

Senate Judiciary Committee Hearing
“Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences”
Questions for the Record Submitted by Senator Al Franken for Marc Levin

Question 1: Minnesota’s Second Chance Coalition sent me a letter, which I am submitting for the record. The letter reads, in part, as follows:

Thirty years of using federal mandatory minimum sentencing laws has created serious problems for our criminal justice system, taxpayers, and communities. Our current mandatory minimum laws have locked up hundreds of thousands of nonviolent, low-level, and drug-addicted offenders over the last three decades. These laws treat small-fry and nonviolent offenders as if they were major kingpins or killers. Defendants, and the American public, expect that judges will get to consider all the facts and circumstances of these cases and craft a punishment that fits the crime. They, and we, are shocked to learn that the sentence has already been chosen, and the judge has no say in the matter. The injustice and arbitrariness of mandatory minimum sentences breeds cynicism and erodes public trust in the criminal justice system.

Can you comment on that passage and on the effect that mandatory minimum sentences have on the credibility of our criminal justice system?

On behalf of the Texas Public Policy Foundation’s Right on Crime Initiative, I can tell you that we share these very same concerns about the excessive scope and severity of many federal mandatory minimums. We were pleased to host an event with the Minnesota Second Chance Coalition in St. Paul, MN in January 2013, which was attended by many Minnesota policymakers and which featured remarks by Right on Crime signatory and former American Conservative Union Chairman David Keene.

Undoubtedly, public trust and confidence in the fairness of the justice system is vital to public safety. This is true for many reasons. For example, research has shown that many crimes are not reported, particularly in some high-crime areas where confidence in the justice system is low. While there will always be different opinions about the merits of sentences in certain cases, it is important that the public overall view the justice system as dispensing sentences that are proportionate to the seriousness of the crime and the level of risk the offender poses.

Unfortunately, mandatory minimums, particularly as applied to nonviolent offenders, often undermine this goal. For example, rigid minimum prison terms can preclude the judge from taking into account that the offender before them may be low-risk as demonstrated by a validated, actuarial risk-needs assessment that has been proven to accurately predict the probability of future offending. Additionally, some cases involve circumstances that tend to show more or less culpability on the part of the offender. A former felon with a gun could be a person who is currently a drug kingpin with a machine gun or it could be a person whose last offense was decades ago who was shooting deer with a hunting rifle. One of the great insights of

free market economists such as Hayek is command and control systems do not work in part because knowledge is diffuse and it is impossible to centrally plan for every contingency. Mandatory minimums suffer mightily from this defect and thus inevitably lead to disproportionate sentences that erode public confidence in the fair administration of justice.

Question 2: During the hearing, you spoke highly about the use of drug courts, mental health courts, and veterans treatment courts. Can you please elaborate on this and explain the importance of federal investments in these diversion programs?

Yes, our research has found that these specialty or problem-solving courts have tended to produce excellent results in terms of reducing recidivism, while costing a fraction of incarceration. There are several reasons why, in our view, these courts continue to succeed. First, they involve a “carrot and stick” approach that balances treatment with responsibility and include the prospect of graduation and not having a permanent criminal record in many cases, as well as consequences for failure to comply. Second, they break from the traditional assembly line model of criminal justice where a judge hands an offender off to probation or prison and never sees him or her again, unless perhaps there is a motion to revoke probation. The constant engagement of the judge and the ongoing offender accountability to that court provide a level of structure in between basic probation and incarceration.

One of the keys is to ensure drug courts are focused on offenders who are not the lowest-risk offenders who could succeed on basic probation. By concentrating on those who with greater needs for supervision and who would likely otherwise be in prison, drug courts can best fill their niche in the broader system. Also, it is important to ensure that judges, prosecutors, and defense lawyers involved in problem-solving courts have appropriate training and that fidelity is maintained to the model. The National Association of Drug Court Professionals has published a useful document that sets for the core elements of a successful drug court.

While drug courts primarily focus on those with chemical dependency, there is another type of specialty court that is targeted more at those who may not necessarily need extensive treatment. The Hawaii HOPE Court that uses swift, sure, and commensurate sanctions, including a few days of jail time, to promote compliance. In the HOPE Court, the judge apprises the drug-related offenders entering his court that each day they must call in to find out if they must report for a random drug test and, if they test positive or don’t show up, an immediate arrest warrant will result in brief jail time, often on the weekend so they can keep their job. The Court has achieved more a more than 50 percent reduction in probation revocations and reoffending, an 80 percent reduction in missed probation appointments, and an 86 percent reduction in positive drug tests.¹ Judge Steve Alm, a former federal prosecutor who launched the Hawaii HOPE Court, recommends that the small minority of offenders who do not desist from drugs through the program be triaged into a drug court with intensive treatment. This is a highly cost-effective approach given that the HOPE Court has a few thousand participants and thus costs about a third of a drug court.

Mental health courts can successfully divert mentally ill offenders from traditional sentencing, redirecting them into appropriate mental health treatment. A clinical case manager screens offenders for participation in the court using an instrument designed to identify individuals with serious mental disorders. Defendants with conditions that are on Axis I of the *Diagnostic and Statistical Manual of Mental Disorders*, such as major depression and schizophrenia, are typically eligible.

Rather than simply issuing a sentence and going to the next case, the judge coordinates mental health services for the offender and monitors compliance. Smaller probation caseloads are typically used, allowing case managers to effectively monitor participants' compliance with the treatment plan.

A RAND Institute study of mental health courts found that “the leveling off of mental health treatment costs and the dramatic drop in jail costs yielded a large cost savings at the end of [its] period of observation.”ⁱⁱ For example, in the Washoe County Mental Health Court in Reno, Nevada, the 2007 class of 106 graduates went from 5,011 jail days one year prior to mental health court to 230 jail days one year after, a 95 percent reduction.ⁱⁱⁱ Strikingly, the cost to the system was reduced from \$566,243 one year prior to mental health court to \$25,290 one year after.^{iv}

Evidence suggests that mental health courts also reduce re-offending. The *American Journal of Psychiatry* reported that mental health courts were “associated with longer time without any new criminal charges or new charges for violent crimes.”^v Similar results have been achieved in the Delaware Mental Health Court. Of the 64 offenders who participated in the first three years of the program, 57 completed the program, of which 53 did not recidivate within six months of completion.

The rationale for veterans' courts is based on the combat-related stress, financial instability and other difficulties adjusting to life that confront many soldiers returning home. A 2008 RAND Corporation study found that about one-fifth of all Iraq and Afghanistan veterans — or about 300,000 of the more than 1.6 million U.S. troops in the two wars — reported symptoms of PTSD or major depression.^{vi} While most of these veterans are law-abiding, these problems contribute to criminal behavior among a substantial number of veterans.

The Bureau of Justice Statistics found in a 2000 survey — the most recent information available — that 12 percent of prison and jail inmates reported military service.^{vii} All told, more than 200,000 veterans are behind bars. Veterans were more likely to be first-time offenders, employed, and have a history of mental illness and/or alcohol dependence.^{viii}

The nation's first veterans' court was founded in 2008 in Buffalo, New York and at least ten communities across the nation have also set up such courts. In the Buffalo court, which has virtually eliminated re-arrests, offenders must complete “rigorous and individually tailored treatment programs.”^{ix} The Buffalo judge, Robert Russell, points out that veteran's courts are

distinguished from other specialty courts in that they also include mentoring sessions with other veterans, which leverage the camaraderie that the military builds. Struck by the impressive results of the Buffalo court, Congressman Steve Buyer (R-Indiana) told Judge Russell at a hearing examining the success of that court: “You win my ‘wow’ award.”^x

Following the success of the Buffalo model, Illinois, Nevada, and Texas are among the states that have enacted legislation authorizing the creation of veteran’s courts. The Texas legislation may be particularly useful as a model for other states, because it authorizes counties to create such courts, provides guidelines that are flexible enough to allow for local innovation, and had no fiscal note.^{xi}

Veterans’ courts share many attributes with drug and mental health courts. Though they recognize that veterans deserve our gratitude for their service, these courts don’t let them off the hook because of that, but rather appropriately hold them accountable through a strict schedule of court appearances and treatment appointments, and, if necessary, sanctions imposed by the judge that can include jail time. Some courts also utilize probation officers to ensure the offender is properly monitored. Serious violent and sex offenders are generally not eligible for a veteran’s court. Some veterans’ courts require that participants have a service-related disability such as primary diagnosis of post-traumatic stress disorder (PTSD), traumatic brain injury, or severe depression.^{xii} Veterans’ courts typically have the authority to require participants to attend rehabilitation, educational, vocational, medical, psychiatric or substance-abuse programs.

Like other problem-solving courts, rather than issue a sentence and move to the next case, a judge in a veterans’ court holds regular hearings to monitor the offender’s progress through treatment and compliance with the terms of probation. The El Paso, Texas court is actually a docket of an existing court so there is no expense of creating a new court and the county expects to save money on jail costs. Just as with drug and mental health courts, successful completion of the court may result in a dismissal or reduction of the charges, a feature which helps participants obtain or retain employment.

In sum, all of these problem-solving courts are proving themselves around the country. As we look to more effectively allocate limited taxpayer funds to maximize public safety, it is clear that, given the small percentage of total offenders who pass through them, there is plenty of opportunity for additional gains in this area. Policymakers should take into account that, while these courts can result in lower total costs in the criminal justice system, they do require funds to operate, including support for the treatment components so the court is more than just a specialized docket. One of the ideas we are working with state policymakers on involves a grant program whereby local jurisdictions would be prioritized for additional such courts to the extent they enter into an agreement with the state to send fewer of the type of low-level offenders to the state who would go into these courts. With this incentive funding model, states that may not have additional funds available would be able to directly link the expansion of these courts with a reduction in spending on unnecessary incarceration.

ⁱ “[Program Evaluation Results](#),” Hawai’i State Judiciary’s HOPE Probation Program

ⁱⁱChristine DeMartini *et al.*, *Justice, Treatment, and Cost: An Evaluation of the Fiscal Impact of Allegheny County Mental Health Court*, (Santa Monica, CA: RAND Corporation, 2007), p. xi.

ⁱⁱⁱPersonal Interview, Julie Clements, Pretrial Services Officer, Washoe County Mental Health Court, January 13, 2009.

^{iv}*Ibid.*

^v <http://ajp.psychiatryonline.org/cgi/content/abstract/164/9/1395>.

^{vi} <http://www.rand.org/pubs/monographs/MG720/>.

^{vii} <http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf>.

^{viii} *Ibid.*

^{ix} <http://www.statebillnews.com/?p=550>.

^x <http://www.buffalonews.com/cityregion/story/798194.html>.

^{xi} <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB01940F.htm>

^{xii} <http://www.allbusiness.com/government/government-bodies-offices-regional/12793391-1.html>.