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COMMITMENT THROUGH FEAR: MANDATORY JURY  
TRIALS AND SUBSTANTIVE DUE PROCESS VIOLATIONS IN THE  
CIVIL COMMITMENT OF SEX OFFENDERS IN ILLINOIS

MICHAEL ZOLFO\*

INTRODUCTION

Taking a person's liberty is one of the most consequential decisions in the American judicial system. The U.S. Constitution contains a number of protections that ensure individuals are treated fairly and equally before they can lose their liberty. The most prominent of these protections is the Fifth Amendment, which states "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."<sup>1</sup> A government must provide a person with both substantial and procedural due process before they can lose their liberty and are confined by the state.

In Rushville, Illinois, there is a detention facility where 562 members of society are confined, many indefinitely. They are not confined because they were convicted of a crime and are being punished. They are not confined to serve as an example and deter others from crime. Rather, they are confined because they have been deemed too dangerous to live freely in society. These individuals are sex offenders, individuals who are often considered "the worst of the worst" of humanity.<sup>2</sup> Sex offenders are not a group of people who engender much sympathy or advocacy. However, the U.S. Constitution states that before a government can make the drastic choice of taking a person's liberty, possibly for the rest of their lives, there are a number of protections and procedures that must be followed. It is the purpose of this Note to demonstrate that in Illinois, civilly-committed sex offenders are not afforded their due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution because they are given

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1. U.S. CONST. amend. V.

2. Chris Serres, *Minnesota Sex Offenders: Are They Really the 'Worst of the Worst?'*, MINNEAPOLIS STAR TRIB. (Dec. 2, 2013, 10:38 AM), <http://www.startribune.com/minnesota-sex-offenders-are-they-really-the-worst-of-the-worst/233945281/> [<https://perma.cc/2GTB-FTP3>].

the illusion that they have a right to a bench trial, but are then subjected to jury trials against their wishes.

The American public expects government protection from sex offenders and those who commit sexually violent crimes.<sup>3</sup> The nature of sexually violent crimes often cause the crime, the offender, and the victim to receive a large amount of media attention, often in a sensational manner.<sup>4</sup> As a result, when a sexually violent crime occurs, the intense media coverage only increases societal fear of sex offenders.<sup>5</sup> In response to public fear and concern over sex offenders and sexually violent crimes, the U.S. government and many state governments have used a variety of tactics to both remove sex offenders from the streets and to better understand the motives of offenders.<sup>6</sup> Beginning as early as the 1930s, in the midst of a nationwide panic over sex offenders, many states attempted to calm the hysteria by passing “sexual psychopath” legislation to keep sex offenders under state control.<sup>7</sup> As the twentieth century progressed, public fear of sex offenders declined.<sup>8</sup> However, the rise of newer forms of media, such as cable news and reality crime shows, initiated a second nationwide panic over sex offenders and sexually violent crimes in the 1980s and 1990s.<sup>9</sup> This led to a flurry of new legislation at both the federal and state level designed to register, monitor, and control sex offenders, including a new tactic: civil commitment of sex offenders.<sup>10</sup>

As of October 2016, the federal government and twenty states, including Illinois, have enacted civil commitment laws for sex offenders.<sup>11</sup> The Illinois Sexually Violent Persons (“SVP”) Commitment Act became effective on January 1, 1998, and was a response to concerns over sex offenders being released into the public after serving their criminal sentences with the Illinois Department of Corrections.<sup>12</sup> The Illinois SVP Commitment Act, much like the federal program and those in other states,

3. Jennifer K. Anderson & Joanna Woolman, *Going Against the Grain of the Status Quo: Hopeful Reforms to Sex Offender Civil Commitment in Minnesota—Karsjens v. Jesson*, 42 MITCHELL HAMLINE L. REV. 1363, 1366 (2016).

4. *Id.* at 1377.

5. *Id.* at 1380.

6. *Id.* at 1372.

7. *Id.* at 1374.

8. *Id.*

9. *Id.* at 1374–75.

10. *Id.* at 1375; Christina Mancini & Daniel P. Mears, *Criminology: U.S. Supreme Court Decisions and Sex Offender Legislation: Evidence of Evidence-Based Policy?*, 103 J. CRIM. L. & CRIMINOLOGY 1115, 1122 (2013).

11. Anderson & Woolman, *supra* note 3, at 1374.

12. *See generally* Sexually Violent Persons Commitment Act, 725 ILL. COMP. STAT. 207/1–99 (2016).

aims to commit sex offenders into government custody after they have completed their criminal sentences, and aims to provide treatment until they are no longer dangerous.<sup>13</sup> The U.S. Supreme Court upheld the constitutionality of state sex offender civil commitment statutes in *Kansas v. Hendricks*, and upheld the constitutionality of the federal sex offender civil commitment in *United States v. Comstock*.<sup>14</sup> The Supreme Court held that so long as these programs are used for treatment purposes, and not as a way to further punish sex offenders, the programs are constitutional.<sup>15</sup> However, two recent decisions in the Eighth Circuit and the Eastern District of Missouri have reexamined the constitutionality of sex offender civil commitment, and have particularly focused on the proper level of scrutiny courts should apply to Due Process Clause challenges by committed sex offenders.<sup>16</sup>

The purpose of this Note is to demonstrate that the Illinois SVP Commitment Act violates the Fifth and Fourteenth Amendments. The Fifth Amendment declares that “[n]o person shall be . . . deprived of life, liberty, or property without due process of law.”<sup>17</sup> The Illinois SVP Commitment Act’s provisions that allow the prosecutors to demand a jury trial violates SVP respondents’ due process rights. The jury trial provisions in the Illinois SVP Commitment Act results in offenders losing their liberty even though they do not pose a threat to society.

Part I of this Note will discuss the evolution and implementation of the Illinois SVP Commitment Act, and will specifically examine the sections that allow for the State to request a jury trial. Part II will examine the due process concerns that federal courts have raised when examining SVP statutes, and demonstrate how the Illinois SVP Commitment Act violates the due process rights of SVP respondents. Part III will examine the likelihood of success for legislative and judicial solutions to remedy the Due Process Clause violations that occur under the Illinois SVP Commitment Act.

13. *Id.* 207/40.

14. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997); *United States v. Comstock*, 560 U.S. 126, 131 (2010).

15. See *Hendricks*, 521 U.S. at 350; *Comstock*, 560 U.S. at 131.

16. *Karsjens v. Piper*, 845 F.3d 394, 411 (8th Cir. 2017); *Van Orden v. Stringer*, 262 F. Supp. 3d 887 (E.D. Mo. 2017) (The Eastern District of Missouri reevaluated its decision in *Van Orden v. Schafer*, 129 F. Supp. 3d 839 (E.D. Mo. 2015), in light of the Eighth Circuit’s decision in *Karsjens v. Piper*, and reversed its earlier decision finding the Missouri Sex Offender Rehabilitation and Treatment Services Program as unconstitutional as applied. The petitioners have filed an appeal to the Eighth Circuit, which is still pending.).

17. U.S. CONST. amend. V.

## I. ILLINOIS SVP COMMITMENT ACT AND STATE RIGHT TO JURY TRIAL

The Illinois SVP Commitment Act was passed in 1997.<sup>18</sup> Illinois is one of seventeen states that passed SVP commitment laws between 1993 and 2005.<sup>19</sup> These laws emerged during a time when public awareness and fear of violent criminals such as sex offenders was on the rise.<sup>20</sup> The Illinois SVP Commitment Act was passed against this backdrop of heightened public attention to sexually violent crimes.<sup>21</sup> The following sections will examine the general constitutional requirements of an SVP program in order to better understand the rationale, terminology, and processes present in the Illinois SVP Commitment Act. The specifics of the Illinois SVP Commitment Act will then be highlighted, giving special attention to the provisions of the Act that grant prosecutors with a unilateral right to a jury trial.

### A. General Requirements for SVP Commitment Programs

The Supreme Court states that there are three criteria a SVP commitment statute must meet to be constitutional.<sup>22</sup> First, an SVP act must be civil in nature, not criminal.<sup>23</sup> If an SVP program is civil in nature, as opposed to criminal, traditional criminal law issues such as double jeopardy, cruel and unusual punishment, and ex post facto laws are not implicated.<sup>24</sup> Second, an SVP program should require that the government prove three elements by the standard of either clear and convincing evidence or beyond a reasonable doubt: 1) the person has been convicted of a sexually violent offense; 2) the person suffers from a mental abnormality or personality disorder; and 3) the person is likely to further engage in acts of sexual violence.<sup>25</sup> Third, an SVP program's purpose must not be for

18. 725 ILL. COMP. STAT. 207/1 (2016).

19. Thomas K. Zander, *Civil Commitment Without Psychosis: The Law's Reliance on the Weakest Links in Psychodiagnosis*, 1 J. SEXUAL OFFENDER CIVIL COMMITMENT 17, 22 (2005).

20. David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 602 (2006).

21. See Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2097 (2010).

22. See *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997); *United States v. Comstock*, 560 U.S. 126, 131 (2010); *Kansas v. Crane*, 534 U.S. 407, 409 (2002).

23. *Hendricks*, 521 U.S. at 361.

24. *Id.* at 368.

25. *Id.* at 352; see *Addington v. Texas*, 441 U.S. 418, 431 (1978) (explaining that the standard of proof in civil commitment proceedings should be either beyond a reasonable doubt or clear and convincing evidence, not preponderance of the evidence). The state or federal government proves that the person has a mental illness through a series of mental health evaluations, and proves that the person

either retribution or deterrence, but must be for treatment of the committed person and the protection of society from dangerous individuals.<sup>26</sup> Justice Kennedy warned in *Hendricks* that if “treatment provisions were adopted as a sham or mere pretext” for confining sex offenders, the civil commitment scheme would be declared unconstitutional.<sup>27</sup>

### *B. Commitment Under Illinois SVP Commitment Act*

The first step to civilly commit a prisoner in Illinois is written notification. The Illinois Department of Corrections (“IDOC”) must send written notification to the Illinois Attorney General or the county State’s Attorney, not later than six months prior to the individual’s anticipated release from imprisonment or mandatory supervised release, stating that an individual who was convicted of a sexually violent offense is set for release.<sup>28</sup> The IDOC or any other agency with jurisdiction over the individual must provide the prosecutor’s office with information regarding the individual’s criminal history, mental condition, any treatment received by the individual, and the individual’s future residence.<sup>29</sup> Once the State receives notice from IDOC, the prosecutor may choose to file an SVP petition alleging that all of the following apply to the person who is eligible for release (known as the “respondent”): 1) the respondent has been convicted of a sexually violent offense; 2) the respondent has a mental disorder; and 3) the respondent is dangerous to others because the person’s mental disorder creates a substantial probability that he or she will further engage in acts of sexual violence.<sup>30</sup> A “mental disorder” is defined under the statute as “a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence.”<sup>31</sup> The statute does not give a definition of “substantial probability,” but it is understood that in order to prove substantial probability, the State must demonstrate that it is “much more likely than not” that the respondent will engage in acts of sexual violence if he is released from custody untreated.<sup>32</sup>

is likely to commit further acts of violence also through a number of psychiatric evaluations, risk factors, and recidivism analysis. *See Hendricks*, 521 U.S. at 378–79.

26. *Hendricks*, 521 U.S. at 361.

27. *Id.* at 371 (Kennedy, J., concurring).

28. 725 ILL. COMP. STAT. 207/9 (2016).

29. *Id.* 207/10(c).

30. *Id.* 207/15(b)(1).

31. *Id.* 207/5(b).

32. Ross A. Brennan, Note, *Keeping the Dangerous Behind Bars: Redefining What a Sexually Violent Person Is in Illinois*, 45 VAL. U. L. REV. 551, 566 (2011).

Once the prosecutor files an SVP petition, a court must review the petition to determine whether there is cause to believe that the respondent is eligible for commitment under the Act.<sup>33</sup> If the court determines that cause exists, the respondent is then transferred from the custody of IDOC to the Illinois Department of Human Services (“DHS”).<sup>34</sup> The court will then hold a hearing to determine whether there is probable cause to believe that the respondent is an SVP.<sup>35</sup> The hearing must be held within seventy-two hours after the petition is filed, unless the respondent waives this timeline allow more time to prepare for the probable cause hearing.<sup>36</sup> If the court finds there is probable cause to believe that the respondent is an SVP, the court will order that the person remain in DHS custody for further evaluation and will set a date for a commitment trial.<sup>37</sup> If the court finds that there is not probable cause to believe the offender is an SVP, the respondent is returned to IDOC for release proceedings.<sup>38</sup> The trial to determine whether the respondent is an SVP must take place no later than 120 days after the finding of probable cause, unless the respondent waives this timeline in order to have more time to prepare for the commitment trial.<sup>39</sup> At the trial, the respondent, the respondent’s attorney, the county State’s Attorney, or the Attorney General may request a jury trial, as opposed to trying the case in front of a judge.<sup>40</sup> If neither side requests a jury, the case will be tried before a judge at a bench trial.<sup>41</sup>

At the SVP commitment trial, the prosecutor has the burden of proving the three elements for SVP commitment beyond a reasonable doubt.<sup>42</sup> At the trial, the judge or jury will hear all of the relevant evidence of respondent’s sexually violent crimes, evidence about his or her mental state, and information about whether the respondent is substantially probable to engage in further acts of sexual violence. The judge or jury will hear the prosecutor’s evidence in the form of opinions from psychologists, psychiatrists, or both.<sup>43</sup> The SVP respondent may present their own witnesses if they wish, but they have no obligation to present evidence.<sup>44</sup> If

33. 725 ILL. COMP. STAT. 207/30(a).

34. *Id.*

35. *Id.* 207/30(b).

36. *Id.*

37. *Id.* 207/30(c).

38. *Id.*

39. *Id.* 207/35(a).

40. *Id.* 207/35(b).

41. *Id.*

42. *Id.* 207/35(d)(1).

43. *Id.* 207/35(b).

44. *Id.*

the judge or jury determines that the State has proved that the respondent fulfills the elements of the SVP Commitment Act beyond a reasonable doubt, the court will then enter a judgment against the respondent and the respondent will be committed to DHS custody.<sup>45</sup> If the judge or jury finds that the prosecutor has not proved that the respondent is a SVP beyond a reasonable doubt, the respondent will be returned to IDOC for release proceedings.<sup>46</sup> Once the court enters a commitment order against the respondent, there are two options for where the respondent will receive their control, care, and treatment.<sup>47</sup> The first option is that the respondent can be placed on conditional release in the community.<sup>48</sup> The second option is the respondent will be committed in a DHS Treatment and Detention Facility (“TDF”), where the respondent will remain until such a time that they are no longer a SVP or are granted conditional release.<sup>49</sup>

### *C. Release from a TDF Under Illinois SVP Commitment Act*

#### 1. Discharge Through Periodic Evaluation

Once a respondent is found to be an SVP and is committed to DHS, there are three main processes by which the respondent can be released from civil commitment. The first is through periodic evaluation.<sup>50</sup> A committed person must be given periodic reevaluations at least once every twelve months.<sup>51</sup> These periodic reevaluations must be submitted in a written report to the court which entered the commitment order.<sup>52</sup> The purpose of the reevaluation is to determine whether the respondent 1) has made sufficient progress in treatment to be conditionally released or 2) the respondent’s condition has so changed from the most recent evaluation or commitment that the respondent is no longer a SVP.<sup>53</sup> If the evaluator finds that the respondent has made sufficient progress in their treatment, or is no longer an SVP, he or she should inform the court of this and the respondent will be discharged.<sup>54</sup>

45. *Id.* 207/35(f).

46. *Id.*

47. *Id.* 207/35(b)(2).

48. *Id.*

49. *Id.*

50. *Id.* 207/55.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*; *id.* 207/65(b)(3).

## 2. Petition for Conditional Release

A respondent can also be released from DHS custody by petitioning the court for conditional release.<sup>55</sup> A respondent or the prosecutor's office may petition the committing court to modify its order for conditional release, so long as at least twelve months have elapsed since the initial commitment order or the most recent continuing commitment order.<sup>56</sup> Once the court receives the petition for conditional release, the court may appoint an examiner to evaluate the mental condition of the respondent and report to the court.<sup>57</sup> The prosecutor's office then has the right to have the respondent evaluated by the State's experts.<sup>58</sup> After the examinations are completed, the court will set a probable cause hearing.<sup>59</sup> If the court finds that there is probable cause to believe that the respondent is no longer substantially probable to engage in acts of sexual violence while on conditional release, the court will set a hearing date for further consideration.<sup>60</sup> At the next hearing, the court, without a jury, will hear the petition as soon as all reports are filed.<sup>61</sup> The court must grant the petition unless the State proves by clear and convincing evidence that the respondent has not made sufficient progress in treatment and is still substantially probable to engage in acts of sexual violence.<sup>62</sup> If the State cannot meet this burden, the court will notify DHS that the respondent should enter into conditional release. If the court finds that the State has met its burden, the person will remain in custody at the TDF.<sup>63</sup>

## 3. Petition for Discharge from DHS Custody

Much like a petition for conditional release, a petition for full discharge from DHS custody begins with a petition from the respondent, his or her attorney, or the prosecutor's office.<sup>64</sup> After the court receives the petition, the court will set a probable cause hearing to determine whether facts exist to believe that the respondent's condition has so changed in the time since his or her most recent periodic reexamination that the respondent

55. 725 ILL. COMP. STAT. 207/60(a).

56. *Id.*

57. *Id.* 207/60(c).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* 207/60(d).

62. *Id.*

63. *Id.* 207/60(f).

64. *Id.* 207/65(b)(1).

is no longer an SVP.<sup>65</sup> If the court finds the petition frivolous or that the respondent was recently found to be an SVP, the court will deny the petition.<sup>66</sup> If not, the court may find that there is probable cause that the petitioner is no longer an SVP, and set a hearing on the issue.<sup>67</sup> At this hearing, unlike a hearing for conditional release, either the respondent or the prosecutor's office may demand a jury.<sup>68</sup> The finding of the jury must be unanimous.<sup>69</sup> The State must prove by clear and convincing evidence that the person is still an SVP.<sup>70</sup> If the State does not meet this standard, the respondent is released from DHS custody, but if the State proves the person is still an SVP, the person remains committed at a TDF.<sup>71</sup> The respondent can also be placed on conditional release.

The text of the SVP Commitment Act seems to present the defendant with a choice as to whether they would prefer a bench trial or a jury trial, similar to criminal trials.<sup>72</sup> However, this is an illusory choice for SVP respondents. Despite allowing for the respondent to demand a jury trial or a bench trial, the Act also allows for the prosecutor to request a jury during the commitment or discharge proceedings.<sup>73</sup> Thus when the State determines that it wants a jury trial, the respondent's decision is overridden, regardless of the respondent's right to a bench trial. The respondent only has a right to a bench trial if the prosecutor chooses to allow it. This illusory right to choose whether a respondent will face a bench trial or jury trial does not exist in other Illinois in other civil commitment proceedings, and also differs from SVP commitment acts in other jurisdictions.

#### *D. Jury Requests in Civil Commitment Proceedings*

Section 207/20 of the Illinois SVP Commitment Act specifically states that all proceedings under the act are civil in nature, and thus not criminal.<sup>74</sup> This is a very important distinction. The fact that the statute is civil means that the SVP Commitment Act is not subject to the Sixth Amendment requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* 207/65(b)(2).

69. *Id.*

70. *Id.*

71. *Id.* 207/65(b)(3).

72. *See id.* 207/35(c).

73. *Id.*

74. *Id.* 207/20.

State and district wherein the crime shall have been committed.”<sup>75</sup> The Supreme Court has deemed the Sixth Amendment protections “fundamental to the American scheme of justice,” and has held that Sixth Amendment protections apply in all federal and state criminal trials.<sup>76</sup> However, because commitment statutes such as the Illinois SVP Commitment Act are civil in nature, the Sixth Amendment protections do not apply.<sup>77</sup>

Because a civil commitment is not a criminal action, it is not governed by the Sixth Amendment, but rather the Seventh Amendment.<sup>78</sup> In civil trials, the Seventh Amendment governs whether the parties have the right to a jury.<sup>79</sup> The Seventh Amendment provides “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”<sup>80</sup> Therefore, a jury trial is only guaranteed in civil cases if the particular action was accompanied by a right to a jury trial under the English common law.<sup>81</sup> The Seventh Amendment is unique in that it is one of the few constitutional amendments that has not been incorporated to apply to the states.<sup>82</sup> This means that the Supreme Court has not ruled that the Seventh Amendment applies to citizens in each of the fifty states, and that states are “free to make an independent determination of the scope of the right under merged courts.”<sup>83</sup>

The Illinois Constitution states that “[t]he right of trial by jury as heretofore enjoyed shall remain inviolate.”<sup>84</sup> The Illinois Supreme Court has interpreted this to mean that the right to a jury trial is preserved in the same state as it was under the English common law.<sup>85</sup> When evaluating whether a civil plaintiff, such as an SVP respondent, is entitled to a civil jury trial, Illinois courts will look to the English common law to determine if that cause of action was granted a right to a jury trial.<sup>86</sup> In *Smith v. People ex rel. Bartholomew*, the Illinois Supreme Court concluded that the

75. U.S. CONST. amend. VI.

76. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

77. Richard L. Peterson, Note, *Unintelligent Jury Waivers: A Call to Amend Federal Rule of Criminal Procedure 23(a)*, 21 GEO. MASON U. C.R. L.J. 441, 446 (2011).

78. U.S. CONST. amend. VII.

79. Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 184–85 (1998).

80. U.S. CONST. amend. VII.

81. Mogin, *supra* note 79, at 186.

82. Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 852 (2010).

83. *Id.* at 854.

84. ILL. CONST. art. I, § 13.

85. *Lazarus v. Vill. of Northbrook*, 199 N.E.2d 797, 799 (Ill. 1964).

86. *See id.*

Illinois Constitution guaranteed a right to a jury trial in non-SVP civil commitment proceedings.<sup>87</sup> The Illinois Supreme Court ruled in *Smith* that the insanity commitment of the petitioner was constitutionally valid because the individual was afforded written notification, a hearing, and proper service before being declared insane by a jury.<sup>88</sup> The Illinois Supreme Court stated that if the individual was committed by the State without a determination by a jury, the commitment would have been in “derogation of the rights of civil liberty guaranteed by the constitution.”<sup>89</sup> Thus Illinois civil commitment respondents have a right to a jury trial. *Smith* did not however grant the prosecutors the right to demand a jury trial in civil commitment trials, nor to override a respondent’s request for a bench trial.

## II. DUE PROCESS PROTECTIONS IN SVP COMMITMENT PROGRAMS

The Fifth Amendment of the U.S. Constitution declares, “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>90</sup> The Fourteenth Amendment similarly reads, “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.”<sup>91</sup> These two amendments, taken together, comprise what is known as the Due Process Clause, which ensures that “neither the federal nor the state governments can deprive any person of life, liberty, or property without due process of law.”<sup>92</sup>

There are two distinct protections that American citizens are afforded under the Due Process Clause. The first protection is often called “procedural due process.”<sup>93</sup> This refers to the actual procedures that federal and state governments must follow in order to take a person’s life, liberty, or property.<sup>94</sup> For example, procedural due process challenges typically involve improper notice, unfair timelines, or the government agents not following the proper procedural safeguards.<sup>95</sup> The second protection

87. *Smith v. People ex rel. Bartholomew*, 65 Ill. 375, 379 (1872).

88. *Id.*

89. *Id.*

90. U.S. CONST. amend. V.

91. *Id.* amend. XIV, § 1.

92. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 603 (4th ed. 2013).

93. *Id.*

94. *Id.*

95. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (holding that petitioner could not terminate respondent’s employment without allowing proper time for review and providing adequate notice).

afforded by the Due Process Clause is called “substantive due process.”<sup>96</sup> Substantive due process ensures that federal and state governments have a compelling reason for taking a person’s liberty, and that the action is “reasonable in relation to its subject and is adopted in the interests of the community.”<sup>97</sup> Substantive due process protects those rights that are “implicit in the concept of ordered liberty.”<sup>98</sup> The Due Process Clause promotes procedural fairness and ensures that any deprivation of liberty is supported by a reasonable and compelling government purpose.<sup>99</sup>

When evaluating a statute that deprives a fundamental liberty interest, the Supreme Court demands that the government have a compelling state interest in depriving that person of their liberty, and that the liberty is only taken by means that are narrowly tailored to achieve the government’s purpose.<sup>100</sup> Because SVP laws involve a large amount of procedure and process, SVP laws must be written, and enforced, in a way that guarantees all individuals will have their procedural due process rights respected. SVP civil commitment laws must also conform to the “rights implicit in the concept of ordered liberty.”<sup>101</sup> In order for an SVP Act to be constitutional, the government must have a compelling reason to take away the liberty of the committed individual. The following sections will focus on how federal courts have recently found SVP civil commitment acts in other states to be unconstitutional, and how the Illinois SVP Commitment Act violates the substantive due process rights of committed SVPs in Illinois.

#### *A. Due Process Challenges to Minnesota SVP Commitment Act*

In 2015, fourteen individuals civilly committed under the Minnesota Sex Offender Program (“MSOP”) sued its administrators and employees in the District Court of Minnesota on behalf of a class of over 700 committees, seeking a declaratory judgment that the MSOP was unconstitutional both as written and as applied.<sup>102</sup> The district court first considered the constitutionality of the MSOP as written. The district court reiterated the constitutional basis for civil commitment programs from *Hendricks*, stating, “a civil commitment statutory scheme is permitted

96. CHEMERINSKY, *supra* note 92.

97. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

98. *Palko v. Connecticut*, 302 U.S. 319, 322 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

99. CHEMERINSKY, *supra* note 92, at 603.

100. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

101. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

102. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1146 (D. Minn. 2015), *rev’d sub nom.* *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017).

provided that an individual is not detained past the time they are no longer dangerous.”<sup>103</sup> The district court stated that whenever legislation affects an individual’s fundamental rights, the standard of “strict scrutiny” will be applied to determine if the law is narrowly tailored to serve a compelling government interest.<sup>104</sup> The district court interpreted *Hendricks* to require that SVP commitment statutes be narrowly tailored to “ensure that individuals are committed no longer than necessary to serve the state’s compelling interests.”<sup>105</sup> The Minnesota District Court cited three reasons for requiring states to have such a strict standard when crafting SVP commitment acts. First, individuals have a fundamental right to live free and not have their rights curtailed.<sup>106</sup> Second, civil commitment is a deprivation of liberty that requires due process protections.<sup>107</sup> Third, the loss of liberty through involuntary civil commitment is a greater loss of freedom than criminal confinement, as it does not involve the twin goals of the criminal justice system, punishment and deterrence.<sup>108</sup>

The district court concluded that Minnesota failed to demonstrate that the MSOP was narrowly tailored to meet the purpose of protecting the public from SVPs while still protecting the liberties of the committed SVPs, and declared the MSOP unconstitutional as written.<sup>109</sup> The court stated that “[b]ecause the statute renders discharge from the MSOP more onerous than admission to it [the MSOP] is not narrowly tailored and results in a punitive effect” on respondents.<sup>110</sup> Because the statute was not narrowly tailored to serve the compelling government interest of protecting the public from dangerous individuals, the district court declared the MSOP an unconstitutional violation of the Due Process Clause. When evaluating the constitutionality of the MSOP as applied, the district court again applied the standard of strict scrutiny and declared the MSOP unconstitutional.<sup>111</sup> The court stated that the MSOP is applied in a manner that “results in plaintiffs being confined to the MSOP beyond such a time as they either meet the statutory reduction in custody criteria or no longer satisfy the constitutional threshold for continued commitment.”<sup>112</sup> The

103. *Id.* at 1167.

104. *Glucksberg*, 521 U.S. at 721.

105. *Karsjens*, 109 F. Supp. 3d. at 1168.

106. *Id.* at 1167.

107. *Id.*; see also *Cooper v. Oklahoma*, 517 U.S. 348, 368–69 (1996).

108. *Karsjens*, 109 F. Supp. 3d. at 1167.

109. *Id.* at 1170.

110. *Id.*

111. *Id.*

112. *Id.*

district court found that too many individuals remain confined at the MSOP even though they have “completed treatment, can no longer benefit from treatment, or have reduced their risk below the ‘highly likely to reoffend standard.’”<sup>113</sup>

However, in January 2017, the Court of Appeals for the Eighth Circuit heard an appeal of *Karsjens v. Jesson* and reversed the decision of the Minnesota District Court.<sup>114</sup> The Eighth Circuit disagreed with the district court’s decision to apply the standard of strict scrutiny to the SVPs’ claims.<sup>115</sup> The Eighth Circuit stated that rather than proving that the statute is narrowly tailored to serve a compelling government interest, Minnesota only needed to prove that the statute has a rational relationship to the government’s purpose.<sup>116</sup> This is a significant difference, and one that has a very adverse effect on the committed offenders’ claims. Under the strict scrutiny standard, the government has the burden of demonstrating that the statute is narrowly tailored to achieve a compelling governmental interest.<sup>117</sup> The government carries the burden of proving to the court that the statute is constitutional. Under rational relation review, the burden is not with the State, but is rather with the petitioners, who must prove to the court that the statute is not reasonably related to the government’s interest.<sup>118</sup> Courts are much more deferential to the state legislation under rational relation review than strict scrutiny review.<sup>119</sup> In order for the person challenging a statute to prevail under rational relation review, the person must demonstrate that “the [state defendants’] conduct was conscience-shocking, *and* that the [state defendants] violated one or more fundamental rights that are ‘deeply rooted in this Nation’s history and tradition.’”<sup>120</sup>

When applying rational relation review to the SVP’s claims, the Eighth Circuit determined the claimants could not demonstrate that the MSOP program and the Minnesota SVP act were not rationally related to the purpose of protecting the public.<sup>121</sup> The court held that the “extensive process and the protections to persons committed under [the act] are

113. *Id.* at 1171.

114. *Karsjens v. Piper*, 845 F.3d 394, 398 (8th Cir. 2017).

115. *Id.* at 406–07.

116. *Id.* at 407–08.

117. *Id.* at 409.

118. *Id.*

119. *Williams v. Lee Optical Co.*, 348 U.S. 483 (1955).

120. *Karsjens*, 845 F.3d at 408 (alteration in original) (quoting *Moran v. Clarke*, 296 F.3d 638, 651 (8th Cir. 2002)).

121. *Id.* at 410.

rationally related to the State's legitimate interest of protecting its citizens from sexually dangerous persons."<sup>122</sup> Because the statute was rationally related to the SVP act's stated purpose, the Eighth Circuit reversed the district court's decision, and held the program was constitutional as written.<sup>123</sup> The Eighth Circuit also applied rational relation review to the committed individuals' constitutional challenge to the act as applied, and reversed the district court's decision.<sup>124</sup> The Eighth Circuit held that under rational relation review, none of the individuals' claims were so "conscience-shocking" as to be declared unconstitutional.<sup>125</sup>

The Eighth Circuit's decision creates an exception for SVPs when evaluating constitutional challenges to statutes that restrict an individual's freedom. The Supreme Court has consistently held that a state's infringement upon an individual's fundamental liberty must be narrowly tailored to serve a compelling governmental interest.<sup>126</sup> State statutes that remove a person's fundamental liberties were given the highest possible level of scrutiny. However, in *Karsjens v. Piper*, the Eighth Circuit held that the Supreme Court has "never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint."<sup>127</sup> The court argues that the liberty interests of sex offenders are not "absolute" because they pose a danger to themselves and to society.<sup>128</sup> However, sex offenders are citizens of this country, and the Supreme Court has previously held that all citizens should have their fundamental interests protected by strict scrutiny review.<sup>129</sup> The Eighth Circuit's ruling thus either classifies sex offenders as a sub-class of citizens who do not receive strict scrutiny review, or it is in conflict with Supreme Court precedent. The standard of review for sex offender legislation is an open issue in all other circuits, and may ultimately need Supreme Court review to settle the matter.

#### *B. Due Process Challenges to Missouri SVP Commitment Act*

A separate 2015 federal district court case, *Van Orden v. Schafer*, considered the Due Process Clause challenges of SVPs committed under

122. *Id.*

123. *Id.*

124. *Id.* at 407–08.

125. *Id.* at 410–11.

126. *See Reno v. Flores*, 507 U.S. 292, 302 (1993); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

127. 845 F. Supp. 3d at 407.

128. *Id.*

129. *See Flores*, 507 U.S. at 302; *Washington*, 521 U.S. at 720–21.

the Missouri SVP act and the Missouri Sex Offender Rehabilitation and Treatment Services Program (“SORTS”).<sup>130</sup> When evaluating whether the Missouri SVP act was facially unconstitutional, the district court rejected the use of strict scrutiny, as advocated by the plaintiffs, but did state that a narrow construction was required when evaluating the plaintiffs’ due process claims.<sup>131</sup> The SVP act needed to “bear some reasonable relation to the purpose for which the individual is committed.”<sup>132</sup> Using this standard, the court found that the Missouri SVP act was facially constitutional, because as written, the SVP act requires release of a civilly committed person if the person is found to be “no longer dangerous, regardless of whether the reason he is no longer dangerous is primarily mental or physical.”<sup>133</sup> The court also found that the SVP act provides for the full release of civilly committed persons by fair procedures, and is therefore facially constitutional.<sup>134</sup>

However, the district court cautioned that SVP commitment acts lend themselves to much more constitutional scrutiny as applied, as opposed to as written.<sup>135</sup> This is because legislatures can craft legislation that falls within the guidelines of *Hendricks*, but the actual application of that legislation goes beyond the constitutional limits of the statute.<sup>136</sup> With this restriction in mind, the District Court ruled that the Missouri SVP act was unconstitutional as applied.<sup>137</sup> First, the court ruled that manner in which the Missouri SORTS program conducted its reviews violated the procedural due process rights of committed individuals.<sup>138</sup> The court found that evaluation procedures were so varied and applied so inconsistently that many individuals who no longer met the dangerousness requirement were still being held at SORTS treatment centers.<sup>139</sup> Second, the court found that the application of the SORTS program was unconstitutional as to its last phase, community reintegration.<sup>140</sup> The court found that progress through the various treatment programs was “torturously slow,” and that lack of clear timelines resulted in committed individuals being held in the SORTS

130. *Van Orden v. Shafer*, 129 F. Supp. 3d 839, 841–42 (E.D. Mo. 2015), *vacated in part on reconsideration sub nom.* *Van Orden v. Stringer*, 262 F. Supp. 3d 887 (E.D. Mo. 2017).

131. *Id.* at 864.

132. *Id.*

133. *Id.* at 865.

134. *Id.*

135. *Id.* at 867.

136. *Id.*

137. *Id.* at 868.

138. *Id.*

139. *Id.*

140. *Id.*

program for longer than should be constitutionally allowed.<sup>141</sup> The court concluded by noting that “these systemic failures have created a pervasive sense of hopelessness at SORTS that is undermining what little improvement the SORTS treatment programs have made.”<sup>142</sup>

However, after the Eighth Circuit issued its opinion in *Karsjens v. Piper*, and reversed the Minnesota District Court’s decision finding the Minnesota SVP act unconstitutional, the Eastern District of Missouri reconsidered its decision in *Van Orden v. Schafer*.<sup>143</sup> In its reconsidered opinion, the district court recognized that the Eighth Circuit used the “highly deferential reasonable relationship review” standard when reviewing the SVPs’ due process challenge.<sup>144</sup> The district court also acknowledged that the SVPs’ as-applied challenge needed to demonstrate “both that the state defendants’ conduct was conscience-shocking, and that the state defendants violated one or more fundamental rights.”<sup>145</sup> In light of these standards from the Eighth Circuit, the district court reversed its earlier decision in *Van Orden v. Schafer*.<sup>146</sup> Because the Eighth Circuit held that SVP commitment does not implicate a fundamental liberty interest, and that rational relation review should apply, the district court upheld the Missouri SVP act as constitutional as written. This also defeated the SVPs as-applied challenge, because without a fundamental liberty interest, no amount of conscience-shocking behavior from the State could defeat the legislation on due process grounds.<sup>147</sup>

Although the district court reversed its earlier decision based on the Eighth Circuit’s *Karsjens v. Piper* decision, the district court did point out some flaws in *Piper*. The district court stated “these holdings [by the Eighth Circuit] raise troubling questions as to whether civil commitment statutes can ever be challenged on as-applied substantive due process grounds,” but acknowledged that the Eighth Circuit’s opinion was binding on the district court.<sup>148</sup> Furthermore, the district court stated that while it did find some of the State’s behavior conscience-shocking—such as continuing to confine infirm, aged individuals who are undisputedly no longer dangerous—the *Piper* decision negated these concerns, because

141. *Id.*

142. *Id.*

143. *Van Orden v. Stringer*, 262 F. Supp. 3d 887, 888–91 (E.D. Mo. 2017).

144. *Id.* at 892.

145. *Id.* (quoting *Karsjens v. Piper*, 845 F.3d 394, 408 (8th Cir. 2017)).

146. *Id.* at 894.

147. *Id.* at 893–94.

148. *Id.*

there is no fundamental liberty interest involved.<sup>149</sup> This again raises the question of how a person being confined indefinitely by an SVP act does not have a fundamental interest in his liberty. The district court, while following the Eighth Circuit's precedent, critiques it in a manner that suggests it questions the constitutionality of the Eighth Circuit's holding in *Piper*.

### *C. Due Process Violations of Illinois SVP Commitment Act*

Although the recent rulings in *Piper* and *Van Orden v. Stringer* seem to complicate the prospects of an as-written or as-applied Due Process Clause challenge to the Illinois SVP Act, it is important to note that the Seventh Circuit has not ruled on whether SVPs have a fundamental liberty interest, and, contrary to what the Eighth Circuit seems to believe in *Piper*, neither has the Supreme Court. Therefore, the recent evaluations of SVP programs in Minnesota and Missouri provide a unique opportunity to review the constitutionality of the Illinois SVP Commitment Act. In particular, the SVP Commitment Act's provisions that grant prosecutors the unilateral right to a jury trial significantly impact SVPs due process rights. During a jury trial, SVP respondents face an unfair level of prejudice in their trials because jurors have an unreasonably heightened fear of sex offenders. This results in SVP respondents being either committed to state custody or being kept in the state custody for longer than if they could be heard by a judge at a bench trial. The following sections will demonstrate how the State right to a jury trial is out of step with civil commitment proceedings in other jurisdictions and Illinois state laws, how jury trials subject SVP respondents to an unfair amount of prejudice, and how the State right to a jury trial results in SVP respondents being unconstitutionally detained after they are no longer substantially likely to commit acts of sexual violence.

#### 1. Prosecutor's Lack of Jury Trial Right in Other States and Illinois Statutes

There are three distinct sections of the Illinois SVP Commitment Act that provide either the SVP respondent or the prosecutor with the right to demand a jury trial.<sup>150</sup> In Illinois, a respondent's constitutional right to a jury trial in a civil commitment proceeding was established in *Smith v.*

149. *Id.* at 894.

150. 725 ILL. COMP. STAT. 207/25(d) (2016); *id.* 207/35(c); *id.* 207/65(b)(2).

*People ex rel. Bartholomew*.<sup>151</sup> However, other states have not declared that the common law guarantees a right to a jury trial in civil commitment proceedings. Notably, the Minnesota Supreme Court has determined that the right to a jury trial does not apply to civil commitment proceedings, which are heard only by probate judges.<sup>152</sup> Similarly, when a civilly committed individual in Minnesota petitions to be released from custody, their petitions are heard by a judge, not a jury.<sup>153</sup> While the majority of states with civil commitment statutes grant the respondent a right to a jury trial under the common law, this is not the case across all jurisdictions.<sup>154</sup>

There are many other states that do not grant the prosecutor's office a right to a jury trial in SVP civil commitment proceedings. In Minnesota, SVP civil commitment proceedings are tried by judges alone.<sup>155</sup> Minnesota established a panel of district judges with statewide authority to preside over commitment proceedings, without a jury right for either the respondent or the State.<sup>156</sup> North Dakota's SVP program states that SVP commitment proceedings "must be tried to the court and not a jury."<sup>157</sup> New York's SVP program provides that the respondent has the right to waive a jury trial in SVP proceedings, and does not give the State the right to force the case to be heard by a jury.<sup>158</sup> While some other states do provide a State right to a jury trial, the provisions in the Illinois SVP Commitment Act that allow the prosecutor to unilaterally request a jury are not universal among the twenty states that have SVP programs.

The Illinois SVP Commitment Act is not the only civil commitment act in Illinois. It is, however, the only civil commitment act that grants the prosecutor a unilateral right to a jury trial. The Illinois Sexually Dangerous Persons ("SDP") Act was also enacted to control and monitor sex offenders.<sup>159</sup> The SDP Act, as opposed to the SVP Commitment Act,

151. *Smith v. People ex rel. Bartholomew*, 65 Ill. 375, 379 (1872).

152. *People ex rel. Pearson v. Prob. Court of Ramsey Cty.*, 287 N.W. 297, 303 (Minn. 1939).

153. C. Peter Erlinder, *Essay: Of Rights Lost and Rights Found: The Coming Restoration of the Right to a Jury Trial in Minnesota Civil Commitment Proceedings*, 29 WM. MITCHELL L. REV. 1269, 1269 (2003).

154. *Id.* at 1274.

155. MINN. STAT. § 253D.07 (2016).

156. *Id.* § 253D.11.

157. N.D. CENT. CODE § 25-03.3-13 (2016).

158. N.Y. MENTAL HYG. § 10.07(b) (McKinney 2017). However, parts of this statute were held unconstitutional by the District Court for the Southern District of New York, holding that the detention procedures used under this statute unconstitutionally held respondents when they had yet to be determined dangerous. *See Mental Hygiene Legal Serv. v. Cuomo*, 785 F. Supp. 2d 205, 229 (S.D.N.Y. 2011), *vacated sub nom. Mental Hygiene Legal Servs. v. Schneiderman*, 472 F. App'x 45 (2d Cir. 2012).

159. Illinois Sexually Dangerous Persons Act, 725 ILL. COMP. STAT. 205/1.01–12 (2016).

applies to individuals who are being charged in a pending criminal proceeding.<sup>160</sup> Under the SDP Act, when a person is charged with a crime, and the Attorney General or county prosecutor believes that the person is an SDP, the prosecutor can file a petition to have the person declared an SDP and committed to the Director of Corrections, who will keep the person in custody until they are no longer a SDP.<sup>161</sup> Procedurally, the SDP Act functions in many of the same ways as the Illinois SVP Commitment Act. The proceedings are civil in nature, the burden of proof for commitment is beyond a reasonable doubt, and the State must prove that the individual has a mental disorder and is likely to continue to commit sexual offenses.<sup>162</sup> However, unlike the SVP Commitment Act, the SDP Act does not give the prosecutor the right to a jury trial, and only the SDP respondent can demand a jury trial.<sup>163</sup> Similarly, under the Illinois Mental Health and Developmental Disabilities Code, only the respondent, not the prosecutor, has a right to a jury trial in the civil commitment of dangerously mentally ill individuals.<sup>164</sup>

Illinois prosecutors do not have a right to a jury in criminal cases either.<sup>165</sup> In *People ex rel. Daley v. Joyce*, the Illinois Supreme Court considered the case of numerous defendants who had wished to waive their right to a jury trial, but had their waivers blocked by the prosecutor, who wished to have a jury trial.<sup>166</sup> The Illinois Supreme Court reviewed a lengthy history of the right to a jury trial in Illinois, reviewing the meaning of the Illinois Constitution's decree that "[t]he right to a jury trial as heretofore enjoyed shall remain inviolate."<sup>167</sup> After conducting this analysis, the court held that "[s]hort of a constitutional amendment to that effect, the legislature cannot now deprive an accused in Illinois of any part of that constitutionally protected right."<sup>168</sup> Under all Illinois criminal proceedings, the defendant alone can decide whether to waive the right to a jury trial, and if the defendant chooses to waive this right, the prosecution cannot force the defendant in front of a jury. The SVP Commitment Act is the only legislation in the entire state that grants the prosecutor's office a unilateral right to a jury trial.

160. *Id.* 205/3.

161. *Id.* 205/8.

162. *See id.* 205/3.01; *id.* 205/4.03.

163. 725 ILL. COMP. STAT. 205/5.

164. 405 ILL. COMP. STAT. 5/3-802 (2016).

165. *People ex rel. Daley v. Joyce*, 533 N.E.2d 873, 884 (Ill. 1998) (Miller, J., dissenting).

166. *Id.* at 211.

167. *Id.* at 213-14.

168. *Id.* at 222.

The federal SVP commitment program also does not provide prosecutors the right to a jury trial. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act, legislation designed to “protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography . . . [and] promote Internet safety.”<sup>169</sup> As part of the larger Adam Walsh Act, Congress created a federal sex offender civil commitment program.<sup>170</sup> The program was upheld as constitutional in *United States v. Comstock*, using the same analysis the Supreme Court applied in *Kansas v. Hendricks*.<sup>171</sup> The federal SVP scheme operates in many of the same ways as the Illinois SVP Commitment Act, including the same commitment criteria and many of the same procedures.<sup>172</sup> However, there are no jury trials in the federal scheme. After a person is named as a SVP respondent, the court will hold a hearing to determine if the person is a SVP.<sup>173</sup> At the hearing, the respondent is given opportunity to testify, to present evidence, subpoena witnesses, and to confront and cross-examine witnesses who appear at the hearing.<sup>174</sup> The federal SVP commitment statute only allows trials to be heard in front of a judge, and respondents are not subjected to the biases that jurors have against sex offenders.<sup>175</sup>

## 2. Juror Fears of Sex Offenders

Public fear of sex offenders was one of the biggest forces that led to the adoption of sex offender commitment programs at the state and federal levels in the 1990s and early 2000s.<sup>176</sup> Sex offender laws passed in the 1990s and early 2000s differed from the sexual psychopath laws passed in the 1930s in two main ways. First, the new SVP laws were primarily aimed at sex offenders who were already convicted and sentenced for sexually violent crimes.<sup>177</sup> Second, these laws were targeted at those offenders who were about to be released from imprisonment or insanity commitment.<sup>178</sup> In some states, there was a direct correlation between a specific sexually violent crime that captured the public’s attention and subsequent sex offender civil commitment legislation. For example, in Washington state,

169. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 and 42 U.S.C.).

170. 18 U.S.C. § 4248 (2016).

171. *United States v. Comstock*, 560 U.S. 126, 131 (2010).

172. 18 U.S.C. § 4248(a).

173. *Id.*

174. 18 U.S.C. § 4247(d).

175. *Id.*; see also *Comstock*, 560 U.S. at 130–31.

176. Singleton, *supra* note 20, at 609.

177. Zander, *supra* note 19, at 22.

178. *Id.*

the passage of its SVP civil commitment law was in response to public outrage over the rape and mutilation of a seven-year old boy by a mentally ill man named Earl Shriver, who professed an interest in committing sexually violent crimes once he was released from prison.<sup>179</sup> Similarly, in New Jersey, a civil commitment statute was passed in response to public outrage at the release of a sexually violent offender who had served his sentence, but expressed an intent to continue committing sexually violent crimes once released.<sup>180</sup>

Due to the often sensationalistic and disturbing coverage of sex offenders in the news media, public panic and fear of sex offenders pervades communities, the same communities where potential jurors are chosen from.<sup>181</sup> It is not just the Geraldo Riveras of the world who promote and sensationalize coverage of sex offenders. A *New York Times* op-ed in 1993 stated that, “[t]here can be no dispute that monsters live among us. The only question is what to do with them once they become known to us.”<sup>182</sup> Media coverage of sexually violent crimes, particularly sensationalistic coverage, creates “an environment in which the ‘common wisdom’ about sex offenders is distorted” and in turns to lead to more fear, and thus more misunderstanding.<sup>183</sup> These media depictions are out of touch with reality; although the national crime rate fell 20% between 1990 and 1998, and sexually violent crime fell 14%, television coverage of violent crime increased 83% during this same time period.<sup>184</sup> Sensationalistic coverage of sex offenders can “instill fear in the American public regarding sexual abuse . . . [leaving] people with a sense of hopelessness and helplessness in addressing the problem.”<sup>185</sup> There is a cyclical pattern to the instilment of fear in the public over the threats posed

179. See generally ROXANNE LIEB, WASH. STATE INST. FOR PUB. POLICY, WASHINGTON’S SEXUALLY VIOLENT PREDATOR LAW: LEGISLATIVE HISTORY AND COMPARISON WITH OTHER STATES (1996), [http://www.wsipp.wa.gov/ReportFile/1244/Wsipp\\_Washingtons-Sexually-Violent-Predator-Law-Legislative-History-and-Comparisons-With-Other-States\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1244/Wsipp_Washingtons-Sexually-Violent-Predator-Law-Legislative-History-and-Comparisons-With-Other-States_Full-Report.pdf) [<https://perma.cc/BD99-XHT9>].

180. Claudine M. Leone, *New Jersey Assembly Bill 155—A Bill Allowing the Civil Commitment of Violent Sex Offenders After the Completion of a Criminal Sentence*, 18 SETON HALL LEGIS. J. 890, 890–96 (1994).

181. *Id.* at 901.

182. Andrew Vachss, *Sex Predators Can’t Be Saved*, N.Y. TIMES, Jan. 5, 1993, at A15.

183. Heather Ellis Cucolo & Michael L. Perlin, “*They’re Planting Stories in the Press*”: *The Impact of Media Distortion on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 208 (2013) [hereinafter Cucolo & Perlin, *Media Distortion*]; see also Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism Through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & C.R. L. REV. 1, 2 (2012).

184. Singleton, *supra* note 20.

185. Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 308 (1997).

by sex offenders. Media coverage of sex offenders results in greater public fear of sex offenders, which results in more media coverage, which results in more fear.<sup>186</sup>

As a result of fear-driven media coverage, there was immense pressure on legislators to pass new legislation aimed at curtailing the freedoms of sex offenders, and pressure on judges to issue longer and more strict sentences.<sup>187</sup> Sex offenders, and the potential risk they pose to communities, are often prominently featured in political races. Many legislators and even some judges are happy to inflame public fear of sex offenders for political gain.<sup>188</sup> In Illinois, the 2014 gubernatorial race between Pat Quinn and Bruce Rauner featured a particularly notorious ad titled “Unthinkable,” which the Rauner campaign released to attack Quinn for an allegedly secret program to release sex offenders.<sup>189</sup> The truth of this attack was factually questionable, but Rauner ultimately won the election.<sup>190</sup> The reality is that the public is not at a particularly high risk of harm from convicted sex offenders. Very few sex offenders ultimately are ever arrested for committing a new sex crime.<sup>191</sup> Sex offenders are much less likely than non-sex offenders to be rearrested for any crime at all.<sup>192</sup> Despite these facts, public fear and misconception has led many jurors to believe that sex offender recidivism rates are close to 100%, when that is far from the truth.<sup>193</sup> The unfortunate result of this pattern is that when sex offenders are put in front of a jury for a commitment trial or discharge hearing, the ingrained public fear of sex offenders leads to a jury that is afraid of sex offenders and desires to keep offenders confined for as long as possible.<sup>194</sup>

Each time a network news special features sex offenders, a columnist pens an op-ed about the evils of sexual crimes, or a politician attacks their opponent for allegedly releasing a sex offender, the public at large is further reinforced in their opinion that sex offenders are dangerous and

186. Cucolo & Perlin, *Media Distortion*, *supra* note 183, at 187.

187. Singleton, *supra* note 20, at 609.

188. Cucolo & Perlin, *Media Distortion*, *supra* note 183, at 211.

189. John O'Connor, *FACT CHECK: Rauner's Ad Generalizes Some Facts About Illinois Governor's Early-Release Program*, U.S. NEWS & WORLD REPORT (Sept. 24, 2014, 6:52 PM), [https://www.usnews.com/news/politics/articles/2014/09/24/fact-check-rauner-early-prison-release-tv-ad?src=usn\\_tw](https://www.usnews.com/news/politics/articles/2014/09/24/fact-check-rauner-early-prison-release-tv-ad?src=usn_tw) [http://perma.cc/G3MY-M23Y].

190. See Brian Cassella, *Rauner Unseats Gov. Quinn*, CHI. TRIB. (Nov. 5, 2014), <http://www.chicagotribune.com/chi-end-chicago-rauner-wins-wre0023707210-20141103-photo.html> [http://perma.cc/JT7Q-Y2FB].

191. Cucolo & Perlin, *Media Distortion*, *supra* note 183, at 216.

192. *Id.*

193. *Id.*

194. *Id.*

despicable members of society who deserve the harshest condemnation.<sup>195</sup> Ultimately, an individual's knowledge of just one sexually violent crime can cause them to generalize their fear and biases against sex offenders as a whole class of individuals. These perceptions do not limit themselves just to the community, however. Fear, bias, and misconceptions also follow citizens into the jury room when they perform their civic duty and serve on an SVP commitment or discharge trial.<sup>196</sup> When jurors act out of fear, it creates a greater risk that an SVP respondent will be confined beyond the point where they are actually dangerous, which results in a due process violation.

### 3. Effect of Juror Fears on Illinois SVP Respondents

The Illinois SVP Commitment Act allows for either the respondent, the respondent's lawyer, the State's Attorney, or the Attorney General to demand a jury trial in commitment proceedings.<sup>197</sup> If neither side demands a jury trial, then the case will be heard by a judge.<sup>198</sup> There are several factors a respondent must consider when choosing between a bench trial or a jury trial. The first factor that the respondent will need to consider is the ambiguity inherent in jury trials.<sup>199</sup> A jury trial is determined by twelve separate individuals, many of whom have never served on a jury before.<sup>200</sup> The respondent will have a difficult time determining the jury's tendencies, and will not be able to tailor a juror-specific defense to the prosecution's arguments.<sup>201</sup> The second factor a respondent will need to consider is the relative lack of ambiguity that accompanies a bench trial.<sup>202</sup> The respondent's lawyer can determine a judge's tendencies by examining the judge's prior decisions, and the attorney may have also tried similar cases in front of the judge and be familiar with his or her way of thinking. The attorney also knows that the judge, unlike the jury, is well versed with the law and will require less explanation.<sup>203</sup> A judge may also be less biased toward sex offenders than the public at large from handling many sex offender cases. The third factor is the "ick" factor that often accompanies

195. *Id.* at 185.

196. Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1536 (2006).

197. 725 ILL. COMP. STAT. 207/65(b)(2) (2016).

198. *Id.*

199. Segal & Stein, *supra* note 196, at 1498.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

SVP commitment and discharge trials. Because all SVPs have been convicted of a sexually violent crime, their trial will inevitably involve some discussion of past crimes, some of which may be disturbing. The average jury member may be unable to look past this when making their decision, whereas a judge seasoned in SVP trials may not be as heavily affected by the “ick” factor.

SVP respondents may also consider the trend in criminal law that bench trials are more likely to result in acquittals than jury trials.<sup>204</sup> Numerous studies have discovered that federal criminal trials that are tried in front of a judge as opposed to a jury are overwhelmingly more likely to result in acquittal.<sup>205</sup> The average conviction rate in federal jury trials since 1946 is 75%.<sup>206</sup> Between 1995 and 2005, the federal jury conviction rate jumped up to 85%.<sup>207</sup> In that same ten-year timeframe, conviction rates in federal bench trials was only 54%, almost 30% lower than the federal jury trial conviction rate.<sup>208</sup> There are multiple explanations for this. First, for certain complex crimes, such as financial or corporate crimes, the inherent complexity in the evidence and defenses may lead to attorneys preferring a bench trial because the judge is more likely to understand the complex evidence than the jury.<sup>209</sup> Second, defendants who employ “legalistic” defenses, which may be legally viable but inconsistent with a jury’s ingrained sense of justice, also benefit from bench trials.<sup>210</sup> Third, defendants whose cases involve “horrible facts or unpopular defendants that might repel a jury” often elect for a bench trial.<sup>211</sup> Unsurprisingly, sex offenders fall into this category.<sup>212</sup> Jurors in cases where the facts are very horrific or outrageous can rush to judgment because of the inflammatory evidence, whereas a judge that is more familiar with these facts may not have his or her passions inflamed easily.<sup>213</sup>

After considering these factors, it is not surprising that SVP respondents may prefer their commitment or discharge trials to be heard by a judge rather than a jury. SVP cases are inherently complex. They often involve a large amount of testimony from psychologists and psychiatrists,

204. Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 WASH. U. L.Q. 151, 164–67 (2005).

205. Segal & Stein, *supra* note 196, at 1504; Leipold, *supra* note 204, at 164–65.

206. Leipold, *supra* note 204, at 164.

207. *Id.*

208. *Id.*

209. *Id.* at 169–70.

210. *Id.* at 177.

211. *Id.*

212. *Id.*

213. *Id.*

who will offer opinions filled with field-specific terms and processes. This testimony can be very technical and repetitive, and can easily confuse an ordinary jury member who is unfamiliar with these terms. SVP trials are also subject to “legalistic” defenses that may be counter to a jury’s ingrained sense of justice. It may be hard for a jury to understand that although a SVP may have committed horrific crimes, the question is only whether they are substantially probable to continue to commit crimes, not whether the person is socially desirable. Finally, and most significantly, many SVP trials contain horrible facts, unpopular defendants, and information that is likely to inflame the passions of the jury. It has already been established that there is bias in almost every community against sex offenders. Many juries may simply be unable to get past the nature of the crimes that a SVP respondent committed.

The decision of whether a judge or jury should hear the case is not the respondent’s alone. The respondent can have a great rationale for preferring a bench trial as opposed to a jury trial, based on the considerations listed in the last two paragraphs. However, if the prosecutor unilaterally decides that he or she wishes to have a jury trial, a jury trial will be had. The prosecutor knows that the inherent biases of the jury members makes it much more likely that the respondent will be committed. The prosecutor knows that the continued commitment of sex offenders is something that can be politically useful for the State. A forced jury trial of an SVP respondent exposes the respondent to a higher risk of commitment than a bench trial would. The respondent faces a jury that must wade through complex issues, set aside ingrained biases against sex offenders, and look past sometimes horrific crimes that inflame the jurors’ passions. An SVP respondent can have their liberty restricted by being placed in a TDF even though they do not meet the statutory criteria. An SVP respondent can also have their liberty restricted by remaining in the TDF well past the point that they are no longer a SVP. Thus, the unilateral right to a jury trial in the Illinois SVP Commitment Act leads to Due Process Clause violations against Illinois SVP respondents.<sup>214</sup> Any person who is deprived of their liberty without a compelling governmental reason, or has their liberty restricted beyond a reasonable period, has had their Fifth and Fourteenth Amendment due process rights violated.

The substantial effect that jury trials have on the commitment and discharge of SVP respondents becomes very clear when examining the census reports maintained by the Illinois Department of Human Services.

214. See 725 ILL. COMP. STAT. 207/35 (2016).

DHS keeps a monthly census of the respondents confined in TDFs, beginning with the inception of the program in 1998.<sup>215</sup> In January of 1998, just four respondents were confined in a TDF through the SVP Commitment Act.<sup>216</sup> As of December 2016, this number has swelled to 562 respondents.<sup>217</sup> Nearly every month, more individuals are committed to TDFs under this Act. In the entirety of the SVP Commitment Act's nearly eighteen-year existence, only sixteen respondents have ever been discharged under the Act.<sup>218</sup> This means that the Illinois SVP Commitment Act has a discharge rate of just 2.8%. In contrast, forty-six respondents have died while at a TDF, for a death rate 8.4%.<sup>219</sup> This means that an individual committed under the SVP Commitment Act is four times more likely to die at a TDF than to be discharged. The effects of the SVP Commitment Act's jury trial provisions are even more apparent when examining the number of individuals who receive conditional release as opposed to full discharge. Remember, an individual who seeks conditional release does not go in front of a jury, and is only tried by a judge. Since the inception of the SVP Commitment Act, ninety-eight respondents have received conditional release, as opposed to the just sixteen respondents who have been released through full discharge.<sup>220</sup> Respondents who face a bench trial for conditional release are more likely to prevail than respondents who are forced to be tried by a jury when seeking full discharge.

### III. LEGISLATIVE AND JUDICIAL REMEDIES TO DUE PROCESS VIOLATIONS

Because the Illinois SVP Commitment Act has been declared constitutional by the Illinois Supreme Court, there are only two means to amend or strike down the prosecutor's jury trial provisions that lead to due process violations. The first means is the legislative process. The Illinois SVP Commitment Act was enacted through the legislative process, and was passed through both houses of the Illinois General Assembly and signed into law by Governor Jim Edgar.<sup>221</sup> The SVP Commitment Act can be

215. ILL. DEP'T OF HUMAN SERVS., RESIDENT CENSUS—MONTHLY SUMMARY (2016).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. See 725 ILL. COMP. STAT. 207/1 (2016); see also 1997 Ill. Legis. Serv. 90-40 (West); ILL. DEP'T OF HUMAN SERVS., 2008 ILLINOIS HUMAN SERVICES PLAN 61 (2009),

amended by the same process it was enacted. New legislation that proposes to amend the SVP Commitment Act could be proposed in both the Illinois House of Representatives and the Illinois Senate, passed by both chambers, and submitted to the governor for his signature.<sup>222</sup> However, any legislation that is viewed as granting leniency to sex offenders is likely to be politically toxic, and unlikely to be passed by the Legislature and signed into law.<sup>223</sup> The more likely, yet still difficult path to remedying the jury right provisions is through the judicial process. In the following sections, this Note will examine the path, and likelihood of success, in challenging the constitutionality of the Illinois SVP Commitment Act's jury trial provisions in the legislative and judicial systems.

#### *A. Legislative Amendments to Illinois SVP Commitment Act*

The process of amending an existing law begins with the introduction of the bill in either the Illinois House of Representatives or the Illinois Senate.<sup>224</sup> If the bill receives a majority of votes in both houses of the General Assembly, it is then sent to the Governor, who may choose to sign the bill into law or veto the bill.<sup>225</sup> This is the process by which any amendment to the Illinois SVP Commitment Act would have to proceed. There are both positives and negatives to this approach. On the positive side, the Illinois SVP Act has already been amended by a bill passed through both Houses of the General Assembly and signed by the Governor. Just this past year, the Illinois General Assembly passed Public Act 99-628, titled "An Act concerning criminal law."<sup>226</sup> Public Act 99-628 made a number of changes to existing Illinois laws, such as the Sex Offender Management Board Act, Juvenile Court Act of 1987, the Rights of Crime Victims and Witnesses Act, and the Illinois SVP Commitment Act.<sup>227</sup> Specifically, Public Act 99-628 amended section 15 of the SVP Commitment Act, which contains the requirements and contents for the SVP petition filed by the prosecutor.<sup>228</sup> The amendment was a relatively minor one, affecting the timeline of when the SVP petition should be

<http://www.dhs.state.il.us/OneNetLibrary/27897/documents/StatePlans/HSP2009.pdf>  
[<https://perma.cc/45B6-XVZV>].

222. See ILL. CONST. art. IV, § 8.

223. Cucolo & Perlin, *Media Distortion*, *supra* note 183, at 215.

224. ILL. CONST. art. IV, § 8.

225. *Id.*

226. 2016 Ill. Legis. Serv. 99-628 (West).

227. *Id.*

228. 725 ILL. COMP. STAT. 207/15 (2016).

filed.<sup>229</sup> Public Act 99-628 changed section 15 to read, “[t]he petition must be filed no more than 90 days before discharge or entry into mandatory supervised release from a Department of Corrections or aftercare release from the Department of Juvenile Justice correctional facility.”<sup>230</sup> The amendment added the phrase “or aftercare release from” a Juvenile Justice facility.<sup>231</sup> This is a minor change, and one that expands the class of individuals who can be named in a SVP petition. Public Act 99-628 establishes that the Illinois General Assembly is at least familiar with the process of passing an amendment to the Illinois SVP Commitment Act, and it is plausible that the jury trial provisions in the act could be remedied through legislative action.

The fact that the Illinois General Assembly has recently amended the Illinois SVP Commitment Act does not mean that the political reality surrounding sex offenders has at all changed. This is because, as discussed in previous sections of this Note, there are many politicians who play to their constituents’ ingrained fears of sex offenders in order to gain political points.<sup>232</sup> The 2016 election cycle in Illinois featured a number of political advertisements in which politicians criticized their opponents for perceived support of sex offenders.<sup>233</sup> The race between incumbent Democratic Illinois Congressman John Bradley and Republican Dave Severin for the seat in Illinois’s 117th District featured political ads slamming Bradley over perceived support for sexual predators.<sup>234</sup> Representative Bradley was featured in ads supporting former Illinois Congressman Keith Farnham, who was later convicted of possession of child pornography.<sup>235</sup> Severin used Bradley’s support of a man who was convicted of a sex crime as an attack on Bradley’s judgment.<sup>236</sup> On election day, Severin won the race and ousted Bradley from his seat.<sup>237</sup>

229. Pub. Act 99-628, sec. 25, § 15, 1997 Ill. Legis. Serv. 99-628 (West).

230. *Id.*

231. *Id.*

232. Cucolo & Perlin, *Media Distortion*, *supra* note 183, at 206.

233. Roni LeForge, *Attack Ads: Why Are We Talking About Sex Offenders?*, WSIL-TV (Oct. 18, 2016, 6:08 PM), <http://www.wsiltv.com/story/33421489/attack-ads-why-are-we-talking-about-sex-offenders> [https://perma.cc/AA7C-XAM2].

234. Rich Miller, *Sex Offender Ads Proliferating: GOP Adopts Longtime Tactic of Democrats*, SAUKVALLEY.COM (Oct. 10, 2016), <http://www.saukvalley.com/2016/10/10/rich-miller-sex-offender-political-ads-proliferating/cslnocf/> [https://perma.cc/QX2T-4PTZ].

235. *Id.*

236. *Id.*

237. *Severin Beats Bradley in 117th District*, WSIL-TV (Nov. 1, 2016, 11:19 AM), <http://www.wsiltv.com/story/33558716/severin-beats-bradley-in-117th-district> [https://perma.cc/E8PG-U96C].

This race was not the only one to feature a politician being attacked for perceived support of sex offenders. Sex offenders were used as ammunition for political attacks in the 2016 races for Illinois's 76th, 79th, and 155th Congressional Districts.<sup>238</sup> Many of these candidates' perceived connections to sex offenders were tenuous at best. In the race for the 79th District, Republican Lindsey Parkhurst was attacked for previously defending a sex offender while working as a criminal defense attorney.<sup>239</sup> In the race for the 76th District, Republican Jerry Long was attacked for renting a home to a convicted sex offender.<sup>240</sup> Considering that politicians have been attacked, and lost races, over such lower forms of "support" of sex offenders as renting a home to an offender or even just knowing an offender, it is not hard to imagine the attacks a politician would receive if they were seen as supporting legislation that appeared to make it easier for sex offenders to be released. This is likely how amending the jury trial provisions of the Illinois SVP Commitment Act would be perceived. It is therefore highly unlikely that the legislative process offers SVP respondents any prospect of relief from the due process violations that occur from the prosecutor's right to a jury trial.

*B. Judicial Remedies to Due Process Violations of SVP Commitment Act*

1. Illinois Judicial System

The Illinois Supreme Court declared the Illinois SVP Commitment Act constitutional in *In re Samuelson*.<sup>241</sup> This decision certainly does not preclude the Illinois Supreme Court from revisiting its decision in this case, or from determining the constitutionality of certain provisions of the SVP Commitment Act. In fact, many attorneys who represent SVP respondents actively attempt to litigate and appeal provisions of the SVP Commitment Act in hopes of going before the Illinois Supreme Court. However, in terms of evaluating the likelihood that the Illinois Supreme Court will rule that the SVP Commitment Act in an unconstitutional violation of the Illinois Constitution, it is almost as unlikely that the Illinois Supreme Court would overturn the jury trial provisions as it is that Illinois legislators would amend these provisions. Illinois has an elected judiciary, and judges and

238. Miller, *supra* note 234.

239. *Id.*

240. *Id.*

241. *In re Samuelson*, 727 N.E.2d 228, 237–38 (Ill. 2000).

judicial candidates are subject to many of the same political pressures that Illinois legislators face.

Illinois's history of an elected judiciary predates Illinois's own addition to the Union as a state.<sup>242</sup> As Illinois's population continued to grow throughout the nineteenth and twentieth centuries, more and more elected judges were added, creating an unruly and highly politicized court structure.<sup>243</sup> To attempt to solve this issue, Illinois adopted Article VI of its new constitution in 1970, which created a unified, three-tier judicial system in which all judges are elected in partisan elections after being nominated by petition or through the primary process.<sup>244</sup> There are a number of concerns regarding how a system with elected judges results in rulings that are partial and politically motivated, especially in Illinois.<sup>245</sup> Because Illinois judges will at one point have to run in an election, many judges will avoid controversial decisions, curb their support for criminal defendants, and become more conservative in deciding cases in order to prevent political backlash.<sup>246</sup> Much like legislators, elected judges in Illinois "are not immune from the impact of 'moral panics,' flowing from 'the public's passive acceptance of media and politician-driven images of the nature and extent of crime.'"<sup>247</sup> For judges, sentences and verdicts issued in SVP cases have a very high salience with the public, and can lead to a great amount of media coverage and negative reactions from political groups and voters.<sup>248</sup> For example, in the 2004 campaign for a seat on the Illinois Supreme Court, Democratic Supreme Court candidate Gordon E. Maag blasted his Republican opponent, Lloyd A. Karemier, for being too lenient with pedophiles, while Karemier accused Maag of releasing a defendant who tortured an elderly woman.<sup>249</sup> Karemier ultimately prevailed in a race that saw between eight to ten million dollars expended by outside groups and donors.<sup>250</sup> This race epitomizes the challenges of convincing the elected

242. Mary Eileen Weicher, Mentorship Article, *The Expansion of the First Amendment in Judicial Elections: Another Cause for Reform*, 38 LOY. U. CHI. L.J. 833, 839 (2007).

243. *Id.* at 840.

244. *Id.* at 842.

245. Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 REV. LITIG. 529, 558 (2006).

246. Weicher, *supra* note 242, at 835.

247. Cucolo & Perlin, *Media Distortion*, *supra* note 183, at 218–19 (quoting Andrew Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 174 (2011)).

248. *Id.* at 219.

249. Souders, *supra* note 245, at 558.

250. Ann Knef, #1 News Story: *Karmeier Wins Costliest State SC Race; Maag Not Retained*, MADISON-ST. CLAIR REC. (Dec. 28, 2004, 5:28 AM), <https://madisonrecord.com/stories/510559082-1-news-story-karmeier-wins-costliest-state-sc-race-maag-not-retained> [<https://perma.cc/5HFN-X6AU>].

members of the Illinois judiciary to strike down jury trial provisions in the Illinois SVP Commitment Act, as any judge who rules in favor of SVP respondents could have his decision come back to haunt him or her in a political opponent's attack ad.

## 2. Federal Judicial System

The fact that the U.S. Supreme Court twice validated the constitutionality of SVP commitment laws in *Kansas v. Crane* and *United States v. Comstock* initially makes the prospect of changing SVP laws through the federal judicial system seem daunting. First, federal prisoners can only be committed as SVPs if they commit a federal crime, and most sexually violent offenses are tried in state court.<sup>251</sup> Second, the Supreme Court is usually highly deferential to its previous decisions through the principle of *stare decisis*.<sup>252</sup> Third, the Supreme Court in recent years has not been viewed as particularly defendant-friendly on criminal law and its related issues, which would presumably include SVP Commitment laws.<sup>253</sup> Fourth, federal courts may be unwilling to reach into the realm of state law and declare specific state programs unconstitutional. Despite these drawbacks, the federal judicial system still offers the most realistic and promising opportunity for SVP respondents to obtain relief from the due process violations of the Illinois SVP Commitment Act.

The first advantage of challenging the Illinois SVP Commitment act in federal court is that federal judges, unlike both Illinois judges and Illinois legislators, are not elected, but rather appointed.<sup>254</sup> Federal judges are appointed by the president under Article III, Section 1 of the Constitution, and are then sent to the Senate for confirmation.<sup>255</sup> Once the judges are confirmed, they receive an appointment that can only be ended by their death, retirement, or impeachment.<sup>256</sup> Because federal judges do not have to run in elections, they are not subject to the same political pressures and citizen fears that elected officials and judges are. This gives federal judges a necessary level of insulation in making their decisions.<sup>257</sup> Federal judges

251. 18 U.S.C. § 4248(a) (2016).

252. Charles N. W. Keckler, *The Hazards of Precedent: A Parameterization of Legal Change*, 80 MISS. L.J. 105, 146 (2010).

253. *Id.* at 147.

254. U.S. CONST. art. III § 1.

255. *Id.*

256. Bertrall L. Ross II, Response, *Reconsidering Statutory Interpretive Divergence Between Elected and Appointed Judges: A Response to Aaron-Andrew P. Bruhl and Ethan J. Leib*, Elected Judges and Statutory Interpretation, 79 *U Chi L Rev* 1215 (2012), 80 U. CHI. L. REV. DIALOGUE 53, 62 (2013).

257. Leipold, *supra* note 204, at 171.

do not need to fear that their decisions will be used against them in political ads, and as a result they can rule according to their own intellect and judgment, without considering political pressures.<sup>258</sup> This partly explains why the acquittal rate is so much higher in federal court than in state courts, as federal judges need not worry about political blowback from their decisions.<sup>259</sup> This protection makes federal judges perfect candidates to evaluate the due process claims of SVP respondents in a vacuum, without any of the fears, biases, and confusion that the public as a whole has regarding sex offenders.

The second benefit of challenging the Illinois SVP Commitment Act in federal court is that there is already a framework for how to prove that an SVP commitment program violates SVP respondents' due process rights. Justice Kennedy warned in *Kansas v. Hendricks* that if SVP programs were enacted as "a sham or mere pretext" for confining individuals past the point where they are no longer dangerous, the program would be unconstitutional.<sup>260</sup> Federal judges can use and have used Justice Kennedy's words to examine SVP programs to determine if any part of the act is being used as pretext for preventing non-dangerous offenders from being released. If a respondent can prove to a federal judge that the jury trial provisions of the Illinois SVP Commitment Act result in respondents being held beyond the point that they are no longer dangerous, federal judges could strike down the provision, or the law as a whole, and cite Justice Kennedy's warning as precedent.

The Supreme Court has not yet specifically addressed the question of the standard of scrutiny that should be applied to SVP's due process claims. The Eighth Circuit in *Karsjens v. Piper* believes the standard is rational basis scrutiny, because SVPs do not have a fundamental liberty interest at stake in their confinement.<sup>261</sup> This approach has not been adopted by other circuit courts. However, Supreme Court precedent provides that the test for evaluating a challenge that involves a fundamental liberty is whether the means used by the government to take away someone's liberty is narrowly tailored to serve a compelling governmental interest.<sup>262</sup>

If SVP respondents are able to convince the Supreme Court that they do have a fundamental liberty in their right not to be confined beyond the point where they are dangerous, the Illinois government will carry a heavy

258. Souders, *supra* note 245, at 552–53.

259. *Id.*

260. *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997).

261. *Karsjens v. Piper*, 845 F.3d 394, 407–08 (8th Cir. 2017).

262. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

burden in overcoming strict scrutiny. Even if the government has a compelling interest in taking the liberty of sex offenders, under the strict scrutiny standard, it must be able to show that it is taking this liberty in the least restrictive means possible.<sup>263</sup>

The final reason why the federal judicial system offers the best chance for declaring sections of the Illinois SVP Commitment Act unconstitutional is that federal courts are in a unique position to consider the totality of a SVP law, and examine how effective the law has been in achieving its stated purpose. Illinois legislators and Illinois judges may be uncomfortable in declaring that an act or provision that they have enacted and ruled on may actually be unconstitutional. However, federal judges do not have these worries, as they do not personally represent the people of Illinois. Federal judges can also evaluate the Illinois SVP Commitment Program in the context of other state programs, such as that of Minnesota and Missouri, to judge its constitutionality. After the challenges in federal district court in Minnesota and Missouri resulting in concerns of the constitutionality of SVP laws, federal judges may feel as if there is momentum to truly evaluate the effectiveness of these laws and programs. It has now been close to twenty years since the Illinois SVP Commitment Act was signed into law.<sup>264</sup> This is a significant amount of time for a federal judge to survey to evaluate the effectiveness and constitutionality of the SVP Commitment Act. With the recent decisions in Minnesota and Missouri, it is possible that time has not been kind to these programs, and that federal judges are reevaluating the constitutionality of SVP programs. For these reasons, a 42 U.S.C. § 1983 constitutional claim alleging that the jury trial provisions of the Illinois SVP Commitment Act result in detention past the time when a person is dangerous, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments, has the best chance of success in federal court.

#### CONCLUSION

The issue of the constitutionality of SVP programs is a difficult one, both legally and politically. Because of the nature of sex offenders and sexually violent crimes, there is little to no public advocacy for the rights of sex offenders. Much of the public would rather risk the constitutional liberties of these criminals than risk that these criminals harm even one person after being released. Political pressures make it a near certainty that

263. *Id.*

264. *See* 725 ILL. COMP. STAT. 207/1 (2016).

politicians and elected judges in Illinois will continue to use public fear of sex offenders as ammunition for political attack ads. Sensationalistic media coverage of sex offenders and sexual crimes will likely continue, increasing the overall fear of sex offenders. Despite these issues, the time is right to challenge the Illinois SVP Commitment Act and its provisions that provide prosecutors with the unilateral right to a jury trial. These provisions result in jurors who fear sex offenders trying the commitment and discharge proceedings of SVP respondents. This in turn results in SVP respondents being committed without meeting the statutory criteria or being detained past the point where they are no longer dangerous. The U.S. Constitution guarantees that a person cannot have their liberty taken without due process of law. A program that forces individuals in front of a hostile jury, which can confine them indefinitely, while actively denying them the right to appear in front of judge simply does not square with Supreme Court precedent on due process. If every citizen is truly to be afforded the due process of law, no matter how horrific their crimes or personality, then there needs to be serious changes to the jury trial provisions in the Illinois SVP Commitment Act.