

**NATIONAL ASSOCIATION OF
COUNTY VETERANS SERVICE OFFICERS**



STATEMENT FOR THE RECORD
NATIONAL ASSOCIATION OF COUNTY VETERAN SERVICE OFFICERS
FOR THE
HOUSE VETERANS' AFFAIRS COMMITTEE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

OVERSIGHT HEARING

"Correcting VA's Violations of Veterans' Due Process and Second Amendment Rights"

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Presented by

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Chairman Luttrell, Ranking Member McGarvey, and Members of the Subcommittee, on behalf of the National Association of County Veterans Service Officers (NACVSO), I appreciate the opportunity to submit this statement for the record concerning the troubling issues surrounding the Department of Veterans Affairs (VA) competency determination process. NACVSO's official stance is that the current process bypasses veterans' constitutionally protected rights to due process, deprives them of self-determination, and restricts their access to property and finances, while also infringing upon their Second Amendment rights. While we believe the current incompetency determination process is flawed, we appreciate the fact that VA's intent has always been focused on keeping the veteran and their families safe from both financial and physical harm. We believe that VA has a significant role in the process, but reform is needed to ensure that veteran's constitutionally protected rights are not subverted.

The Current State of VA Competency Determinations

The VA competency determination process, as it stands, is deeply flawed. The ease at which VA has the authority to render such determinations is evidenced by the findings of a July 14, 2023 Congressional Research Service report that found that out of all federal agencies, VA makes 98% of all referrals to the National Instant Criminal Background Check System (NICS).¹ Under the current process, veterans are declared incompetent to manage their finances based on the opinion of Compensation and Pension (C&P) examiners — providers who are often not part of the veteran's primary care continuum. These examiners operate outside the rigorous court standards of due process and are permitted to make decisions that have far-reaching consequences. This approach contravenes clear precedent established by the U.S. Court of Appeals for Veterans Claims (CAVC).

In *Withers v. Wilkie*, 30 Vet. App. 139, 146 (2018), the court held that VA examiners are “expert witnesses” who provide evidence and medical opinions but are not authorized to make legal determinations. Despite this, VA adjudicators frequently rely on check-box assessments from examiners to make binding legal decisions that strip veterans of their fundamental rights, including control over finances and access to firearms. Such decisions are often made after virtual

¹ Madeline E. Moreno and Jordan B. Cohen, Cong. Rsch. Serv., R47626, *Gun Control, Veterans' Benefits, and Mental Incompetency Determinations* (2023) <https://crsreports.congress.gov/product/pdf/R/R47626>

examinations lasting as little as 30 minutes, conducted by providers who may be located in a different state.

Constitutional and Systemic Concerns

This process represents a clear violation of veterans' due process rights. In civilian settings, a determination of incompetency requires a court proceeding with substantial evidence and input from medical experts and witnesses. By contrast, VA's competency determination process reduces these rigorous protections to a mere administrative formality.

According to a Congressional Research Service report published in July 2023, the VA is responsible for 98% of the National Instant Criminal Background Check System (NICS)² referrals based on mental health conditions — a figure that dwarfs those of other federal agencies, including the Social Security Administration and the FBI. This statistic underscores the disproportionate and unilateral authority the VA wields in labeling veterans as incompetent, often with insufficient evidence and minimal oversight.

Personal Stories of Harm

The human impact of these policies is profound, as illustrated by the following examples:

Stephen

Stephen, a U.S. Marine and Vietnam veteran, earned two Bronze Stars and two Purple Hearts during his service. After transitioning to civilian life, he served as a police officer in Illinois for over 35 years. Diagnosed with Parkinson's disease due to Agent Orange exposure, Stephen was declared incompetent for VA purposes during a C&P examination after reporting that a loved one assisted in the handling of household finances. This determination forced him to surrender his firearms and financial control to his son, who had to navigate the complex VA fiduciary process. With the assistance of a CVSO, Stephen fought the incompetency determination, a process that took over two years to resolve.

Brian

Brian, a U.S. Air Force Special Operations Master Sergeant, who served in Iraq and Afghanistan, returned home to Illinois and applied for benefits, including compensation

² *Id.*

for a combat-incurred mental health disorder. During his VA examination, Brian was rated 50%, but the examiner checked a box indicating Brian was incompetent. Without a court hearing or other due process, Brian was required to surrender his Firearm Owners Identification Card (FOID) and his firearms. It took nearly three years of appeals and additional examinations to overturn the initial determination. Only after further advocacy and reexaminations — where no subsequent examiner found him incompetent — was Brian able to reclaim his property.

Recommendations

1. **Replace “Competency Determination” with “Fiduciary Determination”:** The initiation of competency reviews should require judicial oversight, ensuring due process protections. If a VA disability clinician has concerns with actual competency of a veteran, then VA should provide training on the process of referring their medical concerns to the court of local jurisdiction the same way every other non-VA clinician must.
2. **Prohibit Legal Determinations by Medical Examiners:** Reinforce the precedent established by *Withers v. Wilkie*, clarifying that examiners provide medical opinions only and cannot make legal determinations.
3. **Mandate Court Review for Competency Cases:** Align the VA process with civilian standards by requiring court proceedings before any determination of incompetency is made.
4. **Enhance Training for VA Adjudicators and Examiners:** Ensure all personnel involved in competency determinations understand the limits of their authority and the necessity of due process.
5. **Streamline Appeals:** Enhance the appeals process for veterans contesting competency determinations to minimize undue hardship.

Veterans have earned the right to due process and self-determination through their American citizenship. The VA’s current competency determination process falls far short of the standards set by our Constitution and judicial precedent. Reform is urgently needed to ensure that veterans are not arbitrarily stripped of their rights by an administrative process that bypasses the courts.

NACVSO stands ready to assist Congress in addressing these critical issues and ensuring that no veteran's rights are violated by an inadequate and unjust system.

Chairman, Ranking Member, and members of the subcommittee, on behalf of NACVSO thank you for your attention to this important matter. NACVSO is committed to advocating for veterans' rights and ensuring they receive the respect and dignity they deserve. We look forward to working with you on any proposed legislation to address these important and critical issues.

Respectfully submitted,

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National Association of County Veteran Service Officers