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Passing the Torch but Sailing Too Close to the Wind: Congress's Role in Authorizing Administrative Branches to Promulgate Regulations that Contemplate Criminal Sanctions

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PASSING THE TORCH BUT SAILING TOO CLOSE TO THE WIND: CONGRESS'S ROLE IN AUTHORIZING ADMINISTRATIVE BRANCHES TO PROMULGATE REGULATIONS THAT CONTEMPLATE CRIMINAL SANCTIONS

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INTRODUCTION

The Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States."[1] From this

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[1] U.S. CONST. art. I, § 1.

language, the United States Supreme Court derived the "nondelegation doctrine," which dictates that "Congress may not constitutionally delegate its legislative power to another branch of government."[2] In theory, the nondelegation doctrine precludes Congress from delegating its lawmaking power to administrative agencies. But, proving a nondelegation violation is an uphill battle. The common understanding of our jurisprudence is that striking down regulations by administrative agencies as violating the nondelegation doctrine is a rarity.[3]

The Supreme Court has stated that "Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors;"[4] instead, Congress must simply "lay down by legislative act an intelligible principle" to which the agency must conform.[5] If this is done, a court will find the delegation of broad authority to the agency to be constitutional.

There is, however, an open issue regarding whether the same "intelligible principle" standard applies to delegations of authority that allow for the promulgation of both civil *and* criminal penalties. In *Touby v. United States*,[6] the Supreme Court was asked whether "something more than an 'intelligible principle' is required" when Congress authorizes an agency to issue regulations that contemplate criminal sanctions.[7] The plaintiffs in that case argued that regulations of this sort "pose a heightened risk to individual liberty" and therefore require Congress to provide specific guidance, not just an intelligible principle, in its delegations.[8] The Court admitted that its "cases are not entirely clear as to whether more specific guidance is needed."[9] However, the Court decided to resolve the issue another day.[10] It remains an open question whether Congress must provide "more specific guidance" to administrative agencies that promulgate regulations authorizing criminal penalties.[11]

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[2] Touby v. United States, 500 U.S. 160, 164–65 (1991) (noting that "'[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.'" (quoting Mistretta v. United States, 488 U.S. 361, 371 (1989)).

[3] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (striking down New Deal legislation establishing restrictions on "hot oil" under the nondelegation doctrine); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down New Deal industrial codes under the nondelegation doctrine).

[4] *Touby*, 500 U.S. at 165.

[5] J.W. Hampton Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[6] 500 U.S. 160.

[7] *Id*. at 165–66.

[8] *Id*. at 166.

[9] *Id*.

[10] *Id*.

[11] *See, e.g.*, United States v. Mirza, 454 F. App'x 249, 255 n.4 (5th Cir. 2011) (noting that the

On July 27, 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act of 2006 (AWA).[12] Enacted as Title I of the AWA, the Sex Offender Registration and Notification Act (SORNA)[13] requires convicted sex offenders to register in each jurisdiction in which they reside, are employed, are a student, and were convicted.[14] If a sex offender fails to register when required to do so by SORNA and then travels in interstate commerce, the individual faces up to ten years imprisonment.[15] For offenders who were convicted *prior* to the effective date of SORNA and were therefore unable to comply with the initial registration requirements of the Act, Congress, in § 16913(d) of SORNA, delegated authority to the United States Attorney General to specify the applicability of the registration requirements.[16]

On February 28, 2007, the Attorney General published an Interim Rule,[17] which provides that the registration requirements of SORNA apply to all sex offenders who have been convicted of an offense which would require registration, even if the conviction for the sex offense was prior to the enactment of SORNA.[18] Many defendants—convicted sex offenders—throughout the country have argued that delegating authority to the Attorney General under SORNA to decide the applicability of registration requirements violates the nondelegation doctrine.[19]

Almost every court confronted with this issue has held that Congress's delegation to the Attorney General does not violate the

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Supreme Court has expressly refrained from deciding whether Congress must provide "more specific guidance," rather than merely an "intelligible principle," when authorizing the executive branch to promulgate regulations contemplating criminal sanctions); United States v. Anvari-Hamedani, 378 F. Supp. 2d 821, 829 (N.D. Ohio. 2005) (acknowledging that while the Supreme Court has upheld Congress's delegation of civil authority to the President under the International Emergency Economic Powers Act, the Court has not addressed the issue of delegation of authority to define criminal conduct, which is "more complex").

[12] Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587 (codified in scattered section of 18 U.S.C. and 42 U.S.C. (2006)).

[13] 42 U.S.C. § 16901 *et seq.* (2006).

[14] *Id*. § 16913(a).

[15] 18 U.S.C. § 2250(a) (2006).

[16] 42 U.S.C. § 16913(d) (vesting the Attorney General with "the authority to specify the applicability of the [registration] requirements" to sex offenders convicted before July 27, 2006, the date of enactment, "and for other categories of sex offenders who are unable to comply with" the initial registration requirement in subsection (b)).

[17] 28 C.F.R. § 72.3 (2007).

[18] *Id*.

[19] *See, e.g.*, United States v. Sherman, 784 F. Supp. 2d 618, 622 (W.D. Va. 2011) (rejecting argument by defendant that Congress impermissibly delegated exclusive legislative authority to the Attorney General to determine SORNA's retroactive application); United States v. Hann, 574 F. Supp. 2d 827, 837 (M.D. Tenn. 2008) (holding that the delegation of power in SORNA does not give the Attorney General the power to legislate and therefore does not violate the nondelegation doctrine).

nondelegation doctrine, although each of these cases was decided under the "intelligible principle" standard.[20] An undecided question is: if a court were to adopt the "more specific guidance" standard articulated by the Supreme Court in *Touby* when Congress delegates authority to executive agencies to issue regulations that contemplate criminal sanctions,[21] would the delegation by Congress in SORNA to the Attorney General pass muster?

If the "more specific guidance" standard were applied, then it is likely that Congress would be found to have impermissibly delegated legislative power to the Attorney General. Recently, in *Reynolds v. United States*,[22] Justice Antonin Scalia hinted at this outcome,[23] noting that the delegation in § 16913(d) "sail[s] close to the wind." In addition, at least one court has discussed this exact issue:[24] a federal magistrate judge, writing a Report and Recommendation, wrote:

> [I]f such "specific guidance" is required when the executive engages in rule making in the criminal context, I would recommend that this indictment be dismissed on the ground that SORNA does not provide sufficient "specific guidance" so as to allow this delegation of rule making authority to the Attorney General.[25]

This Comment argues that courts *should* adopt the "specific guidance" rule for delegations relating to criminal penalties, due to the fact these delegated decisions pose a heightened risk to individual liberties. If such a standard were adopted, Congress's delegation of power to the Attorney General in SORNA would likely be found to violate the nondelegation doctrine. Part II of this Comment explains the history and development of the nondelegation doctrine. Part III provides a background of the AWA and SORNA and explores the history of the 2007 interim rule issued by the Attorney General. Part IV examines decisions that address whether Congress's delegation of rulemaking

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[20] *See, e.g.*, United States v. Whaley, 577 F.3d 254, 264 (5th Cir. 2009) (holding that SORNA's statement of purpose is a guiding and sufficient intelligible principle); United States v. Ambert, 561 F.3d 1202, 1213–14 (11th Cir. 2009) (finding SORNA's broad policy goals to be intelligible principles); *Sherman*, 784 F. Supp. 2d at 622 ("Here, Congress clearly delineated the public safety and efficiency arguments underling SORNA's enactment, and . . . that guidance meets the intelligible principle test."); United States v. Morris, No. 08-0142, 2008 WL 5249231, at *10 (W.D. La. Nov. 14, 2008) (finding that the delegation made by § 16913(d) of SORNA to be constitutional under the "intelligible principle" standard but noting that prior cases had left open the question of whether § 16913(d) would pass muster under the "more specific guidance" standard).

[21] *See Touby*, 500 U.S. at 166.

[22] 132 S. Ct. 975 (2012).

[23] *Id.* at 986 (Scalia, J., dissenting).

[24] United States v. Morris, No. 08-0142, 2008 WL 5249231 (W.D. La. Nov. 14, 2008).

[25] *Id*. at *10.

authority to the Attorney General in SORNA passes constitutional muster under the nondelegation doctrine. Part V discusses other scenarios in which the "specific guidance," rather than "intelligible principle" standard, might be invoked. Finally, Part VI argues that the "specific guidance" standard should apply in the SORNA context and, by reason of this application, Congress unconstitutionally delegated authority to the Attorney General, in § 16913(d) of SORNA.

I. THE DOCTRINE OF NONDELEGABILITY

The United States government is rooted by the constitutional principles of separation of powers and due process.[26] In order to keep Congress's legislative power separate from the executive and judicial branches, the Constitution limits congressional delegation of legislative power to the other branches of government. The United States Supreme Court has recognized this principle as the nondelegation doctrine.[27]

Specifically, while the Supreme Court has explicitly declared that "the legislative power of Congress cannot be delegated,"[28] it has held that Congress can delegate "powers which [it] may rightfully exercise itself."[29] One policy justification permitting such delegations is that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[30]

Judicial writings of some of the Justices[31] reflect the flourish of concerns in scholarly literature regarding the scope of the delegation doctrine.[32] Still, the Court "has deemed it 'constitutionally sufficient if

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[26] *See* Mistretta v. United States, 488 U.S. 361, 371, 412 (1989) (concluding that Congress did not violate the separation of powers principle when it constitutionally delegated to the United States Sentencing Commission the power to determine appropriate sentences, within the statutorily established range, for federal criminal offenses); Boddie v. Connecticut, 401 U.S. 374 (1971) (calling the right to due process a "fundamental value in our American constitutional system").

[27] *See Mistretta*, 488 U.S. at 371; *see also* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 735–44 (1999) (explaining the rationales behind the nondelegation doctrine).

[28] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

[29] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825).

[30] *Mistretta*, 488 U.S. at 372; s*ee also* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) (noting that congressional delegation is necessary to ensure that the exertion of legislative power does not become useless).

[31] Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Burger, C.J., dissenting); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring); s*ee also* Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

[32] *See e.g.*, DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate To Be Constitutional*, 53 Fed. Comm. L.J. 427 (2001) (calling for congressional amendment of the public interest standard, because of a conflict with nondelegation values) Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296

Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'"[33] That said, Chief Justice Marshall recognized that discerning the exact limits is challenging and noted that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."[34] But some limits need to be drawn so as to preserve the Constitution's separation of powers principles.[35]

A. History and Application of the Nondelegation Doctrine

In its simplest terms, the nondelegation doctrine provides that any statute through which Congress delegates its legislative power is unconstitutional.[36] In several early cases, the Court upheld delegations when it reasoned that Congress made the legislated decisions and the executive or administrative official was (1) acting pursuant to Congress's instructions when it found contingent facts or conditions that triggered implementing a certain statute or (2) merely filling in the statute's details. The first ground is manifested in *The Brig Aurora*,[37]in which the Court upheld a congressional delegation of authority to the President to lift a statutory trade embargo against France and England should he determine that they had stopped interfering with

(1987) (arguing that broad delegation "deranges" virtually all constitutional relationships); Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 5 (1982) (analyzing "certain causes and consequences" of Congress delegating legislative power to the executive branch); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1237–41 (1994) (contrasting the "true constitutional rule of nondelegation" with the "post-New Deal positive law").

[33] Mistretta v. United States, 488 U.S. 361, 372–73 (1989) (quoting Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)).

[34] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825). *See generally* 1 K. Davis, Administrative Law Treatise Ch. 3 (2d ed. 1978); L. Jaffe, Judicial Control of Administrative Action Ch. 2 (1965).

[35] *See generally* Viktoria Loveit, *Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine*, 73 U. Chi. L. Rev. 1047, 1057 (2006) (noting that broad delegations that do not precisely prescribe agency action lead agencies to make their own rules and determination and in effect arguably engage in legislative lawmaking, which is Congress job.); Peter L. Strauss, Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 492–93 (1987) ("These agencies adopt rules having the shape and impact of statutes, mold governmental policy through enforcement decisions and other initiatives, and decide cases in ways that determine the rights of private parties.").

[36] *Mistretta*, 488 U.S. at 419 (Scalia, J., dissenting) ("The focus of controversy, in the long line of our so-called excessive delegation cases, has been whether the degree of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to amount to a delegation of legislative powers. I say 'so-called excessive delegation' because although that convenient terminology is often used, what is really at issue is whether there has been *any* delegation of legislative power, which occurs (rarely) when Congress authorizes the exercise of executive or judicial power without adequate standards. Strictly speaking, there is no acceptable delegation of legislative power.").

[37] 7 Cr. (11 U.S.) 382 (1813).

U.S. trade.[38] In response to the objection that Congress had invalidly delegated legislative power, the Court simply answered that Congress may exercise its power conditionally. Analogously, in *Field v. Clark*,[39] the Court again held that Congress has the ability to delegate its powers to the Executive,[40] but noted a limit: "[t]he legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."[41] Finally, the second ground is exemplified in *Wayman v. Southhard*,[42] wherein the Court approved a delegation of power to the federal courts to establish rules of practice.

The Supreme Court has rejected delegation challenges in all but the most extreme cases,[43] and has accepted delegations of vast powers to administrative agencies.[44] Specifically, during the mid-1930s, two significant instances in which the Court found an unconstitutional delegation to another governmental agency involved grants of discretion to administrators that the Court found to be limitless.

First, in *Panama Refining Co. v. Ryan*,[45] the Court found that Congress unconstitutionally granted legislative power to the President by authorizing him to prohibit the shipment in interstate commerce of "hot oil" without providing substantive or procedural standards to govern his decision.[46] The statute was silent with regard to when and under what circumstances the President should invoke his power,[47] and the Court found that Congress had "declared no policy, ha[d] established no standard, [and] ha[d] laid down no [intelligible] rule."

Second, in *A.L.A Schechter Poultry Corp. v. United States*,[48] the Court again held that Congress unconstitutionally distributed its vested legislative functions.[49] In *Schechter*, the Court struck down certain statutory provisions of a "Live Poultry Code" (Code), which the President had approved under section three of the National Industry

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[38] *Id*. at 388–389.
[39] 143 U.S. 649 (1892).
[40] *Id*. at 694 (upholding delegation of authority to the President to equalize duties on imports).
[41] *Id*. (citing Locke's Appeal v. Locke, 72 Pa. 491, 498 (1873)).
[42] 10 Wheat. (23 U.S.) 1 (1825).
[43] *See, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[44] *See Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting) (conceding the inability of the courts to police delegations).
[45] 293 U.S. 388 (1935).
[46] *Id*. at 415.
[47] *See id*. at 430.
[48] 295 U.S. 495 (1935).
[49] *Id*. at 529.

Act.[50] The Court found that the pertinent statutory phrase, authorizing the President to approve "codes of fair competition," was ambiguous[51] and did not constitute an intelligible principle necessary to restrict the President's action in enforcing the statute. Lacking such a principle, Congress essentially afforded the President "unfettered discretion"[52] to create "new laws"[53] without congressional approval.

In *J.W. Hampton*,[54] the Court introduced the "intelligible principle" test, in a bold 1928 decision, when it upheld congressional delegation to the President of the authority to alter tariffs when he found that they did not equalize production costs in the United States and competing foreign countries.[55] In *Hampton*, the Court attempted to create a general standard for distinguishing permissible from impermissible delegations when it stated that in seeking cooperation from another branch, Congress was restrained only according to "common sense and the inherent necessities" of the situation.[56] The Court somewhat clarified this vague statement when it stated that the Court would sustain delegations whenever Congress provided an "intelligible principle" to which the President or an agency must conform.[57] This "intelligible principle" test articulated in *J.W. Hampton* is the same as the "legislative standards" test of *Schechter* [58] and *Panama Refining Co*.[59]

B. The "Intelligible Principle" as the Standard for a Constitutional Delegation of Legislative Power

In the 1940's, the Supreme Court leniently applied the nondelegation doctrine; today, the Court sustains delegations whenever Congress provides an "intelligible principle" to which the agency must conform and applies broad standards to find this vague standard satisfied.[60] Thus, the "intelligible principle" standard represents the baseline that

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[50] *Id*. at 550–51.
[51] *Id*. at 531–35.
[52] *Id*. at 537, 542.
[53] *Id*. at 537.
[54] 276 U.S. 394 (1928).
[55] *Id*. at 408–09.
[56] *Id*. at 406.
[57] *Id*. at 409.
[58] 295 U.S. at 530.
[59] 293 U.S. at 421.
[60] *See, e.g.*, Lichter v. United States, 334 U.S. 742, 785 (1948) (stating that when Congress "lay[s] down by legislative act an intelligible principle," a specific formula is not necessary so long as an agency interprets the act by considering the act's purpose within statutory context) (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409); Yakus v. United States, 321 U.S. 414, 420, 426 (1944) (stating that the standards of the Emergency Price Control Act are sufficiently definite and precise to be a constitutional delegation of legislative power); Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 600–01 (1944) (stating the "just and reasonable" standard of the Natural Gas Act was a constitutional delegation of legislative power despite the act's failure to express a specific rule).

Congress must establish when delegating legislative power.

But, as Supreme Court Justice Clarence Thomas stated in *Whitman v. American Trucking Ass'ns*,[61] the Court should abandon the "intelligible principle" test in cases in which "the significance of the delegated decision is simply too great" to be exercised by any governmental organ but Congress.[62] And, in the words of one district judge,

> A jurisprudence which allows Congress to impliedly delegate its criminal lawmaking authority to a regulatory agency such as [the Department of Justice]—so long as Congress provides an 'intelligible principle' to guide that agency—is enough to make any judge pause and question what has happened. Deferent and minimal judicial review of Congress' transfer of its criminal lawmaking function to other bodies, in other branches, calls into question the vitality of the tripartite system established by our Constitution.[63]

Although Congress must normally give some guidance that indicates broad policy objectives, there is no general prohibition on delegating authority that includes the exercise of policy judgment.[64] A number of cases illustrate the point.[65] Likewise, even in regulatory schemes that affect the entire economy, the Court has "never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[66] Hence, Congress may confer discretion on administrative agencies to make determinations like how "imminent" is too imminent, how "necessary" is necessary enough, or how "hazardous" is too hazardous on administrative agencies.[67] In sum, the Court does not insist on much regarding congressional

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[61] 531 U.S. 457 (2001).

[62] *Id*. at 487.

[63] United States v. Mills, 817 F. Supp. 1546, 1555 (N.D. Fla. 1993).

[64] *See Mistretta*, 488 U.S. at 378 (approving congressional delegations to the Sentencing Commission to advance and promulgate guidelines but admitting that significant discretion existed with respect to making policy judgment about the relative severity of different crimes and the relative weight of the characteristics of offender that are to be considered). Notably, in *Mistretta*, the Court found the statute provided more than an intelligible principle because it "'outline[d] the policies which prompted establishment of the Commission, explain[ed] what the Commission should do and how it should do it, and set[] out specific directives to govern particular situations.'" *Id*. at 378–79 (quoting United States v. Chambless, 680 F. Supp. 793, 796 (E.D. La. 1988)).

[65] The Court has upheld complex industrial economic regulation where the agencies had initially denied possession of such power, unsuccessfully sought authorization from Congress, and acted without the requested congressional guidance. *See, e.g.*, Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Am. Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397 (1967).

[66] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) (quoting Am. Trucking Ass'ns v. U.S. E.P.A., 175 F.3d 1027, 1034 (1999)).

[67] *Whitman*, 531 U.S. at 475–76 (quoting Touby v. United States, 500 U.S. 160, 165–67 (1991)).

standards when Congress employs a delegation.

II. THE ADAM WALSH ACT, SORNA, AND THE 2007 INTERIM RULE ISSUED BY THE ATTORNEY GENERAL

"Sex offenders are a serious threat in this Nation," partly because "the victims of sexual assault are most often juveniles" and because "convicted sex offenders . . . are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."[68] As a result, Congress has, over the years, enacted legislation to help states monitor sex offenders and disseminate pertinent information about them to the public "for its own safety."[69]

A. PRECURSORS TO THE AWA AND SORNA

For example, President Clinton enacted the first federal offender registration law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act of 1994 (Wetterling Act),[70] which established minimum standards for states to register sex offenders and conditioned states' receiving federal funding on adopting those minimum standards.[71] Addressing a hole in the criminal justice system—the lack of community awareness of the presence of a convicted sex offender—Congress amended the Wetterling Act, in 1996, to include a provision for community notification,[72] known as "Megan's Law."[73] Congress also enacted the Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (Lychner Act), which demanded that a national sex offender database be created, required lifetime registration for certain offenders, and criminalized some persons' failure to register a federal offense and thus subjecting them

[68] McKune v. Lile, 536 U.S. 24, 32–33 (2002) (plurality opinion); *see* Smith v. Doe, 538 U.S. 84, 103 (2003) (acknowledging that "grave concerns over the high rate of recidivism among convicted sex offenders" exist).

[69] *Smith*, 538 U.S. at 99 (2003).

[70] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. 103-322, 108 Stat. 2038, 2042 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)) (stating that the Attorney General shall establish guidelines for state programs).

[71] Jamie Markham, *Petitions to Terminate Sex Offender Registration*, UNC School of Gov't Blog (May 14, 2009, 9:30 AM), http://nccriminallaw.sog.unc.edu/?p=355; *Smith*, 538 U.S. 84 at 89–90.

[72] *See* 42 U.S.C. § 14701(e)(2) (2006) ("The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section . . . .").

[73] Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071(d) (2006)) (authorizing community notification when sex offenders are released into a particular neighborhood and affording states the power to determine what kind and how much of the information is disclosed to whom and for what purpose). S*ee generally* WAYNE A. LOGAN, KNOWLEDGE AS POWER: A HISTORY OF CRIMINAL REGISTRATION LAWS IN AMERICA (Stanford Univ. Press 2008) (surveying local and state registration laws and discussing how the sexual abuse and murder of Megan Kanka by a convicted sex offender triggered national interest in state legislation—such legislation became known as "Megan's Law").

to penalties.[74] In 1997, Congress expanded the Lychner Act's federal criminal penalty for failure to register to include individuals, including military sex offenders, who had been convicted of federal sex offenses.[75]

B. ENACTMENT OF THE AWA AND SORNA

Despite various amendments to the Wetterling Act, an estimated 100,000 out of 500,000 offenders remained "unregistered and their locations unknown to the public and law enforcement."[76] Also, "there [remained] a 200,000 person difference between all of the state registries and the federal National Sex Offender Registry."[77] Thus, more than ten years after the Wetterling Act was enacted and the ensuing assortment of state registration and notification legislation, Congress passed the AWA, which included SORNA.[78]

SORNA was enacted "to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators."[79] The legislation stemmed from concerns that variations in state legislation were creating loopholes, enabling tens of thousands of sex offenders to exploit such deficiencies and avoid having to register if they moved between states.[80] Hence, in passing SORNA, Congress sought, in part, to make "more uniform and effective" the "patchwork" of federal and state sex-offender registration systems that were already in effect.[81]

In general, SORNA includes both civil and criminal aspects: it requires the creation of a national sex offender registry,[82] makes

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[74] Pub. L. No. 104-236, § 2, 110 Stat. 3093 (1996) (codified as amended at 42 U.S.C. § 14072 (2006)); *see also* Carr v. United States, 130 S. Ct. 2229, 2238–39 (2010).

[75] The Dep't. of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, 42 U.S.C. §§ 14071(b)(7), 14072(i) (Supp. III 1997)); *see also* 42 U.S.C. § 14072(i)(3)–(4) (2006).

[76] 152 CONG. REC. H5722 (2006).

[77] *Id*. at H5726.

[78] 42 U.S.C. § 16901 *et seq*.

[79] 42 U.S.C. § 16901 (2006).

[80] 152 CONG. REC. S8012, 8013 (daily ed. July 20, 2006) (statement of Sen. Hatch); 152 CONG. REC. H5705, 5722 (daily ed. July 25, 2006) (statement of Rep. Sensenbrenner). *See generally* Rebecca L. Visgaitis, *Retroactive Application of the Sex Offender Registration and Notification Act: A Modern Encroachment on Judicial Power*, 45 COLUM. J.L. & SOC. PROBS. 273, 281 (2011) (noting that these concerns inspired SORNA).

[81] Reynolds v. United States, 132 S. Ct. 975, 978 (2012); *see also id*. (explaining that SORNA contains a comprehensive revision of the national standards for sex offender registration and notification and creates a new federal crime allowing for the prosecution of individuals who fail to register as required by SORNA) (citing 18 U.S.C. § 2250(a); 42 U.S.C. §§ 16911(10), 16913–16916 (2006 and Supp. III), 16925)).

[82] 42 U.S.C. § 16912(a) (2006); *see Reynolds*, 132 S. Ct. at 978–79 (noting that, generally, SORNA requires "those convicted of certain sex crimes to provide state governments with (and to update) information, such as names and current addresses" to ensure strong state and federal sex offender

registration of qualifying offenders mandatory,[83] and establishes a new federal crime for individuals who are required to register under § 16913 but knowingly fail to do so.[84]

1. Specific SORNA Requirements

The legislation creates three tiers of offenders, categorized based on the gravity of the underlying sex offense.[85] Specifically, SORNA's registration requirements are set forth in §16913.[86] Sex offenders must register and keep their registrations current in each jurisdiction where they live, work, and are a student."[87] In turn, a "sex offender" is defined as "an individual who was convicted of" an offense that falls within the statute's articulated offenses.[88] Separate provisions within SORNA delineate the information that must be collected as part of registration, the length of time that offenders must remain registered, and the frequency with which a sex offender must appear in person and verify the registry information.[89]

2. Criminal Penalties Under SORNA

SORNA makes it a federal crime to fail to register.[90] A person who (1) "is required to register under [SORNA]," (2) "travels in interstate or foreign commerce" and (3) "knowingly fails to register or update a registration as required by [SORNA]" is guilty of a federal crime punishable by a fine and/or imprisonment for up to ten years.[91] The law does not require that the penalty imposed for failing to register be proportional to that imposed for the original crime.[92] In fact, the penalty clause of § 2250(a) "can be an order of magnitude greater than the maximum allowable for the offender's original offense."[93]

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registries); *see also* 42 U.S.C. § 16913 (imposing registration requirement).

[83] 42 U.S.C. § 16911. The distinguishing categories relate to the duration that sex offenders must remain registered and the number of times they must make in-person verifications. *See id*. §§ 16915–16916.

[84] 18 U.S.C. § 2250(a) (2006) (making failing to register as required under 42 U.S.C. § 16913 a federal sex offense).

[85] *See* 42 U.S.C. § 16911. The distinguishing categories relate to how long a sex offender is required to remain registered.

[86] *Id*. § 16913.

[87] *Id*. § 16913(a).

[88] *Id*. § 16911. SORNA provides a broad definition of "sex offender." *See e.g.*, *id*. § 16911(5)(A)(i) (stating that a sex offender is an individual convicted of "a criminal offense that has an element involving a sexual act of sexual contact with another").

[89] *Id*. §§ 16914–16916; *see also id*. § 16925.

[90] *See* 18 U.S.C. § 2250.

[91] 18 U.S.C. § 2250(a).

[92] *See* 42 U.S.C. § 16913.

[93] Corey R. Yung, *One of These Laws is Not Like the Others: Why The Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 380 (2009).

3. DELEGATION TO THE ATTORNEY GENERAL

Additionally, § 16913(d) of SORNA instructs that "[t]he Attorney General shall have the authority to specify the applicability the [registration] requirements" to pre-Act offenders.[94] The Supreme Court established that sex offenders convicted before SORNA's July 2006 enactment were not required to register under SORNA until the Attorney General exercised his delegated authority to "validly specif[y] that the Act's registration provisions apply to them."[95] Impliedly, a pre-SORNA sex offender cannot be criminally prosecuted under § 2250(a) until he is under a legal obligation to register, and, in turn, that initial registration is not a legal obligation until the Attorney General affirmatively promulgates rules declaring SORNA's provisions apply to that individual.

On February 28, 2007, the Attorney General issued an interim rule extending SORNA's application "to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [§ 16913]."[96] The Interim Rule was made effective immediately to safeguard against most pre-Act sex offenders evading SORNA's registration requirements and enforcement mechanisms.[97]

III. SPECIFIC GUIDANCE OR UNIFORM INTELLIGIBLE PRINCIPLE STANDARD?

Many sex offenders convicted prior to the enactment of SORNA, whose duty to register came from the Attorney General's regulation rather than the statute itself, challenged the constitutionality of SORNA and the legality of the Interim Rule.[98] Almost every court to

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[94] 42 U.S.C. § 16913(d).

[95] Reynolds v. United States, 132 S. Ct. 975, 980 (2012).

[96] 28 C.F.R. § 72.3 (2007). The courts of appeals are divided on exactly when SORNA's registration requirements became applicable to pre-enactment sex offenders. *See, e.g.*, United States v. Mattix, No. 12-30013, 2012 WL 4076148, at *2–3 (9th Cir. Sept. 17, 2012) (holding SORNA applicable to pre-enactment sex offenders as of August 1, 2008); United States v. Stevenson, 676 F.3d 557, 561–62 (6th Cir. 2012) (same), *cert. denied*, No. 11-10520 (U.S. Oct. 1, 2012); United States v. Dixon, 551 F.3d 578, 586 (7th Cir. 2008) (holding SORNA applicable to pre-enactment sex offenders on February 28, 2007), *rev'd on other grounds sub nom.* Carr v. United States, 130 S. Ct. 2229 (2010).

[97] 72 Fed. Reg. at 8896–97.

[98] In *United States v. May*, 535 F.3d 912, 921 (8th Cir. 2008), *abrogated in part by Reynolds*, 132 S. Ct. 975, the United States Court of Appeals for the Eighth Circuit held that defendants who were required to register under state law prior to SORNA's enactment lacked standing to challenge SORNA's applicability to pre-Act offenders. S*ee also, e.g.*, United States v. Mefford, 417 F. App'x 586, 587 (8th Cir. 2011) ("[W]e have held that sex offenders who were required to register before SORNA's passage . . . are unaffected by the Attorney General's expanded authority."), *vacated and cert. granted*, No. 11-6241, 2012 WL 538290 (U.S. Feb. 21, 2012). The Eighth Circuit joined four other Courts of Appeals that essentially held that SORNA's requirements "apply from the date of the Act's enactment" to pre-Act offenders who were required to register under state law. *Reynolds*, 132 S. Ct. at 980. Six other Courts of Appeals, however, determined that SORNA's "registration

reach the issue held that Congress did not impermissibly delegate the authority to the Attorney General to specify the applicability of the registration requirements to pre-SORNA offenders and prescribe rules for registration of those offenders unable to comply with statutory requirements.[99] Yet, most of those cases were decided under the "intelligible principle" standard and in light of "[t]he Supreme Court [giving] Congress wide latitude in meeting the intelligible principle requirement."[100] As such, the question remains whether the delegation in SORNA would pass muster under the "more specific guidance" standard. Thus, it must be decided whether an "intelligible principle" or "more specific guidance" should be the test applied by courts reviewing a delegation by Congress that provides for promulgation of criminal sanctions.

A. REYNOLDS V. UNITED STATES

An emblem of the consequences of applying the ambiguous "intelligible principle" as the standard for a constitutional delegation of legislative power, a deep circuit split[101] emerged concerning whether SORNA's "registration requirements apply to pre-Act offenders prior to the time that the Attorney General specifies their applicability, i.e., from July 2006 until at least February 2007."[102] Reversing the United States Court of Appeals for the Third Circuit and addressing the circuit split, the Supreme Court in *Reynolds v. United States*[103] held that: (1) SORNA does not require pre-Act offenders to register before the Attorney General validly specifies that the Act's registration provisions apply to them and, as a result, (2) pre-Act offenders have standing to challenge SORNA under the nondelegation doctrine.[104]

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requirements do not apply to pre-Act offenders unless and until the Attorney General so specifies." *Id*.

[99] 42 U.S.C. § 16913(d); s*ee e.g.*, United States v. Ambert, 561 F.3d 1202, 1214 (11th Cir. 2009) (holding that the Congress guided the Attorney General in his exercise of discretion by setting forth "the broad policy goal of protecting the public" and seeking a comprehensive national registry); *accord* United States v. Whaley, 577 F.3d 254, 264 (5th Cir. 2009); Sherman, 784 F. Supp. 2d 618, 622 (W.D. Va. 2011) ("Here, Congress clearly delineated the public safety and efficiency arguments underling SORNA's enactment, and as every court to consider this argument has found, that guidance meets the intelligible principle test.").

[100] South Dakota v. U.S. Dep't of the Interior, 423 F.3d 790, 795 (8th Cir. 2005).

[101] *Reynolds*, 132 S. Ct. at 980 (highlighting that five other circuits, similar to the Third Circuit, had held that the registration requirements apply from the date of the Act's enactment, while six circuits had held that the Act's registration requirements do not apply to pre-Act offenders unless and until the Attorney General so specifies).

[102] *Id*.

[103] 132 S. Ct. 975.

[104] *Id*. at 984 (noting that since the SORNA's registration requirements become applicable to pre-SORNA offenders only after the Attorney General issued the Interim Rule, its validity consequently matters).

In *Reynolds*, the defendant, who had been convicted of a Missouri sex offense before SORNA's enactment, sought to dismiss his indictment for failing to register and update a registration in violation of section 2250(a).[105] Essentially, he constructed the following argument: because SORNA's registration requirements were not applicable to individuals with pre-Act convictions, the Interim Rule made SORNA's registration requirements applicable to him, thus giving him standing to contest the Rule's validity.[106] By way of procedural background, while the district court rejected the defendant's improper delegation argument on the merits, the Third Circuit held that SORNA applied to pre-Act offenders "even in the absence of a rule by the Attorney General" and as a result, it did not address the Interim Rule's validity.

Thus, the Court was confronted with two potential issues: first, whether SORNA required pre-Act offenders to register as soon as it was enacted in 2006 and before the Attorney General specified that the statute's provisions apply to them and second, whether pre-SORNA offenders have standing to contest the validity of the Interim Rule as violating both the nondelegation doctrine and the Administrative Procedure Act.[107]

Because SORNA is ambiguous as to whether it, in and of itself, applies to pre-Act offenders, the Court invoked statutory analysis and discussed policy considerations to reach its first holding. Justice Stephen Breyer, writing for the court, noted that SORNA's text consists of four statements: the first statement requires a sex offender to register and update his registration information; the second further states that this initial registration should occur before completing a "sentence of imprisonment" for a sex offense; the third mandates that a sex offender update his registration within three business days upon changing his "name, residence, employment, or student status"; and, finally, the fourth vests the Attorney General with the "authority to specify the applicability of the requirements" to sex offenders convicted before SORNA was enacted.[108]

From the legislation's plain language, the Court reasoned that the "[f]ourth statement modifies the [f]irst" because it specifically deals "with a subset (pre-Act offenders) of the [f]irst [s]tatement's broad general class (all sex offenders)"and therefore controls SORNA's application to that subset. Supporting its interpretation, the Court stated that because

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[105] *Id*. at 976.

[106] *Id*. at 979–980.

[107] *Id*. at 980 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); 5 U.S.C. § 553(b)(3)(B), (d)(3) (2006)).

[108] *Id*. at 980–81.

the fourth statement gives the Attorney General the "authority to specify the Act's 'applicability,' not its 'nonapplicability,'"[109] it confers the "authority to apply the Act, not the authority to make exceptions."[110] Hence for individuals whose convictions arose before SORNA's enactment, Congress authorized, but did not direct or require, that the Attorney General prescribe regulations for their registration. Moreover, the Court speculated that Congress intended to leave it up to the Attorney General to decide § 16913's applicability to resolve practical problems: it might "not prove feasible" to immediately require newly registering or re-registering of a large number of pre-SORNA offenders since that may prove costly.[111] The majority's view that the language means that the Attorney General has to say when and whether the law applies to pre-SORNA offenders[112] supports the inference that Congress bestowed a police agency with the power to control the manner and method of SORNA's implementation and substantively determine the scope of SORNA's reach.[113]

Justice Antonin Scalia penned a lengthy dissent in which he attacked the majority's decision, arguing that "it is simply implausible" that Congress would delegate such overreaching discretion by "leaving it up" to the Attorney General to determine "whether the registration would *ever* apply to pre-Act offenders."[114] He wrote:

> [I]t is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable, and "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no

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[109] *Compare id.* at 981(majority opinion), *with id*. at 986 (Scalia and Ginsburg, J.J., dissenting).

[110] *Id*. at 981. *But see* United States v. Morris, No. 08-0142, 2008 WL 5249231 at *8 (W.D. La. Nov. 14, 2008) ("It would be illogical for members of Congress to express the concern that thousands of sex offenders who were required to register under state law were evading those registration requirements and then exempt those same offenders from SORNA.").

[111] *Reynolds*, 132 S. Ct. at 981.

[112] *Id*.

[113] *Cf*. United States v. Mason, 510 F. Supp. 2d 923, 928 (M.D. Fla. 2007) (holding that the delegation to the Attorney General did not allow him to decide if SORNA would have retroactive application, in violation of the nondelegation doctrine; rather, the statutory language was indicative of a gap-filling provision to ensure SORNA's clearly articulated purpose was effectuated when sex offenders fell outside the purview of the statutory language).

[114] *Reynolds*, 132 S. Ct at 986.

constitutional question." [115]

As support for his argument, Justice Scalia also questioned the point at which a poorly drafted statute becomes unworkable and underscored that "[i]ntelligently drafted statutes make mandatory those executive acts essential to their functioning, *whether or not* those acts would likely occur anyway."[116]

B. Cases Discussing the SORNA Delegation Post-Reynolds

Cases discussing the Attorney General's power to impose criminal sanctions illustrate that there is a difference between delegating the power to set policy and the authority to exercise discretion in carrying out the policy. The Supreme Court has confessed that its prior cases were not clear as to whether or not regulations, which relate to the imposition of criminal sanctions and pose a "heightened risk to individual liberty" require Congress to provide the executive department with specific guidance.[117] However, it is undisputed that some essence of the power to define crimes and fix a range of punishments is not delegable.

In *United States v. Morris*,[118] a federal magistrate judge, writing a Report and Recommendation, discussed the exact issue addressed by Justice Scalia in *Reynolds v. United States*. In *Morris*, the court held that Congress did not unconstitutionally delegate its legislative power because there was a clear "guiding principle" enunciated by Congress, and nothing more, "at least for now," was clearly required by law.[119] Thus, the court did not necessarily reject defendant's argument that Congress was required to give more specific guidance when it let the chief law enforcement officer of the United States decide to whom the law applies.[120] Instead, it acknowledged that there may be certain "core" functions that must be reviewed under a stricter standard than the intelligible principle standard when they are delegated.[121] The

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[115] *Compare id*. at 986 (internal citations omitted) (Scalia, J., dissenting), *with* Tiffany v. Nat'l Bank of Missouri, 85 U.S. 409, 410 (1873) (establishing the timeless principle that penal statutes are to be strictly construed, and that no one should be "subjected to a penalty unless the words of the statute plainly impose it"); M. Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946) (highlighting that that timeless principle requires that prohibited acts be clearly defined in the rule); Loving v. United States, 517 U.S. 748, 768 (1996) ("There is no absolute rule . . . against Congress' delegation of authority to define criminal punishments.").

[116] *Reynolds*, 132 S. Ct. at 986. This suggests Congress's delegation to the Attorney General was broad and ambiguous and thus required the Attorney General to make legislative decisions, which raises an issue of a violation of the nondelegation doctrine.

[117] *United States v. Morris*, No. 08-0142, 2008 WL 5249231, at *9 (W.D. La. Nov. 14. 2008) (quoting Touby v. United States, 500 U.S. 160, 166 (1991)).

[118] No. 08-0142, 2008 WL 5249231, at *9 (W.D. La. Nov. 14. 2008).

[119] *Id*. at *10.

[120] *Id*. at *7, *10.

[121] *See id*. at *9.

magistrate judge wrote:

> It is clear that the language found in 21 U.S.C. § 811(h) (the provision at issue in *Touby*) is much more specific and detailed than is the language found in § 16913(d). Specific guidance and directions is given in § 811(h) and no such specificity is found in § 16913(d). Both sections have at their core a "guiding principle", but § 811(h) provides specific guidance to the rule maker and § 16913(d) does not. Accordingly, if such "specific guidance" is required when the executive engages in rule making in the criminal context, I would recommend that this indictment be dismissed on the ground that SORNA does not provide sufficient "specific guidance" so as to allow this delegation of rule making authority to the Attorney General.[122]

Supporting the need for closer scrutiny of delegations in the criminal context, the court in *United States v. Aldrich*[123] similarly expressed concern, in dicta, that § 16913(d) of SORNA violates the separation of powers doctrine because it is the product of an improper legislative delegation to the Attorney General.[124] The court noted that determining to whom SORNA applied and when it applied were legislative functions and therefore could not be left to the Attorney General's discretion.[125] The court concluded that affording the Attorney General such broad discretion was not an implementation—rather, he is permitted to choose who it applies to and when it applies, which is a "legislative function, not an executive function, and thus is unconstitutional."[126]

IV. WHY "SPECIFIC GUIDANCE" MUST BE REQUIRED

Many cases demonstrate why the law should demand that the "specific guidance," rather than "intelligible principle" standard, be

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[122] *Id* at *10; *see also id*. ("[T]he issue left unresolved in *Touby* . . . is, whether § 16913(d), which has obvious criminal implications, requires more specific guidance be given by Congress than would be the case for regulations promulgated in a non-criminal context. . . . none of the cases hold that § 16913(d) is sufficiently specific so as to 'pass muster' even if more specificity is required for regulations promulgated in the criminal context."). In *Touby*, the Court found that the thorough features of the scheduling process designating illegal drugs "meaningful[ly] constrain[ed]" the Attorney General's authority. 500 U.S. at 166–67.

[123] No. 8:07CR158, 2008 WL 427483, at *6 n.5 (D. Neb. Feb. 14, 2008) (citations omitted).

[124] *Id*.

[125] *Id*. In noting that Congress was "permitted to obtain assistance from other branches of the government for purposes of implementing SORNA," the court expressly stated that Congress could not allow the Attorney General to legislate the time, scope, and reach of the retroactive reach. *See id*.

[126] *Id*.

invoked. In turn, specific guidance should be required when delegations allow for regulations that contemplate criminal sanctions for two reasons: because they are more likely to risk individual liberties and because they more often lead to a deprivation of notice in contravention of federal due process guarantees.

A. SCENARIOS WHERE "SPECIFIC GUIDANCE" RATHER THAN THE "INTELLIGIBLE PRINCIPLE" TEST MIGHT BE INVOKED

The cases below demonstrate that the law should demand a sufficiently stricter standard of draftsmanship when allowing a policy agency to promulgate regulations that contemplate criminal sanctions. Regarding whether, after *Touby*, a heightened standard should be applicable to delegations concerning criminal offenses, some courts have answered in the negative[127] while others view the issue as open but uphold any "delegation [that] is subject to constraints similar to those found sufficient in *Touby*."[128] Currently, however, there is no agreement as to just what constitutes adequate legislative guidelines.[129] In the end, the issue boils down to a policy determination. Although cases are uniform as to the disposition of the "intelligible principle" test, they express a great deal of doubt and reflect great diversity as to the less certain areas of ethical usage of that test. Many cases include statements which belie the seeming consistency in their approach to the problem.

In *United States v. Ward*,[130] the court focused on the rights of a criminal defendant rather than the society's interest in criminal law enforcement and addressed whether an agency standard that was a part of a criminal enforcement proceeding was overbroad. The defendant in that case was charged with willfully violating a general duty clause of the Occupation Safety and Health Act.[131] The court stressed that when

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[127] *E.g.*, United States v. Brown, 364 F.3d 1266, 1274 (11th Cir. 2004) (holding that even if a heightened standard exists, it would not apply to National Park Service regulations because Congress, the court assumed without deciding, criminalized those offenses and fixed the punishment).

[128] *E.g.*, United States v. Dhafir, 461 F.3d 211, 217 (2d Cir. 2006) (holding that authority granted to the President "may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared").

[129] *See generally* Megan S. Peterson, *Clinical Book-Cooking: United States v. Palazzo and the Dilemma of Attaching Criminal Liability to Experimental Drug Investigators for Faulty Record-Keeping*, 56 LOY. L. REV. 311, 329–30 (2010) (addressing the varying methods of determining whether an ambiguous statute imposed criminal liability on clinical investigators and raising the issue of whether Congress provided sufficient guidelines to the Food and Drug Administration to allow for the imposition of criminal sanctions).

[130] 2001 WL 1160168 (E.D. Pa. Sept. 5, 2001).

[131] *Id.* at *1 (citing 29 U.S.C. § 666(e) (2006)) (imposing criminal liability on an employer who willfully violates a safety regulation pursuant to the Act if the violation results in death of an employee); 29 C.F.R. § 1910. 119 (2012)).

there are criminal proceedings, the protection of liberty interests, which is in play in a criminal case, must be more disciplined and cautious than in a civil case.[132] Even if a civil statute is at issue in a criminal proceeding, the court must make sure that it carries the level of clarity that is needed in a criminal penalty context.[133] The court held that the regulation was not explicit and that it was the agency's "responsibility to promulgate clear and unambiguous regulations."[134] Finally, the court did "not hesitate to find that strict construction of promulgated rules and regulations is required when implicated in a criminal case."[135]

In *United States v. Anvari-Hamedani*,[136] the court held that the federal International Emergency Economic Powers Act (IEEPA)[137] and the executive order promulgated thereunder did not violate the non-delegation doctrine nor due process principles, but acknowledged that the issue of delegating authority to define criminal conduct is "complex."[138] In *Anvari-Hamedani*, the IEEPA granted the President "broad authority"[139] to prohibit transfers of funds and equipment to countries he found threatened national security.[140] Thus, President Clinton signed an executive order that prohibited United States citizens from investing in Iran.[141] The defendant was charged, in part, with violating the presidential order issued under the IEEPA and federal money laundering laws based on alleged transfers of money and equipment to Iran.[142]

The defendant constructed the following argument: first, that the IEEPA presidential directives are the product of an unconstitutional delegation of legislative authority to the Executive and second, that the IEEPA and supporting executive orders and regulations are

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[132] *Id*. at *10; *see also* *7 ("Especially where a regulation subjects a private party to criminal sanctions, 'a regulation cannot be construed to mean what an agency intended but did not adequately express.'") (quoting Diamond Roofing Co., Inc. v. OSHRC, 528 F.2d 646, 649 (5th Cir. 1976).

[133] *Id*.

[134] *Id*. at *26 ("The test is not what might have been intended by such regulation, but what it actually says.")

[135] *Id*. (citing United States v. Apex Oil Co., Inc., 132 F.3d 1287 (9th Cir.1997)); United States v. Plaza Health Laboratories, Inc., 3 F.3d 643, 649 (2d Cir. 1993) (holding that when considering the imposition of criminal sanctions, "a court will not be persuaded by cases urging broad interpretation of a regulation in the civil-penalty context."); *see also* McGoff, 831 F.2d 1071, 1077 (D.C. Cir. 1987) ("[I]n the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts.")).

[136] 378 F. Supp. 2d 821, 827 (N.D. Ohio 2005).

[137] 50 U.S.C § 1701 *et. seq*.

[138] *Id*. at 828–29.

[139] *Id*. at 825 n.1.

[140] *Id*. at 827.

[141] Id.

[142] *Id*. at 825.

unconstitutionally vague because they fail to provide fair warning of illegal conduct.[143]

Regarding the nondelegation claim, the court took the Fourth Circuit's lead, which, in turn, adopted the reasoning of *Touby* to find the IEEPA's delegation of authority to criminalize conduct came with "constraining" factors and "explicitly defined and circumscribed" presidential powers satisfying the intelligible principle test.[144] The restrictions present in the IEEPA, however, are far more specific than those—if any are present—in SORNA. With regards to the due process vagueness argument, the court concluded that even in light of "investment" being "very broadly" defined, the President's order gave fair warning of what conduct is illegal.[145]

The nondelegation doctrine also played a role in *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*[146] and *American Textile Manufacturers Institute, Inc. v. Donovan*.[147] In those cases, Justice Rehnquist, concurred and dissented, respectively, because the majorities failed to hold that section 6(b) of the Occupational Safety and Health Act (OSHA) violated the nondelegation doctrine.[148] Via SORNA, Congress has done precisely what Justice Rehnquist in *Industrial Union Department., AFL-CIO v. American Petroleum Institute*,[149] snubbed.[150] In *Industrial Union*, Justice Rehnquist used the notions of the nondelegation doctrine to conclude that Congress, alone, must make the difficult policy decisions rather than pass the responsibility to an administrative or other government official.[151]

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[143] *Id*. at 827, 830. Additionally, he contended that in any event, his conduct was permitted because he was merely sending funds to his family in Iran for humanitarian purposes. *Id*. at 831. The court determined that this claim is a "trial defense, not a rationale why the law is vague." *Id*.

[144] *Id*. at 829 (citing U.S. v. Arch Trading Co., 987 F.2d 1087, 1093–94 (4th Cir. 1993)) ("The IEEPA . . . defines the specific circumstances in which the President may act and to what extent.").

[145] *Id*. at 831.

[146] 448 U.S. 607 (1980).

[147] 452 U.S. 490 (1981).

[148] *Am. Textile*, 452 U.S. at 543; *Indus. Union*, 448 U.S. at 672.

[149] 448 U.S 607 (1980).

[150] *Id*. at 672 ("This litigation presents the Court with what has to be one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths. I would also suggest that the widely varying positions advanced . . . demonstrate . . . that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.").

[151] *See id*. (stating that Congress, not the executive branch, is the "governmental body best suited and most obligated to make" hard policy choices); *see also id*. at 675 (noting that delegations of legislative powers are permitted so long as Congress establishes "the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to" certain cases).

Likewise, in *American Textile*,[152] Justice Rehnquist vehemently dissented, stating that Congress "unconstitutionally delegated to the Executive Branch the authority to make the 'hard policy choices' properly the task of the legislature."[153] His argument supports the inference that there must be a balance between the rights of the individual and the rights of society. But more importantly, it supports the notion of Congress's accountability.[154]

The lack of consensus among the circuit courts with addressing whether SORNA supports the notion that applying a blanket "intelligible principle" test to congressional delegations is unsatisfactory. As exemplified by the analysis in *Ward*, there must be a halt to convicting defendants, whether in the criminal or civil context, under unconstitutionally overbroad statutes. SORNA is unconstitutionally vague as applied to pre-Act defendants when literal compliance would require them to remain in limbo essentially until the Attorney General directs them to "jump" and then promulgates rules that specify "how high."

B. Delegation and Individual Liberties

There is a significant distinction between individual liberties and property interests.[155] The standard of criminal enforcement power is open-ended and vague, and the range of Congress's power to invest the Attorney General with such discretion is almost unchecked. Admittedly, some discretion is needed to preserve social values and promote social reform; but, when it comes to how the Department

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[152] 452 U.S. 490 (1981).

[153] *Id*. at 543–46 (Rehnquist, J., dissenting) (citing *Indus. Union*, 448 U.S. at 671 (1980) (Rehnquist, J., concurring) (calling for a revival of the nondelegation doctrine when evaluating the legality of an Occupational Safety and Health Administration standard for benzene)). *See generally* Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 942–43 (asserting that the nondelegation doctrine revealed hostility to "socially progressive legislation" during the Lochner-era).

[154] *Compare American Textile*, 452 U.S. at 545–46 (Rehnquist, J., dissenting) (arguing that the statutory words "to the extent feasible" were "so vague and precatory" and that Congress "passed" on making a choice, resolving a "difficult policy issue," and speaking with greater precision to "mask a fundamental policy disagreement" within the Congress) (internal citations omitted), *and* United States v. Johnson, 632 F.3d 912, 922 (5th Cir. 2011) (pointing out that when SORNA was enacted, Congress "elected not to decide for itself whether SORNA's registration requirements—and thus § 2250(a)'s criminal sanctions—would apply" to pre-ACT sex offenders and instead left it up to the Attorney General to resolve that question), *with* Reynolds v. United States, 132 S. Ct. 975, 981 (2012) (asserting that Congress must have intended for the Attorney General to decide § 16913's applicability because it might "not prove feasible" to immediately require newly registering or re-registering of a large number of pre-SORNA offenders).

[155] Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 155 (2008) (explaining that notice of a criminal conviction subjects the offender to attitudes of indignation and public shame and noting that "this expressive element is what distinguishes . . . mere 'penalties' or 'price tags from true 'punishment.'").

of Justice wields its discretion to enforce laws of our criminal justice system, the standard by which we evaluate that enforcement power must be guided by more than an intelligible principle.

Time and time again the courts fail to recognize the constitutional issues underlying the nondelegation doctrine and the leniently-read, ambiguous laws in reference to criminal punishments. The Court has implied that the same principles are used when evaluating the validity of a delegation, both in the civil and criminal context and regardless of the subject matter.[156] But, as the deep circuit divide has confirmed, upholding the intelligible principle standard has led to confusing conclusions as to whether SORNA provides the Department of Justice with sufficient standards to guide its actions in such a way that courts can decipher whether the congressional policy has been followed.

The trend of the majority has been to narrowly interpret delegations so as to avoid constitutional problems.[157] However, a few Justices have argued that delegations by Congress of power to burden an individual's exercise of "fundamental freedoms" must be acutely scrutinized.[158] Thus, the courts' justifications for applying the "intelligible principle" test loses its bite when considering that ambiguous statute put civil liberties at stake. There is there is a need for clarity, notice, and caution and the degree to which Congress must provide the required guidance in its delegations must be more defined.[159] When a statute is used in a

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[156] *See* Lichter v. United States, 334 U.S. 742, 779 (1948) (noting that there is no precise degree to which Congress must specify its polices and standards for a court to find that the administrative authority granted was not an unconstitutional delegation of legislative power). *See also* Modern Modern Muzzleloading, Inc. V. Magaw, 18 F. Supp. 2d 29, 33–34 (D.D.C. 1998) (concluding that an agency's interpretation of a certain criminal statute should be given deference, even when the interpretation resulted from an administrative adjudication rather than the rulemaking process). *Cf*. Upton v. SEC, 75 F.3d 92, 98 (2d Cir. 1996) (holding that the court will not defer to an agency's interpretation of an ambiguous state if the individual would be penalized without fair notice of the regulatory violation).

[157] *See e.g.*, Kent v. Dulles, 357 U.S. 116 (1958); Reynolds v. United States, 132 S. Ct. 975, 986–87 (2012) (Scalia, J., dissenting) (quoting Gomez v. United States, 490 U.S. 858, 864 (1989)) ("'[I]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.'"). *But see* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 285 (1985) ("The practical effect of interpreting statutes to avoid raising constitutional questions is . . . to enlarge the . . . reach of constitutional prohibition beyond even the most extravagant modern interpretations of the Constitution . . .").

[158] United States v. Robel, 389 U.S. 258, 269–70 (1967) (Brennan, J., concurring). *But see id*. at 283–86 (White, Harlan, J.J., dissenting).

[159] *Compare* Exec. Order No. 7856, 3 C.F.R. 379, 389 (1936–1938) (authorizing the Secretary of State to use his discretion in refusing to issue a passport) *with* Kent, 357 U.S. 116 (1958) (snubbing the Secretary of State's regulation prohibiting issuing passports to Communist Party members). In *Kent*, the court stated, "[w]here the activities of enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." *Id*. at 129.

criminal case, it must be subject to a certainty[160] because "[t]he numerous deficiencies connected with vague legislative directives whether to a legislative committee, to an executive officer, to a judge and jury, or to private persons, are far more serious when liberty and the exercise of fundamental rights are at stake."[161]

Thus, the "intelligible principle" standard does not consider the fundamental distinction between individual liberties and property interests. As one scholar notes, "[c]riminal liability carries with it a powerful stigma, which is painful in and of itself" and criminal penalties have "the capacity to . . . alter one's self-perception."[162] In contrast, "[c]ivil liability and sanctions usually relate to conduct devoid of, or at least bearing low, moral culpability, and as such, are untainted by moral condemnation and stigma."[163] Because personal liberty interests have a different quality than property interests, "even if civil law could generate deterrence similar to that produced by criminal law . . . it would not provide the same moral directive that is associated with criminal law."[164] Thus, the liberty interests, which are in play in a criminal proceeding, must be more disciplined, cautious, and protected in a than in a civil case. Procedural barriers regarding the imposition of criminal liability and the standard of preenforcement review must be subject to a certainty to avoid having the features of criminal punishment inflicted erroneously. And, if a civil statute is referenced in a criminal proceeding, the court must make sure that it carries the level of clarity that is needed in a criminal statute.

C. Without Congressional Specificity Beyond an Intelligible Principle, Individuals are Deprived of Notice of the Criminality of Their Behavior

Elusive and overbroad statutes result in unjust denial of liberty because they do not give an individual fair warning that certain conduct will give rise to criminal penalties and invite arbitrary and discriminatory enforcement.[165] Thus, the "intelligible principle" test

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[160] *See Robel*, 389 U.S. at 275 (1967) ("The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights.").

[161] *Id*. (internal citations omitted).

[162] Rosen-Zyi & Fisher, *supra* note 127 at 94–95.

[163] *Id.*

[164] *Id.* at 94. *See generally* John C. Coffee, Jr., Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It, 101 YALE L.J. 1875, 1876, 1884 (1992) (explaining that what distinguishes civil from criminal law is that the former simply prices public harms while the latter forbids serious harms to specific victims while playing an educative and socializing role.).

[165] United States v. Ward, 2001 WL 1160168, at *8 (E.D. Pa. Sept. 5, 2001) (elaborating that the void-for-vagueness requires that an individual have fair notice "in light of common understanding within the regulated community" of what conduct is proscribed or required).

applied in *Mistretta* is not a sufficiently strict standard to apply in cases that involve ambiguous legislation, wherein Congress authorizes an agency to issue regulations that contemplate criminal sanctions.[166] The Supreme Court has stated, "a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language."[167] Nonetheless, some courts have neglected this strict command in evaluating Congress's delegation of authority to the Attorney General in § 16913 of SORNA.[168] As a result, the validity of the Attorney General's Interim Rule is unclear.

Given the stakes of the interests affected by SORNA, there is all the more reason to notify the public of newly promulgated rules. The Administrative Procedure Act (APA)[169] provides that notice and comment[170] opportunities ensure "public participation and fairness" by mandating that an agency give any individual or organization interested in the proposed rule and opportunity to participate in its rulemaking via written or oral submission of their opinions."[171] The APA ensures "that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations."[172]

In promulgating the 2007 Interim Rule, the Attorney General did not comply with the APA's notice and comment procedures.[173] Instead,

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166 *See* Dravo Corp. v. Occupational Safety and Heatlth Review Comm'n, 613 F.2d 1227, 1232 (3d Cir. 1980) (championing a strict standard for cases implicating penal sanctions when stating that "the coverage of an agency regulation should be no broader than what is encompassed within its terms" when dealing with a penal sanction).

167 M. Kraus & Bros. v. United States, 327 U.S. 614, 626 (1946) (reversing a conviction because the regulation at issue was vague).

168 See *e.g.*, United States v. Sherman, 784 F. Supp. 2d 618, 622 (W.D. Va. 2011). As mentioned previously, the courts of appeals are divided on exactly when SORNA's registration requirements became applicable to pre-enactment sex offenders.

169 Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559 (2006).

170 *See id*. § 553(b).

171 Batterton v. Marshall, 648 F. 2d 695, 703 (D.C. Cir. 1980); *see* 5 U.S.C. § 553(b).

172 Morton v. Ruiz, 415 U.S. 199, 232 (1974); *see also* Hoctor v. U.S. Dep't of Agriculture, 83 F.3d 165, 169 (7th Cir. 1996) (noting that when a statute is drafted in such a way that is "does not impose a duty on the person subject to it but instead authorizes" or requires an agency to impose duties by implementing rules, "the formulation of [the] duty becomes a legislative task" and such rules must be issued through proper rulemaking procedures); *see also* DIA Navigation Co. v. Pomeroy, 34 F.3d. 1255, 1264 (3d Cir. 1994) (noting that courts struggle to distinguish substantive from interpretive rules, the distinction of which is paramount to understanding the underlying policies of the APA's procedural requirements).

173 *See* 5 U.S.C. § 553(b) (2006); *see also* United States v. Valverde, 628 F. 3d 1159, 1162 (9th Cir. 2010) (explaining the "three-step process" required under the APA, including notice of the proposed rule by publication in the Federal Register, a thirty-day period for public comment and publication of the final rule thirty days before its effective date).

he stated he had "good cause" to promulgate a rule without "notice and comment."[174] Interestingly, when the Attorney General stated the good-cause exception applied because the notice and comment procedure were "contrary to the public interest,"[175] he explained that "[t]he immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements" and to protect the public safety.[176] But, some courts have argued that in criminal cases, "there is all the more reason to strictly adhere to the requisite rulemaking procedures"[177] and this becomes important with regards to the standard by which the courts should evaluate an ambiguous statute that affects an individual's fundamental freedoms.

CONCLUSION

Through SORNA, Congress uses the courts to screen what it is doing by puppeteering instead of making straight forward policy choices in ways that society can see in the legislation. When Congress creates ambiguous statutes, like section 16913(d), there is little or no guidance for a pre-SORNA sex offender to know when he has crossed the invisible line into an area of criminal behavior and thus may be punished pursuant to section 2250. Section 16913(d) embraces conduct which is constitutionally protected as well as conduct which may be prohibited, and there is no line between the two which can be ascertained with any assurance or precision. For pre-SORNA sex offenders, the statute does not explicitly provide that violating its very terms or valid regulations issued pursuant thereto constitutes a crime. Courts must demand a higher standard of certainty when statutes delegate agencies with the power to impose criminal sanctions that affect individual liberties. For the aforementioned reasons, the Supreme Court should consider adopting a more just rule, one that favors the rights of individuals and also ensures that the adversary system of justice is functioning properly by checking that only the guilty are convicted: Congress must provide more specific guidance to agencies

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[174] *See* 72 Fed. Reg. 8894, 8896–97 (Feb. 28, 2007). The good cause exception provides that an agency may dispense with the notice and comment requirements if such procedures "are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B); *see also id*. § 553(d)(3)(noting that "for good cause found and published with the rule," an agency may make the rule effective immediately instead of waiting thirty days after publication).

[175] 72 Fed. Reg. at 8897.

[176] *Id*. at 8896–97. On December 29, 2010, the Attorney General proposed a new rule finalizing the interim rule, which became effective on January 28, 2011. *See* 75 Fed. Reg. 81, 849 (Dec. 29, 2010); *id*. at 91, 850.

[177] United States v. Ward, 2001 WL 1160168, at *23 (E.D. Pa. Sept 5, 2001) (citing United States v. Picciotto, 875 F.2d 345, 346 (D.C. Cir. 1989)); *see id*. ("We know of no manner in which a rule could have greater binding effect than in a criminal case such as this, where the interpretation, rather than the regulation or statute, provides essentially all of the guidance on the existence of a duty.").

in crafting regulations that have criminal implications than would be the case for regulations promulgated in a non-criminal context.