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WASHINGTON, DC 20510-1501
(202) 224-3744
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721 FEDERAL BUILDING
210 WALNUT STREET
DES MOINES, IA 50309-2106
(515) 288-1145

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SUITE 6800
CEDAR RAPIDS, IA 52401-2101
(319) 363-6832

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320 6TH STREET
SIOUX CITY, IA 51101-1244
(712) 233-1860

210 WATERLOO BUILDING
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WATERLOO, IA 50701-5497
(319) 232-6657

201 WEST 2ND STREET
SUITE 720
DAVENPORT, IA 52801-1817
(563) 322-4331

307 FEDERAL BUILDING
8 SOUTH 6TH STREET
COUNCIL BLUFFS, IA 51501-4204
(712) 322-7103

United States Senate

CHARLES E. GRASSLEY

WASHINGTON, DC 20510-1501

March 17, 2016

The Honorable Mark Kirk, Chairman
The Honorable Jon Tester, Ranking Member
Appropriations Subcommittee on Military Construction, Veterans Affairs, and Related Agencies
Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Kirk and Ranking Member Tester:

As you begin consideration of the FY2017 Military Construction, Veterans Affairs, and Related Agencies Appropriations bill, I respectfully request your inclusion of the following language to protect the Second Amendment rights of veterans:

None of the amounts appropriated or otherwise made available under this Act may be used, in any case arising out of the administration by the Secretary of Veterans Affairs of any law administered by the Secretary in which a person is found to be mentally incompetent, for purposes of adjudication as a mental defective under subsection (d)(4) or (g)(4) of section 922 of title 18, United States Code, without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such person is a danger to himself or herself or others.

According to the Congressional Research Service, as of June 1, 2012, 99.3% of all names reported to the National Instant Criminal Background Check System's (NICS) "mental defective" category by federal agencies were provided by the Department of Veterans Affairs (VA) even though reporting requirements apply to all federal agencies;¹ that percentage remained virtually unchanged as of September 2015.² The VA has attempted to justify its actions by relying on a single federal regulation, 38 C.F.R. § 3.353, which by its plain language grants limited authority to determine incompetence, but only in the context of financial matters: "Ratings agencies have sole authority to make official determinations of competency and incompetency for purposes of: insurance and...disbursement of benefits."³ However, the VA is arguably extending beyond its authority and is reporting names of veterans merely appointed a fiduciary to the NICS lists which results in the veteran being precluded from owning or possessing firearms.

¹ Names reported by the VA are not only veterans but also include non-veteran dependents. See also, William J. Krouse, CONG. RESEARCH SERV., r42987, Gun Control Proposals in the 113th Congress: Universal Background Checks, Gun Trafficking, and Military Style Firearms (2014).

² Data compiled by the Congressional Research Service indicates that as of September 30, 2015, the Department of Veterans Affairs had 257,492 mental health records on the NICS list out of a total of 259,876 federal mental health records, which accounts for 99.1% of all federal mental health records.

³ 38 C.F.R. §3.353

CHAIRMAN,
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Committee Assignments:

AGRICULTURE
BUDGET
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INTERNATIONAL NARCOTICS
CONTROL CAUCUS

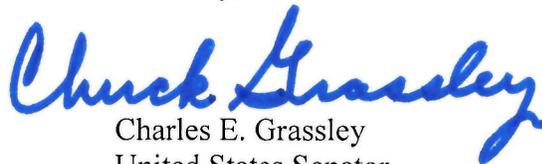
Federal law requires that before a person is reported to the NICS, they be determined a “mental defective.” The Bureau of Alcohol, Tobacco, and Firearms (ATF) promulgated a regulation to interpret what “mental defective” means within 18 U.S.C. § 922(g). The ATF defined that term as a person with marked subnormal intelligence or mental illness, incompetency, condition, or disease who is a danger to themselves or others, or lacks the mental capacity to contract or manage his own affairs.⁴ The purpose of this regulation is to preclude such persons from possessing or owning firearms. As such, the level of impairment of one’s mental state that justifies taking away the right to own firearms must rest at a severe and substantial level – where the mere possession of a weapon constitutes a danger to self or the public. Otherwise, the government has no compelling reason to preclude firearm possession or ownership.

The VA regulations do not follow ATF’s severe and substantial mental state standard. For example, the VA does not determine if a veteran is a danger to self or others. Rather, the VA analyzes a person for mental defect under an inappropriate standard designed for a different purpose: to appoint a fiduciary, not to regulate firearms. Unlike the ATF standard, the VA’s sole purpose is to analyze a veteran to determine if he or she can or cannot manage their finances, and, if not, appoint them a fiduciary. It is clear, therefore, that the core purpose of these competing regulations is different. On the one hand, the ATF regulation is designed to regulate firearms. On the other hand, the VA regulation is designed to appoint a fiduciary. At no time in the process does the VA determine a veteran to be a danger to self or others, a key determinant for whether someone is a “mental defective” precluding the right to own firearms.

Accordingly, in light of the fact that the Second Amendment is a fundamental right, the VA ought to be prevented from reporting veterans to the NICS unless and until the VA first determines they are a threat to themselves or to the public. This rider mandates that approach.

I appreciate your consideration of my request. If you have any questions regarding this request, please contact James Rice of my staff at 202-224-3744.

Sincerely,



Charles E. Grassley
United States Senator

⁴ 27 C.F.R. § 478.11(a)(1)-(2). Notably, the VA regulation uses similar language. However, as expressed in this letter, the purpose and intent of the VA regulation is not the same as the ATF regulation which arguably causes a conflict with the VA reporting names to the NICS list.