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Andrew Gillman

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SEX OFFENDER REGISTRATION AND NOTIFICATION ACT—SUPREME COURT UNDERMINES CONGRESS’S EFFORT TO CRACK DOWN ON SEX OFFENDER REGISTRATION

*Andrew Gillman**

IN *Carr v. United States*, the Supreme Court resolved a circuit split by incorrectly holding that liability under § 2250 of the Sex Offender Registration and Notification Act (SORNA) cannot be predicated on interstate travel that occurred before the passage of the statute.¹ Section 2250 of SORNA makes it a criminal offense with a maximum prison sentence of ten years when anyone who is required to register under SORNA, “travels in interstate or foreign commerce . . . and knowingly fails to register or update [their] registration as required by the Sex Offender Registration and Notification Act.”² The Court’s overly simplistic textual analysis of this statute, which emphasizes the verb tense of “to travel” and the sequential elements of SORNA, glosses over the anomalous policy implications that have resulted from the Court’s refusal to extend § 2250 to sex offenders who engaged in pre-SORNA travel.

In 2004, Thomas Carr (Carr) pled guilty to sexual abuse in Alabama state court.³ Following his release from prison, he registered as a sex offender under Alabama state law.⁴ Shortly after his registration and prior to SORNA’s enactment, Carr moved from Alabama to Indiana.⁵ Carr failed to register pursuant to Indiana’s registration requirements, which carries a prison sentence of up to three years.⁶ Federal officials eventually discovered Carr as a result of his involvement in a fight, and he was

* J.D. Candidate 2012, Southern Methodist University Dedman School of Law; B.B.A. and M.P.A. 2007, the University of Texas at Austin. The author would like to thank his family and friends for their support.

1. *Carr v. United States*, 130 S. Ct. 2229, 2233 (2010). The Court declined to consider whether the alternative interpretation of the statute would violate the Ex Post Facto Clause of the Constitution. *Id.* Accordingly, an analysis of ex post facto implications falls outside the scope of this Note.

2. Sex Offender Registration and Notification Act, 18 U.S.C. § 2250 (2006) (emphasis added).

3. *Carr*, 130 S. Ct. at 2233.

4. *Id.*

5. *Id.*

6. *Id.*

charged in the Northern District of Indiana for failing to register under § 2250 of SORNA.⁷

Carr moved to dismiss, arguing that his interstate travel occurred prior to SORNA's effective date and thus would violate the Ex Post Facto Clause of the Constitution.⁸ Carr entered a conditional guilty plea after the court denied his motion and was sentenced to thirty months in prison.⁹ The Seventh Circuit consolidated Carr's appeal with that of another defendant who also asserted that § 2250 of SORNA does not apply to sex offenders who travelled prior to the statute's effective date.¹⁰

The Seventh Circuit created a split with the Tenth Circuit by holding that the scope of § 2250 extends to defendants who engaged in interstate travel prior to the statute's effective date.¹¹ The Supreme Court granted certiorari to resolve the conflict among the circuits as to the proper scope of the travel requirement under SORNA.¹²

In holding that § 2250 does not extend to pre-SORNA travel, the Supreme Court relies exclusively on two textual arguments: (1) the verb tense that Congress incorporated in § 2250 is the present tense and thus refers to present and future travel, and (2) the elements of the statute must occur in sequential order.¹³ The Court also attacks the Seventh Circuit's two principal arguments for construing the statute to cover pre-SORNA travel: (1) to "avoid[] an anomaly in the statute's coverage of federal versus state sex offenders" and (2) to "better effectuate[] the statutory purpose."¹⁴

The Court relies on the Dictionary Act to attach significance to the verb tense of the travel requirement in § 2250.¹⁵ The Dictionary Act states that "words used in the present tense include the future as well as the present."¹⁶ Accordingly, the Court concludes that "by implication," the Dictionary Act directs that "the present tense . . . does not include the past."¹⁷ While the Dictionary Act allows for an exception to this principle when the "context indicates otherwise," the Court remains convinced that the context supports a forward-looking construction of the travel requirement.¹⁸ The Court supports their contention by pointing to other present tense verbs in the statute and relying on *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* for the proposition that the "un-

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Compare* United States v. Carr, 551 F.3d 578, 583 (7th Cir. 2008), *rev'd* 130 S. Ct. 2229 (2010) (holding that § 2250 applies to pre-SORNA travel), *with* United States v. Husted, 545 F.3d 1240, 1241 (10th Cir. 2008) (holding that § 2250 does not apply to pre-SORNA travel).

12. *Carr*, 130 S. Ct. at 2234.

13. *Id.* at 2235-37.

14. *Id.* at 2238 (internal quotations omitted).

15. *Id.* at 2236.

16. Dictionary Act, 1 U.S.C. § 1 (2006).

17. *Carr*, 130 S. Ct. at 2236.

18. 1 U.S.C. § 1; *see Carr*, 130 S. Ct. at 2237.

deviating use of the present tense” may serve as support for a prospective interpretation of the statute.¹⁹ The Court dismisses the dissent’s observation that other SORNA provisions “plainly use the present tense to refer to events that . . . may have occurred before SORNA took effect.”²⁰ The Court attributes this discrepancy to differences in the definitional and enforcement sections of statutes.²¹ In arguing that the elements of § 2250 should be read “sequentially,” the Court asserts that the first element of the statute is the registration requirement under SORNA rather than the sex offense conviction.²² Since a sex offender may only become subject to the registration requirements after the statute’s effective date, the Court contends that a convicted sex offender must both engage in interstate travel and then fail to register *after* the statute’s effective date to be liable under SORNA.²³ By contrast, the dissent maintains that the first act necessary to trigger the registration requirement under SORNA is the sex offense conviction.²⁴ The majority dismisses this suggestion outright as inconsistent with the statutory text with little explanation or support.²⁵

Following the Court’s grammar lesson in verb tense, the Court responds to the Seventh Circuit’s arguments. First, the Court disputes the Seventh Circuit’s contention that § 2250(a)(2) should apply equally to federal and state sex offenders.²⁶ The Court insists that Congress could have “subject[ed] any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution” if they had wanted to and suggests that it is perfectly reasonable for Congress to have given states primary responsibility for ensuring compliance with sex-offender registration statutes.²⁷ The Court also distinguishes § 2250 of SORNA from the federal felon-in-possession statute that the Seventh Circuit analogizes.²⁸ In particular, the Court argues that the interstate travel component of the statute is the actual conduct that the government sought to punish rather than the jurisdictional element of the offense.²⁹

19. *Carr*, 130 S. Ct. at 2237; *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (noting that suit may be brought for a violation that is “in effect” and that plaintiffs must give notice of the alleged violation).

20. *Carr*, 130 S. Ct. at 2237 n.6.

21. *Id.* (noting that the “definitional section . . . elucidates the meaning of certain statutory terms and proscribes no conduct”).

22. *Id.* at 2235–36.

23. *Id.* at 2237.

24. *Id.* at 2248 (Alito, J., dissenting).

25. *Id.* at 2236 n.4 (majority opinion).

26. *Id.* at 2238–40.

27. *Id.* at 2238–39.

28. *Id.* at 2239. The Seventh Circuit recognized that other courts had interpreted § 922, the federal felon-in-possession statute, to reach felons who traveled interstate before the statute’s effective date. *United States v. Carr*, 551 F.3d 578, 582 (7th Cir. 2008), *rev’d* 130 S. Ct. 2229 (2010). Given the similarities between the two statutes, the Seventh Circuit concluded that § 2250 of SORNA also extends to sex offenders who travelled interstate prior to the statute’s effective date. *Id.* at 583.

29. *Carr*, 130 S. Ct. at 2239; *see* *Gun-Free School Zones Act*, 18 U.S.C. 922(g) (2006) (prohibiting convicted felons from “possess[ing] in or affecting commerce any firearm or ammunition”). The majority relies on *Scarborough* to assert that the danger lies with the possession of the firearm rather than movement across state lines.

Alternatively, the Court disputes the Seventh Circuit's assertion that an interpretation of the statute that reaches pre-SORNA travel better effectuates the statute's purpose.³⁰ Although Congress enacted SORNA with the backdrop of over 100,000 sex offenders or nearly one-fifth of the nation's sex offenders "missing," the Court maintains that the general goal of SORNA and purpose of § 2250 do not necessarily align and that § 2250 is not a singular response to the problem of missing sex offenders.³¹

In dissent, Justice Alito responds that "the Court's textual arguments are thoroughly unsound" and engages in a practical analysis that focuses on the purpose of the statute and the odd predicament that results from the majority's interpretation.³² Justice Alito asserts that, in accordance with "widely accepted modern legislative drafting convention[s]," all statutes should be written in the present tense to "speak[] as of whatever time it is being read (*rather than as of when drafted, enacted, or put into effect*)," thus undermining the majority's present tense argument.³³ Accordingly, the statute should speak "as of the time when the first act necessary for conviction is committed," which is the initial sex offense.³⁴ Furthermore, "SORNA was a response to a dangerous gap" in sex offender registration laws that was meant to uncover "missing" sex offenders in the United States.³⁵ The dissent concludes that the application of SORNA to sex offenders traveling before the statute's effective date would better accomplish that statutory goal.³⁶

The Supreme Court's decision in *Carr* relies excessively on their mechanical analysis of SORNA while glossing over the policy implications that result from such an interpretation. As the majority concedes, SORNA was enacted to fill a "dangerous gap" in sex offender registra-

30. *Carr*, 130 S. Ct. at 2240–42. The Seventh Circuit recognized that "[t]he evil at which [the Act] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected." *Carr*, 551 F.3d at 582 (citing H.R. REP. NO. 109-218, at 23–24, 26 (2005)).

31. *Carr*, 130 S. Ct. at 2240–41; 152 Cong. Rec. H5705 (daily ed. July 25, 2006) (statement of Rep. Sensenbrenner). The Court identifies "missing" sex offenders as those that "have not complied with sex offender registration requirements." *Carr*, 130 S. Ct. at 2240. The Court recognizes that this typically happens when a sex offender moves from one state to another. *Id.*

32. *Id.* at 2243 (Alito, J., dissenting).

33. *Id.* at 2244–45 (citing House Legislative Counsel's Manual on Drafting Style, HLC No. 104-1, § 102(c), p. 2 (1995)).

34. *Id.* at 2245.

35. *Id.* at 2249–50.

36. *Id.* Justice Alito contemplates two alternative cases that demonstrate the unusual consequence of the majority's holding. *Id.* at 2243. In case one, a sex offender moves from State A to State B following SORNA's enactment. *Id.* State A is well aware of the sex offender's presence in that state following his release from prison. *Id.* However, State B has no way of knowing of the sex offender's migration and may find it difficult to enforce their own sex registration laws. *Id.* In case two, the sex offender travels from State A to State B immediately prior to SORNA's enactment and again fails to register in State B. *Id.* State B will certainly face the same difficulties in both cases. *Id.* However, under the majority's holding, these two sex offenders will be treated differently. *Id.* Justice Alito contends that "the Court offers no plausible explanation why Congress might have wanted to treat this case any differently from the first." *Id.*

tion laws.³⁷ The Court's holding in *Carr* has left that chasm wide open. However, even disregarding the anomalous policy implications of the holding, the Court also misses the mark with their textual analysis. The Court misapplies the Dictionary Act and incorrectly assumes that the first act in a § 2250 offense is the registration requirement.

An analysis of SORNA that fully considers the statute's purpose and policy implications will inevitably lead to an interpretation that includes pre-SORNA travel within its scope. The dissent eloquently asserts that "[w]hen an interpretation of a statutory text leads to a result that makes no sense, a court should at a minimum go back and verify that the textual analysis is correct."³⁸ To fully understand the anomaly of the majority's holding, a brief examination of the legislative record is warranted. The Sex Offender Registration and Notification Act was included in Title I of the Adam Walsh Act, which was enacted in response to "[t]he continued vulnerability of America's children to sexual predators."³⁹ As the majority alludes, Congress was concerned about the 100,000 unregistered sex offenders whose locations were unknown to the public and law enforcement.⁴⁰ The legislation was intended to provide "enhanced registration requirement[s]" and to "utilize the United States Marshals service in assisting States to hunt down missing sex offenders."⁴¹ Furthermore, the legislation sought "to prevent more sexual predators from falling through the cracks and molesting and harming and even murdering innocent victims."⁴² The majority attempts to diminish the significance of the statute's purpose, which undoubtedly supports a broad construction of SORNA, by suggesting that the government "confuses a general goal of SORNA with the specific purpose of section 2250."⁴³ However, this argument is inherently flawed since the general goals of SORNA would certainly encompass § 2250, the enforcement provision of the statute. As a result, the majority's analysis grossly narrows the scope of SORNA, a result that severely hampers the federal government's ability to track down those 100,000 unregistered sex offenders the statute was supposed to reach.⁴⁴ While the majority intends to rely on state enforcement to handle enforcement of sex registration laws, states' inability to locate those individuals who traveled in interstate commerce was largely the reason for the statute in the first place.⁴⁵ Furthermore, SORNA provides enhanced penalties over state law provisions, which would likely encourage those in hiding to register rather than face a ten-year prison sen-

37. *Id.* at 2238, 2240 n.9 (majority opinion).

38. *Id.* at 2249 (Alito, J., dissenting).

39. 152 Cong. Rec. H5705 (daily ed. July 25, 2006) (statement of Rep. Sensenbrenner).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Carr*, 130 S. Ct. at 2240.

44. *See id.* at 2249 (Alito, J., dissenting). *See also supra* note 36 and accompanying text.

45. *See Carr*, 130 S. Ct. at 2238 (majority opinion) (recognizing the problem of using "channels of interstate commerce in evading a State's reach").

tence.⁴⁶ By only applying the statute prospectively to post-SORNA travel, those 100,000 “missing” sex offenders may never be found.

The Supreme Court also stumbles in their textual analysis of § 2250. The Court relies on the Dictionary Act for their contention that “to travel” should be read in the present tense.⁴⁷ While the Court considers the tense of other verbs in the statute, the Court elects to ignore the definitional section of the statute that refers to events occurring before SORNA took effect.⁴⁸ Furthermore, the Court compares the verbiage in § 2250 to the “undeviating use of the present tense” from the statute in *Gwaltney*, a statute that explicitly confines its scope to future activity.⁴⁹ The unequivocal language from *Gwaltney* starkly contrasts the imprecise language that Congress used in drafting SORNA. While attempting to pick apart verb tenses in § 2250, the Court neglects an Attorney General rule from the Code of Federal Regulations that suggests that pre-SORNA travel would in fact be sufficient to satisfy § 2250’s interstate travel requirement.⁵⁰ Additionally, the Court incorrectly assumes that the statute reads as of the time that it becomes law. Legislative drafting principles suggest that a statute should speak at the time it is read and thus should “always” be written in the present tense.⁵¹ The majority’s argument falls apart once one considers these generally accepted rules of legislative drafting. Lastly, the Court incorrectly presumes that the first act for conviction is the failure to register. In reality, the duty to register never arises unless the defendant is convicted of the requisite sex offense.⁵²

By engaging in a painstaking textual analysis of SORNA, the Supreme Court “misses the forest for the trees.” The Court reaches a decision that is perverse to the intent of Congress and burdens the effective enforcement of SORNA. SORNA was enacted to reach sex offenders like Thomas Carr. The Court has left a gap in sex offender registration laws that may never be filled.

46. *See id.* at 2239.

47. *Id.* at 2236.

48. *See id.* at 2237 n.6.

49. *Id.* at 2237 (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)).

50. *Id.* at 2246 n.7 (Alito, J., dissenting) (citing 28 C.F.R. § 72.3 (2007)).

51. *Id.* at 2244–45 (citing House Legislative Counsel’s Manual on Drafting Style, HLC No. 104-1, § 102(c), p. 2 (1995)).

52. *See id.* at 2246 n.4.