



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

Military Registration

Prior to 2015, no provision of federal law (since the passage of SORNA) generally enabled or permitted federal authorities to register sex offenders such that the information from those registrations would be submitted to any national database. However, in 2015, Congress amended SORNA to require the Department of Defense (DoD) to provide information to NSOR and NSOPW on any sex offender who is adjudged by courts-martial or released from a military corrections facility.¹ In 2016, DoD issued an instruction establishing policies for the “identification, notification, monitoring and tracking of DoD-affiliated personnel” who are registered sex offenders.²

Offenders convicted by military tribunals of registerable sex offenses are generally required under SORNA to register with any jurisdiction where they live, work or go to school.³ Through a series of statutory and administrative cross-references, SORNA requires that persons convicted of a Uniform Code of Military Justice (UCMJ) offense listed in Department of Defense Instruction 1325.07 must register as a sex offender.⁴

Given the unique structure of the military justice system, SORNA jurisdictions must determine which military convictions will be recognized as registerable offenses — and how they will be categorized. For example, a state-level requirement to register based on a conviction of a sex offense in “federal court” was held to also include a court-martial from a military court.⁵ Issues also arise when trying to compare uniquely military offenses that might have a sexual component — such as “Conduct Unbecoming an Officer” — to jurisdiction-level sex offenses. In at least one state, an offender convicted under article 134 of the UCMJ for an offense relating to child pornography was required to register because the offense of conviction was determined to be a “like violation” to a state offense.⁶

If a person resides, works or attends school on a military base, depending on the source and how the federal government obtained the land where the base is located, a state or territory might not have jurisdiction over matters occurring thereon. In other words, the base may be a “federal enclave” where only federal law applies.⁷ Therefore, in some locations there may be sex offenders present on military bases who are not required to register with the state because they live, work and attend school solely on land considered to be a federal enclave.

In part because of this problem, the Department of Defense (DoD) and Congress took steps to address the issue of convicted sex offenders in the military.⁸ A person required to register as a sex offender is no longer permitted to enlist or be commissioned as an officer in the Armed Forces.⁹ The Army requires that anyone convicted of a sex offense be processed for administrative

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separation.¹⁰ Further, the Army prohibits overseas assignments for any soldier convicted of a sex offense.¹¹

Certain branches have also adopted policies and procedures to independently track and monitor sex offenders who are active duty members, civilian employees, contractors or dependents of active duty members located on U.S. military installations at home and abroad.¹² For example, the Army now requires all sex offenders who reside or are employed on an Army installation (including those outside of the continental United States) to register with the installation provost marshal.¹³

¹ Military Sex Offender Reporting Act of 2015 (Title V of the Justice for Victims of Trafficking Act of 2015), Pub. L. No. 114-22, § 502, 129 Stat. 227 (codified at 34 U.S.C. § 20931).

² Registered Sex Offender (RSO) Management in DoD, Dep't of Defense Instruction 5525.20 (2016), www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/552520_dodi_2016.pdf. This instruction repealed a memorandum previously issued in 2015: Registered Sex Offender (RSO) Identification, Notification, and Monitoring in DoD, Directive-Type Memorandum (DTM) 15-003 (March 26, 2015).

³ United States v. Kebodeaux, 570 U.S. 387 (2013).

⁴ Administration of Military Correctional Facilities and Clemency and Parole Authority, Dep't of Defense Instruction 1325.07, Appx. 4 to Enc. 2 (2013), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132507p.pdf?ver=2018-05-08-141542-293>. Although the United States Coast Guard is technically a part of the Department of Homeland Security, this Instruction also governs their proceedings. *Id.* at 2.

⁵ Billingsley v. Alabama, 115 So.3d 192 (Ala. Crim. App. 2012).

⁶ Doe v. Sex Offender Registry Board, 23 N.E.3d 938 (Mass. 2015).

⁷ “Federal Enclave” is a legal term of art which refers to property that is either in whole or in part under the law enforcement jurisdiction of the United States Government. *See generally* the “Enclave Clause,” U.S. Const. art. I, § 8, cl. 17 (“[The Congress shall have Power...] [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”); *see also* 40 U.S.C. § 3112 (2006) (concerning federal jurisdiction). A similar issue arises regarding offenders located within National Parks or other federally held land that holds the status of “federal enclave.”

⁸ The Department of Defense has also acted by way of investigations and regulatory actions. In 2014, the Inspector General of the Department of Defense (DoD) issued a report regarding DoD's compliance with SORNA. DODIG-2014-103, Evaluation of DoD Compliance with the Sex Offender Registration and Notification Act (August 29, 2014), *available at* web.archive.org/web/20170614201826/http://www.dodig.mil/pubs/documents/DODIG-2014-103.pdf.

⁹ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 523, 126 Stat. 1723 (codified at 10 U.S.C. § 504 note); Enlistment, Appointment, and Induction Criteria, 32 C.F.R. § 66.6(b)(8)(iii) (2015).

¹⁰ *See, e.g.*, Army Regulation 135-178, § 12-4 (2017); Antonieto Rico, *Army to Discharge Convicted Sex Offenders*, Military Times (Nov. 20, 2013), web.archive.org/web/20131127165311/http://www.militarytimes.com/article/20131120/NEWS/311200024/Army-discharge-convicted-sex-offenders.

¹¹ Initiating Separation Proceedings and Prohibiting Overseas Assignment for Soldiers Convicted of Sex offenses, Army Directive 2013-21.

¹² *See* Army Regulation 190-45, § 2-7 (2016), *available at* https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN6734_r190_45_Web_FINAL.pdf. This regulation was heavily revised in 2016 and provides detailed information about the responsibilities of convicted soldiers, Provost Marshals and Directors of Emergency Services.

¹³ Registration of Sex Offenders on Army Installations (inside and outside the Continental United States), 32 C.F.R. § 635.6 (2016). Provost Marshal officials have also been directed to seek to establish Memoranda of Understanding with state and local sex offender registration officials to facilitate the flow of information regarding sex offenders (along with other criminal justice information). Establishing Memoranda of Understanding, 32 C.F.R. § 635.20 (2015); *see also* Army Regulation 27-10, §§ 24-1 to 24-4 (2016) (Registration of Military Sexual Offenders), available at https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r27_10_FINAL.pdf. The Navy also has its own policies, Policy for Sex Offender Tracking, Assignment, and Installation Access Restrictions, CNIC Instruction 1752.1 (2011), www.cnic.navy.mil/content/dam/cnic/hq/pdfs/Instructions/01000%20Series/CNICINST%201752.1.pdf.