U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 11, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice (the Department) on S. 2632, the "Sex Offender Registration and Notification Retroactivity Correction Act of 2008", as introduced. The Department supports this bill, which would clarify that 18 U.S.C. § 2250, the federal felony offense for failure to register as a sex offender, applies to unregistered sex offenders whose interstate or foreign travel or presence in Indian Country predated the enactment of the Sex Offender Registration and Notification Act (SORNA) on July 27, 2006. The Department's specific comments on this important bill are set forth below:

Section 2

This section would specify that SORNA's registration requirements "shall apply to sex offenders convicted before, on, or after the date of enactment of that Act." This provision is unnecessary, because SORNA's requirements have applied of their own force to sex offenders with pre-SORNA convictions since SORNA's enactment on July 27, 2006. *See* 72 FR 8894, 8895-96 (2007). SORNA § 113(d) (42 U.S.C. § 16913(d)) states that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act" and on February 28, 2007, the Attorney General issued regulations stating that "[t]he requirements of ... [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act." *See* 28 CFR § 72.3. While some courts have found SORNA did not apply to those whose qualifying convictions predated SORNA's enactment, especially before the Attorney General so specified, *see, e.g.*, *United States v. Smith*, 528 F. Supp. 2d 615 (S.D.W.V. 2007), the issue now seems resolved. Indeed, the Eleventh Circuit has stated that "[i]t is now clear, following the Attorney General's pronouncement of the interim rule [72 FR 8894, cited above], that SORNA is to be retroactively applied to sex offenders convicted prior to SORNA's enactment." *United States v. Madera*, 528 F.3d 852 (11th Cir. 2008).

The enactment of legislative language of similar import as proposed in S. 2632 would potentially be counterproductive, as it might provide a basis for sex offenders with pre-SORNA convictions to argue that SORNA did not apply to them prior to the enactment of legislation

which so provides explicitly. Insofar as the legislative language refers only to the applicability of section 113 of SORNA to sex offenders with pre-SORNA convictions, it could cloud the applicability of other provisions of SORNA to such sex offenders, such as sections 114, 115, and 116. Under current law, SORNA applies in its entirety to such sex offenders.

Section 3

This section would amend 18 U.S.C. § 2250(a)(2)(B) to clarify that, in cases where federal jurisdiction over a failure to register offense is based on interstate or foreign travel or presence in Indian country, 18 U.S.C. § 2250 applies to offenders whose such travel or presence predates SORNA's enactment. Accurately interpreted, 18 U.S.C. § 2250 as currently formulated reaches such cases, *see, e.g., United States v. Gill*, 520 F. Supp. 2d 1341 (D. Utah 2007), and the amendment proposed in S. 2632 will ensure that there will be no future misunderstanding or misinterpretation on this point. *See, e.g., United States v. Smith*, 481 F. Supp. 2d 846 (E.D. Mich. 2007) (finding that SORNA does not apply to a person whose interstate travel predated SORNA's enactment).

Finally, this section would amend 18 U.S.C. § 2250 to clarify that failure to register violations are continuing offenses as long as the failure to register exists. The Department also supports this amendment, which will confirm the accurate interpretation of the existing statute on this point and foreclose any possible misunderstandings or misinterpretations hereafter. Courts that have considered the issue have reached divergent conclusions. *See United States v. Ditomasso*, No. 07-132-ML, 2008 U.S. Dist. LEXIS 37870 (D.R.I. May 8, 2008) (collecting cases).

Please do not hesitate to contact this office if we may be of additional assistance. The Office of Management and Budget has advised us that from the standpoint of the Administration's program, there is no objection to the submission of this letter.

Sincerely,

Keith B. Nelson
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member