

January 2018

The Best-Fitting Uniform: Balancing Legislative Standards and Judicial Processes in Veterans Treatment Courts

Benjamin Pomerance

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>

Recommended Citation

Pomerance, Benjamin (2018) "The Best-Fitting Uniform: Balancing Legislative Standards and Judicial Processes in Veterans Treatment Courts," *Wyoming Law Review*. Vol. 18: No. 1, Article 3.
Available at: <https://scholarship.law.uwyo.edu/wlr/vol18/iss1/3>

This Article is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

WYOMING LAW REVIEW

VOLUME 18

2018

NUMBER 1

THE BEST-FITTING UNIFORM: BALANCING LEGISLATIVE STANDARDS AND JUDICIAL PROCESSES IN VETERANS TREATMENT COURTS

*Benjamin Pomerance**

I.	INTRODUCTION	180
II.	VETERANS TREATMENT COURTS: BALANCING INDIVIDUAL TREATMENT WITH SOCIETAL JUSTICE	183
III.	THE CONTROVERSIAL BALANCE: JUDICIAL AUTONOMY AND EXTRAJUDICIAL RESTRAINTS.....	193
IV.	A NECESSARY BALANCE: INTER-BRANCH APPROACHES FOR VETERANS TREATMENT COURTS	201
	<i>A. Democratic Accountability</i>	202
	<i>B. Comprehensible and Consistent Labeling</i>	204
	<i>C. Equal Access to Justice</i>	206
	<i>D. Historical Analogies</i>	208
V.	EXISTING BALANCES: STATE STATUTES STANDARDIZING VETERANS TREATMENT COURTS	210
	<i>A. Illinois</i>	211
	<i>B. Michigan</i>	213
	<i>C. Texas</i>	216
	<i>D. Maine</i>	218
	<i>E. Utah</i>	219

* Benjamin Pomerance serves as the Deputy Director for Program Development with the New York State Division of Veterans' Affairs. All opinions expressed herein are his own, and are not necessarily the opinion of the Division of Veterans' Affairs or any other New York State government entity. He owes the utmost thanks to the staff of the *Wyoming Law Review* for their devotion to the craft of careful editing. He dedicates this article to his parents, Ron and Doris Pomerance, for their constant inspiration; to Dr. Julie Baldwin for her pioneering research in this area; and to all of the men and women who devote their time and talents to ensure the success of Veterans Treatment Courts.

<i>F. Tennessee</i>	221
<i>G. Missouri</i>	222
<i>H. Uniform Veterans Treatment Court Act</i>	224
VI. PROPOSING A BALANCE: LEGISLATING STANDARDS THAT RESPECT JUDICIAL AUTONOMY.....	227
<i>A. Threshold Matters</i>	228
<i>B. Court Processes</i>	231
<i>C. Post-Court Outcomes</i>	233
VII. CONCLUSION	235

I. INTRODUCTION

The issue of governmental separation of powers in the United States has occupied the attention of political leaders and commentators alike since the nation's inception.¹ Unanswered questions about how much authority each branch of government possesses, and what methods each branch can wield legally to check the powers of the other two, remains as much at the forefront of political and legal controversy today as at the time of our founding.² Each attempt to resolve these questions produces effects that resound throughout matters of national, state, and local policy.³

¹ AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 37, 59–64 (2005); SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* 315 (2005); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 48, 58, 106–08 (2004). The quotation that is perhaps most often cited regarding separation of powers in the United States comes from James Madison, urging the people of this newly born nation to adopt the Constitution as their fundamental plan of government: “The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” *THE FEDERALIST* NO. 47, at 232 (James Madison) in *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* (David Wootton ed., Hackett 2003).

² See, e.g., Josh Blackman, *Donald Trump's Constitution of One*, *NAT'L REVIEW* (May 12, 2016), <http://www.nationalreview.com/article/435296/donald-trump-constitution-end-separation-powers>; Neil H. Buchanan, *Separation of Powers Gives the President Power on Debt*, *N.Y. TIMES* (Jan. 15, 2013), <http://www.nytimes.com/roomfordebate/2013/01/13/proposing-the-unprecedented-to-avoid-default/separation-of-powers-gives-the-president-power-on-debt>; Tobias T. Gibson, *Executive Orders Give Trump Lots of Power, But There Are Limits*, *THE HILL* (Feb. 3, 2017, 11:22 PM), <http://thehill.com/blogs/pundits-blog/the-administration/317878-executive-orders-give-trump-lots-of-power-but-there-are>; Glenn Harlan Reynolds, *NSA Spying Undermines Separation of Powers*, *USA TODAY* (Feb. 10, 2014, 2:28 PM), <http://www.usatoday.com/story/opinion/2014/02/10/nsa-spying-surveillance-congress-column/5340281/>.

³ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 *HARV. L. REV.* 412, 461–85 (2012); John D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 *COLUM. L. REV.* 515, 532–70 (2015); Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of Separation of Powers*, 53 *AM. U. L. REV.* 1, 46–61 (2003). For a good look at the historical context of these enduring questions and concerns, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *HARV. L. REV.* 1939, 1971–93 (1942).

During the past nine years, more than three hundred jurisdictions across the United States have established specialized diversionary courts aimed exclusively at defendants who previously served in the Armed Forces.⁴ Known as “Veterans Treatment Courts,” these unique entities offer the potentially life-changing opportunity for certain eligible justice-involved veterans to undergo a court-prescribed individualized course of rehabilitative treatment in lieu of incarceration.⁵ Veterans Treatment Courts have sparked significant debate at all levels of government, with policymakers and observers rightfully examining and questioning every aspect of how these courts function.⁶ One of the most contentious of these discussions focuses on the issue of separation of powers, with interested parties grappling over the level of control each branch of government should maintain over a Veterans Treatment Court’s operations.⁷

⁴ Rachel Martin, *Hundreds of Veterans Treatment Courts See Success But More Are Needed*, NPR (Jan. 3, 2017), <http://www.npr.org/2017/01/03/507983947/special-courts-for-military-veterans-gain-traction>.

⁵ Tabatha Renz, *Veterans Treatment Court: A Hand Up Rather Than Lock Up*, 17 RICH. J. L. & PUB. INT. 697, 698–700, 704–05 (2013); Alana Frederick, Comment, *Veterans Treatment Courts: Analysis and Recommendations*, 38 L. & PSYCHOL. REV. 211, 212–20 (2013); see also Mark A. McCormick-Goodhart, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PENN ST. L. REV. 895, 906–25 (2013). Typically, Veterans Treatment Courts use the phrase “justice-involved veteran” to describe any veteran accepted into the court’s treatment program, preferring this term over the more traditional criminal court designation of “defendant.” See generally Sean Clark & Jim McGuire, *PTSD and the Law: An Update*, 22 PTSD RESEARCH Q. 1–3 (2011) (using this phrase in sentences where a description of a conventional criminal court would use the word “defendant”). Out of respect for this preference, this article will generally use the phrase “justice-involved veteran” when referring to veterans accepted into Veterans Treatment Courts and the word “defendant” to describe veterans in a more traditional criminal court setting.

⁶ Allison L. Jones, *Veterans Treatment Courts: Do Status-Based Problem-Solving Courts Create an Improper Privileged Class of Criminal Defendants?*, 43 WASH. U. J. L. & POL’Y 307, 309–10 (2014); see, e.g., Claudia Arno, *Proportional Response: The Need for More—and More Standardized—Veterans’ Courts*, 48 U MICH. J. L. REFORM 1039, 1040–42 (2015); Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans in the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 569–71 (2010); Michael L. Perlin, *“John Brown Went Off To War”: Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445, 450, 465–72 (2013). See generally Tiffany Cartwright, *“To Care for Him Who Shall Have Borne the Battle”: The Recent Development of Veterans Treatment Courts in America*, 22 STAN. L. & POL’Y REV. 295, 299–303 (2011) (providing a brief overview of studies documenting psychological trauma and criminal behaviors observed in veterans and common barriers to receiving care).

⁷ See, e.g., Sohil Shah, *Authorization Required: Veterans Treatment Courts, The Need for Democratic Legitimacy, and the Separation of Powers Doctrine*, 23 S. CAL. INTERDISC. L. J. 67, 67–68, 105–06 (2014). This issue regarding separation of powers in a unique judicial environment extends beyond Veterans Treatment Courts to encompass ongoing debates regarding “problem-solving courts,” including Drug Treatment Courts and Mental Health Courts, as a whole. See THE STATE AND FEDERAL COURTS: A COMPLETE GUIDE TO HISTORY, POWERS, AND CONTROVERSY 292–93 (Christopher P. Banks ed., 2017); DALE CATHELL, WADING THROUGH THE SWAMP: THE MEMOIRS OF A BAD BOY 276 (2014); Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1500–01 (2004); Benton Smith, *Twin Falls County to Open Problem Solving Court for Veterans*, MAGIC VALLEY (Aug. 10, 2015), <http://magicvalley.com/news/local/crime-and-courts/twin-falls-county-to-open-problem-solving>

Plenty of judges who preside over Veterans Treatment Courts argue their courtrooms should remain largely free from control by the other branches of government, permitting these courts the independence necessary to operate freely at the local level.⁸ However, standardization of Veterans Treatment Court processes could undermine the individualized treatment and rehabilitation objectives for which these courts were created. This could force judges and other court personnel to take actions that are not in the best interest of the justice-involved veteran, the court itself, or the general public.⁹ On the other hand, several states have enacted legislation governing multiple aspects of Veterans Treatment Courts within their borders, thereby guaranteeing substantial involvement of the legislative and executive branches in the functioning of these tribunals.¹⁰ In the judgment of these legislative and executive branch leaders, proper oversight and implementation of Veterans Treatment Courts should necessitate at least a baseline set of evenly applied standards that are codified in the law, ensuring the label of “Veterans Treatment Court” carries with it certain fundamental criteria.¹¹

This article proposes a middle ground amid this enduring dispute. To describe and justify this concept of a more balanced approach to administering Veterans Treatment Courts, the article proceeds in five parts. Part II summarizes the development, evolution, and impacts of Veterans Treatment Courts, including a brief discussion about the commonly accepted vital components of the basic Veterans Treatment Court model.¹² Part III reviews the overall legacy and importance of judicial autonomy in the United States and examines key rationales for legislative and executive intervention in matters of judicial process.¹³ Part IV

court-for-veterans/article_cec66007-e025-5af3-b332-ecb929b912fe.html; Kristina Shevory, *Why Veterans Should Get Their Own Courts*, THE ATLANTIC (Oct. 26, 2011), <http://www.theatlantic.com/magazine/archive/2011/12/why-veterans-should-get-their-own-courts/308716/>.

⁸ See Shah, *supra* note 7, at 81–82. In addition, several Veterans Treatment Courts expressed this viewpoint in conversations held “on background” with the author.

⁹ See, e.g., William E. Rafferty, *Despite Being Vetoed Three Times, California Legislature Debates Bill Regarding Creation of Veterans Courts*, GAVEL TO GAVEL (Mar. 5, 2015), <http://gaveltogavel.us/2015/03/05/despite-being-vetoed-3-times-california-legislature-debates-bill-regarding-creation-of-veterans-courts/>. For example, this was the opinion of California governors who vetoed three bills that proposed methods of standardizing Veterans Treatment Court processes. *Id.*

¹⁰ JUSTICE FOR VETS, *Veterans Treatment Court State Legislation*, <http://justiceforvets.org/state-legislation> (last visited Dec. 14, 2016); William E. Rafferty, *Veterans Courts: 2013 Legislatures Are Both Encouraging Them and Trying to Give the Executive Control Over Them*, GAVEL TO GAVEL (Feb. 26, 2013), http://gaveltogavel.us/2013/02/26/veterans-courts-2013-legislatures-are-both-encouraging-them-and-trying-to-give-the-executive-control-over-them/?doing_wp_cron=1484591792.3289239406585693359375.

¹¹ See Arno, *supra* note 6, at 1069–70. For further discussion about the specific criteria established in several state Veterans Treatment Court statutes, see *infra* notes 232–394 and accompanying text; see also Jones, *supra* note 6, at 310 (discussing a lack of uniformity and standardization as one of the most problematic shortcomings of Veterans Treatment Courts).

¹² See *infra* notes 17–92 and accompanying text.

¹³ See *infra* notes 94–152 and accompanying text.

utilizes the information provided in the previous two sections to demonstrate that at least some statutorily-developed standards governing Veterans Treatment Courts are allowable from a separation of powers perspective and beneficial from a public policy perspective.¹⁴ Part V compares and contrasts several existing state statutes regarding Veterans Treatment Courts, with an emphasis on studying the common elements shared among laws.¹⁵ Lastly, Part VI offers a framework that strikes a balance between judicial autonomy and statutory oversight, establishing a steadier balance by demanding a bedrock legal framework while still leaving significant discretion to the individual courts to administer as they deem fit.¹⁶

II. VETERANS TREATMENT COURTS: BALANCING INDIVIDUAL TREATMENT WITH SOCIETAL JUSTICE

It started with an unpleasant day in court.¹⁷ Judge Robert Russell had encountered a particularly difficult defendant in the Drug Treatment Court over which he presided in Buffalo, New York.¹⁸ The man was not belligerent, but simply seemed unreachable.¹⁹ Any questions from the judge regarding his progress through drug counseling and treatment were met with shrugs and vacant stares.²⁰

Exasperated, Judge Russell asked two members of the Drug Court team to speak with the defendant outside of the courtroom.²¹ Twenty minutes later, the

¹⁴ See *infra* notes 154–230 and accompanying text.

¹⁵ See *infra* notes 232–394 and accompanying text.

¹⁶ See *infra* notes 395–455 and accompanying text.

¹⁷ Ari Melber, *For Vets, Rehab Rather Than Prison*, MSNBC (Jan. 29, 2014), <http://www.msnbc.com/the-cycle/vets-rehab-rather-prison>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Chris Peak, *All it Took Was One Judge and Two Veterans to Provide Another Chance to Countless Soldiers*, NAVSO (Apr. 24, 2015), <http://www.navso.org/news/all-it-took-was-one-judge-and-two-veterans-provide-another-chance-countless-soldiers>. The verbiage of this headline contains the type of mistake that is common to commentators who lack the necessary military cultural competency, including plenty of judges who preside over traditional criminal courts. See, e.g., William B. Brown et al., *The Perfect Storm: Veterans, Culture, and the Criminal Justice System*, 10 JUSTICE POL'Y J. 1, 23–24 (2013). In military parlance, the word “Soldiers” refers only to members of the United States Army. Alexandria Neason, *Is There Such a Thing as One Troop?*, NAT'L PUB. RADIO (Aug. 13, 2010), <http://www.npr.org/sections/ombudsman/2010/08/13/129183352/is-there-such-a-thing-as-one-troop>. Veterans Treatment Courts, however, also assist plenty of Sailors (Navy), Airmen (Air Force), Marines, and Guardsmen (Coast Guard). See *id.* (discussing the proper usage of these military labels and the sensitivities surrounding the improper use of these terms); Lindsey Getz, *Veterans Treatment Courts—Helping Vets Seek Justice*, SOCIAL WORK TODAY, <http://www.socialworktoday.com/archive/SO17p22.shtml> (noting that these courts assist servicemembers from multiple branches, not exclusively Army soldiers).

trio re-entered.²² This time, the man stood straight and tall before the judge, hands clasped behind his back in a posture the military labels “parade rest.”²³ Locking eyes with Judge Russell, the man uttered the words that the judge never thought he would hear: “Judge, I’m going to try harder.”²⁴

Pleased but bewildered, Judge Russell caught up with the two Drug Court team members as soon as the day’s session had adjourned and asked how they had transformed the defendant’s attitude so quickly.²⁵ The Drug Court team members explained that the defendant was a veteran who had served in combat in Vietnam.²⁶ Since both of them were also veterans, they engaged the man in a conversation about their shared military experiences and about the struggles of readjusting to civilian life.²⁷ That brief conversation was enough for the defendant to understand he had individuals around him who shared the comradeship of military service and who would fight alongside him on his road to recovery.²⁸

Today, commentators widely recognize this day in 2008 as the birth of a new courtroom model for certain veterans in the criminal justice system.²⁹ Four years earlier, in Anchorage, Alaska, Judge Sigurd E. Murphy, a retired Brigadier General of the United States Army, had established a specialized “therapeutic court” exclusively for veterans with retired Air Force Colonel Jack W. Smith.³⁰ Like the Buffalo model, the Alaska court offered a veteran-to-veteran mentor program and significant integration with services provided by the United States Department of Veterans Affairs (VA).³¹ Yet it was Judge Russell’s experience in Buffalo that truly placed this concept on the radar of public consciousness.³²

²² Peak, *supra* note 21.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Bernard Edelman, *VVA & Veterans Treatment Courts*, THE VVA VETERAN (Mar./Apr. 2015), http://vvaveteran.org/35-2/35-2_vetcourts.html.

²⁷ *See id.*

²⁸ *See id.*

²⁹ Matthew Daneman, *N.Y. Court Gives Veterans Chance to Straighten Out*, USA TODAY (June 1, 2008), http://usatoday30.usatoday.com/news/nation/2008-06-01-veterans-court_N.htm (stating that both the United States Department of Veterans Affairs and the National Drug Court Institute recognize Judge Russell’s court as the nation’s first Veterans Treatment Court); Neale Gulley, *Nation’s First Veterans Court Counts Its Successes*, REUTERS (Jan. 9, 2011), <http://www.reuters.com/article/us-court-veterans-idUSTRE7082U020110109>; J.P. Lawrence, *Veterans Treatment Courts, Explained*, SAN ANTONIO EXPRESS-NEWS (Sept. 29, 2016), <http://www.expressnews.com/militarycity/article/Veterans-treatment-courts-explained-9447254.php>.

³⁰ Jack W. Smith, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004—Dec. 31, 2010*, 29 ALASKA L. REV. 93, 93–98, 100–02 (2012).

³¹ *Id.*

³² Hawkins, *supra* note 6, at 566.

As a non-veteran, the effectiveness of a mere twenty-minute discussion among three former servicemembers who were willing to support one another astonished Judge Russell.³³ That afternoon, he began developing a plan with the two veterans from his Drug Court team.³⁴ They decided to set aside one day each week exclusively for ex-military members and assemble a group with the proper level of cultural competency to address veteran defendants as peers.³⁵ The cultural competency of the group would help gain the trust and understanding of the veterans and link them with veteran-specific benefits and services.³⁶

Significant media attention soon followed.³⁷ When other jurisdictions learned of what Judge Russell had done in Buffalo, several decided to develop a similar model in their own courtrooms.³⁸ Early results demonstrated the successful outcome of veterans graduating from their court-assigned courses of treatment, returning to free society as rehabilitated individuals rather than serving lengthy and expensive sentences behind bars, and rarely committing another criminal offense.³⁹ When other jurisdictions saw the impact of these increasingly well-publicized positive outcomes, the concept spread even faster.⁴⁰

Today, more than three hundred Veterans Treatment Courts exist nationwide, with the majority of states maintaining at least one such court within their borders.⁴¹ More than ten thousand justice-involved veterans have passed through

³³ Edelman, *supra* note 26 (“‘You mean to tell me this guy, being in counseling, they can’t make any headway? And talking to a couple of vets, he responds like that?’ The judge was astonished. And intrigued.”).

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Peak, *supra* note 21.

³⁷ See, e.g., Cheryl Conley, *Judge: Keep Vets Out of Jail*, NPR (June 18, 2008), <http://www.npr.org/templates/story/story.php?storyId=91633166>; Carolyn Thompson, *Special Court for Veterans Addresses More Than Crime*, BOSTON GLOBE (July 7, 2008), [³⁸ See Jack Leonard, *Court Program Offers a More Rehabilitative Way of Handling Veterans*, L.A. TIMES \(Sept. 14, 2010\), <http://articles.latimes.com/2010/sep/14/local/la-me-veterans-20100914>. Between January 2008 and September 2010, forty-one additional jurisdictions opened a Veterans Treatment Court. *Id.*](http://archive.boston.com/news/nation/articles/2008/07/07/special_court_for_veterans_addresses_more_than_crime/?camp=pm;Daneman, supra note 29.</p>
</div>
<div data-bbox=)

³⁹ See, e.g., Conley, *supra* note 37; Daneman, *supra* note 29.

⁴⁰ See Leonard, *supra* note 38; Gulley, *supra* note 29. By the midpoint of 2011, Judge Russell’s court reported that 115 veterans had graduated from the court’s treatment program, with none of them committing any subsequent crimes. Renz, *supra* note 5, at 699. As of June 30, 2014, 220 Veterans Treatment Courts existed throughout the United States. JUSTICE FOR VETS, *The History*, <http://justiceforvets.org/vtc-history> (last visited Dec. 14, 2016). That number rose to more than 300 by November 2016. Charlie Shelton, *Veteran Treatment Courts Help Vets Stay on Their Feet*, AMERICAN HOMEFRONT PROJECT (Nov. 2, 2016), <http://americanhomefront.wunc.org/post/veteran-treatment-courts-help-vets-stay-their-feet>.

⁴¹ Renz, *supra* note 5, at 699.

Veterans Treatment Courts, with the vast majority of them returning to their communities with a new commitment to completing their life's mission in a positive, productive, and law-abiding manner.⁴² National Veterans Treatment Court conferences now attract tremendous numbers of judges, court coordinators, social workers, peer mentors, and other individuals involved in the process of administering these courts.⁴³

The basic Veterans Treatment Court model follows the standard Drug Treatment Court framework that has existed throughout the United States, with increasing popularity, since 1989.⁴⁴ Like a Drug Court, Veterans Treatment Courts offer eligible individuals an opportunity to complete an individualized multi-step treatment program developed by a team of experts and assigned by the presiding judge as an alternative to incarceration.⁴⁵ The court assigns each participant a mentor to help guide him or her through the entire treatment process, in addition to providing support from alcohol and substance abuse specialists, social workers, employment counselors, and other professionals.⁴⁶ Unlike a traditional court setting, the prosecutor and defense attorney interact in a non-adversarial manner, with the judge typically working with the justice-involved veteran in a manner that is considerably less formal than in a criminal proceeding.⁴⁷ Court appearances

⁴² See Robert T. Russell, *Veterans Treatment Courts*, 31 *TOURO L. REV.* 385, 397 (2015); Laurie A. Drapela, *Clark County Veterans Treatment Court: Final Report and Program Recommendations*, WASH. STATE UNIV. 16–18 (Oct. 2014), <http://www.clark.wa.gov/sites/all/files/district-court/Specialty%20Courts/2014VTFCFinal.pdf>; Ines Novacic, *For Veterans in Legal Trouble, Special Courts Can Help*, CNN (Nov. 10, 2014), <http://www.cbsnews.com/news/for-veterans-legal-trouble-special-courts-can-help/>; Melissa Fitzgerald, *A Tale of Two Brothers*, HUFFINGTON POST (Nov. 11, 2014), http://www.huffingtonpost.com/melissa-fitzgerald/a-tale-of-two-brothers_b_6135760.html; Arno, *supra* note 6, at 1050; Jones, *supra* note 6, at 314; Perlin, *supra* note 6, at 450; cf. Heath Druzin, *Having Veterans As Mentors is Key to Treatment Court Success Stories*, STARS & STRIPES (July 29, 2015), <http://www.stripes.com/having-veterans-as-mentors-is-key-to-treatment-court-success-stories-1.360274>. In Michigan alone, 222 of the 350 veterans referred to the state's Veterans Treatment Courts have successfully graduated from the program as of August 2016. Jeffrey Cunningham, *Veterans Court Aims to Restore Honor to Veterans Who Run Afoul of the Law*, MI LIVE (Aug. 15, 2016), http://www.mlive.com/jenison/index.ssf/2016/08/ottawa_county_courts.html.

⁴³ See *Vet Court Con to Make Historic Debut in Washington, D.C.*, ALL RISE 2–5 (Fall 2013) http://www.nadcp.org/sites/default/files/nadcp/AllRise_Fall2013.pdf.

⁴⁴ N.Y. BAR ASS'N, VETERANS TREATMENT COURT MENTOR PROGRAM HANDBOOK 4, <http://www.nysba.org/VetsMentorProgram/>; RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 1–2 (2009); Diana Moga, *9 Questions With a Veterans Treatment Court Judge*, TASK & PURPOSE (July 11, 2016), <http://taskandpurpose.com/9-questions-veteran-treatment-court-judge/>; Hawkins, *supra* note 6, at 564.

⁴⁵ Julie Marie Baldwin, *Investigating the Programmatic Attack: A National Survey of Veterans Treatment Courts*, 105 *J. CRIM. L. & CRIMINOLOGY* 705, 706–07 (2016); Cartwright, *supra* note 6, at 303–07.

⁴⁶ Arno, *supra* note 6, at 1048; Hawkins, *supra* note 6, at 565.

⁴⁷ Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Delivers Remarks at the Roanoke Veterans Treatment Court Program (Jan. 23, 2014), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-roanoke-veterans-treatment-court-program> [hereinafter Holder Remarks].

are frequent, with each treatment team member delivering reports about the veteran's progress and the justice-involved veteran answering directly to the judge about his or her development in the steps toward graduation.⁴⁸ Sobriety throughout the process is expected, with justice-involved veterans receiving numerous randomly administered drug and alcohol tests.⁴⁹ Failure to finish each step in the program to the satisfaction of the presiding judge and the treatment court team can lead to the veteran's removal from the Veterans Treatment Court system.⁵⁰ This results in the veteran receiving more severe sanctions, possibly up to and including incarceration.⁵¹

Where a Veterans Treatment Court differs from a traditional Drug Treatment Court, however, is in the tribunal's substantive emphasis on key aspects of military culture.⁵² As one commentator aptly described this unique courtroom situation, "[t]he Veterans Treatment Court is the military unit: the judge becomes the Commanding Officer, the volunteer veteran mentors become fire team leaders, the court team becomes the company staff, and the veteran defendants become the troops."⁵³ All of the mentors in Veterans Treatment Courts are veterans themselves, and judges typically try to connect justice-involved veterans with mentors from their same branch and era of military service.⁵⁴ Additionally, the other members of the treatment team in a Veterans Treatment Court team are expected to possess a higher-than-average level of military cultural competency, empowering the team to recognize underlying military-related issues that could contribute to a veteran committing a crime—including, but not limited to, service-connected Post-Traumatic Stress Disorder, Traumatic Brain Injury, or military sexual trauma—and knowing how to effectively address such conditions for veterans.⁵⁵

Veterans Treatment Courts also serve as "one-stop shops," linking justice-involved veterans with the full spectrum of federal, state, and local benefits and

⁴⁸ NAT'L INST. OF CORRECTIONS, *Veterans Treatment Court Resources*, <http://nicic.gov/justice-involved-veterans> (last visited Dec. 14, 2016) (stating that best practices require bi-weekly court appearances for a justice-involved veteran beginning his or her treatment program).

⁴⁹ JUSTICE FOR VETS, *What is a Veterans Treatment Court?*, <http://www.justiceforvets.org/what-is-a-veterans-treatment-court> (last visited Dec. 14, 2016).

⁵⁰ Smith, *supra* note 30, at 100; *see also infra* notes 232–394 and accompanying text (providing examples of state statutes defining the penalties for failure to complete the assigned Veterans Treatment Court program).

⁵¹ Jones, *supra* note 6, at 314; Hawkins, *supra* note 6, at 566; Smith, *supra* note 30, at 100.

⁵² *See, e.g.*, Arno, *supra* note 6, at 1048.

⁵³ JUSTICE FOR VETS, *supra* note 49.

⁵⁴ Arno, *supra* note 6, at 1048–49.

⁵⁵ *See* Jones, *supra* note 6, at 314–15 (describing this enhanced military cultural competency as one of the most important policy rationales for establishing a Veterans Treatment Court).

services earned as a result of their military service.⁵⁶ Given the high percentage of veterans who are unaware of these potentially life-changing services, or unable to properly navigate the bureaucratic processes involved in obtaining these benefits, establishing such connections is one of the most important rehabilitative roles a Veterans Treatment Court performs.⁵⁷ Representatives from the VA, particularly Veterans Justice Outreach Specialists, play an active specialized assistance role on most treatment teams.⁵⁸ State and local Veterans Service Organizations commonly serve key functions in connecting justice-involved veterans with veteran-specific benefits, programs, and services.⁵⁹ As a result of this specialized assistance, veterans may be able to obtain financial compensation for injuries incurred while serving in the military, healthcare at VA medical facilities for a low cost or even no cost, education at a university or vocational school with a low price tag or no price tag at all, vocational rehabilitation training to develop skills for certain forms of employment, and other similarly crucial forms of assistance.⁶⁰

However, while the components described above are common to most Veterans Treatment Courts, the procedures utilized in these courts are hardly uniform.⁶¹ Instead, key differences in administration exist from jurisdiction

⁵⁶ Press Release, U.S. Dep't of Justice, Justice Department Announces Over \$4 Million in Grants to Rehabilitate and Reduce Recidivism Among Military Veterans (Sept. 20, 2016), <http://www.justice.gov/opa/pr/justice-department-announces-over-4-million-grants-rehabilitate-and-reduce-recidivism-among>; Novacic, *supra* note 42.

⁵⁷ See Jeanne Shaheen, *Treatment, Not Jail, For Our Veterans*, FOX NEWS (Nov. 9, 2015), <http://www.foxnews.com/opinion/2015/11/09/treatment-not-jail-for-our-veterans.html>.

⁵⁸ Kierra Zoellick, *The Role of Veterans Justice Outreach Specialists in Veterans Treatment Courts*, AM. U. SCHOOL OF PUBLIC AFFAIRS (2016), <http://www.american.edu/spa/jpo/videos/upload/The-Role-of-Veterans-Justice-Outreach-Specialists-in-VTCs-Fact-Sheet.pdf>.

⁵⁹ See, e.g., Michael C. McDaniel, *Veterans Treatment Courts in Michigan: A Consideration of the Factors for Success*, MICH. BAR J. 18, 19 (Feb. 2015); Matt Steiner, *Veterans Service Organizations in Veterans Treatment Courts: Coming to the Aid of their Fellow Veterans*, JUSTICE FOR VETS 2–3 (May 2012), <http://www.justiceforvets.org/sites/default/files/files/Veterans%20Service%20Organizations%20in%20Veterans%20Treatment%20Courts.pdf>.

⁶⁰ Title 38 of the United States Code is filled with statutes governing benefits, programs, and services for veterans who provided active duty military service and were discharged under conditions other than dishonorable. See 38 U.S.C. § 101(2) (2012). For example, veterans who incurred a disability while in military service or had a disability exacerbated by such service are eligible for tax-free disability compensation payments from the VA. See 38 U.S.C. § 1110 (2012); 38 C.F.R. § 4.19 (2017). Low-income veterans who served during a wartime period may be eligible for a monthly tax-free VA pension. See Benjamin Pomerance, *Fighting On Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 HAMLIN L. REV. 19, 26–31 (2014). Veterans seeking to pursue education at a college, university, or vocational program can receive substantial financial assistance to defray the costs of tuition, books and supplies, and housing through the G.I. Bill. See Cassandra Dortch, *The Post-9/11 Veterans Educational Assistance Act of 2008 (Post-9/11 G.I. Bill): Primer and Issues*, CONG. RESEARCH SERV., 8–14 (Sept. 13, 2017), <http://fas.org/spp/crs/misc/R42755.pdf>. This is just the tip of the iceberg of possible benefits, programs, and services that could be available to a given veteran.

⁶¹ Jones, *supra* note 6, at 310.

to jurisdiction.⁶² For example, some Veterans Treatment Courts will accept only those veterans who received an honorable discharge from military service because the VA excludes veterans with lower forms of discharge from most of their benefits, programs, and services.⁶³ Other Veterans Treatment Courts do not automatically bar veterans with a lower character of discharge.⁶⁴ Certain courts demand the veteran demonstrate a nexus between his or her criminal offense and his or her experiences in the military, while other courts impose no such requirement.⁶⁵ Some Veterans Treatment Courts will not accept individuals whose lone form of military service occurred in the National Guard, while others will consider any individual who ever wore the uniform of any component of the Armed Forces.⁶⁶ Some will admit only combat veterans, while others allow veterans with either combat or non-combat service.⁶⁷

Similar disparities exist regarding the types of cases a Veterans Treatment Court will agree to hear.⁶⁸ While these courts unvaryingly exclude the most heinous crimes such as homicide, rape, kidnapping, crimes of terrorism, and other comparably egregious offenses, significant variances emerge among Veterans Treatment Courts in addressing other types of criminal charges.⁶⁹ For instance, some Veterans Treatment Courts will accept veterans charged with domestic violence crimes, while others establish an absolute bar to taking domestic violence cases.⁷⁰ Certain Veterans Treatment Courts will take cases of “simple assault,” such as a commonplace bar fight in which the justice-involved

⁶² See Baldwin, *supra* note 45, at 722–33; see generally Arno, *supra* note 6, at 1060–61; Jones, *supra* note 6, at 310; Perlin, *supra* note 6, at 457–59.

⁶³ Cartwright, *supra* note 6, at 306; Moga, *supra* note 44. A veteran must possess a discharge from active duty service under conditions that are “other than dishonorable” to be eligible for VA benefits and services. 38 U.S.C. § 101(2) (2012).

⁶⁴ Moga, *supra* note 44.

⁶⁵ Jones, *supra* note 6, at 309; Carly Everett, *Cook County’s Effort to Provide a Veterans Track Within the Domestic Violence Court for Chicago*, 16 DIALOGUE 3 (2013), http://www.americanbar.org/content/newsletter/publications/dialogue_home/dialogue_archive/lis_dial_wi13_lamp1.html.

⁶⁶ See *infra* notes 232–395 and accompanying text.

⁶⁷ Arno, *supra* note 6, at 1060–61; see Charles Davis, *Traumatized Vets Are Finding Hope in Special Courts*, TAKEPART (Mar. 6, 2015), <http://www.takepart.com/feature/2015/03/06/veterans-treatment-courts>.

⁶⁸ Jeffrey Lewis Wieand, Jr., *Continuing Combat at Home: How Judges and Attorneys Can Improve Their Handling of Combat Veterans with PTSD in Criminal Courts*, 19 WASH. & LEE J. CIV. RIGHTS & SOC. JUST. 227, 247 (2012).

⁶⁹ See Megan McCloskey, *Veterans Court Takes a Chance on Violent Offenders*, STARS & STRIPES (Sept. 14, 2010), <http://www.stripes.com/veterans-court-takes-a-chance-on-violent-offenders-1.118182>; William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Vets to Help Other Vets*, AM. BAR ASS’N J. (Nov. 1, 2011), http://www.abajournal.com/magazine/article/the_battle_on_the_home_front_special_courts_turn_to_vets_to_help_other_vets/; Arno, *supra* note 6, at 1061; Baldwin, *supra* note 45, at 723; Perlin, *supra* note 6, at 458.

⁷⁰ Pamela Kravetz, *Way Off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 165–66 (2012); McMichael, *supra* note 69.

veteran never used a weapon to attack the victim, while other courts decline such matters.⁷¹ Illegal possession of firearms, an unsurprisingly common charge for individuals who spent years under strict orders to keep their weapons close at hand, is another problematic offense, with some Veterans Treatment Courts rejecting these cases outright but others agreeing to consider accepting them on a case-by-case basis.⁷² Some Veterans Treatment Courts refuse all cases in which the veteran engaged in any form of violence or the threat of violence, while others frequently accept offenders charged with a crime involving violence.⁷³

Still another common difference appears in the relationship between the presiding judge, prosecutor, and defense attorney in the Veterans Treatment Court setting.⁷⁴ While Veterans Treatment Courts are meant to be uniquely non-adversarial entities, the issue of whether a Veterans Treatment Court will accept a particular individual can become very adversarial.⁷⁵ The question of who should serve as the “gatekeeper” for these courts, wielding the final decision of what cases are admitted and what cases are denied, varies among the jurisdictions.⁷⁶ Some courts grant final authority to the presiding judge, others permit the District Attorney’s Office to have absolute veto power, and still others provide for a collaborative conference between the judge, the prosecutor, and the defense counsel.⁷⁷ When a Veterans Treatment Court agrees to handle a case, the respective

⁷¹ Kravetz, *supra* note 70, at 183–84 n.109; see Jeanette Steele, *Progress Report: Veterans Court*, SAN DIEGO UNION-TRIBUNE (Jan. 11, 2015), <http://www.sandiegouniontribune.com/military/sdut-veterans-treatment-court-sandiego-permanent-2015jan11-htmlstory.html>; Cartwright, *supra* note 6, at 309.

⁷² Kravetz, *supra* note 70, at 183–84 n.109; see also Matthew Wolfe, *From PTSD to Prison: Why Veterans Become Criminals*, THE DAILY BEAST (July 28, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/2013/07/28/from-ptsd-to-prison-why-veterans-become-criminals.html> (noting that keeping a firearm close at hand, a requirement while serving on active duty, morphs into a potential felony charge immediately after a veteran’s discharge from military service).

⁷³ Perlin, *supra* note 6, at 458; Wieand, *supra* note 68. Compare McMichael, *supra* note 69 (discussing a Veterans Treatment Court that tries to distinguish between those veterans who were violent before military service and those whose violence began only after military service), and McCloskey, *supra* note 69 (describing a specific Veterans Treatment Court in California that accepts violent offenders), with Arno, *supra* note 6, at 1061 (stating that the Veterans Treatment Court in Buffalo, New York, is limited to non-violent offenders).

⁷⁴ New York State Veterans Treatment Court, Roundtable Discussion at the VA Medical Center in Canandaigua, N.Y. (Nov. 18, 2015) (notes on file with the author) [hereinafter Veterans Treatment Court Roundtable].

⁷⁵ See *id.*; see also Shah, *supra* note 7, at 95 (discussing multiple variances in the eligibility requirements for Veterans Treatment Courts within the State of Wisconsin).

⁷⁶ See *infra* notes 190–201 and accompanying text.

⁷⁷ See, e.g., ALABAMA BAR ASS’N, *Core Competencies Guide: Veterans Treatment Court Planning Initiative Trainings* 1, 11, <http://www.alabar.org/assets/uploads/2014/11/Veterans-Court-Team-Members-Core-Competence-Guide-VTCPIT.pdf> (last visited Dec. 14, 2016) (stating that the prosecutor typically serves as the gatekeeper for a Veterans Treatment Court in Alabama); MICHAEL C.H. McDANIEL, WESTERN MICHIGAN UNIVERSITY, *VETERANS TREATMENT COURTS IN MICHIGAN: A MANUAL FOR JUDGES 9–10* (2015), <http://courts.mi.gov/Administration/admin/op/>

roles of these three key individuals in the ensuing treatment process likewise differs tremendously from court to court.⁷⁸

Data collection also remains disparate among the various courts.⁷⁹ In a number of jurisdictions, Veterans Treatment Courts are not required to develop reliable methods of monitoring court activities, collect relevant data, or report this data in a publicly accessible format.⁸⁰ Some jurisdictions do institute data collection and reporting demands, while other individual courts simply take it upon themselves to engage in such a process.⁸¹ Still, the overall lack of objective and reliable data regarding Veterans Treatment Courts remains startling and detrimental to the public's overall understanding of the benefits and drawbacks of these courts.⁸²

Lastly, Veterans Treatment Courts differ in their criteria for graduation from the treatment program and in the effects of this successful graduation.⁸³ Some courts insist that a justice-involved veteran participate in the treatment program for a particular amount of time before the veteran can become eligible to

problem-solving-courts/SiteAnalyticsReports/VTC%20Manual%20for%20Judges.pdf (describing various gatekeeper models employed in Michigan's Veterans Treatment Courts, including leaving the decision up to the presiding judge and following a consensus model in which the prosecutor, defense counsel, and judge all have a vote).

⁷⁸ Veterans Treatment Court Roundtable, *supra* note 74 (noting the substantial variance in handling Veterans Treatment Court cases from county to county, including differing types of working relationships among judges, district attorneys, and defense attorneys). Veterans Treatment Courts also differ significantly regarding the point at which they determine that a particular defendant is a veteran who may be eligible for Veterans Treatment Court. *See* Baldwin, *supra* note 45, at 734 (stating 88% of all Veterans Treatment Courts surveyed lacked an established procedure for identifying veterans in contact with the criminal justice system).

⁷⁹ *See* Arno, *supra* note 6, at 1061, 1065–68.

⁸⁰ *See, e.g.*, Kerwin Henderson & Kevin Stewart, *Veterans Treatment Courts*, AM. U. JUST. PROGRAMS OFF. 2, <https://www.american.edu/spa/jpo/initiatives/drug-court/upload/VTC-Fact-Sheet.pdf> (last visited Dec. 14, 2016); John Adams, Jaye Hobart & Mark Rosenberg, *The Illinois Veterans Treatment Court Mandate: From Concept to Success*, THE SIMON REV. Paper No. 48, 12 (Oct. 2016) (urging the State of Illinois to adopt reliable and consistent data collection methods among its Veterans Treatment Courts to measure successes and failures and determine best practices).

⁸¹ *See, e.g.*, MICH. COMP. LAWS § 600.1210 (2017) (requiring Veterans Treatment Courts to collect data “on each individual applicant and participant and the entire program.”).

⁸² Luciana Herman, *Do Veterans Treatment Courts Make a Difference?*, STAN. L. & POL'Y LAB (Oct. 20, 2015), <http://law.stanford.edu/2015/10/20/do-veterans-treatment-courts-make-a-difference/> (“[N]o data exists on whether the outcomes from [Veterans Treatment Courts] differ from one jurisdiction to another—each with its own rules and standards—or from other regular courts. . . . Th[is] gap in knowledge impacts public policy as well as the lives of individual veterans and their families and communities.”); Henderson & Stewart, *supra* note 80 (discussing the problems created when jurisdictions fail to collect meaningful data regarding their Veterans Treatment Courts). Thankfully, some researchers have recently published evidence-based reviews of Veterans Treatment Courts across multiple jurisdictions, providing essential guidance for current and future judges, attorneys, court personnel, social services leaders, and policymakers. *See, e.g.*, Baldwin, *supra* note 45.

⁸³ Baldwin, *supra* note 45, at 744–45.

graduate, while others do not establish any time requirements.⁸⁴ A number of courts demand an evaluation from the treatment team affirming that the veteran's condition has improved, while others do not require such an assessment.⁸⁵ Graduation from Veterans Treatment Court can result in full dismissal of the charges against the justice-involved veteran, withdrawal of a guilty plea but acceptance of a non-criminal disposition, or maintenance of the guilty plea with a conviction of a less-severe offense, depending on the court.⁸⁶ Here, as with the other examples provided above, Veterans Treatment Courts institute distinct procedures and deliver different outcomes from location to location.⁸⁷

As a problem-solving and rehabilitation-centered model, Veterans Treatment Courts rightfully appear to be here to stay. Veterans Treatment Courts stand as the latest chapter in the ongoing and necessary trend toward creative judicial diversion programs, such as Drug Courts and Mental Health Courts, in the criminal justice system.⁸⁸ Anecdotally, the outcomes of these courts are excellent overall, drawing support from both sides of the political aisle.⁸⁹ In an era of overcrowded prisons, high publicly-borne incarceration costs, better-than-ever scientific knowledge about the physical and mental effects of military service, and the challenges veterans can face in reintegrating into the civilian world, and perhaps, more veteran-specific services available than at any other point in the history of the United States, the Veterans Treatment Court concept offers a sensible and rational approach to this area of criminal justice.⁹⁰

⁸⁴ See, e.g., FIFTH JUDICIAL DISTRICT (IDAHO), VETERANS TREATMENT COURT PARTICIPANT HANDBOOK 2 (2015), <http://www.5thjudicialdistrict.com/wp-content/uploads/problem-solving-court/family-reunification-drug-court/2015-5th-District-Vet-Court-handbook.pdf>; GUADALUPE COUNTY TEX., VETERANS TREATMENT COURT PARTICIPANT'S HANDBOOK 4 (2016), <http://www.co.guadalupe.tx.us/vetcourt/pdfs/handbook.pdf>; FORREST & PERRY COUNTY MISS., VETERAN'S TREATMENT COURT PARTICIPANT HANDBOOK 2, http://jpo.wrlc.org/bitstream/handle/11204/2956/Participant%20Handbook_Forrest%20and%20Perry%20Counties%20Veterans%20Treatment%20Court%20Mississippi.pdf?sequence=3 (last visited Dec. 14, 2016).

⁸⁵ Baldwin, *supra* note 45, at 744.

⁸⁶ See *infra* notes 154–230 and accompanying text; see also Baldwin, *supra* note 45, at 731 (“If pleading guilty must be a requirement for participation (as it is for the majority of [Veterans Treatment Courts]), including expunction upon graduation or after several years of not having any contact with the criminal justice system might serve as an incentive for more veterans to participate.”); Arno, *supra* note 6, at 1069 (describing the question of the legal impact of graduating from Veterans Treatment Court upon a justice-involved veteran as one of the most crucial decisions that a Veterans Treatment Court needs to make).

⁸⁷ See Baldwin, *supra* note 45, at 744.

⁸⁸ For one of several good existing summaries of this history and modern trend arising from this background, see Perlin, *supra* note 6, at 452–63.

⁸⁹ Holder Remarks, *supra* note 47; see *supra* notes 38–43 and accompanying text.

⁹⁰ See Cartwright, *supra* note 6, at 302–03; Hawkins, *supra* note 6, at 564, 568–70; Martin, *supra* note 4; McMichael, *supra* note 69; Moga, *supra* note 44; Steele, *supra* note 71.

From an equal application of justice perspective, however, the lack of uniformity among these courts remains troubling.⁹¹ While complete procedural rigidity among any subset of courts is already known to be impractical and undesirable, court system participants—and, indeed, the general public overall—deserve at least some standardized set of expectations and criteria by which an entity labeling itself a “Veterans Treatment Court” must abide.⁹² It is the question of who should develop and enforce these standards, as well as what court-related matters should remain unregulated, to which this article moves next.⁹³

III. THE CONTROVERSIAL BALANCE: JUDICIAL AUTONOMY AND EXTRAJUDICIAL RESTRAINTS

Debates over judicial autonomy in the United States date back to the days before the United States even existed.⁹⁴ In declaring their independence from Great Britain, the North American rebels cited King George III’s absolute control over the actions of colonial judges as a primary example of how the Crown had violated the most basic principles of good and reasonable governance.⁹⁵ Shortly afterward, while trying to rally public support for the ratification of the Constitution of the United States, Alexander Hamilton touted the founding document’s creation of a judicial branch steeped in principles of “independence” and “firmness.”⁹⁶ To Hamilton, a government in which the judiciary remained under the thumb of the legislative or executive branches would pose the gravest possible threat to the liberty that America’s revolutionaries had fought for so long to secure.⁹⁷

More than two hundred years later, however, disputes about the proper balance between judicial autonomy and regulation from the other two arms of government continue to rage on in the United States.⁹⁸ The guiding desire to maintain a judiciary that is “not under the thumb of other branches of Govern-

⁹¹ See *infra* notes 92, 188–207 and accompanying text.

⁹² See, e.g., Arno, *supra* note 6, at 1069–70, 1072; Shah, *supra* note 7, at 105–06.

⁹³ See *infra* notes 94–152 and accompanying text.

⁹⁴ See *O’Donoghue v. United States*, 289 U.S. 516, 530–32 (1933).

⁹⁵ WILLIAM R. EVERDELL, *THE END OF KINGS: A HISTORY OF REPUBLICS AND REPUBLICANS* 291 (2d ed. 2000).

⁹⁶ THE FEDERALIST NO. 78, at 405–06 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

⁹⁷ *Id.* at 402–06.

⁹⁸ See Russell Wheeler, *Judicial Independence in the United States of America*, JUDICIAL INDEPENDENCE IN TRANSITION 521–65 (Anja Seibert-Fohr ed., 2012); Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 606–21 (2014); Susan J. Becker, *The Evolution Toward Judicial Independence in the Continuing Quest for LGBT Equality*, 64 CASE W. RES. L. REV. 863, 866–95 (2014). In many ways, contemporary debates regarding judicial autonomy and judicial independence in the United States are extremely similar to the arguments held regarding this topic several decades ago. See generally Francis K. Zemans, *Judicial Independence and Accountability Symposium*, 72 S. CAL. L. REV. 625 (1999); Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108 (1970).

ment, and therefore equipped to administer the law impartially” continues to exist in the United States, at least in principle.⁹⁹ Indeed, the degree of separation between the judiciary and the other governmental entities is now a criterion which many observers use in judging whether a nation can legitimately anoint itself a member of the democratic world.¹⁰⁰ Yet, challenges arise from the fact that courts do not exist in a vacuum.¹⁰¹ Rather, they are a component of the entire mechanism of the Republican form of government in the United States.¹⁰² As a result, expecting courts to somehow function completely autonomously from the remainder of the government is as unrealistic today as it was centuries ago.¹⁰³

From this situation, a constant tug-of-war emerges between judges who want to remain as independent as possible and representatives of the two other branches that want to exercise at least some modicum of control over the judiciary’s activities.¹⁰⁴ This tension is not only acceptable, but desirable.¹⁰⁵ In fact, one

⁹⁹ Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 1 (2011).

¹⁰⁰ See Ian Johnson, *China Grants Courts Greater Autonomy on Limited Matters*, N.Y. TIMES (Jan. 2, 2016), http://www.nytimes.com/2016/01/03/world/asia/china-grants-courts-greater-autonomy-on-limited-matters.html?_r=1; Jan van Zyl Smit, *Judicial Independence in Latin America: The Implications of Tenure and Appointment Processes*, BINGHAM CTR. FOR THE RULE OF LAW 2, 13 (2016), <http://ariaslaw.com/boletines/Publicaciones%202016/2%20Judicial%20Indep%20in%20Latin%20America%20-%20Report%202016-04%20FINAL%20FOR%20WEB.pdf>; Nathan J. Brown, *Egypt’s Judges in a Revolutionary Age*, THE CARNEGIE PAPERS 3–8 (Feb. 2012), http://carnegieendowment.org/files/egypt_judiciary.pdf.

¹⁰¹ See Judith Resnik, *Interdependent Federal Judiciaries: Puzzling About Why and How to Value the Independence of Which Judges*, 137 DAEDALUS 28, 28–31 (2008).

¹⁰² See Charles Gardner Geyh, *Why Courts and Congress Collide, And Why Their Conflicts Subside*, AM. BAR ASS’N, 8–9, 27 (2006), http://www.americanbar.org/content/dam/aba/images/public_education/whycourtscongresscollide.pdf.

¹⁰³ Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 1–3 (2006); Harvey Rishikof & Barbara A. Perry, “Separateness but Interdependence, Autonomy but Reciprocity”: A First Look at Federal Judges’ Appearances Before Legislative Committees, 46 MERCER L. REV. 667, 667, 669–70 (1995); Geyh, *supra* note 102, at 8–9; Resnik, *supra* note 101, at 38–42. In the words of former United States Supreme Court Chief Justice Warren Burger: “There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases . . . But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business . . . [C]an each judge be an absolute monarch and yet have a complex judicial system function efficiently?” J. Clifford Wallace, *Judicial Administration in a System of Independents: A Tribe With Only Chiefs*, 1978 BYU L. REV. 39, 56–57 (1978) (quoting former Chief Justice Warren E. Burger).

¹⁰⁴ Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 73 CHI.-KENT L. REV. 31, 86–87 (1998) (describing the relationship between the judiciary and the other two branches of government as involving both judicial independence and some level of inter-branch co-equality); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 1–3 (1958) (discussing the struggle for control over developing and implementing court rules among the three branches of government).

¹⁰⁵ See AMAR, *supra* note 1, at 60–64 (noting the inter-branch tensions implicit to a system of separation of powers).

can reasonably argue that this is the exact climate the Framers of the United States constitution strove to create when building a structure where each branch possessed powers to check the other two.¹⁰⁶ Through this system, where the three arms of government are at once partly independent from each other and partly responsible to each other, one can hope for an ultimate result that keeps these various governmental bodies in some level of balance for the overall betterment of the public.¹⁰⁷

The question, then, is not whether the legislative and executive branches can enact any significant constraints upon the courts, but rather what regulations and controls the so-called “political branches” may permissibly impose on the theoretically impartial judiciary.¹⁰⁸ Overall, some of the harshest contentions in this area emerge from conflicts about funding.¹⁰⁹ Cases abound concerning disputes over legislative and executive determinations regarding precisely how much money the judiciary should receive to carry out all aspects of its constitutionally appointed mission.¹¹⁰ Judicial leaders argue frequently that they need full autonomy over their own budget, as they possess unique expertise about how to most effectively administer their own necessary functions.¹¹¹ Judicial leaders further claim that legislators and executives could withhold funds as a form of retribution for a decision these lawmakers did not like, or threaten to reduce judicial budgets if judges fail to rule a particular way on a specific issue, thereby severely restricting the impartiality of the courts.¹¹² On

¹⁰⁶ See *id*; see also THOMAS E. MANN & NORMAN J. ORNSTEIN, *RENEWING CONGRESS: A SECOND REPORT* 78 (1993); Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Committee on Separation of Powers and Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT 69, 69 (1996); see Paul R. Verkuil, *A Proposal to Resolve Interbranch Disputes on the Practice Field*, 40 CATH. U. L. REV. 839, 841–42 (1991); Douglas W. Kimec, *Of Balkanized Empires and Cooperative Allies: A Bicentennial Essay on the Separation of Powers*, 37 CATH. U. L. REV. 73, 75–78 (1988) (praising the overall outcomes of the Framers' system of separation of powers, despite the inter-branch tensions that such a structure provides); Thomas O. Sargentich, *Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 464–68 (1987).

¹⁰⁷ Posner, *supra* note 103, at 1 (“[O]ur democracy requires a degree of judicial autonomy but also of checks and balances. Just as the other branches of government are subject to checks and balances, judges must not be treated as monarchical or oligarchical figures immune from all democratic control.”).

¹⁰⁸ See Levin & Amsterdam, *supra* note 104.

¹⁰⁹ See, e.g., William Scott Ferguson, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975, 975–76 (1972); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 219–23 (1993).

¹¹⁰ For one of several existing summaries about such cases, see Jackson, *supra* note 109, at 227–47.

¹¹¹ Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111, 111–12 (1994); G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, 14–19 (2004).

¹¹² Ferguson, *supra* note 109, at 975–76; Jackson, *supra* note 109, at 224–25.

the other hand, leaders from the legislative and executive branches assert that American voters entrust them with the responsibility of using public monies prudently and avoiding extravagant governmental spending, a trust they would violate if they lacked power to scrutinize the judiciary's budget and reject items that appear superfluous or excessive.¹¹³ Jurisprudence regarding these disputes varies widely, but one principle generally remains constant throughout these decisions: the concurrent need for the judiciary to remain at least somewhat accountable to the democratically elected leaders and for the legislative and executive branches to avoid arbitrary or capricious cuts of the judicial budget.¹¹⁴

Other inter-branch conflicts regarding court administration include clashes regarding a court's ability to hire or terminate courthouse personnel, to negotiate contractual terms with employee unions, to buy office equipment necessary to the proper functioning of the court, to compel funds for the necessary upkeep of courthouse facilities, and other "logistic or housekeeping" concerns for the judiciary.¹¹⁵ Often, though not always, the judicial branch has maintained a substantial level of autonomy in these areas, subject to legislative or executive overrule only if the judicial purchases or other decisions under review are blatantly wasteful or otherwise unreasonable.¹¹⁶

A separate category of these inter-branch conflicts includes issues regarding judicial autonomy over processes of courtroom procedural fairness. For instance, judges have long held the ability to establish rules governing appropriate conduct within their own courtrooms and to sanction individuals who violate those rules.¹¹⁷ Likewise, courts often set time limits for certain procedures where no statute of limitations exists in the law, and receive substantial deference when parties attempt to challenge these constraints.¹¹⁸ In certain circumstances, judges

¹¹³ Webb & Whittington, *supra* note 111, at 15–16.

¹¹⁴ See Webb & Whittington, *supra* note 111, at 45; Jackson, *supra* note 109, at 227–47; Ferguson, *supra* note 109, at 980–86; see also Posner, *supra* note 103, at 1 (discussing the need for a balance between judicial independence and accountability to the public).

¹¹⁵ Lyn Laufenberg & Geoffrey Van Remmen, *Courts: Inherent Power and Administrative Court Reform*, 58 MARQ. L. REV. 133, 135 (1975); Jackson, *supra* note 109, at 221 n.26.

¹¹⁶ See PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 92 (2015); Steven W. Hays & James W. Douglas, *Judicial Administration: Modernizing the Third Branch*, in *HANDBOOK OF PUBLIC ADMINISTRATION 1005–06* (Jack Rabin, W. Bartley Hildreth & Gerald J. Muller eds., 3d ed. 2007) (ebook).

¹¹⁷ Jackson, *supra* note 109, at 221 n.28 (discussing several court cases and scholarly commentaries affirming a broad degree of judicial discretion in this area).

¹¹⁸ For a sampling of circuit court cases affirming this traditional area of broadly construed judicial autonomy, see *Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1408 (11th Cir. 2011); *Thanedar v. Time Warner, Inc.*, 352 F. App'x 891, 896 (5th Cir. 2009); *Sparshott v. Feld Entm't, Inc.*, 311 F.3d 425, 433 (D.C. Cir. 2002); *Amarel v. Connell*, 102 F.3d 1494, 1514–15 (9th Cir. 1996); *Johnson v. Ashby*, 808 F.2d 676, 678 (8th Cir. 1987); *MCI Comm. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1172–73 (7th Cir. 1983), *superseded by statute*, *Telecommunications Act of 1996*, Pub. L. No. 104–104, 110 Stat. 56 (1996), *as recognized in Covad Commc'ns Co. v. Bell Atlantic Corp.*, 201 F. Supp. 2d 123, 127 (D. D.C. 2002).

may make and enforce rules of evidence and jurisdiction, as long as these rules do not conflict with existing federal or state evidentiary or jurisdictional laws.¹¹⁹

Judges have the authority to decide whether to grant bail and, if granted, to decide what amount of money constitutes reasonable bail in the case at hand.¹²⁰ They have broad discretion to determine whether an individual possesses the proper mental capacity to comprehend court proceedings and whether an individual needs a guardian assigned to represent his or her best interests.¹²¹ Judges also have the power to appoint counsel to ensure representation for a defendant in a criminal proceeding.¹²² They have significant independence to manage their own court's calendar and compel parties to appear on a date and time of the judge's choosing.¹²³ In all of these areas, judges maintain a substantial degree of self-determination, and are granted wide latitude to make decisions as long as their choices are not arbitrary or capricious.¹²⁴

However, the other two branches of government continue to impose noteworthy restraints upon the judicial branch.¹²⁵ Near the end of the nineteenth century, for instance, many states enacted legislation preventing judges from “summing up” evidence for a criminal trial's jury in a manner that revealed the judge's opinions regarding the value of evidence presented at the trial.¹²⁶ Legislatures determined that judges too often provided this summation in a manner biasing jurors toward one side in the case, causing them to decide that this practice harmed the central policy goal of preventing judges from influencing juries about the facts of a case.¹²⁷ Lawmakers establish other means of “saving

¹¹⁹ Jackson, *supra* note 109, at 221 n.28.

¹²⁰ Ferguson, *supra* note 109, at 976 n.5.

¹²¹ Yitshak Cohen, *The Right of a Minor to Independent Status—Three Models*, 10 NW. J. L. & SOC. POL'Y 1, 26 (2015); Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 738 (2002); Thomas Upchurch, *Guardianship Appointment at Judge's Discretion*, THOMAS UPCHURCH ATTORNEY AT LAW (Dec. 22, 2016, 9:15 PM), <http://www.upchurchlaw.com/guardianship-appointment-at-judges-discretion/>.

¹²² Laura B. Hardwicke, *After Mallard v. United States: The Federal Courts' Inherent Power to Appoint Representation for Indigent Civil Litigants*, 22 LOY. U. CHI. L.J. 715, 716 n.4 (1991); Ferguson, *supra* note 109, at 976 n.5.

¹²³ See, e.g., *Atchison, Topeka & Santa Fe Ry. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998); Joseph J. Janatka, *The Inherent Power: An Obscure Doctrine Confronts Due Process*, 65 WASH. U. L. REV. 429, 438 (1987); Carolyn L. Dessin, *Civil Procedure—Federal District Courts Have Inherent Power to Sanction Attorneys for Abuse of the Judicial Process*, 31 VILL. L. REV. 1073, 1090 (1986) (“[T]he power to control the docket arguably is included in the type of inherent power arising from the nature of the court and necessary to the exercise of all judicial powers.”).

¹²⁴ See *supra* notes 114–17 and accompanying text.

¹²⁵ See Posner, *supra* note 103, at 1.

¹²⁶ Paul Marcus, *Judges Talking to Jurors in Criminal Cases: Why U.S. Judges Do it So Differently from Just About Everyone Else*, 30 ARIZ. J. INT'L & COMP. L. 1, 11–14 (2013); see generally Curtis Wright, Jr., *Instructions to the Jury: Summary Without Comment*, 1954 WASH. U. L. Q. 177 (1954).

¹²⁷ See Marcus, *supra* note 126.

judges from themselves” through laws that prevent judges from engaging in behaviors that give the appearance of impropriety, and require judges to disclose certain aspects of their extra-judicial activities to the public.¹²⁸ These statutes represent policy judgments that the will of the people is best served when judges are prevented from conflicts of interest. This heightens the public confidence in the impartiality of these judges and encourages members of the public to respect judicial outcomes.¹²⁹

Sentencing policies represent another form of legislative and executive control over court procedures.¹³⁰ While statutes establishing mandatory minimum sentences for certain criminal offenses proved controversial from the outset, with courts making the case that too many rigidly constructed sentencing laws remove too much discretion from trial judges to hand down a punishment truly befitting of the guilty party’s crime, the basic concept behind such laws fits the notion of judicial accountability in a democratic society.¹³¹ The voters empower their elected representatives in the legislative and executive branches to advocate for policy decisions the people want, including the difficult determination of how severely society wants to punish a particular crime.¹³² Mandatory minimum sentencing statutes, therefore, represent the will of the people to see certain types of legally proscribed conduct punished in a particular way.¹³³ Given that it is the people’s representatives who establish the laws forbidding certain actions within the United States, again representing the will of the public to see such conduct banned, it logically follows that these same representatives would also codify the public’s desires to see such acts punished to a certain level, as long as that degree of punishment remains constitutional and rational.¹³⁴

¹²⁸ Mira Gur-Arie & Russell Wheeler, *Judicial Independence in the United States: Current Issues and Relevant Background Information*, in OFFICE OF DEMOCRACY & GOVERNANCE, GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 133, 137–38 (2002), http://pdf.usaid.gov/pdf_docs/pnacm007.pdf.

¹²⁹ *Id.*

¹³⁰ See Paul Larkin & Evan Bernick, *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, HERITAGE FOUNDATION (Feb. 10, 2014), <http://www.heritage.org/crime-and-justice/report/reconsidering-mandatory-minimum-sentences-the-arguments-and-against>.

¹³¹ See generally Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004) (stating that overly rigid sentencing requirements constrain judges too much and can lead to unjust outcomes, but pointing out that the concept of giving the people a chance, through their representatives, to establish policy judgments regarding sentencing is meritorious).

¹³² Book Note, *Determinate Sentencing and Judicial Participation in Democratic Punishment*, 108 HARV. L. REV. 947, 947, 952 (1995) (reviewing LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* (1994)) [hereinafter *Participation in Democratic Punishment*].

¹³³ *Id.* at 952.

¹³⁴ See *id.*; see also Larkin & Bernick, *supra* note 130. Of course, elected representatives must fulfill their role of translating the people’s desires into sensible policies that do not offend basic

Many other matters of court procedure receive significant legislative oversight.¹³⁵ For example, while the United States Supreme Court promulgates the Federal Rules of Civil Procedure, the proposed rules then receive the scrutiny of Congress, which has seven months to decide whether to exercise its veto power over the promulgated rules.¹³⁶ A similar review process exists regarding the Federal Rules of Evidence, which Congress adopted only after making multiple revisions to the recommended rules the United States Supreme Court drafted.¹³⁷ Many state legislatures retain the right expressly to veto or revise internally developed local court rules, “where the major premises of the court appear to conflict with policies which the legislators feel should be asserted.”¹³⁸ In all of these examples, the common thread once again becomes the transmission of the public’s input in these bedrock matters of policy through the representatives whom the people elect to make these decisions on their behalf.

From this brief discussion, one can observe a few general principles about the realistic interplay between these three co-equal branches of government.¹³⁹ First, legislative and executive measures designed to coerce judges into deciding cases in a certain manner or otherwise impairing judicial independence blatantly offend the core intentions of the United States Constitution and all subsequent laws attempting to preserve judicial impartiality.¹⁴⁰ By the same token, legislative and executive actions reasonably designed to prevent judges and other judicial branch personnel from compromising situations are proper checks on judicial autonomy, as they represent the public’s desire and need for a court system that distances itself from undue influence and other forms of impropriety.¹⁴¹

Secondly, courts typically maintain ample judicial autonomy over “housekeeping” matters, such as managing personnel, courthouse upkeep,

societal objectives, such as the constitutional prohibition against punishments that are cruel and unusual. See Sarah Kelman, *Comparative Analysis of Democracy and Sentencing in the United States as a Model for Reform in Iraq*, 33 GA. J. INT’L & COMP. L. 303, 305 (2004).

¹³⁵ See *infra* notes 136–38 and accompanying text.

¹³⁶ Nathan R. Sellers, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 328 (2011) (“[Enacting new Rules of Civil Procedure] requires approval from both the judicial and legislative branches of the Federal Government and gains legitimacy from its methodical nature and transparency.”).

¹³⁷ Catherine T. Struve, *The Paradox of Delegation: Interpreting the Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1107 n.16 (2002). While distinctions certainly exist between the legislative-judicial balance regarding the Rules of Evidence and the Rules of Civil Procedure, the fact remains that both of these extremely important sets of court rules are not made by courts alone, but rather, establish democratic legitimacy by engaging the people’s representatives in the process of amending the existing rules. See *id.*; Sellers, *supra* note 136.

¹³⁸ Levin & Amsterdam, *supra* note 104, at 17–18.

¹³⁹ See *supra* notes 108–38 and accompanying text.

¹⁴⁰ See *supra* notes 94–97, 99–100, and accompanying text.

¹⁴¹ See *supra* notes 125–29 and accompanying text.

negotiating contracts, and scheduling court calendars.¹⁴² As a basic rule, only in instances involving a gross abuse of judicial discretion may the other branches interfere with these decisions.¹⁴³ In addition, certain processes remain the traditional domain of judges, including setting bail, accepting or rejecting letters rogatory, assigning counsel, and declaring that a party needs a guardian to properly represent his or her interests.¹⁴⁴ Here, too, the legislative and executive branches generally maintain the power to overrule the judiciary only if the judge's decisions are arbitrary, capricious, or otherwise patently abusive.¹⁴⁵

Lastly, the legislative and executive branches rightfully play a larger role in decisions where matters of judicial administration implicate fundamental questions of public policy. These branches represent the will of the people in issues such as deciding what types of cases a court can and cannot hear, what forms of evidence a court must refuse to consider under certain situations, what types of interaction a judge should refrain from having with a jury, and what types of punishments are necessary to achieve societal criminal justice goals.¹⁴⁶ The electorate must live with the practical effects of these broadly ranging choices.¹⁴⁷ The outcomes of these matters directly impact the lives of American citizens. Their choices will impact verdicts of innocence or guilt, affect the public's faith in the judiciary to render legitimately impartial decisions, and declare where American goals and priorities reside within the criminal justice system.¹⁴⁸ In such matters, the courts must listen to the legislative and executive leaders whom the public entrusts with ensuring their voices are heard and stand accountable to the rationally applied will of the people.¹⁴⁹

However, this does not inherently mean that the "political branches" usurp all levels of judicial control in each of these situations.¹⁵⁰ Instead, the proper goal, as illustrated by some of the above-mentioned examples, is the development of a productive power-sharing arrangement among the three branches.¹⁵¹ In a

¹⁴² See *supra* notes 114–15 and accompanying text.

¹⁴³ See *supra* notes 114–15 and accompanying text.

¹⁴⁴ See *supra* notes 117–24 and accompanying text.

¹⁴⁵ See *supra* notes 117–24 and accompanying text.

¹⁴⁶ See *supra* notes 126–27, 130–38 and accompanying text.

¹⁴⁷ See *supra* notes 126–27, 130–38 and accompanying text; see also *infra* note 149 and accompanying text.

¹⁴⁸ See *supra* notes 126–38 and accompanying text.

¹⁴⁹ See, e.g., Posner, *supra* note 103, at 1; Sellers, *supra* note 136, at 328; *Participation in Democratic Punishment*, *supra* note 132, at 952; Larkin & Bernick, *supra* note 130.

¹⁵⁰ See Levin & Amsterdam, *supra* note 104, at 17–18; Struve, *supra* note 137.

¹⁵¹ See, e.g., Levin & Amsterdam, *supra* note 104, at 17–18; Sellers, *supra* note 136; Struve, *supra* note 137; Wallace, *supra* note 103, at 56–57. As a cautionary tale, one can look at the ongoing problems regarding mandatory sentencing laws. While the spirit behind these laws is proper, giving the people a voice in defining what punishments are appropriate for people who commit illegal acts, some of these laws are overly confining and remove too much discretion from trial court

government intended from the outset to preserve the tensions that an array of checks naturally cause, these give-and-take inter-branch relationships form a desirable relative balance between autonomy and accountability.¹⁵² With this in mind, this article now addresses a rationale for a similarly balanced approach of concurrent powers in the Veterans Treatment Court context.¹⁵³

IV. A NECESSARY BALANCE: INTER-BRANCH APPROACHES FOR VETERANS TREATMENT COURTS

The history of diversion courts or problem-solving courts frequently illustrates the judicial branch taking the lead in both program creation and administration.¹⁵⁴ Drug Treatment Courts started as a concept that judges and other justice professionals developed, rather than as a new legislative or executive creation.¹⁵⁵ As an offspring of this model, the nation's first Veterans Treatment Courts began because of the initiatives of Judge Murphy and Judge Russell, not through the work of innovative statutes or executive orders.¹⁵⁶ Since then, some states have enacted legislation encouraging the creation of Veterans Treatment Courts and establishing some threshold criteria for the work of these courts.¹⁵⁷ Still, in the majority of jurisdictions with Veterans Treatment Courts, the bulk of the criteria-setting work remains solely within the discretion of the judicial branch.¹⁵⁸ With such a court-centric legacy in mind, plenty of judges argue that any measure other than leaving oversight of Veterans Treatment Courts exclusively within the purview of the judicial branch would amount to breaking a system not yet broken.¹⁵⁹

Unfortunately, this complete lack of statutory control over most Veterans Treatment Courts has produced an undesirable level of inconsistency.¹⁶⁰ Basic standards often vary widely among Veterans Treatment Courts within the same

judges to allow for case-specific sentencing determinations. Overall, laws that strike a more balanced approach, establishing sentencing guidelines but permitting judges to deviate from these guidelines in extreme circumstances, have achieved considerably greater success and far broader acceptance. *See supra* notes 130–34 and accompanying text.

¹⁵² *See supra* notes 98–107 and accompanying text; *see also* Kelman, *supra* note 134, at 305 (discussing the democratic necessity of establishing a “balance between democracy and justice”).

¹⁵³ *See infra* notes 154–230 and accompanying text.

¹⁵⁴ *See generally* Greg Berman & John Feinblatt, *Judges and Problem-Solving Courts*, CTR. FOR COURT INNOVATION (2002).

¹⁵⁵ Lauren Kirchner, *Remembering the Drug Court Revolution*, PACIFIC STANDARD (Apr. 25, 2014), <http://psmag.com/remembering-the-drug-court-revolution-be13836c4be3#.9cj6psogq>.

¹⁵⁶ *See supra* notes 17–43 and accompanying text.

¹⁵⁷ *See infra* notes 232–394 and accompanying text.

¹⁵⁸ Shah, *supra* note 7, at 67.

¹⁵⁹ *See supra* notes 7–9 and accompanying text.

¹⁶⁰ Arno, *supra* note 6, at 1052, 1060–61; Baldwin, *supra* note 45, at 722–33; Jones, *supra* note 6, at 310; Perlin, *supra* note 6, at 457–59.

state.¹⁶¹ The components of a Veterans Treatment Court in any given county can be drastically different than the components of a Veterans Treatment Court situated in an adjoining county.¹⁶² While differences in resources, population, and other localized factors make homogeneity among Veterans Treatment Courts both impossible to achieve and detrimental to seek, a basic level of standardization codified in statute would prove desirable and proper for the following reasons.¹⁶³

A. *Democratic Accountability*

Tribunals consistently hold that no party possesses the right to have a case transferred to a Veterans Treatment Court.¹⁶⁴ Appearing in a Veterans Treatment Court, therefore, equates to a privilege that a court system may grant under certain circumstances.¹⁶⁵ In most jurisdictions today, these case-by-case decisions are simply a matter of “feel” made in some courts by the presiding judge, in others by the District Attorney, and in others by some combination of the judge, prosecutor, and defense counsel.¹⁶⁶ Understandably, there is no exacting formula applicable across all scenarios to decide whether a case warrants transfer into a Veterans Treatment Court.¹⁶⁷ Since appearing in a Veterans Treatment Court is not a legal entitlement, judges and other criminal justice personnel deserve enough latitude to make the decision that fits the unique facts and circumstances of a particular justice-involved veteran and the general public as a whole.¹⁶⁸

However, selecting which cases a Veterans Treatment Court should handle involves multiple financial, practical, and ethical considerations from which the public should not be left out.¹⁶⁹ Deciding which services the court needs to provide to a justice-involved veteran, what threshold standards a justice-involved

¹⁶¹ See Shah, *supra* note 7, at 81–84.

¹⁶² See *id.*

¹⁶³ See *infra* notes 164–230 and accompanying text.

¹⁶⁴ Eric Merriam, *Non-Uniform Justice: An Equal Protection Analysis of Veterans Treatment Courts' Exclusionary Qualification Requirements*, 84 MISS. L.J. 685, 714 (2015).

¹⁶⁵ *Id.*; see also *Veterans Court*, LAW FOR VETERANS, <http://www.lawforveterans.org/veterans-courts> (last visited Dec. 14, 2016) (“It is important to remember, no veteran has a ‘right’ to have their case assigned to Veterans Court. Once in Veterans Court, the veteran must continuously ‘earn’ the privilege of remaining in Veterans Court by complying with all the Court’s requirements.”).

¹⁶⁶ See *supra* notes 75–78 and accompanying text.

¹⁶⁷ See Arno, *supra* note 6, at 1060–61; Jones, *supra* note 6, at 310; Merriam, *supra* note 164, at 698–99.

¹⁶⁸ Shah, *supra* note 7, at 81–82; Rafferty, *supra* note 9.

¹⁶⁹ See Posner, *supra* note 103, at 1 (pointing out the importance of democratic control as a check on the power of courts). This does not mean that Veterans Treatment Court judges would or should lose all of their discretion to manage these courts, but rather signifies the need for a multi-branch collaboration in establishing and administering more uniform standards. See Kelman, *supra* note 134, at 305; Posner, *supra* note 103, at 1; Wallace, *supra* note 103, at 56–57.

veteran must meet before graduating from a Veterans Treatment Court, and what impact this graduation has upon the veteran's criminal charges are likewise policy matters that merit some level of public contribution.¹⁷⁰

A simple example illustrates this point. If a Veterans Treatment Court accepts only veterans possessing an honorable discharge, then every veteran in the court will be eligible to receive key treatment services and other benefits from the VA.¹⁷¹ One could argue, however, that a Veterans Treatment Court accepting only honorably discharged veterans excludes the very people whom such a program is designed to help: individuals who served in the Armed Forces but who now face barriers to reintegrating into civilian life.¹⁷² On the other hand, if a Veterans Treatment Court accepts all veterans regardless of discharge, then many veterans will not be eligible for VA benefits and services, meaning community providers will need to fill this void.¹⁷³ Decisions that can leave such a lasting impact upon members of the public warrant input from the individuals whom the people elect to represent their interests.¹⁷⁴

¹⁷⁰ See *infra* notes 171–74 and accompanying text; see generally *supra* notes 94–152 and accompanying text.

¹⁷¹ See 38 U.S.C. § 101(2) (2012) (“The term ‘veteran’ means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”).

¹⁷² Merriam, *supra* note 164, at 726–27, 738–40.

¹⁷³ *Id.* at 738–40; Cartwright, *supra* note 6, at 306; Moga, *supra* note 44. This question becomes even more challenging when considering the large number of veterans who improperly received a less-than-honorable discharge from the military. See John Rowan, *A Less Than Honorable Policy*, N.Y. TIMES (Dec. 30, 2016), <http://www.nytimes.com/2016/12/30/opinion/a-less-than-honorable-policy.html>. For instance, the Pentagon recently acknowledged that tens of thousands of veterans of the Vietnam War developed Post-Traumatic Stress Disorder (PTSD) during their military service that was never properly diagnosed or treated, leading the military to issue less-than-honorable discharges to them when their PTSD manifested itself in behaviors that the military deemed unacceptable. Karen Sloan, *Yale Helps PTSD Sufferers*, NAT'L L.J. (July 6, 2015), <http://www.nationallawjournal.com/id=1202731282790/Yale-Helps-PTSD-Sufferers?slreturn=20150715122112>. Others received a less-than-honorable discharge solely on the basis of declaring that they were homosexuals. David F. Burrelli & Jody Feder, *Homosexuals and the U.S. Military: Current Issues*, CONG. RESEARCH SERV. at 2 n.7, 9–10, <http://fas.org/sgp/crs/natsec/RL30113.pdf> (last visited Dec. 14, 2016). Whether a Veterans Treatment Court should automatically exclude all such individuals is a matter of public policy that the people's elected representatives need to decide for their constituents. See Merriam, *supra* note 164, at 742–43.

¹⁷⁴ See Sellers, *supra* note 136, at 328 (discussing the need for democratic participation in such areas). In the often-repeated words of Alexander Hamilton: “The Judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever. It may truly be said to have neither [f]orce nor [w]ill.” THE FEDERALIST NO. 78 (Alexander Hamilton). A matter that directly impacts “the purse” of the people, such as the scenario described above, is therefore best suited for the people's elected representatives to resolve. See generally *supra* notes 94–153 and accompanying text (discussing the distinctions between areas that are historically the sole province of the judiciary and areas that necessitate participation by the people's elected representatives).

While elected officials must exercise self-restraint and reserve enough statutory flexibility for Veterans Treatment Court judges to properly manage their own courtrooms, state legislatures and executives should enact and enforce statutes defining policy matters.¹⁷⁵ Examples of these areas include the baseline criteria for entry into a Veterans Treatment Court, the basic standards a veteran must meet to stay in and to graduate from the program, and the standard obligations that a Veterans Treatment Court owes to a veteran.¹⁷⁶ Without such principles codified in law, the public would be forced to accept the judiciary's decisions in these areas, even if made without the involvement of the people affected.¹⁷⁷ Such an outcome would represent an unacceptable overreach of power by the judicial branch.¹⁷⁸

B. Comprehensible and Consistent Labeling

When a court decides to establish and maintain an entity labeled as a “Veterans Treatment Court,” then the members of the general public have a right to know what minimum thresholds this entity must meet to bear this label.¹⁷⁹ To increase public understanding regarding what this label means, legislation should include common criteria by which all entities using this label must abide.¹⁸⁰

To an extent, this concept is analogous to labeling certain types of food “organic” or “kosher.”¹⁸¹ Laws and regulations governing the minimum standards food must meet to be labeled organic or kosher exist to create a basic level of expectations among producers and consumers.¹⁸² The same basic rationale holds true for a Veterans Treatment Court. If courts within a state wish to create

¹⁷⁵ See *infra* notes 176–231 and accompanying text.

¹⁷⁶ See *supra* notes 94–152 and accompanying text.

¹⁷⁷ See *supra* notes 94–152 and accompanying text.

¹⁷⁸ See *supra* notes 94–152 and accompanying text.

¹⁷⁹ See *infra* notes 180–87 and accompanying text.

¹⁸⁰ See *supra* notes 146–49, and accompanying text (discussing the rightful role of the voting public in broad policy matters regarding the court system).

¹⁸¹ See Kate L. Harrison, *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211, 213, 215–19 (2008); Marian Burros, *U.S. Imposes Standards for Organic Food-Labeling*, N.Y. TIMES, Dec. 21, 2000, at A22; Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 671 (1993).

¹⁸² Harrison, *supra* note 181, at 216 (“Congress began working on the regulations with the initial goal of creating consistent federal standards that would eliminate consumer confusion by providing ‘a clear picture of just what organically grown really means.’”); Masoudi, *supra* note 181, at 671 (“New York enacted the first kosher food law in 1915 in response to the ‘chaotic state of the kosher food industry—its charlatans, profiteers, and outright crooks—which . . . made any assurance of [validity of a product labeled ‘kosher’] all but impossible.”); see also TIMOTHY D. LYTTON, *KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD* 112 (2013) (noting that more than twenty states have adopted laws defining minimum standards of the term ‘kosher’ to guard against fraud and help marketplace consumers understand what it means when a product bears this label).

subdivisions carrying the “Veterans Treatment Court” label, then it follows logically that the state would want to declare the minimum standards a court must meet to hold this label.¹⁸³

By failing to incorporate minimum standards when designating a tribunal, a Veterans Treatment Court can produce an unnecessary level of confusion within a state. Without some basic standardization, a court could form an entity that calls itself a Veterans Treatment Court even if this entity fails to offer many of the most basic components of such a court, like a mentor program and connections to VA services.¹⁸⁴ These failures in turn, could lead to justice-involved veterans seeking to enter a “Veterans Treatment Court” without fully comprehending the requirements and offerings of that particular court, creating a breeding ground for misconceptions which benefit no one.¹⁸⁵

Establishing a greater level of uniformity will create a far more consistent understanding of what this term means between courtroom participants and the taxpaying public overall.¹⁸⁶ With such basic standards in place, individuals throughout a state will better understand what it means to establish and maintain a Veterans Treatment Court. This comprehension will prevent a court from carrying this label if it fails to meet the threshold criteria that the people, speaking through their popularly elected representatives, deem essential.¹⁸⁷

¹⁸³ See *supra* notes 179–82 and accompanying text. This does not insinuate that legislation is a magic panacea for anything that ails Veterans Treatment Courts. Indeed, commentators point out flaws regarding the food labeling regulation laws, particularly a concerning lack of governmental enforcement that undermines the effectiveness of these standards that are meant to promote greater uniformity. LYTTON, *supra* note 182, at 112–15. However, one would reasonably expect that a state would be able to more easily regulate the major activities of a close-knit network of Veterans Treatment Courts than it could the thousands of kosher food certifiers, suppliers, and retailers that operate private enterprises within a state’s borders. See *id.* (noting that enforceability of legislation is a significant problem in the kosher food industry due to the large and varied number of private-sector participants in this field).

¹⁸⁴ See Arno, *supra* note 6, at 1041–42 (describing the current lack of standardization among Veterans Treatment Courts and the need to develop standards among these courts based on best practices). A 2016 survey of seventy-nine Veterans Treatment Courts found that more than 20% of the Veterans Treatment Courts examined did not offer a mentor program. Baldwin, *supra* note 45, at 746. In this same survey, some courts reported offering only non-VA services in key areas, such as substance abuse treatments. *Id.* at 747. A surprisingly large number of Veterans Treatment Courts surveyed did not require random drug testing or drug and alcohol monitoring, despite the fact that monitoring the sobriety of program participants through “frequent alcohol and drug testing” is one of the “Ten Key Components of Veterans Treatment Courts” widely promoted as vital bedrock principles for any Veterans Treatment Court. *Id.* at 743; JUSTICE FOR VETS, *The Ten Key Components of Veterans Treatment Court*, <http://justiceforvets.org/sites/default/files/files/Ten%20Key%20Components%20of%20Veterans%20Treatment%20Courts%20.pdf> (last visited Dec. 14, 2016) [hereinafter *Ten Key Components*].

¹⁸⁵ See Arno, *supra* note 6, at 1060; Jones, *supra* note 6, at 310; Shah, *supra* note 7, at 105.

¹⁸⁶ See *supra* notes 61–87 and accompanying text (outlining the benefits of greater uniformity among Veterans Treatment Courts).

¹⁸⁷ See Shah, *supra* note 7, at 106.

C. *Equal Access to Justice*

Consistency is a bedrock goal of the criminal justice system.¹⁸⁸ While absolute constancy in the application of every aspect of criminal justice is impossible, basic access to justice remains an area in which consistency is necessary.¹⁸⁹ One would reasonably criticize a statewide criminal justice structure in which defendants received the right to counsel in only half of the state's counties. One would likewise argue against a scenario in which a statutory sentencing range for a particular crime applied in only one-third of the counties, leaving judges at liberty to impose a sentence of any length in the remaining counties.¹⁹⁰

Unfortunately, states open the door to a similarly inequitable system when they fail to provide statutory requirements for their Veterans Treatment Courts.¹⁹¹ In some states today, Veterans Treatment Courts differ markedly from county to county.¹⁹² Without any codified standards, Veterans Treatment Court judges and other court leaders can establish whatever demands they wish regarding the criteria for entering, remaining in, and graduating from their court's treatment program.¹⁹³ The court can make these requirements as stringent or as lenient as they wish, and apply them as evenly or as haphazardly as they choose, without any

¹⁸⁸ See, e.g., Lawrence A. Greenfield, *Foreword*, in U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ – 143505, PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM, at 31, 69 (1993); Mirko Bagaric, *Consistency and Fairness in Sentencing—The Splendor of Fixed Penalties*, 2 CAL. CRIM. L. REV. 1, 1, 5, 67 (2000) (stating that consistency in criminal justice is one of the keystone virtues of the rule of law).

¹⁸⁹ John Terzano, *Lack of Consistency Leads to Lack of Justice*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/john-terzano/lack-of-consistency-leads_b_213033.html (discussing problems arising from lack of consistency in the American criminal justice system); Sarah Krasnostein & Arie Freiberg, *Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How Do You Know When You've Got There?*, 76 L. & CONTEMP. PROBS. 265, 265–66 (2013) (describing societal concerns about the lack of consistency in sentencing policies in Australia); Theodore Dalrymple, *Jail Terms Mock Our Justice System*, THE TELEGRAPH (May 10, 2014, 5:49 PM), <http://www.telegraph.co.uk/news/uknews/law-and-order/10819996/Jail-terms-mock-our-justice-system.html> (criticizing inconsistencies in the criminal justice system in the United Kingdom).

¹⁹⁰ Krasnostein & Freiberg, *supra* note 189, at 265–66 (describing the problems that arise when sentencing policies are inconsistently applied). Again, consistency is not equivalent with rigidity. The “foolish consistency” that accompanies some heavily constrained mandatory sentencing laws is arguably just as disadvantageous to the criminal justice system as lacking any consistent regulations at all. Michele Cotton, *A Foolish Consistency: Keeping Determinism out of the Criminal Law*, 15 BOS. U. PUB. INT. L. J. 1, 5 (2005). The objective of this article is to promote a middle ground regarding Veterans Treatment Courts that establishes baseline standards reflective of the popular will, while still leaving appropriate latitude for judicial discretion in individual courtrooms. See *supra* notes 1–16 and accompanying text.

¹⁹¹ See Cartwright, *supra* note 6, at 308; Perlin, *supra* note 6, at 457–59.

¹⁹² Shah, *supra* note 7, at 105.

¹⁹³ See *id.*; Jones, *supra* note 6, at 313; Kravetz, *supra* note 70, at 166; Merriam, *supra* note 164, at 698–99.

legal consequences whatsoever.¹⁹⁴ They can follow or ignore proven best practices without facing any sanctions under the law.¹⁹⁵ The court can decide which data, if any, they wish to collect about their court's successes and failures, as well as determining on their own accord whether they wish to share this potentially useful data with anyone.¹⁹⁶

To some, this degree of judicial discretion may represent a rightful demonstration of a truly independent judiciary.¹⁹⁷ However, a Veterans Treatment Court landscape lacking consistency, stability, and uniformity does not represent a system of consistently administered justice.¹⁹⁸ For example, if a Veterans Treatment Court in one county demanded a nexus between a veteran's service-connected disability and the crime committed, and a Veterans Treatment Court in the adjoining county imposed no such requirement, a veteran who cannot definitively prove such a nexus would be denied access to a Veterans Treatment Court if he or she had the misfortune of committing an offense in the wrong county.¹⁹⁹ If a Veterans Treatment Court in one jurisdiction did not demand alcohol and substance abuse testing on a regular basis during the duration of the treatment program, and a different Veterans Treatment Court within the same state made such demands, then a veteran's ability to remain in the treatment program would depend entirely upon the court in which he or she were placed.²⁰⁰ Prosecutors, too, could deliver arbitrary gatekeeping decisions in this completely unrestricted universe, singlehandedly preventing a case from entering a Veterans Treatment Court even if the presiding judge considers the individual to be an ideal candidate for this court.²⁰¹ One could easily think of many more examples to illustrate inequities resulting from a system without any statutory constraints in place.²⁰²

¹⁹⁴ See *supra* notes 61–87 and accompanying text (discussing the types of problems that arise when jurisdictions fail to enact any meaningful degree of uniformity regarding Veterans Treatment Courts).

¹⁹⁵ See *supra* notes 61–87 and accompanying text.

¹⁹⁶ See *supra* notes 61–87 and accompanying text.

¹⁹⁷ See *supra* notes 7–9 and accompanying text.

¹⁹⁸ See *infra* notes 199–202 and accompanying text.

¹⁹⁹ See Everett, *supra* note 45; Jones, *supra* note 6, at 309.

²⁰⁰ See Baldwin, *supra* note 45, at 743 (noting that a significant number of the Veterans Treatment Courts surveyed for this study did not require random drug testing or drug and alcohol monitoring).

²⁰¹ See *supra* notes 75–78 and accompanying text.

²⁰² For instance, certain Veterans Treatment Courts within a state lacking any statutory guidance could restrict admission to combat veterans, while other jurisdictions within that state could offer a Veterans Treatment Court that accepts any veteran who ever served on active duty. See Arno, *supra* note 6, at 1060–61. Some Veterans Treatment Courts in such a state could refuse to accept any domestic violence offenders, while others could consider veterans with domestic violence charges on a case-by-case basis. See *supra* note 71 and accompanying text. Some Veterans Treatment

Again, the existence of these inequities does not mean that statutory control should rob every measure of discretion from Veterans Treatment Court judges.²⁰³ Such laws would be unduly rigid and would prove every bit as damaging as the absence of any statutory oversight in this area at all.²⁰⁴ Yet the examples above demonstrate that basic statutory standards are necessary to prevent unbridled disparities among the Veterans Treatment Courts within a particular state.²⁰⁵ Indeed, many Veterans Treatment Court judges themselves seek at least some basic statutory guidance to direct their decision-making in this area and to ensure they are operating their court in a manner consistent with their state's criminal justice objectives.²⁰⁶ The absence of such baseline expectations and requirements would impede any desire for a system striving for evenhanded justice to which people have equal access.²⁰⁷

D. Historical Analogies

The previous section discussed several scenarios in which courts commonly maintain virtually complete autonomy, as well as multiple examples where the judiciary traditionally shares legal authority with the legislative and executive branches.²⁰⁸ When comparing the questions surrounding Veterans Treatment Courts with these historical precedents, these matters fit best with the types of scenarios in which the three branches share control concurrently.²⁰⁹

Administering a Veterans Treatment Court is not a “housekeeping” issue like maintaining court facilities or hiring and firing courthouse personnel.²¹⁰ While certain personnel decisions or alterations to the court building itself may be necessary to operate a Veterans Treatment Court properly, the complete functioning of such a court extends far beyond these choices.²¹¹ Therefore, while courts should continue to maintain autonomy over these decisions in the

Courts could reward a graduating veteran with full dismissal of all pending criminal charges, while others could decide to offer conviction of a lesser offense as the only incentive for successfully completing the treatment program. *See* Baldwin, *supra* note 45, at 731.

²⁰³ *See supra* notes 94–152 (describing the importance of allowing the legislative and executive branches to institute some control over the courts without ever permitting the popularly elected branches from overstepping their constitutional grounds).

²⁰⁴ *See, e.g.,* Cotton, *supra* note 190, at 5; Kelman, *supra* note 134, at 305; *see also supra* notes 130–34 and accompanying text.

²⁰⁵ *See supra* notes 186–89 and accompanying text.

²⁰⁶ Veterans Treatment Court Roundtable, *supra* note 74.

²⁰⁷ *See* Merriam, *supra* note 164, at 745 (“[T]he notion of ‘equal access to the courts’ appeals to all but the least egalitarian among us.”) (emphasis omitted).

²⁰⁸ *See supra* notes 94–152 and accompanying text.

²⁰⁹ *See supra* notes 94–152 and accompanying text.

²¹⁰ *See supra* notes 114–15 and accompanying text.

²¹¹ *See supra* notes 17–60 and accompanying text.

Veterans Treatment Court context, this does not mean all facets of a Veterans Treatment Court should remain within the exclusive domain of the judiciary.²¹²

Nor is a reasonable degree of legislative and executive oversight likely to impede the judiciary's independence in a Veterans Treatment Court.²¹³ If anything, the very existence of a Veterans Treatment Court automatically lessens this concern, as the Veterans Treatment Court model calls for the prosecutor and the defense counsel to set aside their customary adversarial roles and work collaboratively toward a common goal of eventual rehabilitation.²¹⁴ Within this unique framework, the judge's role is typically less formal than what one would see during trial or a hearing, perhaps even removing his or her judicial robe and addressing the justice-involved veteran eye-to-eye rather than from the bench.²¹⁵ In this setting, the judge generally stands on the side of the veteran, ready to remove the veteran from the program if absolutely necessary while still taking all practical measures to set the veteran on a successful course toward graduation.²¹⁶ Well-drafted laws establishing standards for operating a Veterans Treatment Court should not obstruct the judge's ability to carry out this role.²¹⁷

Instead, issues regarding a Veterans Treatment Court's basic obligations effectively mirror the larger public policy questions regarding where the "political branches" and the judiciary typically share power.²¹⁸ In deciding what evidence is admissible in a criminal trial, which sentences are proper for a given crime, and what constitutes fundamental due process in a civil proceeding, the people's elected representatives rightfully play an essential role.²¹⁹ As this article discussed earlier, the concept of a Veterans Treatment Court offers many pathways that a jurisdiction could take.²²⁰ The choices a jurisdiction ultimately makes regarding how to structure and operate its Veterans Treatment Court implicate multiple matters directly affecting the public and should represent the people's choices regarding this unique aspect of the criminal justice system.²²¹ Logically, it follows that the legislative and executive branches should assume a comparable measure of authority to imbue the electorate's voice into these important decisions.²²²

²¹² See *supra* notes 94–152 and accompanying text.

²¹³ See *supra* notes 94–152 and accompanying text.

²¹⁴ Cartwright, *supra* note 6, at 307; Holder Remarks, *supra* note 47.

²¹⁵ See Perlin, *supra* note 6, at 475; Martin, *supra* note 4.

²¹⁶ *Ten Key Components*, *supra* note 184.

²¹⁷ See generally *supra* notes 94–152 and accompanying text (noting multiple areas of court administration in which statutes promote, rather than hinder, the effective functioning of the judiciary).

²¹⁸ See *supra* notes 125–38 and accompanying text.

²¹⁹ See *supra* notes 130–38 and accompanying text.

²²⁰ See *supra* notes 62–87 and accompanying text.

²²¹ See *supra* notes 167–78 and accompanying text.

²²² See *supra* notes 94–152 and accompanying text.

One could argue that the fundamental act of creating a Veterans Treatment Court represents such an important policy matter, and leaves such a definite public impact, that these courts should be permitted to exist only through express statutory authorization.²²³ However, such a stance supports an overly rigid statutory regime, an equally unwarranted and unnecessary stance.²²⁴ First, any state which passes a law compelling each jurisdiction within its borders to establish a Veterans Treatment Court would need to support such legislation with adequate funding to carry out this demand.²²⁵ Failure to do so would represent an improper unfunded mandate imposed by the legislative and executive branches upon the judiciary.²²⁶ Furthermore, over the past few decades, courts have maintained a proud legacy of developing novel ideas within the bounds of existing law which focus on the rehabilitative and corrective aspects of criminal justice, including the Drug Treatment Court model from which Veterans Treatment Courts grew.²²⁷ Robbing the judiciary of its ability to continue this important work would result in an unreasonable and overbroad burden being placed upon this branch.²²⁸

Instead, the proper solution is a balanced one, which allows limited but influential participation from each of the three branches.²²⁹ Just as the courts, the legislature, and the executive offices work together in the many policy-making functions described earlier, this trio of co-equal branches should carry out specific functions resulting in Veterans Treatment Courts maintaining enough discretion to be functional while operating with enough standardization to represent the popular will and to establish a realistically consistent application of justice from court to court.²³⁰ The next section examines several ways in which states are already trying to attain this balanced approach.²³¹

V. EXISTING BALANCES: STATE STATUTES STANDARDIZING VETERANS TREATMENT COURTS

The preceding three parts discussed the societal desirability and democratic necessity for an inter-branch approach to administering Veterans Treatment Courts.²³² This article now turns to an examination of several states that have

²²³ See, e.g., Shah, *supra* note 7, at 80–81.

²²⁴ See *supra* notes 94–152 and accompanying text (discussing the necessity of striking a balance in this area).

²²⁵ See Adams et al., *supra* note 80, at 8.

²²⁶ See *id.*

²²⁷ Berman & Feinblatt, *supra* note 154; Kirchner, *supra* note 155.

²²⁸ See *supra* notes 94–152 and accompanying text.

²²⁹ See *supra* notes 94–152 and accompanying text.

²³⁰ See *supra* notes 94–152 and accompanying text.

²³¹ See *infra* notes 232–394 and accompanying text.

²³² See *supra* notes 17–230 and accompanying text.

already enacted statutes standardizing certain processes in their Veterans Treatment Courts, as well as the Uniform Law Commission's draft of a Model Veterans Treatment Court Act, to study which criteria they chose to homogenize and what factors they decided to leave up to judicial discretion.²³³ The article will then conclude by offering a series of recommendations regarding which elements of a Veterans Treatment Court's operations warrant regulation from the legislative and executive branches and what aspects should remain solely in the hands of the courts.²³⁴

A. *Illinois*

The State of Illinois enacted its Veterans and Servicemembers Treatment Court Act (Act) in 2010, just two years after Judge Russell's Veterans Treatment Court opened in Buffalo.²³⁵ Incorporated within the state's Corrections Law, the statute permits the existence of only one "Veterans and Servicemembers Court" per state judicial circuit, with all other courts throughout that circuit able to transfer eligible cases to this specialty court.²³⁶ It permits such courts to exist under either a pre-plea or post-plea model, depending on the consent of the prosecutor.²³⁷ The statute restricts eligibility to individuals who were discharged from active duty military service "under conditions other than dishonorable," mirroring the VA's definition of the word "veteran."²³⁸ However, the language of the statute also opens the doors of these courts to men and women currently serving in the Armed Forces, including the National Guard and the Reserves.²³⁹ Ironically, this law permits these courts to accept presently serving National Guard members and Reservists, but does not allow for these courts to accept individuals whose only form of military service came in the Guard or the Reserves.²⁴⁰

All Veterans and Servicemembers Courts created in Illinois must follow the "nationally recommended 10 key components of drug courts" in their standards, processes, and procedures.²⁴¹ All such courts are required to bring together

²³³ See *infra* notes 235–394 and accompanying text.

²³⁴ See *infra* notes 395–455 and accompanying text.

²³⁵ 730 ILL. COMP. STAT. 167/1–167/35 (2017). See also *Veterans' Court Offer Soldiers a 2nd Chance*, ILLINOIS LAWYER NOW, Winter 2011, at 1, 4. At least two Veterans Treatment Courts had opened in Illinois before the state's legislature passed this law. *Id.* at 1.

²³⁶ 730 ILL. COMP. STAT. 167/15.

²³⁷ *Id.* 167/10, 167/20.

²³⁸ *Id.* 167/10.

²³⁹ *Id.* ("'Servicemember' means a person who is currently serving in the Army, Air Force, Marines, Navy, or Coast Guard on active duty, reserve status[,], or in the National Guard.").

²⁴⁰ See *id.*

²⁴¹ *Id.*

alcohol and substance abuse professionals, mental health experts, VA representatives, local social services programs, and other team members whom the presiding judge deems necessary to a justice-involved veteran's successful treatment and rehabilitation.²⁴²

The Act devotes an entire section to eligibility criteria.²⁴³ The prosecutor and the presiding judge play a “co-gatekeeper” function in Illinois, with the consent of both parties—as well as consent from the defendant—necessary to transfer a case from a traditional criminal court into a Veterans and Servicemembers Court.²⁴⁴ Any defendant convicted of a crime for which the state does not offer the possibility of probation is automatically ineligible for entry into these courts.²⁴⁵ Additionally, the Act bars the doors of these courts to defendants charged with a “crime of violence” as defined by this statute and defendants convicted of such a crime within the past decade.²⁴⁶ The presiding judge also possesses complete discretion to reject a defendant if the judge believes the defendant “does not demonstrate a willingness to participate in a treatment program,” even if both the prosecutor and defense counsel agree that the individual belongs in a Veterans and Servicemembers Court setting.²⁴⁷

Before accepting a defendant into a Veterans and Servicemembers Court, the judge must order the defendant to submit to a set of mandatory screenings, including an evaluation of the defendant's record as a veteran or a servicemember and a risk assessment including “recommendations for treatment of the conditions which are indicating a need for treatment under the monitoring of the Court.”²⁴⁸ Prior to accepting any eligible justice-involved veteran or servicemember, the presiding judge must inform the individual that failure to complete any component of the program's regimen may result in termination from the program.²⁴⁹ The judge must then execute a written agreement with the justice-involved veteran or servicemember describing the steps of the program and the consequences of non-compliance.²⁵⁰ Judges maintain the discretion to order the veteran or servicemember to complete either or both of substance abuse treatment or mental health counseling, and to “comply with physicians' recommendation[s] regarding medications and all follow up treatment.”²⁵¹

²⁴² *Id.*

²⁴³ *Id.* 167/20.

²⁴⁴ *Id.* 167/20(a).

²⁴⁵ *Id.* 167/20(b)(5).

²⁴⁶ *Id.* 167/20(b)(1), (3).

²⁴⁷ *Id.* 167/20(b)(2).

²⁴⁸ *Id.* 167/25.

²⁴⁹ *Id.* 167/25(c).

²⁵⁰ *Id.* 167/25(d).

²⁵¹ *Id.* 167/25(e).

Veterans and Servicemembers Courts in Illinois may, but are not required to, include a recovery-focused veteran-to-veteran mentorship component.²⁵² If a court establishes a peer-to-peer mentoring program, then the court bears the responsibility of training each volunteer mentor properly before permitting the mentor to work one-on-one with any justice-involved veterans on the court's docket.²⁵³ If a justice-involved veteran or servicemember successfully completes the entire program, then the court has discretion to dismiss the original criminal charges fully, terminate the original sentence, or "otherwise discharge him or her from any further proceedings against him or her in the original prosecution."²⁵⁴ However, the presiding judge also maintains the authority to undertake some other action toward the justice-involved veteran or servicemember following graduation from the prescribed program.²⁵⁵

B. Michigan

Under Michigan law, a veteran must "abuse or [be] dependent upon any controlled substance or alcohol or suffer from a mental illness" to potentially qualify for Veterans Treatment Court services.²⁵⁶ Veterans Treatment Courts are open only to individuals who received a discharge under conditions other than dishonorable and who served on active duty for at least 180 days, making the definition of the word "veteran" under this statute slightly more stringent than the VA's definition of a veteran.²⁵⁷

Michigan's Veterans Treatment Court statute mandates compliance with a modified version of the ten key drug treatment court components that Judge Russell drafted for his court in Buffalo.²⁵⁸ The statute requires any court developing a Veterans Treatment Court component to first participate in Veterans Treatment Court-specific training approved by the state's office of court administration.²⁵⁹ It also requires the circuit court in any state judicial circuit or the district court in any judicial district seeking to create a Veterans Treatment Court to enter into a memorandum of understanding (MOU) with each participating prosecuting attorney in that circuit or district, a member of the

²⁵² *Id.* 167/25(f).

²⁵³ *Id.* ("Courts shall be responsible to administer the mentorship program with the support of volunteer veterans and local veterans service organizations Peer recovery coaches shall be trained and certified by the Court prior to being assigned to participants in the program.").

²⁵⁴ *Id.* 167/35(b).

²⁵⁵ *Id.* The court also maintains broad discretion regarding what actions to take toward a justice-involved veteran who does not participate in the treatment program to the court's satisfaction. *See id.* 167/35(a).

²⁵⁶ MICH. COMP. LAWS § 600.1200(j) (2017).

²⁵⁷ *Compare id.* § 600.1200(h) with 38 U.S.C. § 101(2) (2012).

²⁵⁸ MICH. COMP. LAWS § 600.1201(1).

²⁵⁹ *Id.* § 600.1201(3).

criminal defense bar from that circuit or district, and at least one representative from the VA who agrees to support the work of Veterans Treatment Courts in that circuit or district.²⁶⁰

A traditional criminal court may transfer an eligible case to a Veterans Treatment Court within the state, provided the defendant, the prosecutor, the defense attorney, and the judges of both the transferring court and the Veterans Treatment Court agree to this move.²⁶¹ Transfer can occur at any point during the proceedings.²⁶² To further their work, Veterans Treatment Courts have the authority to contract with local service providers to provide background investigations and clinical assessments, although clinical services like drug and alcohol treatment and mental health therapy are to be provided by the VA whenever possible.²⁶³

Violent offenders are ineligible for admission into Michigan's Veterans Treatment Courts.²⁶⁴ A prior Veterans Treatment Court graduate may still be eligible for admission into a Veterans Treatment Court for his or her new offense.²⁶⁵ However, such a person cannot have his or her current offense fully dismissed upon returning to the court for a second time even if he or she successfully completes the full Veterans Treatment Court program.²⁶⁶ Before admitting a justice-involved veteran to a Veterans Treatment Court, the court must first conduct a "screening and evaluation assessment" that reviews multiple factors, including the individual's military record, prior criminal history, previous drug or alcohol abuse, mental health history, and "any special needs or circumstances . . . that may potentially affect the individual's ability to receive substance abuse treatment and follow the court's orders."²⁶⁷ The court must also work with professionals in various disciplines to assess the veteran's "risk of danger or harm to the individual, others, or the community."²⁶⁸ All information collected for these evaluations and assessments, with the exception of findings which demonstrate criminal conduct other than personal drug or alcohol abuse, cannot be used against the veteran in a criminal prosecution.²⁶⁹

Once a Veterans Treatment Court admits a justice-involved veteran, the court must provide the veteran a mentor who is "as similar to the individual

²⁶⁰ *Id.* § 600.1201(2).

²⁶¹ *Id.* § 600.1201(4).

²⁶² *Id.*

²⁶³ *Id.* § 600.1202.

²⁶⁴ *Id.* § 600.1203(1).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* § 600.1203(3)(a)–(b), (d)–(f).

²⁶⁸ *Id.* § 600.1203(3)(c).

²⁶⁹ *Id.* § 600.1203(4).

as possible in terms of age, gender, branch of service, military rank, and period of military service.”²⁷⁰ The court shall monitor the veteran’s progress closely and provide evaluations on a regular basis discussing the veteran’s progression through the program.²⁷¹ To encourage advancement, the Act requires the court to institute a strategy of rewards for meeting certain objectives and sanctions—including, where appropriate, “the possibility of incarceration or confinement”—for justice-involved veterans who fail to meet program standards.²⁷² The court must also connect the veteran with necessary physical and mental health services, educational opportunities, and vocational counseling.²⁷³ Whenever possible, these services should be VA-based.²⁷⁴ The veteran must also receive assistance from a VA-accredited Veterans Service Officer to determine whether the veteran is eligible for any federal or state veteran-specific benefits, programs, or services.²⁷⁵

A veteran’s admittance to a Veterans Treatment Court in Michigan does not exempt that veteran from paying court-ordered fines and costs, crime victims’ rights assessment fees, and any other court-ordered forms of restitution.²⁷⁶ Furthermore, the court must require that the justice-involved veteran reimburse the court for any expenses linked to services the court provides to the veteran, including all mandatory drug testing and mental health counseling services.²⁷⁷ However, the statute reserves to the court the discretion to waive this requirement in part or in total if the presiding judge determines that requiring the justice-involved veteran to pay money “would be a substantial hardship for the individual or would interfere with the individual’s substance abuse or mental health treatment.”²⁷⁸

Michigan’s statute provides multiple options a court can pursue upon the veteran’s graduation.²⁷⁹ In general, full dismissal of the criminal charges requires agreement from the prosecutor, and is available only if the veteran is participating in a Veterans Treatment Court for the first time.²⁸⁰ Full dismissal is available only if the justice-involved veteran is “not currently charged with and has not pled guilty to a [felony or misdemeanor] traffic offense” under the

²⁷⁰ *Id.* § 600.1207(1)(b).

²⁷¹ *Id.* § 600.1207(d).

²⁷² *Id.* § 600.1207(e).

²⁷³ *Id.* § 600.1207(f)–(g).

²⁷⁴ *Id.*

²⁷⁵ *Id.* § 600.1208(1)(f).

²⁷⁶ *Id.* § 600.1208(1)(a)–(d).

²⁷⁷ *Id.* § 600.1208(3).

²⁷⁸ *Id.*

²⁷⁹ *Id.* § 600.1209.

²⁸⁰ *Id.* § 600.1209(4)(a)–(e).

Michigan Vehicle Code.²⁸¹ If a veteran fails to complete the entire Veterans Treatment Court regimen, or is terminated from the program due to non-compliance, then the court enters an adjudication of guilt and proceeds to sentencing.²⁸²

After each justice-involved veteran leaves a Veterans Treatment Court, the Act requires the court to send information to the state police regarding the veteran's successful or unsuccessful participation in the program.²⁸³ If the veteran successfully graduates from a Veterans Treatment Court, then the state police must keep this record sealed from the public and exempt from disclosure under the state's freedom of information laws.²⁸⁴ Additionally, the Veterans Treatment Court must collect data "on each individual applicant and participant and the entire program," and provide such data to the state's office of court administration, allowing for this agency to examine each Veterans Treatment Court's methods and outcomes, and based on this information, develop best practices for Veterans Treatment Courts across the state.²⁸⁵

C. Texas

When Texas enacted legislation initially regarding Veterans Treatment Courts within its borders, the law limited participation in these courts to justice-involved veterans who sustained an injury while serving in a combat zone or other comparable area of "hazardous duty."²⁸⁶ In 2015, however, an amendment to this law went into effect and expanded eligibility to these courts, representing the improved public understanding that a damaging service-connected injury can occur in locations beyond a combat zone.²⁸⁷ Today, justice-involved veterans and servicemembers who served or are presently serving in any component of the Armed Forces, including the National Guard, State Guard, and Reserves, may be eligible for participation in a Veterans Treatment Court if doing so "is likely to achieve the objective of ensuring public safety through rehabilitation."²⁸⁸ Veterans and servicemembers who suffer "from a brain injury, mental illness, or mental disorder, including post-traumatic stress disorder, or [who] was a victim of military sexual trauma" receive particularly strong consideration for Veterans Treatment Court eligibility if the medical condition in question occurred

²⁸¹ *Id.* § 600.1209(4)(d).

²⁸² *Id.* § 600.1209(8).

²⁸³ *Id.* § 600.1209(6).

²⁸⁴ *See id.*

²⁸⁵ *Id.* § 600.1210; *see also id.* § 600.1211.

²⁸⁶ Brandon Barnett, *Texas Broadens Eligibility for Veterans Treatment Courts*, BARNETT HOWARD & WILLIAMS (Aug. 20, 2015), <http://www.bhwlawfirm.com/texas-broadens-eligibility-for-veterans-treatment-courts/>.

²⁸⁷ *Id.*

²⁸⁸ TEX. GOV'T CODE ANN. § 124.002(a)(2) (West 2017).

as a result of the individual's military service and impacted the individual's conduct that led to the criminal charges at issue.²⁸⁹

Texas's law makes no mention of any specific discharge classifications affecting the eligibility of a veteran's participation in Veterans Treatment Court, meaning that Texas's courts will accept veterans who are ineligible for VA benefits, programs, and services.²⁹⁰ A veteran must be represented by counsel before agreeing to the terms and conditions of a Veterans Treatment Court, and must remain represented by counsel for the duration of the veteran's time in the Veterans Treatment Court program.²⁹¹ All Veterans Treatment Court treatment plans must be individualized and must be provided to the justice-involved veteran.²⁹² Any treatment plan for a justice-involved veteran must involve a minimum of six months of treatment and monitoring, but cannot last longer than the allowable period of community supervision for the offense(s) charged.²⁹³

Veterans Treatment Courts may require justice-involved veterans to pay reasonable fees of \$1,000 or less for participating in the program, as well as the costs for any court-ordered testing, counseling, and treatment.²⁹⁴ The presiding judge maintains the discretion to waive these fees if the justice-involved veteran is truly unable to pay.²⁹⁵ Any money collected from justice-involved veterans in program participation fees must be "used only for purposes specific to the program."²⁹⁶

When necessary, to maximize the veteran's chances of successful rehabilitation, a Veterans Treatment Court that accepts a justice-involved veteran's case may transfer supervision of that case to another Veterans Treatment Court located in the county where the veteran works or lives.²⁹⁷ Where appropriate, courts may also approve teleconferencing or "other Internet-based communications" to meet treatment requirements.²⁹⁸ Veterans Treatment Courts in Texas must adopt the basic premises of Judge Russell's "ten key components" for Veterans Treatment Courts, as well as an eleventh component emphasizing involvement of the justice-involved veteran's family in the treatment process when feasible.²⁹⁹

²⁸⁹ *Id.* § 124.002(a)(1).

²⁹⁰ *See id.* § 124.002(a) (listing no character of service limitations within the statute's definition of the term "veteran").

²⁹¹ *Id.* § 124.003(a).

²⁹² *Id.* § 124.003(a)(3).

²⁹³ *Id.* § 124.003(a)(4).

²⁹⁴ *Id.* § 124.005(a).

²⁹⁵ *Id.* § 124.005(b)(1).

²⁹⁶ *Id.* § 124.005(b)(2).

²⁹⁷ *See id.* § 124.003(b).

²⁹⁸ *Id.* § 124.003(b-1).

²⁹⁹ *Id.* § 124.001(a).

Texas's Veterans Treatment Court statute does not expressly mandate the creation of a peer-to-peer mentor program.³⁰⁰ In addition, this law does not provide a list of specific criminal offenses or classifications of offenses resulting in an absolute bar to Veterans Treatment Court eligibility.³⁰¹ However, no veteran or servicemember may enter a Veterans Treatment Court without consent from the prosecuting attorney, as well as agreement from the defendant.³⁰² When a veteran or servicemember graduates from the Veterans Treatment Court program, the Veterans Treatment Court must then hold a hearing to determine whether dismissal of the charges "is in the best interest of justice."³⁰³ If this hearing results in such a determination, then the court maintaining original jurisdiction over the criminal matter is required to dismiss the case.³⁰⁴

D. Maine

Maine offers a Veterans Treatment Court statute which both expressly and implicitly leaves the bulk of the governing authority to the state's Supreme Judicial Court.³⁰⁵ It defines "veterans treatment court" as "a specialized sentencing docket in select criminal cases in which the defendant is a veteran or member of the United States Armed Forces to enable veterans['] agencies and social services agencies to provide treatment for that defendant."³⁰⁶ The statute specifies that a Veterans Treatment Court is not expected to provide treatment itself, but instead, "contracts or collaborates with experienced and expert treatment providers."³⁰⁷ This legislation calls for a collaborative approach to handling cases on a Veterans Treatment Court's docket, requiring partnerships among departments and agencies including district attorneys, the State Court Administrator, the state's Attorney General, the state's Department of Corrections, the state's Department of Emergency Management, and private community-based social services agencies.³⁰⁸

Beyond that, however, Maine's Veterans Treatment Court statute leaves all other criteria in the hands of the Chief Justice of the state's Supreme Judicial Court.³⁰⁹ If the Chief Justice believes that any baseline criteria are necessary

³⁰⁰ *See id.* § 124.003.

³⁰¹ *Id.* § 124.002 (describing eligibility requirements for Texas' Veterans Treatment Courts without mentioning any offenses that are absolute bars to participation in these courts).

³⁰² *Id.* § 124.002(a).

³⁰³ *Id.* § 124.001(b).

³⁰⁴ *Id.*

³⁰⁵ *See* ME. REV. STAT. ANN. tit. 4, § 433 (2017).

³⁰⁶ *Id.* § 433(1).

³⁰⁷ *Id.*

³⁰⁸ *Id.* § 433(3).

³⁰⁹ *Id.* § 433(2).

regarding management of these courts, then the Chief Justice may issue administrative orders and court rules of practice establishing these standards.³¹⁰ Yet the Chief Justice is not mandated to adopt any orders or rules if he or she does not deem them necessary, meaning each Veterans Treatment Court in Maine could theoretically differ dramatically from all of the other Veterans Treatment Courts around it.³¹¹ As the judicial branch, without legislative or executive input, forms these orders and rules, the people of Maine have very little direct impact upon the important criminal justice policies established by Veterans Treatment Courts within their state.³¹²

E. Utah

Enacted in 2015, Utah's Veterans Treatment Court statute is one of the newest in existence.³¹³ It authorizes the state's Judicial Council to establish a Veterans Treatment Court in any judicial district or geographic region of the state, but only if that district or region first demonstrates the need for such a court.³¹⁴ Furthermore, the district or region seeking a Veterans Treatment Court must first prove to the Judicial Council's satisfaction that a "collaborative strategy" already exists among the court, prosecutors, defense counsel, the Department of Corrections, substance abuse treatment providers, and the VA's Veterans Justice Outreach Program to support and sustain such a court.³¹⁵

All Veterans Treatment Courts in Utah require the justice-involved veteran plead guilty to the charged offense(s) or receive some other adjudication for one or more criminal offenses, before the veteran can enter the court's program.³¹⁶ Once accepted into the program, the justice-involved veteran must receive frequent alcohol and drug testing, unless the court deems such testing inappropriate for the nature of the veteran's criminal offense(s).³¹⁷ Unlike some of the other statutes examined earlier, Utah's law does not specify whether the justice-involved veteran needs to pay for this mandatory testing.³¹⁸ All justice-involved veterans in Veterans Treatment Courts must participate in "veteran diversion outreach programs," including substance abuse treatment programs

³¹⁰ *Id.* § 433(2).

³¹¹ *See id.*

³¹² *See id.* § 433; *supra* notes 94–153 and accompanying text.

³¹³ UTAH CODE ANN. § 78A-5-301 (West 2017).

³¹⁴ *Id.* § 78A-5-301(1)(a).

³¹⁵ *Id.* § 78A-5-301(1)(b).

³¹⁶ *Id.* § 78A-5-301(4)(a).

³¹⁷ *Id.* § 78A-5-301(4)(b).

³¹⁸ *Compare id.* § 78A-5-301 with MICH. COMP. LAWS §§ 600.1200–.1211 (2017) and TEX. GOV'T CODE ANN. §§ 124.001–.006 (West 2017).

when warranted.³¹⁹ Furthermore, all Veterans Treatment Courts in Utah must establish punishments for failing to comply with court-ordered requirements, although the precise nature of these sanctions appears to remain exclusively in the hands of the individual courts.³²⁰

Veterans Treatment Courts in Utah must collect and maintain data regarding their operations, practices, and outcomes, and report this information to the state's Administrative Office of the Courts.³²¹ The Administrative Office of the Courts must publish a report on the state's Veterans Treatment Courts the 1st of October.³²² At minimum, this report must include the number of justice-involved veterans participating in the state's Veterans Treatment Courts, the outcomes for justice-involved veterans who were involved in these court programs, the "types of programs" among the state's Veterans Treatment Courts, and any recommendations for measures that could improve Utah's Veterans Treatment Courts in the future.³²³

Utah's statute does not provide a definition of the term "veteran," nor does it state whether a Veterans Treatment Court may accept the case of an individual still serving on active duty or in the National Guard or Reserves.³²⁴ While a justice-involved veteran must plead guilty to a crime before entering Veterans Treatment Court, the law does not instruct the courts regarding what should happen to the veteran's criminal charges if he or she successfully graduates from the program.³²⁵ Additionally, the law does not establish a list of criminal offenses acting as absolute bars to Veterans Treatment Court eligibility, another distinguishing feature when compared with some of the statutes discussed earlier.³²⁶ Presumably, all of these matters are the sole domain of the individual Veterans Treatment Courts themselves, and would hopefully be resolved in the preliminary negotiations and agreements that must occur before the state's Judicial Council will permit a Veterans Treatment Court to exist in a particular jurisdiction.³²⁷

³¹⁹ UTAH CODE ANN. § 78A-5-301(4)(c).

³²⁰ *Id.* § 78A-5-301(4)(d).

³²¹ *Id.* § 78A-5-301(2), (5).

³²² *Id.* § 78A-5-301(5).

³²³ *Id.*

³²⁴ *See id.* § 78A-5-301 (providing no definition of the term "veteran" for Veterans Treatment Court participation purposes).

³²⁵ *See id.* § 78A-5-301(4)(d) (stating that Veterans Treatment Courts must sanction non-compliant participants, but providing no guidance about the legal impact upon a justice-involved veteran who successfully completes the assigned treatment program).

³²⁶ *Compare id.* § 78A-5-301, with 730 ILL. COMP. STAT. 167/5–167/35 (2017), and MICH. COMP. LAWS §§ 600.1200–.1211 (2017), and TEX. GOV'T CODE ANN. §§ 124.001–.006 (West 2017).

³²⁷ *See* UTAH CODE ANN. § 78A-5-301(1)–(2).

F. Tennessee

Like Utah, Tennessee enacted its Veterans Treatment Court statute in 2015.³²⁸ Tennessee's law mandates that any Veterans Treatment Court established within its borders represent a collaborative venture between the attorney general of that district and the defense counsel representing the justice-involved veteran.³²⁹ All Veterans Treatment Courts in Tennessee must adopt and fully adhere to the "Ten Key Components of Veterans Treatment Courts."³³⁰

The state's Department of Mental Health and Substance Abuse Services is responsible for administering most aspects of Veterans Treatment Courts in Tennessee.³³¹ This includes developing measurable standards for Veterans Treatment Courts within the state, and collecting, synthesizing, and reporting data to quantify the success rates of individual Veterans Treatment Courts, as well as recommending practices to follow and pitfalls to avoid.³³² The Department of Mental Health and Substance Abuse Services (the Department) must "sponsor and coordinate" Veterans Treatment Court trainings throughout the state, although the Department itself does not need to design the training.³³³ The Department must also "support" a peer-to-peer mentoring program for Veterans Treatment Courts, although no provisions in the Veterans Treatment Court statute appear to mandate a mentor program in all of the state's Veterans Treatment Courts.³³⁴

Additionally, Tennessee's statute authorizes the Department to administer and award grants to Veterans Treatment Courts throughout the state.³³⁵ The law restricts the use of grant money to six categories: funding a full-time or part-time director, funding staff to support Veterans Treatment Court program operations, funding medical treatment services for justice-involved veterans, funding drug testing, funding "costs directly related to program operations," and "implement[ing] or continu[ing] [V]eterans [T]reatment [C]ourt program operations."³³⁶ Any Veterans Treatment Court in Tennessee that does not abide by the Ten Key Components or any of the other state-mandated provisions is

³²⁸ TENN. CODE ANN. §§ 16-6-101–106 (2017) ("Criminal Justice Veterans Compensation Act of 2015").

³²⁹ *Id.* § 16-6-101(1).

³³⁰ *Id.* § 16-6-103.

³³¹ *Id.* § 16-6-104. For the remainder of this section, this article shall refer to the Tennessee Department of Mental Health and Substance Abuse Services as "the Department."

³³² *Id.* §§ 16-6-104(1)–(2).

³³³ *Id.* § 16-6-104(4).

³³⁴ *Id.* § 16-6-104(3).

³³⁵ *Id.* § 16-6-105.

³³⁶ *See id.*

ineligible to receive any state grant funding.³³⁷ Beyond this, the Department of Mental Health and Substance Abuse Services appears to possess wide discretion to award these grants to whatever courts they deem worthy of this funding.³³⁸

Similar to Utah's statute, Tennessee's law neither provides an exact definition of the term "veteran" nor clarifies whether servicemembers presently on active duty, National Guard duty, or Reserve status are eligible for Veterans Treatment Courts.³³⁹ Tennessee's statute does not explain whether justice-involved veterans are eligible for Veterans Treatment Court programs only after entering a guilty plea or whether pre-plea eligibility may sometimes be available.³⁴⁰ Tennessee's law also does not provide any precise guidance to Veterans Treatment Courts regarding the legal effects of successful graduation from the court-assigned program, including the impact upon the criminal charges that brought the veteran into the justice system in the first place.³⁴¹

G. Missouri

Missouri requires an agreement from the presiding judge of a state judicial circuit before any judge within that circuit may establish a Veterans Treatment Court.³⁴² The legislature assigns each state circuit court the responsibility of establishing rules for referring a case to a Veterans Treatment Court.³⁴³ However, no referrals can occur within that circuit until the state circuit court enters into a memorandum of understanding (MOU) with each prosecuting attorney in that circuit court.³⁴⁴ This MOU must include a list of offenses automatically rendering a defendant ineligible for the Veterans Treatment Court.³⁴⁵ The MOU may include participation from other parties such as defense attorneys, probation officers, and treatment providers from the VA and from local service agencies.³⁴⁶

Veterans and presently serving military members, including individuals serving in the National Guard, Reserves, and State Guard, meet the service

³³⁷ *Id.* § 16-6-106.

³³⁸ *See id.* § 16-6-105.

³³⁹ *See id.* § 16-6-101 (refraining from defining the term "veteran" within the confines of this statute).

³⁴⁰ *See id.* § 16-6-104 (mentioning nothing about whether Veterans Treatment Courts in Tennessee adopt only a post-plea model or whether pre-plea entry into Veterans Treatment Courts may be allowable).

³⁴¹ *Compare id.* § 16-6-104 with TEX. GOV'T CODE ANN. § 124.001(b) (West 2017) and MICH. COMP. LAWS § 600.1209 (2017).

³⁴² MO. REV. STAT. § 478.008(1) (2017).

³⁴³ *Id.* § 478.008(2)–(3).

³⁴⁴ *Id.* § 478.008(3)(2).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

eligibility standards for Missouri's Veterans Treatment Courts.³⁴⁷ Missouri's Veterans Treatment Court statute imposes no requirements regarding a veteran's character of discharge, meaning veterans who are ineligible for VA benefits, programs and services, may be eligible for a Veterans Treatment Court program.³⁴⁸ Transfer from a traditional criminal court to a Veterans Treatment Court in a different jurisdiction within the state may occur based on the residence of the justice-involved veteran or the unavailability of a Veterans Treatment Court in the original jurisdiction.³⁴⁹ This transfer may occur at any point during the judicial proceedings.³⁵⁰ If the veteran fails to graduate from the Veterans Treatment Court, then the case will return to the original court for a final disposition.³⁵¹

Veterans Treatment Courts in Missouri must refer a justice-involved veteran to mental health treatment, substance abuse treatment, or some combination thereof, unless good cause exists not to do so.³⁵² Such referrals can go to the VA, to the United States Department of Defense, or to community social services agencies.³⁵³ Community-based providers receiving referrals from Veterans Treatment Courts must receive certification through the Missouri Department of Mental Health.³⁵⁴

Statements from a Veterans Treatment Court participant, or any reports that Veterans Treatment Court staff develop regarding a justice-involved veteran's progress, are inadmissible against the justice-involved veteran in any criminal, civil, or juvenile proceeding.³⁵⁵ However, if a Veterans Treatment Court terminates a justice-involved veteran's participation in the program, then the court of original jurisdiction may obtain the reasons for termination and use this information when determining the sentencing or disposition of this individual.³⁵⁶ If a veteran graduates from the court-assigned program, then "the charges, petition, or penalty" against the justice-involved veteran "may be dismissed, reduced, or modified."³⁵⁷ The judiciary holds full authority to decide

³⁴⁷ *Id.* § 478.008(2).

³⁴⁸ *See id.* (refraining from limiting Veterans Treatment Court admissions to veterans discharged under honorable conditions); 38 U.S.C. § 101 (2012).

³⁴⁹ MO. REV. STAT. § 478.008(4).

³⁵⁰ *Id.* § 478.008(4)(2).

³⁵¹ *Id.* § 478.008(4)(4).

³⁵² *Id.* § 478.008(6).

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* § 478.008(7).

³⁵⁶ *Id.*

³⁵⁷ *Id.* § 478.008(10).

which of these options, if any, it wishes to pursue in each case.³⁵⁸ Notably, any fees a justice-involved veteran pays to a court for mental health or substance abuse treatment programs do not qualify as court costs or fees.³⁵⁹

H. Uniform Veterans Treatment Court Act

In November 2015, a seventeen-member committee from the Uniform Law Commission drafted a fourteen-page document that, in the Commission's opinion, represented a model for states seeking to establish legislation governing aspects of Veterans Treatment Courts.³⁶⁰ The model act allows Veterans Treatment Courts to accept both veterans and servicemembers, including individuals presently serving in the National Guard and the Reserves.³⁶¹ No veteran may be excluded from a Veterans Treatment Court under the model legislation solely on the basis of his or her character of discharge.³⁶² Under the model act, all Veterans Treatment Courts must adopt and implement the Ten Key Components of Veterans Treatment Courts.³⁶³

Veterans Treatment Courts may, in accordance with the circuit court judge's discretion, exist as a track within an existing Drug Treatment Court program or as a stand-alone court.³⁶⁴ Any court within a given jurisdiction holds the legal authority to establish a Veterans Treatment Court.³⁶⁵ If the circuit court judge prefers, one Veterans Treatment Court can exist within a particular judicial district, with other tribunals within that district transferring eligible justice-involved veterans to that particular court.³⁶⁶

Under the model act, justice-involved veterans may enter a Veterans Treatment Court only if the prosecutor consents to such a move.³⁶⁷ The justice-

³⁵⁸ *Id.* (placing no statutory limits on the judiciary's ability to pursue any of these options). The criteria for this would likely appear in the MOU governing that particular Veterans Treatment Court's activities. *See id.* § 478.008(3)(2).

³⁵⁹ *Id.* § 478.008(10).

³⁶⁰ MODEL VETERANS COURT ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Proposed Draft 2015).

³⁶¹ *Id.* § 2(1), (4), (5).

³⁶² *Id.* § 5(a) ("Veterans, regardless of discharge, and currently serving servicemembers are eligible for Veterans and Servicemembers Treatment Court.").

³⁶³ *Id.* § 2(6).

³⁶⁴ *Id.* § 4.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* § 5(a)(2).

involved veteran must consent to this arrangement as well.³⁶⁸ Even if both of these parties agree, however, the presiding judge still holds the power to reject a justice-involved veteran from his or her court.³⁶⁹ Interestingly, the model act does not require consent from defense counsel, nor does it require that counsel represent the justice-involved veteran at the time of consenting to Veterans Treatment Court participation.³⁷⁰

The model act devotes considerable attention to factors the court and the prosecutor may consider when evaluating whether to admit a justice-involved veteran to a Veterans Treatment Court.³⁷¹ These factors include, but are not limited to: the nature and circumstances of the charged offense, the defendant's prior criminal history, the defendant's "medical and mental history," the availability of resources to meet the defendant's treatment needs, any recommendations from the victim and from law enforcement, the likelihood of obtaining restitution from the defendant, and any other information that can help the court decide whether a Veterans Treatment Court is appropriate for this particular individual.³⁷² The model act then lists several specific offenses that instantly render a justice-involved veteran ineligible for Veterans Treatment Court, including various crimes of violence and offenses for which probation is never an option.³⁷³

According to the model act, both pre-plea and post-plea frameworks are acceptable for Veterans Treatment Courts.³⁷⁴ The final decision of whether to accept a case before a plea is entered, or to require that particular justice-involved veteran to enter a plea before the case is transferred, remains in the hands of the presiding judge.³⁷⁵ Each Veterans Treatment Court must adopt a manual of written policies and procedures, and must also enter into a written agreement with the justice-involved veteran.³⁷⁶ Both the manual and the written agreement informs the veteran about these policies—including the penalties for failing to comply with court requirements and orders—prior to entering the Veterans Treatment Court program.³⁷⁷ Statements from a justice-involved veteran during his or her participation in a Veterans Treatment Court, or from Veterans Treatment Court staff members about a particular justice-involved veteran, are inadmissible in any

³⁶⁸ *Id.* § 5(a)(1).

³⁶⁹ *Id.* § 5(a)(5).

³⁷⁰ *See id.* § 5.

³⁷¹ *See id.* § 5(a).

³⁷² *Id.*

³⁷³ *Id.* § 5(c).

³⁷⁴ *Id.* § 6(1).

³⁷⁵ *Id.* § 6(1), (4).

³⁷⁶ *Id.* § 6(4).

³⁷⁷ *Id.*

legal proceeding against that justice-involved veteran.³⁷⁸ However, if the court terminates an individual's participation in the program, then the reasons for termination are discoverable by the judge of original jurisdiction and can be used as a factor when considering disposition or sentencing.³⁷⁹

All participants in Veterans Treatment Courts must receive an eligibility assessment and a drug, alcohol, and mental health screening prior to the court deciding whether to accept the case.³⁸⁰ These screening reports must include an assessment of the justice-involved veteran's risk of recidivism, as well as treatment recommendations.³⁸¹ The presiding judge holds the power to order the justice-involved veteran to complete mental health counseling and/or substance abuse treatment, and comply with all physician-ordered treatment requirements.³⁸²

The model act lists several reasons why a Veterans Treatment Court may terminate a justice-involved veteran's participation.³⁸³ If the court ends an individual's participation, the court may reinstate the original criminal proceedings against the defendant.³⁸⁴ In addition, Veterans Treatment Courts retain the authority to order a justice-involved veteran to pay part or all the costs of the court-ordered treatment regimen.³⁸⁵ If the justice-involved veteran lacks adequate funds to pay for these costs, then the presiding judge should make every effort to "arrange for the probationer to be assigned to a treatment program funded by the State or federal government."³⁸⁶ Furthermore, the presiding judge may order the justice-involved veteran to complete reasonable community service activities in lieu of a financial payment to cover the costs of his or her treatment.³⁸⁷ If circumstances merit a full waiver of the costs involved, then the presiding judge also has the power to make such an order.³⁸⁸

Each individual court possesses the authority, under the model act, to develop its own baseline written "criteria that define successful completion of the

³⁷⁸ *Id.* § 6(5).

³⁷⁹ *Id.*

³⁸⁰ *Id.* § 7.

³⁸¹ *Id.* § 7(a).

³⁸² *Id.* § 7(c), (f).

³⁸³ *Id.* § 8.

³⁸⁴ *Id.* § 8(b)(4).

³⁸⁵ *Id.* § 9.

³⁸⁶ *Id.* § 9(a)(1).

³⁸⁷ *Id.* § 9(a)(2).

³⁸⁸ *Id.* § 9(b).

program.”³⁸⁹ If a justice-involved veteran graduates from the Veterans Treatment Court program, then the prosecuting attorney may—but is not required to—dismiss the criminal charges against this individual.³⁹⁰ If the justice-involved veteran entered a Veterans Treatment Court as a condition of the original court’s sentence, then the original court may reduce or modify the severity of the sentence after graduation from the Veterans Treatment Court.³⁹¹

Surprisingly absent from the model act are any criteria regarding peer-to-peer mentor program in the hypothetical state’s Veterans Treatment Courts.³⁹² In addition, the model act does not appear to enact any data collection or reporting requirements upon the courts.³⁹³ Given the tremendous need for reliably collected and thoroughly analyzed data regarding the practices, strategies, and outcomes of Veterans Treatment Courts, such an obligation would be widely welcomed.³⁹⁴

VI. PROPOSING A BALANCE: LEGISLATING STANDARDS THAT RESPECT JUDICIAL AUTONOMY

The final component of this article offers recommendations for states drafting or revising Veterans Treatment Court statutes.³⁹⁵ In developing a list of categories that the popularly elected branches should standardize, this part takes into consideration the existing Veterans Treatment Court laws explored in the preceding section, as well as the previous discussions regarding separation of powers principles in the governance of the United States.³⁹⁶

Again, the objective here is not to evaluate precisely how states should structure these criteria.³⁹⁷ Instead, this proposition considers only what types of decisions regarding Veterans Treatment Courts should come from the legislative and executive branches, and what groups of issues should remain topics over which the judicial branch maintains autonomy.³⁹⁸ This framework may not suggest a perfect structure for every jurisdiction, and plenty of states may indeed

³⁸⁹ *Id.* § 6(4).

³⁹⁰ *Id.* § 6(2).

³⁹¹ *Id.*

³⁹² *See id.* § 6.

³⁹³ Compare MODEL VETERANS COURT ACT with UTAH CODE ANN. § 78A-5-301(2) (West 2017) and MICH. COMP. LAWS § 600.1210 (2017).

³⁹⁴ *See supra* notes 80–83 and accompanying text.

³⁹⁵ *See infra* notes 396–455 and accompanying text.

³⁹⁶ *See supra* notes 94–230 and accompanying text.

³⁹⁷ *See supra* notes 1–16 and accompanying text.

³⁹⁸ *See infra* notes 401–55 and accompanying text.

take issue with some of the categories outlined below.³⁹⁹ However, it serves the ultimate purpose of this article's discussion: demonstrating that a sensible balance between democratically established uniformity and judicial discretion can and should exist in the Veterans Treatment Court context.⁴⁰⁰

A. *Threshold Matters*

A Veterans Treatment Court statute should logically begin with the definition of precisely whom such a court should seek to assist. Individualized case-by-case determinations of whether to accept or deny a particular justice-involved veteran should remain the ultimate domain of the judiciary.⁴⁰¹ Weighing the various facts and circumstances involved in a particular matter, and rendering a judgment about whether a particular case merits the intervention of a problem-solving court, is a traditional function of the judiciary.⁴⁰² In a Veterans Treatment Court, one would reasonably expect that the presiding judge would rely heavily upon the evaluations of the experts who form the treatment team before issuing a decision about whether to admit or deny the case at hand.

However, certain threshold policy matters—particularly those with direct financial implications or fundamental ethical judgments upon the counties where these courts reside—warrant the participation of citizens through their popularly elected representatives.⁴⁰³ For instance, a Veterans Treatment Court statute should provide a definition of the word “veteran” that applies to all Veterans Treatment Courts in the state. As discussed previously, defining this seemingly simple term is quite consequential.⁴⁰⁴ Mirroring the VA's definition, for instance, will automatically ban any individual with a less-than-honorable discharge from participating in a Veterans Treatment Court.⁴⁰⁵ Some might argue that doing so excludes far too many people from obtaining the potentially life-changing intervention and treatment these courts provide.⁴⁰⁶ On the other hand, localities

³⁹⁹ As already noted, each jurisdiction presents unique facts and circumstances that require unique administrative policies. *See, e.g., supra* notes 233–94 and accompanying text (discussing variations in legal standards of Veterans Treatment Courts among several states).

⁴⁰⁰ *See supra* notes 1–16 and accompanying text.

⁴⁰¹ *See supra* notes 165–69 and accompanying text. One would also expect that the judge would make this decision in consultation with the district attorney and the justice-involved veteran's defense counsel, but that the final authority of deciding whether to permit a case to enter Veterans Treatment Court would reside in the hands of that court's presiding judge. *See supra* notes 75–78 and accompanying text.

⁴⁰² *See supra* 94–153 and accompanying text.

⁴⁰³ *See supra* notes 108–53 and accompanying text.

⁴⁰⁴ *See supra* notes 171–73 and accompanying text; *see also supra* notes 154–231 and accompanying text (illustrating the consequences of differing definitions of the word “veteran” in various state statutes).

⁴⁰⁵ *See supra* notes 63, 171–73 and accompanying text.

⁴⁰⁶ Moga, *supra* note 44.

may bear additional treatment costs—an expense ultimately passed on to the men and women who live in these communities—if a Veterans Treatment Court accepts justice-involved veterans who are ineligible for VA services.⁴⁰⁷ Considering the direct impact of the construction of such a definition upon the people themselves, this is a decision the legislative and executive branches should rightfully make and apply uniformly across all of the Veterans Treatment Courts in the state.⁴⁰⁸

A Veterans Treatment Court statute should determine whether the state's Veterans Treatment Courts are open to individuals presently serving as well as to veterans, and decide whether members of the National Guard or the Reserves warrant “veteran” or “servicemember” status in this context.⁴⁰⁹ Determining how and when veterans are identified in the criminal justice system is another area meriting consistent statewide application.⁴¹⁰ Lawmakers also need to establish whether the Veterans Treatment Courts of that state will demand a nexus between a service-connected disability and the charged offense before permitting a justice-involved veteran's case to proceed into that court.⁴¹¹ Once again, these are fundamental criminal justice policy issues directly impacting the pocketbooks and ethical compasses of citizens, and a goal of consistently applied justice demands that these essential matters remain uniform throughout all of the state's Veterans Treatment Courts.⁴¹²

Similarly, the people's elected representatives need to decide whether certain types of criminal offenses are so egregious that the doors of all Veterans Treatment Courts must remain locked to any individual charged with these crimes. These decisions should come from the citizens, just as citizen decided mandatory minimum sentences are imposed upon conviction of certain proscribed conduct.⁴¹³ While the court's presiding judge may ultimately decide that a criminal offense not included on the statutory list is too severe to allow the case into a Veterans Treatment Court, the people have the right to provide

⁴⁰⁷ See Baldwin, *supra* note 45, at 723; Cartwright, *supra* note 6, at 306.

⁴⁰⁸ See *supra* notes 171–73 and accompanying text; see generally *supra* notes 154–231 and accompanying text.

⁴⁰⁹ Many, but not all, of the state statutes examined in this article provide such a definition. See *supra* notes 154–230 and accompanying text.

⁴¹⁰ U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, BREAKING THE CYCLE OF VETERAN INCARCERATION AND HOMELESSNESS: EMERGING COMMUNITY PRACTICES, at 2 (2015).

⁴¹¹ Everett, *supra* note 65; Jones, *supra* note 6, at 309 (discussing the policy objectives at issue for courts and for members of the public regarding this decision).

⁴¹² Arno, *supra* note 6, at 1060 (discussing the desirability of greater consistency among a state's Veterans Treatment Courts in areas that directly impact matters of public policy, including the major categorical questions of who can enter a Veterans Treatment Court and what parties in the justice system are tasked with making this decision); Shah, *supra* note 7, at 105. See *supra* notes 169–78 and accompanying text.

⁴¹³ See *supra* notes 130–34 and accompanying text.

the courts with a basic set of offenses, through their consensus-based input, that Veterans Treatment Courts shall never hear.⁴¹⁴ By the same token, the legislative and executive branches should also include more generalized statutory language about the court's overall mission, guiding the state's Veterans Treatment Courts toward the broad varieties of cases that they should accept.⁴¹⁵ However, a Veterans Treatment Court statute should never mandate that these courts accept a certain category of criminal offense automatically.⁴¹⁶

Veterans Treatment Court statutes should also clearly designate the gatekeeper(s) of the court's docket.⁴¹⁷ The people should decide whether they want the district attorney's office to have absolute veto authority over potentially eligible cases, or whether the presiding judge possesses the final word after consultations with the prosecution and defense counsel, or whether some other arrangement is desirable.⁴¹⁸ Some statutes require a memorandum of understanding (MOU) on this matter between the judge, the district attorney, the defense bar, and other relevant parties.⁴¹⁹ Potentially, a state could require that the defendant be represented by counsel at the time of agreeing to enter the Veterans Treatment Court, a demand noted above in the Texas statute.⁴²⁰ Regardless of the method, this touchstone policy matter does not fit any of the areas in which the courts traditionally hold autonomy.⁴²¹ Instead, the decision in this area deserves to come from the people who will be affected by this elemental choice.

Finally, a Veterans Treatment Court statute should discuss which evaluations, screenings, and risk assessments defendants should undergo before a Veterans Treatment Court decides whether to accept or reject each case.⁴²²

⁴¹⁴ See *supra* notes 154–231 and accompanying text (demonstrating that democratic participation is necessary in decisions that have such a direct impact upon public life). For examples of some statutes that provide such lists, see *supra* notes 232–394 and accompanying text.

⁴¹⁵ See *supra* notes 176–78 and accompanying text (discussing public participation in formulating baseline eligibility requirements for Veterans Treatment Courts). For examples of such language in existing state statutes, see *supra* notes 232–394 and accompanying text.

⁴¹⁶ See, e.g., Cassell, *supra* note 131, at 1017–20; Kelman, *supra* note 134, at 305 (noting the problems that arise from laws that prevent presiding judges from employing any discretion in individual cases).

⁴¹⁷ See *supra* notes 75–78 and accompanying text.

⁴¹⁸ See *supra* notes 75–78 and accompanying text.

⁴¹⁹ See, e.g., MICH. COMP. LAWS § 600.1201(2) (2017); MO. REV. STAT. § 478.008(3)(2) (2017); see also UTAH CODE ANN. § 78A-5-301(1)(b) (West 2017) (requiring a “collaborative strategy” between the court, the district attorney's office, and other key players in the justice system before a new Veterans Treatment Court can form within the state).

⁴²⁰ TEX. GOV'T CODE ANN. §§ 124.002(a); 124.003(a) (West 2017).

⁴²¹ See *supra* notes 17–92 and accompanying text.

⁴²² See Baldwin, *supra* note 40, at 726 (discussing the variety in screening mechanisms among multiple surveyed Veterans Treatment Courts); see also Arno, *supra* note 6, at 1041 (stating that Veterans Treatment Courts would benefit from standardized best practices in this area).

Standardizing this procedure guards against arbitrary acceptances and capricious denials, protecting both the justice-involved veteran and the court system overall.⁴²³ While the judicial branch should still possess the final authority to accept or reject a case, mandating these scientifically administered screenings and assessments provides the Veterans Treatment Court with a body of largely objective evidence to consider when making its decision.⁴²⁴ A court may certainly request additional tests reasonably related to making this determination beyond those tests legally mandated, but a baseline set of examinations that all Veterans Treatment Courts within the state require ensures a particular level of scrutiny before letting a justice-involved veteran enter this program.⁴²⁵

B. Court Processes

After a Veterans Treatment Court accepts an eligible individual, a Veterans Treatment Court statute needs to outline both the justice-involved veteran's obligations to the court and the court's obligations to the justice-involved veteran.⁴²⁶ A Veterans Treatment Court statute should institute reasonable standards in ethics and competence for all persons involved with these programs.⁴²⁷ This should include, but not be limited to, a discussion of training requirements for all justice system personnel involved with these cases.⁴²⁸ While the law does not need to contain specific provisions detailing every aspect of this training, it should provide an overview of areas that the training needs to cover, as well as ensure that the trainers possess the necessary expertise to convey these insights and skills to court personnel.⁴²⁹ These legal requirements are akin to statutes requiring

⁴²³ See Perlin, *supra* note 6, at 470; Shah, *supra* note 7, at 81 (discussing the necessity of consistency within this area from court to court within a state).

⁴²⁴ A number of states have already reached this realization. See, e.g., 730 ILL. COMP. STAT. 167/25 (2017); MICH. COMP. LAWS § 600.1203(3); see also Baldwin, *supra* note 45, at 726, 749 (describing various screening mechanisms that the surveyed Veterans Treatment Courts utilize).

⁴²⁵ See Arno, *supra* note 6, at 1060–61 (describing the need to standardize assessment strategies among Veterans Treatment Courts).

⁴²⁶ See Shah, *supra* note 7, at 101–02. Some jurisdictions have already recognized this need and included this requirement in their Veterans Treatment Court statutes. See *supra* notes 233–394 and accompanying text.

⁴²⁷ See *id.* (describing the need for standardizing the parties involved in a Veterans Treatment Court and the level of expertise that these parties are expected to hold). This is another area in which legislative power to regulate the courts is well-established. See *supra* notes 94–152 and accompanying text.

⁴²⁸ See *supra* notes 252–53 and accompanying text (discussing Illinois' requirement that if a Veterans Treatment Court is establishing a peer mentorship program, the court is responsible for training the mentors); *supra* note 259 and accompanying text (explaining that before establishing a Veterans Treatment Court, Michigan's statutes require the court to undergo state approved training); *supra* note 333 and accompanying text (stating that Tennessee requires the Department of Mental Health and Substance abuse services to coordinate trainings for Veterans Treatment Courts).

⁴²⁹ See *supra* notes 252–53, 259, 333 and accompanying text.

financial disclosures and imposing other safeguards that prevent judges from entering compromising or damaging situations.⁴³⁰ As such measures preserve the public's faith in the judiciary, a matter that is particularly important with a novel judicial concept such as a Veterans Treatment Court, courts traditionally uphold statutes of this nature as a classic function of the "lawmaking branches."⁴³¹

Veterans Treatment Court laws also need to contain explicit language regarding whether any overriding principles or concepts need to govern all of the court's interactions with a justice-involved veteran.⁴³² For instance, if the people, speaking through the voices of their elected representatives, decide that the Ten Key Components of Veterans Treatment Courts encompass overriding goals that they want each Veterans Treatment Court to achieve, then the state's Veterans Treatment Court statute should encompass these ten precepts.⁴³³ The same holds true for other canons by which all Veterans Treatment Courts need to abide.⁴³⁴ In structuring these objectives, however, lawmakers need to ensure the language does not become overly restrictive to the courts, but instead paints these high-level purposes with a broad brush.⁴³⁵

Veterans Treatment Court statutes need to discuss the basic composition and objectives of the treatment team.⁴³⁶ Although these laws should leave plenty of latitude for the court to adjust the team's composition to adapt to certain situations, the statute should establish the permanent members without whom the court cannot properly execute its mission.⁴³⁷ For example, if the people's representatives determine the court should utilize the VA's services whenever possible, then the law should insist that a Veterans Justice Outreach Officer, or

⁴³⁰ See *supra* notes 125–29 and accompanying text.

⁴³¹ See *supra* notes 125–29, 141 and accompanying text.

⁴³² See *infra* notes 433–35 and accompanying text.

⁴³³ See Shah, *supra* note 7, at 67–68, 70, 80–81 (describing the need for greater democratic legitimacy surrounding Veterans Treatment Courts, including the inclusion of basic principles that the people want to apply to all Veterans Treatment Courts in a state). See *Ten Key Components*, *supra* note 184. While there seems to be little, if any, evidence-based research stating that all Veterans Treatment Courts should adopt all of these principles, several states have incorporated the Ten Key Components into their Veterans Treatment Court statutes. See, e.g., MODEL VETERANS COURT ACT § 2(6) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Proposed Draft 2015); 730 ILL. COMP. STAT. 167/10 (2017); TENN. CODE ANN. § 16-6-103 (2017).

⁴³⁴ See Shah, *supra* note 7, at 67–68, 70, 80–81. See, e.g., MICH. COMP. LAWS § 1201(1) (2017); TEX. GOV'T CODE ANN. § 124.001(a) (West 2017).

⁴³⁵ Shah, *supra* note 7, at 100 ("While legislation may provide consistency, it should not be so limiting as to remove the effectiveness of a [Veterans Treatment Court].").

⁴³⁶ See *infra* notes 437–40 and accompanying text.

⁴³⁷ See, e.g., 730 ILL. COMP. STAT. 167/10; MICH. COMP. LAWS § 600.1208; UTAH CODE ANN. § 78A-5-301(1)(b) (West 2017).

other VA representative, play an integral role on the treatment team.⁴³⁸ If the people determine that achieving sobriety is a necessary outcome of the treatment process, then lawmakers should include alcohol and substance abuse experts as mandatory team members.⁴³⁹ Moreover, if the overall public consensus agrees with the notion that peer-to-peer mentors play an essential role in rehabilitating justice-involved veterans, then legislators and executive branch leaders need to codify a requirement that each Veterans Treatment Court institute a mentor program, with each mentor properly trained and supervised in a manner maximizing the justice-involved veteran's chances for success.⁴⁴⁰

C. *Post-Court Outcomes*

Veterans Treatment Court statutes need to reflect the public's judgments about what should happen to a justice-involved veteran when his or her time in the treatment program ends.⁴⁴¹ If a veteran voluntarily drops out of the program, or if the Veterans Treatment Court team terminates the veteran's participation due to non-compliance, a Veterans Treatment Court statute should provide basic guidance regarding an appropriate judicial response.⁴⁴² For example, the law should specify whether the Veterans Treatment Court judge can hand down an appropriate sentence or disposition, the case needs to return to the original criminal court for a final outcome, or some other process is proper.⁴⁴³ Concurrently, the statute should clarify whether the judge may utilize any statements or reports from the veteran's time in the Veterans Treatment Court when deciding what sentence or disposition is appropriate.⁴⁴⁴

⁴³⁸ Shah, *supra* note 7, at 101–02. For a reminder of the important role that Veterans Justice Outreach specialists and other VA representatives can play on a treatment team, see *supra* notes 58–60 and accompanying text.

⁴³⁹ See Baldwin, *supra* note 45, at 739 (noting that 6.1% of the Veterans Treatment Courts who responded to this survey specifically listed “Overcome Drug Dependence” as one of the court's primary objectives); *id.* at 743 (stating that 8.8% of the responding courts require random drug testing and drug and alcohol monitoring as one of the court's participation requirements).

⁴⁴⁰ *Id.* at 746 (stating that nearly three-quarters of the Veterans Treatment Courts responding to this survey offer a peer-to-peer mentor program); see also *supra* notes 53–55 and accompanying text.

⁴⁴¹ See *supra* notes 146–49 (analyzing the historic preservation of democratic participation in forming judicial policies with such wide-ranging public impacts). The question of what happens to unsuccessful participants in a Veterans Treatment Court is another matter that directly impacts the public in terms of public safety, finances, and ethics. See, e.g., Jones, *supra* note 6, at 309–10, 327–28. Such a judgment requires the input of members of the public speaking through their elected representatives. See *supra* notes 94–152 and accompanying text.

⁴⁴² See, e.g., MICH. COMP. LAWS § 600.1209(6); MO. REV. STAT. § 478.008(7) (2017); see *supra* notes 83–87 and accompanying text.

⁴⁴³ See *supra* notes 83–87 and accompanying text.

⁴⁴⁴ See, e.g., MICH. COMP. LAWS § 600.1209(6); MO. REV. STAT. § 478.008(7).

The same concept holds true for veterans who successfully complete the Veterans Treatment Court's requirements.⁴⁴⁵ A Veterans Treatment Court statute must be in accord with the consensus of the public about what outcomes are proper for an individual who graduates from this program.⁴⁴⁶ The law must state whether full dismissal of all charges is possible, and, if so, under what circumstances.⁴⁴⁷ It must likewise define any situations where the court may still impose a disposition of guilt or a sentence of some level upon a veteran who graduates from Veterans Treatment Court.⁴⁴⁸ Additionally, the legislation should specify whether the Veterans Treatment Court holds any authority to order a justice-involved veteran to pay court fees or treatment costs, even if that veteran successfully completes the court-assigned program.⁴⁴⁹ This decision represents the public's opinions about who should bear the financial burdens of maintaining a Veterans Treatment Court and providing treatment to justice-involved veterans.⁴⁵⁰ However, lawmakers should permit Veterans Treatment Court judges enough discretion to waive all or part of the required fees, or to establish an alternative means of paying off this debt, if the judge determines that imposing the entire cost will hinder the justice-involved veteran's rehabilitation.⁴⁵¹

Lastly, a Veterans Treatment Court statute should establish requirements and methodologies for collecting, analyzing, and reporting data.⁴⁵² As noted earlier, reliable empirical data regarding Veterans Treatment Courts remains surprisingly scarce.⁴⁵³ Specifically, if the people's representatives determine it would be in the public's best interest to obtain data about the successes and failures of these courts, then the state's Veterans Treatment Court law should

⁴⁴⁵ See *infra* notes 446–51 and accompanying text.

⁴⁴⁶ See *supra* notes 94–152 and accompanying text (describing the constitutional necessity for members of the public to have an impact upon policy decisions of this nature).

⁴⁴⁷ See Baldwin, *supra* note 45, at 745 (discussing various options that Veterans Treatment Courts may offer to a justice-involved veteran who successfully graduates from the treatment program).

⁴⁴⁸ See *id.* The legislature may decide to grant significant discretion to the individual courts in this area. See, e.g., MO. REV. STAT. § 478.008(3)(2) (affording the presiding judge wide latitude to dismiss a justice-involved veteran's charge, reduce or modify the veteran's sentence on a case-by-case basis).

⁴⁴⁹ See, e.g., MICH. COMP. LAWS § 600.1208; TEX. GOV'T CODE ANN. § 124.005 (West 2017).

⁴⁵⁰ See *supra* note 449 and accompanying text (demonstrating two different statutory approaches to collecting fees from Veterans Treatment Court participants).

⁴⁵¹ This is another way to build inter-branch balance into a Veterans Treatment Court statute, allowing these laws to avoid the type of rigidity that prevent the judiciary from having enough flexibility to administer these courts properly. Courts traditionally hold a significant level of discretion in decisions to waive certain requirements regarding fines, restitution, court fees, and other monetary matters when the party in question truly is unable to pay such costs. See *supra* notes 94–152 and accompanying text.

⁴⁵² See *infra* notes 453–55 and accompanying text.

⁴⁵³ See *supra* notes 79–82 and accompanying text.

reflect this need to obtain reliable empirical data.⁴⁵⁴ As this information will assist Veterans Treatment Court leaders to develop best practices and become more productive—and will provide transparency into the actual effectiveness of these courts—it is fitting for the state’s lawmakers to provide and implement such a requirement.⁴⁵⁵

VII. CONCLUSION

Veterans Treatment Courts across the United States stand at a crossroads, immersed in the broader national debate regarding governmental separation of powers.⁴⁵⁶ While many states defer all matters pertaining to Veterans Treatment Court administration solely to the judiciary, this article demonstrated that a balanced inter-branch approach to managing these unique courts is not only plausible, but essential and appropriate.⁴⁵⁷ Judges must maintain significant discretion to properly manage their courtrooms and exercise independence in their decision-making, but a substantial level of democratic accountability remains necessary to maintain the constantly tense give-and-take of checks and balances the Framers intended.⁴⁵⁸

This article discussed the historic give-and-take between the judicial, the legislative, and executive branches. This evaluation included an analysis of the distinctions between areas in which the judicial branch traditionally maintains broad autonomy, such as rendering judgments in cases and controlling “housekeeping” matters regarding court facilities and personnel, and topics on which the people’s elected representatives in government commonly play a crucial role, including policy matters such as establishing rules of evidence, standards of civil procedure, and minimum sentencing thresholds.⁴⁵⁹ From there, this article demonstrated that certain aspects of Veterans Treatment Courts fall into categories in which the legislative and executive branches typically play a policymaking role, ensuring that the people’s viewpoints regarding these issues are reflected through standards that apply equally to all Veterans Treatment Courts within a given state.⁴⁶⁰

At present, some states have established statutes governing various aspects of their Veterans Treatment Courts, striking their own balances among the

⁴⁵⁴ See Adams et al., *supra* note 80; Herman, *supra* note 82; Jones, *supra* note 6, at 314.

⁴⁵⁵ See, e.g., MICH. COMP. LAWS § 600.1210 (2017); UTAH CODE ANN. § 78A-5-301(2) (West 2017).

⁴⁵⁶ See *supra* notes 1–92, 154–230 and accompanying text.

⁴⁵⁷ See *supra* notes 94–230 and accompanying text.

⁴⁵⁸ See *supra* notes 94–152 and accompanying text.

⁴⁵⁹ See *supra* notes 94–152 and accompanying text.

⁴⁶⁰ See *supra* notes 154–230 and accompanying text.

three branches in their governments.⁴⁶¹ This article offered a proposed framework for future Veterans Treatment Court statutes.⁴⁶² In doing so, this article offered a balance between policy areas in which the public's voice needs to be heard and topics about which the Veterans Treatment Courts themselves logically deserve to retain considerable autonomy.⁴⁶³

States will undoubtedly differ in the content of their Veterans Treatment Court statutes, with lawmakers developing language based upon value judgments and choices from the people themselves.⁴⁶⁴ Yet the objective of this article is not to determine what these outcomes should be, but rather simply to ensure that states provide the people the opportunity to make these decisions.⁴⁶⁵ Doing so will not, as some people fear, unduly intrude upon the rightful independence of the judiciary.⁴⁶⁶ Instead, states that involve all three branches of government in the administration of Veterans Treatment Courts and establish an appropriate balance of powers among them will enhance the likelihood that these courts will succeed.⁴⁶⁷ By reaching this balance, these jurisdictions will sustain the work of their Veterans Treatment Courts amid a framework constructed from some of the most important principles upon which this nation was built.⁴⁶⁸

⁴⁶¹ See *supra* notes 232–394 and accompanying text.

⁴⁶² See *supra* notes 395–455 and accompanying text.

⁴⁶³ See *supra* notes 395–455 and accompanying text.

⁴⁶⁴ See *supra* notes 232–294 and accompanying text.

⁴⁶⁵ See *supra* notes 1–16 and accompanying text.

⁴⁶⁶ See *supra* notes 154–230 and accompanying text.

⁴⁶⁷ See *supra* notes 154–455 and accompanying text.

⁴⁶⁸ See *supra* notes 154w–455 and accompanying text.