



Registry Matters Podcast

Episode 291

Recorded 1-27-24

Announcer 0:00

Registry Matters is an independent production. The opinions and ideas here are those of the host and do not reflect the opinions of any other organization. If you have problems with these thoughts, F Y P.

Andy 0:18

Recording live from FYP studios east and west, transmitting across the internet. This is episode 291 of Registry Matters. Good evening, gentlemen. How are you?

Chance 0:30

Good evening. Very, very well. Andy, thank you.

Andy 0:33

Larry, where are you? Are you there?

Larry 0:35

I'm not here. I'm letting the sidekick take over.

Andy 0:45

(laughs) Well, Larry, since you are still driving that bus do me a favor. What are we doing this evening?

Larry 0:51

Well, we have a few questions from listeners and one from a reader of our lovely transcript service to talk about and go through, and then we have some articles, if time permits, and the big topic is going to be the Adam Walsh Act and the new DOJ regulations. And to show that we have disagreement, respectfully, on Registry Matters, you'll hear two divergent views on that, tonight.

Andy 1:17

Well, very well, very well.

Shall we just dive right in and go for it?

Chance 1:21

Let's do it.

Andy 1:23

Alright, well, this first question comes from Raul, and it says, "I hope to be released on parole this year and plan to contact you about getting the Texas PFR registration statute struck down. If the Court struck down *Roe vs. Wade*, I know they will find this registration unconstitutional as well. The problem as I see it, is that the attorneys are afraid to challenge registration because they fear public backlash. I have no fear." So, before Larry answers, do you think that the court will strike it down? And I gotta press a button ... there!

Laugh Track Audio Clip 1:58

(6 seconds of laughter)

Larry 2:04

Well, I don't really think the Supreme Court is going to itn strike down, but, Raul, you're correct that the Supreme Court did overturn *Roe vs. Wade*. But that's not a valid comparison. The Supreme Court's action in and of itself does not prohibit a single abortion from taking place. And as a result of the Dodd decision, the Supreme Court's action simply reverted to the states, for them to decide the issue. And the Supreme Court decided there is no constitutional right to an abortion. But on the other hand, there's no prohibition against having one either. The states are free to permit them. And several have actually strengthened the right, beyond what Roe previously provided. But the writer suggests that someday a future Supreme Court will prohibit states from having registration schemes. If that is, in fact, what he's suggesting, and I think that's what he is, that is a bit disconnected from reality because registration schemes are not facially unconstitutional. And we have an attorney here that can explain what facial unconstitutionality means, but in my limited understanding of twenty-plus years in this business, it means there would be no set of circumstances where such an act would be constitutional. But there are plenty of circumstances for registration to be constitutional. You could have a very benign registry that would impose no disabilities and restraints, could do nothing to hurt the person. It could be a very benign registry, it would be constitutional. And there are dozens of state registration schemes that operate without running afoul of the constitution. So each registration scheme is going to have to be examined and challenged on its merits. If they were to overturn *Smith vs. Doe*, that would not end registration, it would just mean that if there's a new case that came along, and it was distinguished sufficiently from the *Smith vs. Doe* case, they would say, "Well, gee, you've gone too far. You can't do these things." But they wouldn't say, "You can never register another citizen again." They just wouldn't do that.

Andy 4:16

Chance, what say you?

Chance 4:18

What say me? I say that this may be more of a political question than a legal one, depending on who's sitting in court. I'm talking about the US Supreme Court, at any given time, and what the paradigm says at that time. We're just not there yet, that's what I say. In the future, we may be there. And Larry may be absolutely right, there may be a very limited and benign scheme. But until there's a paradigm shift in thinking on this issue, and perhaps some

movement on the court, as far as the players are concerned, it's just not going to happen.

Andy 4:59

Would you do me a favor? Would you dig into that? You just said that might be more of a political question than a legal question. Why do you think of it that way?

Chance 5:07

Well, I think that, in terms of who's sitting on that court, and what their background and political agenda is, plays into a lot of decisions they make, especially now, especially this last, say, twenty years, you know I mean, just look at the trends. And not just that, but who's sitting there, what their backgrounds are, what they did before. Who placed them in the position to make that step up? There's a lot of considerations here that have nothing to do with whether or not this is legitimate, cruel or unusual, wrong, or overbearing and that, to me, is more of a political skill than, say, a legislative one.

Andy 5:55

That's interesting. Larry, please have something to say in return.

Larry 6:03

Well, it sounds like Chance is saying something that I've said through the years: who we elect to the presidency, and to the US Senate (don't separate those two branches of government, because they're both involved in Federal Judicial Appointments), they have a critical role to play. We basically had a seat hijacked in 2016, when the late Justice Scalia passed away in February of 2016. And the political process decided -- they invented a rule that they cut out of whole cloth -- that a president in their final year in office doesn't get to make Supreme Court appointments. That was a political decision made by Mitch McConnell who was, and still is, in one of the key leadership positions. He happened to be the majority at that time. And they decided they were not going to give the President the opportunity to make an appointment. That was disgraceful, and they did it. And not to say the Democratic Party has never done anything. They put up roadblocks to appointments at lower courts, appellate level and District Court level, when they were in power. But they had never done that at the Supreme Court level. And I remind people about the appointment of Justice John Paul Stevens. We had an unelected President in 1975, who had ascended to the presidency from being appointed to the vice presidency, named Gerald Ford. And we had an opening on the Supreme Court. And we had a Democrat party in charge at that time. And the Democrat Party seated Mr. Stevens, at Mr. Ford's request. And they could have easily applied that rule because Mr. Ford had never been elected to the vice presidency, let alone the presidency, but yet he was

allowed that appointment. We had the same thing when Speaker Carl Albert could have assumed acting presidency role in 1973 when Mr. Nixon appointed Mr. Ford to assume the vice president role. Everybody saw the handwriting on the wall. I was alive in '73. We saw that, likely, the Nixon presidency would not run full term. If they had held up the confirmation of the nomination of Vice President Ford, we would never have had a Ford presidency. And Carl Albert, Speaker of the House, would have become acting president. These were unprecedented actions that were taken in 2016 for a sitting president. And we ended up with what should have been a presidential appointment by President Obama, they deferred to President Trump.

Andy 8:31

What I'm taking away from the two statements provided is that our work is more so on the front side of things and not on the back side. Of course, we're trying to defend ourselves if a prosecution of some sort comes our way. But the work needs to be done on the front side, of preventing things from getting, as we like to say here, Larry, worsen.

Larry 8:54

Correct. And we've got to be careful who we vote for. A lot of the public disconnects from the importance of voting, when they set out in 2016 and said, "I don't like that woman." Remember that?

Andy 9:08

I do recall something along those lines. "She doesn't inspire me" was the words.

Larry 9:11

Yes, yes, "didn't inspire" and, "I just don't like her." I say, "Why don't you like her? You don't know her personally", "I just don't like her." It's like, well, these things have consequences. The court now is in a position with young justices that are going to be there for a very long time. And, even if some of the older justices get out of the picture, it's going to take some time, from the culture that's developed over the last fifteen, twenty years, to change. Justice Roberts is now a moderate and, in fact, if those who listen to the Dan Bongino show, with Chief Justice Roberts and Justice Amy Coney Barrett, they were accusing them on Bongino's show of being liberals. Now can you imagine Justice John Roberts and Amy Coney Barrett being liberals? But that's what Bongino said, because they voted in favor of allowing the administration to remove the wire that the governor of Texas and the Attorney General of Texas have erected on the border. And they said that that converted them to liberals. Can you imagine?

Andy 10:25

I seriously don't know Roberts' politics that well, but I followed a little bit of the hearings of Barrett, and she's definitely not what I would call a liberal.

Larry 10:34

Well, neither is Roberts. Roberts is a very conservative man. He has high principles, he tries to protect the institution of the court, the integrity of the court, and he's a gentleman. But he's by no means a liberal. I mean, he's nothing close.

Andy 10:49

Anything further Chance, before we go? Or Larry, go ahead,

Larry 10:51

Look at how he rules on things related to business and commerce. He's diehard for business. Business can do no wrong. But go ahead, Chance.

Chance 11:01

Yeah, I just want to say that this is a really good discussion, because, if you really listen closely here, you're hearing exactly, exactly, the reasons why I say what I say. And if you want to just condense it down to a nutshell, that's really the legally realistic way of looking at it. Legal realism is there, right on all fours. And I appreciate that, appreciate the discussion on this.

Andy 11:27

Well, all right. This one came in, Larry, and I just put it up here, just because it looks kind of fun. In that, someone posted on YouTube, I just saw just now. It says, "Criminal records are publicly available. And having a registry that's easily accessible for the wider public is a great convenience. It's hypocritical to advocate for the removal of the registry, but not the criminal records themselves, which clearly shows your bias and sympathy towards the worst scumbags on Earth."

Chance 11:52

Wow.

Andy 11:53

That's kind of hateful.

Larry 11:55

Yeah, it's kind of entertaining as well because, first of all, the person's disconnected from reality, whoever you are. What we have advocated for on the Registry Matters podcast is we believe that the United States should seek to follow the example of European nations, where people do have some right, at some point, to be forgotten, and have their pasts go away. So that's a disconnection, number one. And number two, if the registry were only just public records being available, that would be one thing, I would

tend to agree, I've said that over and over again. So clearly, it's not a regular listener. If all the person had to do was register one time, and go on with their life. And they had a picture made at the time they were convicted. And they went on about their life, and they didn't have any obligations to inform law enforcement on every ninety days, or every thirty days, or every sixty days, if they didn't have all these things that would put them in jail for failing to update their internet usernames and passwords, and all the things that they do, and restrictions on where they can live and work. If all the person was doing was being registered, and a photograph made on the day of conviction. I would agree with you that that would not be unconstitutional. And we would be hypocritical scumbags if we said that public records like that, but that's not what registration is. So, whoever you are, you have no idea what is entailed in registration, because it's a lot more than just having a public record of a criminal conviction being exposed.

Andy 13:26

Chance, tell me, on a criminal conviction, what information is in there? It probably varies by state, but what is in there that you're aware of?

Chance 13:35

Well, the most pernicious thing that's in there is what you were convicted of. So that, in itself, is the penal code section. Often with an explanation of what it is, typically the most terrible explanation you can find is typically the short explanation as to what that charge is, if there is one. But typically, there's dates of arrest, there's a description of what the person was arrested for. And on top of which, if there was any kind of disposition or conviction, what a person was convicted for. And by the time you have all that information down, even the simplest arrest, even if it's for next to nothing, looks like a big deal. And that really, really messes up a person's background when it comes to seeking employment or housing or other things. So, yeah, it's kind of nasty.

Andy 14:30

But by comparison, the registry side, just the public information website side could list name, address, telephone number, girlfriends, parents, car license plates, boat registration numbers, ATV registration numbers, and then you end up with, on top of the registry side of it, the level of kind-of restrictions that you can end up with, depending on the state where you were convicted, that whole morass of things that go with it could have living restrictions, could have work restrictions, could have your actual employment restrictions to go with it, etc., etc., etc., not just that you were convicted of the most heinous thing and you look like Jack the Ripper. It's all the other crap that goes on it with the registry, that includes your updated

photo and address and, like Larry had just said, the internet identifiers. They're practically watching your presence on the Internet as you move about.

Chance 15:28

Yeah, really, it's more pernicious than just, you know, a criminal background record. And Larry's right, I mean, Europe has it down. The right to be forgotten is such an important right. And it's just mind boggling that Europe's ahead of us in this way. This is really where the rubber meets the road, the right to be forgotten.

Andy 15:52

I just want to make sure that I add that there is an individual in chat, in Louisiana, who says, "What's driving me crazy in Louisiana is the burden shifting, where the registrant bears the cost of public notification. Last time, four and a half years ago, it was \$700, for postcards, and then \$500 for newspaper ads." So that person has to pay for the notification that he lives in, that particular neighborhood, that region, whatever to send out "self-doxing" information, so-to-speak.

Chance 16:09

That's crazy.

Larry 16:26

I would suggest that you start voting differently in Louisiana. It's not going to change if you keep voting the same way. And one person always says, "Well, there's nothing I can do." But it starts with one step. But back to this question here, because it's common, I should say, if the registry were static, meaning that you did it on the day of conviction, and they said, "Congratulations, you're on the registry," and you went on with your life with no disabilities or restraints, no obligations, that person would be correct. They would be totally correct, that it would be merely a dissemination of static information. But that's not what it is. It's dynamic information that's continuously changing, that has to be updated under the threat of severe penalties, including "habitual offender enhancement" in many of our states. A person could have a registration obligation that was for a very low-level felony, and they can violate the registration of the plethora of things that you can be out of compliance on, and you can go to prison for, sometimes, lifetime. So your original conviction was a five-year maximum low-level felony, and then you're a habitual offender because they didn't exempt registration, as our state did. Our registration, it's not a part of our habitual sentencing scheme. You can get convicted of failure to register forty-five times here and it doesn't make you a habitual offender. But in many of our states, it does. So you're facing a potential life term in prison, in Texas, for an administrative violation.

Andy 17:57

I understand. Yeah, the "threat of prosecution" side, I always forget to mention that one. And you frequently bring it up that, just like the "website" in Florida. There's no threat of prosecution for you not "following the rules" there, if you're just "on the website". Whereas, if we're on the registry, like actively registering, they can come nab you.

Larry 18:21

I have had such trouble, I mean, for six years, I've tried to tell people, "I would prefer not to be on a website. But if that's all it is, there are no obligations imposed on you..." Now, if you believe the Kool Aid drinkers that believe that the website causes you to have all these disabilities and restraints, that's okay. I can't change that. But you have nothing to fear, in terms of a prosecution, if all it is, is you're on the website. You may have a projectile come through your window, if you have an address that's on the website that's still current. But, most of the time, when you've been registered in another state, that address is no longer current, because when you moved out of state, the new state doesn't continuously communicate with the old state. So it'll say "living out of state in New Mexico". And, if you're no longer on the New Mexico website, they don't have a current address so it's hard to send a projectile through your window. But you have no disabilities and restraints when you've been deregistered, just because you're on a website. And we're going to have this conversation, probably for another six years, and people will try to make sure I understand that being on the website is the equivalent of being registered. And we're never going to convince some people that it isn't.

Andy 19:25

Well, all right. I have this other question. So this came from the Connections website for NARSOL, like the social media website. And it is the proverbial "question for a friend of a friend" that lives in North Carolina. And this individual is on federal supervised release. A lot of this I had to kind of like, dig out. Because the question to begin with was a little bit just like, "Hey, this person has this issue. He has to be on federal supervised release and his handler says that he can't use the internet. Full ban as I understand it, and I realize it's pretty scant information, but I thought it was interesting that the full ban is in place where Packingham was decided on, and not some far, far, far away place. And if the full ban is an issue, and that would be the question that I have to ask for the two of you, is that, should this be an issue for someone that's on the federal supervised release that they have a full ban on the internet? And if so, what steps would a person with this condition set by their handlers take to move forward?"

Larry 20:29
Who's going first, me?

Andy 20:31
Why don't you go first, Larry?

Chance 20:34
We'll let Larry go first. I'd like to hear what Larry has to say about this.

Andy 20:38
Larry's gonna say, "They'll do it until they're told to stop."

Larry 20:40
Well, I would say that. But, in terms of a full internet ban, that's very problematic. If you read the Packingham decision, although it's dicta (and Chance can explain "dicta" better than I can, but there's a lot of dicta in Packingham), it suggests strongly that they're concerned about that particular person who's no longer under supervision. Well, this person *is* under supervision, which gives them greater latitude, but not for a total ban, in my opinion, unless it's been individually tailored to the needs of that offender. You could have a person, theoretically, that their offense pattern below, before they got to the stage of life of being on supervised release, that it might merit a near total ban. But as the jurisprudence has developed over the years around the country, total bans are frowned upon because there are adequate means to monitor people, technologically, that I cannot begin to explain with software or hardware, or a combination of the two. And probation is encouraged to give at least limited access to individuals who are under active supervision. But a total ban, I would need to know the circumstances of what the underlying offense was, how long ago it was, and if this was uniquely, narrowly tailored, or if this is something that P.O. or that probation district is doing universally. If it's narrowly tailored and they say, "No, we don't generally do that. But in this rare case, we've done it and here's why," I'd like to see that. But if they just said, "Well, everybody in this probation district has that," I'd be very concerned, and I would be looking at this as a good candidate for a challenge, if I had a law license in that jurisdiction.

Andy 22:26
Chance?

Chance 22:27
I think that's the correct analysis, actually, because, you know, you're on parole or probation. The conditions have to reasonably relate to what they are. And in this particular question, we just don't have enough information to really say what this is really about, and nothing to really analyze or compare it to. So, I think that's right.

Larry 22:52
What is dicta?

Andy 22:54
Yes, please.

Larry 22:55
I mean, I could try, but I'd rather hear it from a lawyer.

Chance 22:58
Well, dicta is just a lot of things thrown into the case that really don't have any relevance, as far as the rationale, or the reason for the holding, or the holding itself, what the case says. It's just a whole lot of, maybe backstory, or it may be things that the court thinks are important to say, but actually has no relevance to what the court is going to do, or why the court is going to do it.

Larry 23:25
In *Smith vs. Doe*, there's a lot of dicta in there and people misunderstand when the court is pontificating, and when they're actually issuing a holding. And there's dicta in the *Smith vs. Doe* decision. Well, one of the big ones -- we're going to hijack this program, because I think that the "frightening and high recidivism", we got to do a program on that, Chance, we're gonna do a program on frightening and high recidivism. We'll have a discussion about that, because that'll hijack the rest of this program if I go down that path.

Chance 23:53
I'd like that, that'd be a fun one.

Andy 23:58
Shall we move along, then?

Larry 24:00
Let's do it.

Chance 24:00
Moving along...

Andy 24:02
All right, I'm going to channel my inner John Donvan of a program called Open to Debate. And on this program, we have two debaters who are going to discuss the question about whether you need to follow Federal SORNA regulations (which really aren't presented very well) but, the idea here is that we have one participant who's going to tell you something about a "warm bucket of spit", and the other participant is going to tell you why "it's the letter of the law, and you have to make sure that you follow everything perfectly and clearly". So, with that, I will introduce you to our first speaker, Larry, do you mind going

first? And give us your opening arguments on why you think it's a warm bucket of spit?

Larry 24:42

Sure, I can go first. I'll tell you that, in my opinion, and I follow the political angle of why the Adam Walsh Act was passed. And I dig very deep below the surface. Very few people do that and they don't understand the backstory of what Congress was attempting to fix, and the limitations that they realized that they faced. So, when they passed the Adam Walsh Act in 2006, they were trying to fix a problem that was legitimate. There were 100,000 or so people who had been registered under the various state registry schemes who had moved across jurisdictional boundaries. And the state they had moved from had absolutely no incentive to want to track them anymore. Because their investigation revealed they're no longer here in Alabama. And if you're Alabama police, law enforcement, you would much prefer the person be offending out in California than Alabama. But California didn't know that they were there because they hadn't checked in. So, they were missing. So the biggest thing they were trying to cure was the 100,000 unaccounted-for registrants who had gone off the grid. And they passed this new series of enhancements to try to close the gaps, and get the states to bring their registries up to more uniformity, and more in alignment, so that a person would be less likely to disappear. And if they did disappear, they needed to have a consequence for disappearing. So they put a provision in there, which I can never cite numbers, but they put a provision in there for interstate travel, that anybody who travels in interstate commerce has a duty to register. They were trying to stop people from traveling from state to state and not registering. And remember, there was no incentive for Alabama to spend any of their dollars to track the person down. So they needed a federal enforcement mechanism. So they looked at the Interstate Flight to Avoid Prosecution. From the political angle, they said, "Hmmm, well we go after state fugitives who have left Alabama and gone to California and we charge them with interstate flight to avoid prosecution so, hmm, that won't work. And they put that provision in there to capture those who travel, who are actively registered in Alabama, and who do not present themselves to California. Well, as all bureaucracies move about, they've discovered that, "Gee, we can use our manpower to go out and hunt down the ones who had traveled prior to enactment." And there was a great deal of litigation, and the courts ruled that they could not go back and prosecute those, because they "had traveled" and the language of it is anyone who "travels" so they took that to be "forward travel" so that wiped out convictions and prosecutions. But the problem they were trying to fix was to get the missing sex offenders. But they recognized they didn't have the ability to create a federal registry. They just didn't. Maybe, narrowly, they could have created a federal registry for

those who had committed Federal sex offenses. So they created "monetary enticement" to get compliance, by giving the states rewards and penalties. They gave them early compliance money for those who achieved substantial compliance, and then there's the theoretical 10% reduction. They used the power of the purse. They clearly recognize that they couldn't create a federal registry because, when you're convicted in a state, there's what's called a "jurisdictional hook" and the federal courts have limited jurisdiction. So therefore, there's no jurisdictional hook to take a person who's been convicted in California, who's never left California, and to force them to register if California doesn't want to register them. So that's what my position has been, is, and will remain. But there are people who look at the iteration of the regulations that have come out, and we'll get into it in another segment, so I can hand this microphone to Chance. But there's a reason why they put the language that they have in there. It says what they say it says, but it doesn't mean what it says. And I can get in there and explain to you why it doesn't mean what it says. And I can give you hard data to tell you why. It's foolish to believe the way that people are interpreting it. I mean, they're overreacting to an imaginary boogeyman, but I'll shut up and let the Chance take a chance.

Andy 29:06

Go ahead, please.

Chance 29:06

Okay, I think maybe the first thing I'll do here is talk about what are the SORNA regulations, so that we're all on the same page here. And that is that they are the Sex Offender Registration and Notification Act. That's what's known as SORNA. It's a federal law that imposes registration requirements upon all persons convicted of a sex offense, even if they were convicted under state law, and even if they live in a state that doesn't follow SORNA's requirements. And it is kind of like what Larry just said, this is kind of like a stop-gap type thing. Like state law registration requirements, SORNA and the regulations impose affirmative obligations to report specified information to law enforcement. Some of the requirements come from SORNA itself, which is a federal statute, while others are added by the DOJ's new regulations which just came out a couple of years ago. Neither SORNA nor the new regulations impose affirmative restrictions like residency, presence, or employment restrictions. So, the second thing to understand is to whom the regulations apply. SORNA requirements are independent of state law. And this is something Larry just spoke about a moment ago, the SORNA requirements apply to you even if your state is not a SORNA state. Initially, Larry said that there were monetary incentives and other additional things to get states to comply. Again, I'll repeat: these requirements apply to you, even if your state is not a SORNA state. And I'm going to

point out a case, it's called *U.S. vs. Felts*. It's 674 F.3rd 599, 603. It's a 2012 case. And some of the language from it goes something like this, "The duty to register in a state registry is independent of a state's degree of implementation of SORNA." Then it goes on to speak about *U.S. vs. Paul* (718 Fed Appx. 360, 363-64, 6th Cir. 2017) and it says "Paul fails to appreciate the duality of sex offender registration systems. Yes, the sex offender's SORNA obligations are co-extensive with corresponding state registration requirements. But SORNA imposes duties on all sex offenders, irrespective of what they may be obliged to do under state law." SORNA requirements apply to you, if you meet the definition of sex offender under SORNA, which means "an individual who was convicted of a sex offense" as defined in 34 U.S.C. Section 20911(5). I want to note that a current requirement to register is not part of the definition. If you were relieved of the duty to register under your state's law, you are probably still subject to the SORNA requirements, because you meet the definition of "sex offender". But, if you have no written or other notice of the SORNA requirements, because the state did not inform you of them, and you otherwise didn't learn of them, the regulations confirm that there is no liability, because SORNA violations must be "knowing". Also, if you cannot comply with SORNA because state or local law enforcement refuses to register you, this is an affirmative defense, meaning that you are not liable. But you must try and report the information to local law enforcement first. And this is really important to know. Imposition of SORNA requirements on persons, regardless of whether state law requires them to register, is discussed throughout the final regulations. And these are the new regulations. These are the things that just came out a couple of years ago, and I'm talking about 86 F.R. (federal rule) 69868. And I'm just going to read you some of the language, "Consider a situation of this nature in which SORNA requires a sex offender to register but the law of the state in which he resides does not...", like we were speaking about above, "Notwithstanding the absence of a parallel state law, registration authorities in the state may be willing to register the sex offender because federal law (for example, SORNA) requires him to register. If the state registration authorities are willing to register the sex offender, he is not relieved of the duty to register merely because the state law does not track the federal law registration requirement." That's found in 86 FR 69866. So naturally then, the next question becomes, if you have a current obligation to register under state law, must you attempt to comply with the SORNA requirements? Well, yeah, most definitely, if your conviction is under federal law, for instance, military convictions, and federal court convictions, District of Columbia law, Indian tribal law, or the law of a U.S. territory or possession. But, probably, even if you have a state law conviction, although there is some ambiguity regarding whether you have to comply before you move

into interstate commerce. So, when do you have notice of duty to comply with SORNA? The regulations state that the normal procedure is written notice to you, which you sign, followed by a process in which you report the required information. And that's at 86 FR 69868. If you don't receive written notice, you are probably not required to comply, but the regulations also say that you can receive notice "from other sources". And I'll say that again: You can receive notice from other sources, and we don't know what those could be. And that's it at 86 FR 69868. So then, how long does SORNA require you to comply, or attempt to comply? Well, that depends on your SORNA tier, and this is where it gets a little confusing. Tier One is 15 years, unless you have a clean record and then it becomes 10. These are the *federal* classifications, under SORNA. Tier Two: 25 years, and Tier Three: lifetime except for some juvenile offenders, for whom it's 25 years. So your SORNA tier requirement may be something that you need formal notice of before becoming obligated to follow the SORNA requirements. SORNA tiers are not necessarily the same as your state tier. For example, in California, CP felony possession and distribution are tier three. Federal SORNA classifies CP Possession as Tier One, and CP Distribution as Tier Two. Many contact offenses in lower tiers in some states, are up on Tier Three in federal SORNA. But, on the bright side, it appears that if you've registered for the length of time required by your SORNA tier, you no longer need to report information required by SORNA, although the regulations do not expressly say that. For instance, 86 FR 69871 says "expiration of the SORNA registration period accordingly, does not obviate the need for sex offenders to check with registration jurisdictions whether they remain subject to registration requirements under the jurisdictions' laws."

Andy 36:35

Chance, can you read that again?

Chance 36:36

Let me read that again. "Expiration of the SORNA registration period accordingly, does not obviate the need for sex offenders to check with registration jurisdictions whether they remain subject to registration requirements under the jurisdictions' laws." It's kind of confusing, right?

Andy 36:57

Without a doubt.

Announcer 36:58

Registry Matters Promo Deleted.

Andy 37:48

I want to ask a question about, and feel free to chime in, either Chance or Larry, you're talking about a federal rule,

but this isn't a House bill, Senate Bill that got signed by a president. Am I reading that correct?

Chance 38:03

You are reading that correct. And that's part of the issue. There is SORNA legislation which occurred before the new rules came out. The new rules were provided by the Attorney General, okay? Those are the new regulations, and the new regulations, as you might determine by what I'm saying here, are very confusing and kind of vague.

Andy 38:30

Larry, do you have anything to add to that before Chance goes on?

Larry 38:33

Well, in terms of the last one that you highlighted that he read, that is, in fact, correct. The federal government can't release you from a state's registration obligation. So if Mississippi considers you to be a lifetime, because they've classified everything as lifetime, it doesn't make a darn bit of difference that, under the federal SORNA guidelines, that you would have had either a fifteen or ten-year obligation at the federal level. So that I agree with. But we'll get into where I disagree. But that is very confusing, in terms of that language, for people to understand. Because it almost looks as though they're trying to have it both ways. But like I say, I have my own theory of why they've done what they've done.

Andy 39:19

Well then continue, Chance, on what the consequences are for non-compliance.

Chance 39:23

Well, that's a big subject here. The federal crime for failing to register appears at 18 U.S.C Section 2250. And the short form is "Upon conviction, a court can sentence an offender to a fine and/or up to 10 years in prison." That is a hefty price to pay. So it comes down to then, where we intersect, where Larry and I intersect in this discussion, which is: Do I need to attempt to comply? Now most, if not all, competent practitioners recommend that you do. Because of the ambiguity of receiving notice, like "from other sources", and the ability to establish an affirmative defense under the new regulations. The regulations seem to assume that someone cannot prove impossibility to comply without first trying to do so. You want to see page 69887 of the new rules, which discusses the affirmative defense applying after the sex offender attempts to comply with the requirements by contacting the local sheriff's office. And they, meaning the above-mentioned practitioners, would suggest that you ask your local jurisdiction how they want you to comply with federal SORNA, and ask them for an email address to which you can send this information. That way, you will

have documented your attempt to comply, and established your affirmative defense against potential future criminal liability. What say you, Larry?

Larry 40:56

Well, what I say is that, looking at this, Andy and I are, at least I know I am, data driven, so I look at the data. The Adam Walsh Act, SORNA as you're referring to it, passed in 2006. And the language has been there since 2006. There's a section that says "obligations on the offender", and the section that clearly delineates "obligations on the jurisdiction". And as it was originally passed in '06, the impetus was trying to get the jurisdictions to upgrade their registration processes. But here we sit, eighteen years later, and in eighteen years time, a lot of people have been discharged from registration across the country, through either a simple timeout, maybe in Vermont where they don't have to petition. But although there's tens of thousands of people have been removed, in eighteen years, not a soul has been prosecuted who has had their registration expire, or have been discharged. And I can't even begin to tell you how many thousands of people that would've been, not a single individual has been prosecuted. And with my connections on the national defense lawyers listserv, the state defense lawyers listserv, I'm fairly confident with our NARSOL network, that we would have found somebody who had been prosecuted, and there is not a single person in eighteen years. So, look at that data point. And also look at, since this injunction was issued on these regulations two years ago, that injunction is only valid in the boundaries of California. That would mean that in forty-nine other states, with forty-nine other U.S. Attorneys' Offices, staffed up fully for the most part, not a soul has been prosecuted in any of the forty-nine states, that has been removed from registration obligations. So, to me, it's a hypothetical boogeyman, because no one is trying to prosecute people who have timed out. But there is an agenda for this, in terms of what they're doing. But it's not to ramp up federal prosecutions for people who have been relieved of registration obligations. What the sinister motivation for this is, is to try to create such a bleak amount of confusion that uneducated part-time lawmakers, which are primarily the rule around this country (not in California, they have a full time paid legislature with significant staff resources, but around the country) these part-time legislators are being given a way to become substantially compliant, by just simply adding one line to their registration obligations, including how they define a sex offender. They can define a sex offender to include a person who would be defined as a sex offender under federal SORNA. So like, for example, in Georgia, you could add one line to the Georgia removal process, and you could say that a person can be removed with the following exceptions. And you can say "a person who would be otherwise defined as a sex offender under federal SORNA". And that's the big

part of the agenda here is trying to convolute the issue so much to where people, the states, either legislatively or administratively can say, "Well, I can't let you off of this list because it would violate that big old bad federal government." But there's nobody anywhere trying to prosecute anybody who's been removed from registration. So people, if you want to spend your time worrying about this, and trying to check in with registration offices, if you want to do that, that's fine. But if you've got a document, a letter saying that you've been removed from registration, and you've been removed by a court order, or you've been termed out by the state, I wouldn't spend another waking moment thinking about what's going to happen within the boundaries of that state I got removed in. Now the whole analysis changes if you leave that jurisdiction, because that was the very loophole that the federal government was trying to plug, the people moving across jurisdictional boundaries. So as this line that we focused on above, talked about that you might not have a state obligation. If you move from Vermont to Mississippi, well, Mississippi would cover you because you're still alive, or Alabama would still cover you because you're still alive. In my opinion, they're trying to capture those people, and since you can't show me the evidence to the contrary, that they're trying to capture the people that have timed out or been removed, I think it's still an imaginary boogeyman.

Andy 45:42

Okay, do you want to pile on top of that, Chance?

Chance 45:48

No, I think that, in practical effect, Larry's got a very good point. And he does understand the basis for this, which is interstate movement. And I think that, in a practical sense, we have not heard of anybody being prosecuted that's been removed. There are, you know, I think ninety-four district courts, I don't know where you would get the information from. But something tells me that that's probably correct, because if people were being prosecuted for it, you'd certainly hear it in attorneys' forums. And we'd certainly understand that it was being applied somewhere at some time. We just don't have that.

Andy 46:37

One thing that I would add is that "absence of evidence isn't evidence of absence". I just want to make sure that that is stated. Just because we don't know doesn't mean it doesn't exist, but it makes it more likely.

Chance 46:49

Well, that's true. But two points to take away from here: One, the boogeyman is not a straw man, it does exist. The practical effect of it, now, so far, nothing. Nothing to report, and the application of it, to be determined in the future.

Larry 47:16

Well, what I would say, Chance, is I hope this litigation with the Pacific Legal Foundation, which is the impetus for this discussion, I hope this litigation is successful. But what would be sad is if it doesn't go the way that we hope it goes. All of a sudden, you have the largest state in the country with an adverse decision which, of course, Pacific Legal would take that up to the Ninth Circuit. And then you have the largest geographic circuit, with the largest amount of concentrated population, you would all of a sudden have case law that would be adverse for the largest population centers of the whole United States. When you take the total population of the Ninth Circuit, it dwarfs every other circuit. And all of a sudden, we would have bad case law, so I hope people have taken that into consideration. In my view, this question did not need to be asked until there's some kind of credible threat of a prosecution. Now, I don't think they asked the question for the reason people think they asked a question for. I think they were looking for a train to ride to go after the non-delegation clause in the Constitution. They're trying to challenge that. Just like these death penalty proposals around the country, to apply the death penalty to people convicted of certain sex offenses. This is not about the death penalty. I mean, it is about the death penalty, but it's not so much about sex offenders, per se. That's the boogeyman that they're choosing to use, to try to test the limits of the death penalty. They believe, the Conservatives and the people who are strong supporters of the death penalty, they believe that this Court is going to be more sympathetic to the application of the death penalty than previous courts have been. So, they might be able to roll back some of the advances, particularly for the prohibition against executing people who committed their crimes as a juvenile. So this is a grander scheme. And I think that's what's going on here with this Pacific Legal Foundation. I think this is just simply a vehicle to ride. And it's a dangerous vehicle to ride because it may not come out the way; just like the people who wanted to have the supreme court rule on same sex marriage. They didn't like the ruling. We may not like how this comes out. I would rather have waited until we needed to have this question answered. Right now, we don't need an answer.

Chance 49:25

And, you know, Larry, you're kind of right here. I see it the same way. It is the vehicle. It's about non-delegation. But look, even if that's successful, those rules are still out there, and they can be legislated, and they can come back to haunt us in a very, very big way. So, you know, whether it happens one way or the other, there's always that risk, you know, the timing of it, how long it would take, whether or not the players were present to do it, who knows? But at this point, the train's left the station. So, again, it's something to see in the future.

Andy 50:06

I have a couple of questions. Were these "hooks" in effect prior to the change to this new SORNA regulation? I'm thinking that there were, they just made them more?

Chance 50:19

Are you referring to the new rules?

Andy 50:22

Yes, I'm referring to the new rules, but compared to the old rules that, if you were released from registration, you still had a federal obligation to make sure that you were in compliance? I don't know the right way to word that. Larry, help me out, please.

Larry 50:36

Yes, I think I understand your question. And yes, if you look at the legislation, you can come up with how the regulations flowed from it because you can interpret that these obligations exist on the offender. I don't interpret it that way because I understand what they were trying to do. They were trying to get the states to impose these obligations on the offenders. And they were trying to give the states the financial incentive to impose these obligations. They didn't want a person leaving Mississippi, where you had a lifetime obligation, to go to Vermont to have a ten-year obligation. So, they were trying to get Vermont's registry to look more like Mississippi's registry. And you have a hard time making Vermont have a lifetime registry for everybody. So, they came up with this three-tiered system that's categorical, rather than risk-based. And that's what they were trying to accomplish. And you can read exactly from the Adam Walsh Act what is there, but that's not what it was trying to do. The fear is, since we always give law enforcement more resources than they need, if you start looking at it that way, and say, "Gee, I can interpret it that way." You could, and you could have some prosecutions going forward. But the first thing I'm going to argue if that happens, is I'm going to argue jurisdiction. There's not the jurisdictional hook. If I got convicted in Georgia, and I never left Georgia, and you try to prosecute me when I've been relieved from registration in Georgia, the first thing I'm gonna say is, "There's no jurisdiction for this prosecution at the federal level." And I'm gonna say, "You can declare all you want to. Congress can declare that the earth is flat, and you're gonna fall off a little outside town, but that doesn't make it so. And so, the fact that you're proclaiming federal jurisdiction doesn't make it so." And so some bureaucrat saying, "we've got federal jurisdiction" does not translate to actual federal jurisdiction.

Andy 52:38

This is complicated. That's all I'm gonna say.

Chance 52:40

Yeah. You know, Andy, though, one thing they did with the new rules and regulations is, rather than put the onus on the states, because some states went along with it, there was a pushback from the majority of the states, they put it on the individual. Okay, and that really crossed the line here in my mind, the constitutional line. They put it on the individual to know and do these things. And to me, that's the most pernicious part of this. It kind of bypasses all the jurisdictional arguments and everything because it then becomes on you, not on the state, not on the federal government, on you. And then they started telling you how you can, you know, build up this affirmative defense and stuff. I mean, I've never seen anything like this, ever. So, the thing that really worries me is, even if the Pacific Legal Foundation is victorious, I'm worried that federal legislators are going to say, "Oh, okay, let's pick this up and let's put it into effect. Let's legislate it." And that would be awful.

Andy 53:55

Well, would they then still have the hook to do it, though? Because, I mean, the way that I understand it from the non-legal mind, is that the federal government cannot push laws down into the states without some kind of buy-in from the states, I suppose you could say. The federal laws are different than state laws. They just can't, like violate constitutional rights, something along those lines.

Chance 54:19

Yes, they can legislate. The issue then becomes not a delegation of powers issue, it becomes whether or not the law, in and of itself, is constitutional. And that's a whole different discussion.

Andy 54:30

Sure. Larry?

Larry 54:31

That's what I was gonna say, that you can legislate till you're blue in the face. But just because you legislate, it starts with a favorable presumption that it's constitutional but this is where conservative courts, if they were intellectually honest, would theoretically push back. Because they're always concerned about the over-encroaching reach of the federal government. Magically, I think they would abandon that, when it comes to this issue. But there's just not a federal jurisdiction. When you regulate trucking, there's a federal argument for jurisdiction, because of the crossing of state boundaries. The truck doesn't just stop at the Georgia line and they don't load it into another truck on the border of Georgia, so you can claim a jurisdictional hook. But just because you say you have jurisdiction doesn't make it so. And if the federal government wants to create a separate registry for all the people that Georgia has removed, that have never left Georgia, arguably, Congress can appropriate

the funds, and declare that they've got a federal registry. But that doesn't mean that the first time the U.S. Attorney files a complaint in the Northern District of Georgia that that is going to be a successful prosecution, because I'm going to argue "There's no jurisdiction for this. There's not a federal issue involved here. There's not a basis for you claiming jurisdiction over whether our state wants to have a sex offender registry." Georgia could abolish their registry tomorrow and there wouldn't be anything the federal government could do about it, other than withhold funds. So jurisdiction is always going to be in the back of my mind, in terms of state convictions for the person who never has left the state.

Andy 56:10

I'm with you. Chance? We're kind of winding down now to move on to the next section. Okay, very well. Very good. So, Larry, do you want to do this one article from California?

Larry 56:23

Yeah, we could do one. That's gonna be a fun one. We can put the other three for next week if we don't have anything better. But yeah, this one from California is gonna give me a chance to pontificate.

Andy 56:33

And is this the one that says, well, I don't really have any notes on this one, though.

Larry 56:41

California prison, I can explain it once you once you set it up.

Andy 56:45

This comes from "Cal Matters". Hey, they stole our name, Larry! Instead of it being Registry, they called it Cal. "As California closes prisons, the cost of locking someone up hits a new record of..." Holy crap! 132,000 bucks per person? Almost 133? I thought the southern states are cheap, at like 50,000 bucks. Holy moly!

Larry 57:09

Well, the reason why I put this in here is because we got the connection with Chance in California, and he can explain why things are expensive out there. But what I took from this is something that I've said through the years on the podcast: Reducing the prison population doesn't have a corresponding reduction in the cost of corrections. And the reason why I knew that is because we, in New Mexico, we took a dramatic turn twenty, twenty-five years ago in terms of our juvenile system. And we downsized our juvenile justice system dramatically, in terms of how many people we locked up, but the cost of the juvenile system went through the roof. And I said, "Hmm, what happened here?" Well, if you don't close the institutions altogether, and

mothball them, which there's cost involved in doing that, you don't really save a whole lot of money. Because the person's three squares a day that they're eating doesn't really cost that much. The building still has to be air conditioned, staff positions still have to be filled, and everything's running along. But if you look at the graphs and charts in this article, over the last decade, the inmate population in California has dropped by 25%. But the cost of running the prisons, despite that drop, continues to go up, and up, and up. The average cost per inmate has really gone up. So those who say, "Well, if we just cut the number of prisoners..." No, it doesn't work that way. You've got to close, shut down, and mothball institutions. And that's tough to do in a political climate, because prisons typically are located and built in more rural areas, because that's the big employer there. And these California prisons are paying some good money. If you look at that article, these corrections officers are making what I consider very good money. So Chance, what do you say? How come you can't get your cost of prisons under control, even though you've got one fourth fewer inmates out there?

Chance 58:59

Oh, yeah, no, that's not happening. Because, you know, crime is always on the up and up, typically. But I see your point, I'm looking at this article. And even though the criminal justice analyst says that the actual costs to house prisoners is like \$15,000 a year! And I understand that cost. Because yeah, I know what prisons and jails do. I mean, as far as, you know, the stuff that they supply the prisoners with, which are seconds, thirds, fourths, fifths, and whatever. But think about this. It's a business. And what she found there was what you said, which is compensation for employees at the Corrections Department increased 43% between 2010 and 2019. These guys are getting paid \$110,000 to \$150,000 per year! And you look at their state contracts, which included bonuses and things like that, goes to the point that California prisons are businesses, not necessarily prisons in the traditional sense. And when you've got businesses, and you've got local rural communities, you've got negotiations every year, and you've got to keep people inside those prisons watching. You're going to have to pay, you're going to have to pay them. And, you know, look at inflation, look at the rest of the costs and say, "No wonder!"

Andy 1:00:27

So it costs another 100,000 bucks to watch, per person, over the 15,000 bucks a year?

Chance 1:00:33

The 15,000 that appears to be in this article, was the cost of housing a prisoner. That's housing.

Andy 1:00:42

Okay, does that not include the food?

Chance 1:00:45

That's necessities, what they wear, what they eat, that type of thing.

Andy 1:00:50

Which is pennies, you know. I think they probably spend something of a dollar or two, per day, per person. So I don't know what that would include. That's not that much money in that 15,000. Whether it is or isn't included, that's \$300 bucks a year.

Chance 1:01:02

Well, if you've ever been to a California prison, which I have, the prisoners, the inmates there live at poverty level.

Andy 1:01:10

Of course.

Chance 1:01:10

But the employees of the correctional department, look, I wasn't aware of this. But you know, when you say from \$110,000 to \$150,000, that's pretty good money.

Andy 1:01:21

Not in California, you're living in a shack!

Chance 1:01:24

These prisons are staffed. So, it makes perfect sense.

Larry 1:01:30

Well, this is where people who don't understand the political angle as well, this is for your conservative and liberal ideology, they overlap and combine nicely. The Conservatives really appreciate having the prisons in their communities because it's an economic driver. You get good jobs, and good economic activity in a community that might not have a whole lot going for it. And that's not unique to California, it's in Arkansas, New Mexico, wherever. But you have prison workers who tend to be unionized. In the public sector you have more unions. So you got the Democratic Party wanting to be kind to the unions, because that's workers for their campaigns. And you got the Republicans wanting to be nice to the prisons, because they believe in corrections. And it's nice to have these people with these cherry jobs that they have in their communities. So this is where you have a hard time overcoming what would seem like a no-brainer. You'd say, "Well, a liberal state like California, they should be able to cut the corrections department budget." No, it's not quite that easy, because being soft on crime is not a big seller, even among progressives. But you have the union workforce that loves the benefits and the wages, and you've got the conservative

part of the state, where they're law-and-order anyway. And they love having these jobs in their community. So, you'd have a lot of support for the Corrections Department, even in a state like California.

Chance 1:02:54

Right, right.

Andy 1:02:58

Anything else in here before we go? We're right at an hour now.

Larry 1:03:01

I think we can kick it over to next week, and Chance is gonna come back and what was it we said we're going to talk about? I've already had a senior moment. I said we'll ...

Chance 1:03:10

Ooh, you know what? I'm having a senior moment as well. I've got our stuff to follow up on from our discussion of the tiered registry in California. Just a quick question when we come back next time, but what is it we were gonna discuss?

Larry 1:03:26

Our transcriptionist will pick it up and he'll send me a note because whatever it was I said I have already forgotten.

Transcriptionist 1:03:30

[Senior Moment Note: He never said anything about whatever it was he thinks he forgot he said regarding what we're doing next week (except, maybe: "We can put the other three [articles] for next week if we don't have anything better." at 56:23)]

Andy 1:03:31

Absolutely.

Chance 1:03:31

Okay.

Andy 1:03:33

Well, fantastic. Thank you both very much for joining again this week. Very lively discussion about why it is, or isn't, A Warm Bucket of Spit. That should be the title of the episode perhaps, Larry? "Is that a warm bucket of spit?"

Larry 1:03:45

I think that sounds great.

Andy 1:03:49

(laughs) Find all the show notes over at registrymatters.co. Leave voicemail at (747) 227-4477. Email us at RegistryMattersCast@gmail.com or you can leave comments on the YouTube page too, if you'd like to. And then, of course, for as little as \$1 a month, please go over

and support the podcast and content creators that make the stuff that you're listening to, over at patreon.com/registrymatters. Without anything else, I bid you both have a fantastic evening and I hope you have a great weekend.

Larry 1:04:19
Good night.

Chance 1:04:19
Okay, same to you. Thank you, Andy.

Andy 1:04:21
Good night.

Announcer 1:04:25

You've been listening to F Y P.

Registry Matters Podcast is a production of FYP Education.

More show transcripts are available at <https://RegistryMatters.co> (that's right... just C O with no M)

In prison and can't get the podcast? Have a loved one "subscribe" at <https://patreon.com/registrymatters> at the **\$15 level**, and include your prison address information. Or send a check to cover at least 3 months.

REGISTRY MATTERS
MAIL-IN SUBSCRIPTION FORM

Sign me up for _____ months X \$6 = \$ _____
(Minimum 3 months) * **We do accept books or sheets of stamps. No singles please.**

First Name

Last Name

Name of Institution

ID Number

Address

City

State

Zip Code

**Make check payable to FYP Education and send to RM Podcast,
Post Office Box 36123, Albuquerque, NM 87176**