender Residence Restrictions: 1000 Feet from Danger or One Step from the Absurd?*, 49 International Journal of Offender Therapy and Comparative Criminology 168 (2005).

to seek correction of information that an individual contends is erroneous." However, the proposed regulations do not mandate that a state have such a method. The proposal's only example of compliance with the act is a suggestion that a state web site might refer someone to the state agency responsible for correcting erroneous information. That suggestion is insufficient and fails to require states to protect the due process rights of registrants.

The system of registration and community notification contained in SORNA and in the proposed regulations is, in reality, a system of supervision of former offenders. It amounts to another method of probation, supervised release or parole. Therefore the regulations should require that each state must have a system for the proposed registrant to contest his or her designation as a sex offender accompanied by the full panoply of due process protections including, but not limited to, the right to be represented by counsel. The effects of registration and community notification on the registrant are severe and life altering. The registrant must have due process protections and the Attorney General ought to recognize and require such protections of all state programs.

VI. SORNA and the Proposed Regulations Are *Ex Post Facto* Laws Prohibited by Article I, Section 9 of the Constitution of the United States of America.

The proposed regulations apply SORNA retroactively in violation of Article I, Section 9 of the Constitution prohibiting the passage of *ex post facto* laws. NACDL has previously raised this concern in comments dated April 30, 2007, in OAG Docket No. 117. Those comments are incorporated by reference herein.

VII. Conclusion

In enacting the Adam Walsh Act and SORNA Congress succumbed to myths about sex offenders which are not supported by the existing scientific and social science research. The proposed regulations in this docket fail to protect important constitutional rights of sex offender registrants and go beyond the statutory authority granted to the Attorney General to promulgate regulations that implement a registration system. The system created by the confluence of SORNA and these regulations is a non-judicial system of supervised released coupled with the ever present specter of additional prison time for even the most minor of violations.