

VETERANS 2ND AMENDMENT PROTECTION ACT

JULY 19, 2013.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MILLER of Florida, from the Committee on Veterans' Affairs, submitted the following

R E P O R T

[To accompany H.R. 602]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 602) 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	5
Committee Consideration	5
Committee Votes	5
Committee Oversight Findings	5
Statement of General Performance Goals and Objectives	5
New Budget Authority, Entitlement Authority, and Tax Expenditures	5
Earmarks and Tax and Tariff Benefits	5
Committee Cost Estimate	6
Congressional Budget Office Estimate	6
Federal Mandates Statement	7
Advisory Committee Statement	7
Statement of Constitutional Authority	7
Applicability to Legislative Branch	7
Statement on Duplication of Federal Programs	7
Disclosure of Directed Rulemaking	7
Section-by-Section Analysis of the Legislation	7
Changes in Existing Law Made by the Bill, as Reported	8

PURPOSE AND SUMMARY

H.R. 602 was introduced on February 8, 2013, by Representative Jeff Miller of Florida. H.R. 602 would amend title 38 to require an order or a finding of a judge, magistrate, or other judicial authority that a person assigned a fiduciary is a danger to himself, herself or others before such a person is adjudicated as a mental defective under Section 922 of title 18, United States Code.

BACKGROUND AND NEED FOR LEGISLATION

Section 1. Short title

The Veterans 2nd Amendment Protection Act

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

Section 2 of H.R. 602 addresses an inequitable penalty that is applied under the guise of federal law solely, and disparately, to veterans who are appointed fiduciaries for management of financial affairs. Specifically, federal laws as relate to the acquiring, possessing, and transporting of firearms have evolved in recent decades, and an improper effect has resulted exclusively to the nation's veterans.

Over 40 years ago, the Federal Gun Control Act of 1968 (GCA), Public Law 90-618, 82 Stat. 1213, and subsequent amendments, established categories of persons who are prohibited from receiving or possessing firearms. Included among the categories is any person who has been "adjudicated as a mental defective or who has been committed to a mental institution." (*Ibid.*, 82 Stat. 1213, 1220). Part 478.11 of title 27, Code of Federal Regulations, defines "adjudicated as a mental defective" as:

(a) 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.

38 C.F.R. § 3.353(a) defines "mental incompetency." 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.

Twenty-five years later, the Brady Handgun Violence Prevention Act of 1993 (Brady Act), Public Law 103-159, 107 Stat. 1536, required the Attorney General to establish a system to assist federally licensed gun dealers in determining whether a gun buyer is prohibited under the GCA from purchasing a firearm. The system developed pursuant to the Brady Act, the National Instant Criminal Background Check System (NICS), is a computerized database operated by the Federal Bureau of Investigation (FBI) NICS Section. The NICS can be queried by gun dealers to determine whether the name of a prospective buyer is on the list and, therefore, legally prohibited from purchasing a firearm.

The Brady Act also required Federal agencies, upon the request of the Attorney General, to submit to the FBI information on persons prohibited from purchasing a firearm. The Attorney General made such a request to VA in 1998. Under a Memorandum of Un-

derstanding entered into between the FBI and VA, VA agreed to make available for inclusion on the NICS database information about VA beneficiaries who are determined to be mentally incompetent on account of their inability to contract or manage their own affairs as determined under 38 C.F.R. § 3.353. Once a determination of incompetency is made under part 3.353, VA appoints a fiduciary for the beneficiary.

The evidence gathered to support a finding of incompetency, under 38 C.F.R. § 3.353, is used to inform a judgment about whether a beneficiary has the capacity “to contract or to manage his or her own affairs, including disbursement of funds without limitation.” There is no current requirement to gather evidence or information regarding whether a beneficiary presents a danger to themselves or others, or whether they should be prohibited from purchasing, possessing, or operating a firearm. Furthermore, although beneficiaries are entitled to a hearing once notified that a fiduciary will be appointed for them, the initial hearing is before VA personnel, not an independent authority.

From the date of the initial 1998 request of the Attorney General, through April, 2013, VA has shared information with NICS on over 143,000 individuals for whom it has appointed a fiduciary. Despite the fact that other agencies, such as the Social Security Administration (SSA), appoint fiduciaries to manage benefit payments for their beneficiaries in a manner similar to VA’s process, a similar reporting to NICS does not occur. VA beneficiaries constitute the overwhelming majority of individuals referred to the FBI by the Federal Government.

The purpose of the VA fiduciary program is to protect veterans who are unable to manage their VA benefits. It is a system designed to assist veterans who are determined unable to manage their finances. Ultimately, the government appoints a third party to assist the veteran beneficiary in financial matters.

The Social Security Administration provides a comparison with its “representative payee” program. According to the Social Security Administration, each legally incompetent adult must be appointed a “representative payee,” or fiduciary, who is responsible for using the beneficiary’s benefits to pay for the current and foreseeable needs of the beneficiary and to properly save any benefits not needed to meet current needs. Again, the government appoints a third party to assist the beneficiary in financial matters.

However, there is a difference in effect of the fiduciary program as applied to a veteran beneficiary as opposed to a Social Security beneficiary; the veteran beneficiary, who served this nation honorably and who is receiving benefits earned, is referred to the Federal Bureau of Investigation and is placed on the NICS list; the Social Security beneficiary is not placed on the NICS list.

H.R. 602 is intended to remedy this disparate treatment and to ensure that there is a specific determination that a veteran is a “danger to himself or herself or others” by a “judge, magistrate, or other judicial authority of competent jurisdiction” before the veteran is determined to have been “adjudicated as a mental defective” under the operation of section 922 of title 38, United States Code.

The Committee believes that a determination that a veteran cannot handle financial affairs is not a determination that they are a

danger to themselves or to the public and hence should be prohibited from purchasing or possessing firearms. Since such a determination implicates a specific right granted under the Constitution, the Committee believes that a specific determination is required.

VA has noted that, under the NICS Improvement Amendments Act of 2007, individuals whom VA has determined to be incompetent can have their firearms rights restored in two ways. VA first notes that a veteran who has been adjudicated by VA as unable to manage his or her own affairs can reopen the issue based on new evidence and have the determination reversed. When this occurs, VA is obligated to notify the Department of Justice to remove the individual's name from the roster of those barred from possessing and purchasing firearms. However, a veteran may very well need assistance with finances and it may be in the veteran's best interest to maintain a fiduciary for that purpose.

Again, the Committee finds that a determination of incompetency regarding financial matters is not a finding of incompetence in all aspects of a veterans' life, although this is the manner in which current law and regulations operate. The Committee believes that this approach is overly broad and not narrowly tailored to address specific concerns that would merit a denial of rights accorded under the Constitution.

Next, VA states that even if a veteran remains adjudicated incompetent by VA for purposes of handling his or her own finances, he or she is entitled to petition VA to have firearms rights restored on the basis that the individual poses no threat to public safety. This is also an unacceptable remedy for several reasons. First, this appellate hearing is held before VA personnel and not before an independent authority. Second, the practical implication of this structure is the immediate abridgement of a veteran's constitutional right; then, the veteran is forced to appeal a matter that was never decided in the first instance, namely whether the veteran is a threat to public or personal safety. As of April, 2013, with over 143,000 subject veterans, VA has granted only seven requests for relief from NICS reporting. This can hardly be advertised as an effective means to safeguard veterans' constitutional rights.

H.R. 602 prohibits disparate treatment of veterans by requiring a standard used elsewhere in the Federal government, such as the fiduciary program conducted by the Social Security Administration.

HEARINGS

On April 16, 2013, the Subcommittee on Disability Assistance and Memorial Affairs conducted a legislative hearing on various bills introduced during the 113th Congress, including H.R. 602. The following witnesses testified at the hearing:

The Honorable Bill Johnson, U.S. House of Representatives; The Honorable Chellie Pingree, U.S. House of Representatives; The Honorable Timothy Walz, U.S. House of Representatives; Mr. Jeff Hall, Assistant National Legislative Director, Disabled American Veterans; Mr. Raymond Kelley, Director of National Legislative Service, Veterans of Foreign Wars; Colonel Robert F. Norton, USA (Ret.), Deputy Director of Government Relations, Military Officers Association of America; Heather Ansley, Esq., MSW, Vice President of Veterans Policy, VetsFirst, a program of United Spinal Association; Mr. Michael D. Murphy, Executive Director, National Associa-

tion of County Veterans Service Officers; Mr. Richard Hipolit, Assistant General Counsel, U.S. Department of Veterans Affairs; Mr. David R. McLenachen, Director, Pension and Fiduciary Service, U.S. Department of Veterans Affairs, accompanied by Ms. Mary Ann Flynn, Deputy Director, Policy and Procedures, Compensation Service, U.S. Department of Veterans Affairs. The following groups submitted statements for the record: The American Legion; Iraq and Afghanistan Veterans of America; National Organization of Veterans Advocates; and Wounded Warrior Project.

SUBCOMMITTEE CONSIDERATION

The Subcommittee on Disability Assistance and Memorial Affairs did not consider H.R. 602 in an open markup session.

COMMITTEE CONSIDERATION

On May 8, 2013, the full Committee met in an open markup session, a quorum being present, and ordered H.R. 602 reported favorably to the House of Representatives, by voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto. There were no recorded votes taken on amendments or in connection with ordering H.R. 602 reported to the full House. A motion by Representative Doug Lamborn of Colorado to order H.R. 602 reported favorably to the full House was agreed to by voice vote.

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 reflected in the descriptive portions of this report.

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. 602 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. 602 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. 602 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, May 13, 2013.

Hon. JEFF MILLER,
*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. 602, 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,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 602—Veterans 2nd Amendment Protection Act

H.R. 602 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. 602 would have no significant budgetary impact.

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, it is required to provide that information to the Department of Justice (DOJ). Such individuals are then added to the list of those prohibited from purchasing or possessing firearms. Under H.R. 602, 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 impact on VA's workload.

Enacting H.R. 602 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 602 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 Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates regarding H.R. 602 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. 602.

STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to Article I, section 8 of the United States Constitution, the reported bill 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 the legislation 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 section 3(j) of H. Res. 5, 113th Cong. (2013), the Committee finds that no provision of H.R.602, the "Veterans 2nd Amendment Protection Act," 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(k) of H. Res. 5, 113th Cong. (2013), the Committee estimates that H.R. 602 does not require any directed rule makings.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section provides the short title of H.R. 602 as the "Veterans 2nd Amendment Protection Act."

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

Section 2(a) would provide that, in any case arising out of the administration by the Secretary of laws and benefits under title 38, 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, as pertain to acquiring, possessing, or transporting a firearm or ammunition, 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 make a clerical amendment to the table of sections at the beginning of Chapter 55 of title 38.

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

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PART IV—GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 55—MINORS, INCOMPETENTS, AND OTHER WARDS

Sec.
5501. Commitment actions.

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5511. *Conditions for treatment of certain persons as adjudicated mentally incompetent for certain purposes.*

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§ 5511. *Conditions for treatment of certain persons as adjudicated mentally incompetent for certain purposes*

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.

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