

Calendar No. 78

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| 111th Congress } <i>1st Session</i> } | SENATE | { REPORT 111-27 |
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VETERANS' 2ND AMENDMENT PROTECTION ACT

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JUNE 16, 2009.—Ordered to be printed
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Mr. AKAKA, from the Committee on Veterans' Affairs,
submitted the following

R E P O R T

[To accompany S. 669]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs (hereinafter, "Committee"), to which was referred the bill (S. 669) 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. The bill will amend the criteria used by the Department of Veterans Affairs (hereinafter, "VA") in reporting names of VA beneficiaries to the Federal Bureau of Investigation (hereinafter, "FBI") for entry into the National Instant Criminal Background Check System (hereinafter, "NICS") so that VA beneficiaries who are found in need of a fiduciary to manage their VA benefit payments would no longer be included in the NICS unless a judge, magistrate or other judicial authority determines that they are a danger to themselves or others. The Committee reports favorably thereon, and recommends that the bill do pass.

INTRODUCTION

On March 23, 2009, Committee Ranking Minority Member Richard Burr introduced S. 669, which would amend the criteria used by VA in reporting names of VA beneficiaries to the FBI for entry into the NICS. Committee Members Jim Webb, Roger F. Wicker, and Lindsey Graham are original cosponsors, as are Senators Tom Coburn, Mike Crapo, John Ensign, James M. Inhofe, Pat Roberts, David Vitter, Thad Cochran, Jim DeMint, Michael B. Enzi, Chuck Grassley, Lisa Murkowski, and John Thune. The bill was referred to the Committee.

COMMITTEE HEARING

On April 22, 2009, the Committee held a hearing on legislation pending before the Committee at which testimony on S. 669, among other bills, was offered by: Dr. Gerald M. Cross, Principal Deputy Under Secretary for Health, Department of Veterans Affairs; Mr. Adrian Atizado, Assistant National Legislative Director, Disabled American Veterans; Ms. Ammie Hilsabeck, RN, American Federation of Government Employees; Ms. Hilda Heady, Former President, National Rural Health Association; Mr. Ralph Ibson, Health Policy Senior Fellow, Wounded Warrior Project; and Mr. Blake Ortner, Senior Associate Legislative Director, Paralyzed Veterans of America.

COMMITTEE MEETING

On May 21, 2009, the Committee met in open session to consider legislation pending before the Committee. Among the measures so considered was S. 669. The Committee voted, without dissent, to report favorably S. 669 to the Senate.

SUMMARY OF THE COMMITTEE BILL AS REPORTED

The Committee bill would clarify the conditions under which VA beneficiaries may be treated as adjudicated mentally defective for purposes of reporting their names to the FBI for entry into the NICS.

Background. The Federal Gun Control Act of 1968 (hereinafter, "GCA"), Public Law 90-618, 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." Part 478.11 of title 27, Code of Federal Regulations, defines the meaning of the phrase "adjudicated as a mental defective" as follows:

(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.

The Brady Handgun Violence Prevention Act of 1993 (hereinafter, the "Brady Act"), Public Law 103-159, 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, NICS, is a computerized database operated by the 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 requires 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 Understanding 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 incom-

petent on account of their inability to contract or manage their own affairs pursuant to part 3.353 of title 38, Code of Federal Regulations. Determinations of incompetency under part 3.353 result in an appointment of a fiduciary.

The evidence gathered to support a finding of incompetency, under part 3.353 of VA's regulations, is used to inform a judgment about whether a beneficiary is capable of managing their VA benefit payments. No evidence is gathered as part of this process to inform a judgment about 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 it is proposed they will be determined incompetent, the initial hearing is before VA personnel, not an independent authority.

From the date of the initial request of the Attorney General through October, 2007, VA has shared information with NICS on over 116,000 individuals for whom it has appointed a fiduciary. VA was unable to provide the Committee with updated information about how many additional names have been added or removed from NICS since October 2007. Despite the fact that other agencies, such as the Social Security Administration, appoint fiduciaries to manage benefit payments for their beneficiaries in a manner similar to VA's process, VA beneficiaries constitute the overwhelming majority of individuals referred to the FBI by the Federal government.

U.S. States and territories may also submit information to the NICS about individuals who have been adjudicated mentally defective under the GCA. In total, 435,520 names have been submitted as of April 30, 2008, although only eight states are responsible for 99.5 percent of the submissions. California, Virginia, and Michigan alone have sent 87 percent of the total. A quick survey of the process used by some states to submit the names of individuals to the NICS is illustrative of the variation involved. For instance, in Michigan a court must enter an order declaring someone a mental defective or incompetent. In Texas, the NICS process is triggered after a criminal court reports incompetency. California sends information to the NICS on those who have been involuntarily committed to a mental institution, afforded a hearing, and who are held for a 3-day period at a mental institution.

The Committee is concerned that the Justice Departments of both the prior Administration (in connection with official views on a substantively similar bill considered by the Committee during the 110th Congress) and the current Administration did not respond to official requests from Chairman Akaka for views on the Veterans' 2nd Amendment Protection Act. Such views would have been helpful to the Committee's understanding of the impact the legislation may have. The Committee encourages the Department of Justice to provide the requested views as soon as possible so that the full Senate may have the benefit of the Administration's opinion.

Committee Bill. S. 669 would amend Chapter 55 of title 38 by adding a new section, to clarify that in any case arising out of VA's administration of benefits under title 38, a VA beneficiary who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness, shall not be considered adjudicated as a mental defective under the GCA without the order

or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such individual is a danger to him- or herself or others.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the Committee, based on information supplied by the CBO, estimates that enactment of the Committee bill would, relative to current law, have no significant budgetary impact. Enactment of the Committee bill would not affect the budget of state, local, or tribal governments.

The cost estimate provided by CBO follows:

CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 16, 2009.

Hon. DANIEL K. AKAKA,
Chairman,
Committee on Veterans' Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S.669, 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,
Director.

Enclosure

S. 669, Veterans 2nd Amendment Protection Act

S. 669 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 S. 669 would have no significant budgetary impact.

Under current law, the Department of Justice (DOJ) considers individuals who are found to be a danger to themselves or others as mentally defective and includes those names in databases managed by the Federal Bureau of Investigation and the Federal Bureau of Alcohol, Tobacco, and Firearms. Once the names are included in the databases, a background check conducted through the National Instant Criminal Background Check System will identify those individuals as being prohibited from purchasing firearms.

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 DOJ. Such individuals are then added to the list of those prohibited from purchasing or possessing firearms.

Under S. 669, veterans would have to be determined by judicial authority to be dangerous before VA would be required to report them to DOJ.

S. 669 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.

REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee on Veterans' Affairs has made an evaluation of the regulatory impact that would be incurred in carrying out the Committee bill. The Committee finds that S. 669 would not entail any regulation of individuals or businesses or result in any impact on the personal privacy of any individuals and that the paperwork resulting from enactment would be minimal.

TABULATION OF VOTES CAST IN COMMITTEE

In compliance with paragraph 7 of rule XXVI of the Standing Rules of the Senate, the following is a tabulation of votes cast in person or by proxy by Members of the Committee on Veterans' Affairs at its May 21, 2009, meeting. On that date, the Committee considered and ordered reported S. 669, a bill providing that veterans who are found in need of a fiduciary to handle their VA benefits will no longer be included in the NICS unless a judge, magistrate or other judicial authority determines that they are a danger to themselves or others. The Committee bill was agreed to by a vote of 14 to 0.

| Yeas | Senator | Nays |
|--------------|---------------------|------|
| X (by proxy) | Mr. Rockefeller | |
| X | Mrs. Murray | |
| X (by proxy) | Mr. Sanders | |
| X | Mr. Brown | |
| X | Mr. Webb | |
| X | Mr. Tester | |
| X | Mr. Begich | |
| X | Mr. Burr | |
| X (by proxy) | Mr. Specter | |
| X | Mr. Burr | |
| X | Mr. Isakson | |
| X (by proxy) | Mr. Wicker | |
| X | Mr. Johanns | |
| | Mr. Graham | |
| X | Mr. Akaka, Chairman | |
| 14 | TALLY | 0 |

AGENCY REPORT

On April 22, 2009, Gerald M. Cross, M.D., FAPP, the then-Principal Deputy Under Secretary for Health, Department of Veterans Affairs, appeared before the Committee on Veterans' Affairs and submitted testimony on, among other things, S. 669. Excerpts from this statement are reprinted below:

STATEMENT OF DR. GERALD M. CROSS, PRINCIPAL
UNDER SECRETARY FOR HEALTH, DEPARTMENT
OF VETERANS AFFAIRS

Good Afternoon Mr. Chairman and Members of the Committee: Thank you for inviting me here today to present the Administration's views on a number of bills that would affect Department of Veterans Affairs (VA) programs and services. With me today are Walter A. Hall, Assistant General Counsel and Joleen Clark, Chief Workforce Management and Consulting Officer for VHA.

* * * * *

S. 669 would clarify the conditions under which certain persons may be treated as adjudicated mentally incompetent for certain purposes. Pursuant to section 103(e)(1) of the Brady Handgun Violence Prevention Act (P. L. 103-159), VA is required to provide the Department of Justice (DOJ) with information concerning individuals who, due to a determination by VA, are prohibited from purchasing or possessing firearms under the standards imposed by 18 U.S.C. § 922(d)(4) and (g)(4), which prohibits the purchase or possession of firearms by any person "adjudicated as a mental defective." Under existing DOJ regulations, the phrase "adjudicated as a mental defective" includes persons found to be a danger to themselves or others and persons found to lack the mental capacity to manage their own affairs. Pursuant to those requirements, VA's Veterans Benefits Administration (VBA) currently provides DOJ with information on persons adjudicated by VA under 38 C.F.R. § 3.353, as lacking the mental capacity to contract or manage their own affairs. This information is then included in databases managed by DOJ's Federal Bureau of Investigation and Bureau of Alcohol Tobacco and Firearms, and serves to prevent, through the National Instant Criminal Background Check System, prohibited individuals from purchasing firearms.

S. 669 would provide that a person VA finds to be mentally incapacitated, mentally incompetent, or experiencing an extended loss of consciousness "shall not be considered adjudicated as a mental defective" for purposes of 18 U.S.C. § 922(d)(4) and (g)(4), unless a "judge, magistrate, or other judicial authority of competent jurisdiction" concludes that the individual is a danger to himself or herself or to others." This amendment would revise the reporting requirements contained in title 18 of the United States Code, by adding additional prerequisites to the reporting by VA to DOJ, of information pertaining to persons VA adjudicates as incompetent. VA takes no position on this bill at this point as the Administration is still working with the Department of Justice to formulate views.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Committee bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 38. VETERANS' BENEFITS

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PART I. GENERAL PROVISIONS

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PART IV. GENERAL ADMINISTRATIVE PROVISIONS

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CHAPTER 51. CLAIMS, EFFECTIVE DATES, AND PAYMENTS

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CHAPTER 55. MINORS, INCOMPETENTS, AND OTHER WARDS

Sec.

5501. Commitment actions.

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5510. Annual report.

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

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SEC. 5501. COMMITMENT ACTIONS.

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SEC. 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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