

Testimony submitted by Jeffrey Swanson, PhD and Richard Bonnie, LLB¹

Subcommittee on Disability Assistance and Memorial Affairs, Hearing
June 24, 2015, H.R.2001 - Veterans 2nd Amendment Protection Act

We thank the Committee for this opportunity to submit testimony
regarding H.R.2001: Veterans 2nd Amendment Protection Act.

The Veterans 2nd Amendment Protection Act (H.R. 2001) addresses an
important concern of fairness in a policy that is intended to protect
veterans but may infringe their rights without sufficient due process.
The policy in question is VA's current practice of reporting to the
FBI's National Instant Criminal Background Check System (NICS) the
names of veterans who are assigned a fiduciary to assist the veteran
in managing their benefit funds. What is controversial about this is
that VA decides, in a rather opaque administrative procedure, who gets
a "fiduciary" --and thus, indirectly, who is put into NICS--without
assessing whether a financially-challenged veteran is at risk of harm
to self or others. This decision occurs without 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.

¹ Jeffrey Swanson, PhD, is Professor in Psychiatry and Behavioral Sciences at Duke University School of Medicine and also works part time as a research scientist under contract with the Durham VA Medical Center in Durham, NC. Richard Bonnie, LLB, is Harrison Foundation Professor of Law and Medicine and Director of the Institute of Law, Psychiatry and Public Policy at the University of Virginia. The opinions expressed in this testimony are Dr. Swanson's and Professor Bonnie's and do not necessarily reflect VA policy.

Over the past several years, VA has reported the names of about 100,000² "incompetent beneficiaries" to the NICS--the database that licensed gun dealers query to determine whether people trying to buy a gun can legally do so. The proposed law, H.R. 2001, would remove these veterans' names from NICS and would uncouple the loss of gun rights from routine assignment of VA fiduciaries in the future. Would such changes be good or bad for veterans, or for the public? Our testimony offers some background information and research evidence to help legislators evaluate VA's fiduciary/gun-restriction policy and consider the possible advantages and drawbacks of rescinding it.

The Department of Veterans Affairs did not invent the idea of removing gun rights from people found incompetent to manage their money; the policy was apparently initiated to implement the 1968 federal Gun Control Act,³ which banned the possession of firearms by certain categories of persons assumed to be dangerous, including anyone "*adjudicated as a mental defective.*" The archaic phrase gives offense to modern ears and lacks clinical meaning, but the Department of Justice (DOJ)⁴ has defined it specifically to include anyone who "*lacks the mental capacity to contract or manage his or her own affairs*" as determined by some lawful authority. According to current VA procedure, military veterans fall under this broad gun-disqualifying

² Unpublished communication from Veterans Benefits Administration (VBA) to Congressional office, 2015.

³ USA. Gun Control Act of 1968, Public Law 90-618, Title 18, United States Code - Firearms;Chapter 44 (Section 101). Washington DC: Congress of the United States;1968.

⁴ Code of Federal Regulations, Title 27, Chapter II, Subchapter B, Part 478, Subpart B, Section 478.11

definition whenever the VA finds them to be financially incompetent and in need of a third-party "fiduciary" to manage VA benefit funds.⁵

VA's assignment of fiduciaries is made through an administrative process within the Veterans Benefits Administration (VBA), and without the requirement of either a formal evaluation of decision-making capacity by a healthcare professional or a genuine opportunity for a fair hearing for *adjudicating* the question of financial capacity as defined in the DOJ regulations.⁶ These strong due process objections to the VA's policy are clearly the main concern underlying H.R. 2001. The argument is mainly about procedure, and we have serious doubts about whether VA's current way of assigning fiduciaries actually meets the definition of "*adjudicated as a mental defective*" under the Gun Control Act. But it is worth asking whether this procedurally flawed policy is also substantively flawed. Is there a public-safety rationale for attaching gun rights to the fiduciary standard? What do we know about the relationship between the *ability* to manage money and *risk* of harm to self or others? Is there even a connection?

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.⁷ In a nationally

⁵ NICS Improvement Amendments Act of 2007 (P.L. 110-180)

⁶ Wilder CM, Elbogen E, Moser L (2015). Fiduciary services for veterans with psychiatric disabilities. *Federal Practitioner* 32(1), 12-19.

⁷ Elbogen EB, Johnson SC, Wagner HR, Newton VM, Beckham JC (2012). Financial well-being and postdeployment adjustment among Iraq and Afghanistan War veterans. *Military Medicine* 177(6), 669-675.

representative random sample of 1,388 separated veterans and reservists from the era of our recent wars, participants were tested on basic money management skills and also queried about violence and suicidal behavior and thoughts. Veterans who scored poorly on financial management abilities were about twice as likely to report serious acts of violence, arrest, suicidal behavior, and use of illicit drugs, compared to those with good money management skills. These differences in relative risk associated with financial incapacity were statistically significant, even though the majority of veterans with financial incapacity were not violent or suicidal. Other research, on civilians with psychiatric disabilities who were found incompetent to manage their Supplemental Security Income (SSI) benefits, found that assignment of a family member as a "representative payee" was significantly associated with increased risk of violent acts by the incompetent beneficiary against family members.⁸

Does the fiduciary gun-restriction policy, as it stands, effectively prevent firearm-related violence and suicide among veterans? The full answer to that question is unknown, but the population impact of the policy is inherently limited by the very small proportion of at-risk individuals that it affects, considering the entire veteran population of approximately 22 million. There are undoubtedly better and more efficient, effective, comprehensive, and carefully-tailored ways to

⁸ Elbogen, EB, Swanson, JW, Swartz, MS, Van Dorn, R (2005). Family representative payeeship and violence risk in severe mental illness. *Law & Human Behavior* 29, 563-574.

keep guns out of the hands of dangerous people⁹ than reporting a relatively small number of putatively financially incompetent veteran beneficiaries to the NICS.

But what about the 100,000 veterans who are already in NICS because they were assigned a fiduciary? What are the implications, for them and their families, of automatically restoring their gun rights without any case-by-case review? Unfortunately, there is little information publically available about the population of incompetent veterans who have already been reported to the NICS. However, we do know something about the distribution of psychiatric diagnoses of veterans in NICS, which are typically the diagnoses for which the veterans are receiving VA benefits: approximately 20,000 of the group--1 in 5 of those in NICS--have a diagnosis of schizophrenia or other psychotic illness, and about half of those have a "paranoid type" of schizophrenia, which is typified by delusions of persecution and threat from others.¹⁰

Do these mental health conditions significantly elevate the risk of violence and suicide and thereby justify legal restrictions on gun access? Sometimes, and it depends. Epidemiological studies of people with schizophrenia in the general community have found that the large majority are *not* violent towards others, but that the subgroup with acute symptoms of excessive and irrational threat perception--such as

⁹ McGinty EE, Frattaroli S, Appelbaum PS, Bonnie RF, Grilley A, Horwitz J, Swanson JW, Webster DW (2014). Using research evidence to reframe the policy debate around mental illness and guns: process and recommendations. *American Journal of Public Health*, 104(11), e22-e26.

¹⁰ Unpublished communication from VBA, *op. cit.*

believing that others are "out to get me"--are significantly more likely to be violent towards others.¹¹

Also in NICS are about 23,000 veterans diagnosed with posttraumatic stress disorder and about 15,000 (mostly older) veterans suffering from dementia with underlying causes ranging from Alzheimer's disease to traumatic brain injury;¹² research literature would suggest that both of these groups of veterans, too, carry some elevated risk of suicide or irresponsible behavior with firearms.^{13,14} Still, all of these diagnostic categories function as nonspecific risk factors for gun violence and suicide; there are many more people with these diagnoses who will *not* harm anyone than who will. That is because violence and suicide are caused by many interacting factors--mental illness being only one--and people with mental illness may carry other risk and protective factors for dangerous behavior.¹⁵ It is just the *magnitude* of the thing being prevented--death by a gun--that might justify limiting the rights of so many people who would not turn out to be violent in any case.

Civil rights advocates and gun violence prevention experts could each find fault with a policy that infringes the constitutional rights of

¹¹ Swanson JW, Swartz MS, Van Dorn RA, Elbogen EB, Wagner HR, Rosenheck RA, Stroup TS, McEvoy JP, Lieberman JA (2006). A national study of violent behavior in persons with schizophrenia. *Archives of General Psychiatry*, 63, 490-499

¹² Unpublished communication from VBA, *op. cit.*

¹³ Krysinskaa K and Lesterb D (2010). Post-traumatic stress disorder and suicide risk: A systematic review. *Archives of Suicide Research* 14(1), 1-23

¹⁴ Seyfried LS, Kales HC, Ignacio RV, Conwell Y, Valenstein M (2011). Predictors of suicide in patients with dementia. *Alzheimer's and Dementia*, 7(6), 567-573

¹⁵ Swanson JW, McGinty EE, Fazel S, Mays VM (2014). Mental illness and reduction of gun violence and suicide: bringing epidemiologic research to policy. *Annals of Epidemiology*. S1047-2797(14)00147-1

so many while having only modest impact, at best, on gun violence and suicide. Hence, the criticism that animates H.R. 2001: that the VA's fiduciary/gun policy, without due process,¹⁶ precludes access to firearms by people who have not been shown to pose any particular risk of harming anyone. To make matters seem even more unfair, those "incompetent beneficiaries" reported by VA to the NICS have been subjected to different treatment than similarly-situated civilian counterparts. For instance, incompetent Supplemental Security Income (SSI) beneficiaries with "representative payees" assigned by the Social Security Administration do *not* similarly lose gun rights.¹⁷ Further, when states report "incompetent" individuals to NICS, it is because a state court has determined mental incompetency in a formal adjudicatory procedure--one that relies on expert clinical testimony and offers due process protections commensurate with the important rights at stake.

In the end, what would H.R. 2001 accomplish from the veteran's point of view? Mainly, it would mean that VA's appointment of a fiduciary to manage one's VA benefits would no longer be used, by itself, as a predicate for denying the veteran the right to purchase and possess a gun. This would reform the VA's arguably flawed policy going forward. However, the problem addressed by H.R. 2001 is more complicated in two

¹⁶ Flynn-Brown J (2014). 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(3), 521-560

¹⁷ Krouse WJ (2014). Gun control legislation in the 113th Congress. *Congressional Research Service Report* number 7-5700, R42987, www.crs.gov

ways. First, it is necessary for the VA to take appropriate steps to facilitate NICS reporting for veterans receiving mental health care in the VA system who are found by a lawful judicial or administrative authority to pose a danger to themselves or others. For example, the VHA could decide to report to NICS all involuntary commitments to VA hospitals; this would fill a gap created by the current inconsistent NICS-reporting practices of state civil courts and public mental health authorities.

Second, it is necessary to address the fate of the 100,000 veterans who are already in NICS. Some of these veterans are disqualified under other criteria because, for example, they have been involuntarily committed or convicted of a felony or domestic violence misdemeanor, with corresponding additional records in the NICS. However, should the gun rights of all of the remaining veterans in this group be automatically restored by retroactively invalidating the VA's past actions? From the limited available data, it seems likely that automatically restoring all of these individuals' gun rights will provide legal access to firearms for at least some veterans who do, in fact, pose a danger to themselves or others. Therefore, for veterans already in the NICS because of a fiduciary determination by the VA, perhaps some level of systematic review on the question of dangerousness, with due process overseen by a federal court, might provide some needed protection and peace of mind--for the veterans themselves, as well as for their families and communities.