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## Searching for "Jurisdictional Hook": *United States v. Kebodeaux* and the Constitutional Limits of the Sex Offender Registration and Notification Act

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# SEARCHING FOR A “JURISDICTIONAL HOOK”: *UNITED STATES v. KEBODEAUX* AND THE CONSTITUTIONAL LIMITS OF THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT

CASEY B. NATHAN\*

**Abstract:** On July 6, 2012, in *United States v. Kebodeaux*, the U.S. Court of Appeals for the Fifth Circuit held that the Sex Offender Registration and Notification Act’s registration requirements were unconstitutional when applied to the intrastate relocation of former federal convicts who had been unconditionally released from federal custody. This decision obfuscates whether former federal sex offenders must follow state or federal sex offender registration requirements in order to avoid criminal penalties. A contrary interpretation of the Act’s statutory history that requires uniform registration requirements among all federal sex offenders would resolve this ambiguity and ensure a fair warning to all former federal offenders.

## INTRODUCTION

In 2008, Anthony Kebodeaux was convicted by the U.S. District Court for the Western District of Texas of violating the Sex Offender Registration and Notification Act (SORNA) by knowingly failing to update his sex offender registration after moving from El Paso to San Antonio, Texas.<sup>1</sup> SORNA requires all former federal sex offenders to regis-

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<sup>1</sup> 18 U.S.C. § 2250(a) (2006); 42 U.S.C. § 16913(a), (c) (2006); *United States v. Kebodeaux (Kebodeaux III)*, 687 F.3d 232, 233 (5th Cir. 2012) (en banc), *rev’g* 647 F.3d 137, *cert. granted*, 133 S. Ct. 928 (Jan. 11, 2013) (No. 12–418); *United States v. Kebodeaux (Kebodeaux I)*, 647 F.3d 137, 138 (5th Cir. 2011), *rev’d en banc*, 687 F.3d 232 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 928 (Jan. 11, 2013) (No. 12–418); Judgment Against Anthony Kebodeaux, *United States v. Kebodeaux*, No. EP-08-CR-976-FM (W.D. Tex. Nov. 6, 2008), ECF No. 59. 18 U.S.C. § 2250(a) provides:

In general—Whoever—

(1) is required to register under [SORNA];

(2) (A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice) . . . ; or

ter their sex offender status in the district where they reside and to inform the local authorities in person upon any change of residence.<sup>2</sup> Following his conviction, Kebodeaux was sentenced to twelve months and one day of imprisonment, with a five year term of supervised release.<sup>3</sup>

Kebodeaux appealed, arguing that Congress did not have the constitutional authority to enact registration requirements that regulated purely intrastate movement.<sup>4</sup> A three-judge panel of the U.S. Court of Appeals for the Fifth Circuit affirmed his conviction.<sup>5</sup> Shortly thereafter, the court, on its own motion, reheard the case en banc to address its concerns about the breadth of congressional power over previously released federal offenders.<sup>6</sup>

The en banc court considered the constitutionality of SORNA's registration requirements under the Necessary and Proper Clause and the Commerce Clause.<sup>7</sup> Specifically, the court considered the constitutionality of SORNA's provisions when applied to federally convicted sex offenders who were "unconditionally released" from federal custody prior to SORNA's enactment, but who knowingly failed to update their residence after an intrastate residence change.<sup>8</sup> The en banc court held that SORNA's registration requirements and criminal penalties are unconstitutional with respect to former federal sex offenders who had been "unconditionally released" prior to SORNA's enactment.<sup>9</sup>

Unfortunately, the en banc majority's holding obfuscates the legal obligations of pre-SORNA federal sex offenders.<sup>10</sup> A contrary statutory interpretation requiring uniform registration requirements among all

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(B) travels in interstate or foreign commerce . . . ; and  
(3) knowingly fails to register or update a registration as required by [SORNA];  
shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a).

<sup>2</sup> See 18 U.S.C. § 2250(a); see also 42 U.S.C. § 16913(a) ("A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides . . ."); § 16913(c) ("A sex offender shall, not later than 3 business days after each change of . . . residence . . . appear in person . . . and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.").

<sup>3</sup> *Kebodeaux I*, 647 F.3d at 139.

<sup>4</sup> *Id.* at 138.

<sup>5</sup> *Id.* at 138, 146.

<sup>6</sup> See *Kebodeaux III*, 687 F.3d at 233–34, 253–54; *United States v. Kebodeaux (Kebodeaux II)*, 647 F.3d 605, 605 (5th Cir. 2011).

<sup>7</sup> *Kebodeaux III*, 687 F.3d at 236, 244, 253.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 253.

<sup>10</sup> See *id.* at 253–54; *infra* notes 82–86 and accompanying text.

federal sex offenders would eliminate the uncertainty of criminal sanctions.<sup>11</sup>

### I. KEBODEAUX'S CONVICTION AND APPEAL

In 1999, Anthony Kebodeaux was convicted under federal law for having sex with a fifteen-year-old.<sup>12</sup> He was sentenced to and served three months in prison and was dishonorably discharged from the military.<sup>13</sup> Kebodeaux registered as a sex offender in El Paso, Texas, on August 8, 2007.<sup>14</sup> He then moved to San Antonio, Texas, but failed to update his state registration or inform authorities of his relocation as required by SORNA.<sup>15</sup>

On March 12, 2008, the police arrested Kebodeaux in San Antonio for failing to update his registration.<sup>16</sup> The following month, a federal grand jury indicted Kebodeaux for violating section 2250(a)(2)(A) of SORNA.<sup>17</sup> Following a bench trial, Kebodeaux was convicted and sentenced to twelve months and one day of imprisonment, with a five year term of supervised release.<sup>18</sup>

On appeal to the Fifth Circuit, Kebodeaux argued that Congress can only regulate interstate commerce.<sup>19</sup> Thus, according to Kebodeaux, Congress could not enact section 2250(a)(2)(A) of SORNA because that provision only regulates intrastate activities.<sup>20</sup> In addition, Kebodeaux argued that no other source of Article I authority empow-

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<sup>11</sup> See *Kebodeaux III*, 687 F.3d at 265–69 (Haynes, J., dissenting); *infra* notes 87–89 and accompanying text.

<sup>12</sup> *United States v. Kebodeaux (Kebodeaux III)*, 687 F.3d 232, 233–34 (5th Cir. 2012) (en banc), *rev'g* 647 F.3d 137, *cert. granted*, 133 S. Ct. 928 (Jan. 11, 2013) (No. 12–418); *United States v. Kebodeaux (Kebodeaux I)*, 647 F.3d 137, 138 (5th Cir. 2011), *rev'd en banc*, 687 F.3d 232 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 928 (Jan. 11, 2013) (No. 12–418); see also 10 U.S.C. § 920 (1994) (prohibiting “carnal knowledge” with a child under sixteen years old).

<sup>13</sup> *Kebodeaux I*, 647 F.3d at 138.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see also 42 U.S.C. § 16913(a), (c) (2006) (requiring convicted sex offenders to keep their registration current and appear in person to update their registration no later than three business days after a change of residence).

<sup>16</sup> *Kebodeaux I*, 647 F.3d at 138.

<sup>17</sup> 18 U.S.C. § 2250(a) (2006); *Kebodeaux I*, 647 F.3d at 138.

<sup>18</sup> *Kebodeaux I*, 647 F.3d at 139. Kebodeaux qualified as a federal sex offender under SORNA because of his previous conviction under the Uniform Code of Military Justice. See § 2250 (defining a person as a sex offender for the purposes of SORNA “by reason of a conviction under Federal law (*including the Uniform Code of Military Justice*)”) (emphasis added); *Kebodeaux I*, 647 F.3d at 139.

<sup>19</sup> *Kebodeaux I*, 647 F.3d at 138.

<sup>20</sup> *Id.*

ered Congress to impose SORNA's registration requirements.<sup>21</sup> The panel affirmed Kebodeaux's conviction concluding that Congress had the power to enact SORNA under the Necessary and Proper Clause.<sup>22</sup>

On its own motion, the Fifth Circuit reheard the case en banc to address its concerns that SORNA potentially allowed Congress to assert unending criminal authority over previously released federal offenders.<sup>23</sup> The court dismissed Kebodeaux's case on narrow grounds finding his conviction unconstitutional.<sup>24</sup> The Fifth Circuit held that absent some "jurisdictional hook" such as interstate travel, Congress has no Article I power to enact registration requirements with criminal penalties over a former sex offender who had been "unconditionally released" from prison.<sup>25</sup>

## II. THE JURISDICTIONAL HOOK: A CONSTITUTIONAL OR STATUTORY QUESTION

The en banc court only addressed whether Congress could impose registration requirements on federal convicts who had been "unconditionally released" from federal custody.<sup>26</sup> The court acknowledged that Congress has the power to impose SORNA's registration requirements on federal offenders who are currently in federal supervision regardless of whether they travel inter or intrastate.<sup>27</sup> The en banc majority thus confronted two separate issues regarding federal offenders who have been "unconditionally released" from federal custody: (1) whether the Necessary and Proper Clause grants Congress the power to apply SORNA's registration requirements; and (2) whether Congress may

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 138, 142–46. In his panel concurrence, Judge Dennis reasoned that Congress has authority under the Commerce Clause to enact section 2250(a)(2)(A) to make the remainder of SORNA an effective regulation of interstate commerce. *See id.* at 146 (Dennis, J., concurring) ("This court and others have consistently held that § 2250(a)(2)(B) is a constitutional execution of Congress's power to regulate the channels of, and persons in, interstate commerce.").

<sup>23</sup> *See Kebodeaux III*, 687 F.3d at 233–34; *United States v. Kebodeaux (Kebodeaux II)*, 647 F.3d 605, 605 (5th Cir. 2011).

<sup>24</sup> *See Kebodeaux III*, 687 F.3d at 234–35, 253–54.

<sup>25</sup> *Id.* at 234–35.

<sup>26</sup> *United States v. Kebodeaux (Kebodeaux III)*, 687 F.3d 232, 234–35 (5th Cir. 2012) (en banc), *rev'g* 647 F.3d 137, *cert. granted*, 133 S. Ct. 928 (Jan. 11, 2013) (No. 12–418).

<sup>27</sup> *See id.* at 234, 253. The majority found that an offender is in federal custody if he or she is in federal prison or on supervised release. *See id.* at 234–35. Additionally, the majority found SORNA's intrastate registration requirements apply to any federal offender convicted after the passage of SORNA. *Id.* at 235.

impose SORNA's registration requirements under its Commerce Clause power.<sup>28</sup>

The majority held that neither the Necessary and Proper Clause nor the Commerce Clause granted Congress the power to enact such requirements.<sup>29</sup> In her dissent, however, Judge Haynes disputed that *Kebedeaux* was “unconditionally released.”<sup>30</sup> Therefore, Judge Haynes saw no need to engage in a constitutional analysis to locate a “jurisdictional hook” necessary to impose SORNA's registration requirements on *Kebedeaux*.<sup>31</sup>

#### A. No Jurisdictional Hook Under the Necessary and Proper Clause

In determining whether the Necessary and Proper Clause grants Congress the ability to impose registration requirements for offenders unconditionally released by the government, the en banc court relied on the framework articulated in 2010 by the Supreme Court in *United States v. Comstock*.<sup>32</sup> In *Comstock*, the Supreme Court examined whether the Necessary and Proper Clause grants Congress the authority to enact “[a] federal civil commitment statute [that] authorizes the Department of Justice to detain mentally ill, sexually dangerous federal prisoners beyond the date the prisoner would otherwise be released.”<sup>33</sup> The Court upheld the constitutionality of the civil commitment statute after examining five considerations: (1) the breadth of the Necessary and Proper Clause; (2) the history of federal involvement in that statute's arena; (3) the reasons for the statute's enactment; (4) the statute's accommodation of state interests; and (5) the statute's narrow scope.<sup>34</sup>

In applying these factors to *Kebedeaux*'s case, the en banc majority acknowledged that the first *Comstock* consideration affords a “presumption of constitutionality” to an enacted statute when the statute is “rationally related” to the broad authority that Congress has to enact legislation under the Necessary and Proper Clause.<sup>35</sup> The majority

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<sup>28</sup> *Id.* at 236, 244–45.

<sup>29</sup> *See id.* at 253–54.

<sup>30</sup> *See id.* at 267–68 (Haynes, J., dissenting).

<sup>31</sup> *See id.* at 265, 268.

<sup>32</sup> *Kebedeaux III*, 687 F.3d at 236, 245 (citing *United States v. Comstock*, 130 S. Ct. 1949, 1954 (2010)).

<sup>33</sup> *Comstock*, 130 S. Ct. at 1954, 1956.

<sup>34</sup> *See id.* at 1956, 1965.

<sup>35</sup> *See Kebedeaux III*, 687 F.3d at 236–37 (citing *Comstock*, 130 S. Ct. at 1957). “[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated

found, however, that the remaining four considerations, taken together, can outweigh the presumption of constitutionality of a statute.<sup>36</sup> Accordingly, the majority weighed the remaining four *Comstock* considerations individually to determine SORNA's constitutionality.<sup>37</sup>

Pursuant to the second *Comstock* consideration, the court examined whether SORNA was a modest addition to federal laws that have existed for decades.<sup>38</sup> The majority noted that federal sex registration laws have a short statutory history.<sup>39</sup> In addition, the majority found that no other federal laws have ever asserted jurisdiction over someone after they had been released from federal custody just because that person committed a federal crime.<sup>40</sup> As a result, the majority held that SORNA's registration requirements were "constitutionally novel" rather than modest additions to existing federal laws and weighed the second factor in *Kebedeaux*'s favor.<sup>41</sup>

Under the third *Comstock* consideration, the court examined whether SORNA was a reasonable extension of Congress's well-established laws.<sup>42</sup> The court recognized that similar federal powers like supervised release and probation are reasonable extensions of federal power because they are used as a means to prevent public danger or to punish offenders.<sup>43</sup> The court, however, distinguished supervised release and probation that apply to federal offenders either upon conviction or while they are in federal custody, from SORNA's registration requirements that apply to "unconditionally released" former federal offenders.<sup>44</sup> Accordingly, the court found that SORNA's registration requirements, as applied to "unconditionally released" former federal offenders like *Kebedeaux*, are not a means to punish a sex offender or prevent public danger from a sex offender's release.<sup>45</sup>

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power." *Comstock*, 130 S. Ct. at 1956 (emphasis added). Moreover, the Constitution "leaves to Congress a *large discretion* as to the means that may be employed in executing a given power." *Id.* at 1957 (emphasis added) (quoting *Champion v. Ames (Lottery Case)*, 188 U.S. 321, 355 (1903)); see also *United States v. Morrison*, 529 U.S. 598, 607 (2000) (applying a presumption of constitutionality when examining congressional enactments out of "due respect for the decisions of a coordinate branch").

<sup>36</sup> See *Kebedeaux III*, 687 F.3d at 236–37.

<sup>37</sup> See *id.* at 237–45.

<sup>38</sup> See *id.* at 237–38 (citing *Comstock*, 130 S. Ct. at 1958).

<sup>39</sup> See *id.* at 238.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.* at 237–38.

<sup>42</sup> See *Kebedeaux III*, 687 F.3d at 238–39, 239 n.18 (citing *Comstock*, 130 S. Ct. at 1961).

<sup>43</sup> See *id.* at 238–40.

<sup>44</sup> See *id.* at 239–40.

<sup>45</sup> See *id.*

Moreover, the majority reasoned that SORNA's registration requirements are an attempt by Congress to obtain an "eternal supervisory interest" over anyone who ever committed a sex crime.<sup>46</sup> Therefore, because holding SORNA constitutional could give Congress unlimited power to regulate anyone ever convicted of a federal crime, the majority held that SORNA's registration requirements were not a reasonable extension of Congress's well-established laws.<sup>47</sup>

Examining the fourth *Comstock* consideration, the court assessed whether SORNA properly accounted for state interests.<sup>48</sup> The majority found that SORNA contained no provisions where a sex offender could be transferred to state custody.<sup>49</sup> In addition, a state could not control the punishment of federal sex offenders who did not update their registration within that state's borders.<sup>50</sup> Therefore, the majority held that the fourth consideration weighed in Kebodeaux's favor because SORNA did not account for state interests.<sup>51</sup>

Finally, under the fifth *Comstock* consideration, the court examined whether SORNA was too sweeping in its scope.<sup>52</sup> Here, the majority

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<sup>46</sup> See *id.* at 241–42. The panel majority held that SORNA was a reasonable adaption of federal law because the federal government has "a direct supervisory interest over former federal prisoners." See *United States v. Kebodeaux (Kebodeaux I)*, 647 F.3d 137, 143–44 (5th Cir. 2011) (citing *Carr v. United States*, 130 S. Ct. 2229, 2239 (2010)), *rev'd en banc*, 687 F.3d 232 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 928 (Jan. 11, 2013) (No. 12–418). The en banc majority rejected this reasoning because Kebodeaux was long free of federal custody and supervision. See *Kebodeaux III*, 687 F.3d at 242 ("To say that Congress continues to have a 'direct supervisory interest' over such persons—like Kebodeaux—is to announce that it has an eternal supervisory interest over anyone who ever committed a federal sex crime.").

<sup>47</sup> See *Kebodeaux III*, 687 F.3d at 242–43 (finding that "because there is nothing that is constitutionally special about sex crimes," granting the federal government an "eternal supervisory interest" over sex offenders is no different than saying that "Congress has such an interest over anyone who ever committed any federal crime").

<sup>48</sup> See *id.* at 243 (quoting *Comstock*, 130 S. Ct. at 1965). Because states have the primary authority to define and enforce criminal laws, federal criminalization of conduct has the effect of changing the "sensitive relation between federal and state criminal jurisdictions" or, alternatively, "displac[ing] state policy choices" when that state has chosen not to outlaw the conduct. See *id.* (quoting *United States v. Enmons*, 410 U.S. 396, 411–12 (1973) (requiring that statutory language or an Act's legislative history must be explicit to justify the federal policing of the conduct of strikes)); see also *United States v. Bass*, 404 U.S. 336, 349 (1971) ("Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States . . . we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.").

<sup>49</sup> See *Kebodeaux III*, 687 F.3d at 243 (citing *Comstock*, 130 S. Ct. at 1962–63) (noting that in *Comstock*, states were given the option to assert authority over federal offenders).

<sup>50</sup> See *id.* at 243–44.

<sup>51</sup> See *id.*

<sup>52</sup> *Id.* at 244 (quoting *Comstock*, 130 S. Ct. at 1963).



found that SORNA's provisions were overbroad because they gave Congress power over anyone who was ever convicted of a sex offense.<sup>53</sup> As a result, the en banc majority held that, taken together, the final four *Comstock* considerations—which all weighed in Kebodeaux's favor—outweighed the presumption of the constitutionality of SORNA under the Necessary and Proper Clause.<sup>54</sup>

### B. No Jurisdictional Hook Under the Commerce Clause

As an alternative argument for upholding SORNA, the government posited that SORNA's registration requirements are constitutional under Congress's Commerce Clause power.<sup>55</sup> The en banc court analyzed this argument using the framework established by the Supreme Court in 1995 in *United States v. Lopez*.<sup>56</sup> According to *Lopez*, Congress may use its Commerce Clause authority to: (1) "regulate the use of the channels of interstate commerce;" (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) "regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."<sup>57</sup>

The government argued that Kebodeaux's case fit into the first two categories of Commerce Clause authority.<sup>58</sup> When a sex offender travels across state lines, a state's jurisdiction ends, leaving the task of tracking and arresting an unmonitored sex offender to the federal government.<sup>59</sup> Accordingly, the government contended that SORNA protects "the channels of" and "persons or things in" interstate commerce be-

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<sup>53</sup> *See id.*

<sup>54</sup> *See id.* at 236, 245.

<sup>55</sup> *Kebodeaux III*, 687 F.3d at 245.

<sup>56</sup> *Id.* at 245 & n.38 (citing *United States v. Lopez*, 514 U.S. 549, 558–59, 567 (1995)). *United States v. Lopez* addressed the Gun-Free School Zones Act of 1990 that "made it a federal offense 'for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Lopez*, 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(1)(A) (1988), *invalidated by Lopez*, 514 U.S. at 560). The Supreme Court found the Act unconstitutional because it exceeded Congress's authority over interstate commerce. *Id.*

<sup>57</sup> *Lopez*, 514 U.S. at 558–59; *see also Kebodeaux III*, 687 F.3d at 245 n.38 (describing *Lopez* as "holding that because the Gun-Free School Zones Act does not fall within any of the three categories, it is an unconstitutional exercise of federal power").

<sup>58</sup> *See Kebodeaux III*, 687 F.3d at 245.

<sup>59</sup> *See id.* at 250.

cause “it reduces the risk of unmonitored interstate travel by sex offenders.”<sup>60</sup>

The en banc majority, however, found that SORNA’s regulations did not fit into any of the three *Lopez* categories.<sup>61</sup> Moreover, the court held that the government’s argument would significantly expand Congress’s power under the first two categories of the Commerce Clause.<sup>62</sup> Instead of regulating “the *use of*” or “persons or things *in*” interstate commerce, Congress would be able to regulate “the *possible use of* the channels” and “persons or things *because they will potentially be in*” interstate commerce.<sup>63</sup> As a result, the majority held that SORNA’s regulations cannot be justified under a federal commerce power that would “confer on the federal government plenary power to regulate all criminal activity.”<sup>64</sup>

### C. *In Dissent: A Jurisdictional Hook Arises from Statutory History*

In her dissenting opinion, Judge Haynes rejected the en banc majority’s contention that the federal government lacks jurisdiction to impose sex offender registration requirements on Kebodeaux.<sup>65</sup> She reasoned that because Kebodeaux was never “unconditionally released,” he was still under federal supervision at the time of SORNA’s passage in 2006.<sup>66</sup> Considering the en banc majority conceded that Congress may place SORNA’s registration requirements on anyone under federal supervision, Judge Haynes posited that the majority’s constitutional analysis of SORNA was unnecessary.<sup>67</sup>

To determine that Kebodeaux was under federal supervision at the time of SORNA’s passage, Judge Haynes examined the statutory history of federal sex offender registration laws before Kebodeaux was convicted of statutory rape and up to the passage of SORNA in 2006.<sup>68</sup> In

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<sup>60</sup> *Id.* at 245; *see Lopez*, 514 U.S. at 558–59.

<sup>61</sup> *Kebodeaux III*, 687 F.3d at 246–53. Because SORNA regulates all intrastate and interstate movement by federal sex offenders, it does not regulate “only activity ‘directed’ at the channels of interstate commerce.” *Id.* at 247 (citing *Morrison*, 529 U.S. at 617). Moreover, “SORNA’s sex-offender registration requirements do not regulate persons *in* interstate commerce because sex offenders do not engage in activity that is either ‘interstate’ or ‘commerce’ just by virtue of being sex offenders.” *Id.* at 250.

<sup>62</sup> *See id.* at 245–46.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* at 245–46, 253.

<sup>65</sup> *See id.* at 268 (Haynes, J., dissenting).

<sup>66</sup> *See id.* at 256–63 (Dennis, J., dissenting); *id.* at 263–69 (Haynes, J., dissenting).

<sup>67</sup> *See Kebodeaux III*, 687 F.3d at 265 (Haynes, J., dissenting).

<sup>68</sup> *See id.* at 265–67.

1994, Congress enacted the Wetterling Act, which subjected certain sex offenders to a minimum of ten years of registration requirements through a state based registration system.<sup>69</sup> Two years later, Congress enacted the Pam Lychner Act, which retained the Wetterling Act's ten-year minimum for sex offenders and imposed lifetime registration requirements on other offenders.<sup>70</sup> The Lychner Act included a criminal penalty for certain offenders' failure to register, and additionally, created a national database to enable registrant tracking by the FBI and to provide a means to register offenders living in states not in compliance with the Wetterling Act.<sup>71</sup> In 1997, the Jacob Wetterling Improvements Act extended these registration requirements to other offenders, including Kebodeaux when he was convicted under Article 120 of the Uniform Code of Military Justice.<sup>72</sup>

In 2006, in an effort to make the federal sex offender registration system more uniform and effective, Congress repealed and "folded" the Wetterling and Lychner Acts into SORNA.<sup>73</sup> By tracing the statutory history, Judge Haynes argued that at the time of Kebodeaux's release in 1999, he was required to register for at least ten years regardless of the state in which he chose to reside.<sup>74</sup> If the state complied with the Wetterling and Lychner Acts, it would receive federal funding and Kebodeaux would be required to register with that state.<sup>75</sup> If a state was not compliant, Kebodeaux would be required to register with the FBI.<sup>76</sup> Therefore, because the Wetterling and Lychner Acts were incorporated into SORNA in 2006, Judge Haynes reasoned that the federal government "never gave up its 'federal' interest in Kebodeaux as a convicted

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<sup>69</sup> See 42 U.S.C. § 14071 (Supp. IV 1999), *repealed by* SORNA, § 129(a), Pub. L. 109-248, Title I, § 129(a), 120 Stat. 600 (2006); *Kebodeaux III*, 687 F.3d at 265 (Haynes, J., dissenting).

<sup>70</sup> See 42 U.S.C. § 14072, *repealed by* SORNA, § 129(a), Pub. L. 109-248, Title I, § 129(a), 120 Stat. 600 (2006); *Kebodeaux III*, 687 F.3d at 265 (Haynes, J., dissenting).

<sup>71</sup> See § 14072; *Kebodeaux III*, 687 F.3d at 266 (Haynes, J., dissenting).

<sup>72</sup> See 18 U.S.C. § 4042(c)(4)(E) (1997), *repealed by* SORNA, Pub. L. 109-248, Title I, § 141(h), 120 Stat. 604 (2006) (including persons convicted of an "offense designated by the Attorney General as a sexual offense for purposes of this subsection"); 42 U.S.C. § 14072(i) (requiring registration by any person "described in section 4042(c) of title 18"); 28 C.F.R. § 571.72 (1999), *invalidated by* *Simmons v. Nash*, 361 F. Supp. 2d 452, 457 (D.N.J. 2005) (designating offense 120B1/2 (Carnal Knowledge) of the Uniform Code of Military Justice as a sexual offense for purposes of 18 U.S.C. § 4042(c)); *Kebodeaux III*, 687 F.3d at 266 (Haynes, J., dissenting).

<sup>73</sup> See *Kebodeaux III*, 687 F.3d at 267 (Haynes, J., dissenting) (citing *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012) (finding that Congress repealed several earlier federal laws and passed SORNA to make sex offender registration more "uniform and effective")).

<sup>74</sup> See *id.* at 266-67.

<sup>75</sup> See *id.* at 266.

<sup>76</sup> See *id.* at 267.

federal sex offender.”<sup>77</sup> In other words, Judge Haynes maintained, in opposition to the majority’s underlying premise, that Kebodeaux was never “unconditionally released” and therefore the federal government never lost its “jurisdictional hook.”<sup>78</sup>

### III. FINDING CERTAINTY: RETHINKING THE MAJORITY’S STATUTORY ASSUMPTION

In consideration of the legislative history, Judge Haynes logically reasoned in her dissenting opinion that the federal government did not “unconditionally release” Kebodeaux and other similar pre-SORNA sex offenders.<sup>79</sup> The en banc majority responded to Judge Haynes’s contention that Kebodeaux was not unconditionally released by dubiously noting that pre-SORNA sex offender laws merely conditioned federal funding on states to maintain their own registries.<sup>80</sup> By relying on this statutory interpretation, only sex offenders residing in non-compliant states were subject to federal guidelines.<sup>81</sup>

A plain reading of the Lychner Act, however, shows that the statute enforces federal criminal penalties upon any former federal sex offender who fails to register regardless of whether the state where the offender resides is compliant with the Act.<sup>82</sup> Thus, Kebodeaux’s release from prison and the military, and up to the passage of SORNA, was conditioned on registration of his change of address for ten years; if he did not register, he would be subject to federal criminal penalties.<sup>83</sup> As a result, the majority did not need to address the constitutionality question.<sup>84</sup>

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<sup>77</sup> See *id.* at 267–68.

<sup>78</sup> See *id.*

<sup>79</sup> See *United States v. Kebodeaux (Kebodeaux III)*, 687 F.3d 232, 268 (5th Cir. 2012) (en banc) (Haynes, J., dissenting), *rev’g* 647 F.3d 137, *cert. granted*, 133 S. Ct. 928 (Jan. 11, 2013) (No. 12–418).

<sup>80</sup> See *id.* at 235 n.4 (majority opinion).

<sup>81</sup> See *id.* (citing 42 U.S.C. § 14072(g)(1)(3), (i) (Supp. IV 1999), *repealed by* SORNA, § 129(a), Pub. L. 109–248, Title I, § 129(a), 120 Stat. 600 (2006)).

<sup>82</sup> See 42 U.S.C. § 14072(i). 42 U.S.C. § 14072(i) provides:

A person who is . . . (3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides . . . shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

*Id.*

<sup>83</sup> See *id.*; *Kebodeaux III*, 687 F.3d at 266–67 (Haynes, J., dissenting).

<sup>84</sup> See *Kebodeaux III*, 687 F.3d 265 (Haynes, J., dissenting).

Furthermore, a consequence flowing from the en banc majority's interpretation of SORNA is that some former federal sex offenders are subjected to federal law, and others to only state law; pre-SORNA sex offenders who lived in states not in compliance with the Wetterling or Lychner Acts at the time they committed a sex offense could always be subject to federal guidelines.<sup>85</sup> Increased complexity of sex offender registration laws, unfortunately, renders it likely that pre-SORNA offenders who attempt to abide by the law may incorrectly conclude which registration requirements apply to them, exposing them to unnecessary punishment.<sup>86</sup>

In contrast, Judge Haynes's reading of SORNA eliminates any uncertainty about the registration requirements of pre-SORNA federal sex offenders.<sup>87</sup> All post-Wetterling federal sex offenders would be required to follow SORNA's registration requirements upon any change of address.<sup>88</sup> Because failure to follow sex offender registration laws can lead to loss of liberty through incarceration, eliminating any uncertainties in its enforcement is crucial to ensure a fair warning to potential offenders and thereby protect the civil liberties of former federal convicts.<sup>89</sup>

#### CONCLUSION

Concerned about the breadth of the Sex Offender Registration and Notification Act and the scope of congressional authority, the Fifth Circuit, sitting en banc, reheard *United States v. Kebodeaux* on its own motion. The court considered the statute's constitutionality under the

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<sup>85</sup> See *id.* at 235 n.4 (majority opinion) ("Because his state of residence, Texas, was compliant with federal guidelines *at the time of his offense*, Kebodeaux was not subject to federal registration requirements.") (emphasis added). Contrapositively, this means that a federal offender who lived in a state that was *not compliant* with the Wetterling Act at the time of his conviction or while he was in custody was subject to federal, not state, registration requirements upon his release. Cf. *id.* at 265 (Haynes, J., dissenting) ("The majority concedes that Congress may place conditions on a federal prisoner's release from custody, or even impose sex-offender registration requirements on *anyone under federal supervision . . .*") (emphasis added). Therefore, that offender could be subject to federal registration requirements because the government did not cede jurisdiction. See *id.*

<sup>86</sup> See *Reynolds v. United States*, 132 S. Ct. 975, 982 (2012) (observing that the complexities in SORNA created gaps about how the registration requirements are applied that could confuse pre-SORNA sex offenders).

<sup>87</sup> See *Kebodeaux III*, 687 F.3d at 268 (Haynes, J., dissenting).

<sup>88</sup> See *id.* at 267–68 ("I see no reason to distinguish the jurisdiction (as a matter of federal power) exercised over Kebodeaux under SORNA from that exercised under its predecessor sex offender registry laws that applied to Kebodeaux.")

<sup>89</sup> See *Reynolds*, 132 S. Ct. at 982 (finding that eliminating uncertainties to pre-SORNA offenders about how the registration requirements apply to them helps to "eliminate the very kind of vagueness and uncertainty that criminal law must seek to avoid").

Necessary and Proper Clause and the Commerce Clause. The majority held that sex offenders convicted prior to SORNA's enactment and unconditionally released by the government should not be subject to SORNA's registration requirements after intrastate relocation. Nevertheless, the majority should have adopted Judge Haynes's reading of the statutory history of federal sex offender laws. In her dissenting opinion, Judge Haynes questioned the premise that the federal government unconditionally released Kebodeaux and therefore argued that the majority did not need to reach its constitutional analysis. The result of the majority's analysis will likely leave former federal sex offenders with uncertainty as to which registration laws apply to them. By obfuscating a sex offender's legal obligations, the Fifth Circuit's holding increases the chance that former offenders will inadvertently break the law by failing to register correctly and, in so doing, subjects those offenders to an otherwise avoidable loss of liberty.

