



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

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Statement Of

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Subcommittee on Disability Assistance and Memorial Affairs

With Respect To

**“Correcting VA’s Violations of Veterans’ Due Process and Second Amendment Rights”**

Washington, D.C.

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Chairman Luttrell, Ranking Member McGarvey, and members of the subcommittee, 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 testimony regarding this important topic.

The VFW strongly supports protecting the Second Amendment rights of veterans who have fiduciaries assigned by the Department of Veterans Affairs (VA), and ensuring they are not unfairly referred to the National Instant Criminal Background Check System (NICS) without a due process judicial review.

However, underneath this constitutional rights issue lays a process that stakeholders could substantially improve. Conversation with an individual who is a former VA field examiner and current VFW member yielded several actionable suggestions for process improvement based on her experiences. Accordingly, the VFW offers the following recommendations:

1. After initial diagnosis, require a second medical examination to confirm or refute the veteran's competency and assess propensity for causing harm. Not being able to manage one's finances does not necessarily imply a veteran is a danger to self or others, or could not responsibly own and use firearms;
2. Require VA field examiners to operate in two-person teams while conducting interviews in person. To conduct an effective interview, the VA field examiner must meet the veteran in his or her environment. Our VFW comrade informed us that the meeting place could range from a veteran's job site to a home; however, the homes she visited included homeless tent encampments and "skid row" areas of dubious safety. The team construct would enhance the examiners' personal security and encourage in-person interviews in the veteran's environment, aiding the examiners in more accurately assessing well-being and mental health status;
3. Reassess all fiduciary assignments made during the COVID-19 pandemic timeframe. Our VFW comrade informed us that the VA field examiners routinely conducted virtual interviews during that time. While understandable during a public health emergency, a virtual interview made it more difficult, if not impossible, to detect vital verbal and non-verbal cues indicative of either a mental health ailment or other situation that could contribute to a veteran endangering self or others due to the

irresponsible use of firearms;

4. Revise VA letters that inform veterans they require a fiduciary to simply and comprehensively explain the significance of this status and the veteran's appeal rights. Also, VA must send letters in a timely manner so veterans receive initial notification prior to a field interview. Our VFW comrade informed us that she was often the first one to inform the veteran of the relationship between fiduciary assignment, NICS referral, and the resulting prohibition against firearm ownership and purchase. Some veterans reacted angrily when they realized the loss of their Second Amendment rights. In one case, a veteran placed a firearm on the table between them during the interview in an attempt to intimidate the VA field examiner, thus putting her in a potentially dangerous situation while merely doing her job; and
5. Require a judicial review prior to NICS referral to guarantee due process before infringing on veterans' Second Amendment rights.

## Background

VA administers a fiduciary program for veterans who cannot manage their VA benefits for several reasons. One cause is mental incompetence, which is defined in 38 CFR 3.353 as, "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." VA bases its incompetency determinations on medical documentation from a variety of sources, such as a medical provider who conducted a routine, incidental medical or mental health examination; a compensation and pension medical examiner in the course of a veteran's application for VA disability compensation; or another VA official who determines that the veteran is incompetent and requires a fiduciary. After initial determination, VA will inform the veteran of its proposed finding of incompetency and initiate the fiduciary assignment process. As part of that process, a VA field examiner will interview the veteran to assist in assigning an appropriate fiduciary. Currently, VA does not order any additional medical or mental health examinations to determine the veteran's propensity for self-harm or harm to others.

Both the Gun Control Act of 1968 (Public Law 90-618) and the Brady Handgun Violence Prevention Act (Public Law 103-159) prohibit a person "adjudicated as a mental defective or who has been committed to a mental institution" from possessing or purchasing a firearm, though neither law defines "adjudicated as a mental defective." However, in its 1997 rulemaking to implement the Brady Act, the Bureau of Alcohol, Tobacco, Firearms and

Explosives (ATF) clarified that adjudicated as a mental defective occurs “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.” In its comments pertaining to this rulemaking, VA interpreted “adjudicated as a mental defective” as a veteran that VA would assess as incompetent under 38 CFR 3.353. This regulation states that a mentally incompetent person is one who, because of injury or disease, lacks the mental capacity to contract or manage his or her own affairs. ATF agreed with VA’s interpretation and commented that the inclusion of the term “mentally incompetent” in the definition of “mental defective” is consistent with the legislative history of the Gun Control Act.

The Brady Act also mandated the creation of the NICS — a name check system managed by the Federal Bureau of Investigation (FBI) that licensed firearms dealers use to confirm a prospective firearms buyer’s qualifications to purchase firearms or ammunition. In compliance with the Brady Act, VA refers the names of veterans with fiduciaries to NICS since VA categorizes these veterans as mentally incompetent. As previously stated, VA requires neither additional medical examinations nor a judicial review to determine the veteran’s propensity to harm self or others prior to NICS referral. Veterans may appeal VA’s decision, though few actually do for undetermined reasons. Of note, according to a July 2023 Congressional Research Service report titled Gun Control, Veterans’ Benefits, and Mental Incompetency Determinations, of the 135 appeals filed in fiscal year 2022, VA data indicate only 24 successful appeals. Our VFW comrade’s personal experience corroborates this statistic. Because of her diligence and experience with the appeal process, she successfully halted referral to NICS for some veterans she assisted. However, none of them successfully appealed their NICS referrals.

In accordance with the NICS Improvement Amendments Act of 2007 (Public Law 110-180) all federal agencies that hold records on people prohibited from possessing or purchasing firearms must refer these records to the FBI for inclusion in NICS. Some of these prohibitions are based upon findings of “mental incompetency” made during certain federal benefit claims processes. For instance, in December 2016, the Social Security Administration (SSA) published its final rule to implement applicable provisions of the law. Under this rule, SSA would refer to NICS its disability beneficiaries for whom it appointed a “representative payee” to manage day-to-day affairs and whose disability could be tied to a mental impairment. However, in February 2017, the House of Representatives passed a Congressional Review Act disapproval resolution that was signed by President Trump

overturning this rule.

Currently, VA is the only federal department that makes substantial NICS referrals, though other agencies provide similar disability and other financial benefits. In this context, veterans could consider that existing VA procedures are both inappropriate and contradictory to the law. Veterans deserve due process when it comes to the potential removal of their constitutional rights.

## **Conclusion**

Because of the somewhat subjective VA incompetency determination process and related loss of Second Amendment rights, some veterans refuse to use VA health care for fear of inadvertently making a disqualifying statement or disclosing a temporary disabling condition that could lead to NICS referral. This stigma unnecessarily deprives veterans of their earned benefits and could compromise their physical and mental health. However, a process that includes additional medical screening and a judicial review prior to NICS assignment could assure veterans of unconditional medical and mental health care without jeopardizing their constitutional rights.

Chairman Luttrell and Ranking Member McGarvey, this concludes my testimony. I am prepared to take any questions you or members of the subcommittee 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 2025, 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.