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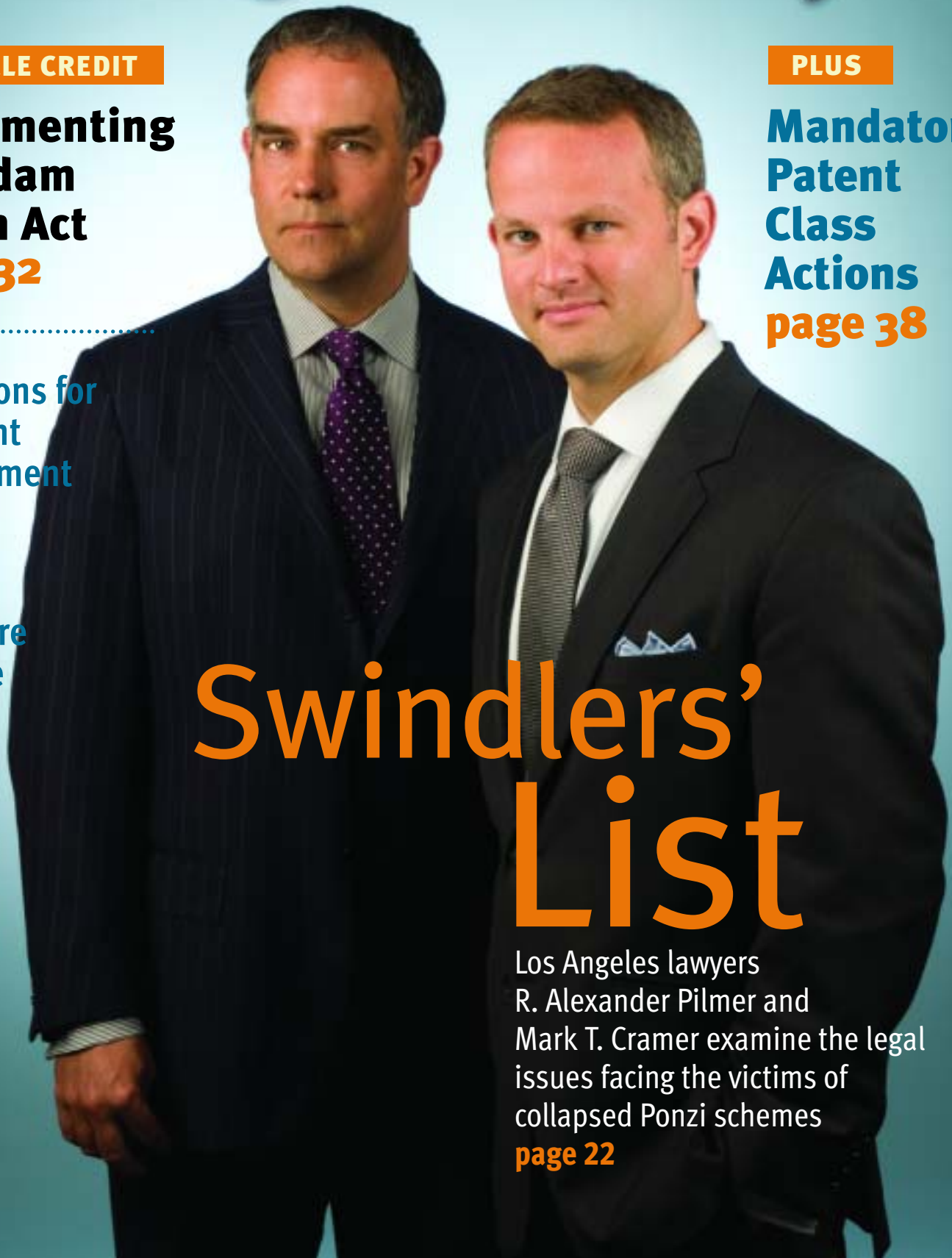
Los Angeles Lawyer

June 2009 /$4



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by Anthony V. Salerno and Elana Goldstein

Predators' Net

In 1981, six-year-old Adam Walsh was abducted from a Sears store in Hollywood, Florida. His severed head was found two weeks later in a canal 120 miles away. Adam's tragic death quickly drew national attention, but it was not until 2008 that investigators revealed that his murderer was a convicted serial killer who had died in prison.[1] Since Adam's death, his father, John Walsh, has become a famous advocate for missing children and unsolved crimes and hosts the well-known *America's Most Wanted* television show. With John Walsh's efforts, many child protection and sex offender laws have passed, including the Adam Walsh Child Protection and Safety Act of 2006 (AWA). On July 27, 2006, the AWA became federal law, and with it came nationwide fiscal and constitutional controversy.[2]

The AWA's most significant provision is the Sex Offender Registration and Notification Act (SORNA), which mandates the creation of a national sex offender registry. Pursuant to the AWA, every state in the country is required to implement, or at least substantially comply with, the provisions of SORNA no later than July 27, 2009,[3] or lose 10 percent of its allocated Byrne Justice Assistance Grant funds for each year of noncompliance.[4] These funds are grants generally applied to law enforcement and drug laws.

According to a Justice Policy Institute study, it will cost California $59,287,816 just to implement SORNA in 2009. But if California chooses not to implement SORNA, it will lose 10 percent of its Byrne Grant money, or a mere $2,187,682 per year.[5] The study found that in all 50 states, the first-year costs of implementing SORNA are significantly greater than the financial loss of a 10 percent reduction of Byrne Grant funding.[6] Given today's economy and the financial burden that the AWA imposes, many states are not complying with the AWA because they cannot afford to do so. Equally, if not more, important are the thousands of state and federal lawsuits that have been filed across the country alleging that the AWA is unconstitutional and therefore unenforceable.

The constitutional challenges to the AWA have arisen due to the unprecedented and aggressive requirements that the AWA imposes on convicted sex offenders and state governments. By requiring all states to adopt SORNA, the AWA endeavors to standardize the various state sex offender registries so that one uniform national sex offender registry can be created. However, all states have adopted their own laws regarding which sex offenses are registerable and maintain their own individualized sex offender registries. California, for example, maintains not only a state sex offender registry but, more recently, a publicly searchable sex offender Web site—a product of Megan's Law.[7] The AWA effectively seeks to displace existing state sex offender laws and state-run sex offender registries.

Under the AWA, the national registry and Web site will be an amalgam of each state's sex offender registry and will also include those offenders who have been convicted of federal sex crimes. To create this Web site, the AWA requires each state to maintain a sex offender registry that conforms to SORNA. However, the AWA only provides the minimum standards that states must impose on their sex offenders. States are free to set more stringent requirements for offenders and to enforce harsher penalties.[8]

SORNA creates a three-tiered classification system of sex offenders who must register. Tier I offenders—the least serious offenders, but not defined by SORNA—will be required to register for 15 years, renewing once annually.[9] Tier II offenders generally are felons convicted of, among other crimes, sex trafficking,

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Implementation of the Adam Walsh Act raises fundamental questions of constitutional rights

the use of minors in prostitution, sexual contact with minors, and the production and distribution of child pornography. Tier II also includes Tier I offenders who reoffend. Tier II offenders must register for 25 years, renewing every six months.[10] Tier III offenders, the most serious offenders, generally are felons convicted of crimes such as aggravated sexual abuse, sexual acts with a child under 13 years old, and nonparental kidnapping of a minor. Tier III also includes Tier II offenders who reoffend. Tier III offenders are subject to lifetime registration, which must be renewed every three months.[11] Tier I offenders can apply for removal from the registry after 10 years, and juveniles classified as Tier III offenders and Tier II offenders can apply for removal after maintaining a clean record for 25 years.[12] Nonjuvenile Tier III offenders will never be allowed to apply for removal from the Web site. Under existing California law, by contrast, all sex offenders required to register must register for life, with no possibility for early removal.

Under the AWA, sex offenders with convictions that predate the enactment of the AWA must register under SORNA. SORNA applies to anyone who is currently incarcerated or on parole, anyone who currently registers as a sex offender, or anyone previously convicted of a sex offense who reenters the system due to a conviction for a new offense that is not necessarily a sex crime—even if he or she is under no current obligation to register as a sex offender.[13]

All offenders required to register under SORNA will, at the very minimum, have to provide the following to the national registry: names and aliases, e-mail addresses and other Internet identifiers like instant message addresses, telephone numbers, Social Security number, residence and travel information (for example, passport information), employment information, school information, vehicle information, date of birth, physical description, criminal history, current photograph, fingerprints, DNA sample, and driver's license or ID card information. Each state must provide the following for disclosure on the national Web site: name of the offender, residence address, address of employer, address of school, vehicle information, physical description of the offender, a list of the offender's sex offense convictions, and a current photograph. Each state has discretion to require additional information from each offender.[14]

SORNA imposes other stringent requirements for registration. All offenders must register in the jurisdictions in which they were convicted and in all jurisdictions where they live, work, and attend school. The timeline within which to register is very exact: Registration must be accomplished no later than three business days after the offender moves to another jurisdiction or changes his or her name, employment, or student status. The offender must appear in person in at least one of the applicable jurisdictions, and that jurisdiction must inform all the other jurisdictions in which the offender is required to register.[15] The AWA enables states to determine the penalties to impose on an offender who fails to properly keep up with registration requirements. Though states have broad discretion, the AWA requires that the maximum prison term for failure to register must be greater than one year.[16]

Aside from the new registration requirements, the AWA also includes provisions that affect those who have been convicted of federal sex crimes. Specifically, the AWA revises the definition and classification of a sex offender, creates the Jimmy Ryce Civil Commitment Program for sexually dangerous offenders, lengthens the statute of limitations for various sex crimes, expands more victims' rights, creates more stringent discovery rules in sex cases, and imposes pretrial release conditions.[17]

In response to the AWA and SORNA, a host of constitutional challenges have emerged to these laws. Federal and state courts disagree on how to implement and enforce the AWA. The two most contentious issues that already plague the implementation of the AWA are: 1) whether the AWA's application to sex offenders convicted before the AWA was enacted violates the ex post facto clause of the

U.S. Constitution, and 2) whether the AWA's new Civil Commitment Program violates the equal protection and due process clauses of the Constitution.

Retroactive Application

The AWA does not specify whether the new law applies to offenders who were convicted before implementation of the AWA. Instead, the AWA delegates authority to the U.S. attorney general to determine whether the new law applies retroactively. On February 28, 2007, in response to Congress's grant of authority, then Attorney General Alberto Gonzales issued an interim order (later codified and made into a final order[18]) stating that SORNA applies to all sex offenders, including those convicted of a sex offense prior to the enactment of the AWA.[19] Therefore, those who fall under the new national standard of a sex offender will be required to register nationally, regardless of when they were convicted.

Under the AWA, it is a federal offense for state registrants, whether they were convicted before or after the AWA was enacted, to travel interstate and thereafter fail to register in the new jurisdiction.[20] This crime is punishable by up to 10 years of imprisonment.[21] An offender's registration requirements following interstate travel do not depend on whether the state to which he or she travels has implemented SORNA.[22] If sex offenders are required to register in their home state, they are required to register in every state to which they travel and stay longer than seven days.[23] Even an offender whose underlying offense was a state crime can be found guilty of the federal offense of failure to register after interstate travel. The federal offense occurs as soon as offenders fail to register by the end of the third day after they change their residence, school, or work.[24]

The retroactive application of SORNA has divided state and federal courts across the country—most notably among the U.S. Circuit Courts of Appeals. For example, in *United States v. Husted*, the Tenth Circuit held that a prosecutor must prove that an offender "travels in interstate commerce" for the offender to be prosecuted for failure to register after crossing state lines. The AWA's seemingly deliberate use of the term "travels," the court reasoned, is prospective and only applies to offenders who travel after the AWA was enacted.[25] Thus the court held that since the defendant traveled and failed to register before the AWA was enacted in July 2006, he was not guilty of failing to register under SORNA.[26]

In *United States v. May*, the Eighth Circuit agreed with the Tenth Circuit's rationale in *Husted* but considered whether a SORNA violation applies to a registered sex offender who travels interstate in the period between the passage of the AWA on July 27, 2006, and the attorney general's interim order on February 28, 2007. The court declared that SORNA applies to all sex offenders retroactively. The defendant in *May* argued that SORNA did not apply to him because he traveled in interstate commerce after the passage of the AWA but before the attorney general's interim ruling.[27] The Eighth Circuit denied the defendant's challenge under the ex post facto clause because the defendant "traveled in interstate commerce and failed to update his registration after enactment of SORNA."

The court explained that SORNA applies to all sex offenders and did not change in the period between its enactment and the interim order because "the Attorney General only promulgated the rule as a precautionary measure to foreclose such claims as May's by making it indisputably clear that SORNA applies to all sex offenders regardless of when they were convicted."[28] Therefore, the court held the statute was not retroactively applied to May and did not violate the Constitution's ex post facto clause because May traveled and failed to register after the AWA was enacted.[29]

The Seventh Circuit disagreed with the holdings in *Husted* and *May*. In *United States v. Dixon*, the defendants relied upon *Husted* and *May* for the propositions that they did not violate SORNA because they had traveled interstate before the AWA was enacted and, further, that their failure to register occurred before the attorney general issued his order regarding retroactivity of SORNA. The Seventh Circuit disagreed and held that SORNA could be applied retroactively to sex offenders who travel interstate before the AWA was enacted. Unlike the Tenth Circuit, the Seventh Circuit found that the need to track sex offenders traveling interstate "is as acute in a case in which the offender moved before the AWA was passed as in one in which he moved afterward."[30]

The *Dixon* court reached this holding by analogy to a felon with a gun who crosses state lines: The danger to the public remains the same no matter when the gun crosses state lines. So too, the danger to the public exists whether sex offenders travel before or after the attorney general issued his retroactivity order.[31] The court was unconvinced by the Tenth Circuit's present tense analysis of the word "travels" and instead referenced a Ninth Circuit case that held that a word from an opinion that was used in the present tense could be applicable to past, present, or future actions.[32] Therefore, the defendants who traveled before the AWA passed but failed to register once the AWA became law were found guilty of violating SORNA's registration requirements.

While the Ninth Circuit has not yet determined whether SORNA may be applied retroactively to offenders who travel interstate, it will soon have the opportunity to do so. On September 11, 2008, the U.S. District Court for Nevada entered a preliminary injunction against the state of Nevada in *American Civil Liberties Union v. Catherine Masto*.[33] The district court enjoined the state from retroactively enforcing state legislation designed to comply with the AWA and SORNA. U.S. District Court Judge Mahan ruled that the retroactive application of Nevada's sex offender registration law, inter alia, violated the constitutional ban on ex post facto laws and violated the due process clauses of the Fifth and Fourteenth Amendments.[34] In October 2008, the Nevada attorney general's office appealed Judge Mahan's ruling to the Ninth Circuit Court of Appeals.[35] At press time, it was uncertain whether oral argument, much less a briefing schedule, had been scheduled in the case. However, it appears that the Ninth Circuit will soon hear this case of first impression.

Challenges to the Civil Commitment Program

Another hotly contested component of the AWA is the implementation of the Jimmy Ryce Civil Commitment Program,[36] which authorizes the allocation of federal funding to the supervision, care, and treatment of "sexually dangerous people."[37] While many states, including California, have laws providing for the civil commitment of sexually violent predators, the AWA is the first federal program to commit sexually dangerous people.[38] Under the AWA, the government can seek to civilly commit any federal prisoner—not only those convicted of sex offenses—and can stay the release of that person for the duration of the civil commitment proceedings. The government need only prove by clear and convincing evidence that 1) the defendant has engaged or attempted to engage in sexually violent conduct or child molestation, and 2) is sexually dangerous to others. If the government carries its burden in proving both elements, then the defendant is committed to the custody of the U.S. attorney general until the state will assume responsibility or until the defendant is found to be no longer sexually dangerous.[39]

Under the AWA, the government can wait until an offender has completed his or her prison sentence before moving for a determination of sexual danger. Consequently, the offender remains in custody beyond his or her sentence, without the opportunity to post bail. While the government must afford a hearing for each person being evaluated for civil commitment, the government has no obligation to provide an attorney or present *Miranda* warnings.[40] Furthermore, the bur-

den of proof to determine whether an offender is sexually dangerous is not based on the reasonable-doubt standard; rather, the standard is clear and convincing evidence.[41] Although committed offenders have the right to request a review of their commitment every 180 days, a civil commitment actually is akin to a life sentence because it is very difficult for offenders to be removed from the program. For an offender to be released from civil commitment, the court must find by a preponderance of the evidence that the committed person is no longer sexually dangerous.

Not surprisingly, common challenges to the Civil Commitment Program have been based on the due process, equal protection, and commerce clauses of the Constitution. Defense counsel have argued 1) that the AWA permits the government, in violation of due process, to detain inmates past their release dates without bail or the right to a prompt postdeprivation hearing, 2) that the law is too broad because it applies to all federal prisoners in violation of the equal protection clause, and 3) that civil commitment is not related to any economic or commercial activity in violation of the commerce clause.

To date, no Ninth Circuit or California district court cases have addressed these constitutional challenges regarding the civil commitment of sex offenders under the AWA. However, courts in other jurisdictions have considered these arguments. The U.S. District Court in Massachusetts, in the First Circuit Court of Appeals, recently held that because civil commitments fall under civil law and are therefore not intended to be a criminal punishment, due process procedures required in criminal proceedings are not mandatory in civil commitment hearings.[42] The court further held that there is a rational basis for the government to differentiate between a sexually dangerous offender and a person with a mental disorder without violating the mandates of equal protection: "[A] person with a mental disorder of a sexual nature is qualitatively more dangerous than another mental patient who nonetheless threatens danger to himself or others…and so, the differing provisions…pass rational basis review."[43]

Conversely, the U.S. District Court in Massachusetts held in another case that the standard of clear and convincing evidence is not a sufficient evidentiary threshold to force an inmate into civil commitment. Accordingly, the court held that "any application of the [AWA] to an individual without a finding beyond a reasonable doubt of sexually violent conduct or child molestation is [u]nconstitutional. The government can meet its burden by demonstrating that the person has been previously convicted of a relevant sex crime."[44]

In *United States v. Comstock*, the Fourth Circuit Court of Appeals addressed the argument that the civil commitment provisions of the AWA exceed the powers of Congress under the commerce clause. First, the court held that the federal civil commitment program "lie[s] beyond the scope of Congress' authority. The Constitution does not empower the Federal government to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any Federal law."[45] Just as the states control civil commitment of the mentally ill, so too should the states have jurisdiction over civil commitment of sex offenders because, as the court noted, the federal government has no general police power.

Next, the *Comstock* court found unpersuasive the government's arguments that civil commitments fall under the commerce clause and the necessary and proper clause. The court relied upon *United States v. Lopez*, in which the U.S. Supreme Court held that a federal law regulating the possession of a firearm in a school zone exceeded the powers of Congress under the commerce clause because the law lacked a sufficient nexus to interstate commerce. The court held that, likewise, "sexual dangerousness does not substantially affect interstate commerce."[46] Furthermore, a federal civil commitment program is not necessary and proper, according to the court, because the federal government only maintains jurisdiction over offenders while they are in federal prison. The government does not continue to possess this power after the prison sentence expires. If the government retained this power, it would clash with the parens patriae power, or police power, reserved for the states.[47]

While the Ninth Circuit has yet to rule on these issues, the U.S. District Court for the Northern District of California recently held in *United States v. Hardeman* that SORNA does represent a valid exercise of Congress's power under the commerce clause.[48] The Northern District made this determination notwithstanding the fact that other district courts have found SORNA unconstitutional under the commerce clause.[49] Congress has the power under the commerce clause to regulate 1) the channels of interstate commerce, 2) the instrumentalities of interstate commerce, or people or things in interstate commerce, and 3) activities that substantially affect interstate commerce.[50] The defendant in *Hardeman* argued that SORNA is unconstitutional because there is no nexus between interstate travel and the defendant's crime—the failure to register. The government, on the other hand, maintained that SORNA squarely falls within the parameters of Congress's power under the commerce clause because Congress, by enacting SORNA, is regulating the movement of people in interstate commerce.[51]

The court, agreeing with the government, held that SORNA falls under the power of Congress to regulate interstate commerce because SORNA is a lawful attempt to ensure that the channels of interstate commerce do not "become the means of promoting or spreading evil, whether of a physical, moral or economic nature."[52] Furthermore, although the court admitted that SORNA has shortcomings and "is not as narrowly tailored as it could be," the court held that the registration requirement in potentially multiple jurisdictions is a proper exercise of congressional authority under the commerce clause because it appropriately tracks offenders who move across state lines.[53]

Defense attorneys have crafted a variety of additional arguments to challenge the AWA, with little success. Some have argued that the Tenth Amendment prevents the federal government from forcing state officials to carry out federal laws.[54] Other challenges have been based on the doctrines of separation of powers and nondelegation. These two arguments essentially address the same issue: whether Congress, by giving the attorney general the sole power to determine the applicability of SORNA to those convicted of sex offenses prior to its enactment, impermissibly delegated a legislative task to the executive branch. Thus far, challenges based on the doctrines of separation of powers and nondelegation have been largely unsuccessful.

One of the primary purposes of the Adam Walsh Act is to create uniformity among states. However, the question remains whether this goal can be achieved within the parameters of the U.S. Constitution and individual state constitutions. The difficulty lies in the fact that each of the 50 states has the ability to create more stringent rules than required by the AWA or simply disregard the requirements and instead lose a small portion of grants. Before the looming state compliance deadline arrives, courts are already in disagreement over how to apply the AWA and SORNA. With inconsistent judicial decisions across the country regarding the constitutionality of these new laws, the AWA and SORNA face a certain fate: a date with the U.S. Supreme Court. ■

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[1] Rich Phillips, *Police: Drifter Killed Adam Walsh in 1981*, cnn.com, Dec. 16, 2008, *available at* http://www.cnn.com/2008/CRIME/12/16/walsh.case.closed/index.html.

[2] Amy Baron-Evans & Sara Noonan, The Adam Walsh Child Protection and Safety Act—Part I, Oct. 19, 2006, *available at* http://www.fd.org/pdf_lib/Adam%20Walsh%20MemoPt%201.pdf.

[3] States can receive up to two one-year extensions on the July 2009 deadline. 42 U.S.C. §16924(b); *see* Lori McPherson, Practitioner's Guide to the Adam Walsh Act (2007), *available at* http://www.ojp.usdoj.gov/smart/pdfs/practitioner_guide_awa.pdf.

[4] Justice Policy Institute, What Will It Cost States

TO COMPLY WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT?, *available at* http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf.

[5] *Id*.

[6] *Id*.

[7] *See* http://www.meganslaw.ca.gov/ for California's sex offender Web site.

[8] U.S. DEPARTMENT OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION, June 2008, *available at* http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf.

[9] Pub. L. No. 109-248 (July 27, 2006), *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ248.109.pdf. *See also* LORI MCPHERSON, *supra* note 3.

[10] *Id*.

[11] *Id*.

[12] LORI MCPHERSON, *supra* note 3.

[13] U.S. DEPARTMENT OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION, *supra* note 8.

[14] *Id*.

[15] Pub. L. No. 109-248 (July 27, 2006), *supra* note 9.

[16] 42 U.S.C.S. §16913.

[17] AMY BARON-EVANS & SARA NOONAN, *supra* note 2.

[18] 28 C.F.R. §72.3 (2009); U.S. DEPARTMENT OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION, *supra* note 8.

[19] 28 C.F.R. §72.3 (2009).

[20] 18 U.S.C.S. §2250.

[21] U.S. DEPARTMENT OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION, *supra* note 8.

[22] United States v. Gould, 526 F. Supp. 2d 538, 542 (D. Md. 2007).

[23] U.S. DEPARTMENT OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION, *supra* note 8.

[24] U.S. Department of Justice, Frequently Asked Questions: The Sex Offender Registration and Notification Act Final Guidelines, *available at* http://www.ojp.usdoj.gov/smart/pdfs/sorna_faqs.pdf.

[25] United States v. Husted, 545 F. 3d 1240, 1243 (10th Cir. Okla. 2008).

[26] *Id*. at 1246.

[27] United States v. May, 535 F. 3d 912, 914 (8th Cir. Iowa 2008).

[28] *Id*. at 919.

[29] *Id*. at 920.

[30] United States v. Dixon, 551 F. 3d 578, 582 (7th Cir. Ind. 2008).

[31] *Id*. (citing Scarborough v. United States, 431 U.S. 563 (1977)).

[32] *Id*. at 583 (citing Coalition for Clean Air v. Southern Cal. Edison Co., 971 F. 2d 219, 225 (9th Cir. 1992)).

[33] American Civil Liberties Union v. Catherine Masto, Case No. 2:08-cv-00822 JCM-PAL (D. Nev.) (filed June 24, 2008).

[34] Carri Geer Thevenot, *Permanent Injunction: Offender Statute Restricted*, LAS VEGAS REV. J., Sept. 11, 2008, *available at* http://www.lvrj.com/news/28232419.html.

[35] David Kihara, *State Appeals Sex Offender Law Ruling*, LAS VEGAS REV. J., Oct. 31, 2008, *available at* http://www.lvrj.com/news/33628204.html; American Civil Liberties Union v. Catherine Masto, Case No. 08-17471 (9th Cir.) (notice of appeal filed on Oct. 29, 2008).

[36] 42 U.S.C.S. §16913.

[37] Pub. L. No. 109-248, tit. III (July 27, 2006), *supra* note 9.

[38] According to the AWA, a "sexually dangerous person" suffers from a serious mental illness, abnormality, or disorder and, as a result, the person has serious difficulty refraining from sexually violent conduct or child molestation. Pub. L. No. 109-248 (July 27, 2006), *supra* note 9.

[39] United States v. Comstock, 507 F. Supp. 2d 522, 527-28 (E.D. N.C. 2007).

[40] AMY BARON-EVANS & SARA NOONAN, ADAM WALSH ACT III: IT'S NOT THE SENTENCE, IT'S THE COMMITMENT…, Sept. 10, 2007, *rev'd*, Sept. 25, 2007, *available at* http://www.fd.org/pdf_lib/Adam.Walsh.III.REV.9.24.07.FINAL.pdf.

[41] *Id*.

[42] United States v. Carta, 503 F. Supp. 2d 405, 409 (D. Mass. 2007).

[43] *Id*. at 408-09.

[44] United States v. Shields, 522 F. Supp. 2d 317, 331 (D. Mass. 2007).

[45] United States v. Comstock, 551 F. 3d 274, 280 (4th Cir. N.C. 2009).

[46] *Id*. at 280.

[47] *Id*. at 281.

[48] United States v. Hardeman, 2009 U.S. Dist. LEXIS 7561 (N.D. Cal. Jan. 23, 2009).

[49] *See* United States v. Myers, 2008 U.S. Dist. LEXIS 99384, 2008 WL 5156671 (S.D. Fla. 2008) ("The jurisdictional element of 'interstate travel' is an indefinite requirement that only requires a person to have traveled in interstate commerce. The purpose attached to the travel is left unstated and is utterly divorced from the activity being regulated: knowingly failing to register as a sex offender."); United States v. Powers, 544 F. Supp. 2d 1331, 1333-34 (M.D. Fla. 2008).

[50] *See* United States v. Lopez, 514 U.S. 549, 558 (1995).

[51] Hardeman, 2009 U.S. Dist. LEXIS 7561, at *12.

[52] *Id*.

[53] *Id*. at *16.

[54] *See* Printz v. United States, 521 U.S. 898 (1997).