United States v. Kebodeaux: 
The Supreme Court clarifies application of SORNA to offenders convicted prior to its passage and subject to registration.

by Sasha N. Rutizer

Prior to Congress’ enactment of the Sex Offender Registration and Notification Act (SORNA) in 2006, sex offenders convicted in military courts-martial were subject to sex offender registration requirements under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994. This class of sexual offenders who were released from confinement into local communities across the Nation posed a unique problem, as compliance with registration requirements are a constant concern for officials charged with the safety of citizens. In June, the Supreme Court ruled on one such case in United States v. Kebodeaux; an offender who was convicted during Wetterling, and violated state registration requirements under SORNA. This case may have significant impact on this class of convicted sex offenders.

In 1999, Anthony Kebodeaux, a member of the Air Force was convicted by a Special Court-Martial of a sexual offense against a child. He was sentenced to three months in jail and a bad conduct discharge. In 2006, Congress enacted SORNA, a federal statute requiring those convicted of federal sexual offenses to register in the states where they live, study, and work.

After completing his term of confinement, Kebodeaux moved to Texas, where he registered as a sex offender with local officials. In 2007, he relocated from San Antonio to El Paso, and updated his registration. That same year he moved back to San Antonio but this time, failed to update his registration. Kebodeaux was prosecuted in federal court, under SORNA for this violation. On appeal, the Fifth Circuit upheld this conviction. However, a rehearing en banc lead to a 6 to 10 vote to reverse the conviction. The court reasoned that prior to the enactment of SORNA in 2006, Kebodeaux was “unconditionally let free” as he was not under military control, federal custody, or any type of supervised release or parole. Since Kebodeaux was unconditionally let free, the court reasoned that the Federal Government did not have authority under the Necessary and Proper Clause to “regulate through registration, Kebodeaux’s intrastate movements.”

The Constitution gives Congress “the power to make rules for the government and regulation of the land and naval forces.” This is known as the Military Regulation Clause. The Constitution also gives Congress “the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers...” known as the Necessary and Proper Clause.

Prior to SORNA’s enactment in 2006, Congress passed the Wetterling Act, and placed registration requirements on those convicted of sexual offenses as well as punishments for violators. The Fifth Circuit recognized this precursor to SORNA, however, it concluded that the Wetterling Act did not apply to Kebodeaux and reasoned that the federal government lacked the power under the Necessary and Proper Clause to regulate Kebodeaux’s movement. On
appeal to the Supreme Court, the Solicitor General pointed out that Kebodeaux was still subject to federal control contrary to the Fifth Circuit’s opinion, and therefore Congress did have the authority to regulate his movements.

Of import is one of the provisions of the Wetterling Act referenced by the Solicitor General, describing that §14072(i)(3) applied to a person convicted of certain enumerated offenses or “[a]ny other offense designated by the Attorney General as a sexual offense for purposes of this subsection.” The year prior to Kebodeaux’s court-martial, the Attorney General delegated his power to designate sexual offenses to the Director of the Bureau of Prisons. In turn, the Director designated the particular military offense Kebodeaux was convicted of. Not stopping there, the Solicitor General pointed to a separate provision of the Wetterling Act which also applied in Kebodeaux’s case. Namely, a section imposing federal criminal penalties on any “person who is … sentenced by a court martial for conduct in a category specified by the Secretary of Defense…and who fails to register. The Secretary of Defense delegated this authority to an Assistant Secretary of Defense who published a list of offenses, including the military offense of carnal knowledge, of which Kebodeaux was convicted. In short, the Solicitor General pointed out two avenues by which Congress maintained authority under the Necessary and Proper Clause to regulate in Kebodeaux’s case, because he was not “unconditionally let free,” but was subject to a federally mandated reporting requirement, to register with the state and keep his registration current.

While SORNA was not in effect at the time Kebodeaux was convicted, the Wetterling Act was, and provided for similar reporting requirements. SORNA’s requirements modified the Wetterling Act to be sure, and arguably provided more muscle. However it also streamlined what was described as “a patchwork of federal and 50 individual state registration systems.” It also clarified the responsibility of military convicts to register, added certain Indian Tribes as registration jurisdictions, created a Federal violation for “failure to register” and increased the registration periods for all Tiers of offenders, among other specific registration requirements. With this ruling, the Supreme Court has helped to clarify application of SORNA to offenders convicted prior to its passage and subject to registration.

1 Sasha N. Rutizer is a Senior Attorney with the National District Attorneys Association’s National Center for Prosecution of Child Abuse. Thank you to Allison Turkel, Senior Policy Advisor, USDOJ-SMART Office for her assistance with this article.
2 A special court martial is the second of three types of courts-martial, with a sentence ceiling of no more than one year in prison, regardless of number of counts convicted. It is loosely similar to a misdemeanor court; however the military does not differentiate between felony and misdemeanor offenses.
3 At the time of Kebodeaux’s court-martial, the offense of carnal knowledge described an act of sexual intercourse with a person not the wife of the defendant and who had not attained the age of 16 years old. (Manual for Courts-Martial, United States, pt. IV, § 45c (1998)).
4 The only type of punitive discharge available at this level of court-martial.
7 United States v. Kebodeaux, 647 F.3d 137, 156 (5th Cir. 2011).
8 United States v. Kebodeaux, 687 F.3d 232, 254 (5th Cir. 2012).
9 United States v. Kebodeaux, 687 F.3d 232, 234 (5th Cir. 2012).
10 U.S. Const. art. I, § 8.
13 U.S. Const. art. I, § 8, cl. 18.