



**National
Defense
Committee**

**Testimony Before the House Veterans Affairs Subcommittee on Disability
Assistance and Memorial Affairs**

by

**Captain Bob “Shoebob” Carey, U.S. Navy (Ret.)
Chairman and Chief Bottle Washer
National Defense Committee**

July 10, 2024

Introduction

Chair Lutrell, Representative Pappas, and members of the Subcommittee, 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), with 45 member organizations, many of whom have supported National Defense Committee’s efforts on protecting veteran gun rights.

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.aspx?DocumentFileKey=992b50ee-a36d-a539-6870-bb89b9d38098&forceDialog=0>.

Summary

While numerous bills are before the Subcommittee today, and all of them are important, the National Defense Committee will limit its testimony to five of them:

- The Safeguarding Veterans 2nd Amendment Rights Act of 2024;
- The Veterans 2nd Amendment Restoration Act of 2024;
- The Modernizing All Veterans and Survivors Claims Processing Act;
- The Board of Veterans Appeals' Attorney Retention and Backlog Reduction Act; and
- The Veterans Claims Education Act of 2023.

Specifically, the first two bills are 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 potential sponsors of the first two bills in decrying the VA's reporting of veterans to the NICS database, we strongly recommend this Subcommittee also 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."

Furthermore, rather than repeat many of the arguments the National Defense Committee made last July before the full Committee during consideration of H.R. 705, we have attached our testimony from that hearing to provide the Subcommittee with that evidence. Furthermore, we've attached a copy of the Petition for Rulemaking National Defense Committee made in 2020 with many other veteran gun right advocacy organizations to further back-up the arguments made here today.

Legislative Discussion – Veterans Gun Rights

Before we get into the specifics of the legislation before the Subcommittee today, please allow National Defense Committee to discuss the collective clutching of pearls by gun control advocates by the recently passed amendments offered by Chair Bost and Senator Kennedy, which eventually became Section 413 of the *Fiscal Year 2024 Military Construction, Department of Veterans Affairs, and Related Agencies Appropriations Act* which prohibit the VA from expending funds to report veterans assigned fiduciaries to the Department of Justice's National Instant Criminal Background Check System (NICS) database. These commentaries, both from Members of Congress and from non-governmental advocacy organizations, make specious jumps in logic, presuming that any veteran who some non-judicial VA bureaucrat believes can't balance their checkbook is therefore a clear and present risk of being a gunfire risk

to themselves and others, is both incredibly disrespectful of all veterans (feeding the common trope that all veterans are, by nature of their military service, “broken” and not to be trusted), and is grossly illogical.

Unsubstantiated Responses to the Bost-Kennedy Fiduciary Amendments House of Representatives Gun Violence Protection Task Force

First of those letters is the March 13, 2024 letter to Secretary McDonough from the House of Representatives’ Gun Violence Prevention Task Force² and claims Section 413 of that Act “rolls back 30 years of common-sense precedent and practice”, claiming that simply because the VA assigns them a fiduciary for the management of their VA benefits (something which National Defense Committee detailed in its July 2023 testimony as being, in and of itself, an unconstitutional denial of due process), they are somehow therefore clearly, “a danger to themselves or others” and should be placed in the National Instant Criminal Background Check System (NICS).

The 136 signatory Members of the House Gun Violence Prevention Task Force, including five Members of this Committee,³ then proceed to encourage the Secretary to automatically have the Department of Veterans Affairs, a federal agency, seek judicial orders in State courts for all veterans assigned a fiduciary so that the State court will therein report them to the NICS database. Those 136 Members, again, including five Members of this Committee, also encourage the Department of Veterans Affairs to intervene in State-level Extreme Risk Protection Orders (ERPOs, or “Red-Flag Laws”), to “flag concerning behavior from veterans”, where in this case, the only concerning behavior is that a non-judicial federal employee within the Veterans Benefit Administration believes a veteran is not good at balancing their checkbook. By that standard about every junior military member I’ve ever known should probably also be assigned a fiduciary and reported to the NICS database. Obviously, such a claim would be preposterous, but then, so is the argumentation of the Members of the Gun Violence Protection Task Force who make such hollow claims.

In the press release heralding the release of this letter, signatories to the letter make additional unsubstantiated claims, such as Representative Mike Thompson automatically claiming that all veterans assigned a fiduciary by the VA are “veterans who are a danger to themselves or others”, or Representative Mark Takano stating “There are very serious reasons why a veteran is deemed mentally incompetent...”⁴

Gun Control Advocacy Groups

Similarly, while the National Defense Committee has not been able to find a copy of the full letter (nor have any staff members of this Committee whom the National Defense Committee has asked for assistance in finding it), press reports indicate a number of gun control groups,

² The Honorable Mike Thompson, et. al., House of Representatives Gun Violence Protection Task Force, Letter to the Honorable Denis McDonough, March 13, 2024.
<https://mikethompsonforms.house.gov/components/redirect/r.aspx?ID=4899-1855982>.

³ The Honorable Mark Takano, Julia Brownley, Frank Mrva, , Moran McGarvey, and Delia Ramirez.

⁴ The Honorable Mike Thompson. “Thompson, Takano, Kelly, McBath, Frost Urge VA to Protect Veterans After Misguided Inclusion of the Kennedy Amendment in Government Funding.” Press Release (March 13, 2024).
<https://mikethompson.house.gov/newsroom/press-releases/thompson-takano-kelly-mcbath-frost-urge-va-protect-veterans-after-misguided>.

including Brady United Against Gun Violence, Everytown for Gun Safety, Giffords, March for Our Lives, and other groups, wrote to appropriators in the House and Senate claiming that veterans assigned a fiduciary are veterans “who may be in crisis”, and that the not reporting these veterans to the NICS database “is an enormous threat to the safety and well-being of veterans and their beneficiaries who are at a heightened risk of harm to themselves or others...” In response to this letter, one news article proceeds to quote VA Press Secretary Terrence Hays as saying, “The Consolidated Appropriations Act of 2024 now restricts VA from using appropriated funds to report a beneficiary unless there is an order or finding from a judicial authority that the beneficiary is a danger to themselves or others.”⁵

Overall Analysis

What is remarkable in both these set of statements is the complete lack of substantiation for these claims, and the rapidity with which both set of claims jump from someone not balancing their checkbook to their being the next mass murderer. What the National Defense Committee fails to see, as we detailed in our July 2023 testimony and elsewhere in this testimony, is, what exactly is the part of the Fiduciary administrative determination process where the specific determination is made the veteran in question is, in fact, a threat to themselves or others? There are none, because that is never discussed in the VA’s fiduciary process. The only factor that is considered in the fiduciary decision process is whether the veteran “may be capable of administering the funds payable without limitation...”⁶ Period.

Nowhere in the fiduciary process is a veteran evaluated for their threat to themselves or others, and certainly there is no discussion of whether the veteran is competent to possess a firearm. Furthermore, nowhere in the fiduciary determination process is the “mental defectiveness” of a veteran considered or determined. Such “determinations” are simply a post fiduciary determination assumption by the VA, that the veteran is a “mental defective” under the *Brady Gun Violence Prevention Act*, and therefore needs to be reported to the NICS database. The veteran is never given a chance to discuss the mental defective determination in the fiduciary determination process, nor are they given the chance to argue why they are capable of possessing a firearm. It is all done after the fiduciary determination process, without the veteran’s input or knowledge.

Furthermore, the VA fiduciary assignment process predates the establishment of the NICS database by the *Brady Gun Violence Prevention Act*, and it was only after the establishment of the NICS database that the VA and Department of Justice decided a veteran so assigned a fiduciary was, in their opinion, a “mental defective” worthy of reporting them to the NICS database. As National Defense Committee and others detailed in their Petition for Rulemaking of October 2020,⁷ that is a stretch of the imagination that defies credulity, and as detailed in the

⁵ Clayton Vickers, “Gun Control Groups Call on Congress to Undo Background Check Change for Veterans.” The Hill (May 1, 2024). <https://thehill.com/homenews/senate/4635865-gun-control-groups-congress-background-check-veterans/>.

⁶ 38 CFR § 3.353(b)(3). <https://www.law.cornell.edu/cfr/text/38/3.353>.

⁷ Gun Owners of America, Inc., Gun Owners Foundation, The Independence Fund, and National Defense Committee. “Petition For Rulemaking to Promulgate Regulations to Prohibit Transmittal of Certain Miscategorized Information to the Department of Justice for Improper Use in the National Instant Criminal Background Check System.” (October 7, 2020). <https://u3s301.p3cdn1.secureserver.net/wp-content/uploads/2023/08/Petition-to-the-United-States-Department-of-Veterans-Affairs-Oct.-7-2020.pdf>.

various veteran organizational letters supporting the Bost and Kennedy amendments to the FY24 MILCON-VA Appropriations Act (also attached), it is without constitutional justification or enumerated authorization.

The Safeguarding Veterans 2nd Amendment Rights Act of 2024 and The Veterans 2nd Amendment Restoration Act of 2024 and VA “End-Running” the Intent by Releasing VA Mental Health Information

The National Defense Committee supports Subcommittee passage of both the *Safeguarding Veterans 2nd Amendment Rights Act of 2024* and *The Veterans 2nd Amendment Restoration Act of 2024*. However, the National Defense Committee does have two concerns regarding the Veterans 2nd Amendment Restoration Act that it believes may profit from additional prohibitions on potential VA actions. First, as described above, opponents of these bills, of the Bost and Kennedy amendments, and the VA itself, have already stated they believe being assigned a fiduciary is clear evidence of a veteran being a gun-violence risk to themselves and others. They’ve said it outright, they’ve practiced it for decades, and this Subcommittee cannot trust the VA will attempt to find every legal method to still effectively report veterans as gun-violence risks to local law enforcement.

Of greatest concern is the VA’s Notice of Privacy Practices, of September 30, 2022.⁸ First, “This Notice outlines the ways in which VHA may use and disclose your health information without your permission as required or permitted by law.”⁹ Not just required by law, but “permitted” allowing VA to do this without LE request. Furthermore, the VA warns, “We may disclose your health information without your authorization for judicial or administrative proceedings, such as when we receive an order of a court, such as a subpoena signed by a judge, or administrative tribunal, requiring the disclosure.”¹⁰ Again, this involuntary release of information is not just for judicial proceedings, but administrative proceedings as well.

The VA has shown itself untrustworthy with veterans cognitive and mental health information when the possibility exists for the VA to effectuate the veteran losing their gun rights, and that is why, as the National Defense Committee detailed in its July 2023 testimony, the National Academy of Sciences found that 35 percent of veterans identify “the potential of having their personal firearms taken away as an obstacle to use VA mental health services.”¹¹ The concern, therefore, is the VA will use these discretionary authorities to release mental health information to local law enforcement or State or local administrative agencies, without actively initiating any Emergency Response Protective Order actions themselves, but fully cognizant doing so will likely initiate such actions by State or local authorities.

⁸ Department of Veterans Affairs. “Notice of Privacy Practices.” Veterans Health Administration: Washington, DC (September 30, 2022). https://www.va.gov/files/2022-10/10-163p_%28004%29_-_Notices_of_Privacy_Practices-PRINT_ONLY.pdf.

⁹ Ibid., 1.

¹⁰ Ibid., 5.

¹¹ 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): 178. <https://www.ncbi.nlm.nih.gov/books/NBK499497/>.

Furthermore, the current construction of the operative sections of *Veterans 2nd Amendment Restoration Act of 2024* do not prohibit the VA from initiating the release of veterans fiduciary status, mental health evaluation, or cognitive ability evaluation information to a third government agency, whether federal or State and local, who then would make their own determination the veteran is therefore a “mental defective” under the Brady Gun Violence Protection Act, and then report such veterans to the NICS database themselves.

Therefore, the National Defense Committee recommend the Subcommittee add additional protections to the *Veterans 2nd Amendment Restoration Act of 2024* to also prohibit the release of otherwise protected privacy information via this Notice of Privacy Practices to effectively circumvent the intent of this legislation. Again, the VA has, by word and deed, consistently shown itself determined to use whatever means necessary to impinge upon veteran gun ownership rights. It cannot be trusted.

Reform the VA Fiduciary Program Itself

While the National Defense Committee hails the discussion of these two pieces of legislation, more still needs to be done. Specifically, the Fiduciary Program itself, long before any report is made to the NICS database, must be reformed itself. The denial of a veteran the opportunity to determine the use of their VA benefits as they see fit, without VA appointed fiduciaries intervening, is a clear denial of due process for the veteran, and an effective taking of their property. The VA hiding behind the concept that since these are benefits to the veteran, there is no due process rights is specious and not supported by case law or general administrative law principles.

Specifically, in the U.S. Supreme Court case of *Goldberg v. Kelly* of 1970, the Court determined in a similar situation to that faced by recipients of VA benefits, “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,” and that “there was no difference between a traditional right and positive rights bestowed upon individuals by government programs, such as welfare... Second, the Court assumed that there was no difference between a traditional right and positive rights bestowed upon individuals by government programs, such as welfare. Both categories of rights, the Court argued, were protected by the Due Process Clause,”¹² with Justice Brennan specifically stating in the majority opinion, “The Constitutional challenge cannot be answered by an argument that public assistance benefits are a privilege and not a right.”¹³

Such constitutionally protected property rights have been repeatedly upheld in VA appeal case law, such as in the case of *Cushman v. Shinseki*¹⁴ the court found that “disability benefits are a protected property interest and may not be discontinued without due process of law” and, in

¹² Joseph Postell. *Bureaucracy in America: The Administrative State's Challenge to Constitutional Government*. University of Missouri Press (2017): 254f.

¹³ *Goldberg v. Kelly*, 397 U.S. 254 (1970). <https://supreme.justia.com/cases/federal/us/397/254/>.

¹⁴ *Cushman v. Shinseki*, 576 F.3d 1290 (Fed. Cir. 2009). <https://casetext.com/case/cushman-v-shinseki>.

citing the case of *Nat'l Ass'n of Radiation Survivors v. Derwinski*,¹⁵ that “both applicants for and recipients of [service-connected death and disability] benefits possess a constitutionally protected property interest in those benefits.”

The current VA Fiduciary adjudication program does not meet the due process requirements of a government action which effectively takes away these veterans’ property rights by denying them the ability to determine those benefits best use, instead, transferring it to a fiduciary. It denies them the opportunity to be heard before a competent judicial authority and places the burden of proof on the veteran to prove their competence, not upon the VA to prove the veteran’s incompetence. Under the VA fiduciary program, the veteran is presumed guilty of being a mental defective until the veteran proves they are not. Therefore, the National Defense Committee recommends the Committee pass legislation which will legislatively modify the execution of the VA’s Fiduciary program under 38 C.F.R. § 3.353 so that the VA is required to petition a competent judicial authority to find a veteran incompetent to handling his or her VA benefits, and similarly to require the judicial authority to make a determination of mental incompetency.

The current program, however, clearly violates a veteran’s due process rights and is an abrogation of the proscriptions of federal government actions under the Fifth and Fourteenth Amendments to the Constitution. Hopefully, with the recent *Loper v. Raimondo* decision¹⁶ of the Supreme Court, the VA will no longer be able to hide behind the “protection” of the Chevron Deference principle and such unconstitutional abrogation of due process and “takings” will more easily be overturned in court. But this Committee can prevent the need for veterans to expend huge sums of money to protect their due process rights by simply legislatively reforming this program to bring it in line with such due process and property protection rights.

Legislative Discussion – Veterans Disability Benefits

The Simplifying Forms for Veterans Claims Act.

The National Defense Committee strongly supports this legislation. Let me start by saying the online system we have today is far better than the pen and paper system we only had back in 2005 when I submitted my first claim. But that is a low bar by which to declare an improvement. The current system is still unintuitive, unable to process more than one claim in development at a time, and denies the veteran access to many of the forms submitted by the examiners and raters in their case, requiring the veteran to make Freedom of Information Act requests which will likely end up costing them for the privilege of asking for the forms used in the determination of their own claim. Therefore, National Defense Committee recommends the Subcommittee modify this legislation to also direct the Secretary and the FFRDC to include the online disability claim system in this review, and to also examine the impact of not having access

¹⁵ *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583 (9th Cir. 1992).
<https://casetext.com/case/natl-assn-of-radiation-survivors-v-derwinski#p588>.

¹⁶ *Loper v. Raimondo* 451 U.S. 22 (2024). https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

to all the forms included in the claim determination, such as rating official checklists and Defined Benefit Questionnaires.

H.R. 2971, *The Veterans Claims Education Act of 2023*.

The National Defense Committee is opposed to this legislation, and believes it misses the fundamental point. This issue is not that veterans don't realize there are Veteran Service Officers at County and State governments and at Veteran Service Organizations who will help and submit claims for the veterans for free. The veterans do know about the availability of such VSO services. The problem is that many, if not most, of these VSOs are not good at their job. They suck, to put it plainly. My personal experience is they are overwhelmed, underpaid, and don't know how to do their job.

It is remarkable that the VA disability system is the only federal disability system that prohibits a claimant from paying a lawyer to help them with their initial claim. In every other disability claim system, the lawyer is the first place you go. While the VA and VSOs will attempt to claim the VA disability compensation system is non-adversarial, the truth is it is very adversarial, at least in practice, and no amount of cajoling from Congress will ever change that. Every disability claim costs VA money, the Office of Management and Budget is on VA every day about spending too much on new disability presumptive conditions, and the experience of most veterans with disability claims is a combination of "deny until they die" and "find reasons to deny the nexus to military service." That is why Congress must repeatedly step in and declare the very presumptive conditions the Secretary already has the authority to approve.

What this Congress should be doing is reforming the VA disability claim process so that veterans can hire lawyers to assist with the initial claim, pay outside consultants to assist with their claims, and give the veterans access to all the forms used in the determination of the veteran's claim, like the Defined Benefit Questionnaires.

The Modernizing All Veterans and Survivors Claims Processing Act

The National Defense Committee supports this legislation.



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by

Captain Bob “Shoebob” Carey, U.S. Navy (Ret.)

Chairman and Chief Bottle Washer

National Defense Committee

July 18, 2023

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.

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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.aspx?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

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*

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 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.

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

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)

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 set a significantly higher bar than does that of the VA's definition, the VA's weaker adjudication requirements still have the same effect on a veteran's gun rights as does the BATFE's by placing the non-criminal veteran under the same prohibition as the criminals under the BATFE process.

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, 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 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

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>.

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.

**TO THE
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS**

**PETITION FOR RULEMAKING
TO PROMULGATE REGULATIONS TO PROHIBIT
TRANSMITTAL OF CERTAIN MISCATEGORIZED INFORMATION TO
THE DEPARTMENT OF JUSTICE FOR IMPROPER USE IN THE
NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM**

SUBMITTED BY

GUN OWNERS OF AMERICA, INC.

AND

GUN OWNERS FOUNDATION

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October 7, 2020

PETITION FOR RULEMAKING

Pursuant to 5 U.S.C. § 553(e) and 38 U.S.C. § 501(a), Gun Owners of America, Inc., Gun Owners Foundation, The Independence Fund, and National Defense Committee (collectively “Petitioners”) hereby petition the Secretary of Veterans Affairs (“Secretary”) to initiate a rulemaking process to promulgate regulations to stop and prohibit the U.S. Department of Veterans Affairs (“VA”) from continuing to engage in the widespread and arbitrary disarmament of law-abiding veterans across the nation, a presumptively unconstitutional policy which has no statutory basis. The proposed rule would prohibit the VA from transmitting information about a VA beneficiary to law enforcement agencies, and specifically the National Instant Background Check System (“NICS”) run by the Federal Bureau of Investigation, solely and simply due to an appointment of a fiduciary to manage the finances of a beneficiary, without a judicial order in accordance with 18 U.S.C. § 922(g)(4).

STATEMENT

In 2008, Congress passed the NICS Improvements Amendments Act of 2007 (“NIAA”). The NIAA was touted as a boon for gun owners, because it required states to establish a “relief from disabilities program” so that individuals could be removed from FBI’s National Instant Background Check System (“NICS”) after they had been improperly added. However the NIAA adopted, without clear analysis, past erroneous interpretations of federal law by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE), and offered federal money to entice states to report as many persons as possible to the NICS system as “prohibited persons” — focusing mainly on those allegedly “adjudicated as a mental defective” or “committed to a mental

institution.”¹ Now, Americans are continually being added to NICS even though they are not prohibited persons under federal law, with very little of the promised relief for those who should not be on the prohibited list.

In December of 2016, during the transition period between presidential administrations, the Social Security Administration (“SSA”) published a final rulemaking² to “implement provisions of the” NIAA. This rulemaking, had it gone into effect, reportedly would have added at least 75,000 persons receiving SSA disability payments to the NICS system as prohibited persons, based on nothing more than their having been designated a representative payee to handle their finances.³

Thankfully, the incoming administration reconsidered this rushed final proposal and acted to stop SSA’s misguided rulemaking. The eventual result was P.L. 115-8,⁴ a congressional joint resolution of disapproval (passed by the House 235-180, by the Senate 57-43, and signed by President Trump on February 28, 2017⁵) which effectively nullified the SSA rulemaking, meaning recipients of disability insurance and supplemental security income benefits should not be reported to NICS simply on the basis of their having been assigned a “representative payee.”

¹ See 18 U.S.C. § 922(d)(4) and 18 U.S.C. § 922 (g)(4)

² See <https://www.federalregister.gov/documents/2016/12/19/2016-30407/implementation-of-the-nics-improvement-amendments-act-of-2007>.

³ SSA proposed to “identify, on a prospective basis, individuals who receive Disability Insurance benefits ... or Supplemental Security Income ... and who also meet certain other criteria, including an award of benefits based on a finding that the individual’s mental impairment meets or medically equals the requirements of section 12.00 of the Listing of Impairments (Listings) and receipt of benefits through a representative payee.” SSA then proposed to “at the commencement of the adjudication process ... notify individuals, both orally and in writing, of their possible Federal prohibition on possessing or receiving firearms....”

⁴ See <https://www.govinfo.gov/content/pkg/PLAW-115publ8/pdf/PLAW-115publ8.pdf>.

Many of the same flaws in the SSA's rejected rule, are present in the VA's current policy. Commenters regarding the SSA's proposed rule noted that it unfairly stigmatized those with non-violent mental health disorders, thereby creating a tremendous disincentive to those who would seek psychological assistance; that the regulation failed to distinguish between being a physical danger to one's self or others, and lacking the capacity to contract or manage one's financial affairs; and the practical difficulties an individual faced in being removed from improper inclusion in NICS. The SSA's tone-deaf responses, including equating those suffering from mental illness with felons, and suggesting that those wrongfully included in NICS could (expensively) file suit in federal court, were obviously unpersuasive to Congress.

However, even though the SSA's flawed rulemaking was stopped by Congress and the Trump Administration, the Veterans Administration has reported and continues to report veterans to NICS as prohibited persons, based on essentially the same criteria of which Congress disapproved in P.L. 115-8.

BACKGROUND

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." 18 U.S.C. § 922(g)(4).

Federal law prohibits the receipt or possession of firearms or ammunition by anyone "who has been adjudicated as a mental defective or who has been committed to a mental

⁵ See <https://www.congress.gov/bill/115th-congress/house-joint-resolution/40/actions>.

institution” in 18 U.S.C. § 922(g)(4). In 1997⁶ and later in 2014,⁷ the BATFE expanded the definition of “adjudicated as a mental defective” to also include

“[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.”

In contrast, however, the VA process for adjudicating a veteran for the fiduciary program is limited to the purpose of determining whether to appoint someone else manage a veteran’s VA benefits. Further, the VA’s fiduciary determination process is initiated by VA officials, and then places the burden of proof on the veteran to prove they are competent to handle their own VA benefits—all without judicial review.

This low standard, based upon a bureaucratic determination, is not commensurate with the BATFE’s higher standard of a determination by an authority such as a court that a person is for example of subnormal intelligence or a danger to others. The VA’s seriously flawed interpretive guidance sweeps up for reporting to NICS a host of persons who Congress never intended to disarm. Commitments and adjudications are done by the judicial system, not by VA bureaucrats. And the terms “mental defective” and “committed” apply to persons who, as a result of a marked subnormal intelligence or capacity, are permanently unable to function in society and historically were often institutionalized. Those concepts do not apply and should not

⁶ See ATF final rule promulgation in Federal Register, vol. 62, no. 124, June 27, 1997, p. 34634

⁷ See <https://www.regulations.gov/docket?D=ATF-2014-0002> and <http://www.lawandfreedom.com/wordpress/goagof-comments-to-atf-on-proposed-changes-to-form-4473/>

be applied far more broadly, such as to veterans temporarily suffering from mild post-traumatic stress who merely rely on a family member to balance their checkbooks.⁸

Yet, since 1998, at the demand of the Department of Justice, the VA has reported to the FBI for addition in the NICS index those beneficiaries who have had a fiduciary appointed for them by the VA based on a determination that the beneficiary requires a fiduciary to manage their VA benefits, under VA's regulations.⁹ In 2016, in response to public concern regarding inadequate procedures to protect the rights of beneficiaries, Congress included provisions in the 21st Century Cures Act to protect, to a small degree, the rights of VA beneficiaries. That provision states:

The Secretary may not make an adverse determination concerning the mental capacity of a beneficiary to manage monetary benefits paid to or for the beneficiary by the Secretary under this title **unless such beneficiary has been provided all of the following**, subject to the procedures and timelines prescribed by the Secretary for determinations of incompetency:

- (1) Notice of the proposed adverse determination and the supporting evidence.
- (2) An opportunity to request a hearing.
- (3) An opportunity to present evidence, including an opinion from a medical professional or other person, on the capacity of the beneficiary to manage monetary benefits paid to or for the beneficiary by the Secretary under this title.
- (4) An opportunity to be represented at no expense to the Government (including by counsel) at any such hearing and to bring a medical professional or other person to provide relevant testimony at any such hearing. [38 U.S.C. § 5501A (emphasis added).]

Nevertheless, even these additional protections fall far short of the legal standards necessary to qualify as a mental defective for reporting to the NICS database, and deprives veterans of their

⁸ See Gun Owners of America, Inc. and Gun Owners Foundation Comments in Docket No. ATF 51P, pp. 3-7.

⁹ The VA's website states that "VA reports the names of incompetent beneficiaries to the Federal Bureau of Investigations [sic] (FBI), which then adds the names to a database called the National Instant Criminal Background Check System (NICS)." <https://www.benefits.va.gov/fiduciary/beneficiary.asp>.

Second Amendment rights, based solely on the non-judicial appointment of a fiduciary to assist with management of monetary benefits. This VA determination was never meant to be used beyond the very narrowly prescribed purposes of managing veterans' benefits, and it is not based on an appropriate adjudication as required by 18 U.S.C. § 922(g)(4).

In contrast to Section 922, which pertains to disarming those “adjudicated as a mental defective or who ha[ve] been committed to a mental institution, 38 C.F.R. § 3.353’s determinations of incompetency pertain to the capacity of a veteran “to contract or to manage his or her own affairs, including disbursement of funds without limitation,”¹⁰ for the specific purposes of insurance and disbursement of benefits, and are made according to “the beneficiary's social, economic and industrial adjustment.”¹¹ Not only the standard, but the intention and scope of the criminal statute, used to justify reporting veterans in the fiduciary program to the NICS database, differ from those of the VA regulation so substantially as to make clear the inapplicability of the VA fiduciary process as a reasonable determination of “mentally defective” requiring reporting to the NICS database.

Proposals are pending in Congress designed to prohibit the VA from reporting beneficiaries to NICS without an adjudication in compliance with 18 U.S.C. § 922(g)(4). For example, H.R. 3826, the “*Veterans 2nd Amendment Protection Act*” would, if enacted, add the following prohibition:

The Secretary may not transmit to any entity in the Department of Justice, for use by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act, personally identifiable information of a beneficiary, solely on the basis of a determination by the Secretary to pay benefits to a fiduciary for the use and benefit of the beneficiary under section 5502 of this title, without the order or finding of a

¹⁰ See 38 C.F.R. § 3.353(a)

¹¹ See 38 C.F.R. § 3.353(b)

judge, magistrate, or other judicial authority of competent jurisdiction that such beneficiary is a danger to themselves or others.¹²

REASONS FOR GRANTING THE PETITION

The VA's current practice of reporting veterans who have financial fiduciaries to NICS penalizes those veterans for seeking mental health care and deters many veterans from seeking needed mental health care. The practice also conflicts with the plain text of 18 U.S.C. § 922(g)(4), as the standard employed in the VA regulation is a gross and unwarranted expansion of the statutory term "adjudicated a mental defective."

Significantly, the United States Court of Appeals for the First Circuit observed that the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), adds a "constitutional component" to every effort by the federal government to regulate the possession and use of firearms.¹³ The *Rehlander* Court observed that "the right to possess arms ... is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process." *Id.* at 48. Still less should any deprivation of rights be based upon the automatic misapplication of an administrative regulation, one with a low standard of proof, to criminal statute that contemplates a much higher standard of due process in evaluating more serious, permanent disabilities. Yet BATFE has continued to perpetuate the deprivation of the Second Amendment rights of this nation's veterans, based on nothing more than an inapplicable determination by the VA that the veteran may need help handling their finances.

PROPOSED REGULATION

Accordingly, Petitioners request the VA undertake a rulemaking to promulgate a rule to correct the VA's practice of submitting the name of a beneficiary to the NICS system solely

¹² See H.R. 3826, Sec. 2 (116th Congress)

based on a determination that the beneficiary is unable to manage his or her own benefits.

Petitioners offer the following text as a proposed rule:

No personally identifiable information of a beneficiary may be transmitted to any law enforcement entity, or for use by the National Instant Criminal Background Check System, as a basis for prohibiting the possession of firearms, solely on the basis of a determination to pay benefits to a fiduciary for the use and benefit of the beneficiary, without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such beneficiary has been adjudicated as a mental defective or has been committed to any mental institution.

Gun Owners of America, Inc., Gun Owners Foundation, The Independence Fund, and National Defense Committee respectfully request that a rulemaking be commenced to implement a regulation with this effect, to avoid the continued illegal and unconstitutional deprivation of the right to keep and bear arms of many veterans, based on the application of a vague standard that appears in no federal statute.

Respectfully submitted,

Gun Owners of America, Inc.
Gun Owners Foundation
The Independence Fund
National Defense Committee

¹³ See *United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012)



March 6, 2024

The Honorable Mike Johnson
Speaker of the House of Representatives

The Honorable Hakeem Jeffries
Minority Leader, House of Representatives

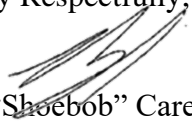
The Honorable Steve Scalise
Majority Leader, House of Representatives

Dear Speaker Johnson and Leaders Jeffries and Scalise,

Thank you very much for listening to the concerns the National Defense Committee raised in the attached letter, also signed by the Military Order of the Purple Heart, Vets 4 Vet Leadership, the Armed Forces Retirees Association, the Ranger Leadership Policy Center, Arizona Veterans, the Association of the United States Navy, TREA: The Enlisted Association, and the Catholic War Veterans of the United States of America, regarding the unconstitutional and unconscionable the unchecked regulatory powers of the Department of Veterans Affairs exercises with the Fiduciary program, and the resultant reporting of those veterans placed into the Fiduciary program to the Department of Justice, resulting in over 250,000 disabled veterans being placed in the National Instant Criminal Background Check System (NICS), and thereafter prohibited from possessing or purchasing firearms, all without any judicial action or review.

That is why we are pleased to see the final version of the FY24 Military Construction, Veterans Affairs, and Related Agencies Appropriations Bill contain in Section 413 the prohibitions of the VA reporting such veterans to the NICS system. **This is a important and crucial first step in reforming the unconstitutional Fiduciary program, and for that reason, the National Defense Committee implores all Members of the House of Representatives to vote for final passage of the Military Construction, Veterans Affairs, and Related Agencies FY24 Appropriations Bill.**

Very Respectfully,



Bob "Shoebob" Carey
CAPT, USN (Ret)
Executive Director

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July 26, 2023

The Honorable Kevin McCarthy
Speaker of the House

The Honorable Hakeem Jeffries
Minority Leader of the House

The Honorable Steve Scalise
Majority Leader of the House

The Honorable Tom Cole
Chair, House Committee on Rules

The Honorable Jim McGovern
Ranking Member, House Committee on
Rules

Dear Speaker McCarthy, Leaders Jeffries and Scalise, Chair Cole, and Representative McGovern:

We, the undersigned veteran and military serving organizations, endorse the inclusion in the House Committee on Rules’ reported Rule on H.R. 4366, the *Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2024*, of the Rules Committee Amendment 23, Version 2 – sponsored by Representative Bost of Illinois – to prohibit “the VA from using funds to submit a beneficiary’s name to the NICS list based on VA’s appointment of a fiduciary.” We also endorse the amendment’s adoption by the House into the final House-passed version of the bill.

The Department of Veterans Affairs (VA’s) Fiduciary program is a testament to the threat the unchecked regulatory powers of the Executive Branch can pose to the inalienable rights of the People, in this case, to the rights of disabled veterans to due process under the law, and to keep and bear arms. From the Fiduciary program’s placing the burden of proof on the veteran to prove they are competent (and not on the VA to prove the veteran is incompetent), to the lack of judicial oversight to the process (as is provided in similar incompetency determinations by the Social Security Administration), to the then Orwellian process by which the VA tattles to the Department of Justice that the veteran has problems balancing their checkbook, and therefore now somehow qualifies as a “mental defective” under the *Brady Handgun Violence Prevention Act of 1993* and loses their right to keep and bear arms, all without any judicial action, this program is rife with threats to the liberty and property of the very men and women who sacrificed their physical well being in the defense of this country.

Furthermore, 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.ⁱ 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.”ⁱⁱ 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,ⁱⁱⁱ such disincentives to seek VA mental health care, such as the Fiduciary Rule, appear to be increasing veteran suicide, not decreasing it.

While we believe the entire VA Fiduciary program must be fundamentally reformed to address the significant civil and legal right abuses the Fiduciary program itself represents for America’s veterans, given the legislative process that will require, we believe the Fiscal Year 2024 Military

Construction and Veterans Affairs Appropriations Act should contain this prohibition on any funds being expended by the VA to involuntarily place any veteran into the Fiduciary program.

Very Respectfully,

National Defense Committee
Vets 4 Vet Leadership
Veteran Warriors
Catholic War Veterans

ⁱ 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/>.

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

ⁱⁱⁱ 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>.

February 27, 2024

The Honorable Mike Johnson
Speaker of the House

The Honorable Hakeem Jeffries
Minority Leader of the House

The Honorable Steve Scalise
Majority Leader of the House

The Honorable Kay Granger
Chair, House Appropriations Committee

The Honorable Rose DeLauro
Ranking Member, House Appropriations
Committee

The Honorable John Carter
Chair, House Appropriations Military Construction,
Veterans Affairs, and Related Agencies
Subcommittee

The Honorable Debbie Wasserman-Schultz
Ranking Member, House Appropriations
Military Construction, Veterans
Affairs, and Related Agencies
Subcommittee

Dear Speaker Johnson, Leaders Jeffries and Scalise, Chairs Granger and Carter, and Representatives DeLauro and Wasserman-Schultz:

In July of this year, many of the below organizations wrote to endorse the inclusion in the House Committee on Rules' reported Rule on H.R. 4366, the *Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2024*, of the Rules Committee Amendment 23, Version 2 – sponsored by Representative Bost of Illinois – to prohibit “the VA from using funds to submit a beneficiary’s name to the NICS list based on VA’s appointment of a fiduciary.” We also endorsed the amendment’s adoption by the House into the final House-passed version of the bill.

As we detailed back then, the Department of Veterans Affairs (VA’s) Fiduciary program is a testament to the threat the unchecked regulatory powers of the Executive Branch can pose to the inalienable rights of the People, in this case, to the rights of disabled veterans to due process under the law, and to keep and bear arms. A copy of that original letter is attached here, but we were pleased the House adopted the amendment to prevent the VA from continuing to unjustly and unconstitutionally abrogate American veterans’ right to keep and bear arms, all without any judicial action.

We repeat the belief the entire VA Fiduciary program must be fundamentally reformed to address the significant civil and legal right abuses the Fiduciary program itself represents for America’s veterans, but given this amendment, and an almost identical one in the Senate, were both adopted to their respective Chamber’s version of the *Fiscal Year 2024 Military Construction and Veterans Affairs Appropriations Act*, any attempt to remove those provisions from the final version to be passed into law, or to add additional provisions such as “Red Flag Law” or other new gun control provisions, would be a gross breach of trust with the majority of the Members of the House who adopted this legislation, and would constitute a gross abuse of legislative power by the House. We implore you to keep this provision in the VA’s final FY25 appropriations act.

Very Respectfully,

National Defense Committee
Military Order of the Purple Heart
Vets 4 Vet Leadership
Armed Forces Retirees Association
Ranger Leadership Policy Center
Arizona Veterans
Association of the United States Navy
TREA: The Enlisted Association
Catholic War Veterans of the United States of America

February 27, 2024

The Honorable Chuck Schumer
U.S. Senate Majority Leader

The Honorable Mitch McConnell
U.S. Senate Minority Leader

The Honorable Patty Murray
Chair, U.S. Senate Committee on
Appropriations and Subcommittee on
Military Construction, Veterans
Affairs, and Related Agencies

The Honorable Susan Collins
Vice Chair, U.S. Senate Committee on Appropriations

The Honorable John Boozman
Ranking Member, U.S. Senate Appropriations
Subcommittee on Military
Construction, Veterans Affairs, and
Related Agencies

Dear Leaders Schumer and McConnell, Chair Murray, and Senators Collins and Boozman:

In July of this year, many of the below organizations wrote to endorse the inclusion in the House Committee on Rules' reported Rule on H.R. 4366, the *Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2024*, of the Rules Committee Amendment 23, Version 2 – sponsored by Representative Bost of Illinois – to prohibit “the VA from using funds to submit a beneficiary’s name to the NICS list based on VA's appointment of a fiduciary.” We also endorsed the amendment’s adoption by the House into the final House-passed version of the bill. We were truly heartened by the Senate including an almost identical provision in its version of the FY24 MILCON-VA Appropriations Bill.

As we detailed back then, the Department of Veterans Affairs (VA's) Fiduciary program is a testament to the threat the unchecked regulatory powers of the Executive Branch can pose to the inalienable rights of the People, in this case, to the rights of disabled veterans to due process under the law, and to keep and bear arms. A copy of that original letter is attached here, but we were pleased both the House and Senate adopted amendments to prevent the VA from continuing to unjustly and unconstitutionally abrogate American veterans’ right to keep and bear arms, all without any judicial action.

We repeat the belief the entire VA Fiduciary program must be fundamentally reformed to address the significant civil and legal right abuses the Fiduciary program itself represents for America’s veterans, but given this amendment, and an almost identical one in the Senate, were both adopted to their respective Chamber’s version of the *Fiscal Year 2024 Military Construction and Veterans Affairs Appropriations Act*, any attempt to remove those provisions from the final version to be passed into law, or to add additional provisions such as “Red Flag Law” or other new gun control provisions, would be a gross breach of trust with the majority of the Members of the Senate who adopted this legislation, and would indicate a gross abuse of legislative power by the Senate. We implore you to keep this provision in the VA’s final FY25 appropriations act.

Very Respectfully,

National Defense Committee
Military Order of the Purple Heart
Vets 4 Vet Leadership
Armed Forces Retirees Association
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Catholic War Veterans of the United States of
America