

Veterans' Second Amendment Rights Restoration Act

As of December 2016, 98% of names listed by federal agencies on the mental defective category for the National Criminal Instant Background Check System (NICS) were from the VA.

Under the VA's current practice, when the VA determines that a veteran requires a fiduciary to administer benefit payments, the VA reports that veteran to the NICS.

The VA justifies its practice based on regulations from the 1970s that grant limited authority to determine incompetence only in the context of financial matters, which have nothing to do with owning firearms.

Federal law requires that before a person is reported to the gun ban list, they be determined a "mental defective." The Bureau of Alcohol, Tobacco, and Firearms created a regulation to define what "mental defective" means, which includes, among other requirements, that a person is a danger to self or others or is unable to manage their affairs. The VA has used the second prong – unable to manage their affairs – to justify reporting names to the NICS.

Although the ATF regulations and VA regulations do share some of the same language, the intent and purpose of each are totally different. The VA regulations are designed to appoint a fiduciary while the ATF regulations are designed to regulate firearms. The VA never reaches a finding that a veteran is a danger to self or others.

The Supreme Court has held the Second Amendment to be a fundamental right which requires the federal government to carry the burden to prove a compelling justification exists to deny such a right, such as demonstrating danger to self or others. The VA has not updated its regulations in light of this ruling.

For several reasons, the VA's process is not adequate to protect a fundamental constitutional right. First, the burden of proof is on the veteran, not the government. Second, the standard applied is not whether a veteran is a danger to self or others but rather one based on inability to manage benefit payments. Finally, in order for veterans to remove their name from NICS, they must prove that they are not dangerous – a standard the government is not held to prior to placing their names on NICS.

The Veterans' Second Amendment Rights Restoration Act would require that before the VA reports names to the Department of Justice for eventual placement on the NICS, the VA must first find that a veteran is a danger to self or others, defined for the purposes of this bill to mean "in relation to a person, the person is likely to use, carry, or possess a firearm in a manner dangerous to himself or the public due to mental illness, condition, or disease," and that finding must be done either through an administrative process managed by a board of three former judicial officers or administrative law judges, or through a judicial process. The veteran has the choice of which forum to use. *The veteran is in control.*

Those persons already on the NICS will not be immediately removed from the list but rather will be afforded the same options to undertake the same administrative or judicial route to remove their names from the NICS. If through the administrative or judicial process the government is unable to prove the individual a danger to self or others, that person's name would then be removed from the NICS list. Again, throughout the entire process, the government has the burden of proving a veteran is dangerous.

Procedurally, this legislation sets up a new process whereby the government must prove a veteran is a danger to self or others so that truly dangerous individuals are properly reported to NICS while preserving the constitutional and due process rights of veterans. The reporting process starts when the VA makes a determination that an individual requires a fiduciary to manage benefits. If a fiduciary is assigned, the VA can then review the information before them to determine if there is a reasonable basis that the veteran may be a danger to self or others. After a reasonable basis is found, the VA must inform the veteran of the option to have the matter decided before a board, or through the judicial process. The board, or court, may then determine if the veteran is a danger to self or others, and if so, the VA is then permitted to refer the veteran to the NICS.

The VA can seek a temporary, emergency order if a court finds that the individual is an imminent danger to self or others.

This legislation does three important things:

First, it requires the VA to determine a veteran to be a danger to self or others before reporting to the NICS.

Second, it shifts the burden of proof from the veteran and onto the government.

Third, it restores constitutional due process by requiring an administrative or judicial process before a veteran's name can be reported to the NICS list.