Sex Offender Program puts Minnesota in the spotlight again

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Minnesota prides itself on being unique in many ways. But we shouldn't bust any buttons over the distinctive reputation our state seems to have earned in many legal circles, and among many defenders of civil liberties and enlightened corrections policies.

"Minnesota's laws and its implementation of those laws [are] uniquely retrograde," declares a legal brief filed this summer with the U.S. Supreme Court by two prominent libertarian think tanks.
On Monday, the nation's highest court is expected to consider whether to hear a constitutional challenge to the long-embattled Minnesota Sex Offender Program (MSOP) — "the most aggressive and restrictive sex-offender civil commitment statute in the country," according to the "friend of the court" brief from the Cato Institute and the Reason Foundation.

The Supreme Court has received similar assessments of Minnesota's nation-leading achievement in the "unregulated deprivation of liberty" in briefs from associations of law professors, criminology scholars and sex-offender-treatment specialists.

It goes without saying that the dangers sex offenders pose in our communities and institutions create a disturbing policy problem. Over the past quarter-century, some 20 states have implemented "civil commitment" programs somewhat like Minnesota's. Under these novel legal arrangements, certain sex offenders, after fully serving prison sentences for their crimes, are judged to be a continuing threat and are locked away again, indefinitely, in prisonlike "treatment centers" until they show progress in controlling their dark impulses.

The unique trouble with MSOP, as I've noted in previous columns, is that it almost never helps anybody make progress, even after decades in its care. Only one "patient" has been fully discharged in more than 20 years (and that came only as MSOP's legal troubles mounted), and the state's 700-plus clients represent America's highest per capita rate of sex-offender commitments. Other states — innovative, compassionate places like Texas — have more success in readying at least some offenders for greater freedom.
But MSOP provides no regular review of patients' progress, no individualized treatment plans and no less-restrictive housing options, even though its leaders admit that some of those it incarcerates probably pose no ongoing risk to the public. MSOP is "so riddled with systemic flaws," its critics

write, that its inadequacies seem “the product of design, not ineptitude.” Indeed, they add, “seeing what it fails to do, one might reasonably ask what the MSOP actually does.”
But that’s no mystery. MSOP has for decades protected Minnesota politicians from potential public wrath should a sex offender released from custody commit a high-profile atrocity. Dangerous men are released to the community every day from prison, jail and pretrial detention, but a blinding spotlight has come to focus on sex criminals.

Back in 1994, it was the imminent release from prison of a single notorious rapist that inspired the Legislature to unanimously enact MSOP for all “sexually dangerous persons.” And far larger numbers have been buried alive in the program ever since a political firestorm followed the horrifying 2003 rape-murder of Dru Sjodin by an offender who could have been sent to MSOP but wasn’t.

“Thick politics surround Minnesota’s program,” the Supreme Court is correctly told in the briefs it’s received.

The request to scrutinize MSOP comes to the high court after the Eighth U.S. Circuit Court of Appeals upheld the program in January, overturning federal District Judge Donovan Frank’s earlier ruling that MSOP is unconstitutional. Emphasizing MSOP’s admitted failure to ensure that all those it imprisons still meet the legal standard for commitment, Frank, after several years of proceedings and attempts to persuade Minnesota politicians to make changes in the program, had finally held that the state must review the status of its “patients” and whether all of them need to stay locked up.

But the Eighth Circuit Court disagreed, under a rationale that demonstrates the power of this issue to pervert logic. The appeals court essentially held that once the state gets a judge to declare a person dangerous, that person’s “fundamental right” to liberty vanishes, and the state no longer needs a “narrowly tailored” law to deny it. Officials are not required to regularly review whether such offenders remain dangerous, or to provide meaningful treatment, or to create a realistic path to success in therapy and even a partial restoration of freedom.

Now, one thing that ruling must mean is that the appeals court understands a judge can get things wrong — even, in its view, a veteran judge like Frank who spends years studying an issue and, being a life-tenured federal judge, faces little political pressure that might distort his decision.

But if judges can so easily be mistaken, how can a court simultaneously conclude that a person should once and for all lose the most elemental human right just because some elected county judge somewhere, often under considerable political and social pressure, is convinced by a prosecutor that the offender is dangerous?

“This case is important,” as MSOP’s detractors have told the court, “because it is too easy to overlook constitutional violations when they are perpetrated against those the public despises.” What’s more, the hostility of the masses and the government can find various targets — and it’s not that hard to think of public officials these days who ought not readily be trusted with a power to lock up forever anyone they deem to be a threat.

“Sex-offender laws have bored a hole in the nation’s constitutional fabric,” declares the Cato/Reason brief. “As state and federal governments expand that hole — threatening to swallow other rights and others’ rights — this Court should intervene.”

It should — though the Supreme Court hears few of the appeals it receives. While sexually dangerous persons are frightening indeed, we need protection from politically dangerous persons, too.