

The Reporter  
2013

Military Justice

**\*10 A LIFETIME OF CONSEQUENCES: REGISTERING CONVICTED MILITARY SEX OFFENDERS**

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The final gavel strike convicting an accused of sexual assault is only one milestone in fulfilling our obligations to crime victims, civil society, and the interest of justice. Nowhere is this more evident than in how we notify local communities about convicted sex offenders. As such, all judge advocates need to know the basics about sexual offender registration for several reasons. Military justice teams and SJAs must ensure post-trial reporting and notification requirements are carried out according to federal law. Defense counsel must carefully advise clients about the lasting impact of a conviction of a qualifying offense. [FN1] And as legal professionals, we may be relied upon to explain how our detailed, multilayered notification system works in concert with state and local jurisdictions--whether in advising commanders, teaming with law enforcement, assisting sex assault victims, or educating concerned citizens about the rigorous public safeguards in place.

## **BACKGROUND**

The Department of Defense (DoD) established a mandatory listing of reportable sexual offenses for military personnel convicted under the Uniform Code of Military Justice (UCMJ). [FN2] Military personnel convicted of a qualifying offense are required to register as a sex offender in the jurisdiction where the offender resides pursuant to the Adam Walsh Act, also known as the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16911 *et seq.* [FN3] SORNA provides a new comprehensive set of minimum standards for sex offender registration and notification. Furthermore, the U.S. Department of Justice (DOJ) set national SORNA guidelines, creating a “floor, not a ceiling” for registration standards. These standards cover all 50 states, the District of Columbia, principal U.S. territories, and Indian \*11 tribal governments. [FN4] Effectively, SORNA provides a blueprint to promote cooperative efforts among states, local law enforcement, and federal agencies in immediately identifying, registering, and tracking convicted sex offenders across the United States. [FN5]

A sex offender is defined under SORNA § 111(1) as a person who is convicted of a covered sex offense. [FN6] This includes sex offenses under the UCMJ, as specified by the Secretary of Defense. So what UCMJ offenses require reporting? The list of qualifying offenses is captured in Air Force Instruction (AFI) 51-201, Figure 13.4, in accordance with DoD policy. [FN7] An updated listing is currently being incorporated into the reissuance of DoD Instruction (DoDI) 1325.07 (formerly DoDI 1325.7) to include recent changes to **Article 120, UCMJ** as of June 28, 2012. [FN8] Remember that it is the *conviction* of a qualifying sex offense, regardless of the sentence adjudged, that will trigger mandatory reporting requirements. [FN9]

If an accused has been convicted of sexual assault or certain other offenses against a minor, the Air Force is

required to provide notice to the receiving jurisdiction's officials prior to the member's release from confinement. The service member will then be required to register as a sex offender based on state, local, or tribal law. [FN10]

Registration is required upon a service member's conviction (if not confined) or release from confinement. Therefore, appropriate DoD officials must inform sex offenders of their duty to register and must inform local law enforcement in the offenders' stated jurisdiction of residence. Subsequent registration must take place within three days of release from confinement or within three days of conviction, if not confined. The member must be notified about these registration requirements and acknowledge them in writing, typically done via a DD Form 2791, *Notice of Release/Acknowledgment of Convicted Sex Offender Registration Requirements*. [FN11]

Offenders should also be advised by reporting officials that the individual jurisdictions in which they live, work, or attend school may have additional registration requirements because each jurisdiction sets its own sex offender policy and laws. Although offenders will register in their local jurisdiction, there is no separate federal sex offender registry. The DOJ operates only a national sex offender registration database. The Dru Sjodin National Offender Public Website collects and consolidates available data from all state, territorial, and tribal registries. [FN12]

## **REPORTING OFFICIALS**

Who are the “appropriate DoD reporting officials” responsible for making the necessary notifications? Each Service has developed its own systems, instructions, and procedures, which are all similar in nature. [FN13] In the Air Force, the local Security Forces (SF) corrections officer, or the designee at the facility where the accused is detained, is responsible for ensuring compliance with federal and state laws in accordance with AFI 31-205, which covers the Air Force Corrections System. Accordingly, reporting officials will use a DD Form 2791 to document notification and acknowledgment. Typically, the three critical notifications will be communicated to the state attorney general, local law enforcement, and the state sex offender registration official where the offender will reside. [FN14]

## **NO CONFINEMENT?**

But what happens when there is no post-trial confinement adjudged (or it is offset by pre-trial confinement credit)? In these instances, the SJA \*12 must notify the appropriate corrections officer (or the Security Forces commander, if there is no corrections officer), in writing, within 24 hours of the accused's conviction. The corrections officer or SF/CC will then make the required notifications, as outlined above. [FN15]

Judge advocates assigned to joint bases should note that the Army, Navy, and Marine Corps have similar, but unique, procedures in place which rely on JAG and law enforcement support. [FN16] Per SECNAV Instruction 5800.14A, the convening authority shall provide notice and necessary documentation to the Naval Criminal Investigative Service (NCIS) when offenders are not sentenced to confinement, or receive a suspended sentence. [FN17] Comparatively, per Army Regulation 27-10, *Military Justice*, when this sentencing result occurs, the trial counsel, in the presence of defense counsel, must immediately provide notice that the military sex offender is subject to a registration requirement, by requiring the military sex offender to complete the acknowledgement of sex offender registration requirements. [FN18]

## **BASE-LEVEL RESPONSIBILITIES**

If a member is convicted of a qualifying offense, the base legal office should indicate that sex offender notification is required in the “SENTENCE” block the AF Form 1359, *Report of Result of Trial*. As AFI 51-201 notes, sex offender registration requirements vary by state and may be triggered by offenses not listed in DoDI 1325.07 or AFI 51-201. Consequently, both trial and defense counsel should understand that a service member convicted of an offense that does not automatically trigger sex offender notification requirements (such as indecent exposure), may still be required to register as a sex offender under specific state laws.

When questions arise whether or not a service member's conviction triggers notification requirements, SJAs should seek guidance from their higher headquarters legal offices. Further questions regarding notification requirements may also be directed to AFLOA/JAJM. [FN19]

## **OVERSEAS ISSUES**

What happens if the service member is convicted of a sex offense by a foreign court? Is registration still required? For starters, foreign-court convictions must be obtained with sufficient safeguards for fundamental fairness and due process for the accused, according to the DOJ Guidelines. [FN20] Sex offense convictions under the laws of any foreign country are deemed to have been obtained with sufficient safeguards if the U.S. State Department, in its Country Reports on Human Rights Practices, concludes that the country has an independent judiciary and enforced the right a fair trial in the year that the conviction occurred. [FN21] Cases prosecuted under the laws of the United Kingdom, Canada, Australia, and New Zealand automatically satisfy this standard. Once this test is passed, a foreign conviction is on the same footing as a similarly-situated domestic offense. [FN22]

This does not mean that local jurisdictions must register all foreign sex offense convictions. As the DOJ National Guidelines make clear, these stated criteria “only define the minimum categories of foreign convicts for whom registration is required for compliance with SORNA ... jurisdictions are free to require registration more broadly than the \*13 SORNA minimum.” [FN23] In unusual situations involving offenders convicted outside the United States, the Headquarters, Air Force Security Forces Center, can provide further assistance, in addition to higher headquarters legal offices and AFLOA/JAJM.

Remember that SORNA does not apply extraterritorially, or outside U.S. borders. Overseas bases may also be located in countries which lack public sex offender reporting requirements. For example, Germany and many European nations do not maintain public sex offender registries (Germany does have a private database for law enforcement use). [FN24] While it is unlikely that a convicted active-duty sex offender would remain in service, much less remain stationed overseas, overseas installations still have to periodically address the issue of military family members or civilian employees who are convicted sex offenders and who may have access to base housing. This requires creative solutions on the part of commanders and their judge advocates.

For example, a recent *Stars and Stripes* article highlighted how “the military services are making it much harder for convicted sex offenders to live in base housing”. [FN25] In late 2011, U.S. Air Forces in Europe (USAFE) implemented a policy change requiring base housing applicants at USAFE installations to fill out a sex offender disclosure form. [FN26] USAFE installation commanders can now use this information to deny government housing, or otherwise restrict a registered sex offender from living near where children may play or attend school or daycare on base. Moreover, the Navy and Marine Corps have gone so far as to preemptively bar any service members or sponsored family members who are sex offenders from being assigned overseas, absent a waiver. Sex offenders are also prohibited from occupying USN/USMC base housing, per command guidance issued in 2008.

[FN27]

## **DEFENSE DUTIES**

In a meticulously-researched article in *The Army Lawyer*, Major Andrew D. Flor outlines a step-by-step method for how defense counsel can advise clients about their potential sex offender status. [FN28] Proactively, defense counsel should seek to identify where the client will reside after release from confinement and research the corresponding state registration requirements. Furthermore, defense counsel should conduct a side-by-side comparison of the charge sheet and qualifying reportable offenses outlined in DoDI 1325.07 and AFI 51-201, then analyze what offenses under the UCMJ require registration in that state. After being advised of the applicable state requirements based on the charged offenses, clients should sign a memorandum for record advising them of the probable requirement to register as a sex offender. [FN29]

While a defense counsel's failure to advise an accused charged with a sex offense of the potential sex offender requirements on the record does not automatically amount to "per se ineffective assistance of counsel," appellate courts may weigh it as one circumstance in evaluating an IAC complaint. [FN30] Regardless, as Major Flor emphasizes, "Due to the harsh realities and lasting impacts of sex offender registration, military clients deserve the best advice from their trial defense counsel, not just the bare minimum standard required by CAAF." [FN31] Likewise, trial counsel should be on guard for "savvy" guilty pleas or pretrial agreements which seek to negotiate a conviction for offenses that do not require sex offender registration. [FN32]

## **LIFELONG CONSEQUENCES**

How long will a convicted service member have to be registered as a sex offender? The answer ranges from 15 years to life, depending on the offense. SORNA establishes three tiers of sex offenders, which can be seen as a rising scale of severity. The duration of time \*14 an offender must be registered depends on the tier. [FN33] This classification scheme is based on the offense committed, the age of the victim, and the offender's history of recidivism. [FN34]

Tier I includes the "least serious" sex offenders who do not fall under Tiers II and III. [FN35] Generally, this includes offenders convicted of: (a) qualifying offenses not punishable by imprisonment of more than one year; (b) the receipt or possession of child pornography; or (c) sexual assault against an adult that involves sexual contact but not a completed or attempted sexual act. Offenders convicted of a prior Tier I sex offense who are subsequently arrested for a felony sex offense, will be classified at least as a Tier II sex offender. [FN36]

Comparatively, Tier II and Tier III offenses are for more severe felony offenses punishable by confinement for more than one year. Tier II treatment is required for victims under age 18, while Tier III treatment is required for victims below 13 years of age. Generally, Tier II offenses include offenses against minors involving sexual contact as well as the production and distribution of child pornography. Tier III offenses include sex acts by force or threat, engaging in a sex act with a victim rendered unconscious or involuntarily drugged, sexual acts with children under the age of age 12, and non-parental kidnapping of a minor.

Tier I sex offenders are required to register for 15 years with their local jurisdiction, renewing their registration annually. Tier II sex offenders must register for 25 years while renewing their registration every six months. Tier III sex offenders must register for life, renewing their registration every three months. [FN37]

## COMPLIANCE

The failure on the part of responsible DoD officials to notify offenders of their duty to register as a sex offender does not relieve offenders of their legal responsibility. To prevent such an occurrence, there are many fail-safes built into the reporting system, to include law enforcement notifications to local authorities, U.S. Marshals Service and its database, and regular law enforcement databases. SORNA created a new federal felony offense for failing to register as a sex offender. [FN38] Per 18 U.S.C. § 2250, those who knowingly fail to register or update a registration required by SORNA will face a fine and imprisonment up to ten years. As an operational arm of the U.S. Marshals Service, the National Sex Offender Targeting Center (NSOTC) serves as an interagency intelligence and operations center, supporting the identification, investigation, location, apprehension, and immediate prosecution of non-compliant sex offenders. [FN39] The DoD works closely with NSOTC and the Army has dedicated two permanent personnel to support registration compliance efforts.

In November 2010, NSOTC began an initiative called Operation Tarnished Service to identify, locate, register, and/or apprehend former service members who fail to comply with registration requirements following discharge from the military. [FN40] With this close partnership of federal and local law enforcement officials, the DoD ensures that all sex offenders released from military confinement, or discharged from the Service, register where they live or face severe consequences.

## SUMMARY

On both sides of the courtroom, JAG Corps members should understand how sex offender reporting and notification procedures work across the DoD. Each Service relies on a robust, multi-disciplinary team involving commanders, JAG Corps members, military law enforcements, and corrections officials, to ensure notifications are made to receiving jurisdictions, so that all required military sex offender registrations take place. Our communities and fellow Wingmen are counting on us, and every day, judge advocates are delivering on that promise.

[FN1]. *United States v. Miller*, 63 M.J. 452 (C.A.A.F. 2006). For a detailed state-by-state analysis of sex offender registration laws, see Major Andrew D. Flor, *Sex Offender Registration Laws and the Uniform Code of Military Justice: A Primer, Army Law.*, (August 2009).

[FN2]. See Department of Defense Instruction (DoDI) 1325.7, Administration of Military Correctional Facilities and Clemency and Parole Authority. The forthcoming reissuance of this instruction will be renumbered DoDI 1325.07.

[FN3]. The pertinent federal laws regarding sex offender registration are available at the U.S. Department of Justice (DOJ) website at [http:// www.ojp.usdoj.gov/smart/legislation.htm](http://www.ojp.usdoj.gov/smart/legislation.htm).

[FN4]. *Id.*

[FN5]. Office of the Attorney General, U.S. Department of Justice, The National Guidelines for Sex Offender Registration and Notification 3, 27, available at [http://www.ojp.usdoj.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf) (hereinafter DOJ National Guidelines).

[FN6]. *Id.* at 15.

[FN7]. The term “sex offense” is not used to refer to any and all crimes of a sexual nature, but rather to those covered by the definition of “sex offense” appearing in SORNA § 111(5). Military offenses are specified by the Secretary of Defense under section 115(a)(C)(i) of [Public Law 105-119 \(10 U.S.C. 951\)](#). The listing of UCMJ offenses is in accordance with an Office of the Under Secretary (Personnel & Readiness) (OUSD (P&R)) memorandum dated 16 November 2009.

[FN8]. Manual for Courts-Martial, United States, pt IV, ¶ 120 (2012).

[FN9]. *Id.*

[FN10]. U.S. Dep't of Air Force, Instr. 51-201, Administration of Military Justice, Incorporating Change 1, para. 13.16 (Feb. 2010) (hereinafter AFI 51-201).

[FN11]. U.S. Dep't of Air Force, Instr. 31-205, The Air Force Corrections System (7 Apr 2004) (hereinafter AFI 31-205). *See also* AFI 51-201 at para. 13.17.

[FN12]. Dru Sjodin National Offender Public Website, <http://www.nsopw.gov>.

[FN13]. *See* U.S. Dep't of Army, Reg. 27-10, Military Justice para. 24-3 (3 Oct. 2007); U.S. Dep't of Navy, Sec'y of Navy Instr. 5800.14, Notice of Release of Military Offenders Convicted of Sex Offenses or Crimes Against Minors (24 May 2005) (hereinafter SECNAV Instruction 5800.14); and Memorandum from the Secretary of the Navy for the Commandant of the Marine Corps and Chief of Naval Operations, subject: Policy for Sex Offender Tracking and Assignment and Access Restrictions within the Department of the Navy (7 Oct. 2008).

[FN14]. *See* AFI 31-205 at para. 3.3.

[FN15]. *Id.* at para. 13.18.1.

[FN16]. Per AR 27-10, Military Justice, when a court-martial finds an accused guilty of a covered offense, but the sentence does not include confinement, the trial counsel (a judge advocate), in the presence of defense counsel, will immediately provide notice that the military sex offender is subject to a registration requirement, by requiring the military sex offender to complete the acknowledgement, DA Form 7439, *Acknowledgment of Sex Offender Registration Requirements*.

[FN17]. *See* SECNAV Instruction 5800.14A. NCIS, upon notification from the convening authority, must ensure required notifications to state or local law enforcement officials are made within ten days of completion of judicial proceedings, in accordance with Enclosure 2 of the instruction. NCIS must ensure written notice of an offender's return is provided to the community to appropriate officials, both for offenders returning to a destination inside the United States, or a destination outside of the United States.

[FN18]. Per AR 27-10, the trial counsel will ensure all essential paperwork is provided, along with the record of trial, to the installation provost marshal where the offender is assigned or will be assigned, are filed in the offender's

official military personnel file and unit file. Copies will be forwarded to the Office of The Judge Advocate General, Criminal Law Division and to the Army Human Resources Command. Installation provost marshals will ensure a copy of the offender's acknowledgment is filed in the United States Army Crime Record Center along with any report of investigation related to the military sex offender. The installation provost marshal in the United States will provide written notice of the conviction or transfer it to the chief law enforcement officer of the State, the chief law enforcement officer of the local jurisdiction in which the offender will reside, the state or local jurisdiction responsible for the receipt or maintenance of a sex offender registration in the state or local jurisdiction in which the offender will reside, and officials of foreign countries upon request.

[FN19]. *See* AFI 51-201, para 13.18.

[FN20]. SORNA, § 111(5)(B). *See U.S. Marshals Service Fact Sheet*, U.S. Marshals Service (Dec.7, 2011), [http://www.usmarshals.gov/duties/factsheets/fugitive\\_ops-2012.html](http://www.usmarshals.gov/duties/factsheets/fugitive_ops-2012.html).

[FN21]. *See* DOJ National Guidelines, *supra* note 5 at 16.

[FN22]. *Id.*

[FN23]. *Id.*

[FN24]. *See* Nicole Atwill, European Court of Human Rights / France: Registration in French National Sex Offender Database Does Not Violate Rights, Library of Congress, Nov. 20, 2012 at 2, *available at* [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_1205401799\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205401799_text).

[FN25]. Jennifer H. Svan, *USAFE keeps track of registered sex offenders on base*, Stars and Stripes, July 26, 2012, *available at* <http://www.stripes.com/news/usafe-keeps-track-ofregisteredsex-offenders-on-base-1.181399>.

[FN26]. *Id.*

[FN27]. Policy Letter, Commandant of the Marine Corps, subject: Registered Sex Offenders Prohibited Occupancy and Access to Marine Corps Government-Owned, Leased or Privatized Family Housing (31 Dec. 2008) and Memorandum from the Secretary of the Navy, subject: Delegation of Authority to Issue Debarment Letters (11 June 2008).

[FN28]. *See* Flor, *supra* note 1 at 13.

[FN29]. *Id.*

[FN30]. *See Miller*, 63 M.J. 452.

[FN31]. *See* Flor, *supra* note 1 at 14.

[FN32]. *Id.* at 13.

[FN33]. See DOJ National Guidelines, *supra* note 5 at 21.

[FN34]. *Id.* at 23.

[FN35]. Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, National Center for Prosecution of Child Abuse Update, Vol. 20, No. 9 & 10, 2 (2007).

[FN36]. See DOJ National Guidelines, *supra* note 5 at 24-25.

[FN37]. See McPherson, *supra* note 35 at 2.

[FN38]. *Id.* at 1.

[FN39]. In FY 2011, the U.S. Marshals Service apprehended 12,144 sex offenders; initiated 2,720 investigations; issued 730 warrants for registration violations; and arrested 586 fugitives for other violations of the Adam Walsh Act.

[FN40]. *The Reauthorization of the Adam Walsh Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) (statement of Stacia A. Hylton, Director, U.S. Marshals Service, U.S. Department of Justice).

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