



**National
Defense
Committee**

Testimony Before the House Committee on Veterans Affairs

by

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Chairman and Chief Bottle Washer

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Introduction

Chairman Bost, Representative Takano, and members of the Committee, the National Defense Committee is honored to be with the Committee here today and thank you for holding this incredibly important hearing. The fact is the Department of Veterans Affairs (VA) has indiscriminately abrogated veterans’ inalienable rights for decades, not only the right to keep and possess arms (as is supposed to be protected from such federal government overreach by the Second Amendment), but those veterans’ due process rights which are similarly supposed to be protected from such government overreach by the Fifth and Fourteenth Amendments.

The National Defense Committee was founded in 2003 to protect military and veteran civil and legal rights. The National Defense Committee is proud of the leadership role it took from its inception to 2010 in:

- Highlighting the wholesale disenfranchisement of military personnel’s votes in federal elections, in the founding of the Alliance of Military and Overseas Voting Rights (AMOVR), in the drafting and adoption of the of the Uniform Military and Overseas Voters Act (UMOVA) by the Uniform Law Commission;¹
- The drafting and enactment of the *Uniform Services Employment and Reemployment Rights Act* (USERRA);
- The treatment of veterans benefits as that veteran’s earned benefits and personal property not subject to arbitrary and capricious bureaucratic oversight; and
- Protecting the Freedom of Speech, Freedom of Worship, and Freedom of Conscience for military personnel, especially military chaplains.

I’m also proud to represent the National Defense Committee’s as Co-Chair of the National Military & Veterans Alliance (NMVA), of which we are proud to be members along with Mission Roll Call and America’s Warrior Partnership, also testifying today, and who have done such crucial work on Operation DEEP DIVE.

¹ National Conference of Commissioners on Uniform State Laws, 2010, “Uniform Military and Overseas Voters Act, Chicago: National Conference of Commissioners on Uniform State Laws.
<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=992b50ee-a36d-a539-6870-bb89b9d38098&forceDialog=0>.

Summary

In 2020, the National Defense Committee joined three other groups in submitting a Petition for Rulemaking to the United States Department of Veterans Affairs (a copy of which is attached to this testimony) to rectify the gross regulatory overreach by the VA for the improper use of mischaracterized mental illness information in the National Instant Criminal Background Check System (NICS) operated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE). To date, none of the submitting organizations received any response from the VA other than an acknowledgement of receipt. It is clear to the National Defense Committee the VA never had any intention of responding to this Petition, nor did it have any intention to reform the Fiduciary program. **Just as the VA consistently and repeatedly ignores public comments critical of proposed rules it may publish, so too it appears hellbent on using the Fiduciary rule, and any other tools at the VA's disposal, to restrict veterans' access to firearms. Because of that, Congress must expect the VA will continue this abuse of its regulatory authority and disregard the Constitution's protections against such Executive Branch overreach, and that the only way to protect veterans' due process and firearm rights is for Congress to legislatively proscribe VA from this activity.**

Discussion

The legislation before the Committee today is crucially important in addressing the issue of the Department of Veterans Affairs taking it upon itself to determine whether or not a veteran is capable of possessing firearms by whether or not the veteran may have bounced a check or gotten into debt. But **while the National Defense Committee joins the sponsors of H.R. 705 in decrying the VA's reporting of veterans to the NICS database, we strongly recommend this Committee look to reform the Fiduciary adjudication process itself, long before it ever gets to point where the VA tattles on the veteran to the Department of Justice; America's veterans need Congress to reign in the abusive and unconstitutional practices of the VA in forcing veterans into the Fiduciary program.** Therefore, National Defense Committee strongly recommends Congress reform the underlying and initial process by which the VA determines the veteran is financially incompetent, as this process is a gross violation of due process even without the VA's subsequent prattling to the Department of Justice of, "Oh, by the way – we've taken away this veteran's check book – you should also take away her guns."

Veterans Benefits Have the Legal Standing of Personal Property, Only Subject to Judicial Due Process

Federal case law is replete with determinations that veterans benefits are personal property protected under the Fifth and Fourteenth Amendments of the Constitution, of which a veteran can only be deprived by the due process of a court of law. Regarding the groundbreaking *Cushman v Shinseki* (576 F.3d 1290, 1293 (Fed. Cir. 2009)) federal court decision of 2009, even the VA admitted:

There is little dispute that this thesis [that Due Process applies to VA benefits because they are non-discretionary, statutorily mandated benefits] holds true once

a claimant for VA benefits shows that he or she meets the eligibility requirements for VA benefits and, thus, acquires a property interest in those benefits.²

Further, in a subsequent appeal by this same appellant, the court found “The Federal Circuit found persuasive other circuit court holdings that “both applicants for and recipients of [service-connected death and disability] benefits possess a constitutionally protected property interest in those benefits.”³

The VA’s own analysis of the subsequent *Gambill v Shinseki* (576 F.3d 1307 (Fed. Cir. 2009)) case found specifically that adequate due process was only provided in cases where,

confrontation of medical opinion evidence, including through interrogatories, was an essential component of due process with respect to the Veteran’s claims. As a rationale for this view, Judge Moore asserted that such means of confrontation were “necessary to help [VA] understand the limitations of the opinions before it, and may be the veteran’s only route to undermine what could otherwise be unassailable evidence in favor of denying benefits.”⁴

This is in line with a similar Supreme Court decision regarding welfare benefits in *Goldberg v Kelly* (397 U.S. 254 (1970)) that found the due process clause of the Fourteenth Amendment requires an evidentiary hearing before someone could be deprived of benefits. Specifically, in that opinion,

...the Court noted that welfare recipients are at the mercy of a vast bureaucracy and, without procedural protections, could be harmed by an arbitrary decision-maker. In other words, instead of presuming that the administrators were acting in the public interest, the Court shifted to presuming that individuals needed to be protected from the bureaucracy.⁵

Significantly, the court also found there was no due process difference between a traditional right guaranteed by natural law and protected by the Constitution, and positive rights bestowed to individuals by some government program. “The constitutional challenge,” Justice Brennan explained in the majority opinion, “cannot be answered by an argument that public assistance benefits are a privilege and not a right.”⁶

As for what adequately protects due process, the National Defense Committee argues that since the VA’s fiduciary program effects both a veteran’s personal property and their right to possess firearms, that such represents an “individualized loss through the summary administrative process insensitive to his interest or where the legislature has shown some

² Deutsch, Emily Woodward and Robert James Burriesci, 2011, “Due Process in the Wake of Cushman v. Shinseki: The Inconsistency of Extending a Constitutionally-Protected Property Interest to Applicants for Veterans’ Benefits,” *Veterans Law Review*, 3: 221. https://www.bva.va.gov/docs/VLR_VOL3/4-DeutschAndBurriesci-DueProcessInTheWakePages220-262.pdf.

³ *Ibid.*, 225.

⁴ *Ibid.*, 233f.

⁵ Postell, Joseph. 2017. *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government*, St. Louis: University of Missouri Press: 254.

⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970). <https://supreme.justia.com/cases/federal/us/397/254/>.

relatively clear intent to single out certain individuals to receive these public benefits.”⁷ As the *Wright v Califano*⁸ decision used in this quoted article states, simply because the provision of due process is costly or difficult is not a defense against providing adequate due process. And given the Fiduciary process has the additional effect of stripping a veteran of their rights to possess and purchase firearms, this rises to the level of individualized loss that requires judicial review to provide adequate due process to the veteran.

The VA’s Fiduciary Adjudication Process Fails to Provide Adequate Due Process Protections

While the National Defense Committee understands federal law prohibits the receipt or possession of a firearm or ammunition by anyone who, “has been adjudicated as a mental defective or who has been committed to a mental institution”⁹ the VA’s process does not meet that requirement. Specifically, the federal agency charged with enforcing that prohibition, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) defines such adjudication as, “[a] determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.”¹⁰

But as we said before, the VA’s Fiduciary adjudication process does not meet the legal standard for adjudicating an individual as a “mental defective” under the *Brady Handgun Violence Protection Act of 1993* (from which the requirement to report to the NICS database arises), and because of that, the veterans placed in the Fiduciary program should never be reported to the NICS database. It’s all done outside any court system, with the burden of proof falling on the veteran to prove they are competent to handle their VA benefits, not upon the VA to prove they are incompetent. Further, appointment of a fiduciary does not come near the legal standard used by the government elsewhere for adjudicating someone as a “mental defective.” Indeed, as the attached Petition for Rulemaking points out, the VA fiduciary determinations were explicitly designed only for the purpose of managing VA benefits, nothing else.

the VA’s Fiduciary assignment adjudication process fails to meet that standard. First, there is no independent oversight of this process. The VA initiates the process, the VA adjudicates its own determination without judicial oversight, and then the VA executes that process. The VA’s made itself the legislator, the judicial review authority, and the executive agent, all by itself. Second, the

⁷ Tarlock, A. Dan, 1980. “Administrative Law: Procedural Due Process and Other Issues Administrative Law: Procedural Due Process and Other Issues,” *Chicago-Kent Law Review* 56, Iss. 4 (April): 22. <https://scholarship.kentlaw.iit.edu/cklawreview/vol56/iss1/4>.

⁸ *Wright v Califano*, 587 F.2d 345 (7th Cir. (1978)). <https://casetext.com/case/wright-v-califano-2>.

⁹ 18 U.S.C. § 922(g)(4)

¹⁰ U.S. Bureau of Alcohol, Tobacco and Firearms, 1997, “Definitions for the Categories of Persons Prohibited from Receiving Firearms (95R-051P),” *Federal Register* 62, No. 124 (June 27): 34634. <https://www.govinfo.gov/content/pkg/FR-1997-06-27/html/97-16900.htm>.

The VA's Fiduciary Adjudication Standard Does Not Meet the Standard BATFE
Proscribes for a "Mental Defective" Determination under the *Brady Handgun Violence
Prevention Act*

The Brady Handgun Violence Prevention Act of 1993 set a high standard by which an individual could be barred from purchasing or possessing a firearm as a "mental defective", directly correlating the term "mental defective" to someone who is involuntarily committed to a mental institution.¹¹ The BATFE went even further in this definition in its Final Rule defining a "mental defective" as someone who because of that mental illness, "(1) Is a danger to himself or others; or (2) Lacks the mental capacity to contract or manage his own affairs." Examples from BATFE's Final Rule include, "a finding of insanity by a court" or someone found incompetent to stand trial.¹² These are incredibly high legal standards, and most importantly, involve explicit and substantial judicial review.

The VA's standard for determining a veteran incompetent for purposes of the Fiduciary program, in contrast, does not approach the level of serious mental instability detailed in the BATFE Final Rule. While BATFE's definition of being a "mental defective" involves judicial determinations of incompetency, presenting a danger to others, or the involuntary commitment to mental institutions, the VA's standard is simply a bureaucratic determination by VA disability rating officials the the veteran lacks "the mental capacity to contract or to manage his or her own affairs, including disbursement of funds",¹³ and then limited only to VA provided insurance and the disbursement of benefits in light of the "the beneficiary's social, economic and industrial adjustment".¹⁴ Further, VA rendered the Judicial Branch impotent in these cases by writing its own regulation where its "rating agencies have sole authority to make official determinations of competency and incompetency"¹⁵; an exceptionally low bar, especially in comparison to the higher and near criminal standard for BATFE's determinations.

To apply the criminal penalties of the BATFE's gun control regulations to the bureaucratic civil procedures of the VA's Fiduciary program is a gross miscarriage of Executive Branch authority bordering on unconstitutionally usurping the legislative authority of Congress to redefine how far back the prohibitions of the *Brady Handgun Violence Prevention Act* can reach, while also unconstitutionally extending the impact of the Executive Branch's bureaucratic determinations with Fiduciary adjudications to effectively deny veterans both liberty and property without due process of law as would normally be sole purview of the Judicial Branch. In essence, the VA joined with the Department of Justice to unilaterally rewrite the law, then assumed the powers of a court to adjudicate that rewritten law, and then finally resumed its Executive Branch functions to execute the penalties under that law.

¹¹ Public Law 103-159, November 30, 1993, "Brady Handgun Violence Prevention Act" 107 STAT. 1528. <https://www.congress.gov/103/statute/STATUTE-107/STATUTE-107-Pg1536.pdf>.

¹² U.S. Bureau of Alcohol, Tobacco, and Firearms, 1997, "Definitions for the Categories of Persons Prohibited from Receiving Firearms (95R-051P)," *Federal Register* 62, No. 124 (June 27): 34638f. <https://www.govinfo.gov/content/pkg/FR-1997-06-27/html/97-16900.htm>.

¹³ 38 C.F.R. §3.353(a)

¹⁴ 38 C.F.R. §3.353(b)(2)

¹⁵ 38 C.F.R. §3.353(b)(1)

The fact is, the VA's Fiduciary adjudication standard does not approach that of BATFE's standard of someone with subnormal intelligence, is incompetent, or a danger to themselves or others. It simply determines whether or not the veteran is capable of managing their VA benefits. Under this standard, the VA could determine that since the veteran does not understand the difference between VA's disability compensation benefit and the needs-based pension benefit (a differentiation which even I have difficulty navigating), the veteran is unable to properly handle their benefits, and therefore incompetent under the VA's test. Specifically, while the criminal statute and BATFE implementing regulations regarding "mental defective" status for prohibiting the purchase or possession of firearms

The VA's process of adjudicating a veteran to be placed into the Fiduciary program, and the process by which the VA then decides to report that veteran to the Department of Justice as a "mental defective" are both gross and unwarranted usurpations of Congress' legislative authority by the VA, all because a veteran has trouble balancing a checkbook.

Severing the Relationship Between the Fiduciary Rule and Gun Control Will Not Increase Veteran Suicide Risk nor Increase the Risk of Violent Gun Behavior

"Red Flag Laws" (Extreme Risk Protection Orders) and the notifications to the NICS database under the *Brady Handgun Violence Prevention Act* through the VA Fiduciary Program are essentially attempting to predict future suicidal and violent behavior. In the case of the VA Fiduciary Program, the VA is using the veteran's cognitive disability as a proxy for predicting violent or suicidal behavior to justify taking away their gun rights. With Extreme Risk Protective Orders, we are asking the Courts to predict whether a person is likely to commit a violent act (whether it be suicide or a crime against another) with a firearm.

But the science shows the best medical research is wildly inaccurate in predicting suicidal behavior or violent behavior, and in today's environment, most advocates of Red Flag Laws focus on its probative value in preventing mass shootings.¹⁶ One of the more comprehensive studies to date was conducted by the RAND Corporation and was last updated in January of this year. That review looked at 152 studies to synthesize the plethora of academic studies of the effectiveness of gun policies on a wide range of violent gun acts, including suicide and mass shootings. The RAND Corporation found no conclusive evidence that any policy regulating who may legally own, purchase, or possess firearms had any significant effect on mass shootings or suicide (including both total suicides and firearm suicides), specifically for Extreme Risk Protection Orders and prohibitions on gun possession by those associated with mental illness to prevent suicide.¹⁷

¹⁶ Everytown for Gun Safety Support Fund, May 31, 2023, *Extreme Risk Laws Save Lives*. <https://everytownresearch.org/report/extreme-risk-laws-save-lives/>.

¹⁷ Smart, Rosanna, Andrew R. Morral, Rajeev Ramchand, Amanda Charbonneau, Jhacova Williams, Sierra Smucker, Samantha Cherney, and Lea Xenakis, 2023, *The Science of Gun Policy: A Critical Synthesis of Research Evidence on the Effects of Gun Policies in the United States*, Third Edition. Santa Monica, CA: RAND Corporation: Table S-1. https://www.rand.org/pubs/research_reports/RRA243-4.html.

No Statistical Linkage Between Mental Health and Firearm Suicide

Specifically, looking at the efficacy of gun control programs to reduce suicide, the RAND Corporation report specifically states that many of the academic reports which argue such policies do reduce gun violence or suicide have,

only weak correlational evidence for a possible causal effect of the law, such as showing that states with a specific law had lower firearm suicides at a single point in time than states without such a law. Correlations like these can occur for many reasons other than the effects of a single law, so this kind of evidence provides little information about the effects attributable to specific laws.¹⁸

And the VA's own research shows gun control measures are based upon specious evidence at best that they will reduce suicide. At the 2019 VA-DoD Suicide Prevention Conference, and subsequently printed in the *JAMA Psychiatry* journal, VA researchers presented their meta-analysis of 7,306 suicide risk studies evaluating 64 different suicide prediction models, that the best algorithms for predicting suicidal behavior was less than 1% accurate in correctly predicting a suicide, meaning there would "more than 100 false-positive [suicide predictions] for every true positive" and that even with a suicide rate of 20 suicides per 100,000 people, a model that was 95 percent accurate would still only yield, "58 true-positive cases and 49,942 false-positive cases"; in other words, the very best algorithms were 862 times more likely to falsely predict someone as suicidal than to correctly predict a suicide.¹⁹ The researchers concluded "efforts to build Predictive Analytic Programs end up with very low positive predictive validity."²⁰

No Statistical Linkage Between Mental Health and Firearm Mass Shootings

As for the use of gun control programs like the Fiduciary program to prevent mass shootings, in 2013, the American Psychological Association stated, "In making predictions about the risk for mass shootings, there is no consistent psychological profile or set of warning signs that can be used reliably to identify such individuals in the general population."²¹ The APA reconfirmed this position August in 2019, "As we psychological scientists have said repeatedly, the overwhelming majority of people with mental illness are not violent. And there is no single personality profile that can reliably predict who will resort to gun violence. Based on the research, we know only that a history of violence is the single best predictor of who will commit future violence."²² But the Fiduciary program does not adjudicate on a veteran's history of violence, only on a veteran's cognitive ability to handle financial matters.

¹⁸ Ibid., vii.

¹⁹ Belsher, Bradley E., Derek J. Smolenski, Larry D. Pruitt, Nigel E. Bush, Erin H. Beech, Don E. Workman, Rebecca L. Morgan, Daniel P. Evatt, Jennifer Tucker, and Nancy A. Skopp, 2019, "Prediction Models for Suicide Attempts and Deaths: A Systematic Review and Simulation," *JAMA Psychiatry*. 76, Iss. 6: 642-651. <https://pubmed.ncbi.nlm.nih.gov/30865249/>.

²⁰ Ibid.

²¹ American Psychological Association, 2013, *Gun Violence: Prediction, Prevention, and Policy: APA Panel of Experts Report*, <https://www.apa.org/pubs/info/reports/gun-violence-report.pdf>

²² American Psychological Association, August 5, 2019, *Statement on Gun Violence and Mental Health by CEO of the American Psychological Association*. <https://www.apa.org/news/press/releases/2019/08/gun-violence-mental-health>.

The Mental Health Care Disincentives Established by the Fiduciary Program and Other VA Gun Control Programs Increase the Suicide Risk for Veterans

Because any veteran receiving VA benefits can be referred to the Fiduciary program by any VA rating official and any VA health care assessor or provider, the VA establishes huge disincentives for veterans to seek mental health care from the VA, which by the VA's Fiduciary program initiatives, seem to be the very veterans the VA believe need mental health treatment. Because of the fear of losing their firearms, which 45% of veterans own,²³ many veterans do not seek the mental health care they need.

The National Academies of Science, Engineering, and Medicine found 55 percent of those Iraq and Afghanistan veterans needing mental health services did not seek VA care.²⁴ The National Academies further stated a significant reason these veterans are not seeking these mental health care services is because of the fear they will lose their firearms, or other legal or administrative actions will be taken against them for seeking mental health care such as loss of security clearance, loss of child custody, and with 35 percent of those interviewed by the National Academy saying "the potential of having their personal firearms taken away as an obstacle to use VA mental health services."²⁵ And given the rate of increase in veteran suicides over the last 20 years is almost 240% higher for those veterans NOT in the VA's mental health care programs than those in it,²⁶ such disincentives to seek VA mental health care, such as the Fiduciary Rule, appear to be increasing veteran suicide, not decreasing it.

Recommendations

First and foremost, **the National Defense Committee wholeheartedly endorses H.R. 705, *The Veterans 2nd Amendment Protection Act***. As I hope our testimony has shown today, VA's reporting to the Department of Justice of those veterans it places in the Fiduciary program to the NICS database does not comport with the legal requirements of the gun control provisions of the *Brady Handgun Violence Prevention Act*, is a gross overreach of the VA's Executive Branch authority, does not provide adequate due process protections to the affected veterans, and is a clear disincentive to veterans using VA mental health services, possibly, and ironically, leading to an increase in veteran suicide rates.

But second, and possibly more importantly, the VA's Fiduciary program itself must be reformed. While such reforms are not covered by the legislation being considered in today's

²³ Cleveland, Emily C., Deborah Azrael, Joseph A. Simonetti, and Matthew Miller, M. 2017. "Firearm Ownership Among American Veterans: Findings from the 2015 National Firearm Survey," *Injury Epidemiology* 4, no. 1 (December): 33. <https://doi.org/10.1186/s40621-017-0130-y>.

²⁴ National Academies of Sciences, Engineering, and Medicine; Health and Medicine Division; Board on Health Care Services; Committee to Evaluate the Department of Veterans Affairs Mental Health Services. 2018. *Evaluation of the Department of Veterans Affairs Mental Health Services* Chapter 6, : Department of Veterans Affairs Mental Health Services: Need, Usage, and Access and Barriers to Care," Washington, DC: National Academies Press; (January 31): <https://www.ncbi.nlm.nih.gov/books/NBK499497/>.

²⁵ Ibid., p. 178. <https://doi.org/10.17226/24915>.

²⁶ Office of Mental Health and Suicide Prevention, 2022, *National Veteran Suicide Prevention Annual Report* Washington, DC: Department of Veterans Affairs (September): Table 3. <https://www.mentalhealth.va.gov/docs/data-sheets/2022/2022-National-Veteran-Suicide-Prevention-Annual-Report-FINAL-508.pdf>.

hearing, even if H.R. 705 is enacted into law, it still will not address the significant civil and legal right abuses the Fiduciary program itself represents for America's veterans. And without those additional reforms, stopping the reporting to the Department of Justice's NICS database will not stop the fundamental violation of civil and legal rights the underlying Fiduciary program represents, even WITHOUT the VA reporting to the NICS database. And until those reforms are in place, **the National Defense Committee recommends the Fiscal Year 2024 Military Construction and Veterans Affairs Appropriations Act contain a prohibition on any funds being expended by the VA to involuntarily place any veteran into the Fiduciary program.**

No veteran should lose control over the management of their VA benefits, which federal case law has repeatedly determined to be the equivalent of the veteran's "property", without proper due process protections for the veteran. And the VA's current Fiduciary adjudication process completely fails to meet that standard.