

VETERANS 2ND AMENDMENT PROTECTION ACT

MARCH 10, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. ROE of Tennessee, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1181]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 1181) to amend title 38, United States Code, to clarify the conditions under which certain persons may be treated as adjudicated mentally incompetent for certain purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for Legislation	2
Hearings	4
Subcommittee Consideration	4
Committee Consideration	4
Committee Votes	4
Committee Oversight Findings	4
Statement of General Performance Goals and Objectives	4
New Budget Authority, Entitlement Authority, and Tax Expenditures	5
Earmarks and Tax and Tariff Benefits	5
Committee Cost Estimate	5
Congressional Budget Office Estimate	5
Federal Mandates Statement	6
Advisory Committee Statement	6
Constitutional Authority Statement	6
Applicability to Legislative Branch	6
Statement on Duplication of Federal Programs	6

Disclosure of Directed Rulemaking	6
Section-by-Section Analysis of the Legislation	7
Changes in Existing Law Made by the Bill as Reported	7
Dissenting Views	9

PURPOSE AND SUMMARY

H.R. 1181, the “Veterans Second Amendment Protection Act,” was introduced by Representative David P. Roe, M.D., of Tennessee, Chairman of the Committee on Veterans’ Affairs, on February 16, 2017. This bill would protect veterans’ Second Amendment rights by prohibiting the Secretary from sending the name of an individual to the Federal Bureau of Investigation for inclusion on the National Instant Criminal Background Check System, unless there has been a specific determination by a judge, magistrate, or other judicial authority that such individual is a danger to himself or others.

BACKGROUND AND NEED FOR LEGISLATION

If there is evidence that a veteran is unable to manage his or her veterans’ benefits, the Department of Veterans Affairs’ (VA) may appoint a fiduciary. Before appointing a fiduciary, VA provides notice to the veteran that the Department proposes to determine that the beneficiary is incompetent and may need a fiduciary. Additionally, VA notifies the veteran that he or she has the right to request a hearing. If the veteran does choose to have a hearing, a VA employee presides over the proceedings.

However, the hearing only reviews evidence that would inform a judgment about whether a beneficiary is capable of managing his or her VA benefit payments. The hearing does not address whether a beneficiary presents a danger to himself/herself or others, or whether the beneficiary should be prohibited from purchasing, possessing, or operating a firearm.

Although it may be appropriate for VA to appoint a fiduciary to help certain veterans with their finances, the decision has serious unintended consequences for the veteran. The Brady Act requires federal agencies, upon the request of the Attorney General, to submit to the Federal Bureau of Investigation (FBI) information on persons prohibited from purchasing a firearm.¹ The Attorney General made such request of VA in 1998. In response, VA has provided the FBI with information about VA beneficiaries who are determined to be mentally incompetent because they are unable to manage their financial affairs pursuant to 38 C.F.R. 3.353.²

Accordingly, after a finding of incompetency, VA sends the beneficiary’s name to the FBI to be added to the National Instant Criminal Background Check System (NICS).³ Thus, the veteran, who may simply need assistance managing his or her finances, is prohibited from purchasing or owning a firearm. Although VA does allow beneficiaries to apply to the Department for relief from the

¹ Brady Handgun Violence Prevention Act of 1993 (Brady Act, P.L. 103–159, § 103(e)(1)).

² 38 C.F.R. § 3.353 provides that “a person is 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.”

³ Department of Veterans Affairs, M21–1 Adjudication Procedures Manual, Section III.v.9.B.4.a.

firearms prohibition, it is a VA employee—not a judge or magistrate—who determines whether such relief should be granted.

The Committee notes that VA's decision to report a beneficiary to the FBI for inclusion on NICS is not considered a decision on a benefit provided by law. Therefore, VA does not have a duty to assist the beneficiary with any request for relief. As such, the burden of proof is on the beneficiary requesting relief, and if the veteran fails to provide clear and convincing evidence that he or she is not prone to violence, VA will deny the request for relief.⁴

Veterans, who were willing to lay down their lives to protect our constitutional rights, should not be deprived of their Second Amendment rights without a proceeding before a judicial authority. A hearing before a judge or magistrate would ensure that the veteran's due process rights are protected before any action is taken that would deprive him or her of fundamental constitutional rights.

Unfortunately, VA's decision to report the names of veterans to the FBI reinforces the erroneous perception that people with mental disabilities are to be feared. VA's goal should be to make veterans whole and encourage them to return to their former activities, including those that may involve a firearm, such as hunting and shooting. Instead, VA is reinforcing the stereotype that those who suffer from mental disabilities are by nature, dangerous and may be violent. Even worse, VA's policy may discourage some veterans from seeking VA services, such as healthcare or mental health counseling, because they are concerned that they would lose their Second Amendment rights.

Furthermore, the Department has not provided any evidence that individuals who need help managing their finances are more likely than the general population to be a danger to themselves or others. Therefore, there is no justification for denying veterans and VA beneficiaries of their right to due process, before they are deprived of the rights guaranteed by the Second Amendment to the Constitution of the United States.

Additionally, some recreational therapy programs have discovered that hunting trips can be therapeutic for veterans with physical and psychological disabilities. For example, a recreational therapy program at the VA Grand Junction Medical Center in Colorado has been organizing shooting and hunting trips for veterans who suffer from physical and mental disabilities.

Accordingly, H.R. 1181 would clarify that in any case arising out of VA's administration of benefits under title 38 of the United States Code, a VA beneficiary who is deemed unable to manage his or her finances shall not be considered adjudicated as a mental defective under the Gun Control Act of 1968 (P.L. 90-618) without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such individual is a danger to himself or herself or others.

H.R. 1181 is supported by The American Legion; the Veterans of Foreign Wars of the United States; AMVETS, also known as the American Veterans; and, the National Rifle Association.

⁴Department of Veterans Affairs, M21-1 Adjudication Procedures Manual, Section III.v.9.B.4.c. Federal law at 38 U.S.C. § 5103A requires VA to assist claimants in obtaining evidence necessary to substantiate their claims for benefits.

HEARINGS

There were no Subcommittee or full Committee hearings held on H.R. 1181.

SUBCOMMITTEE CONSIDERATION

There was no Subcommittee consideration of H.R. 1181.

COMMITTEE CONSIDERATION

On March 8, 2017, the full Committee met in open markup session, a quorum being present, and ordered H.R. 1181 reported favorably to the House of Representatives by voice vote. During consideration of the bill, the following amendment was considered:

An amendment offered by Ms. Elizabeth Esty of Connecticut that would strike all after the enacting clause and, instead, require the U.S. Government Accountability Office (GAO) to conduct a study, issue a report, and make recommendations on the operation of the NICS list with respect for veterans. Such study would include an analysis of VA's procedures for submitting names to NICS; an assessment of how VA's current practices will be impacted by the changes in the fiduciary appointment process mandated by the 21st Century Cures Act; a breakdown by all service-connected disabilities of veterans whose names have been reported to the NICS list; and, the number of veterans who have committed suicide using firearms, even though such veterans were prohibited from possessing firearms. The amendment was defeated by voice vote.

A motion by Representative Mike Coffman of Colorado to report H.R. 1181 favorably to the House of Representatives was agreed to by voice vote.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, no recorded votes were taken on amendments or in connection with ordering H.R. 1181, reported to the House.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are to protect veterans' Second Amendment rights by prohibiting the Secretary of the Department of Veterans Affairs from sending the name of an individual to the Federal Bureau of Investigation for inclusion on the National Instant Criminal Background Check System, without the finding or order of a judicial au-

thority of competent jurisdiction that such individual is a danger to himself or herself or others.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX
EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

EARMARKS AND TAX AND TARIFF BENEFITS

H.R. 1181 does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate on H.R. 1181 prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate for H.R. 1181 provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 10, 2017.

Hon. PHIL ROE, M.D.,
*Chairman, Committee on Veterans' Affairs,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1181, the Veterans 2nd Amendment Protection Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Dwayne M. Wright.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 1181—Veterans 2nd Amendment Protection Act

H.R. 1181 would modify an existing requirement that certain individuals determined to be mentally incompetent by the Department of Veterans Affairs (VA) be prohibited from purchasing or possessing legal firearms. CBO expects that implementing H.R. 1181 would have no significant budgetary effect.

Under current law, when VA deems individuals to be mentally incapacitated, mentally incompetent, experiencing an extended loss of consciousness, or otherwise unable to manage their own affairs, the department is required to provide that information to the De-

partment of Justice (DOJ). Such individuals are then added to the list of those prohibited from purchasing or possessing firearms. Under H.R. 1181, a judicial authority would have to determine that veterans are dangerous before VA would be required to report them to DOJ. CBO expects that such a requirement would have an insignificant effect on VA's workload.

Enacting H.R. 1181 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 1181 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1181 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Dwayne M. Wright. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates regarding H.R. 1181, prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act would be created by H.R. 1181.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to Article I, section 8 of the United States Constitution, H.R. 1181 is authorized by Congress' power to "provide for the common Defense and general Welfare of the United States."

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that H.R. 1181 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

STATEMENT ON DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee finds that no provision of H.R. 1181 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, 115th Cong. (2017), the Committee estimates that H.R. 1181 contains no directed rule making that would require the Secretary to prescribe regulations.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 cites the short title of H.R. 1181, to be the “Veterans Second Amendment Protection Act.”

Section 2. Conditions for treatment of certain persons as adjudicated mentally incompetent for certain purposes

Section 2(a) would amend chapter 55 of title 38, U.S.C., by preventing a person who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness from being considered adjudicated as a mental defective under subsection (d)(4) or (g)(4) of section 922 of title 18, U.S.C., without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such person is a danger to himself or herself or others.

Section 2(b) would provide a clerical amendment.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

* * * * *

PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 55—MINORS, INCOMPETENTS, AND OTHER WARDS

Sec.
5501. Commitment actions.

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5501B. Conditions for treatment of certain persons as adjudicated mentally incompetent for certain purposes.

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§5501B. Conditions for treatment of certain persons as adjudicated mentally incompetent for certain purposes

Notwithstanding any determination made by the Secretary under section 5501A of this title, in any case arising out of the administration by the Secretary of laws and benefits under this title, a person who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness shall not be considered adjudicated as a mental defective under subsection (d)(4) or (g)(4) of section 922 of title 18 without the order or finding of a judge,

magistrate, or other judicial authority of competent jurisdiction that such person is a danger to himself or herself or others.

* * * * *

DISSENTING VIEWS

We have serious concerns over H.R. 1181. We believe this legislation, in practice, would instantly remove all individuals previously determined to be mentally incompetent by the Department of Veterans Affairs (VA) Secretary from the National Instant Criminal Background Check System (NICS), making it easier, not harder, for those veterans in crisis to obtain firearms. Many of those who will be removed from the NICS database include veterans with serious mental illnesses and who are at increased risk of committing suicide by firearm.¹ Additionally, the bill seeks to jettison the carefully crafted bipartisan compromise in the 21st Century Cures Act² enacted in December 2016 that codified VA implementation of the bipartisan NICS Improvement Amendments Act of 2007 (NIAA).³ Instead, H.R. 1181 would require the VA to take a veteran to court to get a determination under a standard that would be in effect nearly impossible to meet.

A VA study last year confirmed that 20 veterans and military service members commit suicide every day.⁴ According to the VA, 66 percent of suicides committed by veterans are by firearms.⁵ Under current law and regulations, the name of a veteran determined by the VA to be “mentally incompetent” and appointed a fiduciary by the VA to manage the veteran’s VA monetary benefits⁶ is provided to the Federal Bureau of Investigation for inclusion in the NICS.⁷ For a veteran in crisis or suffering with a mental health condition or suffering from suicidal ideation, this practice can save a life.

Just last December, in the wake of tragic shootings at Virginia Polytechnic Institute and State University (Virginia Tech) in Blacksburg, Virginia in 2007, Sandy Hook Elementary School in Newtown, Connecticut in April 2013, and mass shootings in San

¹Department of Veterans Affairs Office of Suicide Prevention, *Suicide Among Veterans and Other Americans 2001–2014*, August 3, 2016. Available at <http://www.mentalhealth.va.gov/docs/2016suicidedatareport.pdf>.

²P.L. 114–255, December 13, 2016; 130 Stat. 1307; codified at 38 U.S.C. § 5501A.

³P.L. 110–180, January 8, 2008; 121 Stat. 2559.

⁴Department of Veterans Affairs Office of Suicide Prevention, *Suicide Among Veterans and Other Americans 2001–2014*, August 3, 2016. Available at <http://www.mentalhealth.va.gov/docs/2016suicidedatareport.pdf>.

⁵VA Suicide Prevention Program, *Facts About Veteran Suicide*, July, 2016. Available at https://www.va.gov/opa/publications/factsheets/Suicide_Prevention_FactSheet_New_VA_Stats070616_1400.pdf.

⁶38 C.F.R. § 3.353.

⁷The authority for the VA to refer the names of beneficiaries determined to be incompetent to the FBI for inclusion in the NICS is described in Department of Veterans Affairs, M21–1 Adjudication Procedures Manual, Section III.v.9.B.4.a., http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!/portal/55440000001018/topic/55440000004049/M21-1-Adjudication-Procedures-Manual. The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), also noted in its final rule implementing the NICS under the Brady Act that the inclusion of “mentally incompetent” in the definition of “mental defective” was wholly consistent with the legislative history of the 1968 Gun Control Act (Federal Register, vol. 61, no. 174, September 6, 1996, p. 47095) and that VA correctly interpreted the ATF’s definition of “adjudicated as a mental defective” to include persons determined to be “mentally incompetent” and appointed a fiduciary by the VA (Federal Register, vol. 62, no. 124, June 27, 1997, p. 34634).

Bernardino, CA in December 2015 and Orlando, FL in June 2016, Congress passed the 21st Century Cures Act, which carefully refined, in a bipartisan and bicameral effort, legislation to prevent veterans who pose a danger to themselves and others from obtaining firearms. The 21st Century Cures Act established a fair process to ensure due process for veterans deemed “mentally incompetent” by the VA and appointed a fiduciary. It allows veterans to present evidence from a mental health professional and be represented by counsel at incompetency hearings.⁸

Just three months after the passage of the 21st Century Cures Act, H.R. 1181 would yet again change the standard by requiring the VA to obtain a court determination that the veteran is a danger to self or others before the VA could provide the name of the veteran to the NICS. The language in H.R. 1181(a) states:

“[A] person who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness shall not be considered adjudicated as a mental defective under subsection 17(d)(4) or (g)(4) of section 922 of title 18 without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such person is a danger to himself or herself or others.”⁹

This appears to apply both prospectively and retroactively, as the VA Secretary’s previous adjudication of a veteran’s mental incompetence in compliance with the NICS Improvement Amendments Act of 2007¹⁰ would no longer apply. This would immediately remove over 174,000 records, allowing easy access to firearms for many individuals in crisis and suffering from serious mental illnesses like dementia, schizophrenia, and long-term severe post-traumatic stress disorder (PTSD).

With enactment of the bipartisan 21st Century Cures Act, the VA may not make a determination on the mental capacity of a veteran unless the veteran is provided:

- “(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.”¹¹

This requirement ensures veterans with a mental condition that may require appointment of a fiduciary are given a fair process be-

⁸P.L. 114–255, December 13, 2016; 130 Stat. 1307; codified at 38 U.S.C. § 5501A.

⁹H.R. 1181(a).

¹⁰P.L. 103–159, Section 103(e). To strengthen the Attorney General’s authority to secure from any department or agency of the U.S. government information on persons who are prohibited from possessing or receiving a firearm under federal or state law.

¹¹P.L. 114–255, December 13, 2016; 130 Stat. 1307; codified at 38 U.S.C. § 5501A.

fore that determination is made, and before their names are sent to NICS. Additionally, this process does not remove a veteran's ability to appeal the VA's referral of his or her name to NICS, even after being appointed a fiduciary.

The issue of veterans' suicide is too important to rush through this bill without a hearing or proper time to consider its full implications. We agree that the current practice of information sharing between the VA and NICS may be over inclusive and that alternatives should be explored that would more appropriately balance veterans' Second Amendment rights with ensuring that veterans who pose a danger to themselves or to others do not have access to firearms. However, this bill is not the solution. This bill was not considered through regular order and was rushed to a full committee markup. This gave us only 48 hours to review the legislation. This bill has not received a legislative hearing and has not been marked up in Subcommittee. No discussion, research, or investigation has occurred on the issue subsequent to passage of the 21st Century Cures Act.

This is why we supported an amendment during the full Committee markup that we believe would have given us an opportunity to better study the impact of the 21st Century Cures Act and the VA's existing practices for submitting records of veterans to NICS. The Government Accountability Office would conduct a study to give us better data and information to craft legislation that achieves both goals of protecting veterans in crisis and protecting veterans' Second Amendment rights.

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