



Sex Offender Registration and Notification In the United States Current Case Law and Issues — March 2019

Overview of U.S. Sex Offender Registration

Sex offender registration and notification schemes have existed in the United States for decades. These systems are loosely referred to as sex offender registries. We begin this summary with an outline of those systems.

Registration Is a Local Activity

In the United States, sex offender registration is conducted at the local level. Generally, sex offenders in the United States are required to register with law enforcement in each state, locality, territory or tribe where they reside, work or attend school.¹ Every U.S. state, the District of Columbia, the five principal U.S. territories and approximately 150 federally recognized Indian tribes have their own sex offender registration and notification systems.² Every one of these systems has its own nuances and distinct features. Every jurisdiction (state, territory and tribe) makes its own determinations about who is required to register, what information offenders must provide, which offenders are posted on the jurisdiction's public registry website, and so forth.

Although the federal government does not directly administer sex offender registries, it is involved in sex offender registration and notification in meaningful ways.³

Federal Minimum Standards

Congress has enacted various measures setting "minimum standards" for jurisdictions to implement in their sex offender registration or notification systems.⁴ The first of these was passed in 1994 and is commonly referred to as the "Wetterling Act." This Act established a set of minimum standards for registration systems for the states.⁵ Two years later, Congress passed "Megan's Law" as a set of minimum standards for community notification.⁶ The current set of standards — the Sex Offender Registration and Notification Act (SORNA) — was passed in 2006.⁷

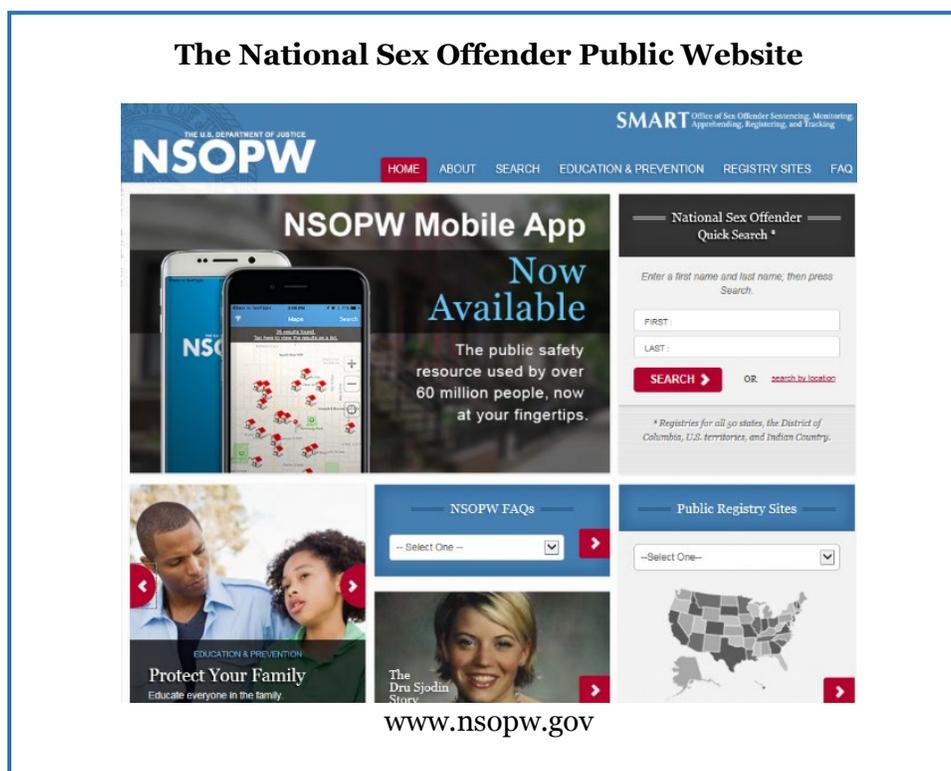
If a state, tribe or territory chooses not to substantially implement SORNA's standards, the jurisdiction risks losing 10 percent of its Edward R. Byrne Justice Assistance Grant (Byrne JAG) funds.⁸ As of March 1, 2019, 17 states, four territories and over 130 federally recognized Indian tribes have substantially implemented SORNA.⁹ Among jurisdictions that have substantially implemented SORNA, registration and notification laws vary.¹⁰ Practitioners are advised to become familiar with the specific registration and notification systems in all jurisdictions where they plan to work.

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National Sex Offender Public Website

The National Sex Offender Public Website (NSOPW), located at www.nsopw.gov, was created by the U.S. Department of Justice in 2005 and is administered by the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office).¹¹ NSOPW works much like a search engine: Jurisdictions connect their public sex offender registries to NSOPW by way of a web service or automated upload to enable NSOPW to query the jurisdictions' websites. Only information that is publicly listed on a jurisdiction's public sex offender registry website will display in NSOPW's search results. The Department of Justice does not administer the registration information searched for or displayed on NSOPW, and only ensures that jurisdictions' registries can be queried through and results displayed on NSOPW.¹²

Note that some jurisdictions do not post information about **all** of their registered offenders on their public registry website: A search of NSOPW is not a comprehensive search of **all** registered offenders nationwide.



Federal Law Enforcement Databases

Federal databases are utilized by law enforcement across the country to access accurate information about registered sex offenders. Registering agencies and other law enforcement entities submit the information necessary to populate these databases:¹³

- The National Sex Offender Registry (NSOR) is a law-enforcement only database that is a file of the National Crime Information Center (NCIC) database managed by the Federal Bureau of Investigation (FBI) Criminal Justice Information Services (CJIS) division. It was created in the late 1990s to store data on every registered sex offender in the United States, and to provide law enforcement nationwide access to that data.¹⁴

- The Next Generation Identification (NGI) system officially replaced the legacy fingerprint database at the FBI (IAFIS) in 2014.¹⁵ NGI fingerprint records are linked to the offender's corresponding NSOR record at CJIS.
- The National Palm Print System (NPPS) is the database for palm prints housed at the FBI.
- The Combined DNA Index System (CODIS) is the national DNA database administered by the FBI.

SORNA requires that jurisdictions submit information on **all** of their registered sex offenders to NSOR, and ensure that all of their offenders' fingerprints have been submitted to NGI, palm prints to NPPS and DNA profiles to CODIS.¹⁶

Federal Corrections

The federal government is also involved with sex offenders housed in federal correctional institutions. Specifically, some federal government agencies are required to notify local law enforcement when a sex offender is released from federal custody. Military detention issues are discussed in the section on military registration.

The Bureau of Prisons (BOP) does not register sex offenders prior to their release from incarceration, as registration is primarily a function of state, territory and tribal governments. However, 18 U.S.C. § 4042(c) requires that BOP or a federal probation officer notify the chief law enforcement officer and registration officials of the appropriate state, tribe or local jurisdiction whenever a federal prisoner required to register under SORNA is released from custody.¹⁷ In 2014, BOP issued guidelines governing its release of sex offenders.¹⁸

The Bureau of Indian Affairs (BIA), as an agency of the Department of the Interior, is not governed by the terms of 18 U.S.C. § 4042(c). There are no generally applicable statutory or administrative requirements for the BIA-operated detention centers (approximately one-quarter of the 90 BIA detention centers) to notify local law enforcement when a sex offender is released from custody.¹⁹

The Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) Enforcement and Removal Operations (ERO) is generally responsible for detaining and deporting undocumented individuals who are present within the United States. In 2015, DHS issued a rule amending its Privacy Act provisions to permit the transfer of information from DHS to any sex offender registration agency about an offender who is released from DHS custody or removed from the United States.²⁰ Like the Bureau of Prisons and BIA detention facilities, offenders are not registered prior to their release from ICE custody.

Federal Law Enforcement and Investigations

SORNA designated the United States Marshals Service as the lead agency in investigations of suspected violations of the federal failure to register statute, 18 U.S.C. § 2250. To further its investigative capacity, the USMS established the National Sex Offender Targeting Center in 2009.²¹

¹ Colleges and universities must also annually include in a security report a statement advising the campus community of the location where information about registered sex offenders on campus may be obtained. Institutional Security Policies and Crime Statistics, 34 C.F.R. § 668.46(b)(12).

² Federally recognized tribes located in PL-280 states typically have their registration functions handled by the state wherein their lands are located. 34 U.S.C. § 20929(a)(2)(A), citing Pub. L. No. 83-280, c. 505, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162).

³ Cong. Research Service Report 7-5700, Federal Involvement in Sex Offender Registration and Notification: Overview and Issues for Congress, In Brief (March 25, 2015), available at www.fas.org/sqp/crs/misc/R43954.pdf.

⁴ For a comprehensive legislative history of federal sex offender registration and notification legislation, see Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) At 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741 (2016), available at lawreviewdrake.files.wordpress.com/2015/01/mcpherson-final.pdf.

⁵ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (1994). This was an incentive-based system, where states would be penalized (via loss of federal grant funds) for failure to implement its terms. The five principal U.S. territories (American Samoa, Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico and the U.S. Virgin Islands) were included under Wetterling's requirements by way of Final Guidelines issued in April 1996. Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 61 Fed. Reg. 15,110 (April 4, 1996).

⁶ In the same way that the Wetterling Act's provisions were incentive-based (see *supra* text accompanying note 5), so were the provisions of Megan's Law.

⁷ 34 U.S.C. §§ 20901-20945. All United States Code references are current as of January 2019. SORNA was reclassified from Title 42 of the U.S. Code to Title 34 in 2017. Editorial Reclassification: Title 34, United States Code, uscode.house.gov/editorialreclassification/t34/index.html; SMARTWatch Dispatch, Editorial Reclassification of SORNA: SORNA Provisions Moved from Title 42 to Title 34, www.smart.gov/pdfs/Dispatch-Title34-Oct2017.pdf.

Three sets of guidelines have been issued to assist in the implementation of SORNA. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030 (July 2, 2008) [*hereinafter* Final Guidelines]; Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630 (Jan. 11, 2011); Supplemental Guidelines for Juvenile Registration under the Sex Offender Registration and Notification Act, 81 Fed. Reg. 50,552 (Aug. 1, 2016). Guidelines provisions, standing alone, generally do not create an additional basis for criminal liability under 18 U.S.C. § 2250, *United States v. Belaire*, 480 Fed. Appx. 284 (5th Cir. 2012) (defendant could not be prosecuted for failing to update "temporary lodging" information when neither originating nor destination state required such information to be provided).

⁸ For any state or territory, the penalty is contained in 34 U.S.C. § 20927:

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this title shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968.

If the 10 percent penalty is assessed, the jurisdiction can apply for reallocation of those funds to use for purposes of implementing SORNA.

For tribes that elect to function as registration jurisdictions, the penalty contained in 34 U.S.C. § 20927 may apply, if the tribe qualifies for that funding, which is determined by formula. However, there is a separate and significant penalty for noncompliance by tribes contained in 34 U.S.C. § 20929: For any federally recognized tribe that the Attorney General determines has "not substantially implemented the requirements of [SORNA] and is not likely to become capable of doing so within a reasonable amount of time," the statute creates automatic delegation of SORNA functions:

. . . to another jurisdiction or jurisdictions within which the territory of the tribe is located [and requires the tribe] to provide access to its territory and such other cooperation and

assistance as may be needed to enable such other jurisdiction or jurisdictions to carry out and enforce the requirements of [SORNA].

⁹ Current as of March 1, 2019. For the current list of implemented jurisdictions, please visit www.smart.gov/newsroom/jurisdictions_sorna.htm. For a comprehensive report on the efforts and challenges in implementing SORNA, see GAO-13-211, Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects (2013), available at www.gao.gov/assets/660/652032.pdf.

¹⁰ Official reviews detailing systems of each jurisdiction are available at www.smart.gov/sorna-map.htm. In addition, the SMART Office maintains the Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check, www.smart.gov/progress_check, which provides a brief overview of each state's SORNA implementation status.

¹¹ The precursor of NSOPW was NSOPR (the National Sex Offender Public Registry), which was the official name of the website from its administrative creation in 2005 until the passage of SORNA in 2006 when it was renamed the Dru Sjodin National Sex Offender Public Website. Press Release, Dep't of Justice, Office of Justice Programs, Department of Justice Activates National Sex Offender Public Registry Website (July 20, 2005), available at www.amberalert.gov/newsroom/pressreleases/ojp_05_0720.htm. By July 2006, all 50 states were linked to NSOPR. Press Release, Dep't of Justice, Office of Justice Programs, All 50 States Linked to Department of Justice National Sex Offender Public Registry Website (July 3, 2006), available at www.justice.gov/archive/opa/pr/2006/July/06_ag_414.html.

¹² The SMART Office administers the Tribe and Territory Sex Offender Registry System (TTSORS), a system developed for federally recognized tribes and territories that had not previously operated a sex offender registration system or website. All of the information in TTSORS is supplied and administered by the jurisdictions. More information about TTSORS is at www.smart.gov/pdfs/TTSORSFactSheet.pdf.

¹³ For example, a local police department might submit an offender's fingerprints to the FBI at the time of arrest.

¹⁴ See Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093.

¹⁵ NGI Officially Replaces IAFIS—Yields More Search Options and Investigative Leads, and Increased Identification Accuracy (Oct. 24, 2014), www.fbi.gov/services/cjis/cjis-link/ngi-officially-replaces-iafis-yields-more-search-options-and-investigative-leads-and-increased-identification-accuracy.

¹⁶ In many cases, an offender will have had their fingerprints, palm prints or DNA submitted prior to the registration process, as part of their arrest, sentencing, incarceration or at some other point in the processing of their case. Registration agencies are not required to submit duplicate entries to federal databases where a fingerprint, palm print or DNA record already exists. Final Guidelines, *supra* note 7, at 38,057.

¹⁷ 18 U.S.C. § 4042(c). The Bureau of Prisons is a Department of Justice subdivision and part of the Executive Branch. Federal probation officers are governed by the Administrative Office of the United States Courts, a Judicial Branch office.

¹⁸ Program Statement 5110.15, Notification Requirements Upon Release of Sex Offenders, Violent Offenders, and Drug Traffickers (May 16, 2014), available at www.bop.gov/policy/progstat/5110_017.pdf. The form utilized by BOP to provide notice of registration responsibilities to its prisoners upon release can be found at www.bop.gov/policy/forms/BP_A0648.pdf.

¹⁹ BIA recently updated its enforcement handbook to require its Office of Justice Services to assist tribes who are operating SORNA registration and notification systems. SO-17.4: Sex Offender Registration and Notification Act, Office of Justice Services Enforcement Handbook (4th ed.).

²⁰ Notice of Amendment of Privacy Act System of Records, 80 Fed. Reg. 24,269 § HH (April 30, 2015). ICE-ERO uses the SORNA Exchange Portal to provide notifications to jurisdictions when a sex offender is released from ICE-ERO custody. For additional information about the SORNA Exchange Portal, see www.smart.gov/pdfs/SORNA_Portalfactsheet.pdf.

²¹ The National Center for Missing and Exploited Children (NCMEC) operates the Sex Offender Tracking Team (SOTT). SOTT publishes a biannual survey of the number of registered sex offenders in the United States. https://api.missingkids.org/en_US/documents/Sex_Offenders_Map.pdf.