IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID LOUIS MAY, Defendant,	**No. 4:07-cr-00164-JEG** **No. 1:07-cr-00059-JEG**
UNITED STATES OF AMERICA, Plaintiff, vs. JOHN ARTHUR PERRY, Defendant.	**O R D E R**

Before the Court are Motions to Dismiss in criminal actions No. 4:07-cr-00164 (United States v. David May) and No. 1:07-cr-00059 (United States v. John Perry). Defendants David May ("May") and John Perry ("Perry") (collectively "Defendants") have been charged in separate single-count indictments for violations of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. Because the Defendants' motions share similar factual bases and both challenge the applicability and constitutionality of § 2250, the Court has consolidated the motions for consideration. The Court conducted a hearing on the motions on September 6, 2007. Federal Public Defender Jim Whalen represented Defendant David May, Federal Public Defender John Burns represented Defendant John Perry, and Assistant United States Attorney Shannon Olson appeared telephonically for the Government. The matter is fully submitted and ready for disposition.

I. BACKGROUND

A. 18 U.S.C. § 2250

On July 27, 2006, Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 (the Act), Pub. L. No. 109-248, codified at 42 U.S.C. §§ 16901-16991. Title I of the Act, entitled the Sex Offender Registration and Notification Act (SORNA), establishes a national sex offender registry. Id. at §§ 16901-16920. SORNA specifies when a sex offender must initially register and sets forth the offender's obligation to keep the registration current:

> (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 –
> (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.
> (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. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.
> (d) Initial registration of sex offenders unable to comply with subsection (b) of this section
> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.
> (e) State penalty for failure to comply

> Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

Id. at § 16913. Under SORNA, a sex offender who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country," and "knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act," is subject to federal criminal penalties. Federal Failure to Register Act (FFR), 18 U.S.C. § 2250 (a)(1)-(3).

On February 28, 2007, the Attorney General exercised the authority delegated by Congress under 42 U.S.C. § 16913(d), and issued an interim regulation addressing the applicability of SORNA to special categories of sex offenders, "who are unable to comply with the [the initial registration requirements of] subsection (b) of SORNA," including sex offenders "convicted before July 27, 2006." The interim regulation states, "The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3.

B. Indictment of Defendant May

In 1994, May pleaded guilty in Oregon to misdemeanor sexual conduct. As a consequence of his 1994 conviction, May was required to register as a sex offender with the Oregon Sex Offender Registry and to keep his registry updated. See O.R.S. § 181.595. May initially registered on June 26, 2000, but thereafter left Oregon, relocated to Maryland, and failed to update his registry in Oregon. Id. § 181.596. May also failed to register as a sex offender as required under Maryland law. See Md. Code Ann. Crim. Pro. §§ 11-701–11-705 (LexisNexis 2006). On June 19, 2002, May was arrested, and later convicted, for failing to register as a sex offender in Maryland. May registered as a sex offender in Maryland on July 11, 2002, but failed

to update his registry after he was released from jail on November 6, 2002. Thereafter, May relocated to Oregon, failed to update his sex offender registry in Oregon, and was convicted on December 21, 2004, for failure to register as a sex offender. May updated his registry with Oregon and complied with his registration requirements through November 8, 2006. However, on November 18, 2006, May relocated to Iowa, did not update his registry in Oregon, and failed to comply with Iowa's sex offender registry requirements, see Iowa Code § 692A.1-.16. On June 20, 2007, after being arrested in Iowa for simple assault on a police officer, the Grand Jury indicted May for being a sex offender who traveled in interstate commerce and knowingly failed to register and update his registration, in violation of SORNA.

C. Indictment of Defendant Perry

In June 1998, Perry was convicted of misdemeanor sexual conduct in Michigan. As a result of his conviction, Perry was required to register as a sex offender and to comply with the Michigan Sex Offender Registry, including providing notice of any change of residence. See Mich. Comp. Laws. Ann. § 28.723 (West 2004). Perry filed his initial registration on June 29, 1998. Between June 1998 and June 2007, Perry relocated several times, including a relocation to Iowa in 2003. Perry initially registered as a sex offender with the State of Iowa in December 2003 and signed a form acknowledging his requirement to annually update his registry and to provide notification of a change of residence. See Iowa Code §§ 692A.3-.4. Perry, however, failed to annually update his Iowa registration. On May 1, 2007, Perry filed a change of mail request, indicating an address change from a residence in Michigan to a residence in Red Oak, Iowa. Perry failed to register the relocation with the sex offender registries in both Michigan and Iowa. On July 10, 2007, the Grand Jury indicted Perry for being a sex offender who traveled in interstate commerce and knowingly failed to register and update his registration, in violation of SORNA.

II. DISCUSSION

A. SORNA's Applicability to Defendants

Defendants admit traveling in interstate commerce after the enactment of SORNA but argue SORNA does not apply to them because their travel occurred before the Attorney General issued the interim ruling designating the application of SORNA to offenders convicted before SORNA's date of enactment. The Government argues § 16913(d) only applies to those sex offenders unable to initially register within the time limits specified by the statute, and therefore, because Defendants had already initially registered, the Attorney General's promulgation of the interim rule regarding initial registration is irrelevant as to these Defendants.

Neither the Eighth Circuit nor any other courts of appeals have addressed this issue and district courts having addressed the issue have reached differing results. Defendants rely on United States v. Muzio, No. 4:07CR179, 2007 WL 2159462 (E.D. Mo. July 26, 2007). The district court in Muzio concluded that despite the title of subsection (d) – Initial Registration of Sex Offenders Unable to Comply with Subsection (b) of this Section – the subsection applied to all previously convicted sex offenders and not only those sex offenders who had not initially registered before the enactment of SORNA. Id. at *3-5. Thus, according to the Muzio court, SORNA could not be enforced against those previously convicted sex offenders who traveled in interstate commerce during the "gap" period between the enactment of SORNA on July 27, 2006, and the Attorney General's issuance of the interim ruling on February 28, 2007. Id. at *4-5 (citing United States v. Kapp, 487 F. Supp. 2d 536, 543 (M.D. Pa. 2007)); accord United States v. Cole, No. 07-cr-30062-DRH, 2007 WL 2714111, at *3 (S.D. Ill. Sept. 17, 2007); United States v. Stinson, __ F. Supp. 2d __, __, 2007 WL 2581464, at * 5-7 (S.D. W. Va. Sept. 7, 2007); United States v. Smith, No. 2:07-cr-00082, 2007 WL 1725329, at *2 (S.D. W. Va. June 13, 2007).

Other district courts have reached the opposite result finding § 16913(d) merely gave the Attorney General the authority to promulgate regulations for those sex offenders who had not initially registered before the enactment of SORNA, and therefore subsection (d) did not apply to those sex offenders who already initially registered. See United States v. Mason, No. 6:07-cr-52, 2007 WL 1521515, at *3 (M.D. Fla. May 22, 2007) (finding "the statutory language [of § 16913(d)] is indicative of a gap-filling provision to insure the statutory purpose is effectuated when sex offenders fall outside the purview of [§] 16913(b)"); United States v. Hinen, 487 F. Supp. 2d 747, 749 (W.D. Va. 2007) ("The plain language of SORNA requires an offender to register, without regard to any construction of the statute by the Attorney General. The delegation provision of the statute refers to persons who, prior to the enactment of SORNA's revised standards, were not required to register by their state's registration law."); United States v. Madera, 474 F. Supp. 2d 1257, 1260-62 (M.D. Fla. 2007) (same).

The Court agrees with the rationale of the Mason, Hinen, and Madera courts. Subsection (a) of § 16913 sets forth the general requirements of sex offender registration, subsection (b) describes how and when a sex offender must register, and subsection (c) requires registered sex offenders to keep their registrations current. Under the plain language of the statute, subsection (d) unambiguously only addresses the narrow class of "unregistered offenders literally unable to comply with (b) because of [sic] the age of their convictions are within the grey area which the Attorney General is authorized to illuminate by rule." United States v. Roberts, No. 6:07-CR-70031, 2007 WL 2155750, at *1-2 (W.D. Va. 2007).

In the present case, both Defendants had initially registered before SORNA's enactment in July 2006: May initially registered in June 2000, and Perry initially registered in June 1998. Both Defendants knew they had a continuing obligation to keep their registrations current and to provide notification of any change of residence. Accordingly, the fact Defendants traveled in

interstate commerce during the "gap" period between SORNA's enactment and the Attorney General's interim ruling is of no consequence.

B. Ex Post Facto Clause Challenge

Defendants next argue § 2250 is not intended to apply retroactively, and if it is applied retroactively, it violates the Ex Post Facto Clause of the United States Constitution. The Court again disagrees.

Ex post facto laws are prohibited under the United States Constitution. See U.S. Const. art. I, § 9, cl. 3. The Ex Post Facto Clause is violated if a statute imposes a greater punitive punishment upon a defendant than the punishment imposed when the defendant was convicted of the underlying offense. See Collins v. Youngblood, 497 U.S. 37, 52 (1990). However, "the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." Id. at 41 (citing Calder v. Bull, 3 Dall. 386, 390-92 (1798)). In determining whether a statute is forbidden by the Ex Post Facto Clause, the court must ask whether the "legislature's intention was to enact a regulatory scheme that is civil and non-punitive," and if so, the court must further determine "'whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil.'" Smith v. Doe, 538 U.S. 84, 92 (2003) (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)) (internal quotations omitted). In making this determination, the court "ordinarily defer[s] to the legislature's stated intent," and thus, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Id. (internal quotations and citations omitted).

In Smith v. Doe, the Supreme Court considered whether Alaska's Sex Offender Registration Act (SORA) violated the Ex Post Facto Clause. See id. at 91-92. The Court employed a two-pronged inquiry, which first examined whether the legislature intended to establish a civil

proceeding. Id. at 92. If the legislature intended to impose punishment on those already convicted of a crime, the statute's intent is punitive and the inquiry ends; but if, on the other hand, the legislature's intent "was to enact a regulatory scheme that is civil and nonpunitive," then the court "must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." Id. (internal quotations omitted).

Several district courts have employed those principles and determined SORNA does not violate ex post facto principles. See Hinen, 487 F. Supp. 2d at 755 (examining Congress's stated purpose in establishing SORNA's comprehensive national sex offender registration system, which was "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators," (quoting 42 U.S.C. § 16901), and concluding "the statutory scheme evidence[d] no desire by Congress to simply exact punishments against sex offenders"); United States v. Manning, No. 06-20055, 2007 WL 624037, at *1 (W.D. Ark. Feb. 23, 2007) (concluding "[t]he retroactivity of the registration law does not violate the ex post facto clause of the Constitution as it is not punitive, but a civil regulatory scheme with no punitive purpose or effect"); United States v. Templeton, No. CR-06-291-M, 2007 WL 445481, at *5 (W.D. Okla. Feb. 7, 2007) (concluding SORNA "does not serve to punish defendant for an act that was not a crime when allegedly performed, does not make the punishment greater for a crime committed before the law's enactment, and does not deprive defendant of a defense available before its enactment"); Madera, 474 F. Supp. 2d at 1262-64 (applying the two-pronged inquiry set forth by the Supreme Court in Smith and concluding SORNA's regulatory scheme "has not been 'regarded in our history and traditions as a punishment;' does not 'impose [ ] an affirmative disability or restraint;' does not 'promote[ ] the traditional aims of punishment;' has a 'rational connection to a nonpunitive purpose;' and is not

'excessive with respect to this [nonpunitive] purpose'" (quoting Smith, 538 U.S. at 97)). The Court agrees with this line of authority and finds SORNA does not violate the Ex Post Facto Clause.

C. Non-delegation Doctrine Challenge

Defendants also argue Congress improperly abdicated legislative responsibility to the Attorney General, and thus violated the Non-delegation Doctrine. This argument also fails.

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." Mistretta v. United States, 488 U.S. 361, 371 (1989). The Supreme Court has emphasized, however, that the doctrine does not "prevent Congress from obtaining the assistance of its coordinate Branches." Id. If Congress lays down in the legislative act "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." Id. (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

As previously discussed, Congress delegated limited rulemaking authority to the Attorney General in § 16913(d), restricted to issuing a rule covering the narrow category of persons classified as sex offenders under SORNA who were unable to currently register. Thus, the Court agrees with those district courts having addressed this challenge to Congress's delegation of authority under § 16913(d) that have concluded Congress was "merely giving the Attorney General an advisory role to the courts," and thus does not run afoul of the non-delegation doctrine. Madera, 474 F. Supp. 2d at 1261; see also Hinen, 487 F. Supp. 2d at 752 (concluding in enacting SORNA Congress envisioned there would be persons "unable to register and for whom the Attorney General is required to promulgate regulations regarding applicability and procedures for registering," and because "the Attorney General has only been given the power to promulgate

regulations under the most limited of circumstances," the authority Congress delegated to the Attorney General "is not so broad as to be violative of the non-delegation doctrine"). The Court concludes SORNA does not violate the Non-delegation Doctrine.

D. Due Process Challenge

Defendants next argue application of SORNA violates the fundamental due process principles of notice and fair warning. See U.S. Const. amend. V (providing that no person shall "be deprived of life, liberty, or property, without due process of law"). Defendants admit they had state obligations to maintain their sex offender registration and admitted failing to satisfy those obligations. However, Defendants contend knowledge of their state sex offender registration obligations is not enough to impose liability under SORNA because SORNA's requirements are more onerous and an essential element of the federal criminal offense of failure to register requires proof Defendants knowingly failed to register or update a registration.

Defendants' due process challenge amounts to a claim that ignorance of the law excuses non-compliance. Defendants suggest the narrow exception to the ignorance of the law is no excuse maxim announced by the Supreme Court in Lambert v. California, 355 U.S. 225, 228 (1957), applies in the present case.

The Lambert Court found an exception to the ignorance is no excuse rule may exist if (1) the defendant's conduct was wholly passive, (2) the defendant is not per se blameworthy, and (3) there was an absence of circumstances alerting the defendant of the consequences of the deed. Id. at 228-29. In the context of examining public welfare statutes lacking a scienter requirement, the Court has reasoned Congress has weighed the possible injustice imposed on a defendant by disposing of a knowledge of the law requirement and found it does not outweigh the benefit to the person the law is meant to protect. United States v. Freed, 401 U.S. 601, 609-10 (1971).

The factors necessary to support an exception to the ignorance of the law is no excuse maxim are not present in this case. Both Defendants knew they had an obligation to keep their sex offender registrations current and received plenty of information regarding those registration obligations. Furthermore, SORNA's stated goal "to protect the public from sex offenders and offenders against children" clearly outweighs any injustice to Defendants caused by disposing of the knowledge requirement. Freed, 401 U.S. at 609-10. See Roberts, 2007 WL 2155750, at *2 (concluding defendant's due process rights were not violated by SORNA stating sex offenders, like "[o]wners of firearms, doctors who prescribe narcotics, and purchasers of dyed diesel are all expected [to] keep themselves abreast of changes in the law[s] which affect them, especially because such people are on notice that their activities are subject to regulation"). Other district courts similarly have concluded a sex offender's knowledge of an obligation to keep registration current under state law is sufficient to fulfill the knowledge requirement under SORNA. See Hinen, 487 F. Supp. 2d at 754 (citing the Jacob Wetterling Act of 1994, 42 U.S.C. § 14071, and reasoning SORNA is not the first federal statute to regulate sex offenders who fail to comply with state registration requirements, therefore "[r]egardless of the applicability of SORNA to the defendant, as of the dates in question, the nature of his conviction required him, under a long-standing federal law, to register in his state of residence and any other state where he was employed, carried on a vocation, or was a student"); Manning, 2007 WL 624037, at *2 (reasoning "the Supreme Court has held that ignorance of the law is generally no excuse to break the law, even in offender registration contexts, where the necessity of registration is likely to be known," and concluding defendant had fair notice because defendant already had an obligation to register under state law, therefore SORNA imposed no new duties (citing Lambert, 355 U.S. at 228)). The Court concludes the application of SORNA to Defendants does not violate Due Process.

E. Commerce Clause Challenge

Defendants' final argument is SORNA and FFR are unconstitutional because they exceed the powers delegated to Congress under the Commerce Clause. See U.S. Const. art. I, § 8, cl. 3. This argument also fails.

In United States v. Lopez, the Court examined Congress's Commerce Clause Powers and concluded Congress may validly regulate three broad categories of activities: (1) the use of the channels of interstate commerce; (2) protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. See United States v. Lopez, 514 U.S. 549, 558-59 (1995). At issue here is whether SORNA regulates activities that substantially affect interstate commerce.

The Gun-Free School Zone Act, which the Court invalidated in Lopez finding Congress overreached its Commerce Clause authority, contained no language or jurisdictional element linking its reach to the use or movement of things or people in the channels of interstate commerce. Id. at 561. SORNA's criminal provision, FFR, on the other hand, does require as an element of the offense, that the offender "travels in interstate or foreign commerce." 18 U.S.C. § 2250(a)(1)(B). In addition to the statute's interstate commerce element, Congress's purpose in passing SORNA was to protect the public from sex offenders. See 42 U.S.C. § 16913. In Gonzales v. Raich, the Court reiterated an activity not even regarded as commerce may "be reached by Congress if it exerts a substantial economic effect on interstate commerce. We have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." Gonzales v. Raich, 545 U.S. 1, 17 (2005) (internal quotations and citations omitted). The Court concluded, "In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether

respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Raich, 545 U.S. at 22. SORNA clearly meets the rational basis test. Congress's desire in enacting SORNA was "to track sex offenders as they move between states, in order to promote the public safety." SORNA does not violate the Commerce Clause.

CONCLUSION

For the reasons stated, Defendants' Motions to Dismiss (No. 4:07-cr-00164, Clerk's No. 19; No. 1:07-cr-00059, Clerk's No.23) must be **denied**.

IT IS SO ORDERED.

Dated this 24th day of September, 2007.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT