

LEGISLATIVE HEARING ON:
H.R. 705; AND H.R. 4562

HEARING
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTEENTH CONGRESS

FIRST SESSION

TUESDAY, JULY 18, 2023

Serial No. 118-26

Printed for the use of the Committee on Veterans' Affairs



Available via <http://govinfo.gov>

U.S. GOVERNMENT PUBLISHING OFFICE

WASHINGTON : 2024

COMMITTEE ON VETERANS' AFFAIRS

MIKE BOST, Illinois, *Chairman*

AUMUA AMATA COLEMAN RADEWAGEN, American Samoa, <i>Vice-Chairwoman</i>	MARK TAKANO, California, <i>Ranking Member</i>
JACK BERGMAN, Michigan	JULIA BROWNLEY, California
NANCY MACE, South Carolina	MIKE LEVIN, California
MATTHEW M. ROSENDALE, SR., Montana	CHRIS PAPPAS, New Hampshire
MARIANNETTE MILLER-MEEKS, Iowa	FRANK J. MRVAN, Indiana
GREGORY F. MURPHY, North Carolina	SHEILA CHERFILUS-MCCORMICK, Florida
C. SCOTT FRANKLIN, Florida	CHRISTOPHER R. DELUZIO, Pennsylvania
DERRICK VAN ORDEN, Wisconsin	MORGAN MCGARVEY, Kentucky
MORGAN LUTTRELL, Texas	DELIA C. RAMIREZ, Illinois
JUAN CISCOMANI, Arizona	GREG LANDSMAN, Ohio
ELIJAH CRANE, Arizona	NIKKI BUDZINSKI, Illinois
KEITH SELF, Texas	
JENNIFER A. KIGGANS, Virginia	

JON CLARK, *Staff Director*

MATT REEL, *Democratic Staff Director*

Pursuant to clause 2(e)(4) of Rule XI of the Rules of the House, public hearing records of the Committee on Veterans' Affairs are also published in electronic form. **The printed hearing record remains the official version.** Because electronic submissions are used to prepare both printed and electronic versions of the hearing record, the process of converting between various electronic formats may introduce unintentional errors or omissions. Such occurrences are inherent in the current publication process and should diminish as the process is further refined.

C O N T E N T S

TUESDAY, JULY 18, 2023

	Page
OPENING STATEMENTS	
The Honorable Mike Bost, Chairman	1
The Honorable Mark Takano, Ranking Member	1
WITNESSES	
PANEL 1	
Mr. Ron Burke, Deputy Under Secretary, Policy & Oversight, Veterans Benefits Administration, U.S. Department of Affairs	5
Accompanied by:	
Mr. Kevin Friel, Deputy Director, Pension & Fiduciary Services, Veterans Benefits Administration, U.S. Department of Veterans Affairs	
Mr. Dave Barrans, Chief Counsel, Benefits Law Group, Office of General Counsel, U.S. Department of Veterans Affairs	
PANEL 2	
Mr. Jeffrey Swanson, Ph.D., Professor in Psychiatry and Behavioral Sciences, Duke University School of Medicine	28
Mr. Bob "Shoebob" Carey, Captain U.S. Navy (Ret), Chairman and Chief Bottle Washer, National Defense Committee	29
Mr. Cole Lyle, Executive Director, Mission Roll Call	31
Ms. Kristina Keenan, Deputy Director for National Legislative Service, Veterans of Foreign Wars of the United States	33
APPENDIX	
PREPARED STATEMENTS OF WITNESSES	
Mr. Ron Burke Prepared Statement	45
Mr. Jeffrey Swanson, Ph.D. Prepared Statement	49
Mr. Bob "Shoebob" Carey Prepared Statement	62
Mr. Cole Lyle Prepared Statement	80
Ms. Kristina Keenan Prepared Statement	81

LEGISLATIVE HEARING ON: H.R. 705; AND H.R. 4562

TUESDAY, JULY 18, 2023

COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room 360, Cannon House Office Building, Hon. Mike Bost (chairman of the committee) presiding.

Present: Representatives Bost, Rosendale, Miller-Meeks, Murphy, Van Orden, Self, Takano, Brownley, Pappas, Mrvan, Cherfilus-McCormick, Deluzio, Ramirez, and Budzinski.

Also present: Representative Stefanik.

OPENING STATEMENT OF MIKE BOST, CHAIRMAN

The CHAIRMAN. I am glad to be here today to consider my bill, H.R. 705, the Veterans 2nd Amendment Protection Act and Ms. Stefanik's bill, H.R. 4562, the Ernest Peltz Accrued Benefits Act. I will be recognizing myself to speak on H.R. 705 in a moment. I do want to give my support to the goals and ideas of H.R. 4562. The pension benefit is one that many families rely on to pay for expenses and it does not make sense to cut these benefits off the month before the veterans pass. I look forward to working with Ms. Stefanik and others to find appropriate offsets for the bill.

I would like to welcome all of the witnesses here today to testify on these two bills. I am looking forward to a thoughtful and healthy discussion on the legislation before us. I also ask unanimous consent when she arrives, our colleague, Ms. Stefanik of New York, to be allowed to sit and ask from the dais to question the witnesses of today's hearing. Hearing no objection, so ordered. I now yield to Ranking Member Takano for any open remarks he may have.

OPENING STATEMENT OF MARK TAKANO, RANKING MEMBER

Mr. TAKANO. Well, thank you Chairman Bost and thank you to all our witnesses for being here today. Speaking to H.R. 705, I have to say that this bill is ill-conceived and unwarranted at best, and potentially dangerous to veterans and beneficiaries at worst. My Republican colleagues have once again eschewed evidence-based, data-driven policymaking, and have instead embraced unnecessarily partisan legislation, or legislating, based on anecdote and soundbite.

The title of the bill is a case in point. Being provocative from the start prevents us from having a real conversation about real and

important policy, policy that saves lives. Republicans have failed to clearly identify or quantify the alleged problem they are attempting to address. They have yet to even figure out what their preferred statutory change is. In fact, we have been told that the legislation we have before us today is not the version that will move to mark-up after this hearing. That version has yet to be seen and will not have been vetted by the members of this committee, Veterans Administration (VA), Veteran Service Organizations (VSOs), and other stakeholders prior to the proposed committee action next week. It is clear that my colleagues have spurned any attempts at sincere bipartisan discussion on the issue at hand and have entrenched themselves in tired and false arguments about the rights of veterans somehow being at risk when there could be nothing further from the truth.

First, I would like to address the idea that veterans are declining to seek mental healthcare for fear that VA will confiscate their firearms or prevent them from purchasing new ones. I have no doubt whatsoever that this fear is real among veterans and does serve as an impediment to seeking care. We have all heard that charge. However, the failure of my colleagues to condemn and counter the misinformation that leads to such a sentiment among veterans is as infuriating as it is damaging. I know, as does everyone on this committee and among the VSOs, that however real that fear is, it is also unfounded. Under no circumstances does VA ever confiscate anyone's firearms, and let me be clear about this, under no circumstances does VA ever confiscate anyone's firearms.

Seeking mental healthcare from the Veterans Health Administration (VHA) will not result in your firearms being taken away. VA does not have the legal authority to do so. Only under a very discrete set of circumstances and for a very discrete population does the Veterans Benefits Administration (VBA) report veterans to the National Instant Criminal Background Check System (NICS). VHA never does.

I asked my colleagues, and I asked the VSOs, what is your response to the veteran who expresses fear their firearms will be restricted? If it is anything other than an unequivocal, that is not true, go get help, then you are perpetuating that stigma. This bill traffics in that same disinformation. It is a deliberate attempt to scare veterans and that scaring is what is doing the real harm.

Now, moreover, with respect to the protection of a beneficiary's Second Amendment rights, there are no less than six avenues already available to a claimant for redress. How many more layers of government bureaucracy are my colleagues suggesting that we add according to data from VA? These are the six avenues right behind me. Most of those avenues for redress not even are even widely used by claimants. We have not seen claimants use these six avenues.

In fact, in fiscal 22, only 135 claimants out of roughly 22,000 who were newly assigned a fiduciary appealed the incompetency determination and only 33 sought relief from NICS reporting. Adding more layers to the six we already see here to this process I think is unnecessary.

A second argument I would like to address is the charge that the claims adjudication process is inadequate to discern between those

who require a fiduciary because they are bad at math and those who have a mental illness or a condition that makes them a danger to themselves or others. In many ways, that distinction is immaterial. In general, it is clear that the fiduciary process does serve as an adequate proxy determination for potential dangerousness. It is important to acknowledge that there are significant data gaps that exist related to the population of beneficiaries in the fiduciary program. H.R. 705, by the way, addresses none of those data gaps, which is one of its many flaws.

Here are some of what we do know. Among beneficiaries assigned a fiduciary because of a mental health condition, the most common conditions are as follows: schizophrenia, 36.5 percent, traumatic brain injury, 31.2 percent, Post-Traumatic Stress Disorder (PTSD), 22.3 percent, bipolar disorder and dementia, 10 percent. Mr. Chairman, all these disorders are associated with elevated risks of dangerousness to self or others. Suicide in particular, as are a host of other factors that are actually concentrated in the veterans population.

Moreover, we also know empirically that veterans who are found to have poor financial management abilities are also two times as likely to have substance use disorders, suicidal ideation, engage in violent behavior, and be in the justice system. Drawing a distinction between those who simply cannot balance their check book and those who are more explicitly dangerous to themselves or others is not warranted and in fact could cause more veterans to slip through the cracks.

Mr. Chairman, suicide prevention has been VA's highest clinical priority for years. It is a priority I share with countless others on this committee and the VSO community. I am not questioning anyone's sincerity in wanting to prevent veteran suicide, but going back to data driven, evidence-based policymaking, here is what we know for certain. Firearms are used in over half of suicide attempts nationally. Number two, suicide attempts using firearms are lethal in over 85 percent of cases. Three, firearms account for 70 percent of male veteran suicides, and 50 percent of female veteran suicides. Veterans, number 4, are three times more likely to die by suicide than the general population. It begs the question, if we all care so deeply about preventing what is clearly an epidemic among veterans of death by suicide using a firearm, why would we pursue a bill which addresses no clearly defined problem. The only clear result of which would be the removal of a safeguard that puts more guns in the hands of the most vulnerable beneficiaries VA has. The answer, as I alluded to earlier, is simply this, it is politics. Mr. Chairman, I yield back.

The CHAIRMAN. I thank the ranking member. I do not necessarily agree with everything he said, but we have two panels before us today, so I will be holding myself to a 5-minute speak on my bill. Now, I recognize myself for 5 minutes.

You know, I am proud to have introduced my bill, H.R. 705, the Veterans 2nd Amendment Protection Act again this Congress. My bill would prohibit VA from sending a veteran's name to the Federal Bureau of Investigation's (FBI's) National Instant Criminal Background Check System, or NICS list, unless there is first a determination by a judge or a court, like anyone else who is not a

veteran, that says that person could be a harm to themselves or others.

In some cases, VA will appoint a fiduciary to a veteran or a VA beneficiary to help them manage their VA benefits. The appointment of the fiduciary does not, I will say it and repeat it, does not indicate the person is dangerous or mentally ill. It is about their ability to manage their financial benefits. Hundreds of thousands of Americans, including veterans, have fiduciaries. When it comes to our veterans, the minute the VA appoints a fiduciary, that veteran's name is automatically sent to NICS. When the ranking member says that the VA does not take their guns away, they do not. They report them to NICS, and then their guns are taken away by another agency. The veteran is now prohibited from purchasing a firearm based on the decisions of the VA employees, not a court's finding.

My message remains simple. VA should not be able to take away a veteran's Second Amendment rights because they need help managing their benefits. Veterans should not be treated any different than every other American citizen. Even criminals have to be convicted of a crime in a court of law before their names are reported to NICS. Let me say that again. Even criminals have better due process rights than the men and women who fought to protect our constitutional rights in the first place. Veterans are not being reported to NICS for much less than this unjust practice. This unjust practice must end.

A little over 8,000 U.S. veterans and beneficiaries have been reported to NICS since the beginning of last year alone, 8,000. Why are our veterans losing one of their constitutional rights because they need help managing their VA benefits? You might be thinking, surely VA that they do additional screening with a psychologist, a doctor, a therapist, the veteran's family, or anyone else for that matter, before they turn them over to the NICS. They do not. It is unacceptable. We know that practice creates a stigma around getting veterans into VA to get the care and services they have earned. That might not happen if you are from a city and you are not using your Second Amendment rights on a regular basis. It does happen if you are from flyover country.

I have been hearing from veterans across the country for years, and it is time it stops. We should be breaking down barriers when our veterans are telling us why they would not go to the VA, not standing idle like our hands are tied. My legislation is not about guns on demand. It would add one step so the veteran can have their day in court before they lose their constitutional right, as any American should expect, which is something we should all care about. I want to thank Mission Roll Call, the National Defense Committee, Veterans of Foreign Wars (VFW), the American Legion for their support. Together, you have represented millions of veterans' voices nationwide.

Once again, this bill is not about guns on demand, but about due process and the Constitution, which is the bedrock of our Republic. In my life, I tried to count it up this morning, how many times I raised my hand and took an oath to uphold and defend the Constitution of this United States. Whether it was as a member of the armed services, whether it was an elected local official, whether it

was a state elected official, or whether it has been here in Congress. I am going to do just that because what we are doing right now and the reason I am carrying this bill to what we are doing for veterans who are seeking help is unconstitutional. There is no due process. I look forward to hearing comments and having input and having a debate over this.

Now, I will yield back the balance of my time and I will now invite our first panel of witnesses to the table, which they are already there. Testifying before us today, we have Mr. Ron Burke, Deputy Undersecretary of Policy and Oversight at the Veterans Benefits Administration for the U.S. Department of Affairs. He is accompanied by Kevin Friel, Deputy Director of Pension and Fiduciary Services at the Veterans Benefit Administration for the Department of Veterans Affairs, and Mr. Dave Barrans, Chief Counsel of the Benefits Law Group in the Office of the General Counsel at the Department of Veterans Affairs. I ask the witnesses if they would please stand and raise your right hand.

[Witnesses sworn.]

Thank you very much. Let the record reflect that the witnesses have answered in the affirmative. Mr. Burke, I now recognize myself for 5 minutes for, or I am sorry, I recognize you for 5 minutes to give your testimony.

STATEMENT OF RON BURKE

Mr. BURKE. Chairman Bost, Ranking Member Takano, and other members of the committee, thank you for inviting us here today to discuss pending legislation which would affect the Department of Veterans Affairs programs and services. Joining me today are Dave Barrans, Chief Counsel, Benefits Law Group, Office of General Counsel, and Kevin Friel, Deputy Director, Pension and Fiduciary Service.

Mr. Chairman, I will highlight both bills in my opening statement. We have provided detailed comments in the full testimony describing areas of concern that VA has on both pieces of legislation. At VA, we believe that veterans, their families, and survivors have earned and sacrificed for our country, and now it is our job to care for them. With these principles in mind, VA opposes H.R. 705, the Veterans 2nd Amendment Protection Act. VA appreciates the Committee's focus on veterans Second Amendment and due process rights. However, we do not support a bill that would conflict with existing statutory reporting requirements of the Brady Handgun Violence Prevention Act, otherwise known as the Brady Act. In accordance with Bureau of Alcohol, Tobacco, Firearms (ATF) regulations and Department of Justice (DOJ) guidance, VA reports all individuals determined unable to manage their VA benefit funds. Such a determination must be based on definitive medical evidence that is clear, convincing, and leaves no doubt as to the person's inability to manage their financial affairs. Once a proposal of incompetency is finalized, VA notifies the beneficiary orally and in writing and reports the necessary information to NICS. When notifying the beneficiary of the determination, VA provides information on how to request relief from Brady Act restrictions. When deciding a request for relief, VA considers not only the beneficiary's

individual rights, but also the safety of the beneficiary, their family, and the community.

In addition to complying with Federal law, VA is reporting to DOJ as a matter of veteran safety, which is of utmost concern to VA. In fact, VA's top clinical priority is veteran suicide prevention, utilizing a whole-of-VA approach that integrates strategic planning, program operations, and program evaluation across VA. Scientific research shows that mental health is one clear risk factor for suicide, and use of a firearm in a suicide attempt significantly reduces the chance of survival. Veterans are significantly more likely than civilians to use firearms as a suicide method with an extremely high lethality rate of 90 percent. When firearm access is denied, only one out of five would-be gun suicide attempts later died from suicide by substituting another lethal method. It is VA's mission to care for our veterans and their families, and the removal of the required reporting of veterans to DOJ would run counter to this.

VA also opposes the Ernest Peltz Accrued Veterans Benefits Act. This bill would result in different discontinuation dates and therefore disparate treatment between beneficiaries in receipt of pension based on existing rating or decision and beneficiaries in receipt of compensation or dependency and indemnity compensation. For beneficiaries in receipt of pension based on an existing rating or decision, the discontinuance date would be the last day of the month of death. For beneficiaries in receipt of compensation or DIC, the discontinuation date would be the last day of the month before death.

Further, the bill would create incongruity as it relates to the month of death benefit by functionally eliminating that benefit in certain circumstances for surviving spouses of veterans in receipt of pension, while the month of death benefit for the surviving spouse of a veteran in receipt of compensation would remain unchanged. This would result in disparity between beneficiaries in equivalent situations aside from the benefit type the veteran happened to be receiving at the time of his death.

VA is continuously working to deliver earned benefits to veterans and their survivors more effectively and efficiently. Unfortunately, this bill would result in a change in processing that would introduce automation and program limitations. These limitations will slow down the receipt of the month of death benefit and as such be detrimental to the surviving spouse on file at the time of the veteran's death. A surviving spouse who would have been able to benefit from expedited processing of a month of death benefit will be disadvantaged by the processing impacts of this bill. Surviving spouses of veterans in receipt of pension at the time of death would have to file for, and be found entitled to, accrued benefits in order to receive the veteran's payment previously paid separately as the month of death benefit. In contrast, the current month of death benefit may be paid automatically to the spouse on file and does not require that that spouse file a claim.

Across VA, we are committed to providing the high-quality care our veterans have earned and deserve. We continue to improve services to meet the needs of our veterans and families. We are grateful for the resources that Congress has provided to VA and pledge to do all that we can to ensure they are used as effectively

as possible. Thank you for the opportunity to appear before you today. We look forward to working with you on this and future legislation. Mr. Chairman, this concludes my statement. My colleagues and I are prepared to respond to any questions you or other members of the committee may have.

[THE PREPARED STATEMENT OF RON BURKE APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you, Mr. Burke. Now, we want to go to questions, and I would like to recognize myself for 5 minutes to start this off. Mr. Burke, can you please explain to me why the VA is the only Federal agency that reports citizens to NICS without finding them a danger to themselves or others?

Mr. BURKE. Yes, sir. I can share that we are simply complying with Federal law. It is VA's intent to comply with Federal law and regulations and ensure that we are putting the safety of veterans first. Veteran safety is an extremely high priority for us, and we are simply complying with Federal law.

The CHAIRMAN. Okay. Then I need to ask the whole panel, or you, if you want to answer, and I just need a yes or no. Do you believe that everyone that has a fiduciary is a danger to themselves or others?

Mr. BURKE. I do not believe that everybody that has a fiduciary is a danger to others.

The CHAIRMAN. Okay. Can you explain to me how the determination of incompetent for VA purposes is linked to being a danger to themselves or others?

Mr. BURKE. Basically the determination of a finding of incompetency, which leads to us reporting to NICS is one that is based on clear and conclusive evidence that the veteran is unable to manage his or her funds. That definition is the same definition adopted by DOJ in their determinations. We do not have a compliance or an enforcement arm here. We simply have a reporting requirement——

The CHAIRMAN. I understand that.

Mr. BURKE [continuing]. that we comply with.

The CHAIRMAN. I understand that. You turn it over to the people that do have the enforcement arm.

Mr. BURKE. In comply——

The CHAIRMAN. Correct?

Mr. BURKE. Yes, sir. In compliance with Federal rules.

The CHAIRMAN. I mean, we are not disagreeing on the fact—what we are disagreeing on here is the fact that a constitutional right is not being secured for our veterans and can be taken away by a bureaucrat's ruling. That is a problem. Any other person in this Nation, besides a veteran, can go and receive a fiduciary. They are having trouble with their finances at home, they can receive a fiduciary. That does not mean that they are a danger to themselves or others. If they are a danger to themselves or others, there are reporting bodies. It can be a family member. It can be law enforcement. It can be others. You at your office could say, we believe that they are. We believe that this person is danger to themselves or others. Then it goes to a court of law. What we are doing and what we are doing with the process, you can say you have interpreted the way you want, but what we are doing with the process is we

are punishing our veterans for simply seeking help. That is the problem here. This is not about guns. It is about the situation of not using due process. Due process does not involve a bureaucrat. A due process has you go before a judge.

Let me give a quick story. I am the owner of a newspaper. I have a right to the freedom of speech. If the government comes in, shuts down my newspaper without any warning, do you agree that there is a violation of my First Amendment? Do you agree with that?

Mr. BURKE. Yes, sir.

The CHAIRMAN. Mm-hmm. Why are we applying the same situation through the agency for our veterans' Second Amendment rights? I do not understand this. When I first came to Congress, I heard, and I could not believe that this was what the interpretation of the VA was. I heard it from people in the coffee shops. I heard it from people in the barber shops. My wife and I own a beauty salon. I heard it there. People talk at the Legion. People talk at the VFW. They talk about the fact that they wanted to seek help, but all of a sudden there is a loophole that allows them to lose their Second Amendment right.

I know that the ranking member gave quite a testimony on how he feels about this, but the reality is I am not arguing about guns here. I am arguing about the fact that veterans are losing their constitutional right without due process. Why it is that I receive arguments from the VA or anyone else on why it is that I am arguing this point and think that I want to endanger the veterans, I do not, because there is still a process like any other person. I stand and fight against suicide like anybody else. I want no veteran to commit suicide.

I also do not want any veteran to lose the rights that they were willing to fight for, that they took and raised their hand to defend the Constitution, to have something that is a right in that Constitution have it taken away from them. With that, I am going to yield back and ranking member, I recognize you for 5 minutes.

Mr. TAKANO. Well, thank you, Mr. Chairman. Mr. Burke, does the status quo, does the status quo in your mind with regard to the fiduciary program and the fact that veterans who are admitted into the fiduciary program are reported to NICS, do you believe that that protects veterans and saves many veterans' lives?

Mr. BURKE. Thank you for the question. I appreciate that. Yes. Yes, sir, I do. I believe in the fiduciary program. It does, it is put in place and protects some of our most vulnerable veterans. We do believe that taking firearms away, not us, but the process, does protect our veterans. Preventing veteran suicide is the number one clinical focus for VA and we believe that the process works.

Mr. TAKANO. You answered affirmatively to the chairman's question, does everyone who has a fiduciary, are they a danger to themselves or others? You appropriately answered, no, that not every single veteran that has a fiduciary is potentially dangerous to themselves or others. I think it is also true that many, many, many veterans who have fiduciaries, I read off at least one-third of veterans in the fiduciary program are identified as potentially schizophrenic, nearly as much are identified as with serious bipolar disorder, and that they have eight times greater likelihood of suicidal ideations. The fiduciary program, by reporting these veterans to

NICS so that they cannot buy a firearm, would therefore be protective of these veterans. Is that correct?

Mr. BURKE. That is correct, yes sir.

Mr. TAKANO. Is, you know, the chairman's making, I think appropriately, his concern about due process. Is competency, veterans' competency to handle their own finances, is that based on a bureaucrat's decision or is there a process by which a veteran is declared incompetent to handle their finances?

Mr. BURKE. There is a process for that, sir, and it requires clear evidence, medical evidence, medical statements. In addition to those findings, there is a proposed finding of incompetency which gives a veteran due process rights. During that period of time, the veteran or his or her accredited representative can submit additional evidence for consideration that in some cases does change the determination or the proposal. There is a due process period of time before a finding of incompetency. It is only after due process has been served that the veteran's name will be referred to NICS. It is not a bureaucratic process. It is one where clear and convincing medical evidence and or statements are reviewed as part of that.

Mr. TAKANO. It is a medical evaluation. Is that right?

Mr. BURKE. In most cases, we will get it from a medical exam, medical document, statement from a medical professional.

Mr. TAKANO. Are veterans informed at the time that they are going through this process that being determined to be mentally incompetent and to need a fiduciary would put them on the NICS list? Are they made aware of that?

Mr. BURKE. Yes, sir, they are. As part of our requirements under the Brady Bill, we are required to make contact, and we do that both in writing and in contact.

Mr. TAKANO. My understanding is that legislation was passed by a Republican House, a Republican Senate, and signed by President Trump, reaffirming the process by which mental incompetency is determined and by which also being put on the NICS list would result, is that right?

Mr. BURKE. Yes sir, that is correct.

Mr. TAKANO. In fact there is a due process. A due process does exist administratively and that there are six levels of appeal. There are six levels where a veteran can seek to not be put on the NICS list, even as they are going through a process of being determined to be mentally incompetent. Is that correct?

Mr. BURKE. There is, in fact, a due process period. In addition to that, there is a relief request process. Once somebody is placed on the list, there is a process for requesting relief as well.

Mr. TAKANO. This bill before us, as far as we know, would require that a judge be required to be involved in this. How would that affect this process? Would anybody be able to be protected at all from, you know, themselves if they are a danger, if we introduce what the majority is saying we should do?

Mr. BURKE. Yes, sir. In many instances, those type of records, our claims processors do not have access to. In order to get those records, we are going to elongate the process of making that determination whether a veteran is incompetent or not. We believe as part of suicide prevention, that those determinations should not be

elongated. We believe it caused further harm to veterans by elongating the process to secure those type of records.

Mr. TAKANO. Sir, I am over time. Mr. Chairman, I just want to say that the judicial process you are thinking of bringing in would effectively end VA's ability to put anyone, you know, on the NICS list. We have at least one-third that definitely should be there, and I yield back.

The CHAIRMAN. Thank you for yielding back. Mr. Self, you are recognized for 5 minutes. Mr. Self.

Mr. SELF. Thank you, Mr. Chairman. I want to explore your using the Brady Act because somehow we have conflated this with suicide prevention as opposed to the superior constitutional right. Why do you think the Brady Act gives you the constitutional right to report? Let me expand the question. You said, are you the only Federal agency that has read the Brady Act that way? It seems that you are.

Mr. BURKE. I am going to—thank you for your question and ask my colleague from Office of General Counsel (OGC) to chime in on this one if you could, Mr. Barrans.

Mr. BARRANS. Yes, thank you. The Brady Act authorizes the Department of Justice to request and obtain records from any agency on categories of individuals identified in the Act who are prohibited from owning guns. VA merely complies with that requirement. I do not think our interpretation is unique in that respect. Our interpretation—

Mr. SELF. Who else—

Mr. BARRANS [continuing]. is one that we verify.

Mr. SELF. Who else does it?

Mr. BARRANS. Well, the Department, we verify that interpretation with the Department of Justice when they issued their recommendations.

Mr. SELF. What other Federal agencies make the same determination?

Mr. BARRANS. I cannot speak for what other Federal agencies do. Are you talking about determinations of incompetence?

Mr. SELF. Put yes, exactly.

Mr. BARRANS. Yes.

Mr. SELF. Report to the DOJ and then have weapons taken away under the Brady Act. What other agencies do that?

Mr. BARRANS. As far as I am aware, Social Security Administration makes similar determinations of the need for a representative payee. I am not aware of other agencies that are making similar determinations.

Mr. SELF. Okay. We are discussing, it seems to me, hearing the chairman and the ranking member, we are discussing drama and emotion here versus the rule of law. The alleged problem that I want to discuss is the Second Amendment, because there is no judicial review here. This is, I know of legislative processes. I know of judicial processes. Mr. Burke, you say this is not a bureaucratic process. What would you call it then if you do not call it a bureaucratic process? What would you call it?

Mr. BURKE. Well, the actual process of determining competency for a veteran is something that has been in our fiduciary portfolio for many years.

Mr. SELF. What would you call it if it is not a bureaucratic process?

Mr. BURKE. I would not call it a bureaucratic process. It is an established process that we follow with respect to us turning those names over in accordance with NICS. We call that complying with Federal law.

Mr. SELF. We have legislative processes, we have judiciary, judicial processes. What would you call this?

Mr. BURKE. I would not—

Mr. SELF. It has got to conform to eventually constitutional. How do we get a court of law involved before you make this determination? Tell us, as Congress, how do we do that?

Mr. BURKE. Well, I think, sir, that one of the concerns we have about getting a court of law involved before was what I mentioned briefly a moment ago is the concern that it could potentially or will elongate the process. For us, with veteran suicide prevention being at the forefront of our clinical focus, we do not want folks in harm's way for an extended period of time to secure documents.

Mr. SELF. I got what you want, but we are talking about a constitutional right here that requires a high bar to take it away, a high bar. Anyone will tell you it takes a high bar to take a constitutional right away. That is what the chairman was referring to in his newspaper example. How do we raise the bar here before we take a constitutional right away? That is the question.

Mr. BURKE. Sir, I have spent my entire adult life either in uniform or serving those that were in uniform, and I will continue to do that by doing two things, complying with Federal law, which I believe we are doing in this case.

Mr. SELF. What is the highest Federal law?

Mr. BURKE. What is the highest Federal law?

Mr. SELF. Yes, that is my question.

Mr. BURKE. I am not quite sure I understand that.

Mr. SELF. It is the Constitution. Therefore, it takes a high bar to take a constitutional right away. That is why the Second Amendment, we heard more words about, we heard a lot of words here today. The Second Amendment is very clear. It takes a high bar. I think my time is almost up. I will yield back after I say we need to establish a higher bar here and you need to help Congress with how we do that rather than having the administrative state make this determination on a constitutional right. With that, Mr. Chairman, I yield back.

The CHAIRMAN. Thank you Mr. Self. Ms. Brownley, you are recognized for 5 minutes.

Ms. BROWNLEY. Thank you, Mr. Chairman. Mr. Burke, we have discussed this bill several times in this committee, and I think on my side of the aisle, we have said, you know, we are, if there is any way in which we can improve upon due process, we are open and willing to look at it. I think the chairman has made it pretty clear that there is a pretty extensive already process for due process. I guess my question is to you, is there anything that you would recommend to this panel of how we can improve due process from where we are today?

Mr. BURKE. Yes, ma'am. I can tell you that VA is always committed and willing to collaborate with Congress on ways to im-

prove. I am happy to get, you know, outside of the hearing, staff level, to connect and communicate on ways that we may be able to improve.

Ms. BROWNLEY. Okay. How many, can you quantify or do you have the data to know that how many veterans have used the due process and the various steps to reverse the opinion of the VA?

Mr. BURKE. I can. I can speak to two things and I think what you may be wanting more specific information is the actual relief process. All decisions from VA come with a due process period. With respect to the finding of incompetency and those that want to seek relief from that, I will tell you that the average age of the individual in our fiduciary program is 73. The average age of the person that seeks relief from being placed on the NICS list is 59. We had in FY 22, we had 33 individuals seek relief. Of those 33, there were 12 that based on submission of new evidence had their competency level restored. That was in FY 22. We are on pace this year for very similar numbers. It is not a large number of veterans that are seeking relief. When they do, they are significantly younger than the average age of the person in the fiduciary program.

Again, there is an avenue even outside of due process where the relief process itself has resulted in determinations of the removal of the incompetency status. When we report to NICS, we report three things. Those that need to be added to the list based on a finding of incompetency, those that need to be removed from the list because they have been since found to be competent, and then three, those that need to be removed from the list because they are deceased.

Ms. BROWNLEY. Thank you for that. Do you have, you know, evidence-based data that supports the issue that this process indeed saves lives?

Mr. BURKE. I can take that for the record and certainly provide you with a more detailed response.

Ms. BROWNLEY. Thank you. From your vantage point, how many veterans do you know who have had their firearms confiscated by the VA?

Mr. BURKE. I know right now we have approximately 109,000 active beneficiaries in our program and those names would have been referred obviously to NICS.

Ms. BROWNLEY. Right, but does VA have the authority to confiscate firearms?

Mr. BURKE. The VA has no authority to confiscate. We merely have a reporting responsibility.

Ms. BROWNLEY. Do you know how many veterans who have attempted to purchase a firearm, who were denied because they have a fiduciary at the VA?

Mr. BURKE. I do not have that data, ma'am.

Ms. BROWNLEY. Okay. I have no more questions. I will yield back.

The CHAIRMAN. Thank you. Dr. Miller-Meeks, you are recognized for 5 minutes.

Ms. MILLER-MEEKS. Thank you, Mr. Chair, and I thank our witnesses for being here today. Mr. Burke, what level of VA employee is normally the one who would send the name to the NICS system, N-I-C-S system?

Mr. BURKE. We have rating veteran service representatives and other employees that make the determinations and I believe the feed, if you will, of data from VA to NICS is done at our headquarters level and that is an automated process on a weekly basis.

Ms. MILLER-MEEKS. What type of training do they receive?

Mr. BURKE. All of our rating veteran service representatives, there is training on incompetency determinations and decisions. Medical providers, both vendor and VHA, are required to take incompetency training as well. That is training that we track through our training management system and other modalities, but they are required to take that training.

Ms. MILLER-MEEKS. Would you be able to send us what the competency training is?

Mr. BURKE. Yes, ma'am.

Ms. MILLER-MEEKS. Send it by mail. Thank you.

Mr. BURKE. Yes, ma'am.

Ms. MILLER-MEEKS. Even if I accept the VA, and I am a 24-year military veteran, married to a veteran, in a family of six of the eight children, my father was also military, as was my grandfather and my uncle. Even if I accept the VA's premises that those who need help with their finances are a danger to themselves and others, what is done about firearms that are already stored in the home by themselves or other members of the household? If it is not the veteran's firearm, what happens to that firearm?

Mr. BURKE. First let me thank you and your family for your collective service. I may have to take that one for the record. That is not something that VA, whether VBA, VHA, or National Cemetery Administration (NCA) is responsible for.

Ms. MILLER-MEEKS. If you have 190,000 veterans who are currently under a fiduciary person status, why do you not know how many firearms have been confiscated in reference to Ms. Brownley's question?

Mr. BURKE. For clarification, it is 109, not to correct you, ma'am, but just want to make sure for the record it is accurately portrayed. It is 109,000 and about 63 percent of that are veterans. In our fiduciary program, we also have spouses. With that, again, we report the incompetency numbers to DOJ, and there is no other engagement or involvement with us reporting or receiving information on numbers of weapons collected, taken back, et cetera.

Ms. MILLER-MEEKS. Is there a Health Insurance Portability and Accountability Act (HIPAA) reason why you would not be able to collect that information and do not you think that is valuable information to have?

Mr. BURKE. I do believe that is in DOJ's lane. If Mr. Barrans has anything he would like to add, please feel free, but I do not think that is VA's responsibility.

Ms. MILLER-MEEKS. Before Mr. Barrans' answered, have you requested that information? Have you sent a letter requesting the information for your records?

Mr. BURKE. Not to my knowledge, no ma'am.

Ms. MILLER-MEEKS. Mr. Barrans.

Mr. BARRANS. Yes, just to say that this is a governmentwide reporting program administered by DOJ, so, you know, VA is one of

among all the Federal agencies that comply, and I am not aware that there is a general report out from DOJ on the actions taken.

Ms. MILLER-MEEKS. I think that would be important information. I appreciate my colleague bringing up the question. Does the VA have any evidence that the current system in place for sending names to NICS list is actually working? To put it simply, has there ever been a study done if it is actually providing any level of suicide prevention, i.e., if that weapon is confiscated and a veteran had suicidal ideology or dementia that led to suicide ideology having read other testimony, do we have a correlation, a status? Are we preventing? Has veteran suicide gone up, not gone down?

Mr. BURKE. I would say that the studies that we cited in the testimony do reflect that, you know, the inability to access firearms does prevent suicides. Again, this is something that we are continuing, not just VBA, but VA as a whole, focusing on suicide prevention. We do cite some studies. I think some panel members may have some further information, but we do know, and I think it was in my oral statement, that 90 percent of suicide attempts with a firearm are successful, meaning there is a fatality. When those weapons are removed, only one out of five that would have used a gun find an alternate means to commit suicide.

Ms. MILLER-MEEKS. My time is almost over, but I did not see in those studies that there was a correlation. Yes, having access to a firearm, whether or not they were successful. My question is, in a person who is placed in a fiduciary status, what is that relationship? I read the physician's testimony from Duke, but I did not see that there is a correlation with fiduciary status and firearms and suicide. That is more the point, since we are talking about a fiduciary status. Thank you very much, I yield back.

The CHAIRMAN. Thank you, Doctor. Representative Budzinski, you are recognized for 5 minutes.

Ms. BUDZINSKI. Thank you so much, Mr. Chairman, and good morning to everyone. Thank you to my colleagues and the committee for this, I think, a really important discussion. I had the opportunity recently to visit the Veterans Hospital in St. Louis. I learned about all of the critical care they are providing to about 35,000 veterans that are on the Illinois side, which is the side of the river that I represent in Central and Southern Illinois. A lot of those services are mental health services and can certainly see the need after that visit of the greater need that we have to provide more mental health services for our veterans.

I bring this up because of the statistics, the statistic that the suicide rate for veterans is 1-1/2 times higher than the general population. I also just want to point out that 71 percent of those suicides by veterans are happening by firearm. I just want to mention this obviously weighs really heavily on me personally as we are having this discussion about this topic. I do believe we are all here today because we have a commitment to mental health providing that to our veterans. I hope we can find some commonsense, bipartisan solutions to ensure that both our veterans' rights and their health is protected.

I have a few questions related to how the VA evaluates the medical evidence that underpin the mental competency decisions made. I would like to start with you, Mr. Burke, if you do not mind. Mr.

Burke, one of the arguments we have heard against the current process is that the determination that a veteran needs a fiduciary is based solely on their limitations to manage their finances. I think you have spoken a little bit about this already, but just to ask again, but in reality, there is a medical determination underlying that determination, correct, is a question. Then just one quick follow-up and I will ask you to respond. Can you talk about the level of specificity in that medical evidence produced by the Comp and Pen exam?

Mr. BURKE. Yes, to confirm your statement, it is medical information that is used to determine a finding or even a proposal, if you will, of incompetency. With respect to exams, exams are not the only avenue that we use. There could be other evidence submitted from a, you know, primary care physician, there are, you know, other entities.

With respect to the VA exams, C&P exams, there used to be a simple check block on the exam, yes or no. We found that that was insufficient. Now the providers must detail the specific diagnosis that led to the check block of yes. Yes because of schizophrenia, yes because of PTSD, yes because of something else.

If I could just add one thing for clarification, and I think this is an important point when we talk about mental health, the mere presence of a mental health diagnosis does not lead to a finding of incompetency. When we talk about access to VHA and healthcare, we are telling folks through our comms, through our outreach, to access the benefits they deserve. The mere presence of a diagnosis is not what leads. It is the finding of the inability to manage their funds independently or through contract.

Ms. BUDZINSKI. Okay. Thank you for that point. Just to follow up. There is an additional charge that there is a lack of consistency as well between contract exam providers related to how the competency question on a Disability Benefits Questionnaire (DBQ) is filled out. Can you speak to that as well?

Mr. BURKE. I think with respect to both the training that is required for VHA and for our exam vendors, we will continuously look at ways to make sure that they are as aligned as possible. There is required training there now. The forms that we use, again some improvements to the form to make sure we are drawing out more adequate, more complete findings. In the medical disability exam space, it is something we continue to focus on increasing and improving quality and accuracy. You have our commitment that we will continue to do so.

Ms. BUDZINSKI. Okay, thank you. I have a little bit more time, so I would like to ask an additional question, Mr. Burke. What is the evidentiary standard that a Veteran Service Representative (VSR), Rating Veteran Service Representative (RVSR), must adhere to when determining that a beneficiary may need a fiduciary? Then additionally, how are you training your claims raters to interpret and utilize that medical evidence?

Mr. BURKE. The determination of incompetency by our VSRs and RVSRs is based upon, and I have to stress, a definitive finding by a responsible medical authority or medical evidence that is clear, convincing, and leaves no doubt as to the person's inability to manage their affairs or a court order finding the individual to be incom-

petent. Again, our employees that touch these claims, these cases, do get required training. As was asked by the committee already, we will submit those training modalities as well.

Ms. BUDZINSKI. Thank you, and I yield back.

Mr. ROSENDALE. [Presiding] Thank you. I recognize Dr. Murphy for 5 minutes.

Mr. MURPHY. Just give me a second. I might need a fiduciary myself. I want to applaud everybody here, everybody on the committee in a totally apolitical, non-partisan manner as everybody concerned about veteran suicide. I know there is, you know, unanimity in that. The problem is in just in the manner in which we are attacking this.

Mr. BURKE, I have a line of questions. I have just been sitting here writing out the PhD from Duke, I was just reading his report. I am not sure he has ever seen a patient, but just reads off studies. Just going through the whole fiduciary process, is there just one single individual who gets to check the box that says the person needs a fiduciary?

Mr. BURKE. Sir, there is not. The way that the VBA processes a workload, there are numerous hands that touch the process, those that develop the claim, those that may go out and request a medical exam to elicit further information. It could be a rater that proposes a finding. They—

Mr. MURPHY. All right, so let me, I am sorry, I do not want to go through that because I got other questions. There is one person finally that has to check the box. I mean, it has to be—

Mr. BURKE. There is one—

Mr. MURPHY [continuing]. there has to be.

Mr. BURKE. There is one person sir.

Mr. MURPHY. Is that automatically referred to a re-referral for evaluation? Just because you are taking away a person's constitutional rights, is there any checks and balances to that final check of a box?

Mr. BURKE. The check and balance is actually the fact that before that final determination is made, the veteran and his or her representative get a proposed finding with a due process period.

Mr. MURPHY. All right.

Mr. BURKE. Once that has expired, that decision is then appealable, but it is a final decision. At that point—

Mr. MURPHY. It takes an action of appealing rather than because the veteran then has to jump through a bunch of different hoops from bureaucrats. I was determined to be my mom's fiduciary when she got older and just could not handle her financial matters. She just was not there. It was not that she had any particular issues, but that made me her fiduciary. By definition, I am her fiduciary.

If she were a veteran, wow, that would put her in a different category of an assumption of incompetence. Not incompetence, you just sometimes cannot handle your matters. You brought up at one point, and Representative Brownley asked you the question for evidence that this program had saved lives. You mentioned that you would have to get back to her. How long has the program been in effect?

Mr. BURKE. With respect to providing information to NICS or the fiduciary program? We have had the fiduciary program for years.

Mr. MURPHY. For this, for the one we are talking about, for taking away a person's Second Amendment rights.

Mr. BURKE. I know there was a NICS improvement in 2017. I will ask Mr. Barrans if he has a more—

Mr. MURPHY. The reason I say this is if we do not have information at this point that you have not here, not that you have right here, that this is saving lives, it is not that you do a program with the hope that would save lives, even though I guess we all really truly want to save lives. It is not empiric evidence, you want factual evidence, objective evidence that this is going to save a life. Yes, I understand people with suicidal ideations and access to guns, absolutely I get that. I have been a surgeon, trauma surgeon, for 35 years and I understand that part. I just want us to be on the other side of making sure that those veterans have benefits.

I will ask one thing because you did mention PTSD as being one of the issues. Are you aware that there is a very, very good program especially in my part of Eastern North Carolina where it is where we take veterans out and it is hunting for veterans to help them with PTSD?

Mr. BURKE. Yes, sir.

Mr. MURPHY. How would, if then, if somebody has PTSD, how would they be able to participate in that program?

Mr. BURKE. Well, as I cited in an earlier question, the mere diagnosis of a mental condition is not a bar to owning a firearm. There are different levels of severity with post-traumatic stress disorder and other mental conditions. It is only at the point where the medical evidence clearly and convincingly shows that the individual is unable to manage their funds independently that we refer to NICS.

Mr. MURPHY. Yes, but funds, managing funds, and as I said, I was my mom's fiduciary, managing funds and having suicidal ideations are two absolute different things. Absolutely different. One is simple, basically you cannot handle your affairs, and the other thing is you want to kill yourself. You cannot equvalate, make those equivalent. Not by any means.

Mr. BURKE. Simply complying with Federal law. That is, we have a requirement by law to submit those to NICS, and that is the crux of this conversation.

Mr. MURPHY. Is there any evidence that requiring a fiduciary has decreased suicide attempts?

Mr. BURKE. There is evidence that access to firearms, right?

Mr. MURPHY. Sure.

Mr. BURKE. The fiduciary itself, the fiduciary program was not set up or established to remove, you know, access to weapons. It is a byproduct of the requirement in the Brady Act. With respect to science and research, there is research that shows that limiting access to firearms does help us in preventing suicide.

Mr. MURPHY. Yes, I am really trying not to be belligerent. I am really trying because I really want this issue solved with veteran suicides. It is tragic. I represent one out of eight of my constituents is a veteran in my district. It is an absolute tragedy. It is also a tragedy in this country that 110,000-plus people are now are dying from overdoses for drugs coming across our border, but I do not see us as a administration taking any issue with that.

I appreciate your work. I cannot say I agree with the premise on which you are working. With that, I will yield back.

Mr. ROSENDALE. Thank you. I recognize Representative Deluzio for 5 minutes.

Mr. DELUZIO. Thank you, Mr. Chairman, and good morning. Thank you for being here. Before I proceed with my question, I want to offer one clarifying point for the record. There was some discussion of whether VA was alone in sharing or doing this kind of reporting to NICS under Brady, and my understanding is others who are doing this reporting include the Air Force, the Army, the Marine Corps, the Navy, the Defense Department, National Center for Information Security (NCIS), Department of Health and Human Services (HHS), FBI, ATF, and the Secret Service. VA is not alone here.

With that, I will ask a question for all or each of you to weigh in on. I am struck by how few veterans are using the avenues for relief or redress. An open-ended question then to each of you, why do you think that is? I mean, it is a small percentage of the folks who are subject to these determinations. Why are we not seeing more or should we be seeing more folks pursue these avenues? Is there something about advertising that they exist or some other sort of information sharing with veterans in the program?

Mr. BURKE. Yes, sir. Thank you for that question. The numbers are staggeringly low. I believe it is a testament to the fact that the due process is clear, that there is a due process opportunity, that folks are afforded the opportunity to submit, you know, medical evidence to the contrary of what we have considered. Again, the numbers are low. I honestly do think it is because the process is clear. We also articulate in the due process with incompetency the specific impact on their ability to own firearms. It is pretty clearly explained. I believe that the communication is clear and understood and I believe that leads to the low numbers.

Mr. DELUZIO. Just a clarifying question, gentlemen, please feel free as well to weigh in if you would like. When that determination is shared, and you mentioned the impact on firearm ownership, is there also information about the avenues of redress and relief provided to the veteran as well?

Mr. FRIEL. Yes, sir, thank you for the question. Yes, we do address relief as part of the process, both in the final determination. We also, in the appointment of a fiduciary, a field examiner goes out and physically meets with the beneficiary and discusses the impacts of the appointment of the fiduciary and what abilities exist for them.

Mr. DELUZIO. Mr. Barrans, anything you want to add?

Mr. BARRANS. No, I would just again reemphasize that we do conduct extensive outreach in terms of written and oral communication, so to the extent people are not taking advantage of the avenues of relief, I do not think it is for lack of communication.

Mr. DELUZIO. To put a finer point on it, the small number of folks who are pursuing this does not give you pause because you are taking the view the VA is making it very clear at the outset of determination that this is the path both for redress but also that there is substantial process to get to that point.

Mr. BARRANS. Yes. Yes, I think that is fair and we do give, you know, with every decision VA gives appellate rights, so not just the NICS relief program but also to appeal the actual finding of incompetency.

Mr. DELUZIO. Okay. Thank you. Mr. Chairman, I yield back.

Mr. ROSENDALE. Thank you very much. I will now recognize myself for 5 minutes. Just following the law is not going to cut it. There are a lot of laws that are not right. They just are not right. As my good friend, the Ranking Member Takano said that Republicans do, yes, they do pass bad legislation too. Contrary to what many of you guys might believe. I do not believe that only Democrats pass bad legislation. We have messed up some things ourselves.

As a matter of fact, we just had an amendment that I proposed and was placed on the National Defense Authorization Act that basically for the last decade or more has authorized the United States military to pick up American citizens on American soil, whisk them off to a foreign land without charges without counsel and hold them for an indetermined amount of time. That by anybody's estimation is completely unconstitutional.

To continue a process with which our veterans lose their Second Amendment rights because somebody might think that they are a danger, not a court, not a jury of their peers, but a bureaucrat sitting in an office somewhere has made that determination is absolutely 100 percent wrong. I really do not care what the law says. I really do not care what the law says. It is wrong.

We have programs that show that it is not the simple act of owning a firearm that causes a problem and increases the likelihood that they are going to, a veteran who is suffering with PTSD, is going to take their life. It is the time with which they think about it and then have access to that weapon. If the weapon's locked away, if it does not have the ammunition right next to it, the likelihood that they are going to take their life reduces dramatically. There is a very good program out. It is called Overwatch Program, that places time and distance between a veteran and their firearm to make sure that we can drive down the rates of suicide.

Mr. Burke, with your previous statement, we have already established that veterans who need a fiduciary to manage their benefits are not always a danger to themselves or others. Current law treats them as being dangerous because they are unable to own a gun if they have a fiduciary. This is just simply false, a false premise. Do you think that a veteran who needs a fiduciary is mentally defective? Mr. Burke.

Mr. BURKE. I think the mere placement of somebody in our fiduciary program is based on the premise that they were found to be unable to manage their funds.

Mr. ROSENDALE. Mr. Burke, do you believe that a veteran who needs a fiduciary is mentally defective?

Mr. BURKE. In most cases, a veteran that has been appointed a fiduciary does have mental impairment or a mental issue that has caused them to be unable to manage their funds.

Mr. ROSENDALE. That is just stunning to me that you would sit here and say that you think that a veteran who has a fiduciary is mentally defective. Under the current law, procedural due process

is violated because a veteran is not afforded a proper pre-deprivation hearing before the imposition of firearm restrictions. I am very concerned that the VA is treating veterans who need help in managing their money as criminals.

Under this policy, anyone who uses the services of a firm to manage their books, a bookkeeping service, would be subject to surrendering their firearms and their Second Amendment rights. This is as ridiculous as it is dangerous. The Supreme Court found in *Heller* that the Second Amendment guarantees the individual right to possess and carry firearms in the case of confrontation. In *McDonald*, the court established the Second Amendment to be a fundamental right applied equally to the Federal Government and the States. The way the VA is interpreting the statute is blatantly unconstitutional and an affront to the Supreme Court and the separation of powers. Mr. Burke, do you believe in due process?

Mr. BURKE. I certainly do, yes, sir.

Mr. ROSENDALE. We are losing 21 veterans a day to suicide in this country. Are you concerned that veterans might be less willing to seek care at the VA knowing that it could result in them unfairly losing their Second Amendment rights?

Mr. BURKE. I am concerned any time a veteran does not want to seek care or assistance, but I do not believe this process is a deterrent. I do not believe it is a deterrent and that is why I am here to stand by—

Mr. ROSENDALE. Well, Mr. Burke, I will tell you that I have had veterans come to me and declare that they are not seeking help because they are concerned about their Second Amendment rights being violated.

Mr. BURKE. My—

Mr. ROSENDALE. Thank you very much.

Mr. BURKE. My point, sir, would be that we can together work on their behalf.

Mr. ROSENDALE. Mr. Burke, I have got veterans who have quoted to me, okay, quoted to me and come to me and said that they are concerned about their Second Amendment rights being violated and that is not, that is why they are not seeking help. I will turn my time. Yes, I will now recognize Representative Cherfilus-McCormick for 5 minutes questioning.

Ms. CHERFILUS-McCORMICK. Thank you, Mr. Chairman. Mr. Burke, VA's authorities, as well as the processes and procedures used to determine mental incapacity and NICS reporting, have been clarified, redefined, and codified since then, both in the NICS Improvement Amendments Act and the 21st Century Cures Act. Is that correct?

Mr. BURKE. Yes, ma'am.

Ms. CHERFILUS-McCORMICK. I will remind my colleagues that the 21st Century Cures Act was passed under a Republican-led House and Senate. If VA's fiduciary program was so problematic, Congress could have chosen to reform it as opposed to validating it as we did then.

My next question is for Secretary Burke. Is it safe to say that VBA is on firm legal footing to conduct the fiduciary program and are complying with the laws as written? Would you agree?

Mr. BURKE. Yes, ma'am. In consultation with our Office of General Counsel, we believe we are on firm footing. Yes, ma'am.

Ms. CHERFILUS-McCORMICK. In Fiscal Year 2022, the VA provided fiduciary services to over 180,000 veterans. Of these veterans, there were a little over 14,000 referrals from the VA to the FBI's National Instant Criminal Background Check System, NICS. Of these 14,000 referrals to NICS, only 33 were appealed and 11 beneficiaries were ultimately removed from NICS. Veterans make up less than 4 percent of the total NICS reporting despite making up 6.4 of the United States population, meaning that veterans are underrepresented in the NICS.

Mr. Friel, how has the VA been estimating how many lives have been saved? We asked you this question before and we have not got a clear answer. Is your office currently collecting the information to make this determination?

Mr. FRIEL. Ma'am, thank you for the question. No, we currently do not collect that information. We do not have insight as to whether or not, you know, the fiduciary process and members within the fiduciary process are committing suicide. We do not have that information readily available.

Ms. CHERFILUS-McCORMICK. Thank you. As I mentioned earlier, only 33 were appealed out of the 14,000 veterans. How is information made available to veterans that they have the rights to appeal?

Mr. BURKE. Ma'am, as part of the due process, as well as any final decision that VA renders, they get their appeal rights. I do want to point out that the numbers that you are referencing, the 33, those are ones that sought relief through the process, which is a low number. Also, in FY 22, there are almost 1,100 veterans who were previously found to be incompetent that were later converted to being competent. Again, lessening the number of folks that were on that NICS list.

Ms. CHERFILUS-McCORMICK. Those people, were they appealing that right, the ones who you said who were made competent, did they appeal that right?

Mr. BURKE. That could have been a combination of appealing or just mere submission of a new claim through one of those six avenues that the ranking member showed. Whether it was a higher-level review or some other submission of evidence, at some point, they were then later found to be competent to manage their funds.

Ms. CHERFILUS-McCORMICK. Well, what I wanted to confirm was that all the veterans are aware of their right to appeal. Is that correct?

Mr. BURKE. That is correct. Yes, ma'am.

Ms. CHERFILUS-McCORMICK. Only 33 appealed that right?

Mr. BURKE. Only 33 sought relief through the relief avenue. The numbers that I do not have are how many may have done a formal appeal through the Board of Veterans Appeals or beyond.

Ms. CHERFILUS-McCORMICK. Thank you so much. I yield back the balance of my time.

Mr. ROSENDALE. Thank you. I will now recognize Representative Ramirez for 5 minutes for questions.

Ms. RAMIREZ. Thank you. I want to thank Chairman Bost and Ranking Member Takano for holding today's hearing. I also want

to thank the witnesses who are with us today. For the last hour, you have heard from several of my colleagues on issues spanning from mental health to fiduciary issues. I should be able to pronounce it well, we have said it about 35 times in the last hour.

I want to take a moment to refocus on why we are here, why every single one of us here chose to be a member of the Veteran Affairs Committee and why you sit here and the people that are sitting here listening. We are here for our veterans, our first-generation veterans, our veterans of color, and even some of us are here for our veterans who have been deported after risking their lives for the country we love.

These veterans need our support, and the VA support in providing them with wraparound services and other resources they may need has to be our priority. We can go back and forth and blame game all day here. Let me just say what I think some of us have said here already, 121 suicides per day, 121 veterans commit suicide every single day. If you do the math, that means in the hour that we have been debating and questioning and talking here and blaming each other, five veterans died.

I really want to make sure that we refocus ourselves and ask ourselves what the heck are we doing as Congress, as the VA, and as every single organization who is committed in ensuring that our veterans have what they need so that they do not feel that life is such that they no longer can live. I actually want to really focus on the mental health part here because I think others will continue to talk about the other pieces. I want to ask you, Mr. Burke, what are the initiatives that the VA is spearheading to address the concerns with seeking mental health services for our veterans?

Mr. BURKE. I think honestly, ma'am, thank you for that question. This may be one that we come back with some further information from the VHA side of the organization. I will tell you that every entity within VA is committed, not just to suicide prevention, but making sure that we are communicating all rights, all avenues for access for care and for benefits. On the VHA side of the house, a very heavy focus, as you can imagine, on improving mental health. We have a Suicide Prevention Office, obviously, and those folks are connected. It is a, I hate to use a generic term, but a synergistic approach to us tackling mental health crisis, and also making sure that we are putting a primary clinical focus on preventing veteran suicide. We are happy to connect with you and members of the committee on more detailed information of what we are doing in that space if that would be helpful.

Ms. RAMIREZ. We know we are not doing certainly enough, right? I mean, enough is when we know that no veteran has to make that decision between life and death. We have a lot of work to do.

I do want to follow up and say, I mean, we know it is critical that we prioritize. We know it is critical that we do more. We know it is critical that we get into the nuance of what is happening and the supports and the claims. However, mental health illness and disorders can also wax and wane over time. Mr. Burke, can you tell me what processes are in place for veterans to have the impact of their mental health issues re-evaluated?

Mr. BURKE. Certainly. With respect to the claims process, any veteran that is in receipt of compensation that has deteriorated or

their condition has worsened, they have the opportunity to file a claim for an increase. They can come back and have another examination. We will review additional evidence. That if they did have an increase or an exacerbation of their condition that we could adjust the compensation rate and also ensure that is another touch point for us to make sure that they are in the VHA system enrolled in healthcare and seeking the appropriate attention there. There is a claims process where we would collect new information, assess any potential increase in the severity of their condition, and then re-adjudicate a claim in that same fashion.

Ms. RAMIREZ. Thank you, Mr. Burke. Chairman, I yield back.

Mr. ROSENDALE. Thank you very much, Representative. I now recognize Representative Van Orden for 5 minutes questioning.

Mr. VAN ORDEN. Thank you, Mr. Chairman. Mr. Burke, I have had, as with Senior Chief Mike Day, 21 of my friends and colleagues commit suicide, veterans. I am going to say some things, and I want you to have that in the back of your mind at all times, please. I take this very seriously. It is very personal to me. Do you believe that our constitutional rights are granted by God?

Mr. BURKE. I am sorry, I am here in a—

Mr. VAN ORDEN. Do you—

Mr. BURKE [continuing]. professional capacity and my personal beliefs I will not bring into the hearing.

Mr. VAN ORDEN. Okay. Well, do you believe that our constitutional rights are articulated in the Constitution of the United States?

Mr. BURKE. I do.

Mr. VAN ORDEN. Do you understand that our foundational documents say that our rights are derived from God?

Mr. BURKE. I know the wording in the Constitution, yes, sir.

Mr. VAN ORDEN. Okay, great. Either you believe that our constitutional rights are granted to us by God and simply articulated in the Constitution, making them immutable or you do not. Those two cannot exist in the same universe. Our rights are either immutable or they are not, which means if they are immutable, you cannot take a pause on them. You cannot have a cooling off period. For good or for bad, and oftentimes for bad, and this is true, they are still our constitutional rights that are granted by God and I believe you took an oath to support and defend that at one point, and I do not think that expired. It did not.

When the VA opposes this bill that would absolutely infringe on our constitutional rights, a well-regulated militia being necessary for the security of a free state, the rights for the people to keep and bear arms shall not be infringed. This will infringe on that. Either your oath to support and defend the Constitution of the United States of America expired or you are in error in supporting this—or opposing this bill. That is a factual statement. Okay. I want you to rethink this policy.

Mr. BURKE. May I respond to that?

Mr. VAN ORDEN. Of course you can. I would love you to, Mr. Burke.

Mr. BURKE. I will just say, I take exception to anyone, Member of Congress or not, questioning my oath that I took.

Mr. VAN ORDEN. I am not.

Mr. BURKE. My entire life, my entire adult life, has either been in uniform or serving those that were in uniform.

Mr. VAN ORDEN. I get it.

Mr. BURKE. I am simply in a position where we are complying with the law and we always commit to work with Congress on improving legislation and the matter of law. For the record, I take it seriously as well.

Mr. VAN ORDEN. Good. I am not saying you do not.

Mr. BURKE. Okay.

Mr. VAN ORDEN. I am not impugning your reputation, sir. I am just saying that these two things, by definition, cannot exist in the same universe. They are incompatible. We have to do things in a way that we look at things globally. Again, the reason I told you I have had so many of my friends commit suicide, so that you know that I am saying this from a place where I want that to stop. We also have to balance our individual rights that are granted by God and articulated the Constitution with sometimes these most horrible things. I have held my friend's children's hands at their funeral because their father committed suicide. I have cried with their widows. This is real. We have to make sure that we do not lose, we do not lose our freedoms trying to protect them. Can we agree on that, sir?

Mr. BURKE. Yes, sir.

Mr. VAN ORDEN. Thanks, man. Okay, going to this other. Mr. Peltz Accrued Veterans Benefits Act. You oppose this bill and why is that again? I mean, I read your testimony. I would just like you to do the Reader's Digest. I have 1 minute and 7 seconds.

Mr. BURKE. Yes, sir. There are just a couple things that it creates some complexities, different discontinuation dates.

Mr. VAN ORDEN. Yes.

Mr. BURKE. It not only makes it complicated for our veterans because of different dates and different change in benefits, impacts the complexity for the processing for our employees. As you know, quality of processing is keenly important. Then also the complexity with the different dates and the nuances also make it hard for things like technology advancements, automation, and speedy delivery of benefits.

Mr. VAN ORDEN. Okay. So——

Mr. BURKE. Again, happy to work with Congress on some technical assistance. As written, we oppose for those reasons.

Mr. VAN ORDEN. Okay. In the aggregate, if you had your choice to err on the side of the veteran or not, would this be more beneficial financially to the veteran or not?

Mr. BURKE. Parts of it would be, other parts would actually be a detriment. There are some parts where it would negatively impact a surviving spouse——

Mr. VAN ORDEN. Yes.

Mr. BURKE [continuing]. and remove a payment, and those are the things that we are concerned about.

Mr. VAN ORDEN. Okay. Then I seek a little bit more clarity in your testimony about this. Is that good? All right, with that I yield back, Mr. Chairman.

Mr. ROSENDALE. Thank you, Representative. I will now recognize the ranking member briefly for a follow-up question or two that he had.

Mr. TAKANO. Thank you, ranking—Chairman Rosendale. I just want to briefly just say that the Constitution begins with we, the people, the men and—mostly men wrote the Constitution, came together not thinking they were channeling God, but were thinking that in a practical way, they were trying to unite colonies. The Bill of Rights was added later. That they think of human beings neither as God nor devil, but somewhere in between. That is why we needed the Constitution, to have power and ambition check ambition. It is a very practical document.

The Declaration of Independence, of course, does claim to channel God in terms of endowed by their creator, a sense of system, a belief in the natural rights. Let us turn back to, I just want to get at a couple of things. Chairman, you said that you admired the program that put some distance, that separated ammunition from the weapons and you talk about a program that could.

Mr. ROSENDALE. Urban Watch, Urban Watch.

Mr. TAKANO. Urban Watch. Sounds very much like safe storage and lethal means training. That counseling veterans about how to safely store firearms and lethal means training, that this could save lives and could prevent suicides. I hope that you might work with us to see that that policy gets implemented, because it sounds very much what you were talking about.

Mr. BURKE, I just want to confirm one thing, and the chairman was very concerned about the veterans that come to him talking about their fear of having their guns taken away because they do not trust the VA on that. Does again, I want to hear this on record, does the Veterans Health administration report any veteran to NICS who are getting treated for mental health or any other condition?

Mr. BURKE. No, sir. The VHA does not communicate any information to NICS. The only entity that provides information is VBA direct to NICS. VHA does not.

Mr. TAKANO. Now, I have no doubt that people came to the chairman with this concern because there is a perception and a belief out there. Is that your understanding, there is a perception and belief among veterans that the VHA will turn them over to NICS?

Mr. BURKE. Absolutely, and I do appreciate the members that communicate directly with each member of this committee. What I would say is, you know, our willingness to partner to make sure that everybody that has communication and contact with veterans has the right message. If we can partner together and communicate that the mere diagnosis of a condition, entry into the medical centers for treatment does not necessitate an automatic removal of weapons. We are willing to partner further on strengthening that communication so no veteran feels as though he or she cannot go for treatment or care for fear of losing their weapon.

Mr. TAKANO. There is a perception problem. There is misinformation and disinformation out there which is insidiously misleading our veterans into thinking that if they go to the VA to get treated for mental health or any other condition, that that could lead to their inability to buy firearms because they have been misled into

thinking that the VHA will report them to NICS. I want to, just for the record, again, that is not true. Is that right?

Mr. BURKE. You are correct. I want to clarify for any veteran that watches this hearing or reviews the testimony later, the transcript, VHA, the Veterans Health Administration does not provide NICS with any information. Any veteran that feels that he or she needs assistance or treatment from the VA should seek such.

Mr. TAKANO. In the time I have remaining, I just want to address this issue. I mean, my Republican colleagues believe about a pre-deprivation hearing by a judge, a Federal judge. I do not believe that that is necessary, that it is important that we have a fiduciary program, that we do have six layers of appeals where they can seek relief from the putting on the NICS list. Effectively, you said, would lengthen the process if they brought in a Federal judge or some level, a judicial figure, that would effectively really impair VA's ability to put anyone on this list, is that right?

Mr. BURKE. That is correct, sir, and I do believe that the process as written would prevent us from potentially saving a life, and so by elongating the process, that is the point I was making earlier.

Mr. TAKANO. The process as defined by the Republican bill?

Mr. BURKE. That is correct, yes, sir. Thank you. I yield back.

Mr. ROSENDALE. Thank you, Ranking Member Takano. I will now—

Ms. RAMIREZ. Mr. Chair.

Mr. ROSENDALE [continuing]. recognize Representative Ramirez momentarily.

Ms. RAMIREZ. Thank you, Mr. Chairman. I wanted to correct the figure that I gave in my remarks. Fortunately, when we were talking about the number of suicides per day, the information that was given to me was incorrect. It is actually 17 per day. I would like to make sure that we correct that for the record. Either way, too many. Thank you.

Mr. ROSENDALE. Thank you very much for that correction. I would just like to say that while the VA may not be the ones who actually take a gun or report to NICS, you certainly are the conduit with which it happens and it gives you plausible deniability having being able to transfer that information off to someone else, you start the chain of events that cause this to take place. That is what it boils down to.

With that, I would like to thank Mr. Burke, Mr. Friel, Mr. Barrans for testifying today, and you are excused from the witness table. Once they are out of there, I would like to invite the second panel to the witness table if you want to prepare yourselves.

Before we introduce the second round of witnesses, the second panel, I would like to recognize Representative Stefanik for 5 minutes to comment on your bill.

Ms. STEFANIK. Thank you so much, Chairman Rosendale, and thank you to Ranking Member Takano for the opportunity to join the Veterans Affairs Committee today for this critically important legislative hearing. Today's hearing is critical for veterans across my district in upstate New York and the North Country but especially so for the Peltz family from Queensberry, New York. Ernest Peltz proudly served in the U.S. Navy from 1942 to 1946. During

World War II, Mr. Peltz bravely protected our freedom in the Pacific Theater on the island of Guam.

During the final chapter of his life, he lived in Queensbury, New York to be close to his son, Charles. While living there, his health tragically began to decline, and the Warren County Veterans Services Office assisted Mr. Peltz with his application for pension benefit, for which he was approved on December 16, 2019. My office was proud to help with that effort in the form of casework and constituent services. Mr. Peltz passed away shortly thereafter on January 1, 2020. January 1st is New Year's Day. On New Year's Eve, I was in contact with the Peltz family, with Charles Peltz, that his father, as he was on his deathbed, was so concerned about the VA not processing his claim. I told the Peltz family, we would work to make this right.

Due to a processing error at the Department of Veterans Affairs, the approved funds were not deposited into Mr. Peltz's account until 7 days after his death, on January 7, 2020. The VA's erroneous delay in the disbursement of Mr. Peltz's benefits resulted in the VA clawing back those funds from Mr. Peltz's account, despite the fact that the VA approved his benefit while he was alive. This is unacceptable. Mr. Peltz's distinguished service to our Nation came in a great national time of need, and he worked hard to serve this country to earn this benefit, a benefit he was owed. These funds should have been passed down to his family through his estate.

Again, on this gentleman, on this hero's deathbed, he was very concerned about the VA malfeasance and the red tape. A family mourning the loss of a loved veteran is a burden enough. The VA must work to ease these burdens, not increase them as they did with the Peltz family. I have worked for years with the Peltz family, our great veteran service organizations that are before us today, and the VA, as well as members of this committee on crafting this legislation to ensure no other family has to endure what they went through when World War II veteran and hero Ernest Peltz passed away. My bipartisan bill named in honor of Ernest Peltz eliminates the burden on surviving families by ensuring that veterans receive their already approved pension benefits for the month at their death and prohibits the VA from clawing back these funds after they are approved, as they did in the case of Mr. Ernest Peltz.

I want to thank the service organizations that are here today for your support of this legislation. I want to thank the committee for working with us on this legislation as well as my colleagues across the aisle who have worked to support this legislation as well and I yield back.

Mr. ROSENDALE. Thank you very much Representative Stefanik. It is very important legislation and we are glad to have it in front of us. I would like now to welcome Dr. Jeffrey Swanson professor in psychiatry and behavioral sciences from Duke University School of Medicine. Mr. Bob Carey Chairman of the National Defense Committee, Mr. Cole Lyle, Executive Director of Mission Roll Call, and Ms. Kristina Keenan, Deputy Director of National Legislative Services for Veterans of Foreign Wars of the United States. I ap-

preciate all of you being here today. I ask the witnesses to please stand and raise your right hand.

[Witnesses sworn.]

Thank you very much and let the record reflect that the witnesses have answered in the affirmative. Dr. Swanson, you are now recognized for 5 minutes for your testimony.

STATEMENT OF JEFFREY SWANSON

Mr. SWANSON. Good morning Mr. Chairman, Ranking Member Takano, and members of the committee. A challenging policy dilemma underlies arguments for and against the proposed Veterans 2nd Amendment Protection Act. On the one hand, private ownership of firearms is a constitutionally protected individual right that is especially cherished by many U.S. military veterans. As a group, veterans are twice as likely to own a firearm as the general population. On the other hand, veterans are dying every single day by suicide with firearms, in numbers exceeding the toll of those who perished in war. Each is a preventable tragedy of immense human cost.

Suicide is the second leading cause of death in veterans, who are 57 percent more likely to die by suicide than non-veteran adults. Veterans' greater access to firearms plays a key role in their increased risk of suicide. Veterans are far more likely than non-veterans to use guns, the most lethal weapon in suicide attempts. Approximately one in five suicides in the United States is a military veteran.

A key policy question is, how do we find the right balance between mitigating risk and upholding rights in designing and implementing legal restrictions to veterans' access to firearms? No firearm restriction policy is perfect, and there will always be errors made in its application to individuals, false positives, and false negatives. Is it better for the law to err on the side of preserving the Second Amendment right for more veterans, even if it means that some will die preventable deaths? Or is it better to err on the side of saving more lives at the cost of restricting the gun rights of some veterans who would not have died by suicide anyway. Wherever the lines are drawn to mark out a category of people deemed sufficiently risky to override their Second Amendment right, we should aspire to provide due process protections and opportunities for appeal that are sufficiently robust to offer a meaningful and not overly burdensome chance for individuals to contest their deprivation in an adjudicative process, either by judicial authority or an administrative officer acting in that capacity. On that score, the current policy might be seen as a work in progress. It could be improved.

We cannot know precisely each individual's likelihood of harming others or self with a gun. We know that some categories of people are generally associated with relatively higher risk. One such category comprises VA beneficiaries found incompetent to manage their VA affairs. The statistical evidence for this is indirect. It would be most informative to bring direct evidence to bear by studying the actual population of veterans with fiduciaries, to quantify their concentration of risk factors for dangerous behavior, and examine their specific suicide mortality rate with and without firearm involvement. Such a study has yet to be conducted.

In the meantime, our research group carried out a study designed to estimate risk of suicidal behavior and interpersonal violence in veterans who are most likely to be assigned a fiduciary. We analyzed data on 3,200 post-deployment veterans from the Iraq and Afghanistan war era, we constructed three separate indicators of need for a fiduciary in these data, based on cognitive performance, substance use disorder, and acute psychopathology. We found that all three of these proxies for a fiduciary assignment were statistically significantly correlated with suicidal symptoms and interpersonal violence. This third indicator identified a small group of veterans who were, on average, eight times more likely than other veterans to have suicidal symptoms and to have engaged in violence.

In summary, our research provided evidence consistent with the public safety rationale for the policy of fiduciary NICS reporting. However, I have also concluded that a somewhat analogous civilian policy of reporting incompetent Social Security beneficiaries to the NICS was not warranted. It was overbroad, not supported by evidence, and lacked due process. Policies that restrict access to firearms for people who pose a high risk of harming others or themselves can and do save lives. In this country, such policies need to find the right balance between mitigating risk and preserving rights. The current VA policy of reporting to the NICS the names of veterans who are assigned fiduciaries is not perfect. It could be improved, especially if guided by more research.

We cannot know precisely each individual's likelihood of harming others or self with a gun. We know that some categories of people are generally associated with relatively higher risk and one such category comprises VA beneficiaries found incompetent to manage their VA benefits. The statistical evidence for this is indirect.

In closing, I have a personal interest in this as well. My late father, a gun owner who served honorably in the United States Navy in the 1940's, was deemed incompetent by the VA toward the end of his life. I was his fiduciary and I understood clearly why he should not have access to guns. I have also lost three members of my extended family to gun-related suicides and each of them was a preventable tragedy that caused immense suffering for their families and friends. I am happy to take your questions and provide further assistance to the committee.

[THE PREPARED STATEMENT OF JEFFREY SWANSON APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you, Dr. Swanson. Mr. Carey, you are now recognized for 5 minutes for your opening statement.

STATEMENT OF BOB CAREY

Mr. CAREY. Chairman Bost, Representative Takano, members of the committee, thank you very much for having me here today. I am Bob Carey of the National Defense Committee. I am going to probably be somewhat contrarian here, but I believe there are no constitutional rights to due process or to ownership of guns. These rights are inalienable and pre-exist the Constitution. The Second, Fifth, and Fourteenth Amendments do not grant those rights. They restrain the Federal Government from impinging upon those

rights. That is what is not being provided by the current fiduciary program.

The fiduciary program is effectively a gun control program. It does not matter who takes away the gun rights, whether VA or DOJ takes away the right. The previous VA officials admitted that the program saves lives, and from a policy perspective, they wanted to by controlling access to guns. When we talk about the VHA versus VBA, the Veterans Benefits Administration, as the previous official said, use VHA data to determine whether someone needs to go into the fiduciary program. Then the VBA uses that data to make the fiduciary determination. Then the VBA justifies reporting to the DOJ based upon that Veterans Health Administration data.

The VA fiduciary program does not provide adequate due process. It does not meet the standards of the ATF regulations for mental defective. There is a presumption of incompetency. The burden of proof is on the veteran to prove their competency, not upon the VA to prove the veteran's incompetency. There is no judicial oversight or requirement as there is with the Social Security Administration's incompetency process that does require court action.

There is no statistical correlation between gun access restrictions and reductions in suicide or mass shootings. As I detail in my report, in my written testimony, the RAND study did an extensive meta-analysis of all these different gun safety studies and found no statistical correlation, inconclusive evidence that either restricting access to guns because of mental health issues or emergency protective regulatory orders, you know, red flag laws, reduce suicides or mass shootings. As I detail in my testimony, my written testimony, the VA itself presented at the VA Department of Defense (DoD) Suicide Prevention Conference of 2019, an extensive study of about 7,300 suicide risk models and found that there is no capacity to predict that activity. In fact, when you have a—and in fact that it was able to positively predict 1 percent of the suicides, but that for every one suicide that was properly, that would be properly predicted, 842 false positives would be predicted, but they would still be under the same fiduciary rule.

Then the American Psychological Association said there is no statistical evidence that links any type of psychological illness to mass shootings—to gun violence. Then the National Academy of Sciences study that I referenced also said that 35 percent of the veterans that were surveyed said they did not believe that their gun rights would be protected if they went to the VA. It does not matter, you know, whether, you know, whether the VA is the one that takes away your gun rights or the Department of Justice, your gun rights get taken away.

What are our recommendations? We do not believe that VA will ever change on this. It is going to have to be legislatively mandated if we are going to provide those due process rights, not only on the gun rights issue, but on the underlying issue of due process rights for managing your own finances and managing your own—and managing your own healthcare. We need to place the burden of proof on the VA to prove incompetency, not upon the veteran to prove their competency. We need to refer positive decisions by the VA to the Court of Veterans' Appeals to give a judicial oversight,

and we need to de-link the fiduciary program from reporting to the NICS data base.

As far as the Peltz Act, we do support that. Given some of the concerns raised, which I think are legitimate about differentiation between different types of, you know, different types of final benefits being provided, my recommendation is you standardize it and standardize it across the board and just expand the Peltz Act and standardize it across the board. I look forward to your questions.

[THE PREPARED STATEMENT OF BOB CAREY APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you. Mr. Lyle, you are now recognized for 5 minutes.

STATEMENT OF COLE LYLE

Mr. LYLE. Thank you, Chairman Bost, Ranking Member Takano, and members of the committee. On behalf of Mission Roll Call (MRC), a national nonpartisan program, and the roughly 1.4 million veterans and supporters who have opted into our digital advocacy network, thank you for the opportunity to provide their feedback through our remarks on pending legislation.

In 2022, Mission Roll Call sent out 30 policy-based polls with approximately 159,000 responses and spoke to 5,000 veterans in person around the country seeking the ground truth. Based on those interactions, MRC's three main priorities are veteran suicide prevention, access to healthcare and benefits, and amplification of voices of traditionally underserved populations. As these topics are broad and complicated to tackle, MRC continuously polls veterans and supporters on a wide range of topics, usually when Congress, the VA, or the White House releases policy that may directly or tangentially affect veterans across the United States, or at the suggestion of a Member of Congress or committee that wishes to ascertain the veteran community's opinion on a particular topic. I welcome all members of this committee to use MRC as a resource as you seek to craft thoughtful legislation with respect to veteran issues.

MRC supports H.R. 705, the Veterans 2nd Amendment Protection Act, as a necessity to ensure veterans receive the same due process as the average American whose rights they serve to protect. Currently, the VA is the only Federal agency to refer veterans to the FBI's NICS data base following a determination by agency officials, not a court, that the veteran cannot manage their own VA benefits. Under the Brady Act of 1993, Congress authorized the DOJ to receive data from government agencies on any person whose receipt or possession of firearms violated the Gun Control Act of 1968.

As part of the implementation process, the VA defined a mentally incompetent person as "one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including of disbursement of funds without limitation." This determination does not include any consideration of whether the person is considered to have a propensity for violence or is considered a threat to themselves or others. Thus, for example, a veteran who during the determination process for disability compensation indicates that because of a traumatic brain injury, they are experi-

encing short-term memory loss which affects their ability to manage their finances, they could be determined to be mentally incompetent, even if there is no evidence that this veteran's condition would impair their ability to safely own or handle a firearm, or that they are a threat to themselves or others.

Since 1998, VA has provided records to the FBI for inclusion in the NICS index on beneficiaries for whom a fiduciary has been appointed by VA on his or her behalf. The appointment of a fiduciary is based on a VA determination that they are mentally incompetent under the previously mentioned definition in VA regulations. As of December 2020, Federal agencies have contributed 263,225 records to NICS, of which the VA contributed 98.1 percent of the total number. This incongruity in the implementation of the law between the VA and other Federal agencies unfairly prejudices veterans by stigmatizing those who are challenged with service-related healthcare issues as inherently dangerous to others, when in fact several studies and data from the U.S. Bureau of Justice statistics show no evidence that military veterans, including those who saw combat, are more prone to lethal violence than the general population. Furthermore, veterans convicted of violent gun-related crimes in the Federal prison system accounted for less than 1 percent of the entire Federal prison population and were almost 7 percent less likely to be incarcerated for a gun-related charge than the civilian population, per the United States Sentencing Commission.

Veterans across this country know that, despite challenges with a few bad apples, our community is one of service that abides by the laws they were sworn to protect, and in fact is less dangerous and less prone to extremism, as some have argued. These points are likely why, when asked about the VA's current policy of referral to NICS per the Brady Act in a recent MRC poll, 83 percent of 9,968 veterans said Congress should change the law.

Finally, there are those who would use the alarming rate of veteran suicide to justify a lower standard of referral to NICS, citing access to guns as a prime driver of veteran suicide rates. While data from the U.S. Department of Veterans Affairs asserts veterans who kill themselves are more likely to use a firearm, they only track declared suicides and fail to account for self-injury mortality. Per recent studies, over 80 percent of self-injury mortalities are overdose deaths. Accordingly, a more upstream approach to tackle veteran suicide, rather than focusing on the lethal means of carrying out the deed, would serve to prevent far more veteran suicide deaths. This is in line with the wishes of many veterans throughout the Nation who are begging the VA to approach suicide prevention in a more holistic way, looking proactively instead of reactively at the issue.

The current status quo of fiduciary determination and referral to NICS for veterans simply undermines the spirit of justice veterans fought to defend, taking away a constitutionally enumerated right by a bureaucratic determination rather than a court order. The results of MRC's poll were clear. Congress should pass legislation protecting veterans' rights. Chairman Bost, Ranking Member Takano, this concludes my testimony and I am happy to answer any questions you or other committee members may have.

[THE PREPARED STATEMENT OF COLE LYLE APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you Mr. Lyle. Ms. Kristina Keenan, you are now recognized for 5 minutes.

STATEMENT OF KRISTINA KEENAN

Ms. KEENAN. Chairman Bost, Ranking Member Takano, and members of the committee, on behalf of the men and women of the Veterans of Foreign Wars of the United States and its auxiliary, thank you for the opportunity to provide our remarks on legislation pending before this committee. The VFW supports the Ernest Peltz Accrued Veterans Benefits Act, which would ensure VA pension benefits are paid out for the entire month when a veteran passes away. By receiving the full month-of-death payment, survivors would be able to better manage the financial hardships that come with a veteran's passing.

The VFW also supports the Veterans 2nd Amendment Protection Act. This would establish due process for veterans with fiduciaries before VA refers them to the National Instant Criminal Background Check System or NICS. The Department of Veterans Affairs sends the names of all veterans in their system with fiduciaries to NICS and once referred, veterans are prohibited from purchasing, possessing, receiving, or transporting firearms.

The fact is, VA is the only Federal entity that has made substantial referrals to NICS. Why? It comes down to definitions. The Brady Handgun Violence Prevention Act of 1993 established that an individual adjudicated as a mental defective or who is committed to a mental institution may not own a firearm. The ATF further explains that this would include persons determined by a court, board, or commission to be a danger to themselves or others or lacks the mental capacity to contract or manage his own affairs.

The VA has interpreted the law even broader within its own regulations. It defines a mentally incompetent person to be one who, because of injury or disease, lacks the mental capacity to contract or manage his or her own affairs, including disbursement of funds without limitation. The VA's interpretation concerns the VFW because once a veteran is determined to need a fiduciary, no other screenings or medical assessments are conducted. These would be key to learning if the veteran is a danger to themselves or others, or indeed lacks the mental capacity to manage aspects of their lives besides their finances. For example, take a veteran with severe PTSD who experiences debilitating anxiety when trying to go through their bills. While they may require assistance to ensure their bills are looked at and paid on time, the veteran may be capable of taking care of other aspects of their life and poses no threat to themselves or others. Without due process, veterans with fiduciaries may be wrongly referred to NICS, infringing on their Second Amendment rights.

Furthermore, VA's practice of referring all veterans with fiduciaries to NICS has had a negative impact on veteran trust. Our members regularly tell us that they refuse to seek VA mental healthcare because they fear their firearms will be taken away. This has created a significant stigma around mental health and has created barriers to care. This perception is difficult to change. The VFW encourages veterans to use their earned VA healthcare,

including the world-class veteran-specific mental health services that VA provides.

The VFW has also been involved in numerous efforts to reduce veteran suicide, including urging veterans in distress to consider using trigger locks or to temporarily give their firearms to a trusted friend to lessen the ease of using a firearm to harm themselves or others. The VFW also believes in looking at the economic factors that veterans face that can also put them at a risk for death by suicide. As we know, suicide is not solely a mental health or firearm issue.

Last, though the VFW estimates that the problems surrounding fiduciaries likely affects a small number of veterans, we argue that every veteran deserves protection of their constitutional rights. Chairman Bost, Ranking Member Takano, this concludes my testimony. I am prepared to take any questions you or the committee may have. Thank you.

[THE PREPARED STATEMENT OF KRISTINA KEENAN APPEARS IN THE APPENDIX]

The CHAIRMAN. Thank you, and I would now like to go to questions. I will recognize myself for 5 minutes. Now this is for anyone on the panel, or all of you on the panel. Do you believe an American citizen is due their day in court before they lose a constitutional right?

Mr. CAREY. Yes.

Mr. SWANSON. Yes.

Mr. LYLE. Yes.

Ms. KEENAN. Yes.

The CHAIRMAN. This is for the whole panel as well. Do you believe that veterans fought to defend those constitutional rights?

Mr. LYLE. Absolutely.

Ms. KEENAN. Yes.

Mr. SWANSON. Mm-hmm.

Mr. CAREY. Yes.

The CHAIRMAN. Do you believe that veterans have been trained on how to handle a gun?

Mr. SWANSON. Yes.

Ms. KEENAN. Yes.

Mr. LYLE. Yes.

Mr. CAREY. Yes.

The CHAIRMAN. Do you think it is logical to assume that veterans are better suited to handle a gun safely compared to the average citizen?

Mr. SWANSON. Yes.

Mr. CAREY. Probably.

The CHAIRMAN. Yes. Okay. Given that, do you think a veteran, at the very minimum, should have the same due process rights as every other American before they lose their constitutional right?

Mr. SWANSON. Yes.

Mr. CAREY. Yes.

Mr. LYLE. Yes.

Ms. KEENAN. Yes.

The CHAIRMAN. Okay. With that being said, remember what we are trying to do here. What we are trying to do is make sure that it is not, regardless of what was said earlier, a bureaucrat, but a

court of law, that makes a decision to remove a constitutional right based on evidence that is found.

Ms. Keenan, would you please elaborate on the consequences of the VA current practices of reporting veterans with a fiduciary to the NICS list has had with respect to perpetuate the broken veteran stigma?

Ms. KEENAN. Thank you, Chairman, for that question. The current VA process of referring veterans to the NICS list has created mistrust with veterans in regards to VA mental healthcare. When we talk about suicide prevention, there are risks to veterans not seeking mental healthcare. We want to consider that as a factor. We want to encourage veterans to come to VA for their mental healthcare. If that trust is broken, then we also look at this as a suicide marker. Thank you.

The CHAIRMAN. Thank you. Mr. Carey, are you familiar with the research done by Dr. Swanson? Do you have any comments with that?

Mr. CAREY. Well, yes, I did read over the—I appreciate him attaching the report, the Informing Federal Policy on Firearm Restrictions. I think there is some, sorry, I think there is some methodological issues here that may overestimate the amount of positive flags. You know, for the proxy regarding illicit drug use, it is any diagnosis of drug abuse except alcohol. In the substance use disorder cases that I have seen, not only is it comorbid to have alcohol and illicit drug abuse, but alcohol itself is pretty darn bad. In the example that he used in his study, in the case of *Clemons v. Shinseki*, it was about cannabis. Basically, the court was deciding that the fiduciary ruling was adequate because the continued cannabis use is detrimental to Mr. Clemon's further progress and needs to be stopped. Now, at the same time, this committee, the Senate Veterans Affairs Committee have been discussing how to expand the availability of cannabis for veterans. Where does this stand?

On the IQ based, there is a, you know, there is a—for all these proxies, 74 were flagged as hitting the IQ proxy, but only 14 of them were flagged as having a suicide risk. Seventy-two were flagged as hitting the substance abuse proxy, but only 14 of them were flagged as suicide risks. Of the 294 who reported violent behavior, only 13 of the IQ flags, 18 of the substance abuse flags, and 39 of the severe mental illness flags were classified to be at risk of fiduciary need.

Dr. Swanson goes through and points out a number of limitations to his studies, such as self-reported suicidal ideation and troubling controlling violent behavior do not directly assess the risk of misusing a firearm. The public safety case for reputative risk-based reporting to NICS is weaker for veterans identified solely by the illicit drug abuse proxy or intellectual impairment. I think this, you know, lines up with the VA study that I talk about in my report, that in my testimony that goes on about how there is really no statistically significant predictive methodologies.

The CHAIRMAN. Thank you. My time has expired. Ranking member, I recognize you for 5 minutes.

Mr. TAKANO. Thank you, Mr. Chairman. Dr. Swanson, recognizing that no system is perfect, does your research lead you to be-

lieve the fiduciary assignment process is a sufficient proxy for a direct determination of dangerousness as it is currently constituted?

Mr. SWANSON. I think it is the best we have available now, and I think we need to be careful not to make the perfect the enemy of the good enough as we try to find our way, perhaps, to a better policy in the future. As I mentioned in my testimony, the evidence for the fiduciary being correlated with risk is indirect. It would be better if we had a direct study of the individuals who have been assigned fiduciaries. I would be eager to conduct such a study in collaboration with VA. As for now, the problem we are addressing is that all of the risk factors for suicide and for violence are nonspecific and they are going to apply to more people who are not going to do the thing we are trying to prevent.

Unfortunately, when we balance probability of a poor outcome, we have to think about the consequence we are talking about. If it is going to be catastrophic, somebody's going to die, someone's life is going to be cut short with loved ones left behind, maybe it is important to, you know, have a probability that is going to try to save that life.

Mr. TAKANO. Well, in terms of your pragmatic observation, if I could restate it, the result of a false positive in this case is that a veteran will not be able to buy a gun if they are put on the NICS list. The result of a false negative is that a veteran dies, potentially. You are conceding that we have indirect evidence and you are saying that you would think that we should need, that we should pursue studies that offer a more direct understanding. I would agree with you. I would say that the committee should not rush into a bifurcation or separation of the determination process and the NICS list, but that we should hold steady for the sake of caution, the practical result of which would be potentially saving veterans lives. We do not know that for sure with absolute certainty.

Perhaps this committee should be interested in pursuing and urging VA, or requiring VA, or mandating VA to do more studies, to get more information, to look at the data more carefully. What do we know currently from the data we do have and the analysis we do have, what do we know about the population of veterans, of beneficiaries assigned a fiduciary with respect to their increased risk for death by suicide?

Mr. SWANSON. Again, we do not have direct evidence of the veterans who have been assigned fiduciaries because we have not studied those individuals directly. What we can do is make an inference based on people who look like them, other veterans. There, in terms of relative risk, if we think about suicidal ideation in the first two proxies we talked about, it is probably about twice as high. The third one with regard to acute psychopathology, which is having a disorder like schizophrenia that impairs the brain's ability to reason or to regulate mood in the case of bipolar disorder. In addition to that, having been hospitalized as a criterion and having active symptoms. That, as in terms of relative risk, was eight times more likely to have suicidal ideation or violent behavior.

Again, it is relative risk. We have to keep that in mind in terms of, you know, balancing out the efforts to mitigate risk and to up-

hold the right that we are talking about, because there is a constitutional right at stake.

Mr. TAKANO. As I was suggesting in my statement, would it not be more prudent to wait until we had additional information before plowing forward with the reforms my colleagues are proposing in the bill we are considering today?

Mr. SWANSON. I think so. I think in the meantime, it seems unwise to me to simply scrap the reporting policy that is been in place for decades without having something better to put in its place.

Mr. TAKANO. Thank you. Before yielding back, I just want to say that, you know, the rights, if you believe that they pre-existed the Constitution, that the Constitution attempts to preserve, was a practical attempt by very practical men, objected to by Abigail Adams, who felt that John Adams had forgotten about the ladies. That ultimately they were practical, but the Constitution itself had some very serious flaws and serious compromises within it. Nevertheless, you know, I think in the spirit of the pragmatism of our founding fathers that we should err on the side of caution in this case and practicality. I yield back.

Mr. ROSENDALE. Thank you very much. I will now recognize Representative Self for 5 minutes of questioning.

Mr. SELF. I think I heard one of you in your testimony say we need to normalize under the second bill that we are—normalize when death happens, normalize all of that. I think that is a pretty good solution.

I want to go back to the Bill of Rights, though, just real simply, and it will not take long, there is a preamble to the Bill of Rights. Not the preamble to the Constitution itself, but a preamble to the Bill of Rights. The Constitution to the Bill of Rights is very clear that the states wanted another set of amendments, a set of amendments that would further constrain the Federal Government. It is very clear in the preamble that this is not, they were being very pragmatic, that the Constitution itself, the articles themselves in the body of the Constitution did not go far enough in limiting the Federal Government. That is why we have the first 10 amendments to the Constitution. They set that high bar. I appreciate the testimony of all of you here. I am going to leave it at that. There is not a question here. I just want to point out that the preamble to the Bill of Rights is very important to tell us why we have the first 10 amendments to the Constitution. Thank you. I yield back.

Mr. ROSENDALE. Thank you very much, Representative Self. I will now recognize Representative Van Orden for 5 minutes of questioning.

Mr. VAN ORDEN. Thank you, Mr. Chairman. Were you here earlier, sir, Mr. Swanson?

Mr. SWANSON. Was I here? Yes.

Mr. VAN ORDEN. Were you here for the first panel?

Mr. SWANSON. Yes.

Mr. VAN ORDEN. Okay, so I do not have to go through the whole thing—

Mr. SWANSON. Yes.

Mr. VAN ORDEN.—that Mr. Takano was referring to. It is very easy to legislate the removal of an inanimate object. I have been carrying weapons my entire adult life. It is very easy to legislate

removing that. It is nearly impossible to legislate the healing of a man's soul. That is the core issue here. It is not the weapon. It is the soul of the person that has been injured by combat, and I had multiple combat tours. What you are doing, sir, is chasing a symptom. You are not looking at the root cause.

I understand that you volunteered to study this again. I read your resume. It is incredibly impressive and tragic at the same time. I am very sorry about your family's history. It is just terrible. Your academic record is incredibly impressive. It just seems like you want to do more of the same, study, study, study, study.

On a philosophical level, the Constitution of the United States has a provision that is written into it that allows you to change the Constitution if you feel that it has been in error or it needs addition. That is the amendment process. The Eighteenth Amendment was passed that prohibited the sale of alcohol in the United States of America. It was in play for like 3 years and they realized it was a terrible mistake because it had increased organized crime and it was repealed.

The original error that Mr. Takano is referring to was not just an error, it was the original sin of the United States of America the compromise was made to count human beings as 2/3 of one person if they had more melanin in their skin than other people. That was horrible. The finest, in my opinion, amendment that has ever passed in the United States of America is the Thirteenth, which got rid of slavery and indentured servitude. In the spirit of the Eighteenth and the Twenty-first Amendment, which repealed it, are you calling for the repeal of the Second Amendment?

Mr. SWANSON. I am not. I am prepared to accept the way the Supreme Court has interpreted the Second Amendment and to try to work within the exception in Justice Scalia's statement in *Heller* that the right is not unlimited. It falls to us to try—

Mr. VAN ORDEN. That is correct. In the Reading Law, in the book *Reading Law*, Antonin Scalia goes through the developmental process of the Second Amendment. I think that you are misinterpreting what he is saying. Now listen to me here, what we are doing is we are subverting the Second Amendment.

The Veterans Administration does not have the authority to remove constitutional rights now or ever. This body, including my Democrat colleagues, are the only body that are chartered by our Constitution that can change it. You are not. Neither is he. You cannot do that. You are actively, willfully, and knowingly subverting the Constitution of the United States of America, and that will not stand with this body, sir. Either you amend the Constitution, which is incredibly difficult on purpose so you cannot willy nilly change these things. It takes a very deliberative and hard-fought process. We watched the movie *Lincoln* last night as a body. It was fantastic. It was a 2-month period of time about the ratification of the Thirteenth Amendment, which freed men and helped correct the original sin in this country. It was 20 Democrats voted for that. If they had not, it would not have passed.

Either you call for the repeal of the Second Amendment or you stop doing this. You stop doing this. Knock it off. You are subverting the constitutional rights of American citizens, and you do not have that authority. We do.

Mr. SWANSON. May I—

Mr. VAN ORDEN. That is all I have to say. Yes sir, please comment, Mr. Swanson.

Mr. SWANSON. I certainly concede that we cannot broadly limit legal access to guns in this country.

Mr. VAN ORDEN. Well then do not.

Mr. SWANSON. What we have to do is something more difficult, and that is to figure out who are the people who pose such a high risk of harming themselves or others that it is justified to limit their Second Amendment Right.

Mr. VAN ORDEN. Mr. Swanson, you are a clinical psychologist who has been in this field for almost 40 years, and you have not figured it out yet? Then maybe you should look at—

Mr. SWANSON. I—

Mr. VAN ORDEN.—a different vocation, sir.

Mr. SWANSON. I think we have made a lot of progress on that score. I think we have some evidence.

Mr. VAN ORDEN. We have not. Veteran suicide is increasing. That is not true. That is not true. We have spent \$19 billion in 2023 on suicide prevention and suicides are increasing. So, your—

Mr. SWANSON. We need to—

Mr. VAN ORDEN.—your methodology has been proven to be bad and I have no more time, sir. With that I yield back. Thank you.

Mr. ROSENDALE. Thank you, Representative. I am now going to recognize myself for a line of questioning. Ms. Keenan, thanks for your testimony. You mentioned that currently the VA sends the names of all veterans who have fiduciaries to the NICS, the NICS system. Can you explain why this violates due process and is harmful to veterans?

Ms. KEENAN. Thank you for the question. The VFW believes that veterans are owed due process in this process. It is clear, and we have discussed it today, that that is lacking in this process and unfairly discriminates veterans from a step further that is necessary to determine if they should even be referred to that list.

Mr. ROSENDALE. Thank you very much. You mentioned that the Social Security Administration does not report information to NICS of people who have been assigned to pay. Why is this?

Ms. KEENAN. It is our understanding that the Social Security Administration has a rigorous process if they are ever to do that. At this point, the VA has a simplified process, and we think that does not go far enough to screen veterans, to look at additional medical evidence, to understand if they should be referred to NICS or not.

Mr. ROSENDALE. Ms. Keenan, finally, thank you for pointing this out. It seems to me that veterans are being held basically to a different standard than the rest of the population. They are simply being deprived of their Second Amendment rights. I, as many of you do, believe that this is wrong. Can you elaborate on how this is a complete violation?

Ms. KEENAN. The assumption that veterans are at more of a risk of violence or harm to themselves or others is in and of itself a harmful notion. Veterans, their rights should be protected. They serve this country to protect our Nation's rights, and so we ought to protect their own individual rights. Our fear is that, as VFW

members tell us, that the mistrust with VA and seeking mental healthcare is a major issue, and we need to take that into consideration with these policies.

Mr. ROSENDALE. Mr. Lyle, you made mention of that as well, that there are veterans who do not seek the treatment that they not only have earned and deserve, but need, because of fear of losing their Second Amendment rights. Can you expand on that a little bit?

Mr. LYLE. Well, thank you for the question, Mr. Chairman. I think when you look at this problem in context, less than 50 percent or about 50 percent of veterans do not utilize the VA or are not enrolled in VA healthcare and even less use it on a regular basis. I would assume that some of those veterans do not use it because there is a perception, now whether it is right or wrong, it is still felt true, that their Second Amendment rights would be infringed upon if they sought healthcare, not just mental healthcare, but especially mental health care at the VA.

Mr. ROSENDALE. Thank you very much. Mr. Carey, we have heard that no other department or agency uses this policy of reporting to NICS, thereby putting into action whether the VA themselves are responsible for implementing it or not. It puts into action the process of violating Second Amendment rights of all of our veterans. Is there a special carve out? Are you familiar with any special carve out in the Brady Act or is this just an overreach by the VA?

Mr. CAREY. I was a Senate staffer back in 1998, and I remember when this was all going down. What I remember is that the Clinton administration was concerned that there were not enough names in the NICS data base, which is a big part of the Brady Handgun Violence Prevention Act. That they were looking at ways in order to be able to make sure that all the Federal agencies were indeed reporting.

Now you know, the Department of Defense agencies that were talked about as reporting, that is the dishonorable discharges that they are reporting. They are not reporting mental healthcare cases. They are not reporting financial mismanagement cases. They are only reporting the dishonorable discharges.

Social Security Administration, you know, to the extent that they do find incompetence, they only find incompetence when a court order says so, and they do not report. As I understand, you know, during that process, basically VA was called upon to start, you know, to comment on their regulation and to say, well, hold it, we have all these fiduciaries. They should be classified as mental defectives and we will start reporting that. That is where it came from.

Mr. ROSENDALE. Thank you very much. Ms. Keenan, one last question for you. I myself have hosted at my ranch in Montana several Wounded Warriors programs and the hunters come out and whether they are pheasant hunting for the day or deer hunting for the day, the Wounded Warriors program and the sponsors for the day typically purchase firearms for those veterans that they keep, they retain. Would then they be in violation of Federal law or in conflict with this statute that is currently being implemented by receiving as a gift a firearm from Wounded Warriors Program when

they otherwise would be prohibited from going to the sporting goods store and purchasing one if they had been utilizing services of a fiduciary?

Ms. KEENAN. That is a possible scenario, unfortunately. If they, indeed have been reported to NICS, that could be an issue for them.

Mr. ROSENDALE. Thank you so much. I thank you all so much for your testimony. I will now turn to Ranking Member Takano if you have any closing remarks.

Mr. TAKANO. Thank you, Mr. Chairman. Thank you again for our witnesses. Thank you to our witnesses today for being here and contributing to the discussion. Mr. Chairman, at no time during this hearing have you heard anyone on our side of the aisle assert that the fiduciary program is infallible. No policy or program is, and to state otherwise would be disingenuous. However, what we have said and will continue to say is that any change to a program or policy must be evidence-based and data-driven. In the case of VA's fiduciary program, a program designed to protect the most vulnerable veterans from both financial and physical harm, we must be especially careful not to put more veterans at risk. Democrats are more than willing to have a debate on the merits of this program under those parameters.

Unfortunately, Mr. Chairman, this committee is embarking down a different path, and it is trotting out a highly charged, highly partisan bill that precludes us from having a reasoned and nuanced debate. I assure you, Mr. Chairman, that if you insist on pushing this bill through this committee, and perhaps even the floor of the House, it will die a quiet death in the Senate. If for some reason it did pass the Senate, I guarantee the President will not sign such a faulty piece of legislation.

I implore you, Mr. Chairman, if you actually are attempting to address what you feel to be a problem, pull back from this course and let us get to work on a bill that may actually have a chance of becoming law and does not inject more bureaucracy or harm into the system. There is absolutely room for compromise on this issue, but it involves inclusion of things like lethal means training and safe storage and handling and commonsense ideas that are actually proven to prevent suicide.

Sadly, I fear that my Republican colleagues would rather use this as a messaging bill to score cheap political points, because for some reason, you are reflexively against those things. Again, that begs the question, how serious are you about actually addressing this topic? The answer to that question has been made painfully obvious during this hearing. It is not serious at all. Democrats stand ready to engage on this topic in an informed and reasoned way. What Republicans have put forth here today is a philosophical debate about the absoluteness of the Second Amendment. They have made this argument in the absence of data to push legislation without safeguards that will have real life consequences for veterans.

Nowhere in these debates have Republicans presented an example of a veteran's firearm being confiscated, but they have perpetuated that fear. Nowhere in this debate have they even presented an example or any quantification of veterans assigned a fiduciary

and subsequently reported to NICS that have asked for assistance. This bill is, you know, a solution in search of a problem. Mr. Chairman, it seems as if this committee is intent on letting politics win over sound policy and to me that is very regrettable and I yield back.

The CHAIRMAN. I thank the Ranking Member for yielding back and I thank the witnesses for being here today. I look forward to addressing the issues these bills are written to fix on behalf of the men and women who are serving our Nation. With that, I need to also say that we actually did bring out a lot of facts on where we are at. That this is not about guns, I said that. This is about a constitutional right. I am not trying to make political hay, neither are anyone of my members on this side of the aisle, though it was said in the closing statement.

What we are doing is, is we are trying to make sure that everyone, especially our veterans, receive the rights that they have under the Constitution and that they can keep those rights. That they have due process, not due process by bureaucrats. You can say, well, that is not really bureaucrats. Yes, it is, you are bureaucrats. Everyone else has to go before a judge, a judge, a person that we have assigned in our judicial system to weigh the evidence of whether or not someone should have their Second Amendment rights removed. The fact that we are doing this and have been doing this with those people who have served this Nation to protect the rights for every other person out there, it is not a problem in search of a solution—a solution in search of a problem. It is a real live fact that some people, matter of fact, what was the numbers here? Let me see. In 2022, 14,158 were ruled incompetent and then turned over to the NICS. Already this year, 8,431. Of that going through the process in 2022, there were 12 that were reversed. In 2023 so far, there has been two that have been reversed.

It is a legitimate issue. I unfortunately in both the opening and closing remarks, which I hope were written by staff, basically said that this is not happening and that we are scaring veterans, but yet veteran service organizations are giving testimony that they are talking about this. They might not be talking about it in California. I think they probably are. I know they are talking about it in deep Southern Illinois and the other areas around this Nation that it discourages our men and women that are veterans from seeking the help that they truly need that is available and presented well. I want to be very, very clear. You can say that the VA does not take away their rights. They do not. They simply turn them over to the NICS list and they take away the rights. That is the way it works. They do not have a judge to make that decision. All we are trying to do is make sure that the rights of our veterans are the exact same rights that every other citizens have.

With that, I want to ask unanimous consent that all members have 5 legislative days in which to revise and extend their remarks and include any extraneous material. Hearing no objections, so ordered. This hearing is now adjourned.

[Whereupon, at 12:20 p.m., the committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF WITNESS

Prepared Statement of Ron Burke

STATEMENT OF RONALD S. BURKE, JR.
DEPUTY UNDER SECRETARY, OFFICE OF POLICY & OVERSIGHT,
VETERANS BENEFITS ADMINISTRATION,
DEPARTMENT OF VETERANS AFFAIRS (VA),
BEFORE THE COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

July 18, 2023

Good afternoon, Chairman Bost, Ranking Member Takano, and other Members of the Committee. Thank you for inviting us here today to present our views on two bills that would affect VA programs and services. Joining me today is David Barrans, Chief Counsel, Benefits Law Group, Office of the General Counsel.

H.R. 705 "Veterans 2nd Amendment Protection Act"

H.R. 705 would create a new section under Title 38 of the United States Code. Section 5501B would prohibit VA from transmitting a beneficiary's personally identifiable information, based on a determination to pay benefits to a VA-appointed fiduciary under 38 U.S.C. § 5502, to the Department of Justice (DOJ) for use by the national instant criminal background check system (NICS), unless there is an order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that the beneficiary is a danger to themselves or others. While the underlying reporting requirements of the Brady Handgun Violence Prevention Act (Brady Act) and associated regulations would remain, the bill would prevent VA from complying with those requirements absent the required judicial order.

VA opposes this bill. VA recognizes the important policy considerations underlying the Brady Act, see 34 U.S.C. § 40901, and this bill, and defers to DOJ on the central policy and public safety issues associated. Any further discussion on this legislation should also include DOJ (specifically the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the Federal Bureau of Investigation (FBI)).

Currently, VA reports all individuals determined unable to manage their funds to NICS based on regulations issued by ATF (see 27 C.F.R. § 478.11(a)) and guidance provided by DOJ (see March 2013 Guidance to Agencies Regarding Submission of Relevant Federal Records to NICS). In addition to complying with Federal law, this reporting policy is a matter of Veteran safety. With VA's top clinical priority being Veteran suicide prevention, VA continues a "whole of VA" approach to preventing Veteran suicide that integrates strategic planning, program operations and program evaluation across VA, including VHA, VBA and NCA.¹ This strategy focuses on the

¹ See [2022 National Veteran Suicide Prevention Annual Report, VA Suicide Prevention, Office of Mental Health and Suicide Prevention, September 2022](#) and Department of Veterans Affairs, (2018), *National*

safety of America's Veterans with an emphasis on preventative measures. Scientific research has shown that mental health issues are one clear risk factor for suicide and use of a firearm in a suicide attempt significantly reduces the chance of survival. It is VA's mission to care for our Veterans and their families and the removal of required reporting of Veterans to DOJ would run counter to this.

For example, a 2018 study examined the public safety rationale for a Federal policy of prohibiting gun sales to Veterans with mental health concerns who are assigned a fiduciary to manage their benefits from VA.² The policy was evaluated utilizing data from 3,200 post-deployment Veterans from the Iraq and Afghanistan war era. This study determined that intellectual disability, drug abuse, and acute psychopathology were associated with increased suicidal ideation and violence risk in Veterans who were identified as needing a fiduciary; and acute psychopathology was found to have a significant association when other factors were controlled for in the analyses. In consideration of these findings and to provide utmost protection to this vulnerable population, VA recommends that NICS reporting continue for those individuals determined to be incompetent and require the appointment of a VA fiduciary, with an option for the Veteran to request relief from NICS restrictions.²

VA understands this bill to support a separate requirement for a judicial evaluation regarding whether a beneficiary is a danger to themselves or others, however, this information may not be readily available to the VA claims processor during the adjudication process. VA adjudications concerning the need for the appointment of a fiduciary are based on whether a beneficiary can manage their VA benefits and handle their own financial affairs. A study involving 1,388 Iraq and Afghanistan War Era Veterans who completed a national survey on post-deployment adjustment indicated that probable major depressive disorder, posttraumatic stress disorder and traumatic brain injury were associated with financial difficulties.⁴ This study also found an association between poor money management and self-reported recent suicidal ideation and physical aggression. Given this finding, elimination of the NICS reporting requirements could be detrimental to Veterans.

A VA determination that a beneficiary cannot manage their own VA benefits is based upon a definitive finding regarding that fact by a responsible medical authority or medical evidence that is clear, convincing, and leaves no doubt as to the person's inability to manage their affairs, including disbursement of funds without limitation, or a

Strategy for Preventing Veteran Suicide. Avail at: [National Strategy for Preventing Veteran Suicide \(va.gov\)](https://www.va.gov/strategy-for-preventing-veteran-suicide/).

² See Swanson J, Easter M, Brancu M; VA Mid-Atlantic MIRECC Workgroup; Fairbank JA. Informing Federal Policy on Firearm Restrictions for Veterans with Fiduciaries: Risk Indicators in the Post-Deployment Mental Health Study. *Adm Policy Ment Health*. 2018. Avail at: [Informing Federal Policy on Firearm Restrictions for Veterans with Fiduciaries: Risk Indicators in the Post-Deployment Mental Health Study](https://www.va.gov/Informing-Federal-Policy-on-Firearm-Restrictions-for-Veterans-with-Fiduciaries-Risk-Indicators-in-the-Post-Deployment-Mental-Health-Study)

³ See Elbogen EB, Johnson SC, Wagner HR, Newton VM, Beckham JC. *Financial well-being and postdeployment adjustment among Iraq and Afghanistan war veterans*. *Mil Med*. (2012). Avail: [Financial well-being and postdeployment adjustment among Iraq and Afghanistan war veterans - PubMed \(nih.gov\)](https://pubmed.ncbi.nlm.nih.gov/22011111/)

court order finding the individual to be incompetent. See 38 C.F.R. § 3.353(c) and (e). Prior to the final rating of incompetency, the beneficiary is provided a due process period to allow the submission of evidence to support a finding of competency. However, if the beneficiary is deemed to be incompetent VA's reporting to NICS based on Brady Act requirements and regulations currently in place allows for VA to operate out of an abundance of caution regarding protections offered to such beneficiaries. Additionally, VA provides beneficiaries who have been determined to be unable to manage their VA funds the ability to request relief from NICS restrictions. When deciding a request for relief, VA considers not only the beneficiary's desire to own firearms and/or ammunition, but also the safety of the beneficiary, their family, and the community.

Given VA's focus on reducing suicide risk among veterans, studies linking financial issues with some mental health concerns, and study findings showing the lethality of suicide attempts when firearms are used, VA opposes this bill. If this bill is advanced, VA notes that the effective date of the bill should be no earlier than nine months after enactment to allow for necessary information technology system enhancements. System enhancements would be required to terminate the current automated process of NICS reporting, which is tied to incompetency determinations.

No mandatory or discretionary costs are associated with this draft bill.

H.R. XXXX "Ernest Peltz Accrued Veterans Benefits Act"

This bill would change the effective date for a discontinuance of pension, by reason of the death of a payee entitled to pension based on an existing rating or decision, from the last day of the month before such death occurs to the last day of the month in which the death occurs. The bill would also provide that, in these circumstances, an amount equal to the difference between the amount of pension to which the Veteran would have been entitled for the month of death had the Veteran not died, and the amount of the check or other payment issued to the surviving spouse shall be treated in the same manner as an accrued benefit.

VA opposes this bill. This bill would result in different discontinuance dates—and therefore disparate treatment—between (1) beneficiaries in receipt of pension based on an existing rating or decision and (2) beneficiaries in receipt of compensation or dependency and indemnity compensation (DIC). For beneficiaries in receipt of pension based on an existing rating or decision, the discontinuance date would be the last day of the month of death; for beneficiaries in receipt of compensation or DIC, the discontinuance date would be the last day of the month *before* death.

Similarly, the bill would result in disparate treatment between (1) beneficiaries in receipt of pension based on an existing rating or decision and (2) beneficiaries that are determined to be entitled to pension following an evaluation for accrued benefits. In other words, the bill would result in different discontinuance dates based on when

pension entitlement is determined.

In addition, the bill would create incongruity as it relates to the month-of-death benefit by functionally eliminating that benefit in certain circumstances. The bill would effectively discontinue the month-of-death benefit, provided under 38 U.S.C. § 5310, for the surviving spouse of a Veteran in receipt of pension based on an existing rating or decision, while the month-of-death benefit for the surviving spouse of a Veteran in receipt of compensation would remain unchanged. This would result in a disparity between beneficiaries in equivalent situations aside from the benefit type the Veteran happened to be receiving at the time of death.

Moreover, the amount that used to be the month-of-death benefit for the surviving spouse of a Veteran in receipt of pension based on an existing rating or decision would now be processed as an accrued benefit. This change in processing would introduce automation and program limitations, which would slow down the receipt of the benefit in question and, as such, be detrimental to the individual recognized as the spouse on file at the time of the Veteran's death. A surviving spouse who would have been able to benefit from expedited processing of a month-of-death benefit will be disadvantaged by the processing impacts of this bill. Ultimately, this bill's functional elimination of the month-of-death benefit for certain beneficiaries would be detrimental rather than favorable. It would result in surviving spouses of Veterans in receipt of pension at the time of death having to file for, and be found entitled to, accrued benefits in order to receive the benefit payment associated with the month in which the Veteran dies. In contrast, the current month-of-death benefit may be paid automatically to the spouse on file and does not require that spouse to file a claim.

Finally, if this bill is advanced, VA requests that the effective date of the bill be no earlier than nine months after enactment, to allow for necessary system enhancements. System enhancements would be required to stop the current automation of month-of-death payments in these cases; automation would continue to grant impacted benefits until those enhancements are in effect.

Conclusion

This concludes my statement. We thank the committee for your continued support of programs that serve our Nation's Veterans and look forward to working together to further enhance delivery of benefits and services.

Prepared Statement of Jeffrey Swanson

Good morning, Mr. Chairman and members of the Committee. Thank you for this opportunity to submit testimony regarding H.R. 705, Veterans 2nd Amendment Protection Act. My purpose today is to share some relevant information from scientific research to assist the Committee in making an evidence-based legislative decision—one that will protect the safety of military veterans who pose a high risk of suicide, while also respecting the Constitutional right to bear arms.

In my professional capacity, I serve as Professor in Psychiatry and Behavioral Sciences at the Duke University School of Medicine. I am also a faculty affiliate of the Wilson Center for Science and Justice and the Center for Firearms Law at Duke Law School. However, I speak for myself today and not officially on behalf of these institutions.

I hold a PhD in medical sociology from Yale University with additional postdoctoral training in psychiatric epidemiology and mental health services and policy research at Duke University and the University of North Carolina at Chapel Hill.

As a social scientist and researcher, I have spent more than three decades of my career conducting interdisciplinary studies to build scientific evidence for interventions, policies and legal tools to improve outcomes for adults with serious behavioral health challenges in the community, and to reduce firearm-related violence and suicide.

For nearly a decade, until last year, I also held a part-time appointment in the VA Medical Center in Durham, NC, as a research scientist affiliated with VA's VISN 6 Mid-Atlantic Mental Illness Research, Education, and Clinical Center (MIRECC). In that capacity, I devoted myself to conducting research studies on the specific question of how best to prevent suicide in the U.S. military veteran population.

Also in this topical area of research, I now serve as the principal investigator of a federal grant to Duke University from the National Institute of Mental Health for a multi-site study known as VESPER, designed to develop better suicide risk-prediction models for military veterans who receive healthcare in civilian, non-VA healthcare systems.

I have a personal concern for preventing suicide, too, as three members of my own extended family died of suicide using a firearm. I know from experience how these tragedies can rip through families and communities across generations.

I deeply respect military veterans and care about their safety and well-being for another personal reason as well. My father, the late Dr. Wallace Swanson, served honorably in the United States Navy in the mid-1940's. After he reached the age of 90, my dad became a VA beneficiary—at a time when he suffered from chronic pain and significant cognitive decline.

The VA found my father to be incompetent to manage his VA benefit funds due to his health condition, and in due course appointed me to serve as his fiduciary; I did so gladly for several years and am thus familiar with the fiduciary examination, appointment and reporting process. I remain grateful for the kind and able assistance of a field examiner at VA's Milwaukee Fiduciary Hub.

My father had owned rifles and shotguns in his younger years. He enjoyed hunting as an outdoor recreational activity, and he taught me to shoot safely and responsibly when I was a boy. When the time came for me to care for my dad and to manage his money in the last season of his life, I understood why the VA notified him that they were sending his name to the National Instant Check System. While he was never determined in a legal proceeding to be a specific danger to himself or others, I understood why he would be legally disqualified from accessing firearms from that point on.

Last October, my father passed away peacefully of natural causes. I proudly display in my home office the flag that I received from the U.S. Government in his honor "on behalf of a grateful nation." I miss him still.

I am not here to express my personal opinion on the benefits or drawbacks of VA's longstanding practice of reporting the names of incompetent beneficiaries such as my father to the NICS, nor my opinion on whether to enact H.R. 705 in its current form; that is for you as lawmakers to decide. Instead, I would like to use this opportunity to present the results of a relevant research study that my colleagues and I published in 2018 as a peer-reviewed article in a policy studies journal with a long name: Administration and Policy in Mental Health and Mental Health Services Research. Our paper is titled: "Informing Federal Policy on Firearm Restrictions for

Veterans with Fiduciaries: Risk Indicators in the Post-Deployment Mental Health Study.” I have attached a copy of the published article to my written testimony.¹

Our study amounts to an empirical evaluation of the public safety rationale for prohibiting veterans with fiduciaries from accessing firearms. To do this, we analyzed data on 3,200 post-deployment veterans from the Iraq and Afghanistan war era. We constructed three separate indicators of need for a fiduciary in these data and then examined the statistical correlation between the indicators and veterans’ self-reported suicidal symptoms and violent behavior.

The first measure relied on a standard test of cognitive performance, falling below a cutoff score indicating both mental incapacity and functional impairment. This widely used measure identified 74 of the 3,200 veterans in the study, or 2.3 percent of the sample. About 1 out of 5 of these individuals were then found to pose a suicide risk—a rate twice as high as the rate among those without the indicator of cognitive decline.

The second indicator of fiduciary need relied upon evidence of drug abuse. This criterion identified a similar proportion of veterans—just over 2 percent—and was similarly associated with increased risk of suicidality as well as with a self-report measure of interpersonal violence; the rate of both of these kinds of injurious behaviors was about twice as high among those with the substance abuse indicator of fiduciary need.

The third indicator rested on evidence of acute psychopathology, meeting diagnostic criteria for a serious psychiatric disorder such as schizophrenia or bipolar disorder, with a history of inpatient psychiatric hospitalization, as well as some reported active symptoms in the past year. This indicator of fiduciary need in veterans was associated most strongly with increased risk of both suicidality and interpersonal violence—about 8 times higher in each case.

Demographic, clinical, service-use and combat exposure characteristics were also included in our statistical analysis. Clinical variables included self-reported service-connected mental health disability, trauma and traumatic life events, traumatic brain injuries, drug or alcohol use problems.

In summary, our research provided evidence consistent with a public-safety rationale for the policy of separating firearms from veterans found mentally incompetent to manage their VA benefits and assigned a fiduciary.

Suicide is a top-tier public health problem in the U.S., and suicides among military veterans represent an important part of that problem. More veterans have died by suicide than in our wars—mostly by firearms. Veterans carry a unique burden of medical, psychological, and social risk factors, often compounded by ready access to lethal means. Firearms are involved in most veteran suicide deaths. Nearly 1 in 5 firearm suicide decedents in the U.S. is a veteran.^{2,3} Veterans are more likely than civilians to own firearms,⁴ to use them in suicide attempts,⁵ and to die from suicide attempts; approximately 90 percent of firearm suicide attempts are fatal, compared with 3 percent of drug overdose suicide attempts.^{6,7,8} Thus, firearms contribute significantly to veterans’ excess burden of suicide mortality.

Policies and laws that find the right balance between risk and rights in separating firearms from veterans at risk of suicide will save lives.

I am happy to take your questions and to provide any further assistance the Committee might like in making this important decision.

Thank you.

¹Swanson JW, Easter MM, Brancu M, VA Mid-Atlantic MIRECC Workgroup, Fairbank JA (2018). Informing Federal policy on firearm restrictions for veterans with fiduciaries: risk indicators in the Post-Deployment Mental Health Study. *Administration and Policy in Mental Health and Mental Health Services Research* 4, 673–683.

²Web-based Injury Statistics Query and Reporting System (WISQARS) [online]. Accessed May 18, 2021.

³U.S. Department of Veterans Affairs, Office of Mental Health and Suicide Prevention. 2021 National Veteran Suicide Prevention Annual Report.

⁴Cleveland EC, Azrael D, Simonetti JA, Miller M. Firearm ownership among American veterans: findings from the 2015 National Firearm Survey. *Inj Epidemiol* 2017;4(1):33.

⁵U.S. Department of Veterans Affairs, Office of Mental Health and Suicide Prevention. 2021 National Veteran Suicide Prevention Annual Report.

⁶Conner A, Azrael D, Miller M. Suicide case-fatality rates in the united states, 2007 to 2014: A nationwide population-based study. *Ann Intern Med* 2019;171(12):885–895.

⁷Elnour AA, Harrison J. Lethality of suicide methods. *Inj Prev* 2008;14(1):39–45.

⁸Fowler KA, Dahlberg LL, Haileyesus T, Annett JL. Firearm injuries in the United States. *Prev Med* 2015;79:5–14.



Informing Federal Policy on Firearm Restrictions for Veterans with Fiduciaries: Risk Indicators in the Post-Deployment Mental Health Study

Jeffrey Swanson^{1,2} · Michele Easter¹ · Mira Brancu^{1,2} · VA Mid-Atlantic MIRECC Workgroup² · John A. Fairbank^{1,2}

© Springer Science+Business Media, LLC, part of Springer Nature 2018

Abstract

This article examines the public safety rationale for a federal policy of prohibiting gun sales to veterans with psychiatric disabilities who are assigned a fiduciary to manage their benefits from the Department of Veterans Affairs. The policy was evaluated using data on 3200 post-deployment veterans from the Iraq and Afghanistan war era. Three proxy measures of fiduciary need—based on intellectual disability, drug abuse, or acute psychopathology—were associated in bivariate analysis with interpersonal violence and suicidality. In multivariate analysis, statistical significance remained only for the measure based on acute psychopathology. Implications for reforms to the fiduciary firearm restriction policy are discussed.

Keywords Veterans · Mental Illness · Suicide · Gun violence · Fiduciary

Introduction

Every day, an estimated 20 US military veterans die from suicide, about two-thirds of them using a firearm. Veterans are significantly more likely than civilians to use firearms as a suicide method, and the extremely high lethality rate of intentional self-injury with a gun—about 90% of attempts being fatal—contributes to an overall veteran suicide rate 21% higher than the civilian rate, after adjusting for age and sex (United States Department of Veterans Affairs 2016). What laws and policies are intended to reduce intentional firearm-related injuries specifically in the veteran population, and do they work? This article examines a federal firearm restriction policy that could help prevent suicide among veterans: the prohibition of firearm sales to mentally “incompetent” veteran beneficiaries with fiduciaries appointed to manage their financial benefits from the US Department of Veterans Affairs (VA). We address the

emerging controversy surrounding the fiduciary firearm prohibition and recent legislative efforts to repeal it. We present new empirical analysis relevant to the public safety rationale and legal justification for the policy: its targeting, implementation, and effectiveness, as well as its possible unintended adverse consequences.

The Firearm Restriction Policy for “Incompetent” VA Beneficiaries: Current Status and Emerging Controversy

Limiting legal access to firearms for veterans at risk of self-injury or interpersonal violence has been a component of federal efforts to prevent gun-related suicide and violent behavior since 1998, when the National Instant Criminal Background Check System (NICS) was initiated as an information tool designed to block the purchase of firearms by prohibited individuals. The Brady Law, enacted in 1994 (Brady Handgun Violence Prevention Act 1994), required federal agencies including the VA to report to the FBI for inclusion in the NICS the records of beneficiaries who are legally prohibited from purchasing firearms. The Veterans Benefits Administration (VBA) appoints a fiduciary to manage a veteran’s benefits after determining that a veteran “because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs” (38 CFR

✉ Jeffrey Swanson
jeffrey.swanson@duke.edu

¹ Department of Psychiatry and Behavioral Sciences, Duke University School of Medicine, DUMC Box 3017, Durham, NC 27710, USA

² Department of Veterans Affairs (VA) Mid-Atlantic Mental Illness Research, Education, and Clinical Center (VISN 6 MIRECC), Durham, NC, USA

3.353). The VA's regulatory definition of mental incompetence and need for a fiduciary closely matches one of the criteria for federal firearms restriction originating in the 1968 Gun Control Act (GCA): "...as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease...lacks the mental capacity to contract or manage his own affairs" (18 U.S.C. Chapt. 44, Gun Control Act). Thus, in compliance with the GCA and the Brady Law, the VA since 1998 has reported to the FBI the names of any veterans who are assigned fiduciaries, and these veterans' names have been added to the NICS as persons prohibited from purchasing or possessing firearms.

The NICS Improvement Amendments Act of 2008 (P.L. 110–180) required VA to notify beneficiaries who are proposed for a determination of incompetency that this will result in loss of gun rights under the Brady Law. VA is also required to provide an avenue for affected beneficiaries to appeal the incompetency determination in order to have their firearm rights restored (US Department of Veterans Affairs 2013). The 21st Century Cures Act (P.L. 114–255) codified VA procedures related to the appeal of incompetency determinations for the purpose of relief from federal firearm disabilities (Congressional Research Service 2017).

By the end of 2016, there were 167,815 active records in the NICS associated with VA-reported beneficiaries with appointed fiduciaries (Congressional Research Service 2017). This represents a corrected total based on a reconciliation completed in 2016 between the VA and FBI-NICS to remove erroneous entries, duplicate entries, competent beneficiaries, and deceased beneficiaries from NICS. In 2015, the VA served 233,473 incompetent beneficiaries with fiduciaries. Of the total number served in the fiduciary program, 134,256 (57.5%) were veterans; 83,508 (35.8%) were surviving spouses; 13,125 (5.6%) were adult disabled children or dependent parents, and the remaining 2584 (1.1%) were minor children. A total of 35,053 (15%) of these cases involved "proposed" fiduciaries awaiting a final competency determination, which would account for the fact that the number reported to the NICS is lower than the total served in the fiduciary program. Also, dependent children are not reported to NICS (Veteran Benefits Administration 2017). In the majority of cases (158,069 individuals, or 79.7% of those with completed incompetency determinations), the fiduciary is appointed as a "legal custodian" with control over the veteran beneficiary's VA disability, pension, or other support payments.

Limited information is available on the specific psychiatric disorders and types of impairments of incompetent VA beneficiaries currently enrolled in the NICS. An unpublished statistical report to Congress in 2015 (Swanson and Bonnie 2015) provided the following breakdown of mental-health-related diagnoses among VA beneficiaries reported to NICS: schizophrenia-spectrum, 36.5%

(about half of those being classified as "paranoid type"); post-traumatic stress disorder, 22.3%; bipolar disorder, 5.6%; depression, 4.4%; and major neurocognitive disorders (formerly defined as "dementias"), including Alzheimer's disease, and traumatic brain injury (TBI), 31.2%.

The fiduciary gun-restriction policy has drawn criticism from some commentators in the legal academy (Flynn-Brown 2013; Stewart 2016). These critics object that a federal regulation and corresponding administrative process that were designed originally to determine a veteran's need for assistance in managing money are used to create a unique firearm prohibition under the 1968 Gun Control Act in a way that effectively applies only to veterans. The argument is that the VA's fiduciary appointment process is functionally but not legally equivalent to a formal, court-based adjudication of mental incompetence or a judicial finding of dangerousness that would be sufficient to limit the Second Amendment right with due process.

The VA's determination of need for a fiduciary occurs without formally or routinely assessing whether a financially-challenged veteran is also at risk of harm to self or others. The decision also does not require a hearing before either a judge or other objective, duly authorized administrative officer in which the facts of the matter could be presented and challenged. By the linking of fiduciary assignment to NICS reporting, the VA's assessment of a beneficiary's financial incompetence becomes entangled with a separate and unrelated policy promulgated by the Department of Justice, with the result that the affected veterans' gun rights are restricted under an assumption of dangerousness without a determination of whether significant risk exists in any particular case.

Like the VA, the Social Security Administration (SSA) uses an administrative (non-judicial) process to appoint representative payees to manage the funds of civilian disability beneficiaries who are found to be mentally incompetent. In 2016, a new policy was initiated that required reporting these SSA beneficiaries to the NICS, citing the VA's analogous NICS-reporting policy as a precedent for federal agencies' compliance with the NICS Improvement Act (Social Security Administration 2016). However, the SSA requirement was repealed in 2017, thus perpetuating an apparent disparity in the treatment of civilian and veteran recipients of federal disability benefits with respect to firearm rights. Also in contrast to the VA's fiduciary NICS-reporting process, states report the records of adults placed in legal guardianship status to the NICS only after a state probate court has rendered a legal finding of mental incompetence (Pinals et al. 2015; Search 2015); a guardian gains control over another person's property through a formal legal process designed to safeguard the rights of the mentally incompetent individual (American Bar Association 2017).

Despite recent reforms intended to enhance the appellate process for veterans who wish to contest the VA's determination of incompetency (21st Century Cures Act 2016), the policy's critics contend that the VA's fiduciary NICS-reporting practice continues to unfairly repurpose an administrative judgment of financial incapacity as a firearms prohibitor without the benefit of a formal, court-based adjudicative process commensurate with the gravity of removing a constitutional right. Further, critics of the policy argue that mismanaging money and misusing a gun involve very different functional impairments with no necessary connection. These issues have fueled ongoing complaints that the policy abridges the affected veterans' Second Amendment right to bear arms, as well as Fifth Amendment due process protections when their liberty or property rights are limited by the federal government (Flynn-Brown 2013).

Proposed remedial legislation in Congress (Veterans' Second Amendment Rights Restoration Act 2018) would uncouple the loss of gun rights from VA fiduciary appointment going forward, and would provide an expedient opportunity for gun rights restoration to those with existing records in the NICS due to fiduciary assignment. Under the proposed new law, a veteran with an appointed fiduciary could not be prohibited from firearms unless the Federal Government, in a court or judicial review board proceeding, has met the burden of proving by clear and convincing evidence that the veteran is a danger to self or others.

In some sense, these legal critiques invite an empirical question: Is there an evidence-based, public-safety rationale for attaching gun rights to the fiduciary standard? What do we know, scientifically speaking, about the relationship between the ability to manage money and the risk of harm to self or others? Recent research on post-deployment adjustment of Iraq and Afghanistan war veterans has found a modest statistical correlation between a measure of financial decision-making capacity and self-reported suicidality and interpersonal violent behavior. In a nationally representative random sample of 1388 separated veterans and reservists from this era, participants were tested on basic money management skills and also queried about violence and suicidal behavior and thoughts (Elbogen et al. 2012).

Veterans who scored poorly on financial management abilities were about twice as likely to report suicidal ideation and attempts, using illicit drugs, engaging in violent behavior, and getting arrested, compared to those with good management skills. The differences in relative risk associated with the measure of financial incapacity were statistically significant, even though the majority of veterans with this measured incapacity were not violent or suicidal. In other research, a study of civilians with psychiatric disabilities who were found incompetent to manage their supplemental security income (SSI) benefits reported that having a family member appointed as a "representative payee" was

significantly associated with increased risk of violent acts by the incompetent beneficiary against family members, though the causal direction of this association was unclear (Elbogen et al. 2005).

While such evidence from survey research is suggestive, and would appear to provide at least some empirical justification for reporting the records of incompetent VA beneficiaries to the NICS, none of these previous studies has examined the actual population of incompetent veteran beneficiaries with records in the NICS. Thus, the policy's impact on those directly affected by it remains unknown. Research evidence is needed to evaluate the rationale for the present policy, and to guide any reform efforts in the balancing of risk and rights. This article addresses these issues with additional empirical evidence based on a new analysis of veteran data from the VA Mid-Atlantic Post-Deployment Mental Health Study (N = 3200). Three proxy measures of veterans' need for a fiduciary are described and compared in their respective statistical associations to independent measures of violent behavior and suicidality. Implications of the findings for fiduciary gun restriction policy are discussed.

Methods

Sample

The Post-Deployment Mental Health Study (PDMH) (Brancu et al. 2017) is an ongoing project enrolling Iraq/Afghanistan-era veterans at four VA medical centers in the Mid-Atlantic region of the US. The study is conducted by the VA Mid-Atlantic Mental Illness Research, Education and Clinical Center (MIRECC), beginning in 2005 as a baseline study, research registry, and data warehouse to facilitate research on the mental health and illness of individuals who served in the military on or after September 11, 2001. Most participants had received care from a VA medical facility; a mailing to VA-enrolled veterans was the primary recruitment method. More detailed information about the project is available elsewhere (Brancu et al. 2017). The present study includes all participant data accrued by September 15, 2016 (n = 3200). The PDMH was approved by IRBs at each collaborating site, and our analysis of de-identified data was approved by the Durham VA IRB.

Measures

Outcome Measures

Suicide risk and interpersonal violence risk were each measured dichotomously. Suicide risk was indicated by a score of 3 or greater on the Beck Scale for Suicide Ideation (Kumar and Steer 1995); violence risk by answering "yes" to the

question, “During the past 30 days, have you had trouble controlling violent behavior (e.g., hitting someone)?”

Proxy Measures of Fiduciary Need

PDMH data were used to construct and evaluate three alternative proxy measures of fiduciary need. The measures were derived both theoretically and empirically, through an iterative deductive and inductive process. We began by operationalizing each component of the VA’s regulatory criteria for appointment of a fiduciary, and then selected measures available in the PDMH data that research literature would posit as valid indicators of those components. The specific operational definition of need for a fiduciary, that is, that the veteran “...because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs...”, can be broken down into three elements: (1) functional impairment manifest in the failure to appropriately manage one’s own affairs; (2) lack of mental capacity as the proximal cause of failing to manage one’s own affairs; and (3) presence of an injury or disease as the proximal cause of mental incapacity, and thereby a distal cause of failing to manage one’s own affairs. Throughout this process, we also informally consulted several practicing VA psychiatrists for their opinion regarding the correspondence between each proposed proxy measure of need for a fiduciary, on the one hand, and common clinical case characteristics, on the other hand, which in practice (according to these psychiatrists) would likely lead to a referral of a veteran patient for evaluation of financial competency and appointment of a fiduciary.

The first proxy is a direct measure of significantly impaired intellectual and adaptive functioning, using the Shipley Institute of Living Scale (SILS) IQ-equivalent test (Zachary et al. 1985) with a cutoff score below 70. This measure offers face validity as an indicator of both functional impairment (such as the inability to manage one’s own financial affairs) and mental incapacity; it has been widely used as a marker of intellectual disability or generalized neurodevelopmental disorder. As a purely functional measure, the IQ-equivalent proxy does not exclude any particular etiology or type of illness or injury as the cause of cognitive deficit.

The second proxy equates to a measure of illicit drug use problems: having a current SCID (First et al. 1994) diagnosis of drug abuse (any drug diagnosis except alcohol.) The rationale for including this proxy is based partly on discussions with VA clinicians regarding the practice of fiduciary referral when there is evidence that a veteran may be using VA benefits to purchase illicit drugs. While this may not be typical of current practice, these informal reports are consistent with court documents in the case of *Clennan v. Shinseki*, a 2013 decision by the US Court of Appeals for

Veterans Affairs to deny a veteran’s appeal of a fiduciary appointment:

The psychologist opined that the ‘continued cannabis use is detrimental to [Mr. Clennan’s] further progress and needs to be stopped.’ He suggested that Mr. Clennan was using his Social Security and VA pension benefits to purchase the marijuana and therefore proposed that he ‘have his competency removed for the use of his funds’....VA medical and regional office center sent Mr. Clennan a letter that...proposed to find him incompetent to manage his pension benefit payments.” (US Court of Appeals 2013)

It is not known to what extent this approach to assigning fiduciaries is broadly representative of VA practice.

The third fiduciary proxy is based on a combination of three indicators of serious, severe mental illness accompanied by acute symptoms of psychopathology—a set of conditions known to correlate with functional impairment that would be expected to significantly limit a person’s ability to manage his or her own affairs. The specific components of the proxy were: (1) a SCID (First et al. 1994) diagnosis of a mental illness or substance abuse disorder; (2) a self-reported history of inpatient treatment for mental illness or substance abuse disorder (any hospitalization for treatment of an “emotional or substance use problem, including war stress or PTSD”, at a VA or non-VA hospital); and (3) a score of 3 or higher on the SCL-90 (Kinney et al. 1991) subscales measuring active symptoms of depression, hostility, paranoia, or psychoticism. It should be noted that a substantial, but unknown proportion of these individuals would be redundantly disqualified in the NICS by dint of having a history of involuntary commitment to a mental hospital.

Other Variables

Demographic, clinical, service-use and combat exposure characteristics were also included in the analysis. We used the following indicators to describe the sample’s demographic characteristics: age (1 = younger than 35); gender (1 = male); education (1 = high school or less); marital status (1 = married); living alone; having low social support (1 = lowest quartile of Medical Outcomes Study Social Support Survey (Sherbourne and Stewart 1991), 57 for this sample); employment status (1 = not working); residential status (1 = not living at home). Racial/ethnic background was measured in three categories: White, Black, and Other. A three-category version of SCID diagnosis was created: No diagnosis, any PTSD, or any other diagnosis. We measured other clinical characteristics and trauma exposure dichotomously: Self-reported service-connected mental health disability (1 = mention of psychiatric issue in free-text answers coded by study staff); trauma (1 = a score of greater than 35

on the Davidson Trauma Scale, Davidson 2004); traumatic life events (1=highest quartile of Traumatic Life Events Questionnaire-Modified, Kubany et al. 2000, which was 6 or more events in this sample); combat exposure (1=highest quartile of Combat Exposure Scale, Lund et al. 1984, which was 20 or higher in this sample); traumatic brain injuries (1=two or more TBIs recorded using TBI Screen, Ivins et al. 2003); alcohol use problem (1=score of 8 for men or 7 for women on the Alcohol Use Disorder Identification Test, Bradley et al. 1998); drug use problem (1=score of 6 or greater on the Drug Abuse Screening Test, Skinner 1982). Past service utilization was captured by two indicators of self-reported outpatient and inpatient treatment for mental health or substance abuse (1=ever received). In addition, self-reported combat exposures were measured dichotomously (serving in a combat unit in a war zone, firing a weapon in a combat situation, ever being under enemy fire, and ever being wounded or injured in a war zone).

Analysis

We used Chi square tests to assess statistical significance of associations in frequency tables (Table 1). We used SAS PROC LOGISTIC to estimate odds ratios associated with each of three proxies, reporting 95% confidence intervals and the statistical significance of each outcome (Table 2). Odds ratios were adjusted by including demographic, clinical, service use, and combat exposure variables described above, with the following exceptions: we omitted from multivariate models any variables that had been used to create the proxy under consideration, and those that were redundant or overlapping with the proxy component variables. For example, in models estimating associations with the SMI proxy, we omitted SCID diagnosis, psychiatric hospitalization history, and acute symptoms as independent covariates, because these measures had been used to create the proxy, and also omitted the Davidson Trauma Scale because of its overlap with SCID diagnosis. The problem of missing data was managed by multiple imputation ($m=10$); estimates were pooled using SAS PROC MIANALYZE.

Results

Proxy Measures of Fiduciary Need and Their Correlates

The IQ-based measure identified 74 of 3200 veterans, 2.3% of the PDMH sample. Of note, 52.7% of these individuals were not working and 31% had a low degree of social support. Regarding clinical characteristics, 88% had a lifetime psychiatric diagnosis, assessed by the Structured Clinical Interview for DSM-IV (SCID); 64.9% had a history

of treatment for mental health or substance use disorder (with 32.4% having been hospitalized for these problems); 78.4% had some significant trauma-related psychological symptoms (scoring above 35 on the Davidson Trauma Scale); 9.5% self-reported a history of two or more traumatic brain injuries (TBIs) (Ivins et al. 2003); 6.8% had significant symptoms of alcohol use disorder (AUDIT) and 10.8% had likely illicit drug use disorder (DAST).

The proxy for current drug (non-alcohol) use disorder identified 72 of 3200 veterans, or 2.2% of the PDMH sample. Similar to those identified by the IQ proxy, over half (59.7%) were not working and over a third (36.1%) reported low social support. By definition, all had a SCID diagnosis of substance use disorder, and most also had a SCID diagnosis of PTSD (59.7%) or a score above 35 on the Davidson Trauma Scale (66.7%). Most had a history of outpatient treatment for mental health or substance use disorder (72.2%) and over a third (38.9%) had been hospitalized for these disorders as well. Despite a current diagnosis of drug use disorder, only 61% of those identified by this proxy measure were classified by the DAST as having a drug use problem. About a fifth (22.2%) had indications of a co-occurring alcohol problem, as measured by AUDIT.

The acute-SMI-based proxy indicator of fiduciary need identified 93 of 3200 veterans, 2.9% of the PDMH sample. The large majority (75.3%) of these veterans were not working and 51.6% had a low degree of social support. Regarding clinical characteristics, unlike the IQ-based measure, all of those identified by the acute-SMI-based proxy (by definition) had lifetime psychiatric diagnoses and a history of inpatient hospitalization; and 96.8% scored above 35 on the Davidson Trauma Scale screen for PTSD; 28.0% reported two or more past TBIs; 21.5% had indications of alcohol use disorder (AUDIT) and 29.0% had indications of illicit drug use disorder (DAST).

Table 1 presents the prevalence of a positive fiduciary classification for each alternative proxy measure, along with the associations of these indicators to a set of demographic, clinical, functional, and service use characteristics in the PDMH sample. Tests of statistical significance of these bivariate associations indicate the salience of observed differences in the proportions identified with fiduciary need among those with various characteristics and conditions.

Demographic and clinical characteristics were associated with assignment to each fiduciary group. Notably, having less than a high school education, not working, and reporting low social support were associated with classification in all three proxy groups. Gender and living alone were not associated with any proxy group. Being under age 35 was associated with inclusion in both the SMI and SA group, and not being married was associated only with the SA group. Trauma symptoms, a history of outpatient and inpatient treatment for MH or SA, and acute MH symptoms

Table 1 Percent of sample identified as needing a fiduciary for each proxy measure, by demographic, clinical, service use characteristics, and risk of study outcomes (n = 3200)

Sample characteristics	Total sample N	IQ-based proxy (n = 74)		SA-based proxy (n = 72)		Acute SMI-based proxy (n = 93)	
		n	(%)	n	(%)	n	(%)
Age < 35							
No	1487	36	(2.42)	60	(4.03)***	53	(3.56)*
Yes	1713	38	(2.22)	12	(0.70)	40	(2.34)
Sex							
Female	650	14	(2.15)	10	(1.54)	13	(2.00)
Male	2550	60	(2.35)	62	(2.43)	80	(3.14)
Education: HS or less							
No	1890	26	(1.38)***	25	(1.32)***	44	(2.33)*
Yes	1305	48	(3.68)	47	(3.60)	49	(3.75)
Married							
No	1494	31	(2.07)	57	(3.82)***	48	(3.21)
Yes	1701	43	(2.53)	15	(0.88)	45	(2.65)
Live alone							
No	2071	55	(2.66)	48	(2.32)	73	(3.52)
Yes	365	6	(1.64)	11	(3.01)	6	(1.64)
Low social support							
No	1808	37	(2.05)*	32	(1.77)***	31	(1.71)***
Yes	622	23	(3.70)	26	(4.18)	48	(7.72)
Racial/ethnic background							
White	1529	21	(1.37)**	24	(1.57)	42	(2.75)
Black	1508	49	(3.25)	42	(2.79)	42	(2.79)
Other	122	3	(2.46)	4	(3.28)	8	(6.56)
Not working							
No	1945	35	(1.80)*	29	(1.49)***	23	(1.18)***
Yes	1245	39	(3.13)	43	(3.45)	70	(5.62)
Not in home							
No	2168	50	(2.31)	40	(1.85)***	55	(2.54)***
Yes	268	11	(4.10)	19	(7.09)	24	(8.96)
SCID diagnosis							
None	1033	9	(0.87)***	0	(0.00) [def.]	0	(0.00) [def.]
Any PTSD	1176	49	(4.17)	43	(3.66)	79	(6.72)
Other	991	16	(1.61)	29	(2.93)	14	(1.41)
Service-connected disability—MH							
No	2505	48	(1.92)**	54	(2.16)	46	(1.84)***
Yes	695	26	(3.74)	18	(2.59)	47	(6.76)
PTSD (Davidson > 35)							
No	1733	15	(0.87)***	24	(1.38)***	2	(0.12)***
Yes	1445	58	(4.01)	48	(3.32)	90	(6.23)
Outpatient treatment (MH/SA)							
No	1490	26	(1.74)*	18	(1.21)***	5	(0.34)***
Yes	1631	48	(2.94)	52	(3.19)	85	(5.21)
Ever hospitalized (MH/SA)							
No	2713	50	(1.84)***	44	(1.62)***	0	(0.00) [def.]
Yes	482	24	(4.98)	28	(5.81)	93	(19.29)
MH symptoms: SCL-90 > 3							
No	2763	56	(2.03)***	55	(1.99)***	0	(0.00) [def.]
Yes	303	16	(5.28)	17	(5.61)	93	(30.69)

Table 1 (continued)

Sample characteristics	Total sample	IQ-based proxy (n = 74)		SA-based proxy (n = 72)		Acute SMI-based proxy (n = 93)	
		N	n (%)	n (%)	n (%)	n (%)	
IQ <= 70							
No	3126	0	(0.00) [def.]	71	(2.27)	88	(2.82)*
Yes	74	74	(100.00)	1	(1.35)	5	(6.76)
2 or more TBIs							
No	2769	67	(2.42)	59	(2.13)	67	(2.42)***
Yes	431	7	(1.62)	13	(3.02)	26	(6.03)
Alcohol problem (AUDIT)							
No	2931	69	(2.35)	56	(1.91)***	72	(2.46)***
Yes	264	5	(1.89)	16	(6.06)	20	(7.58)
Drug problem (DAST)							
No	3001	66	(2.20)	28	(0.93)***	66	(2.2)***
Yes	197	8	(4.06)	44	(22.34)	27	(13.71)
Combat Exposure Scale (highest quartile: 20 or higher)							
No	2393	47	(1.96)*	47	(1.96)	49	(2.05)***
Yes	799	27	(3.38)	24	(3.00)	44	(5.51)
Traumatic life events (TLEQ highest quartile: 6 or more events)							
No	2301	48	(2.09)	43	(1.87)*	38	(1.65)***
Yes	899	26	(2.89)	29	(3.23)	55	(6.12)
Suicide risk							
No	2875	60	(2.09)**	58	(2.02)**	51	(1.77)***
Yes	320	14	(4.38)	14	(4.38)	42	(13.13)
Violent behavior							
No	2899	61	(2.10)*	54	(1.86)***	53	(1.83)***
Yes	294	13	(4.42)	18	(6.12)	39	(13.27)

Sample N varies with missing data on some variables

Statistical significance: *p < 0.05, **p < .01, ***p < .001

on the SCL-90 scale were associated with inclusion in all three proxy groups, if not already part of their definition. Self-report of a service-connected MH disability and high scores on the Combat Exposure Scale were also associated with inclusion in the IQ- and acute SMI-based proxy groups. Traumatic life events were associated with inclusion in the SA- and SMI-groups.

Table 1 also presents information about suicidal risk and interpersonal violent behavior in the full PDMH sample and by proxy group. Three-hundred-and-twenty veterans were at heightened risk of suicide, and proxy groups for acute SMI, IQ, and substance abuse included 14, 14, and 42 of these individuals, respectively. There were 294 veterans who reported recent violent behavior. Of these, 13, 18, and 39 were classified to be at risk of fiduciary need according to criteria for acute SMI, IQ, and substance abuse history.

Table 2 presents a comparison of the alternative proxy measures of fiduciary need with respect to the two outcomes of particular relevance to VA policy of linking firearms prohibition to fiduciary assignment: suicidality and interpersonal violent behavior. We found that rates of both

suicidality and violence were significantly elevated in veterans who were identified by any one of the proxy measures, with unadjusted (bivariate) odds ratios in range of 2.15–8.4. However, those identified by the acute-SMI-based proxy had substantially higher rates of violence than those identified by the IQ or drug abuse proxy (41.9 vs. 17.6% and 25.0%, respectively), as well as higher rates of suicidality (45.2 vs. 18.9% and 19.4%, respectively). With controls for relevant demographic and clinical covariates in a multivariate logistic regression model, neither the IQ- nor drug abuse-based proxies were statistically significantly related to either violence or suicidality. However, in equivalent multivariate models the proxy indicators based on acute psychopathology were both found to remain significantly associated with increased risk of interpersonal violence and suicide (adjusted OR 3.25, p < .0001 for violence; adjusted OR 3.27, p < .0001 for suicidality).

Table 2 Fiduciary proxy measures and risk of suicidality and interpersonal violence: bivariate and adjusted associations

	N	n at risk	(% at risk)	Bivariate unadjusted associations ^a		Multivariable adjusted associations ^b	
				O.R.	95% C.I.	O.R.	95% C.I.
Suicidality risk models							
IQ-based proxy							
No	3121	306	(9.80)	2.15	(1.19–3.89)*	1.13	(0.57–2.22)
Yes	74	14	(18.92)				
SA-based proxy							
No	3123	306	(9.80)	2.22	(1.23–4.03)**	1.31	(0.64–2.65)
Yes	72	14	(19.44)				
Acute SMI-based proxy							
No	3102	278	(8.96)	8.36	(5.46–12.81)***	3.25	(2.00–5.28)***
Yes	93	42	(45.16)				
Interpersonal violence risk models							
IQ-based proxy							
No	3119	281	(9.01)	2.15	(1.17–3.97)*	1.1	(0.56–2.18)
Yes	74	13	(17.57)				
SA-based proxy							
No	3121	276	(8.84)	3.44	(1.99–5.94)***	1.83	(0.93–3.57)
Yes	72	18	(25.00)				
Acute SMI-based proxy							
No	3101	255	(8.22)	8.21	(5.33–12.66)***	3.27	(2.01–5.32)***
Yes	93	39	(41.94)				

Statistical significance: * $p < 0.05$, ** $p < .01$, *** $p < .001$ ^aSample size was $n = 3195$ for suicidality risk and $n = 3193$ for violence risk bivariate models, due to missing outcome data^bModels are adjusted for demographic and social characteristics (age, education, marital status, social support, employment, residential status, race/ethnic background); clinical and functional characteristics not part of fiduciary proxy measure (SCID psychiatric diagnosis, alcohol and drug abuse problems, multiple TBIs, IQ-equivalent measure of intellectual functioning); services utilization not part of fiduciary proxy measure (VA service-connected psychiatric disability, receipt of outpatient mental health and substance abuse services, history of psychiatric hospitalization,) war and trauma experience (served in warzone, served in warzone with combat, fired weapon in combat, under enemy fire, wounded in war zone, Combat Exposure Scale, Traumatic life events, Davidson trauma scale). Estimates are pooled results from multiple imputation

Discussion

Since 1998, the VA has reported the names of over 167,000 incompetent beneficiaries to the NICS, rendering these individuals legally ineligible to purchase or possess firearms. A proposed new law, the Veterans' Second Amendment Rights Restoration Act of 2018 (S.2386), would provide a process for veterans to have their names expediently removed from the background check database and have their gun rights restored, by placing the burden on the Federal Government to prove by clear and convincing evidence in a court or judicial review board proceeding that the veteran is a danger to self or others. In the same manner, the law would uncouple the loss of gun rights from routine assignment of VA fiduciaries in the future. The proposed law is ostensibly motivated by a concern for fairness. What consequences might follow, for veterans and the public?

Unfortunately, there is very limited information publicly available about the population of veterans deemed to be financially incompetent who have historically been reported to the NICS, and whether they, on average, have elevated rates of suicidality or violence. In the absence of such direct information, this study used a large survey database of post-deployment Iraq and Afghanistan-era veterans' mental health to develop three proxy measures of fiduciary need, capturing intellectual disability, illicit drug abuse, and serious and acute psychopathology. These proxy measures were based on the regulatory criteria for fiduciary appointment, combined with external information about VA practice and the application of alternative clinical paradigms regarding the target population and purpose of the program. The proxy measures each identified 2–3% of the population of participants in the PDMH study. Together the proxies captured 7.0% ($n = 225$) of the PDMH sample. To put this

in comparative context, the total number of veterans with fiduciaries represents about 10% of the total number of veterans with service-connected mental health disabilities; 2% of the total number of veterans served by the Veterans Health Administration; and less than 1% of the total US veteran population (US Department of Veterans Affairs 2017).

Irrespective of which proxy measure was used—intellectual disability, substance abuse, or acute psychopathology—rates of suicidality and violence were found to be significantly elevated in veterans who were identified as needing a fiduciary, as shown in Table 2. The strongest net associations were seen for the acute psychopathology proxy, with nearly half of those identified reporting violence or suicidality, and with significant effects maintained in the presence of controls in a multivariate statistical model. Indeed, the acute serious mental illness indicator was associated with a tripling of the risk of suicidality and interpersonal violence, after adjusting for covariates. This finding would suggest that NICS reporting is most appropriate for veterans in the fiduciary program who have a diagnosis of a serious mental illness combined with acute psychiatric symptoms and a history of inpatient treatment. The evidence also supports the policy goal of providing a meaningful opportunity for gun rights restoration, if symptoms subside over time and the veteran's illness is persistently controlled in treatment. The public safety case for putative risk-based reporting to NICS is weaker for veterans identified solely by the illicit drug abuse proxy or intellectual impairment.

A limitation of the study is that its outcome measures—self-reported suicidal ideation and trouble controlling violent behavior—do not directly assess the risk of misusing a firearm, which is the ultimate issue for NICS reporting. However, gun-involved suicide and homicide clearly are subsets of these broader categories of concern. This study was also limited with regard to its sample and indirect measure of fiduciary need. A larger and older sample would be needed to capture risk associated with age-related neurocognitive disorders, which are likely to be the most common reason why an older veteran would be assigned a fiduciary. For a fuller understanding of risk among veterans with fiduciaries, direct study of those with fiduciaries, such as an evaluation administrative data from the Veterans Benefits Administration in combination with medical data from the Veterans Health Administration, would provide further insight into how fiduciaries are assigned by the VA, in practice, along with the level of associated suicide and violence risk across age and service-era cohorts.

A challenge for policy-making in this arena is that categorical prohibitions may be simultaneously too broad and too narrow, such that they include non-dangerous individuals and exclude others who pose a real threat. In this regard, it is possible that most veterans who have been assigned a fiduciary do not pose a substantial risk to

themselves or others, and that many of those who are at elevated risk have not been assigned fiduciaries; we would know more about this if data on veterans with fiduciaries were available. Ideally, an effective public health approach to restricting firearms access for veterans at risk of harming themselves or others would be targeted broadly, and not limited to those who are proposed for a determination of financial incapacity. However, such an approach would also be based on identifying the presence of strong correlates or known indicators of danger to self or others, taking into account an individual's observed risky behaviors and experience over time. In the interim, the results of this study suggest that certain operational definitions of likely need for fiduciary management of a veteran's benefits are indeed significant correlates of dangerousness, albeit indirect and fairly nonspecific indicators. Future research may guide efforts to optimize the processes both for determining a veteran's need for financial assistance and identifying those who pose a significant firearm safety concern, in a way that appropriately balances risk and rights.

Acknowledgements The research was funded by the VISN 6 Mid-Atlantic MIRECC and the Elizabeth K. Dollard Charitable Trust. The project was supported by the VA Mid-Atlantic Mental Illness Research, Education and Clinical Center (VISN 6 MIRECC) of the Department of Veterans Affairs Office of Mental Health Services and Suicide Prevention and the VA Mid-Atlantic Healthcare Network (VISN 6). The Mid-Atlantic MIRECC Workgroup contributors for this article include: Jean C. Beckham, PhD, Patrick S. Calhoun, PhD, Eric Dedert, PhD, Eric B. Elbogen, PhD, Robin A. Hurley, MD, Jason D. Kilts, PhD, Nathan A. Kimbrel, PhD, Angela Kirby, MS, Christine E. Marx, MD, MS, Gregory McCarthy, PhD, Scott D. McDonald, PhD, Scott D. Moore, MD, PhD, Rajendra A. Morey, MD, MS, Jennifer C. Naylor, PhD, Treven C. Pickett, PsyD, Jared A. Rowland, PhD, Cindy Swinkels, PhD, Steven T. Szabo, MD, PhD, Katherine H. Taber, PhD, Larry A. Tupler, PhD, Elizabeth E. Van Voorhees, PhD, H. Ryan Wagner, Ph.D., Richard D. Weiner, MD, PhD, and Ruth E. Yoash-Gantz, PsyD. The views expressed in this article are those of the authors and do not necessarily reflect the position or policy of the Department of Veterans Affairs, the Department of Defense, or the US government. Dedert is funded by a Department of Veterans Affairs Clinical Science Research and Development Career Development Award (1K2CX000718.) Kimbrel is funded by a Department of Veterans Affairs Clinical Science Research and Development Career Development Award (1K2CX000525). McDonald completed funding by a Department of Veterans Affairs Rehabilitation Research and Development Career Development Award (1K2RX000703-01). Naylor is funded by a Department of Veterans Affairs Rehabilitation Research and Development Career Development Award (1K2RX000908). Van Voorhees is funded by a Department of Veterans Affairs Rehabilitation Research and Development Career Development Award (1K2RX001298). The authors gratefully acknowledge the able assistance of Paola Fernandez and the helpful critical review of an earlier draft by Wendy Tenhula, Ph.D. and Stacey Pollack, Ph.D.

Funding This study was funded by the VISN 6 Mid-Atlantic MIRECC and the Elizabeth K. Dollard Charitable Trust.

Compliance with Ethical Standards

Conflict of interest The authors declare they have no conflict of interest.

Ethical Approval All procedures performed in studies involving human participants were in accordance with the ethical standards of the institutional research committees and with the 1964 Helsinki declaration and its later amendments or comparable ethical standards.

Informed Consent Informed consent was obtained from all individual participants included in the Post-Deployment Mental Health study.

References

- 21st Century Cures Act (P.L. 114–255) (2016). <https://www.congress.gov/114/plaws/publ255/PLAW-114publ255.pdf>.
- 38 CFR 3.353—Determinations of incompetency and competency, Department of Veterans Affairs. <https://www.gpo.gov/fdsys/pkg/CFR-2011-title38-vol1/pdf/CFR-2011-title38-vol1-sec3-353.pdf>.
- American Bar Association, Commission on Law and Aging. (2017). State adult guardianship summary: Directions of reform, 2017. https://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_legislative_summary_fnl.authcheckdam.pdf.
- Bradley, K. A., Bush, K. R., McDonnell, M. B., Malone, T., & Fihn, S. D. (1998). Screening for problem drinking: Comparison of CAGE and AUDIT. Ambulatory Care Quality Improvement Project (ACQUIP). Alcohol use disorders identification test. *Journal of General Internal Medicine*, 13(6), 379–388.
- Brady Handgun Violence Prevention Act (1994). Pub.L. 103–159, 107 Stat. 1536.
- Branecu, M., Wagner, H. R., Morey, R. A., Beckham, J. C., Calhoun, P. S., Tupler, L. A., et al. (2017). The Post-Deployment Mental Health (PDMH) study and repository: A multi-site study of US Afghanistan and Iraq era veterans. *International Journal of Methods in Psychiatric Research*. <https://doi.org/10.1002/mpr.1570>.
- Congressional Research Service. (2017). Gun control, veterans benefits, and mental incompetency determinations, R44818. <http://www.crs.gov>.
- Davidson, J. R. (2004). Remission in post-traumatic stress disorder (PTSD): Effects of sertraline as assessed by the Davidson Trauma Scale, Clinical Global Impressions and the Clinician-Administered PTSD scale. *International Clinical Psychopharmacology*, 19(2), 85–87.
- Elbogen, E. B., Johnson, S. C., Wagner, H. R., Newton, V. M., & Beckham, J. C. (2012). Financial well-being and postdeployment adjustment among Iraq and Afghanistan war veterans. *Military Medicine*, 177(6), 669–675.
- Elbogen, E. B., Swanson, J. W., Swartz, M. S., & Van Dorn, R. (2005). Family representative payeeship and violence risk in severe mental illness. *Law and Human Behavior*, 29(5), 563–574. <https://doi.org/10.1007/s10979-005-7120-2>.
- First, M. B., Spitzer, R. L., Gibbon, M., & Williams, J. B. W. (1994). *Structured clinical interview for axis I DSM-IV disorders, version 2.0*. New York: Biometrics Research Department.
- Flynn-Brown, J. (2013). Analyzing the constitutional implications of the Department of Veterans Affairs' process to determine incompetency: Is the Federal Government violating the second amendment and due process. *Hastings Constitutional Law Quarterly*, 41, 521.
- Gun Control Act of 1968, Public Law 90–618, Title 18, United States Code - Firearms; Chap. 44 (Sect. 101). Washington DC: Congress of the United States; 1968.
- H.R. 1118, the Veterans Second Amendment Protection Act <https://www.congress.gov/bill/115th-congress/house-bill/1181>.
- Ivins, B. J., Schwab, K. A., Warden, D., Harvey, L. T., Hoilien, M. A., Powell, C. O., et al. (2003). Traumatic brain injury in U.S. Army paratroopers: Prevalence and character. *Journal of Trauma and Acute Care Surgery*, 55(4), 617–621. <https://doi.org/10.1097/01.TA.0000052368.97573.D4>.
- Kinney, R. K., Gatchel, R. J., & Mayer, T. G. (1991). The SCL-90R evaluated as an alternative to the MMPI for psychological screening of chronic low-back pain patients. *Spine (Phila Pa 1976)*, 16(8), 940–942.
- Kubany, E. S., Haynes, S. N., Leisen, M. B., Owens, J. A., Kaplan, A. S., Watson, S. B., et al. (2000). Development and preliminary validation of a brief broad-spectrum measure of trauma exposure: The traumatic life events questionnaire. *Psychological Assessment*, 12(2), 210–224. <https://doi.org/10.1037/1040-3590.12.2.210>.
- Kumar, G., & Steer, R. A. (1995). Psychosocial correlates of suicidal ideation in adolescent psychiatric inpatients. *Suicide and Life-Threatening Behavior*, 25(3), 339–346.
- Lund, M., Sippelle, C., Foy, D., & Strachan, A. (1984). The Combat Exposure Scale—A systematic assessment of Trauma in the Vietnam War. *Journal of Clinical Psychology*, 40(6), 1323–1328. [https://doi.org/10.1002/1097-4679\(198411\)40:6%3C1323::Aid-Jclp2270400607%3E3.0.Co;2-I](https://doi.org/10.1002/1097-4679(198411)40:6%3C1323::Aid-Jclp2270400607%3E3.0.Co;2-I).
- National Instant Criminal Background Check System Improvement Act of 2008, Public Law 110–180, 121 STAT. 2559–2572.
- Pinals, D. A., Appelbaum, P. S., Bonnie, R. J., Fisher, C. E., Gold, L. H., & Lee, L. W. (2015). Resource document on access to firearms by people with mental disorders. *Behavioral Sciences and the Law*, 33(2–3), 186–194.
- SEARCH.org. (2015). Reporting mental health records to the NICS Index: SEARCH White Paper. http://www.search.org/files/pdf/Reporting_Mental_Health_Records_NICS_Index.pdf.
- Sherbourne, C. D., & Stewart, A. L. (1991). The MOS social support survey. *Social Science & Medicine*, 32(6), 705–714.
- Skinner, H. A. (1982). The drug abuse screening test. *Addictive Behaviors*, 7(4), 363–371.
- Social Security Administration (2016). Implementation of the NICS Improvement Act of 2007: Final rules. 20 CFR 421, Docket No. SSA-2016-0011, RIN 0960-AH95. [https://www.ssa.gov/regulation/s/SSA%20NICS%20Final%20Rule%20\(To%20Publish%2012-19-16\).pdf](https://www.ssa.gov/regulation/s/SSA%20NICS%20Final%20Rule%20(To%20Publish%2012-19-16).pdf).
- Stewart, M. M. III (2016). You can have my gun when you pry it from my hands which are incapable of managing my own estate by reason of advanced age, physical incapacity, or mental weakness: Firearms rights of wards in Mississippi Guardianships and Conservatorships. *Miss. CL Rev.*, 35, 495.
- Swanson, J. W., & Bonnie, R. J. Testimony submitted by Jeffrey Swanson, PhD, and Richard Bonnie, LL.B. Testimony Submitted to the Subcommittee on Disability Assistance and Memorial Affairs, Hearing, June 24, 2015, H.R. 2001—Veterans 2nd Amendment Protection Act U.S. House of Representatives, Congressional Record. <https://www.congress.gov/crc/2017/03/16/CREC-2017-03-16-pt1-PgH2102-2.pdf>.
- United States Court of Appeals for Veterans Claims no. 10-1375 Michael V. Clennan, appellant, v. Eric K. Shinseki, Secretary of Veterans Affairs, appellee. On appeal from the Board of Veterans' Appeals (argued November 13, 2012; decided January 24, 2013).
- United States Department of Veterans Affairs (2013). Fiduciary. <https://www.benefits.va.gov/FIDUCIARY/beneficiary.asp>.
- United States Department of Veterans Affairs (2016). Suicide among Veterans and other Americans 2001–2014. Washington, DC, Office of Suicide Prevention.
- United States Department of Veterans Affairs (2017). Veteran Population. National Center for Veterans Analysis and Statistics. https://www.va.gov/vetdata/veteran_population.asp.

Veteran Benefits Administration (2017) Annual Budget Report FY 2016. Pension and Fiduciary Services. <https://www.benefits.va.gov/REPORTS/abr/ABR-Pension-FY16-02242017.pdf>.

Veterans' Second Amendment Rights Restoration Act of 2018. S.2386. <https://www.congress.gov/bills/115/congress/senate/bills/2386/text>.

Zachary, R. A., Paulson, M. J., & Gorsuch, R. L. (1985). Estimating WAIS IQ from the Shipley Institute of Living Scale using continuously adjusted age norms. *Journal of Clinical Psychology*, 41(6), 820–831.

Prepared Statement of Bob Carey

**National
Defense
Committee**

**Testimony Before the House Committee on Veterans Affairs
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.

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=992b50ec-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.

**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

8001 Forbes Place, Suite 202

Springfield, VA 22151

703-321-8585

www.gunowners.org

www.gunowners.com

THE INDEPENDENCE FUND

9013 Perimeter Woods Drive, Suite E

Charlotte, NC 28216

888.851.7996

www.IndependenceFund.org

NATIONAL DEFENSE COMMITTEE

6022 Knights Ridge Way

Alexandria, VA 22310

703-402-1119

www.NationalDefenseCommittee.org

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)

Prepared Statement of Cole Lyle

Chairman Bost, Ranking Member Takano, and members of the committee, on behalf of Mission Roll Call, a non-partisan program of America's Warrior Partnership, and the roughly 1.4 million veterans and supporters who have opted-in to our digital advocacy network, thank you for the opportunity to provide their feedback through our remarks on pending legislation.

In 2022, Mission Roll Call sent out 30 policy-based polls with approximately 159,000 responses and spoke to 5,000 veterans in-person around the country, seeking the ground truth. Based on those interactions, MRC's three main priorities are veteran suicide prevention, access to healthcare and benefits, and amplifying the voices of traditionally underserved populations. As these topics are broad and complicated to tackle, MRC continuously polls veterans and supporters on a wide range of topics, usually when Congress, the VA, or the White House releases policy that may directly or tangentially affect veterans across the United States, or at the suggestion of a Member of Congress or committee that wishes to ascertain the veteran communities' opinion on a particular topic. I welcome all members of this committee to use MRC as a resource as you seek to craft thoughtful legislation with respect to veteran issues.

H.R. 705, Veterans 2nd Amendment Protection Act

MRC supports H.R. 705, the Veterans 2nd Amendment Protection Act, as a necessity to ensure veterans receive the same due process as the average American, whose rights they served to protect.

Currently, the VA is the only federal agency to refer veterans to the FBI's NICS data base following a determination by agency officials, not a court, that the veteran cannot manage their own VA benefits.

Under the Brady Act of 1993, Congress authorized the DOJ to receive data from government agencies on any person whose receipt or possession of firearms violated the Gun Control Act of 1968. As part of the implementation process, the VA defined a "mentally incompetent person" as "one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation." This determination does not include any consideration of whether the person is considered to have a propensity for violence or is considered a threat to themselves or others. Thus, for example, a veteran who during the determination process for disability compensation indicates that because of a traumatic brain injury he is experiencing some short-term memory loss which affects his ability to manage his finances, could be determined to be "mentally incompetent" even if there is no evidence that this veteran's condition would impair his ability to safely own or handle a firearm or that he is a threat to himself or others.

Since 1998, VA has provided records to the FBI for inclusion in the NICS index on beneficiaries for whom a fiduciary has been appointed by VA on his or her behalf. The appointment of a fiduciary is based on a VA determination that the beneficiary is "mentally incompetent" under the previous mentioned definition in VA regulations. As of December 2020, federal agencies have contributed 263,225 records to NICS, of which the VA contributed 98.1 percent of the total number.

This incongruity in the implementation of the law, between the VA and other federal agencies, unfairly prejudices veterans by stigmatizing those who are challenged with service-related healthcare issues as inherently dangerous to others, when in fact, several studies and data from the U.S. Bureau of Justice Statistics show no evidence that military veterans—including those who saw combat—are more prone to lethal violence than the general population.¹ Furthermore, veterans convicted of violent gun-related crimes in the federal prison system accounted for less than 1 percent of the entire federal prison population and were almost 7 percent less likely to be incarcerated for a gun-related charge than the civilian population, per the United States Sentencing Commission.² Veterans across this country know that, despite challenges with a few bad apples, our community is one of service that abides by the laws they were sworn to protect, and in fact less dangerous and less prone to extremism, as some have argued.

These points are likely why, when asked about the VA's current policy of referral to NICS per the Brady Act in a recent MRC poll, 83 percent of veterans said Congress should change the law out of 9,968 responses.

Finally, there are those that would use the alarming rate of veteran suicide to justify a lower standard of referral to NICS, citing access to guns as a prime driver

¹ <https://bjs.ojp.gov/content/pub/pdf/vpspi16st.pdf>

² <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211028—armed-forces.pdf>

of veteran suicide rates. While data from the U.S. Department of Veterans Affairs asserts veterans who kill themselves are more likely to use a firearm, only track declared suicides and fail to account for self-injury mortality. Per the interim results of Operation Deep Dive published last year, over 80 percent of self-injury mortalities are overdose deaths. Accordingly, a more upstream approach to tackle veteran suicide rather than focusing on the lethal means of carrying out the deed, would serve to prevent far more veteran suicide deaths. This is in line with the wishes of many veterans throughout the nation who are begging the VA to approach suicide prevention in a more wholistic way, looking proactively instead of reactively at the issue.

The current status quo of a fiduciary determination and referral to NICS for veterans simply undermines the spirit of justice veterans fought to defend, taking away a constitutionally enumerated right by a bureaucratic determination rather than a court order. The results of MRC's poll were clear: Congress should pass legislation protecting veterans' rights.

Chairman Bost, Ranking Member Takano, this concludes my testimony. Thank you again for the opportunity to be here today, and I'm happy to answer any questions you or other committee members may have.

Prepared Statement of Kristina Keenan

Chairman Bost, Ranking Member Takano, and members of the committee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to provide our remarks on legislation pending before this committee.

H.R. 705, Veterans 2nd Amendment Protection Act

The VFW supports this proposal to protect veterans' Second Amendment rights and to establish due process for veterans who have been assigned fiduciaries before referring them to the National Instant Criminal Background Check System (NICS).

Background

The Department of Veterans' Affairs (VA) may determine that a veteran is unable to manage their finances when there is medical documentation. This determination could be made by a Compensation and Pension medical examiner, a medical provider, or other VA official who determines that the veteran is incompetent and requires a fiduciary to manage their benefits. This is then confirmed by one of VA's fiduciary hubs and the veteran is informed of the decision.

VA sends the names of all veterans who have fiduciaries to NICS. This is a name check system, managed by the Federal Bureau of Investigation, and is used primarily by licensed sellers to know if a person has been disqualified from purchasing or possessing a firearm.

VA refers veterans with fiduciaries to NICS without additional screening or medical assessments to ascertain if the individual is a danger to themselves or others. Once referred, veterans are then prohibited from purchasing, possessing, receiving, or transporting a firearm. Individuals may appeal the decision, though few actually do, perhaps because they do not know that is an option.

Definitions and Reporting Practices

The *Brady Handgun Violence Prevention Act* (Public Law 103-159) of 1993, which created NICS, established that an individual "adjudicated as a mental defective or committed to a mental institution" may not own a firearm. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) defines that a person is adjudicated as a mental defective "if a court, board, commission, or other lawful authority has made a determination that a person, as a result of marked subnormal intelligence, mental illness, incompetency, condition or disease: is a danger to himself or others; lacks the mental capacity to contract or manage his own affairs; is found insane by a court in a criminal case; or is found incompetent to stand trial."

VA's broader characterization within regulation (38 C.F.R. 3.353) defines "A mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation." As explained in a September 2021 Congressional Research Service (CRS) report titled *Gun Control, Veterans Benefits, and Mental Incompetency Determinations* VA does not make any consideration if the veteran is a threat to themselves or others. One example from this report shows the risk of VA's regulation: "for example, a veteran who during the determination process for Veterans Disability Compensation (VDC) indicates that because of a traumatic brain injury he is experiencing some short-term memory loss which affects his ability to

manage his finances, could be determined to be ‘mentally incompetent’ even if there is no evidence that this veteran’s condition would impair his ability to safely own or handle a firearm or that he is a threat to himself or others.”

Furthermore, the Social Security Administration (SSA) does not report information to NICS. In a 2009 letter to the FBI’s NICS section chief, the legal basis for not reporting individuals to NICS is explained in that the inability to manage one’s finances does not always preclude someone from managing other aspects of their life. “Thus, if SSA were to submit for NICS inclusion the names of all beneficiaries with mental impairments who have been assigned a representative payee, a significant number of those individuals would be wrongfully identified as lacking the mental capacity to manage their own affairs.”

The earlier mentioned CRS report concludes that VA’s procedures could be viewed as an incongruity of the law. It states that one might ask “why VA is the only federal department or agency that has made substantial numbers of NICS referrals to the FBI based on mental incompetency determinations, even though other federal agencies that provide similar disability and income security benefits have not done so.” This incongruity calls into question if VA’s process goes far enough to ensure that veterans’ Second Amendment rights are not infringed.

VFW Observations

A negative consequence of VA’s current practice is that veterans tell the VFW that they refuse to seek mental health care at VA because they fear their firearms will be taken away. This has created a significant stigma surrounding mental health and has created a barrier to care for many. This perception is difficult to change. The VFW continues to encourage veterans to use their earned VA health care, including the world-class, veteran-specific mental health services that VA provides. The VFW has also been involved in numerous efforts to reduce veteran suicide, including urging that veterans in distress temporarily give their firearms to a trusted friend or consider using trigger locks to lessen the ease of using a firearm to harm themselves. The VFW also believes in looking at the economic factors veterans face that can put them at risk for death by suicide, as we know suicide is not solely a mental health or firearm issue.

Last, few veterans that the VFW represents in the VA disability claims process are assigned a fiduciary, and of those it is very rare that our accredited representatives are asked to assist in appealing the decision. Even though we estimate the issue surrounding fiduciaries likely affects a small number of veterans, we argue that every veteran deserves protection of their constitutional rights.

Discussion Draft, Ernest Peltz Accrued Veterans Benefits Act

The VFW supports this proposal which would ensure VA pension benefits are paid out for the entire month when a veteran passes away. By receiving the “month-of-death” full benefit payment, the surviving family members would be able to better manage the financial hardships that come with a veteran’s passing. Rather than suddenly stopping those benefits in the middle of the month, this would provide survivors with assistance and peace of mind during a devastating moment in their lives.

The legislation is named after the World War II veteran Ernest Peltz of Queensbury, New York. He had been approved for his accrued pension and wanted his surviving family to use it for his end-of-life care and funeral expenses. Due to a VA error, the funds were deposited seven days after his death (during the following month) and then were immediately pulled back, leaving his family without these funds to manage impending expenses. This bill would ensure that pension funds reach survivors and would cover the full month of the veteran’s passing.

Chairman Bost, this concludes my testimony. Again, the VFW thanks you and Ranking Member Takano for the opportunity to testify on these important issues before this committee. I am prepared to take any questions you or the committee members may have.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, the VFW has not received any federal grants in Fiscal Year 2023, nor has it received any federal grants in the two previous Fiscal Years.

The VFW has not received payments or contracts from any foreign governments in the current year or preceding two calendar years.