IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAMMY TAWAKKOL, PLAINTIFF,	§	
V.	§	CAUSE NO. 1:19-CV-513-LY
MANAGER SHEILA VASQUEZ, IN HER OFFICIAL CAPACITY AS MANAGER OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY–SEX OFFENDER REGISTRATION BUREAU, AND DIRECTOR STEVEN MCCRAW, IN HIS OFFICIAL CAPACITY OF DIRECTOR OF THE TEXAS DEPARTMENT OF PUBLIC SAFETY, DEFENDANTS.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 20, 2021, the court called the above-styled case for bench trial. Plaintiff Sammy Tawakkol appeared in person and by counsel. Defendants Sheila Vasquez and Steven McCraw appeared by counsel. Having carefully considered the evidence presented at trial, the pleadings, and the applicable law, the court concludes that Tawakkol proved by a preponderance of the evidence that he is not required to register as a sex offender under federal or Texas law.

In so deciding, the court makes the following findings of fact and conclusions of law, ultimately declaring that Defendants may not require Tawakkol to register as an extrajurisdictional sex offender under Texas law.[1]

[1] All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed. Likewise, any conclusion of law more appropriately considered a finding of fact shall be so deemed.

I. PROCEDURAL HISTORY AND JURISDICTION

This suit is brought against Sheila Vazquez and Steven McCraw in their official capacities as employees of the Texas Department of Public Safety, seeking declaratory and injunctive relief for state action requiring Sammy Tawakkol to register as a sex offender under Chapter 62 of the Texas Code of Criminal Procedure and violating Tawakkol's right to procedural due process under the Fourteenth Amendment to the United States Constitution. This court has federal-question jurisdiction and can exercise jurisdiction over claims seeking declaratory and injunctive relief. 28 U.S.C. § 1331; 28 U.S.C. §§ 2201 and 1343(a). Venue is proper because Tawakkol's claim substantially arises in the Austin Division of the Western District of Texas, where the Texas Department of Public Safety is located. *See* 28 U.S.C. § 1391(b)(1), (2).

II. FINDINGS OF FACTS

The following findings incorporate facts stipulated by the parties, as well as those found by the court.

On January 11, 2018, Tawakkol, while enrolled as a cadet at the United States Air Force Academy, was tried by court-martial and entered a negotiated plea of guilty to three charges of criminal misconduct. All three charges stemmed from attempted or actual violations of Uniform Code of Military Justice ("UCMJ") Article 120c(a)(2), Indecent Viewing, Visual Recording, or Broadcasting. 10 USC § 920c(a)(2). Specifically, Tawakkol was convicted of "knowingly and wrongfully photograph[ing] the private area of female individuals, without their consent, and under circumstances in which the female individuals had a reasonable expectation of privacy." As punishment for commission of these offenses Tawakkol was reprimanded and restricted to a dormitory room at the Air Force Academy for 60 days. Additionally, two-thirds of Tawakkol's pay per month was ordered forfeited for a period of six months.

At the time of Tawakkol's plea, the presiding military judge ensured Tawakkol was aware that he "may have to register as a sex offender." The military judge made no formal or definitive finding of fact or conclusion of law concerning whether Tawakkol was required to register as a sex offender under any state or federal law, including the federal Sex Offender Registration and Notification Act ("SORNA"). 34 U.S.C. §§ 20901–20962.

Tawakkol was also convicted of one count of Invasive Visual Recording on March 27, 2018, in a Texas state-court proceeding. Tex. Penal Code Ann. § 21.15(b). Tawakkol's conviction under Section 21.15(b) is not included in the definition of a "reportable conviction or adjudication" for the purposes of the registration required by Texas law. Tex. Code. Crim. Proc. Ann. § 62.001(5).

On May 15, 2018, Tawakkol was contacted by law-enforcement officials employed by the City of Houston, Texas, and informed that, based on their correspondence with the Sex Offender Registration Bureau ("SORB") of the Texas Department of Public Safety, Tawakkol was required to register as a sex offender under Chapter 62 of the Texas Code of Criminal Procedure. Tex. Code. Crim. Proc. Ann. §§ 62.001–62.408.

On March 4, 2019, Tawakkol's attorney, Jack B. Zimmermann ("Zimmermann"), sent a letter to SORB by United States mail, arguing that Tawakkol was not required to register under any federal law, under the UCMJ, or under Chapter 62. On March 22, 2019, Vasquez, Manager of SORB, replied in writing to Zimmerman's letter:

> Thank you for your inquiry regarding Mr. Tawokkol's [sic] duty to register as a sex offender in Texas.
>
> Neither offense cited[2] in your letter is considered substantially similar to a reportable offense in Texas. Therefore, the Texas offense is not a 'reportable conviction or adjudication' requiring registration under CCP Chapter 62.

[2] "[N]either offense cited" refers to Tawakkol's prior convictions for violating Article 120c(a)(2).

> However, pursuant to CCP Art. 62.001(10), the offense under Art. 120c(a)(2) of the Uniform Code of Military Justice requires Mr. Tawokkol [sic] to register as an extrajurisdictional registrant in Texas.

III. DISCUSSION AND ANALYSIS

A. Registration as an extrajudicial sex offender

Defendants argue that Tawakkol must register as a sex offender because he is an "extrajurisdictional registrant" under Texas law. An extrajurisdictional registrant is required to register as a sex offender in Texas. An extrajurisdictional registrant

> (A) is required to register as a sex offender under:
>
> . . . (iii) federal law or the Uniform Code of Military Justice . . . and
>
> (B) is not otherwise required to register under this chapter because:
>
> (i) the person does not have a reportable conviction for an offense under the laws of the other state, federal law, the laws of the foreign country, or the Uniform Code of Military Justice containing elements that are substantially similar to the elements of an offense requiring registration under this chapter . . .

Tex. Code Crim. Proc. Ann. § 62.001(10). Article 120c(a)(2), the statute under which Tawakkol was convicted, does not "contain[] elements that are substantially similar to the elements of any offense requiring registration" in Texas. Tex. Code Crim. Proc. Ann. § 62.001(10)(B)(i).

1. Interpretation of Applicable Federal Law and Policy

The first major question this court must address is whether Tawakkol's conviction requires him to register as a sex offender under Texas law. Section 62.001(10) identifies "federal law or the Uniform Code of Military Justice" as the potential basis for Tawakkol being labeled an extrajurisdictional registrant.

Enacted as Title I of the Adam Walsh Child Protection and Child Safety Act of 2006, SORNA established a comprehensive national system for the registration of sex offenders and offenders against children. 34 U.S.C. § 20901. The statute defined "sex offense," in part, as "a military offense specified by the Secretary of Defense (the "Secretary") under section

115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note)." 34 U.S.C. § 20911(5)(A)(iv). The relevant portion of Public Law 105-119, as amended, states that:

> (C)(i) The Secretary of Defense shall specify categories of conduct punishable under the Uniform Code of Military Justice which are sex offenses as that term is defined in the Sex Offender Registration and Notification Act, and such other conduct as the Secretary deems appropriate for inclusion for purposes of this subparagraph.
>
> . . .
>
> (iii) The procedures and requirements established by the Secretary under this subparagraph shall, to the maximum extent practicable, be consistent with those specified for Federal offenders under the Sex Offender Registration and Notification Act.

Department of Justice Appropriations Act of 1998, Pub. L. No. 105-119, § 115(a)(8)(C), 111 Stat. 2440, 2466 (1997) (as amended by the Adam Walsh Child Protection and Safety Act, Pub. L. 109-248, § 141(i), 120 Stat. 587, 604 (2006)).[3] The current delegation of authority requires the Secretary's rulemaking to be consistent with SORNA's treatment of "Federal offenders." SORNA specifies a variety of federal penal statutes that qualify as sex offenses,[4] all of which are crimes of violence or crimes against children. In addition to these specific statutes, SORNA defines sex offense "as a criminal offense that has an element involving a sexual act or sexual contact with another" or "a criminal offense that is a specified offense against a minor."

Pursuant to this grant of authority, the Department of Defense ("DoD") has published DoD Instruction No. 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority ("DoDI 1325.07"). DoDI 1325.07, published in 2013 as replacement to DoDI

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[3] The original delegation was made prior to the passage of SORNA. With SORNA's passage in 2006, Congress expressly linked its delegation of authority to the new law by amending the original, uncodified, delegation statute.

[4] SORNA specifically lists 18 U.S.C. Section 1591, Sex trafficking of children or by force, fraud, or coercion; 18 U.S.C. Chapter 109A, Sexual Abuse; 18 U.S.C. Chapter 110, Sexual Exploitation and Other Abuse of Children (except failure to report child abuse and two non-punitive sections); and 18 U.S.C. Chapter 117, Transportation for Illegal Sexual Activity and Related Crimes.

1325.7, *inter alia* "[r]evises the offenses for which sex offender notification is required, in accordance with [SORNA]." Language relevant to determining which military offenses require sex-offender registration can be found throughout the instruction but appears to be inconsistent.

Paragraph 23(d) of Enclosure 2 of DoDI 1325.07 states that "covered offenses," that is, offenses "requiring registration as a sex offender" can be found in "Tables 4 and 5 at Appendix 4." Paragraph 23(f) directs the reader more generally to Appendix 4 for "covered sex offense[s]." Appendix 4, entitled "Listing of Offenses Requiring Sex Offender Processing," begins by stating that "[a] Service member who is convicted in a general or special court-martial of any of the offenses listed in Table 4 must register with the appropriate authorities in the jurisdiction . . . in which he or she will reside, work, or attend school." Paragraph 4 of the appendix instructs that "reporting . . . is required based on a qualifying conviction of any offense listed below, without regard to the date of the offense or the date of the conviction."

Notably, the appendix contains three tables: Table 4: Offenses Defined before October 1, 2007; Table 5: Offenses Defined on or After October 1, 2007 and Before June 28, 2012, and Table 6: Offenses Defined on or After June 28, 2012. Article 120c(a)(2), Tawakkol's offense of conviction, appears in Table 6. Tawakkol argues that by referencing only Table 4 at the start of the appendix, the DoD's intent is that the offenses listed in Table 6 are only listed to show offenses that require *notification* and not *registration*. After reviewing the instruction as a whole, with special attention to the language above, the court finds that DoDI 1325.07 requires sex-offender registration for those convicted offenses listed in any of the three tables.

As Defendants argue, the dates listed above each table "correspond to the effective dates of significant legislative changes to military law passed by Congress." These amendments revised and reorganized sex offenses into, primarily, Articles 120, 120b, and 120c. Even considering

Tawakkol's notification argument and multiple references to Table 4 or Tables 4 and 5 specifically, the language and context of the instruction makes it impossible to read the instruction as Tawakkol requests. Table 6 includes the amended versions of crimes that now only exist in the articles listed in that table because the 2012 amendments moved them out of the articles listed in tables 4 and 5. Tawakkol's suggested interpretation of the instruction would require, for example, that the instruction did not intend to require registration for violations of amended statutes penalizing various sexual offenses against minors, all listed in Table 6. Additionally, Appendix 4's fifth paragraph provides some insight into the intended differences between the tables: "The offenses defined before October 1, 2007[, listed in Table 4], are included to facilitate identification of those prisoners who were convicted of offenses occurring before October 1, 2007." This context reinforces the court's understanding of the language discussed above of, specifically paragraph 23(f) of Enclosure 2 (directing the reader to Appendix Four generally for "covered offenses," a term earlier defined as offenses "requiring registration as a sex offender") and paragraph 4 of the appendix (requiring reporting "based on a qualifying conviction of any offense listed below, without regard to the date of the offense or the date of the conviction.").

Whether inconsistent references to the tables are caused by scrivener's error or inartful amendment drafting, DoDI 1325.07 requires reporting and registration for convictions of any of the offenses listed in Tables 4, 5 and 6 of Appendix 4. The court finds that in causing DoDI 1325.07 to be published, the Secretary has listed Article 120c(a)(2) as a sex offense under the Uniform Code of Military Justice, which, if a valid designation, would trigger the application of SORNA and therefore an extrajurisdictional registrant requirement under Texas law. Tex. Code Crim. Proc. Ann. 62.001(10).

2. *Scope of Delegated Authority*

Tawakkol argues that if the Secretary listed Article 120c(a)(2) as an offense requiring registration, that act exceeded the scope of the rulemaking authority authorized by Congress. "[F]or agencies charged with administering congressional statutes, . . . how they are to act is authoritatively prescribed by Congress, so that when they act improperly, . . . what they do is ultra vires." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 291 (2013).

The current delegation language provides the Secretary some latitude, requiring the Secretary to specify conduct punishable under the UCMJ that are sex offenses under SORNA and "other conduct as the Secretary deems appropriate for inclusion." § 115(a)(8)(C), 111 Stat. at 2466 (as amended by § 141(i), 120 Stat. at 604). However, it also requires that the listed categories of conduct "be consistent with those specified for Federal offenders under [SORNA]." *Id.* Tawakkol asserts that because the acts defined in Article 120c(a)(2) are not consistent with the offenses requiring registration for civilian federal offenders, any attempt to list it as a covered military offense would be an *ultra vires* act.[5]

In reviewing the validity of a military law or regulation, the court gives "great deference to professional judgment of military authorities." *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters"). The Supreme Court has explained this deference: "the special relationships that define military life have 'supported the military establishment's power to deal with its own personnel' [because] 'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might

[5] Tawakkol's argument is limited to violations of Article 120c(a)(2) with adult victims. *See* 34 U.S.C. 20911(7)(F).

have.'" *Chappell v. Wallace*, 426 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188 (1962)).

The discretion provided to the Secretary to identify qualifying offenses is limited by the delegation's plain and unambiguous language. Deference does not justify abdication of the court's duty to meaningfully review agency action. *See Rostker v. Goldberg*, 453 U.S. 57, 70 (1981). Congress's delegation of rulemaking authority to the Secretary requires that "to the maximum extent practicable" the identified military offenses be consistent with SORNA's definition of sexual offenses. § 115(a)(8)(C), 111 Stat. at 2466 (as amended by § 141(i), 120 Stat. at 604). The power to list "such other conduct as the Secretary deems appropriate for inclusion" provides the Secretary the power to consider uniquely military offenses, which the Secretary did by listing specific variants of "Conduct Unbecoming an Officer" and "Conduct Prejudicial to Good Order and Discipline" as offenses requiring sex-offender processing. DoDI 1325.07, Appendix 4 to Enclosure 2. It does not authorize the Secretary to require registration for offenses that Congress contemplated and elected not to list in SORNA. When the offense of conviction is directly parallel to a civilian federal offense, namely 18 U.S.C. § 1801 ("Section 1801"), it is plainly practicable for the Secretary to remain consistent with SORNA's sex-offender classifications.

The court must next resolve whether Congress made violations of Section 1801, or any offense comparable to Article 120c(a)(2), an offense "specified for Federal offenders" under SORNA. Even an expansive view of the scope of delegation limits SORNA's federal offenses to three categories: (i) criminal offenses involving sexual acts or sexual contact with another; (ii) specified criminal offenses against a minor, or (iii) explicitly listed federal crimes in Title 18 of the U.S. Code. 34 U.S.C. 20911(5)(A). Tawakkol's victims were not minors, and his actions did not involve "sexual contact" with his victims. It is equally clear that the explicitly listed federal

offenses do not include conduct substantially similar to Tawakkol's violation of Article 120c(a)(2). The court next turns to whether a violation of Article 120c(a)(2) "has an element involving a sexual act." 34 U.S.C. 20911(5)(A)(i). Although SORNA does not define sexual act, the Attorney General has published formal guidance clarifying that "[t]he offenses covered by this clause should be understood to include all sexual offenses whose elements involve: (i) Any type or degree of genital, oral, or anal penetration, or (ii) any sexual touching of or contact with a person's body, either directly or through the clothing." Office of the Attorney General, *National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38030 (DOJ, July 2, 2008). Under a categorical, modified categorial, or fact-specific approach, this plainly excludes Tawakkol's violation of Article 120c(a)(2).

Article 120c(a)(2) cannot be considered an offense requiring sex offender-registration, at least in cases where the victim is not a minor. Such a determination by the Secretary is not permitted by the plain language of the rulemaking authority delegated to Congress. As such, any act requiring registration for a violation of Article 120c(a)(2) is not authorized by the congressional delegation of rulemaking power and is *ultra vires*.[6] As such, this court finds that Tawakkol is not required to register as a sex offender under "federal law or the Uniform Code of Military Justice" as required to trigger Texas's extrajurisdictional registrant requirement. Tex. Code Crim. Proc. Ann. 62.001(10).

B. Due Process

Because the court concludes that Tawakkol's offense is not one requiring sex-offender registration under SORNA, the court need not address Tawakkol's arguments regarding procedural due process.

[6] This court expresses no opinion on other offenses listed in DoDI 1325.07.

IV. CONCLUSION

Article 120c(a)(2) may not be listed as a military offense requiring justification pursuant to Congress's delegation of authority. Therefore, Tawakkol is not an extrajurisdictional registrant sex offender under Texas law, and Defendants' order for him to register as such is unlawful. Having reached this conclusion, the court will permanently enjoin Defendants from requiring Tawakkol to register as a sex offender in Texas.

A final judgment will be filed subsequently.

SIGNED this 29th day of March, 2022.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE