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To: Connecticut Sentencing Commission

Re: Constitutional Litigation Concerning Sex Offender Registries and Potential Challenges

Date: September 27, 2021

ISSUE

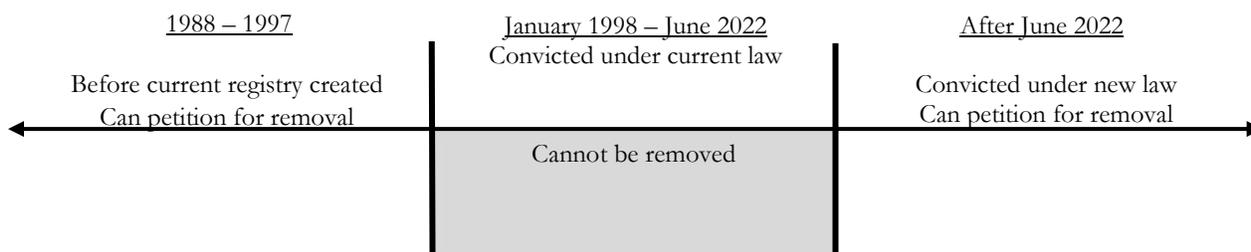
What constitutional challenges could the Sentencing Commission's proposed prospective-only removal mechanism face?

SUMMARY

Sex offender registration and notification laws are often challenged as forms of criminal punishment in violation of the constitutional provisions that protect criminal defendants. In 2013, the United States Supreme Court determined that at least one sex offender registration and notification program, functioned as a civil remedy rather than a criminal sanction. In upholding the Alaska Sex Offender Registration Act, the U.S. Supreme Court held that the burdens imposed by the statute did not impose additional punishment on registered sex offenders, and thus did not trigger the constitutional protections reserved for criminal defendants. The majority of federal and state courts have endorsed registration schemes as civil regulations, which as structured, could be based exclusively on an offender's prior conviction for a sexual offense. A small but growing number of courts, however, have found that various constitutional provisions do apply when certain aspects of registration is found to be punitive.

DISCUSSION

The Sentencing Commission is considering a proposal to create a removal mechanism for certain sexual offender registrants. In one version of the proposal, only future registrants and grandfathered registrants would be eligible for removal. Commission members have raised concerns that such a scheme could be unconstitutional as applied to current registrants, who would be ineligible for removal. Whether Connecticut will face successful litigation challenges to a less-than-fully retroactive removal mechanism, may depend on whether registration changes deal with civil regulations or criminal penalties.



Is registration a punishment? *Ex Post Facto* & Cruel and Unusual Punishments

Following the implementation of sex offender registration and notification laws around the country, registrants began to challenge registration structures as forms of punishment in violation of the U.S. Constitution. Most constitutional challenges to sexual offender registration requirements, particularly those that treat past and future registrants differently, have historically failed on the grounds that sex offender registration is not “punishment” in its intent or effect.

In 2003, the U.S. Supreme Court in *Smith v. Doe*¹ upheld Alaska’s registration and notification law on the ground that it did not expressly or in effect punish under its requirements. The petitioners challenged their placement on the registry because of the principle of *ex post facto*, which rejects the government’s ability to impose punishment retroactively. The petitioners claimed that because they had completed their prison time by 1991, it was unconstitutional to require them to register as sex offenders under Alaska’s newly enacted registry scheme. The court concluded that the requirements of registration under the then-existing Alaska registry did not share traditional characteristics of punishment, a hallmark of criminal penalties.²

In the same year, petitioners challenged the constitutionality of the registration law in Connecticut claiming that a procedural due process demanded that they receive individualized hearings to determine their risk to the community before their information was placed on a public registry.³ In *Connecticut Department of Public Safety v. Doe*,⁴ the Court held that automatic placement on a public registry did not offend procedural due process because inclusion only signified that a person had been convicted of a sexual crime, not that the person presented future dangerousness.⁵

Most state and federal courts had drawn similar conclusions. *See Roe v. Office of Adult Prob.*, 125 F.3d 47 (2d Cir. 1997) (holding the Connecticut Office of Adult Probation’s public notification policy for sex offenders, which applied to offenders who were retroactively placed on the registry, was not *ex post facto* because the policy was not a punishment); *State v. Kelly*, 770 A.2d 908 (Conn. 2001) (holding that Connecticut’s sex offender registration requirements are not punishment).⁶ These nonpunitive holding foreclosed *ex post facto* and cruel and unusual punishment challenges to registration requirements.

In the years following the Supreme Court’s decision, laws regulating sex offender registration and notification have multiplied. With the expansion of sex offender legislation around the country,

¹ 538 U.S. 84 (2003).

² *Smith*, 538 U.S. at 97-110.

³ *Conn. Department of Public Safety*, 538 U.S. at 5-7.

⁴ 538 U.S. 1, 5 (2003).

⁵ *Id.* at 7.

⁶ See also *Shaw*, 823 F.3d at 577 (upholding Oklahoma’s SORN law); *Cuomo*, 755 F.3d at 111–12 (upholding New York’s SORN law); *ACLU of Nevada*, 670 F.3d at 1058 (upholding Nevada’s sex offender registration statute); *Anderson v. Holder*, 647 F.3d 1165, 1173 (D.C. Cir. 2011) (upholding the District of Columbia’s law); *Houston v. Williams*, 547 F.3d 1357, 1364 (11th Cir. 2008) (upholding Florida’s sex offender registration statute); *Virsnieks v. Smith*, 521 F.3d 707, 720 (7th Cir. 2008) (upholding Wisconsin’s sex offender registration statute); *Bredesen*, 507 F.3d at 1008 (upholding the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004); *Weems v. Little Rock Police Department*, 453 F.3d 1010, 1017 (8th Cir. 2006) (upholding Arkansas’s SORN law); *Hatton v. Bonner*, 356 F.3d 955, 967 (9th Cir. 2004) (upholding California’s sex offender registration statute).

registrations launched new challenges, alleging that the more burdensome requirements are different from previous registration laws and had become criminal in nature.⁷

In 2016, the Court of Appeals for the Sixth Circuit held that amendments to the Michigan's sex offender registry system was punishment and thus subject to *ex post facto* restrictions. Differentiating Michigan's registry from the registry in question in *Smith* (which simply required registration), the court highlighted that Michigan's registry 1) imposed strict geographical restrictions on where registrants could live, work, and loiter, 2) required in-person reporting to update registration information, and 3) lacked the types of empirical support or individualized risk assessments that would indicate a nonpunitive purpose for the registry. *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016). *See also People v. Betts*, No. 148981, 2021 Mich. LEXIS 1304 (July 27, 2021) (adjudicating similar issues with Michigan's registry under the state constitution and arriving at the same result).

In the wake of the Sixth Circuit's decision, a minority of state and federal courts followed in determining that some modern registration programs do function as punishment, and thus, do trigger constitutional protections. New Hampshire's supreme court, for example, came to a similar conclusion in 2015, finding that its registration system was a penalty because it 1) based registration requirements on the individual's offense, rather than risk, 2) required in-person reporting and police visits to registrant's homes, 3) exposed registrants to shame and stigma, 4) was tied to conviction for a crime, and 5) was excessive in relation to its nonpunitive purposes. *Doe v. State*, 167 N.H. 382, 111 A.3d 1077 (2015). As a remedy, the court held that retrospectively impacted registrants could petition for a judicial or administrative hearing to demonstrate he or she no longer poses a risk warranting continued registration.

Several other states have followed this trend, particularly when individuals convicted under a previous sex offender registration statute are subject to heightened restrictions applied retroactively. For cases finding registration to be a punishment, see *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011) (holding registry to be an *ex post facto* punishment when an amendment retroactively applied heightened classification and registration requirements); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (holding *ex post facto* a law that retroactively lengthened the registration period, prohibited registrants from seeking a previous-available removal waiver, and required in-person reporting); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013) (holding that a retroactive extension of the registration period is *ex post facto*); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009) (holding that the retroactive imposition of residency restrictions and the lack of individualized risk assessments made Kentucky's registry punitive and *ex post facto*); *Doe v. State*, 189 P.3d 999 (Alaska 2008) (finding Alaska's registry punitive and thus violative of the state's *ex post facto* protections when applied retroactively). *See also People ex rel. T.B.*, 489 P.3d 752 (Colo. 2021) (finding registration to be a punishment when applied to juveniles).

In 2017, the Pennsylvania Supreme Court determined the state's sexual offender registry was a punishment because 1) the law required quarterly in-person verification and in-person filing of registry updates, 2) the public's access to the internet and registrants' information has expanded significantly since *Smith*, 3) the registry served deterrent and retributivist purposes, and 4) registration requirements were excessive and over-inclusive in relation to the state's interest in

⁷ *ACLU of Nevada vs. Mastro*, 670 F.3d 1046, 1054-55 (9th Cir. 2012). (The registrant argued that the Nevada registration law was distinguishable from the Alaskan statute because it provided for active notification).

protecting the public. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017). Accordingly, the court held the system violated the state and federal *ex post facto* clauses when applied retroactively. *Id.* Following this ruling, the legislature amended its sex offender registry statutes to reduce in-person reporting requirements from quarterly to annually, shorten the required registration period, reduce the number of offenses requiring registration, and provide for a removal mechanism. As a result, when the court analyzed the revised system in 2020, it found that the state's registry was no longer aimed at deterrence, was not as excessive as the previous scheme, and, ultimately, was nonpunitive. *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020).

In short, most state and federal courts continue to view registration and notification requirements as civil regulations. Over the past decade, a minority of courts have found that sexual offender registries are, in fact, penalties that trigger heightened constitutional protections for registrants. In each of these cases, courts have highlighted differences between the earlier, registration-only schemes that the Supreme Court found nonpunitive in *Smith* and newer registry schemes that require in-person reporting and restraints on where offenders can live, travel, or work. Additionally, many courts have found that 1) blanket, offense-based registration requirements and 2) the lack of individualized risk assessments make it more likely that sexual offender registration is punitive in its effect. Although a minority, some courts have found sexual offender registration to be cruel and unusual.⁸

⁸ See *People ex rel. T.B.*, 489 P.3d 752 (Colo. 2021) (holding that lifetime sexual offender registration for juvenile offenders, without a removal mechanism or an individualized risk assessment, is cruel and unusual); *Millard v. Rankin*, 265 F. Supp. 3d 1211 (D. Colo. 2017) (holding sexual offender registration to be cruel and unusual), *rev'd in part, vacated in part sub nom. Millard v. Camper*, 971 F.3d 1174 (10th Cir. 2020).