UNITED STATES v. DAVID HALL
577 F. Supp. 2d 610 (N.D.N.Y. 2008)

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

David Hall is charged with traveling in interstate commerce and thereafter knowingly failing to register and update his sex offender registration. Defendant moves to dismiss the Indictment.

II. BACKGROUND

A. Facts

On August 12, 2004, defendant was sentenced to ten years probation after pleading guilty to Rape in the Third Degree in violation of New York Penal Law. Defendant again pled guilty to a subsequent offense of Rape in the Third Degree on May 25, 2006 and was sentenced to one year imprisonment.

Defendant was required to register as a sex offender in New York and keep his registration current by notifying the New York Sex Offender Registry of any change of address. On July 11, 2006, defendant filed a Sex Offender Change of Address Form, thereby notifying the Registry of his new residence in Moravia, New York. An annual verification form was sent to defendant's new address on June 13, 2007, but the form was returned by the U.S. Post Office.

Defendant's whereabouts were unknown until he applied for public assistance benefits in February of 2008. A Social Services Investigator interviewed defendant regarding his application for benefits. During the interview, defendant stated he had been living and working in Virginia before moving back to New York on February 22, 2008. An investigator with the Virginia Sex Offender Registry confirmed that defendant failed to register as a sex offender in Virginia, and there is no record of defendant having updated his registry upon resuming his residence in New York.

On April 3, 2008, the Government filed a complaint charging defendant with failing to register under the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §16913, after traveling in interstate commerce in violation of the federal criminal penalty statute, 18 U.S.C. § 2250(a). On April 9, 2008, a grand jury indicted defendant on one count of knowingly failing to update his sex offender registration after traveling in interstate commerce as required by SORNA.

B. The Federal Duty to Register as a Sex Offender

SORNA provides: "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). A "sex offender" is defined as any individual who is convicted of a sex offense under either state or federal law. 42 U.S.C. § 16911(1). Following a change of a sex offender's name, residence, employment, or student status, SORNA requires a sex offender notify the state in which he lives of such change(s). 42 U.S.C. § 16913(c).

C. The Federal Criminal Penalty for Failure to Register

While § 16913 creates a sex offender's duty under federal law to register with state sex offender registries and continually update one's registration, 18 U.S.C. § 2250(a) serves as the enforcement

mechanism for a sex offender's duty to register. Pursuant to § 2250(a), any sex offender who is required to register under SORNA and either was convicted of a federal sex offense or was convicted of a state sex offense and traveled in interstate commerce faces up to ten years in prison for knowingly failing to register or update his registration.

III. DISCUSSION

Motion to Dismiss

Defendant argues that Congress lacks constitutional authority to compel individuals convicted of purely local sex offenses to register as sex offenders.

The Commerce Clause

Defendant argues 18 U.S.C. § 2250(a) and 42 U.S.C. § 16913 are unconstitutional because Congress lacks the authority to require individuals convicted of state sex offenses to register as sex offenders. Section 2250(a) imposes a federal criminal penalty for an individual's failure to update his sex offender registration as required under SORNA after traveling in interstate commerce. Section 16913 creates a federal duty to register or update one's sex offender registry regardless of whether a sex offender has traveled in interstate commerce.

The United States Supreme Court identified three categories of activities Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though they may come only from intrastate activities;" and (3) "those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Court further explained that the final category of activities Congress may regulate requires that the regulated activity "substantially affects" interstate commerce. Four factors are used to determine whether an activity has a substantial effect upon interstate commerce: (1) whether the statute regulates activity that is economic in nature; (2) whether the statute includes a jurisdictional element; (3) whether there are congressional findings concerning the effect of the regulated activity upon interstate commerce; and (4) whether the nexus between the regulated activity and the substantial effect upon interstate commerce is attenuated. *United States v. Morrison*, 529 U.S. 598 (2000).

18 U.S.C. § 2250(a)

Defendant argues that § 2250(a) is unconstitutional because it does not fall within the three permissible categories identified in *Lopez*. Although defendant concedes § 2250(a) requires an individual travel in interstate commerce before he may be charged with violating the statute, defendant asserts that § 2250(a) is nonetheless invalid because it does not require the defendant travel in interstate commerce with the intent to violate the statute. Defendant warns that upholding statutes such as § 2250(a) will permit Congress to create federal criminal offenses for a broad range of conduct already proscribed by state law so long as interstate travel is an element of the federal statute.

Unlike the statutes considered in *Lopez* and *Morrison*, § 2250(a) falls within the first and second categories of activity Congress may regulate under the Commerce Clause because it requires sex offenders travel in interstate commerce before being held criminally liable. Although other federal criminal statutes have been upheld on the ground that they require a direct link between the criminal conduct and the interstate travel, the constitutionality of § 2250(a) does not entirely depend upon whether the statue requires a connection between the interstate travel element and a sex offender's

failure to update his registry. Rather, Congress may regulate "persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Lopez*, 514 U.S. at 558. In light of the language in *Lopez*, defendant's argument that Congress lacks the authority to regulate individuals convicted of purely state sex offenses is misguided because Congress may safeguard against conduct that is wholly intrastate so long as the federal statute extends only to individuals who travel in interstate commerce. Therefore, defendant's challenge to § 2250(a) is rejected.

42 U.S.C. § 16913

Section 16913 raises greater constitutional concern than § 2250(a) because it lacks a jurisdictional element restricting its application to individuals who travel in interstate commerce. Unlike § 2250(a), § 16913 confers a duty upon all sex offenders, regardless of whether they travel in interstate commerce or whether convicted of state or federal sex offenses, to register and update their registration within three days of any change of name, residence, employment, or student status. While the vast majority of courts to consider the constitutionality of SORNA have upheld the statute as a valid exercise of Congress' power, defendant correctly asserts that a statute may not be given effect if it is predicated upon another statute improperly enacted by Congress.

A conviction under § 2250(a) undisputably rests, in part, upon a defendant's obligation to register as a sex offender under § 16913. Many of the courts that have upheld SORNA under the Commerce Clause interpret § 16913 and § 2250(a) "as interrelated components of the larger whole of SORNA sufficient to overcome any deficiencies when viewing § 16913 in isolation." Such an interpretation ignores the language of § 16913, however. Section 16913 imposes a federal duty for all individuals convicted of a sex offense to register or update their sex offender registration within three days of any change of name, residence, employment, or student status. The federal law extends to all sex offenders, regardless of whether they travel in interstate commerce or were convicted of a federal or state sex offense. For example, under § 16913, an individual convicted of a state sex offense while living in Buffalo, New York would have an obligation under federal law to update his sex offender registration upon moving to Albany, New York. Taken even further, the same individual would have a federal obligation to update his sex offender registry if he remained in Buffalo but simply moved into a new home across the street from his previous residence. Presently, federal law requires sex offenders update their registration after any change of their employment or student status even if they never have or never intended to travel across state lines.

Although some courts rely on Congress' intent to create a national database for tracking sex offenders across interstate lines, § 16913 nonetheless imposes a federal duty upon sex offenders who never travel in interstate commerce. Section 16913 in its entirety makes no reference to travel across interstate lines or any of the channels of interstate commerce. The section completely lacks any jurisdictional element or restriction to sex offenders traveling between the states.

Whether or not § 16913 and § 2250(a) are read as "interrelated components" of SORNA, § 16913 nonetheless confers a duty under federal law upon sex offenders to maintain their registration even if they do not travel in interstate commerce. The jurisdictional element of § 2250(a) does not remove a sex offender's duty under § 16913 to update his registration after he changes jobs or graduates from college. Rather, any sex offender who fails to update his registration after changing residences, jobs, or student status would be in violation of § 16913.

As a regulation of all sex offenders, § 16913 neither regulates the use of the channels of interstate commerce nor the instrumentalities or persons in interstate commerce. Accordingly, § 16913

"cannot be upheld under either of the first two categories of activity subject to regulation under the Commerce Clause. Instead, if it is to be sustained under the Commerce Clause, it must fall within the third *Lopez* category, i.e., regulation of 'activities that substantially affect interstate commerce.'"

An application of the factors used to determine whether regulated activity has a substantial effect upon interstate commerce indicates § 16913 cannot be upheld under the Commerce Clause. First, § 16913 does not regulate activity that is economic in nature. SORNA's stated purpose is "to protect the public from sex offenders and offenders against children." The creation of a federal duty to register or update one's registry as a sex offender does not have a connection to commerce and cannot be construed as a regulation of commercial activity. Second, as noted above, § 16913 does not contain a jurisdictional element restricting its application to activities or individuals having a clear connection to interstate commerce. Third, the legislative history of SORNA is devoid of clear congressional findings concerning the effect of sex offender registration upon interstate commerce. Finally, effect of continually registering sex offenders upon interstate commerce is too attenuated to uphold § 16913 as a statute regulating activity that substantially affects interstate commerce.

In consideration of the fourth factor for whether a statute regulates activity substantially affecting interstate commerce, the Supreme Court has rejected the argument that violent crime sufficiently affects the national economy so as to uphold a federal criminal statute. In *Lopez*, the Government offered a "cost of crime" argument. In response, the Court warned:

> Under the theories that the Government presents in support of [the federal statute], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

In light of the *Lopez* Court's language, the Government may not contend that the registration of sex offenders is strongly connected to a substantial effect upon interstate commerce. The conduct regulated by § 16913 does not fall within any of the three categories of activity that Congress may regulate pursuant to its Commerce Clause power.

Because § 16913 is not a valid exercise of Congressional authority under the Commerce Clause, the federal duty to register as a sex offender under § 16913 is unconstitutional. It then follows that a conviction under § 2250(a) is invalid because the criminal penalty statute demands the Government prove defendant was required to register under § 16913. For this reason, defendant's motion to dismiss the Indictment will be granted.

UNITED STATES vs. CHARLES THOMAS
534 F. Supp. 2d 912 (N.D. Iowa 2008)

OPINION

The matter before the court is Defendant Charles Thomas's Motion to Dismiss ("Motion"). In the Motion, Defendant represents to the court that, if this matter were to proceed to trial, the government would be able to prove the following facts:

On October 5, 2000, [Defendant] was sentenced on one count of Sexual Abuse in the Third Degree in the State of Iowa. He received a 10-year sentence and was discharged in 2005. [Defendant] completed his initial registration for the State of Iowa on October 28, 2005. He filled out a number of Sex Offender Registration Forms since that time.

In September 2007, [Defendant] was living in Prarie du Chien, Wisconsin, and working in Iowa. He lost his job. He was evicted from his residence. From September 13, 2007 to October 9, 2007, he lived in his car in Wisconsin.

From October 10, 2007 to October 24, 2007, he lived in his car in various parking lots around McGregor, Iowa. On October 24, 2007, he was arrested in McGregor, Iowa. He was charged with Failure to Comply with Sex Offender Registry Requirements.

ANALYSIS

The Indictment is based upon two important provisions of the recent Sex Offender Registration and Notification Act ("SORNA"), that is, Title I of the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). The first provision at issue is 18 U.S.C. § 2250. Section 2250 makes it a crime for certain persons to fail to register as sex offenders after traveling in interstate commerce. The second provision at issue is 42 U.S.C. § 16913. Section 16913 contains SORNA's underlying registration requirements.

Defendant asks the court to dismiss the Indictment. Defendant argues that § 2250 and § 16913 cannot be justified under the Commerce Clause. Defendant maintains that Congress lacks the power under the Commerce Clause to make it a crime for sex offenders to fail to register after traveling in interstate commerce and, in any event, lacks the power in the first instance to require all sex offenders to register. Defendant posits that § 2250(a) and § 16913 constitute an impermissible attempt to exercise police power in criminal matters that must be reserved to the States. The government rejoins generally that § 2250(a) and § 16913 are valid exercises of the Commerce Clause.

Background on § 2250 and § 16913

In relevant part, § 2250 provides:

> **§ 2250. Failure to register**
>
> **(a) In general.**--Whoever--
>
> **(1)** is required to register under [§ 16913];
>
> **(2)(A)** * * *
>
> **(B)** travels in interstate or foreign commerce, or enters or leaves or resides in, Indian country; and
>
> **(3)** knowingly fails to register or update a registration as required by [§ 16913];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

To prove Defendant violated § 2250, the government will need to prove three elements: (1) Defendant was required to register under § 16913; (2) Defendant traveled in interstate commerce; and (3) Defendant knowingly failed to register or update a registration as required by § 16913.

Section 16913, in turn, imposes registration requirements upon each and every "sex offender" in the United States. In relevant part, § 16913 states:

> **§ 16913. Registry requirements for sex offenders**
>
> **(a) In general**
>
> A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
>
> **(b) Initial Registration**
>
> The sex offender shall initially register--
>
> * * *
>
> **(c) Keeping the registration current**
>
> A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. . . .

Analysis

1. § 2250

The government does not contend that § 2250 falls within either the first or the third *Lopez* categories. The government argues that § 2250 falls within a portion of the second *Lopez* category. Specifically, the government maintains that § 2250 falls within Congress's power under the Commerce Clause to "regulate . . . persons . . . in interstate commerce, even though the threat may come only from intrastate activities." The government posits that, even though a sex offender poses only a non-economic intrastate threat, the second element of § 2250 saves the statute. Such second element, a so-called "jurisdictional element," requires proof that the sex offender who failed to register traveled in interstate commerce. Accordingly, the government concludes that § 2250 has an explicit connection with interstate commerce.

Defendant recognizes that, "[a]t first glance, § 2250 might appear to fall into the second *Lopez* category" for the reasons the government advances. Defendant argues, however, that something more than mere travel across state lines is required for activity to fall within the second *Lopez* category. Defendant argues:

> Section 2250 lacks the very important link between the required travel and the offense of failure to register. Unlike other statutes which requires a defendant to travel in interstate commerce with the intent to commit certain criminal acts, the travel element of § 2250 does not require that the travel occur in connection with a defendant's failure to register or avoidance of registration. Thus, the statute establishes no connection between the jurisdictional element of travel and the criminal act of failing to register.

> Furthermore, the statute fails to specify when the travel must have occurred. If a defendant traveled out of state 10 years before he was required to register, he would still have "traveled in interstate . . . commerce" under § 2250. Upholding § 2250 based on this travel requirement would allow Congress to federalize nearly any local criminal offense simply by making it a crime for someone who committed a local offense to travel in interstate commerce at some point in his life. Some nexus must exist between the criminal activity and the interstate travel in order to satisfy the Commerce Clause. Because § 2250 contains no such nexus, it cannot be said to regulate "people in interstate commerce." At best, it regulates "people who have, at some point in their lives, traveled in interstate commerce." As such, the travel requirement in § 2250 is insufficient by itself to make the statute a legitimate exercise of Commerce Clause authority.

Defendant concedes that a number of district courts have upheld § 2250 against Commerce Clause challenges. Defendant criticizes the fact that many of these decisions failed to examine the non-economic character and impact of § 2250, including whether the movement of sex offenders across state lines is an activity that substantially affects interstate commerce.

The court holds that § 2250 is a valid exercise of Congress's Commerce Clause power. Section 2250 falls squarely within the second *Lopez* category. Unlike the criminal statute that the Supreme Court invalidated in *Lopez,* § 2250 does not seek to criminalize purely intrastate activity. Only sex offenders who fail to register or update their registrations after having crossed state lines fall within § 2250's cross-hairs. Two constitutional scholars writing in the wake of *Lopez* and its progeny write: The Court will continue to uphold federal laws that . . . regulate activities, persons, products or transactions that cross state . . . boundaries. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* 648-50 (4th ed. 2007). Section 2250 falls within Congress's broad federal power to regulate persons who cross state boundaries.

Section 2250 is similar to a variety of criminal statutes in the United States Code that federalize activities that were otherwise the subject of state criminal law. The Supreme Court upheld such criminal statutes long ago. For example, the Mann Act outlaws the transportation of persons across state lines for prostitution or "any sexual activity for which any person can be charged with a criminal offense." In upholding the Mann Act, the Supreme Court emphasized:

> Commerce among the states . . . consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And [the Mann Act] was drawn in view of that possibility. What the [Mann Act] condemns is transportation obtained or aided, or transportation induced, in interstate commerce, for the immoral purposes mentioned.

Hoke v. United States, 227 U.S. 308, 321 (1913). Similarly, § 2250 condemns the transportation of the sex offender (albeit self-transportation) across state lines without registering or updating an existing registration.

"[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained and is no longer open to question." Thus, Congress "may forbid or punish the use of channels to promote dishonesty or the spread of any evil or harm across state lines." Congress has deemed sex offenders to be inherently dangerous, a threat to public

safety in themselves and deserving of extensive monitoring through SORNA's registration requirements. *See* Adam Walsh Act § 102 (stating that the purpose of the Adam Walsh Act is "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against [victims.]"). Congress may regulate the movement of sex offenders across state lines.

Contrary to Defendant's argument, there is a nexus between the interstate travel requirement and the failure to register or update a registration. In a § 2250 prosecution, the government is required to prove that Defendant "knowingly fail[ed] to register or update a registration *as required by* [§ *16913]."* 18 U.S.C. § 2250. Generally, § 16913 requires sex offenders to register in those jurisdictions where they reside, are employed or are students. Such registration must occur initially "not later than three business days after" sentencing if not sentenced to a term of imprisonment, 42 U.S.C. § 16913(b), must occur initially before completing a sentence of imprisonment given for a sex offense if sentenced to a term of imprisonment, and must be updated "not later than three business days after each change of name, residence, employment, or student status . . . ." Accordingly, § 2250 only criminalizes those sex offenders who fail to register within three or fewer business days of travel across state lines. The nexus between travel and the failure to register is thus substantial.

Lastly, Defendant's argument that the movement of sex offenders across state lines is not an activity that substantially affects interstate commerce in any economic sense is of no moment here. The substantial-effects test is only applicable when a statute is alleged to fall within the third *Lopez* category, not the second *Lopez* category.

Accordingly, the court holds that § 2250 is constitutional under the Commerce Clause.

2. § 16913

Alternatively, Defendant argues that § 16913 exceeds Congress's Commerce Clause powers and is unconstitutional. Defendant points out that § 16913 requires all sex offenders in the United States to register; such registration requirement is not limited to merely those sex offenders who travel across state lines. The gist of Defendant's argument is as follows: even if Defendant is otherwise guilty of § 2250(a), his conviction is void because he should not have been required to register under § 16913 in the first place. Section 16913 sweeps too broadly; the first and third elements of a § 2250 prosecution, which incorporate the § 16913 registration requirements, are thus void *ab initio.*

The court holds that § 16913 cannot be justified under the Commerce Clause. Section 16913 does not fall within any of the three *Lopez* categories. The first category does not apply, because § 16913 is not an attempt to regulate the use of the channels of interstate commerce. The second category does not apply, because § 16913 is not an attempt to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce. Unlike § 2250, § 16913 is not limited to persons who travel across state lines; the latter statute contains no jurisdictional element and reaches purely intrastate activity insofar as sex offenders who never cross state lines are required to register. The third category does not apply, because there is no evidence in the record that the registration of sex offenders has a substantial relation to interstate commerce, *i.e.*, there is no evidence that "sex offending" is an activity that substantially affects interstate commerce. Much like the statute at issue in *Lopez,* § 16913 "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." There are no Congressional findings that would "enable [the court] to evaluate the legislative judgment that ['sex offending'] substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the

naked eye." Any argument that Congress is permitted to enact § 16913 under the Commerce Clause would appear to be too attenuated and, if accepted, "'would effectually obliterate the distinction between what is national and what is local and create a completely centralized national government.'"

Accordingly, the court holds that § 16913 exceeds Congress's power under the Commerce Clause. This holding does not entail Defendant's conclusion that § 16913 is unconstitutional. Section 16913 may be sustained under the Necessary and Proper Clause.

The Necessary and Proper Clause delegates to Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the [Congressional] Powers" enumerated in the Constitution, "and all other Powers vested by [the] Constitution in the Government of the United States." The Necessary and Proper Clause affords Congress broader power than its terms "necessary" and "proper" might suggest. The Supreme Court "long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be *'absolutely* necessary' to the exercise of an enumerated power." *Jinks v. Richland County, S.C.*, 538 U.S. 456, 462 (2003) (quoting *McCulloch v. Maryland*). In *McCulloch*, the Supreme Court stated the proper standard:

> [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

When used as a corollary to the Commerce Clause, the Necessary and Proper Clause provides that, "[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce." *Gonzales*, 545 U.S. at 35 (Scalia, J., concurring). "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37. "The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."

The court concludes that § 16913 is an appropriate and reasonably adapted means by Congress to attain the legitimate end of § 2250, *i.e.*, monitoring sex offenders who cross state lines. To be certain, § 16913's blanket-registration requirement is not narrowly tailored or absolutely necessary to attain such end. For example, Congress could have taken a less drastic step and only required sex offenders who have certain qualifying life events *(e.g.*, a change in employment, school or residence) and actually travel in interstate commerce to register immediately after such travel. Instead, § 16913 reaches those sex offenders who change jobs, schools or residences but never travel across state lines. Even so, the court concludes that § 16913 represents a reasonable, good-faith effort on the part of Congress to monitor sex offenders who cross state lines. It must be remembered that we live in a very mobile society. There can be no doubt that sex offenders, like other Americans, frequently change jobs, schools or residences. Congress may have determined that it was unworkable, as a practical matter, to devise a sex-offender registration system that could monitor only those sex offenders who traveled in interstate commerce. Recognizing the federalism concerns that the Supreme Court expressed in *Lopez* and *Morrison*, however, Congress limited federal criminal enforcement of § 16913 to instances in which the sex offender crosses state lines. Congress must be

afforded the opportunity to use its "discretion with respect to the means by which [its] powers are to be carried into execution." Therefore, the court concludes that Congress had the authority to enact § 16913 and make it applicable to § 2250. Accordingly, the court holds that § 16913 is constitutional under the Necessary and Proper Clause. The Motion is **DENIED.**

UNITED STATES v. KEITH DWAYNE CRUM
2008 U.S. Dist. LEXIS 83563 (W.D. Wash. October 8, 2008)

OPINION

This matter comes before the Court on defendant Keith Dwayne Crum's "Motion to Dismiss the Indictment." For the reasons set forth below, the Court denies defendant's motion to dismiss.

The government's indictment alleges that defendant was convicted of two separate sexual offenses involving minors. It further alleges that at some time between March 27, 2007 and June 30, 2008, defendant moved to the state of Washington and "did knowingly fail to register and update his sexual offender registration" in violation of 18 U.S.C. § 2250.

Defendant contends that Congress exceeded its Commerce Clause power in enacting SORNA's registration provision, 42 U.S.C. § 16913, and its enforcement mechanism, 18 U.S.C. § 2250(a). Because the Court views § 16913 and § 2250(a) as interrelated parts of a single statutory scheme with a distinctly national focus, defendant's Commerce Clause challenge fails.

Section 2250(a) establishes a federal offense where an individual (1) is required to register under SORNA, (2) travels in interstate commerce, and (3) knowingly fails to register or update a registration as required by SORNA. Defendant contends that because § 2250(a) does not require a "direct nexus between criminal activity and the [interstate] travel" it cannot survive any prong of the Lopez test. The Court disagrees, and finds that § 2250 fall squarely within the second *Lopez* category.

Section 2250(a) explicitly regulates "persons . . . in interstate commerce," *Lopez*, 514 U.S. at 558, and therefore is a valid exercise of Congress's Commerce Clause power under the second *Lopez* prong. While defendant correctly notes that § 2250(a) does not require an individual to travel interstate for the purpose of evading registration requirements, the Commerce Clause does not require such a direct link. *Lopez*'s second category permits regulation of people who travel in interstate commerce "even though the threat may come only from intrastate activities." A sex offender's failure to register intrastate is brought within the second category of *Lopez* by virtue of the statute's jurisdictional nexus; criminal intent need not accompany the move across state lines.[1]

[1] Although § 2250(a) need only fit within one *Lopez* category, the Court notes that the statute also appears valid under the first *Lopez* prong. In regulating the channels of interstate commerce, "Congress may impose conditions on those who use the channels of interstate commerce in order that those channels will not become the means of spreading evil, whether of a physical, moral or economic nature." Just as Congress may impose conditions on the movement of products, so, too, may it impose conditions on the movement of people. In the interest of preventing sex offenders from evading state notification laws, § 2250(a) regulates the "use of the channels of interstate commerce," by requiring sex offenders who travel interstate to adhere to registration requirements.

But while § 2250(a) "includes an express and clear jurisdictional element" bringing it directly within the ambit of Congress's Commerce Clause authority, § 16913 contains no such jurisdictional trigger. Rather, § 16913 imposes a federal duty to register on all sex offenders regardless of whether they travel interstate. For this reason, § 16913, when read in isolation, "raises greater constitutional concern" than § 2250(a).

First, § 2250(a) and § 16913 "are interrelated such that a facial challenge to one part of the SORNA cannot be resolved without resort to the totality of the statute." The federal duty does not operate in a vacuum. SORNA's requirement that all sex offenders register is unenforceable until a sex offender crosses state lines, at which point the failure to abide by one's federal duty bears federal consequences. Together § 16913 and § 2250(a) are "components of a symbiotic statutory scheme in which there is no criminal penalty unless there is a failure to register and, conversely, failure to register cannot be enforced without a criminal penalty." Section 2250(a) lacks all meaning without reference to § 16913, and § 16913 lacks all effect without reference to § 2250(a). "As a result, the only registration requirements imposed on offenders who do not travel in interstate commerce are those required by state law." While Congress clearly intended to impose a duty on all convicted sex offenders in its effort to develop a national registry, the fact that SORNA prosecutions are limited to those individuals who travel in interstate commerce "evidences that Congress was acutely aware of the breadth of its power when it enacted SORNA."

Second, SORNA's federalization of sex offender registration requirements seeks to "close loopholes to prevent sex offenders from being lost to tracking efforts as they travel from state to state," a goal that no individual state has the power to accomplish. "Courts have consistently recognized that federal statutes enacted to help states address problems that defy a local solution constitute an appropriate exercise of Congress's Commerce Clause power." SORNA's emphasis on "coordination among registries and enforcement of registry requirements" bolsters its validity under the Commerce Clause; to the extent SORNA reaches intrastate activity, it does so with a distinctly national purpose that transcends state lines and state capabilities. This attempt at interstate coordination preserves rather than destroys the distinction between "what is truly national and what is truly local."

Finally, § 16913 finds further support in the Necessary and Proper Clause. This Clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation." *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring). SORNA presents a "comprehensive scheme of regulation," under which the need to prevent sex offenders from "being lost in the cracks *between* state regulations" requires initial and continuing registration at the state level. Granted, Congress could have "limited the scope of § 16913 to sex offenders convicted of federal sex offenses or who travel across state lines as it did with § 2250(a)." But the means chosen, intrastate registration and updating, are "'reasonably adapted' to the attainment of a legitimate end under the commerce power," *Raich*, 545 U.S. at 37 (Scalia, J., concurring) (quoting *United States v. Darby*). The regulation and tracking of sex offenders who travel interstate under § 2250(a) requires registration on the state level to achieve SORNA's national objective.

Accordingly, both 18 U.S.C. § 2250(a) and 42 U.S.C. § 16913 are constitutional under the Commerce Clause, and defendant's facial challenge to SORNA therefore fails.