

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?

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Introduction

Over the past decade, the U.S. Department of Veterans Affairs (“VA”) quietly reported hundreds of thousands of veterans¹ to the National Instant Criminal Background Check System.² As of June 1, 2012, there were 153,298 names on the list with a shocking 99.3% of them from the VA.³ Placement on the list prevents veterans from obtaining firearms from federal firearms licensees, effectively precluding exercise of the fundamental right to own a firearm. Adding insult to injury, placement on the list not only results in a

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1. The standard employed applies not only to veterans, but also to their beneficiaries who receive VA benefits. Throughout this Article “veterans, or their beneficiary” will be referred to as “veterans.”

2. The National Instant Criminal Background Check System is a national gun ban list, which is discussed in more depth in subsequent paragraphs and is hereinafter referred to as “NICS” or “gun ban list.”

3. WILLIAM J. KROUSE, CONG. RESEARCH SERV., R42987, GUN CONTROL PROPOSALS IN THE 113TH CONGRESS: UNIVERSAL BACKGROUND CHECKS, GUN TRAFFICKING, AND MILITARY STYLE FIREARMS 23 (2013).

denial of the constitutional right to firearms but also places veterans in the same category as convicted criminals.⁴

The process by which the VA adds veterans to the gun ban list is highly unusual and illegal for one simple reason: the VA overreports veterans to the list. Once it determines that a veteran requires a fiduciary to administer benefit payments, the VA automatically reports that veteran to the gun ban list, consequently denying his or her right to possess and own firearms. The VA attempts to justify its actions by relying on a single federal regulation, 38 C.F.R. § 3.353, which grants *limited* authority to determine incompetence in the context of financial incompetence—i.e., whether or not the veteran can adequately administer benefit payments.⁵ The regulation's core purpose is limited to appointing a fiduciary for financial purposes and is not designed to deny the right to possess or own firearms.⁶ Yet, the VA irrationally assumes that a veteran who cannot properly manage VA payments is a danger to public safety and is incapable of adequately managing a firearm, thereby justifying adding the veteran's name to the gun ban list. Not only is the VA intentionally

4. The restrictions are imposed under the authority of 18 U.S.C. § 922(g), which also restricts firearms for convicted felons.

5. See 38 C.F.R. § 3.353(b)(1) (2014) ("Rating agencies have sole authority to make official determinations of competency and incompetency for purposes of: insurance (38 U.S.C. 1922) and, subject to §13.56 of this chapter, disbursement of benefits."). See also *id.* § 3.353(b)(3) ("[If a manager] develops evidence indicating that the beneficiary may be capable of administering the funds payable without limitation, he or she will refer that evidence."); Letter from K. Kalama, Veterans Service Manager, Department of Veterans Affairs, Portland Regional Office, at 2 (Dec. 20, 2012) (on file with author) ("You must send us medical evidence . . . that says you are able to handle your own financial affairs . . . if you believe you are able to handle your VA benefits without anyone's help."). See also, Letter from P. Zondervan, Veterans Service Manager, Department of Veterans Affairs, San Diego Regional Office, at 1 (Feb. 26, 2014) (on file with author) ("We propose to rate you incompetent for VA purposes. This means a fiduciary may be appointed to help manage your VA benefits.").

6. Every part of the process is designed around a fiduciary appointment. See 38 C.F.R. §13.56 (2014) (direct payment rules for appointed fiduciaries); 38 U.S.C. § 5502 (2005) ("Payments to and supervision of fiduciaries."); 38 U.S.C. § 5507 (2005) ("Inquiry, investigations, and qualifications of fiduciaries."). See also KROUSE, *supra* note 3, at 27. See also M21-1MR Part 3, General Claims Process, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR3.asp (Scroll down to "Subpart IV – General Rating Process;" scroll down to "Chapter 8 – Competency, Due Process and Protected Ratings;" click on "Section A" document; scroll down to Topic 2: "Considering Competency While Evaluating Evidence."), at 8-A-4 and 8-A-5 (2012) (providing for a "Step 4" (final stage) in the process of determining incompetency and stating a Veterans Service Representative "establishes EP 290 to control the appointment of a fiduciary, and prepares VA Form 21-592, *Request for Appointment of a Fiduciary, Custodian, or Guardian*, for use by the fiduciary activity").

misinterpreting and misapplying existing federal firearm restrictions, it is unconstitutionally applying these federal laws to veterans merely because they cannot manage VA benefits. Thus, without proper legal authority and without affording due process of law, the VA subjects veterans to a broad sweeping firearm ban.⁷ Throughout Supreme Court jurisprudence there does not exist a case on point that allows firearm restrictions to be employed based upon a financial incompetence standard.⁸ Furthermore, in the aftermath of the Supreme Court holding that the Second Amendment is a fundamental right, the constitutionality of the VA's conduct is suspect and worthy of analysis.⁹

In Section II, this Article applies Second Amendment jurisprudence as established in *District of Columbia v. Heller* and *McDonald v. City of Chicago* to evaluate the federal law and regulations the VA relies on to find a veteran incompetent to manage VA benefits. Currently, the VA is conflating two different standards: If it deems a veteran unable to handle his or her financial affairs, it assumes the veteran is a danger to self or others and reports the veteran's name to a gun ban list. Thus, according to the VA, financial incompetence is grounds for firearm restriction. In *Heller*, the Court held that the Second Amendment "guarantee[s] the individual right to possess and carry [firearms] in case of confrontation";¹⁰ and in *McDonald*, the Court established the Second Amendment to be a fundamental right applied equally to the federal government and the states.¹¹ Since firearm possession is a fundamental right, Section II examines the federal laws and regulations addressed herein under strict scrutiny, which requires the VA to prove that the regulation is

7. Kalama, *supra* note 5 ("The evidence indicates that you are not able to handle your VA benefits payments because of a physical or mental condition A determination of incompetence will prohibit you from purchasing, possessing, receiving or transporting a firearm or ammunition. If you knowingly violate any of these prohibitions, you may be fined, imprisoned, or both pursuant to the Brady Handgun Violence Prevention Act.").

8. The most relevant case is *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), which references justified firearms restrictions for felons and the mentally ill—individuals that pose a legitimate risk to the public when in possession of firearms. Furthermore, the VA definition of insanity is not equivalent to "mental incompetence" at issue in this Article. *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 783 F. Supp. 187, 190 (S.D.N.Y. 1992).

9. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010).

10. *Heller*, 554 U.S. at 592.

11. *McDonald*, 130 S. Ct. at 3050.

narrowly tailored to a compelling government interest.¹² This Article takes the position that in order for the VA's absolute gun ban to satisfy this standard, the only credible compelling government interest in the regulation of firearms is public safety, not financial incompetence. In the context of the strict scrutiny standard, this Article will examine the fact that VA does not determine whether a veteran is a danger to self or others to justify regulation.¹³ Because the VA does not complete an analysis to determine if a veteran is a public safety danger, the VA's laws and regulations do not satisfy the strict scrutiny standard; therefore, the VA's regulatory conduct is not narrowly tailored and unconstitutionally infringes on the Second Amendment.¹⁴ Section II concludes by providing examples of less burdensome alternatives, reinforcing the argument that the VA regime is not narrowly tailored.

Section III focuses on Fifth Amendment procedural due process. The *Mathews v. Eldridge* balancing test is applied to the VA's process of determining that a veteran is incompetent to handle benefit payments. In Section III, this Article argues that the standard employed by the VA is arbitrary and does in fact result in discriminatory application (99.3 percent of all names on the gun ban list are from the VA) because the procedural safeguards in place are wholly inadequate to protect the fundamental nature of the Second Amendment. Moreover, procedural due process is violated because

12. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment and dissenting in part) (“[A] government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”); *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (“[S]trict scrutiny will be applied to the deprivation of whatever sort of right we consider ‘fundamental.’”). *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (“As we stated recently in *Flores*, the Fourteenth Amendment forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”) (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)) (internal quotations omitted).

13. The only credible compelling government interest to impose an absolute firearm ban is that a person is a danger to himself or others, i.e., a public safety risk. This Article takes the position that a proper definition encompasses a risk of causing “grievous bodily injury or death upon himself, herself or others.” There may be many mental afflictions that cause someone to be dangerous, however this Article will not discuss the reasons a person may be dangerous. Rather, this Article will focus on the requirement that the VA must determine if an individual is, in fact, dangerous.

14. Adding further color to the strict scrutiny test, it appears that the VA believes that its “compelling government interest” is determining financial incompetence—which is a compelling government interest not found within strict scrutiny jurisprudence.

the veteran is not afforded a proper pre-deprivation hearing to determine if he or she is a public safety danger prior to the imposition of firearm restrictions.

In Section IV, this Article addresses current legislative fixes regarding the VA regulatory regime discussed herein. Both the U.S. House of Representatives and the U.S. Senate introduced the Veterans Second Amendment Protection Act to prevent reporting to the gun ban list unless a veteran is deemed a danger to self or others. But, there are inherent flaws in the legislative language, including the legislation's failure to properly determine what "danger" means. That the House and Senate have filed the same legislation confirms that there is a constitutional problem that requires a fix.

Section V concludes that the VA's gun restriction standard does not fit inside the bounds of current federal gun laws and that, in the context of the Second Amendment, the VA's use of the financial incompetence standard is unconstitutional because it is not narrowly tailored to determine if the veteran is a danger to self or others. In the same vein, procedural due process is likewise violated because there are not proper safeguards in place to protect the fundamental nature of firearm ownership, including the lack of a pre-deprivation hearing.

A. Overview of Existing Firearm-Related Law and Its Application to the U.S. Department of Veterans Affairs

Let us begin by quickly reviewing relevant firearm laws and their interplay with the VA. There are two main statutes that regulate the possession and ownership of firearms: the National Firearms Act of 1934¹⁵ and the Gun Control Act of 1968,¹⁶ as amended.¹⁷ The National Firearms Act made it more difficult for citizens to acquire certain highly lethal firearms, such as machine guns and short-barreled long guns.¹⁸ The Gun Control Act is the core regulatory mechanism designed to regulate the buying and selling of firearms, establishing categories of persons who are prohibited from owning or possessing firearms.¹⁹ The Gun Control Act was amended by the Brady Handgun Violence Prevention Act.²⁰ The amendment required

15. National Firearms Act of 1934, 26 U.S.C. § 5801 (2014).

16. Gun Control Act of 1968, 18 U.S.C. § 921 (2014).

17. KROUSE, *supra* note 3, at 6.

18. *Id.*

19. *See id.* at 8.

20. 18 U.S.C. § 921 (2014).

completed background checks for all unlicensed persons seeking to obtain firearms from federal firearms licensees, and it created the National Instant Criminal Background Check System (“NICS”), otherwise known as the national gun ban list.²¹ The most relevant laws for this Article are the NICS laws and Brady laws, specifically 18 U.S.C. § 922(g).²² The interplay between these provisions is as follows: Section 922(g) restricts individuals deemed “mentally defective” from firearm possession and ownership; the Brady laws created the gun ban list where those ruled “mentally defective” are to be placed; and the NICS laws require federal agencies, such as the VA, to report persons deemed “mentally defective” for placement on said list.²³ The Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) adopted a regulation that defined “mental defective” as

21. KROUSE, *supra* note 3, at 8, 12; Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, § 103(b), 107 Stat. 1536 (1993) (codified in scattered sections of 18 U.S.C.).

22. NICS Improvement Amendments Act of 2007, Pub. L. No. 110–180, 121 Stat. 2559, § 101(a)(4)(C) (2008); Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, § 103(b), 107 Stat. 1536 (1993) (codified in 18 U.S.C. § 922(t) and other scattered sections of 18 U.S.C.); Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1216–1221 (1968) (codified in 18 U.S.C. § 922(g)).

23. *Id.* The Bureau of Alcohol, Tobacco and Firearms (“ATF”), an agency of the U.S. Department of Justice, defines mentally defective as persons “of marked subnormal intelligence, mentally ill, or mentally incompetent AND [sic] are found to be either a danger to themselves or to others as a result of mental disease or illness or because of injury or disease lack the mental capacity to contract or manage their own affairs.” Definitions for the Categories of Persons Prohibited From Receiving Firearms (95R–051P), 61 Fed. Reg. 47095, 47097 (Sept. 6, 1996) (codified at 27 C.F.R. § 478.11). In a subsequent sentence, the regulation clarifies this long-winded definition and determines that the standard does not include these persons “suffering from a mental illness but who are not a danger to themselves.” *Id.* The VA regulation purports to rule on mental issues in the context of managing benefits; but, pursuant to the ATF regulation, the VA is required to also find that the veteran is a danger to him or herself. This requirement is in lockstep with recent Supreme Court findings such as *v. Heller* wherein the Court stated that legitimate firearm restrictions can be employed against dangerous individuals such as felons or the mentally ill. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The VA does not perform an analysis for subnormal intelligence or mental illness. It does purport to determine mental incompetence, but such analysis is only designed to appoint a fiduciary. Likewise, a proper analysis on capacity to contract is not entertained and cannot practically be performed. *See infra* notes 92–93. In addition, in order to take a name off the gun ban list the Attorney General must determine that the person is not a public safety danger. 18 U.S.C. § 925(c) (2003). Accordingly, the defining factor to impose firearm restrictions is whether a person is dangerous, and financial incompetence does not equal danger.

somebody who—among other things—is a danger to himself or others.²⁴

Separate and distinct from these laws and regulations, the VA adopted a regulation in the 1970s that governs the determination of whether veterans are incompetent to handle VA benefit payments, and if found incompetent, appoints them a fiduciary.²⁵ While federal laws and regulations relate generally to mental competence, the VA's regulation omits important findings and never reaches the question of whether a veteran is a danger to himself or others; thus, a veteran determined to be "incompetent" by the VA is not automatically a "mental defective" under the Brady standard.²⁶ As such, the VA need not report veteran names to the gun ban list. However, the VA incorrectly assumes that veterans appointed a fiduciary do, in fact, represent a danger to self or others and satisfy the mental defective standard.²⁷ In its hyper-regulatory effort, the VA is trying to fit a

24. Regulation of individuals "would also not include persons who have been adjudicated to be suffering from a mental illness but who are not a danger to themselves." Definitions for the Categories of Persons Prohibited From Receiving Firearms (95R-051P), 61 Fed. Reg. 47095, 47097 (Sept. 6, 1996). *See also* Definitions for the Categories of Persons Prohibited From Receiving Firearms (95R-051P), 62 Fed. Reg. 34634, 34634 (June 27, 1997) (ATF final rule) (codified at 27 C.F.R. § 478.11). Other definitions apply firearm restrictions to additional categories of individuals such as felons or persons inside mental institutions; however, that is outside the scope of this Article. Furthermore, this Article does not stipulate to the constitutionality of the "mental defective" standard.

25. Determinations of Incompetency and Competency, 36 Fed. Reg. 19020, 19020 (Sept. 25, 1971) (codified at 38 C.F.R. pt. 3). ("These are amendments to an existing regulation which states the criteria and procedures incidental to a Veterans Administration determination that a beneficiary's mental condition is such that a fiduciary should manage his affairs and safeguard his funds."). *See also* Determinations of Incompetency and Competency, 60 Fed. Reg. 55791, 55791 (Nov. 3, 1995) (codified at 38 C.F.R. pt. 3) ("This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning determinations of mental incompetency to make clear that only rating boards are authorized to make determinations of incompetency for purposes of VA benefits and VA insurance.").

26. VA regulation 38 C.F.R. § 3.353 (2014) states: "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." This standard does not remotely touch upon a "danger to self or others" standard.

27. Given the fact that 99.3 percent of the names on the gun ban list are from the VA, we know they are reporting names and are doing so under the alleged cover of the NICS law. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 101(a)(4)(C), 121 Stat. 2559, 2561 (2008) ("If a Federal department or agency under subparagraph (A) has any record of any person demonstrating that the person falls within one of the categories described in subsection (g) or (n) of section 922 of title 18, United States Code, the head of such department or agency shall, not less frequently than quarterly, provide the pertinent information contained in such record to the Attorney General."). *See also* KROUSE, *supra* note 3, at 27.

square peg in a round hole. The VA is misapplying and misinterpreting Brady and NICS provisions resulting in illegal reporting of names to the national gun ban list. It is indisputable that the VA is engaging in such behavior because, in order to be placed on the national gun ban list, a person must be deemed mentally defective and not simply financially incompetent. The VA provides 99.3% of the names on that list.

B. Overview of the Procedural Process by Which a Veteran is Deemed Financially Incompetent

The VA's process to determine mental incompetence is not particularly robust. The VA adjudications depend wholly on an analysis by its employees, specifically a Rating Veteran Service Representative ("rating representative") during the first stage of the process.²⁸ Throughout the process, a face-to-face meeting with a doctor is not required,²⁹ and it is possible for a rating representative to conclude that the existing medical evidence meets the threshold of financial incompetence. A friend or family member can refer a veteran into the VA system out of concern that the veteran is unable to handle his or her financial affairs. VA employees can also "red-flag" a veteran during the course of routine visits to a VA facility when the veteran sees a doctor or when the veteran or any of his or her beneficiaries meet with VA employees.³⁰ In other words, not only will the VA analyze the veteran's competence, but also the competency of a non-veteran beneficiary of VA Benefits, such as a

28. M21-1MR Part 3, General Claims Process, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR3.asp (Scroll down to "Subpart IV – General Rating Process;" scroll down to "Chapter 8 – Competency, Due Process and Protected Ratings;" click on "Section A" document; scroll down to Topic 3: "Process for Making Competency Determinations"), at 8-A-6 and 8-A-7 (2012).

29. The relevant VA regulation, 38 C.F.R. § 3.353 (2014) ("Determinations of incompetency and competency"), and VA guidelines contained in M21-1MR do not require a doctor and patient meeting to determine incompetency.

30. M21-1MR Part 3, General Claims Process, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR3.asp (Scroll down to "Subpart IV – General Rating Process;" scroll down to "Chapter 8 – Competency, Due Process and Protected Ratings;" click on "Section A" document; scroll down to Topic 2: "Considering Competency While Evaluating Evidence"), at 8-A-4 and 8-A-5. On a personal note, I had a client that visited a VA Hospital for treatment due to aggravation of service-connected injuries from a recent car accident. After meeting with a doctor, my client received a call from a VA employee who asked questions about my client's access to firearms. My client was an Operation Iraqi Freedom combat-veteran and was rated 100 percent disabled due to service-connected injuries from war, including 50 percent for Post-Traumatic Stress Disorder.

spouse or child. However, only during meetings with veterans, and non-veteran beneficiaries, are VA employees directed to operate under the rule that financial competency is an “inferred issue.”³¹ The VA’s decision to immediately target veterans while turning a blind eye to nonveteran beneficiaries assumes that veterans are inherently flawed and suspect without basing such a label on any known metric. In essence, the VA is assuming facts not in evidence and is treating similarly situated people (those that receive VA benefits) differently. Such a policy further indicates that the entire process of imposing firearm restrictions is unfairly targeting the veteran population.

The rating representative prepares a rating decision proposing a finding of incompetence after the initial meeting with the veteran, or in the absence of a meeting, with the existent medical evidence.³² The proposal is based on a “clear and convincing” evidence standard that the veteran is “incapable of managing his own affairs, including disbursement of funds without limitation.”³³ The evidentiary standard does not include an analysis determining whether the veteran is a danger to self or others.

In the second stage, a Veterans Service Representative, different from the rating representative in stage one, provides the veteran with a proposed incompetency rating and the opportunity for a hearing to contest the proposal.³⁴ If a request for a hearing is not received within thirty days, the incompetency proposal will stand. During the hearing, the veteran can present evidence to support his or her contention that he or she is competent to manage finances. Also, the veteran may bring an attorney at his or her own cost, or a nonlawyer service representative from a service organization can be provided to represent the veteran free of cost.³⁵ This hearing does not involve any analysis, evidence, or discussion as to whether the veteran is a danger to self or others and the veteran is not informed at any point in the

31. *Id.* (click on “Section A” document; scroll down to Part 2(a) – “Considering the Competency of a Veteran”), at 8–A–4.

32. *Id.* (click on “Section A” document; scroll down to Part 3 – “Process for Making Competency Determinations”), at 8–A–6.

33. *Id.* Note that this standard does not include a capacity to contract, as does 38 C.F.R. § 3.353 (2014) (“Determinations of incompetency and competency”).

34. M21–1MR Part 3, General Claims Process, U.S. DEP’T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR3.asp (Scroll down to “Subpart IV – General Rating Process,” scroll down to “Chapter 8 – Competency, Due Process and Protected Ratings,” click on “Section A” document; scroll down to Topic 3: “Process for Making Competency Determinations”), at 8–A–7.

35. Kalama, *supra* note 5, at 2.

process that he or she is analyzed under that rubric. The sole articulated standard communicated to the veteran is based on financial incompetence.³⁶ In stage three, the rating representative (from stage one) makes a final decision based on the evidence. In stage four, the representative (from stage three) provides notice to the veteran. The entire process is exhausted in the absence of a court order.³⁷

It is not surprising that the VA's process to determine mental incompetence is not particularly engaging or robust. The standard of review is particularly low ("clear and convincing"),³⁸ hearsay is allowed,³⁹ and there are no significant checks nor balances in place to ensure proper adjudication of veterans who are a real risk to public safety.⁴⁰ All of this inadequacy would be palatable if the VA limited the ultimate result to the purpose it was originally designed to serve—appointing fiduciaries to help veterans with their benefits. But, the VA employs a process that results in veterans being stripped of their fundamental rights. When fundamental rights are involved, such as the Second Amendment, greater levels of procedural protections must be afforded. When lesser rights are involved, such as appointing a fiduciary, lower levels of procedural protections can be applied.

Once the veteran is determined incompetent to handle financial payments, the VA communicates the name of the veteran to the U.S. Department of Justice, and the name is placed on the national gun ban list.⁴¹ These reporting requirements are arguably the unconstitutional trigger because once on the list, the named person is

36. *Id.* The letter from VA does not mention the "mental defective" standard the veteran will be surreptitiously held to.

37. *See id.* *See also* 38 C.F.R. § 3.353 (2014).

38. 38 C.F.R. § 3.353(c) creates a clear and convincing standard for evidence ("Unless the medical evidence is clear, convincing and leaves no doubt as to the person's incompetency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities.").

39. Procedural Due Process and Appellate Rights, 38 C.F.R. § 3.103 (2012), provides substantive details about the hearing process and specifically, in section (d) of the regulation, does not institute general federal evidentiary rules, but instead allows for admission of any type of evidence, which reasonably includes hearsay.

40. As discussed throughout this Article, the purpose of the hearing is to determine financial competency, not whether the veteran is a risk to self or others.

41. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(e)(1), 107 Stat. 1536 (1993); NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 101(a)(4)(C), 121 Stat. 2559, 2561 (2008).

effectively prevented from owning or possessing firearms in the U.S.⁴² At some point after the veteran is determined to be financially incompetent, the VA will notify the veteran that he is prohibited from purchasing, possessing, receiving, or transporting a firearm or ammunition. If the veteran knowingly violates any of these prohibitions, he or she may be fined, imprisoned, or both pursuant to the Brady Handgun Violence Prevention Act.⁴³

I. The Second Amendment, as a Fundamental Right, Requires Government Regulation of Firearms to Survive the Strictest of Scrutiny

The Second Amendment was adopted December 15, 1791, but it was not defined as a fundamental right until 2010 in *McDonald v. Chicago*—almost 219 years without a final “say-so” by the Supreme Court.⁴⁴ Prior to *McDonald*, in 2008, the Court heard *District of Columbia v. Heller* and focused its discussion and analysis on the meaning of the Second Amendment, but did not define it as a fundamental right.⁴⁵ *Heller* did, however, answer constitutional questions in relation to the scope of the individual powers contained in the Second Amendment.⁴⁶

In *Heller*, the Court found that the phrase “the right of the people” does not refer to “collective rights, or rights that may be exercised only through participation in some corporate body,” but instead refers to an individual right.⁴⁷ Moreover, the Court differentiated between the “militia” and “the right of the people,” holding that the Second Amendment’s protections extend beyond the militia clause to “all members of the political community.”⁴⁸ The

42. FBI, NICS FACT SHEET, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet> (last visited Mar. 1, 2014). Not all states participate in the gun ban list and they cannot be forced to participate: The federal government cannot force the states to perform work on behalf of the federal government. *Printz v. United States*, 521 U.S. 898, 935 (1997). Instead, the federal government can only incentivize states to participate. *Id.* Once reported to the gun ban list, the veteran is also subject to 18 U.S.C. § 922(g) (2014) (“Unlawful acts”), which applies to interstate commerce firearm transactions. This effectively prevents the veteran from possessing or owning firearms that were transported through interstate commerce.

43. 18 U.S.C. § 924(a)(2) (2006). *See Kalama, supra* note 5.

44. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010).

45. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

46. *Id.*

47. *Id.* at 579.

48. *Id.* at 580–81.

Court further determined that the clause “to keep and bear Arms” is an individual right that “guarantees the individual right to possess and carry weapons in case of confrontation.”⁴⁹ And finally, the Court noted that the individual right to possess and carry weapons in case of confrontation is a right that existed prior to the creation of the Constitution, Bill of Rights, and federal government.⁵⁰ Therefore, the right is inherent in each individual and was not created by the Second Amendment; rather the Second Amendment merely recognized a right already in existence. The *Heller* decision is vital because it not only emphasized the personal nature of the right of self-defense, but also the Second Amendment’s crucial association in restraining the government from inhibiting the exercise of personal defensive actions.

Rather than determining whether the Second Amendment is fundamental, the *Heller* decision focused on the meaning of the text, labeling the Second Amendment as a “right.”⁵¹ In *McDonald*, the Court’s analysis of the Second Amendment concentrated on incorporation under the Fourteenth Amendment. Here, the Court held that the Second Amendment articulated a fundamental right and must be applied equally to the states and federal government.⁵² This decision was seminal for Second Amendment jurisprudence. The court noted *Heller*’s finding that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present” and that “individual self-defense is ‘the central component’ of the

49. *Id.* at 592.

50. *Id.* Writing for the Court, Justice Antonin Scalia noted:

We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it “shall not be infringed.” As we said in *United States v. Cruikshank*, 92 U.S. 542, 553 (1876), “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment [sic] declares that it shall not be infringed.”

Id.

51. *Heller* also did not cast doubt on “long-standing prohibitions” on possession of firearms by individuals that may represent a danger to the public such as felons and the mentally ill. *Heller*, 554 U.S. at 627. Leaving these categories in place fits within the class of individuals meant to be regulated under Brady laws but, as noted throughout this Article, the class of individuals regulated by the VA is not deemed mentally ill or dangerous persons.

52. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

Second Amendment right.”⁵³ The Court strongly emphasized the nature of the Second Amendment, that “[i]t cannot be doubted that the right to bear arms was regarded as a substantive guarantee, not a prohibition that could be ignored so long as the States legislated in an evenhanded manner”⁵⁴ and “[i]n sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”⁵⁵ And, thus, the fundamental nature of the Second Amendment was recognized.

Taking this in lock-step with *Heller*, the Court is protecting a very personal choice of individuals to be armed for the protection of not just themselves, but their families. The right to bear arms is intertwined with the right to defend one’s life. Reduced to its essence, it is a right to entertain measures to ensure survival. An absolute ban on firearms, such as that imposed by the VA, undermines a person’s ability to defend himself and it infringes on the measures that can be taken to defend life; such an infringement must subject the federal government to a very strict test.

Even though the Court held the Second Amendment to be a fundamental right, the Court did not expressly articulate a standard of scrutiny. It arguably did not need to because, generally speaking, all fundamental rights are subject to strict scrutiny—the highest standard of review.⁵⁶ In other words, the government regulation of the fundamental right will be analyzed under strict scrutiny if it substantially burdens the exercise of that fundamental right.⁵⁷ Thus,

53. *Id.* at 3023.

54. *Id.* at 3043–44.

55. *Id.* at 3042.

56. *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment) (“[S]trict scrutiny is the appropriate standard for infringements of fundamental rights.”) (internal citations omitted); *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (“[S]trict scrutiny will be applied to the deprivation of whatever sort of right we consider ‘fundamental.’”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment and dissenting in part) (“[A] government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”).

57. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (concluding that abortion procedure regulations that don’t “impose an undue burden” on the right to an abortion need only have a “rational basis”); *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (“A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”).

the opposite may be true of an incidental burden and a lower burden may trigger a level of review less than strict scrutiny.⁵⁸

There are competing ideas and analyses by a number of academics predicting how the Court will ultimately define the standard of scrutiny and whether an undue burden test will be utilized.⁵⁹ This Article, however, takes the position that the substantial burden test is a proper filter for constitutional analysis. This test is proper because the VA is imposing an absolute ban on firearms. This is similar to the *Heller* case where an absolute ban was in effect and in which the Court stated, “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one’s home and family, would fail constitutional muster.”⁶⁰ In addition, the Court stated that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home” and “the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home”⁶¹ These findings of the Court, and the fact that the Second Amendment is a fundamental right, give reason to believe that absolute gun bans will be analyzed through the lens of strict scrutiny. And when an absolute ban is in place it is, by definition, a substantial burden on the exercise of that particular constitutional right—in this case, the Second Amendment.

58. For a more in-depth analysis about differing standards of review, see Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1179 (1996).

59. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and Research Agenda*, 56 UCLA L. REV. 1443, 1446–47 (2009) (“I argue that the question should not be whether federal or state right-to-bear-arms claims ought to be subject to strict scrutiny, intermediate scrutiny, an undue burden standard, or any other unitary test. . . . [T]here are four different categories of justifications for a restriction on the right to bear arms”: (1) scope; (2) burden; (3) danger reduction; and (4) government as proprietor. “Paying attention to all four of these categories can help identify the proper scope of government authority.”); Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245, 1259 (2009) (“And while lower courts sometimes lament the lack of clarity in *Heller* regarding, say, what the standard of review actually was, few judges seem interested in figuring it out on their own.”).

60. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (internal quotations and citation omitted).

61. *Id.* at 635–36.

A. Based on Existing Regulations, Federal Law, and Relevant Case Law, the U.S. Department of Veterans Affairs Cannot Impose Firearm Restrictions and Is Limited to Determining Financial Incompetence in Order to Appoint a Fiduciary

To properly conclude whether or not government action can constitutionally infringe upon the Second Amendment, the regulatory action must first be distilled to its core, and the purpose and intent of the overall government action must be determined. Then, there must be an understanding of how the government action is applied in a real world setting; in other words, the analysis must not be limited to what the government's original regulatory intention was, but what government is regulating *now*. Once there is an understanding of the government activity, it can then be applied to a constitutional filter—the strict scrutiny standard. This section is the distillation process and provides a primer for Section B, *infra*, where the VA regulatory activity is put through the exacting strict scrutiny test.

The original grant of authority for the VA to promulgate regulations determining incompetence rests in 38 U.S.C. § 501. This statutory provision provides that the Secretary may promulgate “regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws.”⁶² In addition, the provision grants the Secretary authority to promulgate regulations with respect to “the manner and form of adjudications and awards.”⁶³ Thus, section 501's plain language evinces an original intent that the VA's scope of authority to promulgate regulations is limited to imposing conditions on who qualifies for benefits and how those benefits will be administered. In other words, the original grant of authority is squarely based on financial matters and does not allow the VA to make determinations relative to whether the veteran is a danger to self or others. And, most importantly, the grant of authority does not create power to impose restrictions on the Second Amendment.

With section 501 in hand, the VA promulgated 38 C.F.R. § 3.353, “Determinations of Incompetency and Competency.” Incompetency is defined in this regulation as “one who, because of injury or disease, lacks the mental capacity to contract or to manage his or her own

62. 38 C.F.R. § 3.353 contains an authority provision that states the authority to promulgate the regulation arises under 38 U.S.C. § 501(a)(1).

63. 38 U.S.C. § 501(a)(4) (2014).

affairs, including disbursement of funds without limitation.”⁶⁴ The definition of incompetence, as used by the VA, is very narrow and can only be applied to manage insurance or benefit disbursements—it cannot be applied to determine whether the veteran is a risk to self or others.⁶⁵ The Code of Federal Regulations (“C.F.R.”) is clear in its direction and unequivocally states “[r]ating agencies have sole authority to make official determinations of competency and incompetency for purposes of: insurance (38 U.S.C. 1922), and . . . disbursement of benefits.”⁶⁶

To further demonstrate that the VA’s authority is narrowly measured to administration of funds, the C.F.R. also states, “[i]f . . . the Veterans Service Center Manager develops evidence indicating that the beneficiary may be capable of *administering the funds payable* without limitation, he or she will refer that evidence to the rating agency with a statement as to his or her findings.”⁶⁷ The C.F.R. tightly moors authority to financial matters and has always done so. For instance, in 1971 the VA promulgated an amendment to the C.F.R. that made clear that the primary purpose of finding a mental condition is “such that a fiduciary should manage his affairs and safeguard his funds.”⁶⁸ In 1995 another addition to the C.F.R. noted that the VA is linked to a limited authority to “make determinations of incompetency for purposes of VA benefits and VA insurance.”⁶⁹ Furthermore, the letter sent to veterans threatening a finding of financial incompetence explicitly appraises them of the financial standard: “You must send us medical evidence . . . that says you are able to handle your own financial affairs . . . if you believe you are able to handle your VA benefits without anyone’s help.”⁷⁰ And finally, the single case that analyzed the meaning of the C.F.R.

64. 38 C.F.R. § 3.353(a) (2014).

65. *See id.* § 3.353(b)(1).

66. *Id.*

67. *Id.* § 3.353(b)(3) (emphasis added).

68. Determinations of Incompetency and Competency, 36 Fed. Reg. 19020, 19020 (Sept. 25, 1971) (to be codified at 38 C.F.R. pt. 3) (“These are amendments to an existing regulation which states the criteria and procedures incidental to a Veterans Administration determination that a beneficiary’s mental condition is such that a fiduciary should manage his affairs and safeguard his funds.”).

69. Determinations of Incompetency and Competency, 60 Fed. Reg. 55791, 55791 (Nov. 3, 1995) (to be codified at 38 C.F.R. pt. 3) (“This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning determinations of mental incompetency to make clear that only rating boards are authorized to make determinations of incompetency for purposes of VA benefits and VA insurance.”).

70. Kalama, *supra* note 5, at 2.

determined that it was “limited for purposes of insurance and disbursement of benefits.”⁷¹

The plain language of section 501 makes clear that Congress did not intend to give the VA authority to promulgate regulations that allow it to base their adjudications on whether or not the veteran is a danger to self or others. Rather, the law and resulting regulation makes clear that the intent is focused squarely on incompetency adjudications relating to veteran benefit payments—i.e., *financial matters*. This intent is supported by the overall goal of the regulation: to appoint a fiduciary to safeguard funds. Moreover, the regulation that was created with section 501's authority in no way attempts to provide the VA with the legal power to interfere with Second Amendment rights.⁷² Thus, the plain language, judicial interpretation, and overall structure of law limits the VA's power to only determine financial incompetence; it does not provide authority to determine the veteran to be a danger to self or others and has no substantive relation granting any perceived authority to impose firearm restrictions.

B. The Veterans Affairs' Utilization of the Financial Incompetence Standard to Impose Firearm Restrictions Is Not Narrowly Tailored to a Compelling Government Interest and Less Burdensome Alternatives Exist

The strict scrutiny test is the most stringent standard applied to government action. In particular, this stringent test applies to fundamental rights because such rights exist in the upper pantheon of civil society requiring an exacting burden of proof to warrant legal interference. The Second Amendment encompasses not just a fundamental right to a firearm, but is entrenched further into the philosophical underpinnings of our constitutional republic and encapsulates the Framers' intent that each man retains the right of self-defense for himself and his family. With such a personal right at stake, it is no surprise that the Second Amendment as a fundamental right can only be infringed when government action is finely tuned to

71. *In re Estate of Berg*, 783 N.W.2d 831, 834 (S.D. Sup. Ct. 2010).

72. If the government were to argue that the regulation does extend beyond mere financial incompetence, then another constitutional issue arises, namely whether there was proper rulemaking authority for the regulation in the first place. The original statutory provision, 38 U.S.C. § 501, provides the guideposts that the regulation must fit into. As discussed, the guideposts are limited to financial matters. Thus, if the VA argues the regulation extends beyond financial incompetence, it is exceeding its prescribed authority.

target a very specific and compelling government interest and no less burdensome alternatives to such government action exist.

Thus, in accordance with the subject matter discussed herein, the VA must prove that the regulatory activity is narrowly tailored to achieve a compelling government interest.⁷³ An example of a compelling government interest is a pressing public necessity such as public safety.⁷⁴ In the context of the absolute firearm ban employed by the VA, the government is required to find that a veteran is a danger to self or others in order to fit within the public safety exception.⁷⁵ In addition, the means of achieving that goal requires the VA to utilize the most efficient and least intrusive method available.⁷⁶ Thus, if there is a more efficient and less intrusive alternative than the one currently employed, the VA conduct will most likely not satisfy strict scrutiny. The test is one of skepticism and is designed to protect the people against invidious government actions, presumably in instances such as the present when 99.3% of names on the gun ban list are from the VA.⁷⁷ Given that only three years ago, the Supreme

73. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (“As we stated recently in *Flores*, the Fourteenth Amendment forbids the government to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”) (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)) (internal quotations omitted); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (“A law that regulates free exercise of religion that is not neutral or generally applicable must be justified by a compelling government interest and must be narrowly tailored to advance that interest.”); *United States v. Lee*, 455 U.S. 252, 257 (1982) (“The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”). *See also* *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.”).

74. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”). Constitutional rights are not absolute and this Article takes the position that when faced with a constitutional challenge on the subject matter discussed herein, the government will assert that the overriding government interest in the regulation of firearms is public safety.

75. *See supra* note 23.

76. 38 C.F.R. 3.353(b)(3) (2014).

77. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”).

Court determined the Second Amendment to be a fundamental right, the VA use of its perceived regulatory authority gives birth to novel constitutional questions.⁷⁸

In this instance, the VA adopted a regulatory scheme based on a single federal regulation that, when applied, results in denying veterans the right to possess or own firearms, leads to confiscating their firearms, and consequently limits their right of self-defense. This is because the VA determined that these veterans need a little help with their finances—that they were “financially incompetent.”

Quite simply, the regulation was not designed to impose these firearm restrictions as illustrated by its plain language, which is circumscribed to assisting those veterans who are unable to contract or manage their own financial affairs.⁷⁹ Moreover, the authority provision within the regulation is specifically and expressly linked to a determination of the veteran being unable to handle disbursement of benefits.⁸⁰ It is no surprise, then, that the regulation’s sole purpose is to determine if the veteran is unable to manage his or her finances in order to appoint a fiduciary.⁸¹ This purpose is further corroborated by the explicit reference in a letter sent to veterans informing them that the standard by which their right to firearms can be infringed is linked

78. There are two main cases the government cites as authority to restrict access to firearms. One case specifically involved a felon losing his right to possess and own firearms. *Huddleston v. United States*, 415 U.S. 814, 824 (1974). The other case looked to state law to determine the definition of “voluntary admission” into a mental care facility; and if the defendant fell under that definition, whether the federal government could prevent him from possessing and owning a firearm under the Gun Control Act. *United States v. Waters*, 23 F.3d 29, 30 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 185 (1994). Neither case involved or determined an inability to manage VA benefits to be grounds for firearm prohibition.

79. 38 C.F.R. § 3.353(a) (2014) (“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.”).

80. 38 C.F.R. § 3.353(b)(1) (2014) (“Rating agencies have sole authority to make official determinations of competency and incompetency for purposes of: insurance (38 U.S.C. 1922), and, subject to § 13.56 of this chapter, disbursement of benefits. Such determinations are final and binding on field stations for these purposes.”).

81. M21-1MR Part 3, General Claims Process, U.S. DEP’T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR3.asp (Scroll down to “Subpart IV – General Rating Process,” scroll down to “Chapter 8 – Competency, Due Process and Protected Ratings,” click on “Section A” document; scroll down to Topic 2: “Considering Competency While Evaluating Evidence”), at 8-A-4 and 8-A-5. This subsection of the VA guidelines provides for a “Step 4” (final stage) in the process of determining incompetency and states a Veterans Service Representative “establishes EP 290 to control the appointment of a fiduciary, and prepares VA Form 21-592, *Request for Appointment of a Fiduciary, Custodian, or Guardian*, for use by the fiduciary activity.”

to their ability to manage their finances, stating that “[y]ou must send us medical evidence . . . that says you are able to handle your own financial affairs . . . if you believe you are able to handle your VA benefits without anyone’s help.”⁸²

Most importantly, in addition to the regulation itself, the federal statutory provision granting the VA the authority to promulgate the regulation is squarely in line with the financial incompetence standard and was not designed to impose firearm restrictions.⁸³ The original intent set forth by the law and regulation were prescribed in the 1970s, almost 40 years before the Supreme Court held the Second Amendment to be a fundamental right.⁸⁴ The regulation’s unambiguous language, the history of its promulgation, and its execution by the VA do not purport to determine when it is proper to impose firearms restrictions; it is also not designed to determine if a veteran is a dangerous person.⁸⁵ Yet, irrespective of this overwhelming evidence, the VA nonetheless exceeds its legal authority and reports “financially incompetent” veterans to the national gun ban list.

Although the federal government can utilize existing federal laws and Supreme Court jurisprudence to restrict firearms from dangerous and mentally insane persons,⁸⁶ the employed VA standard does not even *attempt* to determine if veterans are mentally ill and/or a danger to themselves or others.⁸⁷ Although it is well established that the

82. Kalama, *supra* note 5, at 2.

83. 38 U.S.C. § 501(a)(1)–(4) (2014). The VA’s authority to promulgate regulations is limited to those which “establish the right to benefits under such laws” and the “manner and form” of the process by which a veteran is to receive the benefits. *Id.*

84. Determinations of Incompetency and Competency, 36 Fed. Reg. 19020, 19020 (Sept. 25, 1971) (to be codified at 38 C.F.R. pt. 3) (“These are amendments to an existing regulation which states the criteria and procedures incidental to a Veterans Administration determination that a beneficiary’s mental condition is such that a fiduciary should manage his affairs and safeguard his funds.”).

85. 36 Fed. Reg. Determinations of Incompetency and Competency, 36 Fed. Reg. 19020, 19020 (Sept. 25, 1971) (to be codified at 38 C.F.R. pt. 3) (“such that a fiduciary should manage his affairs and safeguard his funds”). In 1995, another addition to the C.F.R. noted that the VA is moored to a limited authority to only “make determinations of incompetency for purposes of VA benefits and VA insurance.” Determinations of Incompetency and Competency, 60 Fed. Reg. 55791, 55791 (Nov. 3, 1995) (to be codified at 38 C.F.R. pt. 3).

86. 18 U.S.C. § 922(g) (2014); *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

87. *See* 38 C.F.R. § 3.353(b)(1) (2014). The VA process is specifically aimed at appointing a fiduciary to manage benefit payments. *Id.* Moreover, the VA definition of insanity is not equivalent to mental incompetence). *See Disabled Am. Veterans v. United States Dep’t of Veterans Affairs*, 783 F. Supp. 187, 190 (S.D.N.Y. 1992).

VA's regulatory efforts is the incompetence standard, further review demonstrates its weaknesses. For example, existing case law shows the efforts do not even preclude testamentary capacity⁸⁸ and the veteran still contains enough mental capacity to file a claim for benefits.⁸⁹ Common sense dictates that if a veteran retains the legal ability to execute wills and trusts, can properly file a claim for benefits, and is not determined to be a danger to himself or the public, that veteran is not within the class of individuals intended to be regulated. Thus, when considering all of the facts, existing federal firearm laws point out that a finding of financial incompetence by the VA does not equal a finding of a mental affliction that rises to a level that can legitimately and legally result in the imposition of firearm restrictions. In light of this analysis, it is apparent that the VA is not only utilizing a vague standard that allows discriminatory and arbitrary enforcement, but also improperly subsuming veterans into a category of persons in which they do not belong. Therefore, the VA will have no chance of passing constitutional muster because its regulatory scheme is not narrowly tailored to properly identify veterans that are a verifiable danger to themselves or to the public.⁹⁰

88. *In re Estate of Berg*, 783 N.W.2d 831, 834 (S.D. Sup. Ct. 2010). In addition, throughout the United States views diverge on whether testamentary capacity and contractual capacity are the same or different. The existence of one does not necessarily disprove or prove the other's invalidity. Therefore, even if the VA standard precluded testamentary capacity, it may not preclude contractual capacity, which still leaves the VA standard in weak footing. See 1 PAGE, THE LAW OF WILLS §12.20 (citing cases from Connecticut (*Turner's Appeal*, 44 A. 310 (Conn. 1899); *Doolittle v. Upson*, 88 A.2d 334 (Conn. 1952)); Georgia (*Griffin v. Barrett*, 187 S.E. 828 (Ga. 1936)); Tennessee (*Bruster v. Etheridge*, 345 S.W.2d 692 (Tenn. Ct. App. 1961)); Texas (*Brown v. Mitchell*, 31 S.W. 621 (Tex. 1895); *Venner v. Layton*, 244 S.W.2d 852 (Tex. App. 1952))). See also *In re Kester*, 167 N.W. 614 (Iowa 1918); *Chandler v. Barrett*, 21 La. Ann. 58 (1869) (citing *Aubert v. Aubert*, 6 La. Ann. 104(1851))). The courts have held that testamentary capacity is higher than contractual capacity. Thus, if one can execute a will or trust in these states, they most certainly contain a sound enough mind to be considered mentally competent.

89. M21-1MR Part 3, General Claims Process, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR3.asp (Scroll down to "Subpart V – General Authorization Issues and Claimant Notifications;" scroll down to "Chapter 9 – Authorizing Awards for Incompetency and Fiduciary Cases;" click on "Section B" document; scroll down to Topic 4(d): "Claims From Beneficiaries Rated Incompetent"), at 9-B-3 (2012) ("An application received from a claimant who has been rated incompetent for VA purposes may be accepted, even if a fiduciary has been appointed for the claimant. A VA rating of incompetency under 38 C.F.R. § 3.353 (2013) determines the claimant's incapacity to handle his/her own affairs, including disbursement of funds. It does not preclude the claimant from prosecuting a claim for benefits.").

90. The VA's regulatory regime is mostly standardless, and such an approach is at odds with the Social Security Administration's guidelines, which attempt to define bipolar and schizophrenic standards for benefit purposes. See 5 SOCIAL SECURITY PRACTICE

In spite of the overwhelming evidence demonstrating that the VA cannot impose firearm restrictions, the VA may make a last-ditch effort to satisfy constitutionality by arguing that they are relying upon a veteran's inability to contract because of the plain language of the regulation: "a mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract"⁹¹ However, the meaning of "mental capacity to contract" is not defined; it also cannot be properly defined because each state creates its own contract code, which is interpreted by that state's courts.⁹² It is probable that a number of states will have a slight variation depending on the specific affliction—mental or physical—that undercuts an individual's precise ability to contract.⁹³ This creates a dilemma if a federal court were forced to determine what the ability to contract means in the context of the C.F.R. The federal courts could invariably hold differing interpretations.⁹⁴ But, the constitutional analysis is much simpler than that because there is no

GUIDE § 40.01 (lists a number of mechanisms and standards for analyzing individuals to determine if they are mentally compromised. Such detail does not exist with the VA system and such a standardless approach contributes to the arbitrary and unconstitutional nature of the VA actions).

91. 38 C.F.R. § 3.353(a) (2014).

92. There is a divergence of views throughout the United States on whether testamentary capacity and contractual capacity are the same or different. Thus, the existence of one does not necessarily disprove or prove the other's invalidity. See LexisNexis 1 PAGE, THE LAW OF WILLS § 12.20. See also RESTATEMENT (SECOND) OF CONTRACTS: CAPACITY TO CONTRACT § 12 (1981) ("Historically, the principal categories of natural persons having no capacity or limited capacity to contract were married women, infants, and insane persons. Those formerly referred to as insane are included in the more modern phrase "mentally ill," and mentally defective persons are treated similarly."). The mental capacity to contract, according to the Restatement, provides further guidance for a factfinder to conclude that insane persons, mentally ill persons, and those deemed mentally defective are all in the same general category. Veterans regulated by the VA do not fit in these categories of persons because they still have the capacity, as found through case law interpreting the VA regulations discussed herein and through the VA's own admission, to self-file VA claims and to enter into testamentary instruments which, according to some states, equals the ability to contract. See *supra* note 88.

93. RESTATEMENT (SECOND) OF CONTRACTS: MENTAL ILLNESS OR DEFECT § 15 ("It is now recognized that there is a wide variety of types and degrees of mental incompetency. Among them are congenital deficiencies in intelligence, the mental deterioration of old age, the effects of brain damage caused by accident or organic disease, and mental illnesses evidenced by such symptoms as delusions, hallucinations, delirium, confusion and depression [A] person may be able to understand almost nothing, or only simple or routine transactions, or he may be incompetent only with respect to a particular type of transaction.").

94. See, e.g., *United States v. Waters*, 23 F.3d 29, 35 (2d Cir. 1994). The court looked to state law to determine what voluntary admission means in the context of determining whether someone fell within the regulatory authority of the Gun Control Act. *Id.*

federal government requirement that a person who owns a firearm must prove to the federal government that he or she has the capacity to contract in order to fire his weapon. Rather, in imposing firearm restrictions, the government must prove that an individual is a danger to self or others. The VA does not employ this standard.

In conclusion, the C.F.R.'s original intent is to identify veterans who are unable to manage their finances and appoint a fiduciary to handle such benefits.⁹⁵ The C.F.R. does not determine if a veteran is a risk to self or others and does not provide authority to conclude a veteran cannot manage a firearm. Currently, this investigatory regime wrongly assumes that if a veteran is appointed a fiduciary, he or she represents a danger to the public and is reportable to a national gun ban list. The standard employed by the VA is not narrowly tailored because it sweeps into the net individuals who may be perfectly able to manage a firearm *and* not determined to be a danger to self or others.⁹⁶ The absurd and arbitrary nature of the VA's conduct is a material defect that ultimately results in an unconstitutional, and surreptitious, exercise of government power. Congress surely did not contemplate this when drafting the Gun Control Act and Brady legislation.

1. *Illustrations of Less Burdensome Alternatives*

To protect the fundamental nature of the Second Amendment, heightened procedural safeguards must be put in place.⁹⁷ With a bit of creativity one can piece together a regulatory scheme that is less burdensome on the Second Amendment and veteran than the

95. 38 C.F.R. §13.56 (2014) (direct payment rules for appointed fiduciaries); 38 U.S.C. § 5502 (2005) ("Payments to and supervision of fiduciaries"); 38 U.S.C. § 5507 (2005) ("Inquiry, investigations, and qualifications of fiduciaries"). See also KROUSE, *supra* note 3, at 27. M21-1MR Part 3, General Claims Process, U.S. DEP'T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR3.asp (Scroll down to "Subpart V – General Authorization Issues and Claimant Notifications;" scroll down to "Chapter 9 – Authorizing Awards for Incompetency and Fiduciary Cases;" click on "Section A" document; scroll down to Topic 2: "Considering Competency While Evaluating Evidence"), at 8-A-4 and 8-A-5. This subsection of the VA guidelines provides for a "Step 4" (final stage) in the process of determining incompetency and states a Veterans Service Representative "establishes EP 290 to control the appointment of a fiduciary, and prepares VA Form 21-592, *Request for Appointment of a Fiduciary, Custodian, or Guardian*, for use by the fiduciary activity."

96. And to go a step further, placing a person in the same category as convicted criminals and the mentally insane besmirches and denigrates reputations and is borderline defamatory.

97. To ensure protection of the Second Amendment, the federal government should divest itself from imposing firearm restrictions.

patchwork currently in place. If there is a regulatory scheme that is less burdensome on a person's ability to exercise his Second Amendment right, the original scheme is arguably unconstitutional.⁹⁸ It should be noted that the government cannot argue against less burdensome tests simply because it is more onerous and more expensive to the government.⁹⁹ Protection of constitutional rights cannot be contingent on the monetary cost to the government. While this Section does not address every complication, it will offer limited examples to illustrate that the current system is not narrowly tailored because there are less burdensome alternatives available to achieve the purported government interest of public safety.

The federal government operates a regulatory mandate that all veterans be analyzed under a rubric to determine if that veteran can adequately manage his or her VA benefit payments. But, this finding may result in an assumption that veterans cannot manage a firearm and that they are dangerous people. These findings ultimately result in the denial of a veteran's right to possess and own a firearm—a loss wholly at odds with constitutional guarantees. There are three instances in which manipulations to the current rubric will result in a less invasive attack on the Second Amendment and at the same time will reduce or entirely eliminate the burden on the individual.

The first instance pertains to a veteran's initial meeting with nondoctors. A veteran is not required to meet with a doctor, but he or she can meet with a nondoctor who sets the entire mechanism in motion.¹⁰⁰ Instead of meeting with a nondoctor to begin the process of determining incompetence, there should be two doctors: a physician and a psychiatrist. This system more properly balances the evidence and protects a veteran from an incorrect diagnosis. It will be more burdensome for the government, but less burdensome to the

98. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); *United States v. Lee*, 455 U.S. 252, 257 (1982) (“The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”); *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981).

99. Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 RUTGERS L.J. 483 (2004). See also *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (raising revenue for police services does not justify a parade fee requirement); *Schneider v. State of New Jersey*, *Town of Irvington*, 308 U.S. 147, 162 (1939) (burden of caring for the streets does not justify a ban on distributing leaflets to willing recipients).

100. The relevant VA regulation, 38 C.F.R. § 3.353 (“Determinations of incompetency and competency”), does not require a doctor and patient meeting to determine incompetency and neither does the VA guidelines contained in M21–1MR.

individual and Second Amendment rights because medical professionals are placed at the beginning of the process to determine a medical diagnosis. Cutting back on incorrect diagnoses will reduce the number of individuals wrongly transited through the process.

The second instance pertains to the standard in assessing a veteran's threat to public safety. Currently, a hearing is required if a doctor reasonably believes, based upon clear and convincing medical evidence, that a veteran is incompetent to handle his or her finances. However, the hearing does not investigate whether the veteran is a danger to self or others. To protect Second Amendment rights, the VA should be required to find, based on clear and convincing evidence, that a veteran is at danger of inflicting grievous bodily injury or death on self or others due to a severe and pervasive mental or physical injury or disease.¹⁰¹ In addition, the government must so find under the authority of two doctor opinions: one physician and one psychiatrist. Thus, these two doctors must have medical evidence that the veteran meets this standard and the evidence must be presented at a subsequent hearing so that the veteran can properly challenge it in a neutral setting.¹⁰² Importantly, a temporary illness, such as one suffered by a veteran recovering from complicated surgery, will not suffice.¹⁰³ The affliction must be severe to the point that both doctors feel the veteran has the potential to inflict grievous bodily injury or death on self or others. This is in lockstep with current constitutional findings in this Article because the compelling government interest in precluding an individual from possessing or owning a firearm cannot be anything but personal or public safety. Therefore, if the government can determine the veteran to be a "danger subject," then it can take away weapons; but, absent that

101. This proposed standard aims to reduce the number of veterans wrongfully transited through the VA process. It would require the government to prove that a veteran is a dangerous person by providing facts and circumstances, such as a severe and pervasive mental illness, that supports the reasons for which the government deems the veteran dangerous.

102. The imposition of a requirement that the VA motion a court before reporting a veteran's name to the NICS list is discussed in more detail in Section II.C.3, *infra*.

103. As the standard currently postulates, the VA does not discriminate between a transient or pervasive mental illness. As such, a veteran using Vicodin after invasive surgery could be subjected to the rigors in place by the VA. The same is true of PTSD. *See How Common is PTSD?*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp> (last visited Mar. 2, 2014).

finding, the government's rationale for taking firearms is not founded on constitutional footing.¹⁰⁴

The third instance is for the VA, and federal government generally, to stop utilizing the underlying assumption throughout the regulatory process that a veteran who cannot manage his or her finances is also unable to adequately and safely operate a firearm, and therefore, is concurrently a danger to the public and must ultimately be barred from use and possession of a firearm.¹⁰⁵ This assumption is the core of the VA regulatory scheme and it fails constitutional muster because it places a massive burden on the veteran to prove he is "worthy" and "able" to safely operate a firearm—without the VA providing the means for the veterans to actually prove he can do so. Moreover, in spite of the VA's regulatory scheme, the federal government at large does not require potential purchasers of firearms prove they can adequately and safely operate a weapon before exercising their Second Amendment right. However, even if that standard existed within federal law it would not pass constitutional muster because the federal government does not have the authority to require every individual in the United States to undergo gun training in order to purchase a weapon. Under current jurisprudence, it would be just as unconstitutional for the federal government to require a woman to physically practice having an abortion before she is legally allowed to exercise her constitutional right to go through with the procedure.¹⁰⁶ The Court has held that abortion is an

104. To eliminate the risk of bias, the government should be required to motion a court to enforce the VA's ruling. *See infra* note 139.

105. Attacking and eliminating this assumption would, in effect, eliminate the VA reporting veteran names to the gun ban list. The VA is making a huge leap in logic and assumes that a veteran who is financially incompetent fits the standard of a dangerous person which thereafter allows the federal government to prevent that veteran from owning or possessing a firearm out of concern that the veteran is a risk to the public. The reasoning of the VA and federal government does not make sense because a veteran appointed a fiduciary by the VA to handle his VA benefits is never determined to actually be a risk to the public and, therefore, that veteran is not in the class of individuals intended to be regulated by federal gun law.

106. The example illustrates that requiring an "access to rights test" for an abortion before going through with it would undoubtedly be unconstitutional given the substantial burden test outlined in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–77 (1992), and addressed in this Article. If the same "access to rights test" were applied to the Second Amendment, the regulation would also fail. The Supreme Court has held that both an abortion and self-defense are intensely personal and, in that vein, they create similar arguments as to what can and cannot be a constitutional burden. For example, the Court has held that abortion is a personal right: "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy." *Roe v. Wade*, 410 U.S. 113,

intensely intimate and personal right—as is self-defense; thus, based on the fundamental nature of abortion, a substantial impediment to acquiring one would be to require physically practicing the highly invasive procedure before the medical event.¹⁰⁷ Since the right to firearms and abortion are both deemed fundamental by the Supreme Court, substantial impediments to the exercise of that constitutional right—such as proof of satisfactory operation of a weapon system—would likewise run afoul of the basic principle that fundamental rights cannot be subject to substantial government interference. The effect of such government action devalues the inherent importance of that right.¹⁰⁸ But, more significantly, the Second Amendment is an enumerated right, whereas abortion is not. The right to firearms is held in high regard within the philosophical foundation of society and, therefore, any interference with that right must be of the utmost compelling purpose and as narrowly tailored as possible so that there are no less burdensome alternatives available.

These few examples illustrate that there is a less restrictive means to achieve the compelling government interest in public safety. If veterans were to meet with two doctors and an analysis were performed as to the veteran's danger to self or others, it would reduce

152 (1973) (internal citation omitted). And the Court specifically stated the right to abortion is implicit in the concept of liberty: “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, as the District Court determined, in the Ninth Amendment’s reservations of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.* at 153. The Court reaffirmed its stance in *Casey*: “After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rules of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.” *Casey*, 505 U.S. at 845–46. Likewise, the Court has also held that the Second Amendment is a personal right: “Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is the ‘central component’ of the Second Amendment right.” *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010). Just like abortion, the Court held that the Second Amendment is implicit in the concept of ordered liberty: “In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *Id.* at 3042.

107. *Id.*

108. The general argument being made should not be construed as being pro-life or pro-choice. Rather, it is to illustrate that federal government regulation of firearms, in the manner that the VA is engaging, is a massive government overreach because the government conduct devalues the fundamental nature of the Second Amendment. The argument then draws a corollary to a fundamental right that the Supreme Court determined to be extremely personal—abortion—to make the case that if the Court is to be consistent, it should strike down the VA regulatory activity that is the subject matter of this Article.

the number of veterans who are unnecessarily precluded from possessing and owning firearms. The current scheme is not designed to identify individuals that truly are at danger of inflicting grievous bodily injury or death.

II. The Veterans Affairs' Use of the Financial Incompetence Standard and Resulting Firearm Restrictions Do Not Comport with Fifth Amendment Procedural Due Process Requirements

At its core, procedural due process requires notice, an opportunity to be heard, and proper procedural safeguards to prevent the infringement of a person's constitutional rights.¹⁰⁹ As it currently stands, the VA procedure does not comply with procedural due process requirements.

The VA does not consider that a veteran will lose access to firearms because the sole purpose of the hearing is to determine whether the veteran requires a fiduciary to manage VA benefits. Moreover, the standard employed does not determine whether a veteran is a danger to inflicting grievous bodily injury or death on oneself or others, but the VA assumes that a veteran is in fact a "danger subject" once he or she is appointed a fiduciary. The standard utilized by the VA is vague, but also eerily surreptitious. It creates the very real risk of discriminatory and arbitrary enforcement, a byproduct that constitutional due process eschews.¹¹⁰

This Section employs the *Mathews v. Eldridge* balancing test in a step-by-step process by first dissecting the origins of the right to firearms under a liberty and property interests, and then applying that interest to the balancing test. This Section concludes that the VA must utilize a standard determining whether a veteran is a danger to self or others, which would arguably be a ground to eliminate access to firearms.¹¹¹ In addition, the VA must *apprise* veterans of the *actual* standard they are held to—a standard that is aimed at determining if they are a "danger subject." Furthermore, the arbitrary standard in

109. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.").

110. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) ("Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.").

111. However, as this Article asserts, the best way to ensure Second Amendment guarantees are protected is to exclude the VA from injecting itself into the issue of absolute firearm bans in the first place.

play results in discriminatory application against veterans who comprise 99.3% of the national gun ban list—a result fundamentally at odds with the Second Amendment and procedural due process.

A. Veterans Have Liberty and Property Interests in Their Firearm

The Fifth Amendment states no person shall be deprived of life, liberty, or property without due process of law.¹¹² “Life, liberty,”¹¹³ and “property”¹¹⁴ are problematic to define, and in order to activate the requirements of procedural due process, the claimant must illustrate a defined constitutional right.¹¹⁵ In the case at bar we have a clearly defined “constitutional right”—possessing and owning a firearm.¹¹⁶

Depending on the type of constitutional interest at stake, the requirement of a hearing may or may not apply. However, the Supreme Court has enlarged the scope of interests that demand a hearing before intentional deprivation.¹¹⁷ In the context of liberty interests, procedural due process jurisprudence requires hearings when a fundamental constitutional liberty interest is at stake, such as when the right to marry or raise a family is restricted.¹¹⁸ In addition, the Supreme Court has gone so far as to hold that there is a liberty interest when a student is threatened with suspension from school such that procedural due process demands a hearing prior to

112. U.S. CONST. amend. V.

113. The Supreme Court has defined “liberty” to include freedom from restraint on one’s opportunities, as well as freedom from imprisonment. *See* *Bishop v. Wood*, 426 U.S. 341, 348–49 (1976); *Paul v. Davis*, 424 U.S. 693, 710–11 (1976); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571–72 (1972).

114. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (Prior to termination of welfare benefits, a hearing is required; welfare benefits are statutory entitlements and should be regarded as “property” rather than a “gratuity.”).

115. *Lehr v. Robertson*, 463 U.S. 248, 257–58 (1983) (An unmarried father has no absolute right to a hearing before the adoption of his child, when he has had no significant relationship with the child.); *Inv. Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 7–8 (D.C. Cir. 1979) (A constitutionally protected property interest is not actionable unless the person affected is deprived of the actual property or a common law or statutory right.).

116. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

117. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (citing *Roth*, 408 U.S. at 577) (A lack of contractual claim does not defeat constitutional property considerations because existing rules and understandings that stem from independent sources can give rise to constitutional property claims that require a hearing before deprivation.).

118. *Santosky v. Kramer*, 455 U.S. 745, 768–69 (1982) (A state cannot refuse to provide natural parents adequate procedural safeguards in a parental rights termination proceeding on the grounds that the family unit already has broken down.).

suspension.¹¹⁹ In the school suspension case, *Goss v. Lopez*, the Supreme Court held that “[t]he Due Process Clause also forbids arbitrary deprivations of liberty. ‘Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,’ the minimal requirements of the Clause must be satisfied.”¹²⁰ This description also applies to veterans wrongly labeled as a danger to the public who not only lose their good name and reputation, but also lose their ability to engage in self-defense. A veteran has a liberty interest in the exercise of his or her fundamental Second Amendment rights, and if a child cannot be suspended from school without a hearing, the VA is also required to put forth a hearing specifically regarding imposition of Second Amendment restrictions.

In the context of a property interest, the Supreme Court broadly defines what a property interest is and expands its scope to include more than tangible personal property.¹²¹ For example, a teacher may have a property interest in continued employment if the facts and circumstances indicate a detrimental reliance on a promise of continued employment.¹²² With the case at bar, one need not make a nebulous property argument because a veteran can directly point to a loss of property—his or her firearm. As long as there is a tangible property interest, such as a firearm in danger of confiscation by the government, a hearing must occur prior to deprivation of that property.¹²³

Supreme Court jurisprudence provides more than reasonable constitutional justification that not only justifies a liberty interest in possessing and owning firearms under the Second Amendment, but also a property interest in the firearm itself. Because liberty and

119. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

120. *Id.*

121. *Roth*, 408 U.S. at 571–72 (1972) (“The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. By the same token, the Court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.”).

122. *Id.* at 577 (“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”).

123. *Goss*, 419 U.S. at 576 (“The Court’s view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause.”).

property interests exist, a proper hearing must occur prior to deprivation.

B. The Failure of the Federal Government to Hold a Hearing Prior to Deprivation is Unconstitutional

The process by which a veteran is deemed financially incompetent is discussed in Section I.B, *supra*. The hearing that occurs determines financial incompetence; it does not discuss Second Amendment issues or whether the veteran is a danger to self or others. The hearing's sole purpose is to determine if the veteran can adequately manage VA benefit payments; if the veteran is deemed unable to adequately manage his or her VA benefits, a fiduciary is appointed to the veteran. There is no hearing that specifically discusses potential prohibition of weapons. On its face, there is no attempt by the VA to determine whether the veteran is a danger to public safety.

That a hearing discussing Second Amendment rights is not part of the VA process, which results in the deprivation of keeping a firearm is, on its face, an unconstitutional deprivation of liberty and property interests.¹²⁴ If a pre-deprivation hearing is required for non-fundamental rights such as welfare benefits, the Supreme Court will likely side with a veteran when his or her weapon and right to possess and own a firearm in the future is taken away without a hearing.¹²⁵ The entire VA process is a violation of procedural due process because the federal government does not provide a hearing prior to the deprivation of the right to keep and bear arms.¹²⁶

C. *Mathews v. Eldridge* Test: What Process is Due?

*Mathews v. Eldridge*¹²⁷ is the seminal case establishing a balancing test to determine what process satisfies procedural due process. In *Mathews*, the Supreme Court held that procedural due process imposes constraints on governmental decisions that deprive

124. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”).

125. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)). See also Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

126. *Mathews*, 424 U.S. at 334 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974)) (“This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.”).

127. *Mathews*, 424 U.S. 319.

individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth Amendment.¹²⁸ The Court further held due process is not a technical conception, but a flexible one that calls for such procedural protections depending on the facts and circumstances of the case.¹²⁹

The test consists of three balancing factors: (1) individual interest involved; (2) procedural safeguards to that interest; and (3) governmental interest in fiscal and administrative efficiency.¹³⁰ This Section discusses all three factors as applied to the VA’s intentional deprivation of liberty and property, and concludes that the process afforded veterans does not satisfy the demands of procedural due process.

1. *An Individual Has a Strong Interest in His or Her Fundamental Right to Keep and Bear Arms*

Here, the individual interests involved are both a liberty and property interest under the Second Amendment. The liberty interest is the fundamental right to exercise the Second Amendment and the property interest is the firearm itself. Both of these interests are infringed upon: Once a veteran is deemed financially incompetent, his or her ability to possess and own a firearm is extinguished and his or her firearms can be confiscated. The Supreme Court has held that the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process.¹³¹ Thus, in the case at bar, the hardship imposed on an erroneous deprivation is extreme and potentially lifelong.¹³²

Because the individual’s liberty and property interests are fundamental, the process afforded must be tailored to adequately protect an erroneous deprivation. Here, such protection is not in

128. *Id.* at 333.

129. *Id.* at 335.

130. *Id.*

131. *Id.* at 343.

132. An incompetency determination is supposed to be appealable subject to 38 C.F.R. § 3.103(f) (“Procedural due process and appellate rights”), and the competency status can change. M21-1MR Part 3, General Claims Process, U.S. DEP’T OF VETERANS AFFAIRS, http://www.benefits.va.gov/WARMS/M21_1MR3.asp (Scroll down to “Subpart IV – General Rating Process;” scroll down to “Chapter 8 – Competency, Due Process and Protected Ratings;” click on “Section A” document; scroll down to Topic 4(b): “Determining Restored Competency”), at 8-A-9 (2012). In addition, 18 U.S.C. § 925 (“Exceptions: relief from disabilities”) provides for a mechanism to delete a veterans name from the gun ban list.

place because the VA does not offer a hearing that involves a discussion as to whether the veteran is a danger to self or others. Rather, the hearing specifically addresses whether the veteran lacks the ability to manage VA benefits and, if so, the veteran is assigned a fiduciary. Thus, there is no hearing designed with the Second Amendment in mind and, ultimately, Second Amendment interests are not merely *affected*, but are potentially *extinguished* from a person's life. The Supreme Court is clear on this absolute ban of exercisable fundamental rights; if a proper hearing is not provided, an unconstitutional process exists.¹³³

2. *The Procedural Safeguards in Place to Protect the Fundamental Nature of the Second Amendment Do Not Pass Constitutional Muster*

Procedural safeguards require the government to have certain procedures in place to prevent an erroneous deprivation of rights.¹³⁴ The goal of the VA hearing is to appoint a fiduciary, thus the procedural safeguards are presumably designed to act on behalf of that goal. With the goal of appointing a fiduciary in mind, it is easier to understand why the current procedural aspects of the VA hearing system are sorely lacking in constitutional protections; the hearing simply was not designed to deal with constitutional rights, it was only designed to appoint a fiduciary. In this light, the current procedural safeguards are more than enough. However, when the ultimate result and underlying goal of the hearing is to infringe on Second Amendment rights, a new calculus enters the equation. As this Section expresses, once constitutional rights are involved, the due process requirements ramp up considerably—and rightly so. The current hearing regime does not have proper and fair procedural safeguards in place and the risk of an erroneous deprivation of constitutional rights is immense for the following reasons.

First, the government does not require that a doctor meet with a veteran prior to the hearing to determine mental and physical status. Thus, the VA can institute proceedings on a hunch, not on recent and relevant medical evidence; this risks increasing the number of

133. *Mathews*, 424 U.S. at 334 (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (“The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.”).

134. *Mathews*, 424 U.S. at 335–36 (“More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”). *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970).

wrongly targeted veterans. Second, the VA is not required to determine if the veteran is a real danger to self or others, even though that is the required standard to impose firearm restrictions under federal law. Third, the hearing's purpose is to determine whether the veteran is capable of managing VA benefits. However, the standard the veteran is held to, if found to be incapable of managing benefits, is one that connotes the veteran to be a real risk to self or others. Thus, the veteran walks into the hearing attempting to prove one set of facts under a standard of "financial incompetence," but ultimately the veteran is subject to a standard of "risk to self or others." In effect, the veteran is subsumed and labeled under a standard in which he or she was not originally apprised of *and* a standard that he or she was not given an opportunity to challenge. Therefore, the veteran is never afforded true proper notice of the impending government action, nor does a proper pre-deprivation evidentiary hearing take place. Fourth, the veteran will lose his legal right to possess and own firearms already purchased, and will presumably be subject to confiscation—an issue the hearing does not address. Finally, the hearing is inherently biased because the presiding individuals are VA employees; thus, there is no neutral decisionmaker.

Procedural due process requires, at a minimum, proper notice and an opportunity to be heard.¹³⁵ Under the current VA regulatory scheme, not only are veterans not notified about the real standard of review under which they will be analyzed, but they are not provided an actual forum to challenge the Second Amendment implications of the VA's regulatory attempts. Therefore, the VA's regulatory scheme lacks proper procedural safeguards and offends procedural due process.

3. *The Government Interest in Fiscal and Administrative Burdens Do Not Outweigh the Constitutional Demands to Protect the Right to Keep and Bear Arms*

The Supreme Court has held that the process afforded must be balanced with the function of the hearing and the fiscal and administrative burdens that additional procedures would create.¹³⁶

135. *Mathews*, 424 U.S. at 349 (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring) (The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.")).

136. *Mathews*, 424 U.S. at 336 ("the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"). See, e.g., *Goldberg*, 397 U.S. at 263–71.

The function of the VA hearing is to determine financial incompetence and appoint a fiduciary to manage VA benefits. However, the effect of the hearing is much broader in that a determination of financial incompetence results in a deprivation of Second Amendment rights. In order to adequately apprise veterans about the true repercussions of the hearing and to allow a proper challenge to prevent those repercussions, an entirely new hearing system should be implemented.¹³⁷ The new system must protect the personal and fundamental right of self-defense from unfair governmental burdens, and it must balance fiscal and administrative burdens.

The new system should mandate that a doctor meet with a veteran to medically assess, based on clear and convincing evidence, whether the veteran is at danger of inflicting grievous bodily injury or death to self or others. Then, a psychiatrist should meet with the veteran to make sure the diagnosis is medically accurate. Such a requirement would not cause an outrageous fiscal burden to the government because it already employs doctors at VA facilities.¹³⁸ In addition, the hearing itself must offer a proper forum to adequately challenge whether the veteran is a danger to self or others. This means that the veteran must be told that the standard of evaluation is not just “financial incompetence” but, as this Article proposes, “danger of inflicting grievous bodily injury or death on self or others.” Moreover, the hearing should comply with federal evidentiary rules and allow the veteran, or his or her representative, to cross-examine witnesses to test their veracity and credibility. These changes will increase the administrative burden, but it is clear that the interests advanced by the government do not justify the current burdens imposed on veterans’ Second Amendment rights.

To alleviate the danger of nonneutrality and bypass the inherently unfair VA process currently in place, a veteran should not be considered adjudicated under the new standard without a finding of judicial authority.¹³⁹ Mandating the VA to acquire a court order

137. The suggestions in this Section assume that the VA will continue reporting names to the gun ban list, but for the sake of constitutionality, the VA should cease reporting.

138. See *supra* note 99 (noting that the government will have difficulty claiming that a financial burden is so large as to justify invading a fundamental right).

139. Mandating judicial involvement is not novel. In fact, 18 U.S.C. § 4241 requires that a judicial hearing occur prior to the federal government institutionalizing a person for mental illness. There is a liberty interest in not being committed just as there is a liberty interest in firearm possession and ownership. Both liberty interests are highly personal, and if a judicial hearing is required before the infringement of one liberty interest, then it

prior to reporting a name to the gun ban list may be more acceptable than any other changes because once found to be a danger to self or others, the individual is subject to firearm confiscation.¹⁴⁰ Thus, at some point, a government agency will presumably confiscate the weapons. Prior to confiscation, the government will need a court order. Since the government is already required to make a court appearance for the purposes of obtaining the court granting confiscation, it is not overly burdensome to also ensure proper procedural due process at the same time. Requiring the federal government to jump extra hurdles before infringing on fundamental rights is not outrageous and is proposed in the Veterans Second Amendment Protection Act.¹⁴¹

Going to court, however, is not without further constitutional landmines. Will a federal court recognize the new standard set forth by the VA? Does the state provide for more Second Amendment protections than the federal government? In light of the recent Defense of Marriage Act ruling in *United States v. Windsor*, it appears the federal government is now required to defer to state law in determining if a same-sex couple is legally married; if so, that couple will qualify for some federal benefits.¹⁴² If the federal government defers to same-sex laws in the states regarding federal benefits, *Windsor* may force the federal court to defer to state gun laws when receipt of some federal benefits (e.g., VA benefits) creates a clash between federal and state gun laws. For example, in *United States v. Waters*, state law was used to define “voluntary admission” into a mental care facility for federal regulatory purposes; if the defendant fell under that state definition, the federal government could prevent

should be the same for the other. In fact, the House of Representatives and the Senate drafted legislation requiring the VA to acquire an order from a “judicial authority” before imposing firearm restrictions. See *infra* note 141. Moreover, the primary purpose of the court order requirement proposed in this Article is to force the federal government to prove that the veteran truly is a danger to himself or others, in front of a neutral party with the requisite knowledge, skill, discipline and maturity acquired from practicing law over a period of years or decades. And finally, the requirement of going to court essentially negates the entire VA process, which is intentional because the VA process is inherently unfair.

140. 18 U.S.C. § 922(g) prevents the “possession and ownership” of firearms and the only way to enforce is to confiscate.

141. Veterans Second Amendment Protection Act, H.R. 577, 113th Cong. (introduced by Rep. Steve Stockman on Feb. 6, 2013) and S.572, 113th Cong. (introduced by Sen. Richard Burr on Mar. 14, 2013), available at www.congress.gov.

142. See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013).

him from possessing and owning a firearm under the Gun Control Act.¹⁴³

The cost of these changes is not a controlling factor in deciding what constitutional due process is (and is not).¹⁴⁴ While the burden to the government will increase, an ominous regulatory burden is on the veteran in the exercise of his right to firearms. This is unacceptable in light of the fundamental nature of firearms and in light of the strict scrutiny standard which places the burden on the government. The proposed additional safeguards are not the full extent of those that are necessary to comply with the protection of constitutional rights, but are examples of safeguards that can ensure the proper protection of a fundamental right against an overbearing government with endless resources. More often than not it is the individual bending to the mercy of the federal government; procedural safeguards are designed to level the playing field, shift the evidentiary burden to the government, and force the government to prove the justification for curtailing an individual's constitutional rights. If the government argues that the simple changes proposed in this Article are too expensive and burdensome, then government's attempt to deprive veterans of their Second Amendment rights should not be entertained in the first place. Fundamental rights require the highest of care, and the government cannot be so willing to entertain inadequate procedural safeguards.

III. Available Legislative Options to Adequately Protect the Second Amendment and Procedural Due Process

Lawmakers have realized the constitutional implications of the VA's regulatory regime and the inherent unfairness of targeting veterans. In an effort to alleviate these constitutional issues, Members of the U.S. House of Representatives and U.S. Senate introduced the Veterans Second Amendment Protection Act, which imposed two major changes to the current regulatory activity: (1) a person who is mentally incapacitated, deemed mentally incompetent, or experiencing extended loss of consciousness cannot be considered mentally defective unless; (2) a judicial authority finds the person a danger to self or others.¹⁴⁵ This new test addresses some of the

143. *United States v. Waters*, 23 F.3d 29, 35 (2d Cir. 1994).

144. *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision.").

145. Veterans Second Amendment Protection Act, *supra* note 141.

problem areas in the current system. With these proposed changes the federal government would be forced to prove not just financial incompetence, but that the veteran is a danger to self or others before moving to institute and enforce a firearm ban.¹⁴⁶ Furthermore, the federal government would be required to prove in court that the person to be regulated is in fact a danger to self or others.¹⁴⁷

These proposed changes would not prevent the VA from reporting names to the national gun ban list. However, the proposed changes would require the VA to retool and reconfigure their procedural process. For instance, the VA would no longer be able to merely inform a veteran that there is evidence demonstrating his or her inability to handle benefit payments. Instead, the VA would be required to inform the veteran that there is evidence indicating that he or she represents a danger to self or others. Moreover, an evidentiary hearing would take place to determine whether that is, in fact, the case. Finally, once the administrative side is exhausted, the government would be required to enter a courtroom and argue before judicial officers.

Although it is not constitutionally required, the introduced legislation should have offered even more protections. As this Article proposes, the VA should be required to base its findings on the interpretation of two doctors, including a psychiatrist. This will greatly aid in preventing veterans who are not a danger from being swept up in this arduous process.¹⁴⁸ Additionally, the legislation does not address the confiscation of weapons. If a veteran's firearm must be confiscated, then the veteran must be informed of the pending confiscation.¹⁴⁹ Lastly, the legislation should qualify the standard of "danger to self or others" as a danger of inflicting grievous bodily injury or death. As it stands, the legislation leaves the language open to interpretation, which can be abused in future rulemaking, just as the current C.F.R. has become overextended.

Overall, the introduced legislation would adequately protect veterans from government's unconstitutional infringement on

146. *Id.*

147. *Id.*

148. The VA backlog is tremendous; so much so that the Ninth Circuit Court of Appeals ordered a complete overhaul of the VA benefit processing system because the length of delays amount to constitutional violations. See Carol J. Williams, *Court Orders Major Overhaul of VA's Mental Health System*, L.A. TIMES (May 11, 2011), <http://articles.latimes.com/2011/may/11/local/la-me-0511-veterans-ptsd-20110511>.

149. In the alternative, a veteran should be allowed to keep the firearms, but not allowed to keep ammunition.

veterans' Second Amendment rights. It more narrowly tailors the government's rubric by requiring the government to determine if the veteran is a danger to self or others—but only by court order. In addition, should the legislation become law, it will demand that the government constitutionalize the procedure by which a veteran is adjudicated.

Conclusion

The federal government's use of power to regulate firearms in the context of VA incompetency is unconstitutional. The VA takes the position that its authority allows for a financial incompetence standard that results in the prohibition of current and future firearm possession and ownership. Such perceived authority is outrageous in light of the clear intent of the regulations as evidenced through its historical roots, federal statutes, and federal case law. As it is employed today, the VA's standard of incompetence is not narrowly tailored and is unconstitutional because the VA regulatory process does not consider if a veteran is a danger to self or others in order to restrict firearms. In order to regulate the possession and use of firearms, the government's standard should be one that determines whether a veteran is a danger to self or others and, more specifically, whether a veteran is at danger of inflicting grievous bodily injury or death upon self or someone else. The current VA standard fails in this regard.

Aside from the standard used by the VA, the process that a veteran is subjected to is likewise unconstitutional. First, a proper hearing to determine whether a veteran is a danger to self or others never occurs. Second, the hearing that does take place only determines whether a fiduciary should be appointed and has nothing to do with firearm restrictions. Third, after a fiduciary is assigned, the veteran is barred from possessing and owning firearms—a draconian result that not only conflicts with the fundamental nature of the right to keep and bear arms, but also clashes with the natural right of self-defense. The federal government's procedural process lacks proper notice and an opportunity to be heard and, therefore, fails to protect the liberty and property interests of the veteran. Such failures are blatant violations of procedural due process afforded by the Constitution.

Each individual has a fundamental right to keep and bear arms. The federal government can infringe upon this right only if it can prove that its method of regulation is narrowly tailored to a

compelling government interest. The VA standards and process of adjudication in place simply do satisfy this requirement. Therefore, the VA's regulatory regime and process of adjudication not only unfairly target the veteran population, but are unconstitutional as unwarranted infringements on the Second Amendment and procedural due process.