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SORNA in the Eighth Circuit

By Daniel Hassing*

Child exploitation and other sexual crimes are some of the most perverse and pervasive crimes in the United States. Cases such as those involving Elizabeth Smart and Jessica Lunsford grab headlines and demonstrate the depravity of some criminals.[1] In an effort to combat such offenders, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006.[2] Title I of the Act is called the Sex Offender Registration and Notification Act (SORNA).[3]

In the past year, the Eighth Circuit Court of Appeals has decided two cases involving challenges to SORNA.[4] Both cases involved criminal defendants who argued, among other things, that provisions of SORNA violated the Commerce Clause. These cases are *United States v. May*[5] and *United States v. Howell*.[6] In both cases, the Eighth Circuit upheld the challenged provisions of SORNA.

The purpose of this commentary is to explain the Eighth Circuit's decisions in *May* and *Howell*. This commentary contains four parts. The first is a summary of the facts and holdings of *May* and *Howell*. The second is a very brief overview of Commerce Clause jurisprudence. The third examines how courts across the country have applied that jurisprudence to SORNA. The last section explains what *May* and *Howell* mean for practitioners in the Eighth Circuit.

The Cases

* Online Editor, NEBRASKA LAW REVIEW. J.D. candidate, expected May 2010. I would like to thank Michelle Salter, Stephanie Mahlin, and Patrick Barackman for reviewing drafts.

1 *See* Elizabeth Smart, WIKIPEDIA, http://en.wikipedia.org/wiki/Elizabeth_Smart (last accessed Feb. 23, 2009); Jessica Lunsford, WIKIPEDIA, http://en.wikipedia.org/wiki/Jessica_Lunsford (last accessed Feb. 23, 2009).

2 Pub. L. No. 109-248, 120 Stat. 587 (2006).

3 42 U.S.C.A. §§ 16901-16991 (2008).

4 The Eighth Circuit is not alone. SORNA has been challenged in several courts across the country. *See* Tracy Bateman Farrell, Annotation, *Validity, Construction, and Application of Federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. §§16901 et. seq., Its Enforcement Provision, 18 U.S.C.A. §2250, and Associated Regulations*, 30 A.L.R. FED. 2D 213, §§ 17,18 (2008).

5 535 F.3d 912 (8th Cir. 2008).

6 No. 08-2126 (8th Cir. Jan. 13, 2009).

May and *Howell* implicate two provisions of SORNA.[7] To briefly summarize the relevant statutes, § 16913 requires that sex offenders keep authorities apprised of their whereabouts. The offender must also alert authorities in any new jurisdiction to which the offender relocates. Section 2250 provides for criminal sanctions if the offender fails to update the registration.[8]

David May initially pled guilty to misdemeanor sexual conduct in Oregon. As required, he registered as a sex offender. However, he then moved to Maryland where he failed to register. After being convicted and serving prison time for that failure in Maryland, May eventually relocated back to Oregon, where he again failed to register and was again convicted for it. May then moved to Iowa where he again failed to register. This led to his arrest and the present case.

May challenged SORNA on numerous grounds, including an assertion that SORNA went beyond Congress' commerce power. The Eighth Circuit disagreed with May's claim. In reaching its conclusion, the court relied heavily on the language of § 2250, specifically, the "jurisdictional hook" which required that May move in interstate commerce in order to be convicted.[9] The court further explained that Congress has long been able to regulate interstate commerce as means of preventing evil and immorality.[10] Based on this reasoning, the court concluded that "SORNA contains a sufficient nexus to interstate commerce."[11]

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[7] 18 U.S.C. § 2250 (2006) and 42 U.S.C.A. § 16913 (2008).

[8] The actual language of § 2250 is pivotal in the court's analysis. It states:

> (a) In general.—Whoever—
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> (1) is required to register under the Sex Offender Registration and Notification Act;
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> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
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> (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 the Sex Offender Registration and Notification Act;
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> shall be fined under this title or imprisoned not more than 10 years, or both.

[9] The court found § 2250 valid under all of the *Lopez* prongs. United States v. May, 535 F.3d 912, 921 (2008). *See also infra* notes 14-36 and accompanying text (explaining *Lopez* prongs). However, the court provided reasoning relating only to the first two prongs in *May*.

[10] *May*, 535 F.3d at 921-22.

[11] *Id.* at 922.

Howell involved the consolidated appeals of two men convicted under SORNA and the corresponding criminal statute. Both defendants, like May, had previously been convicted of sex crimes, moved between several states, and ultimately failed to register.

In *Howell*, the Eighth Circuit, relying on *May*, did not independently analyze the constitutionality of § 2250 and instead focused on § 16913. In upholding § 16913, the court relied on two constitutional provisions—the Commerce Clause and the Necessary and Proper Clause.[12] The court's analysis was relatively simple and straightforward. It posited that since § 2250 is a legitimate end under the Commerce Clause, Congress could take reasonable steps to further its goals. The court then went on to say that the purpose of SORNA was to track sex offenders who move interstate. Many offenders move in order to exploit the patchwork, state-based system of sex offender registration. The registration requirement of § 16913 was thus constitutional as it was "a necessary part of a more general regulation of interstate commerce."[13] Essentially, it was deemed necessary because the court felt that without the federal registration requirement, the entire statutory scheme could potentially be undermined.

The Commerce Clause

Under the Commerce Clause, Congress can regulate three categories of interstate commerce:

> First, Congress may regulate the use of channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[14]

Each of these areas will be briefly examined in turn.[15]

Under the first prong, Congress may regulate the channels of interstate commerce. Channels of interstate commerce include highways, canals, and hotels, among others. In *Brooks v. United States*,[16] the Court upheld a federal statute criminalizing the interstate transportation of

[12] The Necessary and Proper Clause of the Constitution allows Congress to use means reasonably adapted to a legitimate end, even if Congress was not explicitly given them. As was said in *McCulloch v. Maryland*, "[l]et 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." 17 U.S. (4 Wheat.) 316, 421 (1819).

[13] United States v. Howell, No. 08-2126, slip op. at 13-14 (8th Cir. Jan. 13, 2009) (quoting Gonzales v. Raich, 545 U.S. 1, 37 (2005) (Scalia, J., concurring)).

[14] United States v. Lopez, 514 U.S. 549, 558-559 (1995) (citations omitted).

[15] For a discussion of preceding commerce clause jurisprudence, see *id.* at 552-60. A full discussion of the evolution of the Commerce Clause jurisprudence is beyond the scope of this commentary.

[16] 267 U.S. 432 (1925).

stolen automobiles. The Court stated that "Congress can certainly regulate interstate commerce to . . . [forbid] and [punish] the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm . . . ."[17] Thus, the Court has deemed interstate criminal activity to be a proper target of the Commerce Clause.[18] The Court approved a statute banning goods produced under exploitative labor conditions from interstate commerce in *United States v. Darby*.[19] Congress can even regulate hotels as a channel of interstate commerce. In *Heart of Atlanta Motel, Inc. v. United States*,[20] the appellant wished to deny African-Americans the use of his hotel in contravention of the Civil Rights Act of 1964. He was denied this wish with the Court declaring that "[t]he transportation of passengers in interstate commerce . . . is within the regulatory power of Congress, . . . and the 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."[21]

The second prong allows Congress to regulate the "persons and things in interstate commerce, even though the threat may come only from intrastate activities."[22] In the *Shreveport Rate Cases*,[23] the Court assessed Congress' attempt to check discriminatory shipping prices in Texas and Louisiana; intrastate shipments were far cheaper than interstate shipments. The appellants argued that Congress was powerless to regulate the intrastate rates. The Court disagreed and upheld Congress' power.[24] It was immaterial that the regulation would necessarily control intrastate pricing as well.[25] In *Southern Railway Co. v. United States*,[26] the Court upheld a law requiring certain safety requirements to be implemented on any train or locomotive used on any railway engaged in interstate commerce. The rail company argued it went too far as it would include cars and trains that only shipped goods intrastate. The Court refused to follow

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[17] *Id.* at 436.

[18] For other criminal statutes that have been upheld under the Commerce Clause, see LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA 438-41 (4th ed. 2001) and JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 189-92 (6th ed. 2000).

[19] 312 U.S. 100 (1941). *Darby* is also relevant to the third prong. The law in question in the case also dealt with working conditions mandated by Congress. These provisions of the law were upheld on the basis of their relation to interstate commerce.

[20] 379 U.S. 241 (1964). *Heart of Atlanta*, like *Darby*, is also a very important case in the jurisprudence of the third prong.

[21] *Id.* at 256 (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)).

[22] United States v. Lopez, 514 U.S. 548, 558 (1995).

[23] 234 U.S. 342 (1914).

[24] "The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention." *Id.* at 354.

[25] "It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates." *Id.* at 354.

[26] 222 U.S. 20 (1911).

this line of reasoning, stating that "it is no objection . . . that the dangers intended to be avoided arise . . . out of matters connected with intrastate commerce."[27]

The third prong allows Congress to regulate those activities that have a substantial effect on interstate commerce. This prong has had a long evolution and the test for the prong has changed over time.[28] However, there are three principal cases that presently control. These are *United States v. Lopez*,[29] *United States v. Morrison*,[30] and *Gonzales v. Raich*.[31] The defendant in *Lopez* was convicted of possessing a firearm on school grounds. He challenged his conviction on the grounds that the federal criminal statute exceeded Congress's authority under the Commerce Clause. The Supreme Court agreed and, in overturning his conviction, made clear that the commerce power did have its limits;[32] congressional statutes relying on the third prong would only be upheld if they *substantially* affected interstate commerce.[33] The act challenged in *Morrison* provided a federal civil remedy for women who were victims of gender-motivated crimes. As in *Lopez*, the Court again struck down this law, declaring that it did not contain a sufficient nexus to interstate commerce; again the Court found the government's alleged effect on interstate commerce to be too attenuated. California's decision to allow marijuana to be used for medicinal purposes was the focal point in *Raich*. While the state had legalized marijuana for such purposes, the federal government had imposed an outright prohibition on the drug—criminalizing its use and possession for any purpose. The respondents in the case, patients who were prescribed marijuana, challenged the federal law. The Court sided with the federal government and upheld the law, focusing on the economic nature of marijuana use,[34] thus deeming the law to have a sufficiently substantial effect on interstate commerce.

Taken together, these cases illustrate that the third prong commerce power will not be as wide as it once was. After *Lopez*, Professor Tribe suggested that the operative question might not deal with the quantity of effects, but rather the nature of the underlying activity.[35] Tribe argues that the key may be whether or not the activity is economic. Indeed, in both *Lopez* and

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[27] *Id.* at 27.

[28] *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 807-24 (3rd ed. 2000).

[29] 514 U.S. 549 (1995).

[30] 529 U.S. 598 (2000).

[31] 545 U.S. 1 (2005).

[32] In the years between 1937 and 1995, the Court engaged in an extremely deferential view of Congress' exercise of power under the Commerce Clause. During this time, "striking down a congressional attempt to invoke the commerce power as outside the affirmative scope of that power was a *de facto* impossibility." TRIBE, *supra* note 28, at 816.

[33] The government argued that guns in schools would lead to less educated graduates who in turn would be less productive in society. The government also argued that the cost of violent crime was high and that, because of this, gun possession in schools thus had a substantial effect on interstate commerce. The Court rejected these arguments as the effects appeared to be too attenuated. *Lopez*, 514 U.S. at 563-64.

[34] *Raich*, 545 U.S. at 26.

[35] TRIBE, *supra* note 28 at 819.

Morrison, the Court considered whether or not the activity was economic.[36] This distinction also makes it possible to square *Raich* with these decisions, as there is a commercial market for marijuana. Thus, at least presently, it appears that only conduct economic or commercial in nature can be regulated under the third prong.

Other Courts' Approaches to SORNA

When analyzing SORNA under the framework established by prior Commerce Clause cases, the vast majority of courts have found § 2250 and § 16913 to be constitutional[37] while very few have found otherwise. Those courts that have found SORNA to be valid under the Commerce Clause have relied to varying degrees on all three prongs.

The most convincing defenses of SORNA rely on its jurisdictional hook to uphold the law under either the first or second *Lopez* prong. In *United States v. Ditomasso*,[38] a district court upheld § 2250 by saying that the government was required to prove there was interstate travel to sustain a conviction. Without interstate travel, there is no federal offense. The court also countered the defendant's claim that anything could be reached by merely asserting a jurisdictional hook by noting that the regulated activity, registration, was closely connected to the jurisdictional element. Interstate travel was not enough; the defendant also had to fail to register after moving interstate.[39] The court in *United States v. Hinen*[40] found that § 2250 was valid under the second prong. The court also noted that when a jurisdictional element is present, the regulated activity need not "substantially affect" commerce; a de minimis effect is sufficient.[41]

Courts have also upheld the provisions under the third *Lopez* prong.[42] In less-than-thoroughly explained reasoning, one court found that there was a rational basis for finding that

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[36] "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." United States v. Morrison, 529 U.S. 598, 610 (2000).

[37] *See*, *e.g.*, United States v. May, 535 F.3d 912 (8th Cir. 2008). *See also* Farrell, *supra* note 4 at § 17 (2008) (listing several courts that have held SORNA to be constitutional under the commerce clause).

[38] 552 F. Supp. 2d 233 (D.R.I. 2008).

[39] *Id.* at 247.

[40] 487 F. Supp. 2d 747 (W.D. Va. 2007).

[41] *Id.* at 758. The court found this standard to be satisfied as the law required the person to move across state lines. *See also* United States v. Mason, 2008 WL 1882255, *3 (M.D. Fla. April 24, 2008) (holding SORNA to be constitutional, stating "a statute containing a jurisdictional element is constitutional so long as the crime has a minimal nexus with interstate commerce").

[42] Although the courts that have upheld § 16913 and § 2250 under the third *Lopez* prong have not provided thorough reasoning, there is a good case for such an argument. Section 2250 is only applicable when, along with other things, § 16913 requires an updated registration and the defendant fails to do so. Section 16913 requires registration only when there has been a change in name, residence, employment, or student status. Several of these could be argued to have an effect on interstate commerce as employment and relocation are economic activities. *See supra* notes 28-36 and accompanying text.

there was a substantial effect as "Congress's desire [was] to track sex offenders as they move between states, in order to promote the public safety."[43] *United States v. Hacker*[44] also jumps to a conclusion of constitutionality. There the court simply assumed that because Congress was tracking people who move between states, there was a rational basis for assuming § 2250 has a substantial effect on interstate commerce.

A few courts that have examined SORNA have found, at least parts of it, to be unconstitutional. *United States v. Powers*[45] found § 2250 to be unconstitutional. The court found § 2250 to be invalid under the first two prongs as the interstate travel per se was not regulated; sex offenders were free to travel and would not have to register as long as they did not change anything listed under § 16913.[46] The court also rejected the argument that § 2250 had a substantial effect on interstate commerce, discounting the jurisdictional hook by saying "[t]he Commerce Clause . . . require[s] more than statutory 'lip service' to interstate commerce."[47] The court in *United States v. Hall*, while finding § 2250 itself to be permissible, found § 16913 to be unconstitutional as it did not fall into any of the *Lopez* prongs.[48] *United States v. Waybright*[49] also found § 2250 to be constitutional but refused to deem the registration requirement constitutional. The court rejected both the Commerce Clause argument and the Necessary and Proper Clause argument. In striking down the latter, the court held that reliance on *Raich* was incorrect as that case dealt with an economic regulation.[50] The court also claimed that the end furthered by the registration requirement was not proper under the clause. The court, relying on the statutory language of SORNA as a whole, held that the primary purpose of SORNA was to register sex offenders, not to track them across states. Thus, since the ultimate goal had nothing to do with interstate commerce, the reliance on the Necessary and Proper Clause was misplaced.[51]

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[43] United States v. Madera, 474 F. Supp. 2d 1257, 1265 (M.D. Fla. 2007). The court was not even clear what prong it was applying. One can assume it was applying the third prong based on the language it quoted from *Raich*, a third prong case. However, the court's explanation of why it found a substantial effect was conclusory. *United States v. Holt*, No. 3:07-cr-0630-JAJ, 2008 WL 1776495, at *3 (S.D. Iowa April 14, 2008) echoes the scant reasoning put forward in *Madera*.

[44] No. 8:07CR243, 2008 WL 312689 (D. Neb. Feb. 1, 2008).

[45] 544 F. Supp. 2d 1331 (M.D. Fla. 2008).

[46] *Id.* at 1333-34.

[47] *Id.* at 1335.

[48] United States v. Hall, 577 F. Supp. 2d 610 (N.D.N.Y. 2008). However, the court in *Hall* did not consider § 16913 in light of the Necessary and Proper Clause. Also, seeing as the registration requirement was invalid, a conviction under § 2250 would be invalid as the registration could not be constitutionally required.

[49] United States v. Waybright, 561 F. Supp. 2d 1154 (D. Mont. 2008).

[50] *Id.* at 1166.

[51] *Id.* at 1165-67. *United States v. Guzman*, 582 F. Supp. 2d 305 (N.D.N.Y. 2008), engages in a similar analysis to *Waybright* in striking down the Necessary and Proper Clause argument.

What *May* and *Howell* Mean

May and *Howell* signify that, when assessing a statute under the Commerce Clause, the Eighth Circuit is going to give significant weight to jurisdictional elements in a statute. Relying on cases such as *Brooks* for the proposition that Congress can keep the channels of interstate commerce clear of immoral behavior, the Eighth Circuit will be highly deferential to any statute containing a jurisdictional hook. Further, it appears that even criminal statutes aimed at crimes that are not in any sense commercial will be easily sustained under the Eighth Circuit's ruling. As Professor Tribe noted, the changes in the Commerce Clause jurisprudence brought forth by *Lopez*, *Morrison*, and *Raich* do not affect the analysis under the first two *Lopez* prongs.[52] Judging by the arguments put forward against SORNA across the country, practitioners have, however, apparently failed to recognize this.

Unfortunately, the Eighth Circuit's reasoning in *Howell* is likely to perpetuate this misunderstanding. The problem is the court's reliance on Justice Scalia's concurring opinion in *Raich*.[53] *Raich* was a third prong case, meaning that the activity to be regulated had to have a substantial effect on interstate commerce. Although the intrastate activity sought to be regulated did not have such an effect, it was deemed to be necessary to regulate it because the entire regulatory framework might collapse otherwise. While the court's cite to *Raich* is by no means incorrect, the result could be reached in a manner that does not rely on third prong cases and thus cause unnecessary confusion.

As was made clear in *Lopez*, *Morrison*, and *Raich*, Congress can regulate three areas of activity under the Commerce Clause.[54] In *May*, it was determined that § 2250 was a valid regulation under either the first or second prong.[55] The Necessary and Proper Clause of the Constitution allows Congress to take means reasonably adapted to a legitimate end, even if Congress was not given those powers, as long as there is no separate constitutional bar to the acts.[56] As was stated in *Howell*, the purpose of SORNA is "to track the interstate movement of sex offenders."[57] Tracking the interstate movement of people, *i.e.*, instrumentalities of interstate commerce, is clearly a legitimate end of the Commerce Clause.[58] And since there is no bar to a

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[52] TRIBE, *supra* note 28 at 827.

[53] United States v. Howell, No. 08-2126, slip op. at 8 (8th Cir. Jan. 13, 2009).

[54] *See supra* note 14 and accompanying text.

[55] *See supra* notes 9-11 and accompanying text.

[56] *See supra* note 12.

[57] *Howell*, No. 08-2126 at 11.

[58] There has been some debate about what the "end" of SORNA is. *United States v. Waybright*, 561 F. Supp. 2d, 1154, 1166 (D. Mont. 2008), argues that the registration itself is the end, and not just a means of furthering another legitimate end. Since intrastate regulation itself is not a valid aim of the Commerce Clause, the court in *Waybright* found § 16913 to be unconstitutional. In *Howell*, Judge Riley dedicated several paragraphs to refute the claim that registration was the end itself rather than a means to facilitate the interstate tracking of sex offenders.

The text of the Act lends credence to the *Waybright* position. 42 U.S.C.A. § 16901 reads that the Act "establishes a comprehensive national system for the registration of those offenders." However, as all states

registration requirement found in the Constitution, it would appear that § 16913 is an appropriate use of the Necessary and Proper Clause. Thus, rather than relying on *Raich*, and opening the door to the economic/non-economic arguments put forward in the Eighth Circuit and other courts, the court could have simply cited to *Brooks*, *Lopez*, and *McCulloch*, and avoided the issue and confusion.

In sum, criminal defense lawyers in the Eighth Circuit whose clients are charged with federal crimes including a jurisdictional hook face an uphill battle; it is unlikely that they will be able to successfully challenge the statute under the Commerce Clause. Arguments that their clients' cases resemble *Lopez* or *Morrison* are likely to fall flat.

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currently have their own registries, it goes to reason that a national registry would be designed to keep track of an offender as he moves from one state to another.