

Sex Offender Registration and Notification Act (SORNA) Survives Renewed Constitutional Challenges

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Introduction

The U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) in *United States v. Wass* recently overturned a district court decision that dismissed on constitutional grounds an indictment for violation of the Sex Offender Registration and Notification Act (SORNA). The Fourth Circuit concluded that the district court disregarded binding precedents in finding that the application of SORNA to Wass undermined the defendant's nondelegation doctrine and ex post facto violation arguments.

Background

Passed in 2006, SORNA [requires](#) individuals with prior qualifying sex offense convictions to register as sex offenders with each jurisdiction in which they live, work, or go to school. It is a federal [crime](#) for sex offenders to travel in interstate or foreign commerce if they failed to register or to follow the steps necessary to update registration information. SORNA [also](#) authorized the Attorney General to determine the act's application to offenders who were convicted of qualifying sex offenses before Congress enacted SORNA. The Attorney General [extended](#) coverage to pre-SORNA offenses in 2011.

In 1995, the defendant in the case, Edward Jay Wass, was [convicted](#) of two felony sex offenses in Florida. Following 2006 passage of SORNA and its application to his Florida convictions by order of the Attorney General, a federal district court convicted Wass of failing to register as required, and travelling in interstate commerce.

Constitutional Limitations: Nondelegation Doctrine and Ex Post Facto Clauses

Under the [nondelegation doctrine](#) (discussed in this [CRS Report](#)), Congress may not delegate its legislative powers to another branch of government without guidance on how to use the delegated

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authority. The Constitution's Ex Post Facto Clause (discussed in this [CRS InFocus](#)) denies Congress and state legislatures the power to retroactively outlaw, or increase the punishment for, prior conduct. Wass argued, and the district court agreed, that the nondelegation doctrine barred application of SORNA to him and that the federal Ex Post Facto Clause precluded punishing him anew for his Florida sex offenses. However, the courts had already resolved these issues.

The Supreme Court in *Gundy v United States* (discussed in [CRS Report R45884](#)) had rejected a nondelegation doctrine challenge to SORNA. Wass's contention, that the 4-1-3 *Gundy* decision had resulted in no binding precedent, is at odds with the lowest common denominator [rule](#) for plurality High Court opinions, that is, "when a decision of the Court lacks a majority, the opinion of the justices concurring in the judgment on the narrowest grounds is to be regarded as the Court's holding." (For more on plurality opinions and what happens when five Supreme Court Justices can't agree, see this [CRS Legal Sidebar](#).) In *Gundy*, four members of the Court declared that Congress's feasibility instruction supplied the Attorney General with a sufficient guiding standard; a fifth justice, Justice Alito concurred because he considered the result compatible with the Court's prior decisions.

As to the ex post facto challenge, in an early state sex offender registration case, the High Court [stated](#) that the Ex Post Facto Clause is grounded in a legislative intent to punish, and reaches an asserted regulatory or remedial regime only when its features are so draconian as to belie any but a punitive intent. The Fourth Circuit had already [determined](#) that SORNA was "nonpunitive" in purpose and effect for purposes of the Ex Post Facto Clause.

Wass sought to use the rule of constitutional avoidance (discussed in this [CRS Report](#)) as a last attempt. This too, the Fourth Circuit found unavailing. The rule of constitutional avoidance is a canon of statutory construction that comes into play when a statute admits to two interpretations – one harmless and the other fraught with constitutional uncertainty. But the rule applies only in cases of statutory ambiguity, and the Fourth Circuit [believed](#) its earlier cases and those of the Supreme Court dispelled any uncertainty.

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