

AUTHORIZATION REQUIRED: VETERANS TREATMENT COURTS, THE NEED FOR DEMOCRATIC LEGITIMACY, AND THE SEPARATION OF POWERS DOCTRINE

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ABSTRACT

What limits do judges have when creating specialty courts such as Veterans Treatment Courts (“VTCs”)? Many states have virtually no limits. I argue that states should enact legislation authorizing the creation of VTCs to maintain democratic legitimacy and ensure that the judiciary respects the separation of powers doctrine.

VTCs represent an innovative and courageous approach to treat and rehabilitate veterans who have committed certain crimes by acknowledging the underlying mental health effects that can result after combat experiences and trigger criminal behavior. In many states, however, judges create these courts without legislative authorization. Without legislative authorization, judges have almost unlimited power to establish these courts, as well as to determine their structures, rules, and procedures. Allowing for unlimited judicial power diminishes democratic legitimacy and often creates separation of powers issues.

First, legislation lends VTCs democratic legitimacy. Legislation allows a democratically elected legislature to set forth basic requirements and procedures for the courts, thereby ensuring that judges do not have unlimited power in establishing them. Legislation also helps usher in the systematic changes that these courts achieve as specialized problem-solving courts that aim to treat veterans who have committed certain

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crimes. Second, legislation ensures separation of powers between the legislative and judicial branches of our government. Legislation acknowledges the historic tradition of separation of powers by setting forth a change in the criminal justice system pursuant to public advocacy. Separation of powers also requires distinct law-making power in the legislative branch. Legislation, therefore, prevents judges from usurping that law-making power by setting up these courts independently and without oversight.

I. INTRODUCTION

A veteran was charged with the sale of a controlled substance and possession of drugs. He has been enrolled in a VTC for about eight months and lives at a mental health treatment facility. He receives care from the Department of Veterans Affairs, attends weekly Alcoholics Anonymous meetings, and meets with a veteran mentor twice a month. He has a history of checking in with his case manager on schedule. The judge holds that he must attend another progress hearing at the court in thirty days.¹

Another veteran was charged with driving with a suspended license, no proof of insurance, and excessive tint. He was a habitual offender and presented mental health issues as well. After this veteran's most recent charges six months ago, he enrolled in a VTC and now lives at home with his family. Since then, he has not tested positively for controlled substances and attends mental health counseling three times a week. He stays in regular contact with his case manager. The judge orders him to attend another progress hearing at the court in thirty days.²

A third veteran was charged with felony obstruction and battery with physical harm. He has been enrolled in a VTC for about four months and has not been as successful. He lives by himself in an apartment and attends regular mental health counseling. His last two drug tests came back positive for ethanol. The treatment team, composed of mental health organizations and other community partners, has recommended to the judge that he should move the veteran to a residence-based treatment facility. During the proceeding, the judge presented him with this option and a warning that if he fails to follow the treatment plan he will be sent to jail. The veteran accepts that this elevated treatment requires him to check in with the court in thirty days.³

1. Veterans Treatment Ct. Proceeding, Muscogee County Veterans Ct. (Dec. 7, 2012).

2. *Id.*

3. *Id.*

The above veterans appeared as criminal defendants before the Muscogee County Veterans Court as a part of mandatory judicial monitoring.⁴ The periodic check-ins allow the court to analyze the progress that each veteran makes regarding his treatment plan and ensure proper judicial oversight of these defendants.⁵ Each defendant fought in Operation Enduring Freedom and/or Operation Iraqi Freedom and had no criminal record or history of mental health issues prior to military enrollment. These three defendants are representative of a large number of veterans across the country that have suffered physical or mental trauma while at war, and who cannot return to their normal civilian lives. After war, veterans may suffer from a host of problems, including post-traumatic stress disorder (“PTSD”), major depression, and other mental health issues.⁶ They may engage in new behavior such as abusing drugs and alcohol, reacting violently to seemingly normal situations, withdrawing emotionally from their family and friends, and committing a variety of criminal offenses in order to deal with these problems and any existing rage.⁷

States around the country have been creating VTCs to help these veterans by providing treatment as an alternative to incarceration.⁸ These courts aim to rehabilitate veterans who have committed certain criminal offenses that directly or indirectly stem from their experience in combat.⁹ VTCs are the latest form of the popular problem-solving court model. They present a novel approach to dealing with a select group of criminal offenders who have special needs, mostly in the form of mental health counseling necessary to deal with combat memories and trauma.

VTCs operate in a local community with the support of the judiciary as well as various community actors, including the district attorney’s office, the state’s attorney’s office, criminal defense attorneys, veterans’ organizations, mental health treatment providers, and in some cases the state legislature. In some states, the state legislature has authorized the

4. *Id.*

5. *See id.*

6. Terri Tanielian et al., *Introduction, in* INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 3, 3 (Terri Tanielian & Lisa H. Jaycox eds., 2008).

7. CONG. BUDGET OFFICE, *THE VETERANS HEALTH ADMINISTRATION’S TREATMENT OF PTSD AND TRAUMATIC BRAIN INJURY AMONG RECENT COMBAT VETERANS* 2 (2012) [hereinafter *TREATMENT OF PTSD*].

8. *E.g.*, Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 357, 368 (2009) [hereinafter *A Proactive Approach*]; H.B. 5159, 96th Leg., Reg. Sess. (Mich. 2012).

9. *See A Proactive Approach, supra* note 8, at 368.

creation of VTCs through legislative mandates prescribing basic requirements and policies. In other states, judges have created VTCs using the judiciary's power to create specialized courts and dockets with no legislative mandate. These states give judges nearly unlimited discretion in establishing VTCs, setting up their policies and procedures, and guiding defendants through the legal process and medical treatment. While it is not necessarily constitutionally required, VTCs should operate under a comprehensive legislative mandate so that the courts maintain democratic legitimacy and the judiciary respects the separation of powers doctrine inherent in our government.

In Part I of this Article, I first discuss mental health issues that veterans face after returning from war, primarily PTSD and traumatic brain injury ("TBI"), and how these conditions affect veterans by disrupting their livelihoods. Next, I argue that PTSD and TBI are present in a significant portion of veterans and that care required to treat these issues is not currently effective enough to help all of them.

Part II provides background information about the history and structure of VTCs. Since these courts are recent developments in our justice system and have not gained a widespread following, this background information is necessary. I argue that VTCs can help veterans who have committed crimes as a result of their mental health issues by offering comprehensive treatment rather than incarceration. In Part III, I review the creation of the first VTC in the country, which serves as a model for VTCs in other jurisdictions, and look at the rationale behind its creation and operation. Lastly, I discuss how the court admits veterans and treats them until they "graduate" from the court.

In Part IV, I argue that a legislative mandate for these courts is necessary to maintain their democratic legitimacy and ensure that the judiciary respects the separation of powers doctrine. This legislative mandate should merely authorize the possibility of creating VTCs within a state, rather than requiring it. I then present a detailed analysis of VTCs in different states, categorizing them into three groups. In the first group, I discuss VTCs in states in which the legislature has enacted legislation authorizing VTCs. The second group looks at states in which no such legislation exists and the judiciary or other body has created VTCs. The third group presents states in which the legislature has authorized mental health treatment as an alternative to incarceration. The analysis will show that a legislative mandate is not only necessary for these courts, but also

preferable to other alternatives. I conclude this section by evaluating arguments by critics of legislative mandates.

In Part V, I propose components for model VTC legislation. I present the essential elements for provisions that every state should include in its own legislation. I conclude this Part with a brief look into federal legislation that offers very little in the way of guidance for states.

II. VETERANS' ISSUES AFTER RETURNING FROM COMBAT

While veterans risk physical injury in combat, they also can endure mental injuries. In this Part, I will provide an overview of PTSD and TBI, their effects, their prevalence in veterans, and available treatments.

A. WHAT ARE PTSD AND TBI AND HOW DO THEY AFFECT VETERANS?

PTSD is an anxiety disorder that results after an individual experiences a traumatic event that may include observation of serious injuries or deaths.¹⁰ The individual then responds to these experiences with great fear or helplessness.¹¹ PTSD symptoms include “re-experiencing the traumatic event, such as having recurring and distressing recollections or nightmares; avoidance of stimuli associated with the trauma, such as thoughts, feelings, and conversations, along with diminished responsiveness and loss of interest in activities; and hyper-arousal, such as irritability, anger, hyper-vigilance, insomnia, or difficulty with concentration.”¹² For veterans, war is the traumatic event. Veterans who develop PTSD may show immediate symptoms or experience chronic symptoms for years.¹³ A study of Vietnam War veterans, presented for its conclusiveness on PTSD, estimates that more than sixty percent of Vietnam veterans who developed PTSD did so less than two years after beginning combat.¹⁴

TBI is a head trauma that disrupts the brain's function, either temporarily or permanently.¹⁵ Causes include explosions from improvised

10. Tanielian et al., *supra* note 6, at 12.

11. *Id.*

12. TREATMENT OF PTSD, *supra* note 7, at 23.

13. *Id.* at 24; Benjamin R. Karney et al., *Predicting the Immediate and Long-Term Consequences of Post-Traumatic Stress Disorder, Depression, and Traumatic Brain Injury in Veterans of Operation Enduring Freedom and Operation Iraqi Freedom*, in *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* 119, 119 (Terri Tanielian & Lisa H. Jaycox eds., 2008).

14. TREATMENT OF PTSD, *supra* note 7, at 24.

15. Tanielian et al., *supra* note 6, at 13.

explosive devices (“IEDs”), other bombs, falls, vehicle accidents, and bullet wounds.¹⁶ TBI may result in a “decreased level of consciousness; amnesia regarding the event itself or events preceding or following the injury; skull fracture; a neurological or neuropsychological abnormality such as disorientation, agitation, or confusion; or an intracranial lesion such as a traumatic intracranial hematoma, cerebral contusion, or penetrating injury.”¹⁷ While effects may continue for more than three months, the wide variation among TBI studies means that no objective test exists to determine whether a mild TBI or other condition causes these prolonged effects.¹⁸

Veterans face a host of issues upon return from war such as alcohol and substance abuse, unemployment, strained relationships, and suicide attempts, all of which are often connected with mental health issues such as PTSD and TBI.¹⁹ PTSD and TBI affect veterans by creating or exacerbating problems they experience after their return.²⁰ First, PTSD and distress from TBI can lead to substance abuse if veterans use drugs or alcohol in an attempt to treat their underlying mental health issues.²¹ Second, individuals with PTSD or TBI tend to miss more days of work and are more likely to be unemployed.²² Third, PTSD and TBI can also lead to negative consequences for interpersonal relationships by disrupting marriages and parenting.²³ Fourth, while veterans make up only ten percent of the total population, they are responsible for approximately twenty percent of all suicides in the country.²⁴ Likewise, PTSD and TBI increase an individual’s risk for attempting suicide.²⁵ Additionally, mental health issues in veterans correspond to their propensity to engage in criminal conduct.²⁶ Alcohol-related tragedies are also more common among veterans, including but not limited to, driving under the influence, reckless

16. TREATMENT OF PTSD, *supra* note 7, at 1.

17. *Id.* at 24.

18. *Id.* at 25–26.

19. *A Proactive Approach*, *supra* note 8, at 358–60.

20. *E.g., id.* at 362; Karney et al., *supra* note 13, at 149.

21. *A Proactive Approach*, *supra* note 8, at 362.

22. Karney et al., *supra* note 13, at 149.

23. *Id.*

24. Mark Thompson & Nancy Gibbs, *The War on Suicide?*, TIME, July 23, 2012, <http://www.time.com/time/magazine/article/0,9171,2119337,00.html>.

25. Karney et al., *supra* note 13, at 149.

26. See Robert T. Russell, *Veterans Treatment Courts Developing Throughout the Nation*, NATIONAL CENTER FOR STATE COURTS 130 (2009), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/204> [hereinafter *Developing*].

driving, and drunk and disorderly conduct.²⁷ A conservative estimate states that about twelve percent of individuals in prisons and jails are veterans.²⁸

B. PREVALENCE OF PTSD AND TBI IN VETERANS

According to the Department of Defense, approximately 50,000 soldiers have been wounded in action during Operations Enduring Freedom and Iraqi Freedom.²⁹ However, this figure does not account for soldiers who are suffering separately from PTSD and TBI, the two mental health issues that affect veterans with the most ferocity.³⁰ The Department of Veterans Affairs estimates that approximately ten to eighteen percent of soldiers engaged in active combat are likely to have PTSD after their return.³¹ Another recent study indicates that up to twenty percent of soldiers engaged in active combat experience PTSD symptoms.³² Between fifteen and twenty-three percent of soldiers have experienced a TBI, depending on the study,³³ and at least thirty percent of soldiers may have suffered a mild TBI as a result of an IED explosion during combat.³⁴

The two current wars have made mental health issues such as PTSD and TBI more prevalent among veterans for a variety of reasons.³⁵ First, soldiers are subject to longer and more frequent deployments abroad than in previous wars.³⁶ Second, breaks between deployments have been less

27. *A Proactive Approach*, *supra* note 8, at 363 n.54.

28. *Developing*, *supra* note 26, at 130.

29. *Casualty Status*, DEP'T. OF DEF., <http://www.defense.gov/news/casualty.pdf> (last visited Feb. 19, 2012).

30. See Steven Berenson, *The Movement Toward Veterans Courts*, 44 CLEARINGHOUSE REV. 37, 37 (2010).

31. *Mental Health Effects of Serving in Afghanistan and Iraq*, DEP'T. OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/overview-mental-health-effects.asp> (last updated Dec. 20, 2011).

32. Peter W. Tuerk et al., *Diagnosis and Treatment of PTSD-Related Compulsive Checking Behaviors in Veterans of the Iraq War: The Influence of Military Context on the Expression of PTSD Symptoms*, 166 AM. J. PSYCHIATRY 762, 762 (2009). See generally Paula P. Schnurr, *PTSD and Combat-Related Psychiatric Systems in Older Veterans*, PTSD RESEARCH QUARTERLY (The Nat'l Ctr. for Post-Traumatic Stress Disorder), Winter 1991, at 1–2 (summarizing that PTSD was not formalized as a diagnoses until 1980); Jennifer L. Price, *Findings from the National Vietnam Veterans' Readjustment Study*, DEP'T OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/professional/pages/vietnam-vets-study.asp> (last updated Oct. 23, 2012) (finding that, after reanalyzing data under the current PTSD paradigm, approximately 30.9% of male Vietnam War era veterans and 26.9% of female Vietnam War era veterans have experienced PTSD over their lifetime).

33. TREATMENT OF PTSD, *supra* note 7, at 11.

34. Tanielian et al., *supra* note 6, at 4.

35. Berenson, *supra* note 30.

36. *Id.*

frequent.³⁷ Third, redeployment to combat has been more common.³⁸ Fourth, these two wars demand constant vigilance with no clear boundary between battle and rest due to the unpredictable nature of the counterinsurgency.³⁹ Fifth, due to improvements in equipment and medicine, more victims of physical trauma are surviving but often with lingering and hidden mental effects.⁴⁰ Sixth, the counterinsurgency's chief weapon, the IED, can cause brain injuries that are difficult to diagnose and treat.⁴¹

C. CARE FOR VETERANS

While veterans have access to healthcare through the Department of Defense and the Department of Veterans Affairs, veterans do not receive the treatment for their mental health issues that they deserve. A recent study found that only half of the veterans from Operations Enduring Freedom and Iraqi Freedom who had a referral for a mental health problem listed in their post-deployment health assessment used mental health services.⁴² Why have so few veterans sought help? There are two explanations: the veterans themselves resist treatment or institutional inefficiency stymies their efforts to obtain treatment.⁴³ Veterans and soldiers have many concerns in deciding to seek treatment: (1) they are concerned about being seen as weak; (2) they worry about being treated differently; (3) they are concerned others would lose confidence in them;⁴⁴ (4) they fear that seeking treatment might harm their career;⁴⁵ (5) they value their privacy; (6) they prefer to rely on their family and friends for support; (7) they believe that treatment is ineffective; (8) they are concerned about the side effects of potential treatments;⁴⁶ and (9) for

37. Terri Tanielian et al., *Summary*, in *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* xix, xix (Terri Tanielian & Lisa H. Jaycox eds., 2008).

38. *Id.*

39. Berenson, *supra* note 30.

40. *Id.*

41. *Id.*

42. M. Audrey Burnam et al., *Systems of Care: Challenges and Opportunities to Improve Access to High-Quality Care*, in *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* 245, 252 (Terri Tanielian & Lisa H. Jaycox eds., 2008).

43. *See, e.g., Mental Health Effects of Serving in Afghanistan and Iraq*, *supra* note 31; Burnam et al., *supra* note 42, at 277.

44. *Mental Health Effects of Serving in Afghanistan and Iraq*, *supra* note 31.

45. Burnam et al., *supra* note 42, at 277.

46. *Mental Health Effects of Serving in Afghanistan and Iraq*, *supra* note 31.

soldiers still abroad, they fear that admitting a mental health problem would delay their return home.⁴⁷

A recent *Time* article cited studies that examined soldiers' mandatory self-assessments upon their return from deployment.⁴⁸ Questions from the self-assessment ask whether soldiers saw people killed during their tour, whether they had been at risk of dying, and whether they were interested in receiving counseling for stress, alcohol use, or other issues.⁴⁹ A 2008 study found that when soldiers answer these questions anonymously, they are more than twice as likely to report any mental health issues such as depression or suicidal thoughts.⁵⁰ The article also states that independent investigators found reports of commanders instructing soldiers to give a positive outlook in their answers or risk their careers.⁵¹

Institutions do not have sufficient capacity or resources to treat veterans with PTSD or TBI. Veterans on active duty can receive care through the healthcare programs operated by the Department of Defense.⁵² Several challenges limit the department's reach. First, the department does not have a unified mental health program; it instead has extensive care at the local level so services vary considerably depending on locale.⁵³ Second, the department lacks the financial resources and manpower to support mental health needs for soldiers due to inadequate funding and a shortage of mental health providers.⁵⁴ For up to five years after discharge, veterans can seek care through the Veterans Health Administration.⁵⁵ This system faces challenges as well. A Department of Veterans Affairs report published last year revealed that less than half of patients evaluated for mental health services received their full evaluations within fourteen days.⁵⁶ The remaining patients received their evaluations on average after fifty days.⁵⁷ The department blamed the delay on a lack of mental health

47. Tanielian et al., *supra* note 6, at 7.

48. Thompson & Gibbs, *supra* note 24.

49. *Id.*

50. *Id.*

51. *Id.*

52. Burnam et al., *supra* note 42, at 253.

53. Tanielian et al., *supra* note 6, at 8.

54. Burnam et al., *supra* note 42, at 260.

55. *Id.* at 264.

56. James Dao, *Many Veterans Face Long Wait for Mental Health Evaluations, Report Finds*, N.Y. TIMES AT WAR BLOG (Apr. 23, 2012, 5:37 PM), <http://atwar.blogs.nytimes.com/2012/04/23/veterans-face-longer-wait-for-mental-health-evaluations-report-finds/>.

57. *Id.*

clinicians; although it has expanded its staff greatly, the department has been unable to keep up with increasing demand.⁵⁸

What happens when veterans who suffer from untreated PTSD or TBI suddenly start engaging in destructive behavior and begin committing crimes? Incarcerating veterans under the traditional criminal court model is one option, but this method fails to treat their underlying mental health issues.⁵⁹ Problem-solving courts, such as drug courts and mental health courts, can help treat veterans who are suffering from mental health issues like PTSD and TBI because veterans have special needs that deserve unique attention. As this Article explores next, VTCs offer a novel form of justice to “punish” veterans who commit certain crimes while addressing their underlying mental health issues. I now turn to why and how VTCs were created.

III. THE FIRST VETERANS TREATMENT COURT

In this Part, I review the first VTC in the country, which is the model VTC for jurisdictions in states around the country. I present the reasons for its creation, and then look to its approach and operation for a holistic analysis of one representative VTC.

A. RATIONALE AND CREATION

Judge Robert T. Russell, Jr.⁶⁰ created the first VTC in Buffalo, New York,⁶¹ and his court serves as a model for VTCs around the country.⁶² The mission of his court is to “successfully habilitate veterans by diverting them from the traditional criminal justice system and providing them with the tools they need in order to lead a productive and law-abiding lifestyle.”⁶³ Judge Russell cited two main reasons for creating a special court for

58. *Id.*

59. See GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 8 (2005) (arguing that drug courts treat offenders’ underlying addiction issues as an alternative to incarceration).

60. *Russell Bio*, BUFFALO VETERANS TREATMENT CT., <http://www.buffaloveteranscourt.org/content/judge-russell-bio> (last visited Aug. 26, 2013) (explaining that Judge Russell serves as an Associate Judge for Buffalo City Court, created the first Veterans Treatment Court in the nation in January of 2008, and previously established other problem-solving courts in Buffalo).

61. U.S. DEP’T OF VETERANS AFFAIRS, *KEEPING VETERANS WITH PTSD OUT OF THE JUSTICE SYSTEM* (2010); Matthew Daneman, *N.Y. Court Gives Veterans a Chance to Straighten Out*, USA TODAY (June 1, 2008), http://usatoday30.usatoday.com/news/nation/2008-06-01-veterans-court_N.htm.

62. *E.g.*, Jessica Stephen, *Area Looks to Establish Veterans Court*, KENOSHA NEWS (July 31, 2012), http://www.kenoshanews.com/news/area_looks_to_establish_veterans_court_413644531.html.

63. *A Proactive Approach*, *supra* note 8, at 364. See also Daneman, *supra* note 61.

veterans rather than placing veterans in traditional mental health and drug courts.⁶⁴ First, he argues that veterans are a niche population.⁶⁵ They have common experiences centered upon their military service, an experience that non-veterans do not share.⁶⁶ Second, this common experience allows for veterans to receive tailored treatment from those who are familiar with military service and its mental ramifications; Judge Russell found that veterans going through local drug treatment and mental health courts responded more favorably to treatment with people who were similarly situated or who had common past experiences.⁶⁷

Judge Russell notes that VTCs are a hybrid of traditional drug courts and mental health courts, as veterans may have drug addiction issues, mental illness, or both at the same time.⁶⁸ Just as drug courts and mental health courts restrict who can enter into those courts, Judge Russell's VTC has certain entry requirements as well. The court accepts only those veterans who: (1) have a clinical diagnosis of a mental-health disease, or substance dependency, or both; and (2) have committed a non-violent felony or misdemeanor crime.⁶⁹ Evidence-based screening and assessments identify eligible veterans, and veterans' participation in the VTC is voluntary.⁷⁰ Veterans must enter a guilty plea before entering the court.⁷¹

The VTC in Buffalo, along with other VTCs around the country, has adopted and modified tenets of the ten key components recommended by the U.S. Department of Justice for jurisdictions establishing drug courts and mental health courts.⁷² These components are guidelines for establishing and structuring VTCs.⁷³ The components cover several categories. Some components focus on veterans' entry into a VTC. For example, eligible participants are to be identified early and promptly for

64. *Id.* at 363.

65. *Id.* See also Daneman, *supra* note 61.

66. *A Proactive Approach*, *supra* note 8, at 363.

67. *Id.* at 363–64.

68. *Id.* at 365.

69. *Developing*, *supra* note 26, at 2.

70. *A Proactive Approach*, *supra* note 8, at 368.

71. Nicholas Riccardi, *These Courts Give Wayward Veterans a Chance*, L.A. TIMES (March 10, 2009), <http://articles.latimes.com/2009/mar/10/nation/na-veterans-court10>.

72. *A Proactive Approach*, *supra* note 8, at 364–65. Justice for Vets, a national non-profit and non-partisan organization that advocates for VTCs and provides resources for various jurisdictions to set up their own VTCs, recommends that courts use the components described by the Buffalo Veterans Treatment Court as guiding principles. See JUSTICE FOR VETS, THE TEN KEY COMPONENTS OF VETERANS TREATMENT COURT, available at <http://www.ndcrc.org/content/10-key-components-veterans-treatment-courts> (last visited Sept. 6, 2013).

73. *A Proactive Approach*, *supra* note 8, at 365.

placement into a VTC.⁷⁴ Judge Russell writes that although an arrest can traumatize an individual, it may also create a crisis in the person's life and can help him or her recognize the need for treatment.⁷⁵ In addition, the components advocate a non-adversarial approach, in which prosecution and defense counsel continue to promote public safety while protecting defendants' due process rights.⁷⁶ Once a veteran enters the treatment program, the prosecutor and defense counsel step out of their traditional adversarial relationship and work as a team to develop treatment for a veteran defendant, focusing on his or her recovery and law-abiding behavior rather than the case's merits.⁷⁷

Other components center on the treatment provided in VTCs, which should integrate alcohol treatment, drug treatment, and mental health services with justice system case processing.⁷⁸ Judge Russell writes that a VTC should promote sobriety, recovery, and stability through the treatment that it offers veteran defendants.⁷⁹ Moreover, Judge Russell suggests that this treatment should be coordinated amongst the court, community partners, the Veteran Administration Health Care Network, veterans' organizations, and veteran volunteer mentors.⁸⁰ As such, Judge Russell's VTC provides access to a continuum of alcohol, drug, mental health, and other related treatment and rehabilitation services.⁸¹ In addition to addressing substance abuse and mental illness, the VTC team also considers primary medical problems, other diseases, homelessness, unemployment, family issues such as domestic violence, and any other effects of trauma.⁸²

Yet another set of components considers the treatment plan enforcement for veteran defendants. Frequent alcohol and drug testing is used to monitor defendants' abstinence; this allows the court to establish an accountability framework and gauge each defendant's progress.⁸³ VTCs should measure veteran defendants' progress by their compliance with treatment plans and should have a coordinated strategy to reward

74. *Id.*

75. JUSTICE FOR VETS, *supra* note 72.

76. *A Proactive Approach*, *supra* note 8, at 365.

77. *Id.*; JUSTICE FOR VETS, *supra* note 72.

78. *A Proactive Approach*, *supra* note 8, at 365.

79. *Id.*

80. *Id.*; JUSTICE FOR VETS, *supra* note 72.

81. *A Proactive Approach*, *supra* note 8, at 366.

82. *Id.*; JUSTICE FOR VETS, *supra* note 72.

83. *A Proactive Approach*, *supra* note 8, at 366.

compliance and respond to noncompliance through graduated penalties.⁸⁴ The judges are the leaders of the team and maintain ongoing contact with each participant because an active and supervising relationship throughout the treatment will increase the likelihood that a veteran will remain on track and become a sober and law-abiding citizen.⁸⁵

The final set allows for monitoring systems and evaluations to measure the program's successes and to gauge the treatment's effectiveness.⁸⁶ In addition, continuing interdisciplinary education promotes effective VTC planning, implementation, and operations.⁸⁷ Finally, partnerships between the VTCs, the Veterans Administration, public agencies, and community-based organizations generate local support and enhance VTC effectiveness.⁸⁸ This community coalition helps to ensure that veteran defendants receive a variety of services and informs the community of a VTC's existence.⁸⁹

Judge Russell argues that VTCs, a type of treatment court, provide many additional benefits. The rehabilitative approach of VTCs makes veterans accountable for their lives and promotes positive behavior modifications.⁹⁰ VTCs, like drug courts or mental health courts, help veterans to become productive members of society again, and evidence shows that they are less likely to return to crime or drug use.⁹¹ These specialized treatment courts have saved taxpayers millions upon millions of dollars annually and allow states to save on incarceration costs as well.⁹²

B. APPROACH

The VTC in Buffalo uses a coordinated approach to treat veterans;⁹³ it not only tries to secure mental health treatment, but also, depending on the particular veteran, attempts to assist with housing, meals, physical health care, job training, job placement, and personal development and empowerment.⁹⁴ The court uses a community-based approach in providing

84. *Id.*; JUSTICE FOR VETS, *supra* note 72.

85. *A Proactive Approach*, *supra* note 8, at 366; JUSTICE FOR VETS, *supra* note 72.

86. *A Proactive Approach*, *supra* note 8, at 367.

87. *Id.*

88. *Id.*

89. JUSTICE FOR VETS, *supra* note 72.

90. *A Proactive Approach*, *supra* note 8, at 370.

91. *Id.* at 370–71.

92. *Id.* at 371.

93. *Id.* at 368.

94. *Id.*

treatment.⁹⁵ Partners include the Veterans Administration Health Network, the Veterans Benefits Administration, the Western New York Veterans Project, volunteer veteran mentors, and other community healthcare providers.⁹⁶ The partnership between the court and these various community actors is vital to the court's success and to providing treatment to veterans.⁹⁷

The court also places a high level of value on personal accountability.⁹⁸ Veterans in the court system are allowed to remain in the community and must attend regular status hearings, participate in developing their treatment plans, and engage with community groups.⁹⁹ In helping to develop their own treatment plans, veterans must try to identify triggers that can cause them to revert to negative behaviors and then use this knowledge to make positive lifestyle choices, including deciding which people and activities are conducive to those choices.¹⁰⁰ Family involvement is essential as well, as family can provide support and motivation for the veterans to stick with their treatment programs.¹⁰¹

Veterans "graduate" from the court when they complete their treatment program.¹⁰² Those veterans who complete the program are substance-free and dealing with their mental health issues.¹⁰³ They also have a place to live, solid employment, or access to continuing education.¹⁰⁴ Finally, they have repaired relationships with the families and friends whom they may have damaged through their substance abuse or mental health problems.¹⁰⁵

IV. THE NEED FOR A LEGISLATIVE MANDATE

Although states take different approaches to instituting lower courts such as VTCs,¹⁰⁶ these courts should operate under a comprehensive

95. *Id.*

96. *Id.* at 368–69.

97. *Id.* at 369.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 370.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Compare* TEX. CONST. art. V, § 1 ("The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and orgin[in]ation thereof, and may conform the jurisdiction of the district and other inferior courts thereto."), *with* ILL. CONST. art. VI (refraining from

legislative mandate so that they can maintain democratic legitimacy and respect the separation of powers doctrine. In most states, state judiciaries have broad discretion to create specialized dockets and courts at the trial level.¹⁰⁷ Under this authority, state judiciaries have created numerous problem-solving courts such as VTCs.¹⁰⁸ As this Part illustrates, judges have an immense amount of power to establish VTCs, set their parameters, and determine the rules and guidelines under which they operate. To counter this excessive discretion, states should enact VTC legislation. However, this legislative mandate should not *require* creation of these courts, but rather provide the opportunity to interested communities and judges.

A. WHY A LEGISLATIVE MANDATE?

The legislature's establishment of VTCs is necessary because it lends an element of democratic legitimacy to the court's functions through political accountability.¹⁰⁹

When a state constitution requires legislative authorization for the creation of new courts,¹¹⁰ robust legislation can allow the legislature to set out basic guidelines and procedures for the courts, ensuring consistency among various VTCs so that defendants have similar experiences in different jurisdictions within the state. Even in those states with constitutions that do not require legislative authorization for the creation of new courts,¹¹¹ the legislation achieves the same effect. Moreover, legislation allows for the legitimization of systematic change.¹¹² By creating problem-solving courts, such as VTCs, states are reengineering

granting the judiciary the power to create inferior courts or treatment courts), and Tenn. CONST. art. VI, § 1 ("The judicial power of this state shall be vested in one Supreme Court and in such Circuit, Chancery and other Inferior Courts as the Legislature shall from time to time, ordain and establish; and in the judges thereof, and in justices of the peace.").

107. See, e.g., ILL. CONST. art. VI.; TENN. CONST. art. VI.

108. See BERMAN & FEINBLATT, *supra* note 59, at 7–8.

109. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1501 (2004). The concern with judicial accountability stems from the fact that some judges are insulated from the electoral process, suggesting that these judges have a lesser degree of accountability. *Id.* Even in those states in which judges are elected, elected judges often serve a much shorter term than legislators so they likewise also have a lesser degree of accountability. See *id.*

110. E.g. COLO. CONST. art. VI.; TEX. CONST. art. V.

111. See, e.g., ILL. CONST. art. VI.

112. MODEL STATE DRUG COURT LEGISLATION COMM., MODEL STATE DRUG COURT LEGISLATION: MODEL DRUG OFFENDER ACCOUNTABILITY AND TREATMENT ACT 19 (2004).

their justice systems to protect victims, communities, and defendants, and legislation allows states to formalize this evolution of the courts.¹¹³

A legislative mandate also helps ensure a separation of powers between the legislative and judicial branches. When judicial authority to create state courts is based on powers granted to the judiciary by the state constitution, a legislative mandate describing those courts establishes appropriate parameters for the exercise of judicial power; if a legislative mandate does not define the creation of the court, then the court is “responsible for both the enactment and enforcement of the governing rules and procedures.”¹¹⁴ Such a dual role threatens the separation of powers inherent in the structure of our government, which requires discrete lawmaking power in the legislative branch and enforcement power in the executive branch.¹¹⁵ Constitutional issues arise when judges act in roles traditionally associated with the executive or legislature.¹¹⁶ Finally, when legislatures set the basic parameters for a VTC, it can ensure proper checks and balances, which may take the form of timely legislative evaluation of the courts’ effectiveness.

A legislative mandate can also ensure separation of powers between all three branches of government and remind judges of the need for judicial restraint. This reminder is particularly vital given that problem-solving court judges have exceeded their delegated authority in the past. *Alexander v. State*, a state case from Oklahoma, is illustrative.¹¹⁷ In this case, the defendant entered into a drug court after pleading guilty to drug possession charges.¹¹⁸ The trial court removed the defendant from drug court due to his failure to cooperate with drug court staff, his failure of drug tests, and a multitude of other factors.¹¹⁹ He appealed on many grounds, including a charge that the court violated his due process rights by allowing the drug court judge to also serve as a judge in the trial court that decided his removal from the program, as well as a claim that the judge was not an impartial adjudicator in the second trial, thereby violating the defendant’s right to a fair and impartial trial.¹²⁰ While the appeals court upheld the

113. AM. BAR ASS’N COALITION FOR JUSTICE COMM. ON STATE JUSTICE INITIATIVES, REPORT TO THE HOUSE OF DELEGATES 3 (2001).

114. Casey, *supra* note 109, at 1502.

115. *Id.*

116. *Id.* at 1492.

117. *Alexander v. State*, 48 P.3d 110, 111 (Okla. Crim. App. 2002).

118. *Id.*

119. *Id.* at 112.

120. *Id.* at 111.

defendant's removal from drug court, it also acknowledged that the judge became a part of the defendant's treatment team by virtue of his sitting on the drug court, and it issued the following rule:

In the future, if an application to terminate a Drug Court participant is filed, and the defendant objects to the Drug Court team judge hearing the matter by filing a Motion to Recuse, the defendant's application for recusal should be granted and the motion to remove the defendant from the Drug Court program should be assigned to another judge for resolution.¹²¹

In his concurring opinion, Judge Lumpkin further justified this rule. He argued that the judge violated the separation of powers doctrine by serving both as a member of the drug court treatment team (performing an executive function) and presiding over the court handling the defendant's termination (performing a judicial function).¹²² He stated that judges should be independent adjudicators, and they have historically lacked the authority to perform such functions as promulgating rules for the drug court, supervising the treatment programs, and enforcing and adjudicating violations of those rules.¹²³ By doing so, a judge became part of an executive, judicial, and legislative triumvirate.¹²⁴ Judge Lumpkin argued that, as a result of the judge's overreach of power, the defendant was denied his due process guarantee of a hearing before an objective, uninterested, and impartial judge.¹²⁵ Judge Lumpkin found that the judge's dual role as treatment officer and probation officer was a violation of separation of powers.¹²⁶ Legislation could have outlined a streamlined procedure for these processes. Similar to drug courts, VTCs should operate with a legislative mandate to avoid the problems this case presents.

Simply put, legislation for the court in *Alexander* could have prevented this due process violation by prohibiting a drug court judge from also sitting as a trial court judge rendering decisions regarding a defendant's participation in the drug court program. The court noted that the Oklahoma Drug Court Act on its face did not prevent a drug court judge from making decisions regarding a defendant's termination from the drug court program,¹²⁷ but more detailed legislation could have assured that the drug court judiciary did not assume both executive and judicial

121. *Id.* at 115.

122. *Id.* (Lumpkin, J., concurring).

123. *Id.* at 115–16.

124. *Id.* at 116.

125. *Id.*

126. *Id.*

127. *Id.* at 113.

functions. Legislation could have also anticipated the lack of self-monitoring by the judiciary to wield too much power. This case shows an example of where detailed legislation could have constrained judicial overreaching.

In the next Subsection, this Article evaluates how states around the country have established their VTCs, either through legislative mandate, no mandate at all, or some other form of authorization.

B. VTCs IN DIFFERENT STATES

In analyzing states' creation of VTCs, I have categorized the states into three different groups. The first group consists of states with robust legislation where the legislature is the implementing body with strong oversight of the VTCs' creation and operation. In this group, the legislature has authorized the judiciary to create courts while establishing certain base guidelines and rules. The second group includes states where legislatures have not authorized the VTCs, and the courts have been created by the judiciary. The third group consists of states where the legislature has not authorized the creation of VTCs but has provided mental health treatment as an alternative to incarceration.

1. Legislatively Authorized Courts

The legislatures of the following states have authorized the establishment of VTCs, although the states differ in the specificity with which they outline the provisions that the judiciary should follow when creating and operating VTCs.

a. Colorado

In Colorado, the legislature authorized the creation of VTCs with a basic, "bare bones" bill.¹²⁸ The bill states that "the chief judge of a judicial district may establish an appropriate program for the treatment of veterans and members of the military."¹²⁹ The bill contains no other provisions regarding the rules for the operation of the court, the criteria for admission to the court, or the involvement of other branches of government for a check on judicial power.¹³⁰ While legislation enables VTC creation, it does nothing further, therefore blurring the line between rulemaking and

128. H.R. 10-1104, 67th Gen. Assemb., Reg. Sess. (Colo. 2010) (enacted).

129. *Id.*

130. *See id.*

enforcement. Judges would appear to have an immense amount of power to create VTCs and run them according to their own rules.

Colorado has two VTCs and they appear to be similar to other VTCs around the country.¹³¹ Veterans who have committed felonies other than sex offenses or serious assaults can be admitted to the court.¹³² The district attorney's office for the local judicial district in charge of the courts operates as a gatekeeper to determine which veterans are accepted by the court.¹³³ The courts have partnered with local agencies to provide treatment to veterans, including drug and alcohol treatment, mental health counseling, and assistance with jobs and housing.¹³⁴ Besides the initial authorization for the creation of the court, the Colorado legislature has apparently not set up any rules for the court or its operation.

This lack of a detailed mandate presents dangers for the VTCs regarding their democratic legitimacy and their supervision by coordinate branches of government. The judges overseeing the VTCs have wide discretion in implementing the courts' requirements, policies, and procedures. While it can be assumed that judges will not abuse their discretion, a clearer legislative mandate would have provided a basis of legitimacy for the courts. The judges presiding over the VTCs in Colorado are likely to run them appropriately and the courts promise to be successful; however, a more detailed legislative mandate could have provided basic guidelines and limitations on the judges' power, preventing even the possibility of a repetition of the situation in *Alexander v. State*.

b. Michigan

Michigan's legislature authorized the creation of VTCs in the state.¹³⁵ The VTCs have a clear legislative mandate for their existence and operation. First, the legislation grants authority to circuit courts and district courts in the state to create VTCs in their respective districts only after they enter into a memorandum of understanding with every participating prosecuting attorney in the district, a criminal defense bar representative,

131. *Press Release*, Colorado Judicial Branch, 18th Judicial District Opens Veterans Treatment Court (Apr. 12, 2013), http://www.courts.state.co.us/Media/Press_Docs/JD18%20VTC%20-%20FINAL.pdf.

132. Lance Benzel, *Veterans Court Reclaims Those Struggling with War Trauma*, GAZETTE (Oct. 27, 2011), <http://www.gazette.com/articles/trauma-127445-veterans-court.html>; *Press Release*, *supra* note 131.

133. Benzel, *supra* note 132; *Press Release*, *supra* note 131.

134. Benzel, *supra* note 132; *Press Release*, *supra* note 131.

135. H.R. 5162, 96th Leg., Reg. Sess. (Mich. 2012) (enacted).

community treatment provider representatives, veteran service organizations representatives, federal Department of Veterans Affairs representatives, and any other necessary representatives.¹³⁶ Second, the VTCs must comply with the ten key components promulgated by the Buffalo VTC.¹³⁷ Third, the legislation outlines procedures for VTCs to hire or contract with treatment providers in an effort to supply defendants with appropriate care.¹³⁸ Fourth, it creates criteria for admission into the VTCs: (1) defendants must be veterans; (2) defendants must be dependent on drugs or alcohol or suffer from a mental illness; (3) defendants must understand the requirements of the VTC and agree to comply with those requirements and court orders; (4) defendants must not pose an unwarranted or substantial risk to public safety; (5) defendants must not be violent offenders; (6) defendants must undergo a screening and evaluation prior to admission; (7) defendants must have criminal proceedings against them under certain sections of the public health code, code of criminal procedure, and Michigan penal code; (8) defendants' crimes must be related to their military service; (9) defendants must enter into a guilty plea before entering into the VTC; and (10) defendants must waive the right to a speedy trial, the right to an attorney's representation at VTC review hearings, and the right to a preliminary examination.¹³⁹

Next, the legislation also imposes other standards on VTCs. VTCs have a certain time limit under which they must work through a defendant's treatment.¹⁴⁰ VTCs have to provide certain services to defendants under their jurisdiction including close monitoring, mentorships with other veterans, regular testing for controlled substances or alcohol, evaluation assessments of the defendants' progress, certain rewards for compliance and sanctions for noncompliance, substance abuse treatment, educational opportunities, and job search opportunities.¹⁴¹ VTCs must follow certain procedures when defendants complete treatment, such as clearing criminal charges.¹⁴² If defendants fail to complete the required treatment, VTCs may remove them from the court, enter an adjudication of guilt, and sentence the defendants.¹⁴³

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

Finally, the legislation allows for checks and balances on the power of the VTCs. The act mandates that the state drug treatment court advisory committee will monitor VTCs and make annual recommendations to the legislature and state supreme court for any statutory changes.¹⁴⁴ The legislature created the state drug treatment court advisory committee under Section 1082.¹⁴⁵ The committee operates under the legislative council's control and has numerous members, including the state court administrator, various judges, attorneys, law enforcement officials, treatment providers, and individuals who have gone through drug courts.¹⁴⁶ Other than the state court administrator, the Speaker of the House of Representatives and the Senate Majority Leader appoint the remaining members.¹⁴⁷

The legislation's depth spells out clear roles for the VTCs and what the judges can or cannot do while presiding over them. By outlining governing rules and procedures for VTCs, the legislature has provided a clear and healthy mandate for the courts and their operation. Additionally, the state drug treatment court advisory committee's oversight of VTCs protects the courts by providing an effective supervisory checks-and-balance system that ensures the separation of powers between the judicial and legislative branches of Michigan's government.

c. Illinois

In Illinois, the legislature passed an act in 2010 that provides authorization for VTCs.¹⁴⁸ The Illinois General Assembly intended the legislation to create VTCs with the "necessary flexibility to meet the specialized problems" that veterans face.¹⁴⁹ The act authorizes judicial circuits' Chief Judges to establish courts in their respective circuits.¹⁵⁰ Judges may decide to set up a separate VTC or create a docket as a part of

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. H.R. 5214, 96th Gen. Assemb., Reg. Sess. (Ill. 2010) (enacted) ("It is the intent of the General Assembly to create specialized veteran and servicemember courts or programs with the necessary flexibility to meet the specialized problems faced by these veteran and servicemember defendants."); Chastity Johnson, *Gov Quinn Signs Bill to Create Veterans and Servicemembers Court*, ALEDO TIMES RECORD (June 25, 2010), <http://www.aledotimesrecord.com/article/20100625/NEWS/306259873>

149. H.R. 5214, 96th Gen. Assemb., Reg. Sess. (Ill. 2010). *See also* Johnson, *supra* note 148.

150. H.R. 5214, 96th Gen. Assemb., Reg. Sess. (Ill. 2010). *See also* Johnson, *supra* note 148.

an existing problem-solving court (such as a mental health or drug court).¹⁵¹

The act also spells out various other requirements for VTCs in the state. First, it lists eligibility requirements for entry into the court: defendants must be veterans or service members and can only enter the court voluntarily and with the consent of both the prosecutor and the judge.¹⁵² Defendants may not enter the court if they have committed murder, certain types of sexual assault, arson, or other violent crimes.¹⁵³ Second, the act establishes basic procedural rules for the courts.¹⁵⁴ Defendants must submit to an eligibility screening and assessment through the federal or state Department of Veterans Affairs to validate their veteran or service member statuses.¹⁵⁵ Defendants must also submit to mental health, drug, and alcohol screenings and assessments, which will include treatment recommendations.¹⁵⁶ In addition, defendants must sign a written agreement to participate in the VTC and abide by the program terms and conditions.¹⁵⁷ The judge in each court must inform defendants that if they fail to comply with the program requirements, the judge may discontinue their participation in the program and sentence the defendants or allow for prosecution of the charged crimes to continue.¹⁵⁸ Defendants may be disqualified from participation in the program for any of the following reasons: (1) the defendants are not performing satisfactorily; (2) the treatment plan is not benefitting the defendants; (3) the defendants have committed criminal conduct while enrolled in treatment programs; and (4) the defendants violate the terms and conditions of the program or their sentences, or are otherwise unable to participate in the program.¹⁵⁹

Third, the act demands that courts select treatment providers with certain specified characteristics.¹⁶⁰ A VTC has the ability to establish partnerships with substance abuse treatment programs including those affiliated with the federal or state Department of Veterans Affairs, the State of Illinois, and other community-based programs that the State or

151. H.R. 5214, 96th Gen. Assemb., Reg. Sess. (Ill. 2010).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

Department of Veterans Affairs sanctions or sponsors.¹⁶¹ A court also has the discretion to use additional services or interventions based on individual cases.¹⁶² Finally, a VTC may set up or collaborate with a network of mental health treatment programs.¹⁶³

Illinois's mandate, while not as detailed as Michigan's legislation, still provides basic requirements for entry into the court, certain policies related to treatment, and procedural rules. For example, the judge has strict parameters for certain procedures, such as termination of defendants from VTCs. The judge, nevertheless, has an immense amount of power to develop procedural rules for an individual VTC, perhaps because judges are in the best position to determine how to run their own courtrooms. However, the legislation lacks information on proposed treatment term limits or specific treatment plan recommendations. Also missing from the legislation is a check on VTCs' power—the legislature leaves its expansion and much of its operations completely in the judiciary's hands. Illinois's legislation offers a basic and rudimentary authorization of VTCs in the state, but not much else. A more robust legislative mandate would have provided more detailed requirements, policies, and procedures and would have lent the courts additional democratic legitimacy.

d. Texas

The Texas Legislature passed a bill in 2009 authorizing the creation of VTCs in the state.¹⁶⁴ As opposed to the states discussed above, Texas grants power to county court commissioners to establish VTCs.¹⁶⁵ It also mandates certain rules. First, it spells out requirements for participation in the VTC: (1) defendants must consent to their participation in the VTC; (2) defendants must be veterans or current members of the armed forces; (3) defendants must suffer from brain injuries, mental illnesses, or mental disorders (including PTSD) that resulted from their military service in combat or similarly hazardous areas and that materially affected their criminal conduct;¹⁶⁶ (4) defendants must have been arrested for or charged with any misdemeanor or felony offense; and (5) the State Attorney must

161. *Id.*

162. *Id.*

163. *Id.*

164. S. 1940, 81st Leg., Reg. Sess. (Tex. 2009); Judy L. Marchman, *Veterans Courts in Texas*, 75 No. 8 TEX. BAR J. 616, 616 (2012).

165. S. 1940, 81st Leg., Reg. Sess. (Tex. 2009).

166. *Id.*

consent to the defendants' participation in the VTC.¹⁶⁷ Second, the bill outlines several characteristics that each VTC must possess: requiring the court to monitor treatment programs for participants; maintaining access to alcohol, substance, and mental health treatment and rehabilitative services; and evaluating the VTC's effectiveness.¹⁶⁸ Third, the legislation allows a local VTC to "make, establish, and publish" procedures to ensure that the maximum number of eligible defendants can participate.¹⁶⁹ Hence, this legislation authorizes the creation of VTCs and creates basic rules for the courts. Additionally, by granting procedural rule-making power to the VTCs themselves, the legislation acknowledges that courts and judges are in the best position to set procedures for a specific court depending on its particular circumstances.¹⁷⁰

The 2009 Texas bill also placed a check on a VTC's independent power by ensuring that it is accountable to the executive and legislative branches. First, the Lieutenant Governor and Speaker of the House of Representatives had the ability to place oversight of the VTCs into the hands of legislative committees.¹⁷¹ Second, the criminal justice division of the Governor's Office must have received notice when or before a county established a VTC and may have request information on the performance of a specific VTC.¹⁷²

In 2013, the Texas legislature passed a bill encompassing all specialty courts, including VTCs.¹⁷³ This bill amended the legislative and executive oversight of all specialty courts in the state.¹⁷⁴ The Lieutenant Governor and Speaker of the House of Representatives still have the ability to hand oversight of the VTCs to legislative committees.¹⁷⁵ The bill expanded what information a county must provide to the criminal justice division of the Governor's Office before a county creates a VTC: written notice of the court, any official declaration under which the court is established, and a copy of any sort of community justice plan that contains information

167. Marchman, *supra* note 164, at 617.

168. S. 1940, 81st Leg., Reg. Sess. (Tex. 2009).

169. *Id.*

170. *See id.*

171. *Id.*

172. *Id.*

173. S. 462, 83rd Leg. Reg. Sess. (Tex. 2013).

174. *Id.*

175. *Id.*

related to the court's supervision.¹⁷⁶ Further, the VTC must then receive written confirmation of its compliance with those conditions.¹⁷⁷

This 2013 bill also expanded oversight of the courts. It gives the Governor authority to establish a Specialty Courts Advisory Council within the state's criminal justice division to make recommendations regarding best practices for all specialty courts.¹⁷⁸ The council is composed of judges or former judges from each type of specialty court in the state and five members representing the public.¹⁷⁹

These oversight provisions from both bills guarantee that a judge will not make great leaps of power in running the VTC.¹⁸⁰ Both the legislature and the executive can rein in a court and that court's judge if they become too unwieldy.

2. Judiciary-Created Courts

In other states, judiciaries have created VTCs on their own with no authorizing legislation. In these states, judges structured VTCs using their power to create specialized courts and programs.

a. Kentucky

Kentucky presents a unique situation for setting up a VTC in the state. Its legislature did not pass any laws or acts authorizing VTC creation. Instead, judicial officials went through a series of steps to establish the first VTC in the state.

Initially, the Supreme Court of Kentucky issued an order to establish a commission called the Kentucky Access to Justice Commission.¹⁸¹ The Supreme Court justified the creation of the Commission using Section 110 of the Kentucky Constitution, which grants the Chief Justice the power to perform necessary administrative functions for state courts.¹⁸² Voting members of the Commission include a large number of judges, the Governor of Kentucky or an appointed representative, the Speaker of the House of Representatives or another member of the House appointed by the

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *See* S. 1940, 81st Leg., Reg. Sess. (Tex. 2009).

181. Order Establishment of Kentucky Access to Justice Commission (Oct. 14, 2010), *available at* http://courts.ky.gov/commissionscommittees/KAJC/Documents/AccessstoJustice_SupremeCourtOrder.pdf.

182. *Id. Accord* KY. CONST. § 110.

Speaker, the President of the Senate or another member of the Senate appointed by the Senate President, and many other Kentucky State representatives.¹⁸³ The Commission was responsible for identifying the legal needs of low-income citizens and creating a plan and strategy to deliver those services.¹⁸⁴ Every year, the Commission has to submit a written summary report to the Supreme Court for its review.¹⁸⁵

Second, the Commission's research and report of the large number of veterans in Kentucky and their need for more legal assistance led to a response by the Administrative Office of the Courts to create the first state VTC in Jefferson County.¹⁸⁶ The Administrative Office is the primary administrator of the state court system in Kentucky.¹⁸⁷ It collaborated with several state agencies, including the Office of the Jefferson County Attorney, the Robley Rex Veterans Administration Medical Center, Jefferson County Drug Court, Seven Counties Services, and Morehead State University, a local university.¹⁸⁸

The VTC, established in November of 2012, provides services similar to those offered in other VTCs around the country.¹⁸⁹ Defendants receive treatment, community integration, and other services.¹⁹⁰ In operating the court, the Administrative Office of the Courts will use the Department of Justice's ten key components of a VTC.¹⁹¹ The VTC's goal is to assist veterans entering the criminal justice system in gaining mental health stability and recovering from addictions.¹⁹²

As stated above, no legislative act authorized the creation of the VTC in Kentucky. While members of the Kentucky Senate and House of Representatives were members of the Kentucky Access to Justice

183. Establishment of Kentucky Access to Justice Commission, *supra* note 181.

184. *Id.*

185. *Id.*

186. 6th Meeting of the 2012 Interim, Interim Joint Comm. on Judiciary (Ky. Nov. 19, 2012), <http://www.lrc.ky.gov/minutes/judiciar/121119ok.htm>.

187. See *Kentucky Administrative Office of the Courts*, KY. CT. OF J., <http://courts.ky.gov/aoc/Pages/default.aspx> (last visited Dec. 1, 2012).

188. Press Release, Ky. Ct. of J., Jefferson County Veterans Treatment Court is First of its Kind in Kentucky (Nov. 26, 2012), <http://courts.ky.gov/Pages/newsroom.aspx?viewMode=PressRelease&pressReleaseGUID=%7BDB240396-FCC4-4300-81A9-8F7AC4684DA6%7D>.

189. *Id.*

190. *Id.*

191. *Id.* See also *supra* Part III.A.

192. 6th Meeting of the 2012 Interim, Interim Joint Comm. on Judiciary (Ky. Nov. 19, 2012) <http://www.lrc.ky.gov/minutes/judiciar/121119ok.htm>.

Commission, neither chamber passed an act or law to create the VTC.¹⁹³ The VTC opened under the judiciary's authority.¹⁹⁴ The judges behind the VTC possess great power in running the court and in admitting defendants into it. Their discretion appears to be almost limitless in shaping its structure and policies. As with judges in Colorado, Kentucky judges are responsible for both enacting and enforcing governing rules for the VTC.¹⁹⁵ While the VTC serves a vital need in the Kentucky justice system, its establishment does not obviate the fact that judges drove its creation and operation without legislative authorization.

b. Florida

In Florida, while local government action first established VTCs, a legislative mandate soon followed. Under an informal local agreement, Okaloosa County began referring veterans' cases to a special court docket for veterans and veterans' issues in 2010.¹⁹⁶ This was possible because of the cooperation of the local State's Attorney's Office, the court, and local treatment professionals.¹⁹⁷ Defendants can enter the special docket if they are veterans suffering from treatable behavioral, mental, or chemical health problems that are related to trauma they received while in a combat or war zone.¹⁹⁸ The treatment program is anywhere from twelve to eighteen months long, and it promotes sobriety, recovery, restoration, and stability.¹⁹⁹ No legislative act authorized the VTC or docket's creation.²⁰⁰ Rather, local government created the docket under its own authority.²⁰¹

Palm Beach County established a VTC on its own as well. The local circuit's chief judge signed a judicial order establishing the court.²⁰² The

193. See Establishment of Kentucky Access to Justice Commission, *supra* note 181; KY. CONST. § 110.

194. See Establishment of Kentucky Access to Justice Commission, *supra* note 181; KY. CONST. § 110.

195. See Establishment of Kentucky Access to Justice Commission, *supra* note 181; KY. CONST. § 110.

196. COMM. ON MILITARY AFFAIRS AND DOMESTIC SEC., INTERIM REPORT, S. 2011-131, Reg. Sess., at 5 (2010).

197. *Id.*

198. *Okaloosa Veterans' Court Program*, FIRST JUD. CIRCUIT FLORIDA., <http://www.firstjudicialcircuit.org/programs-and-services/veterans-court> (last visited Nov. 22, 2012).

199. *Id.*

200. *Id.*

201. COMM. ON MILITARY AFFAIRS AND DOMESTIC SEC., *supra* note 196, at 5.

202. *The Palm Beach County Veterans Court*, VIETNAM VETERANS AM., <http://vva.org/Committees/VetsIncarcerated/Palm%20Beach%20County%20Veterans%20Court.pdf> (last visited Nov. 22, 2012).

court partnered with various community actors, including the Palm Beach County Commission, the Sheriff's Department, the Department of Corrections Probation, the local State Attorney's Office, the Office of Public Defenders, and the federal Department of Veterans Affairs' local hospital.²⁰³ Veterans go through an initial intake assessment and then are placed on the docket for the VTC.²⁰⁴ The VTC uses a Veterans Justice Outreach Specialist and judicial monitoring to manage the cases.²⁰⁵ Again, no legislative act mandated the VTC's creation. The judiciary used its own power to create the court and, presumably, its governing rules and procedures.²⁰⁶

In March of 2012, after local judiciaries created these two VTCs, the Florida Legislature passed a bill authorizing VTCs across the state.²⁰⁷ The legislation allows the chief judge of each circuit to establish a Military Veterans and Servicemembers Court Program, or in other words, a VTC, and spells out requirements for them.²⁰⁸ First, entrance requirements for the courts include the following: (1) the defendant must be a veteran or service member; (2) the defendant must suffer from a military service-related mental illness, TBI, substance abuse disorder, or other psychological problem; and (3) the defendant must be charged with a criminal offense.²⁰⁹ Second, the courts must follow the Department of Justice's ten key components for VTCs, mentioned above, and use a coordinated strategy to treat the defendants.²¹⁰ Third, defendants must agree to enter the court program after the court presents a strategy to them in writing.²¹¹ Fourth, after completion of the program, courts may dismiss criminal charges that the defendant faces.²¹² Fifth, the courts may impose sanctions upon defendants who do not comply with the program rules, including placing

203. *Id.*

204. *Veterans Treatment Court*, WEST PALM BEACH VA. MED. CENTER, <http://www.westpalmbeach.va.gov/WESTPALMBEACH/features/VeteransJusticeOutreach.asp> (last updated July 13, 2011).

205. *Id.*

206. *The Palm Beach County Veterans Court*, *supra* note 202.

207. S. 922, 2012 Leg., Reg. Sess. (Fla. 2012). *See also* Bobbie O'Brien, *Florida Lawmakers Authorize Veterans Treatment Court*, WUSF (Mar. 14, 2012), http://www.wusf.usf.edu/news/2012/03/14/florida_lawmakers_authorize_veterans_courts; *Governor Scott Signs 2012 Legislation to Honor Florida's Veterans*, FLA. DEP'T OF VETERANS' AFFAIRS (June 27, 2012), <http://floridavets.org/?p=340>.

208. S. 922, 2012 Leg., Reg. Sess. (Fla. 2012).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

defendants into a standard treatment program, a jail-based treatment program, or a standard jail facility.²¹³ Here, Florida has issued a clear legislative mandate for VTCs in the state.²¹⁴ While judges have the power to create the VTC, their power to do so now derives from a legislative act.²¹⁵ The earlier iterations of VTCs in Florida provided valuable services to our veterans, but they improperly expanded judicial power and discretion that the state legislature had not authorized. In relying on their own authority to create these VTCs, the judiciary did not give credence to the separation of powers and thereby lacked democratic legitimacy.

c. Wisconsin

In Wisconsin, the judiciary led the effort to create VTCs, but used other partners in the process.²¹⁶ In June 2009, the state court system co-sponsored a conference to develop VTCs.²¹⁷ Partners who co-sponsored the conference included the State Public Defender, the Department of Corrections, the Department of Justice, the Veterans Administration, and the federal Department of Veterans Affairs.²¹⁸ Judges, as well as public defenders, prosecutors, and treatment providers attended the conference.²¹⁹ After the conference, counties around the state developed their own programs.²²⁰ For the most part, judges created the VTCs on their own after consulting with various partners, including local defense attorneys, the Wisconsin Department of Veterans Affairs, and local treatment providers.²²¹ In other counties, no evidence exists suggesting that the judiciary consulted with community partners.²²² Requirements for entry into the courts differ around the state. In the Northeast Wisconsin VTC, only veterans who have committed a qualifying felony or misdemeanor offense and have pled guilty may enter the court.²²³ In the Milwaukee

213. *Id.*

214. *Id.*

215. *Id.*

216. *For Veterans*, WISCONSIN CT. SYS. (Jan. 7, 2013), <http://www.wicourts.gov/services/veteran/index.htm>.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*; Ted Sullivan, *Rock County Veterans Treatment Court First in the State*, GAZETTEEXTRA (Sept. 20, 2009), <http://gazetteextra.com/news/2009/sep/20/rock-county-veterans-treatment-court-first-state/>; LaToya Dennis, *Veterans Treatment Court Aims to Keep Vets Out of Criminal Justice System*, WUWM MILWAUKEE PUBLIC RADIO (Dec. 6, 2012), http://www.wuwm.com/news/wuwm_news.php?articleid=11562.

221. *For Veterans*, *supra* note 216.

222. *Id.*

223. *Id.*

VTC, veterans who have committed non-violent crimes and pled guilty may enter the court.²²⁴

Regardless of the structure, the state legislature did not pass a law authorizing the VTCs' creation.²²⁵ As of today, Wisconsin has eleven VTCs.²²⁶ As discussed above, entry requirements vary. Additionally, courts have different partners depending on where they are located.²²⁷ In the VTC in Outagamie County, the judge pairs the veteran with a mentor who is a veteran from the same branch, while in the Rock County VTC, the judge pairs the veteran with a mentor of similar military background.²²⁸ While these differences do not appear to adversely affect the VTC programs, they evidence a lack of unified procedures for the courts. A legislative mandate may have established basic principles for each of the courts, such as entry requirements, treatment lengths, and appropriate treatment parameters. By creating courts on their own, judges across Wisconsin risk charges of disparate treatment options and due process violations. A legislative mandate would have lent these courts democratic legitimacy and allowed for appropriate deference to the separation of power between the legislative and judicial branches of government.

3. Legislatively Authorized Treatment

Other states have passed legislation that does not authorize the creation of separate courts or dockets, but instead permits judges to order treatment, rather than incarceration, for veterans suffering from mental health issues. This third alternative presents an effective method for dealing with veterans' mental health issues. However, as I shall outline below, it creates the same democratic legitimacy and separation of powers concerns if the judiciary later establishes VTCs on its own.

a. Minnesota

The Minnesota Legislature passed a bill in 2008 that allows judges to order treatment, instead of incarceration, for veterans suffering from mental illnesses.²²⁹ Under the directive of public policy, the bill requires the court

224. Dennis, *supra* note 220.

225. *For Veterans*, *supra* note 216.

226. *Id.* It should be noted that the website lists many county programs but only eleven qualify as VTCs, per my analysis. *See id.*

227. *Id.*

228. *Id.*

229. H.R. 3670, 85th Leg., Reg. Sess. (Minn. 2008). *See also Laws that Protect Veterans and Military Status*, MINN DEP'T OF CIV. RTS., http://mn.gov/mdhr/education/articles/rs10_vetlaws.html (last visited Feb. 25, 2013); Beth Walton, *Minnesota Becomes Second State to Offer Treatment to*

to inquire whether the defendant is a veteran.²³⁰ It then asks the court to confirm that a psychiatrist, clinical psychologist, or physician has diagnosed the defendant with a mental illness.²³¹ Once both of these conditions have been satisfied, the court, when ordering a presentence report, may order the person preparing that report to consult with the U.S. Department of Veterans Affairs, the Minnesota Department of Veterans Affairs, or another person or agency with knowledge of the defendant's mental health to provide potential treatment options.²³² The court may consider these treatment recommendations when imposing its sentence.²³³

This legislation does not establish a VTC, but it does provide a basis for judges to prescribe mental health treatment in place of or in addition to incarceration.²³⁴ By making this option available to judges, the legislature has acknowledged the presence of mental health concerns in soldiers and veterans and has allowed a mental health treatment option for them. The judges now have a legislative mandate to offer treatment, rather than creating this option on their own—a mandate that grants this practice democratic legitimacy. This mandate also respects separation of powers as it complements our societal jurisprudence expectations when dealing with criminals. The public determines punishment by laws its legislature has enacted, and here, the legislature has offered mental health treatment as an appropriate form of punishment.²³⁵

Nevertheless, in 2010, a county and a local judge created the state's first VTC, without a Minnesota law expressly authorizing its creation.²³⁶ The county administration formed a planning committee and, along with the judge and numerous other justice partners, launched this court.²³⁷ While this collaborative committee researched courts around the country before setting up the VTC,²³⁸ it did not have the legal blessing of the state legislature. Thus, while the Minnesota Legislature was innovative in

Veterans who Commit Crimes, CITY PAGES (May 21, 2008), <http://www.citypages.com/2008-05-21/news/minnesota-becomes-second-state-to-offer-treatment-to-veterans-who-commit-crimes/full/>.

230. H.R. 3670, 85th Leg., Reg. Sess. (Minn. 2008).

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* See also *Laws that Protect Veterans and Military Status*, *supra* note 229; Walton, *supra* note 229.

235. See H.R. 3670, 85th Leg., Reg. Sess. (Minn. 2008); *Laws that Protect Veterans and Military Status*, *supra* note 229; Walton, *supra* note 229.

236. HENNEPIN CNTY. VETERANS COURT OVERSIGHT COMM., HENNEPIN COUNTY VETERANS COURT: FIRST YEAR IN REVIEW 9 (2011).

237. *Id.*

238. *Id.*

passing the treatment legislation acknowledging veterans' mental health issues, its lack of authorization echoes the concerns raised above for the judiciaries in Kentucky, Florida, and Wisconsin.

b. New Hampshire

The New Hampshire Legislature passed a bill similar to Minnesota's bill, which allows judges to order treatment instead of incarceration for certain veterans.²³⁹ Rather than creating VTCs, the legislature authorized courts to prescribe treatment in their courtrooms.²⁴⁰ First, the bill alters the state's criminal code relating to presentence investigations.²⁴¹ It adds language indicating that the court must consider a written presentence report for a member or veteran of the armed forces who has been convicted of a felony or misdemeanor.²⁴² The court, the defendant, or the state may waive this requirement.²⁴³

Second, the bill offers a treatment remedy for veterans. It states that when defendants appear in court and are convicted of crimes, the court shall determine whether they serve in the armed forces or are veterans.²⁴⁴ If so, the court must also look to see whether the defendants have been diagnosed with mental illnesses.²⁴⁵ If the defendants have satisfied both of these factors, the court may require the person preparing the presentence report to consult with the U.S. Department of Veterans Affairs, the Adjutant General, the State Veterans Counsel, or another agency or person who has knowledge of potential treatment options for the defendants.²⁴⁶ Finally, the court may consider any proposed treatment recommendations that will diagnose or treat the defendants when imposing its sentences.²⁴⁷

Thus, because the New Hampshire bill authorizes judges to order treatment, instead of incarceration, for veteran defendants with mental health issues, it allows judges to operate with democratic legitimacy.

239. H.R. 295, 162nd Gen. Court, Reg. Sess. (N.H. 2009).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

C. CRITICS OF LEGISLATIVE MANDATES

There are, however, critics of the requirement for a legislative authorization of VTCs. I will argue, nevertheless, that their rationale is not compelling. The Tennessee Administrative Office of the Courts prepared a study on VTCs in 2012 that explored, among other things, the need for a legislative mandate for the courts in the state.²⁴⁸ The report discourages a legislative mandate for several reasons. First, it concludes that legislation establishing a statewide VTC system is unnecessary.²⁴⁹ Rather, it states that a mandate would be detrimental to the development of the courts, arguing that the most effective way of addressing veterans issues would be to allow each judicial district the discretion to deal with these issues after evaluating its resources and population needs.²⁵⁰ Second, because VTCs are in their nascent stages and because courts are still learning the most effective procedures, the report argues that the lack of legislation allows courts to adjust their programs over time.²⁵¹ Third, it cites anecdotal evidence from other VTC judges and staff in the country to suggest that legislation can be too detailed and can constrict the courts' flexibility.²⁵²

These concerns do not undercut the evidence I have presented above. First, judges cannot be allowed unlimited discretion in setting up new courts and programs. While state judicial branches and offices have certain rules for setting up specialty courts and programs, conferring too much discretion on one branch of government presents a dangerous concentration of power. VTCs present a new iteration of the problem-solving court model and, consequently, basic operational rules and procedures must exist. The legislature is in the best position to set forth these rules and procedures as it can offer an appropriate grant of power to the judiciary. By doing so, it lends the judiciary democratic legitimacy and protects separation of powers.

Second, acknowledging that VTCs are in their infancy in this country, courts will need to reevaluate their procedures and rules over time as they determine which ones are effective. However, this does not obviate the need for basic guidelines for courts. A state's legislature can establish basic rules and procedures for the courts and allow a yearly evaluation of any

248. TENN. ADMIN. OFFICE OF THE COURTS, VETERANS TREATMENT COURTS LEGISLATIVE REPORT 3–5 (2012).

249. *Id.* at 3.

250. *Id.*

251. *Id.* at 4.

252. *Id.* at 3.

laws in place. The legislation does not have to generate indelible rules that the legislature cannot later amend or remove. The Michigan bill, discussed above, allows for a court advisory committee to monitor VTCs and make annual recommendations to its legislature and state supreme court for any changes.²⁵³ A state may also place oversight of the VTCs into the hands of a committee or group of state officials that can evaluate the courts after a certain period of time and propose changes. Rather than excluding the judiciary from the process, the committee may include judges or VTC staff members, or may consult judiciary members when proposing changes. As stated above, Texas' bill presents one potential structure for oversight of the VTCs,²⁵⁴ and the Texas legislature could further adopt additional evaluative mechanisms.

Third, legislation does not have to be so detailed as to be entirely inflexible. Legislation may take many forms and may vary in its degree of specificity.²⁵⁵ The Illinois bill, for example, identifies minimal requirements that still offer an effective mandate for VTCs.²⁵⁶ It states eligibility requirements for entry into the courts, sets procedural safeguards (such as requiring defendants to submit to screenings and consent to participation), and lists treatment structure recommendations instead of requirements.²⁵⁷ Even a more detailed piece of legislation, such as the Michigan bill, does not restrict the court's ability to draft its own rules and procedures as it sees fit.²⁵⁸ Different courts will have different needs and requirements based on their locations, communities, and populations. Statewide legislation for VTCs may permit flexibility to account for such different needs and concerns.

VTC legislation may take many forms, and no one piece should be duplicated exactly for jurisdictions around the country. While legislation may provide consistency, it should not be so limiting as to remove the effectiveness of a VTC. Legislation needs to provide certain basic requirements for VTCs, but state legislatures should also be free to supplement that legislation to accommodate their own priorities.

253. H.R. 5159, 96th Leg., Reg. Sess. (Mich. 2012). *See also supra* Part IV.B.1.b.

254. *See generally* S. 1940, 81st Leg., Reg. Sess. (Tex. 2009); *supra* Part IV.B.1.d.

255. *See supra* Part IV.B.1.

256. H.R. 5214, 96th Gen. Assemb., Reg. Sess. (Ill. 2010) (enacted).

257. *Id.*

258. *See* H.R. 5159, 96th Leg. Reg. Sess. (Mich. 2012).

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V. WHAT SHOULD LEGISLATION ESTABLISHING VTCS LOOK LIKE?

No single piece of legislation presents a uniform solution for establishing VTCs in a particular state. Nonetheless, each state's act should contain essential elements providing effective guidelines and structures for jurisdictions to establish their own VTCs. The following section outlines these basic requirements and then illustrates, by evaluating the limited effect of federal legislation for VTCs, that federal legislation does not provide much guidance.

A. MODEL LEGISLATION

A piece of legislation authorizing VTC creation needs to contain a few essential provisions. First, it should require courts to adopt the ten key components that the U.S. Department of Justice has recommended for setting up other problem-solving courts and that the Buffalo VTC has adopted as guiding principles.²⁵⁹ These components offer loose, yet important, theoretical bases for VTCs, such as entry procedures, treatment goals, treatment enforcement and adherence, and other overall procedures.²⁶⁰ While these are not strict rules, they ensure that VTCs remain committed to their problem-solving goals and that these goals always remain at the forefront for treating veterans.

Second, the legislation should list entry requirements for the court. VTCs and other problem-solving courts are based on targeting a segment of the population that has particular needs. Here, VTCs should restrict entry to soldiers and veterans who experienced a history of combat, exhibited signs of mental illness, and have committed certain crimes. Courts and states differ as to whether they allow defendants who have committed misdemeanors, felonies, or both,²⁶¹ and that discretion should be left to individual states.

Third, the legislation should require judges to coordinate treatment with various community partners. Judges are not experts in mental health treatment, and thus they should collaborate with partners such as the state and federal Department of Veterans Affairs, local treatment providers such as mental health clinics and organizations, and other local veterans groups. These partnerships display the community aspect of VTCs. By having

259. JUSTICE FOR VETS, *supra* note 72.

260. *Id.*

261. *E.g., Developing, supra* note 26, at 2; H.R. 295, 162nd Gen. Court, Reg. Sess. (N.H. 2009).

various partners on board, the judge acknowledges that treatment under VTCs is a team process and that veterans need many resources to rehabilitate.

Fourth, legislation should require judges to provide the basic tenets for the treatment plan. Veteran defendants should receive close monitoring, including repeated drug or substance testing and periodic check-ins with the court. Each judge has different standards and the time periods for these monitoring mechanisms may be left open for judges to implement. Judges should also require a mentor for veterans in the courts. Mentors with similar experience can immediately establish a close personal connection with the veteran.

Fifth, the legislation should allow for checks and balances on the VTCs. It should place oversight of the VTCs into the hands of a state committee comprised of officials from all three branches or it should request the judiciary to regularly update the legislature on the VTCs and their progress. This additional protection presents an effective safeguard against judicial overreaching and reinforces the separation of power principle that is vital to an effective administration of government. These major requirements are instrumental in ensuring responsible handling of veterans in the courts and effective VTC operation.

B. WHAT ABOUT FEDERAL LEGISLATION?

No federal legislation has provided detailed instruction or guidance to states in establishing VTCs other than providing funding to jurisdictions establishing and operating the courts. Inherent in this statement is the assumption that federal legislation does not authorize the creation of or establish state courts because Congress does not have the power to do so under the Spending Clause;²⁶² it is only able to encourage favored conduct with the power of its purse.²⁶³ Federal legislation may provide funding while also stipulating basic guidelines for VTCs and determining reasonable parameters for the courts' structures.

Four recent federal developments related to funding have highlighted the relatively recent emergence of VTCs. First, in the 2011 fiscal year, the Department of Justice's Bureau of Justice Assistance announced that it would provide funds for four areas to set up VTCs under its Adult

262. U.S. CONST. art. I, § 8, cl. 1.

263. *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987).

Discretionary Drug Court Program.²⁶⁴ The announcement, however, provided no direction or polices for the VTCs.²⁶⁵ Second, on December 16, 2011, Congressman Patrick Meehan introduced the Servicemember Assistance for Lawful Understanding, Treatment, and Education Act (“SALUTE”), which would authorize the Attorney General to provide grants for creating VTCs around the country, as well as for programs to continue judicial supervision over criminal offenders who are veterans.²⁶⁶ SALUTE has two main provisions for which it would provide grants:

(1) developing, implementing, or enhancing veterans’ treatment courts or expanding operational mental health or drug courts to serve veterans to ensure that such courts effectively integrate substance abuse treatment, mental health treatment, sanctions and incentives, and transitional services in a judicially supervised court setting with jurisdiction over offenders that have served in the U.S. military; and

(2) programs that involve continuing judicial supervision over offenders with substance abuse or mental health problems who have served in the U.S. military and the integrated administration of other sanctions and services, which shall include substance abuse and mental health treatment for each participant and diversion, probation, or other supervised release involving the possibility of prosecution, confinement, or incarceration based on noncompliance with program requirements or failure to show satisfactory progress.²⁶⁷

SALUTE’s provisions include loose definitions for the subject matter of the grants as well as helpful initial requirements for the programs.²⁶⁸ However, its only influence on states would be in the form of a financial incentive; no guidelines or procedural requirements would stem from the act.²⁶⁹ States could use these initial guidelines while drafting legislation for VTC creation, and then achieve the combined goals of providing a proper mandate for the courts and securing federal funding for the courts if and when SALUTE becomes law.

264. *Justice Department Funds More Than \$1 Million to Veteran Treatment Courts*, PR NEWSWIRE (Nov. 10, 2011) <http://www.prnewswire.com/news-releases/justice-department-funds-more-than-1-million-to-veteran-treatment-courts-133624213.html>.

265. *See id.*

266. H.R. 3721, 112th Cong. (2011).

267. *Id.*

268. *See id.*

269. *See id.*

Third, Congressmen Bobby Scott and Richard Nugent introduced the Justice and Mental Health Collaboration Act on January 28, 2013.²⁷⁰ The bill's purpose is to fund states and counties so that they may introduce collaborative efforts between their mental health and criminal justice systems.²⁷¹ Specifically, the bill gives the Attorney General the ability to award grants to establish or expand VTC programs as well as other training and mentoring programs for veterans.²⁷² The bill is still in its early stages but does provide certain parameters by defining a VTC.²⁷³ It states that a VTC is a "court program involving collaboration among criminal justice, veterans, and mental health and substance abuse agencies that provides qualified veterans with [four distinct services]."²⁷⁴ A "qualified veteran" is an offender who has served in the military and was discharged or released under conditions other than dishonorable.²⁷⁵ The four services that a VTC must provide include: (1) intensive judicial supervision and case management which may require drug testing; (2) a continuum of treatment services including mental health, substance abuse, medical services, and services to address trauma; (3) incarceration alternatives; and (4) other services such as housing, mentoring, transportation, employment, education, and job training.²⁷⁶ This bill, the most comprehensive federal legislation to date, provides affirmative and basic requirements that every VTC should possess and that every state legislature should attempt to emulate. States can incorporate these requirements into their own legislation, providing uniformity throughout the state, and helping local jurisdictions secure federal funding under the bill.

Fourth, on March 21, 2013, Congress passed the Department of Defense, Military Construction and Veterans Affairs, and Full-Year Continuing Appropriations Act.²⁷⁷ The federal appropriations bill, under its state and local law enforcement section, awarded \$4,000,000 to the Department of Justice to provide funding for VTC programs.²⁷⁸ The bill represents the first time Congress has passed federal funding to assist local

270. Press Release, Congressman Bobby Scott, Scott & Nugent Introduce Justice & Mental Health Collaboration Act (2013), http://www.bobbyscott.house.gov/index.php?option=com_content&view=article&id=828.

271. *Id.*

272. S. 162, 113th Cong. § 2 (2013).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. H.R. 933, 113th Cong. (2013).

278. *Id.* § 2.

VTCs.²⁷⁹ However, as previously mentioned, it provides no guidance on establishing the courts, structures, or rules; it only provides funding, which is valuable to jurisdictions around the country.

VI. CONCLUSION

An important systematic effect of judiciary-created VTCs is variation among jurisdictions within a state. In many respects, jurisdictions operate as individual silos by including their own procedural safeguards or other local rules. This practice becomes problematic, though, when disparate treatment of veterans results from varying standards for VTCs throughout the state. If individual jurisdictions create VTCs on their own, they may have different admission standards, which would treat the same types of offenders asymmetrically. They may also vary in treatment options, sentencing guidelines, and other important requirements. Veterans in one part of the state may experience treatments that are starkly different from those in another jurisdiction. State legislation may provide an easy solution to this problem by providing basic guidelines, principles, and requirements for VTCs, with the added benefit of ensuring that courts are somewhat accountable to the public.

What are the remedies, besides legislation, for states when the judiciary creates VTCs on its own? One potential remedy is for a state court system to issue a mandamus to a judicial district that creates its own VTC.²⁸⁰ While a state court system could issue a mandamus to a judicial district that creates courts of its own accord, this remedy seems harsh, considering that VTCs provide a much-needed treatment program for veterans who have devoted their lives to protecting the country. Another potential remedy may have the judiciary convene to create guidelines for VTC creation. While this may help allow for consistency throughout jurisdictions, as mentioned for Kentucky above,²⁸¹ the judiciary is proceeding without legislative authorization and, again, the problems of democratic legitimacy and separation of powers arise.

279. *Federal Funding for Veterans Treatment Courts Program Is the Right Move*, DAILY LOCAL NEWS (Mar. 22, 2013), <http://www.dailylocal.com/article/20130322/OPINION01/130329872/federal-funding-for-veterans-treatment-court-program-is-the-right-move>.

280. The judiciary and judges have an immense amount of power. The Framers created an independent judiciary as a safeguard of our government when drafting the Constitution, and an independent judiciary is essential for judges to carry out their challenging duty to adjudicate cases and propose solutions to complicated legal problems. See Alexander Hamilton, *The Federalist No. 78* (1788).

281. See Establishment of Kentucky Access to Justice Commission, *supra* note 181; *supra* Part IV.B.2.a.

States should act quickly to pass legislation that authorizes VTC creation to lend the courts democratic legitimacy and preserve the separation of powers inherent in our government. Rather than putting veterans through the traditional justice process, under which they likely will end up in jail with no plan to treat potential mental illness or to restore their health, VTCs present a valuable opportunity to provide a rehabilitative approach for veterans in the criminal justice system. Every effort should be made to ensure that VTCs have the proper legal authority to operate—a responsibility that should be borne by state legislatures.