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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

March 16, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Robert A. McDonald
Secretary
U.S. Department of Veteran Affairs
810 Vermont Ave. NW
Washington, D.C. 20420

Dear Secretary McDonald:

The National Instant Criminal Background Check System (NICS) is effectively a national gun ban list and placement on the list precludes the ownership and possession of firearms. According to the Congressional Research Service, as of June 1, 2012, 99.3% of all names reported to the NICS list's "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] Given the numbers, it is essential to ensure that the process by which the VA reports names to the Department of Justice (DOJ) for placement on the NICS list recognizes and protects the fundamental nature of veterans' rights under the Second Amendment.

Questionable VA Standards

Specifically, once the VA determines that a veteran requires a fiduciary to administer benefit payments, the VA reports that veteran to the gun ban list, consequently denying his or her right to possess and own firearms. In the past, 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:

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[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.

"Ratings agencies have sole authority to make official determinations of competency and incompetency for purposes of: insurance and…disbursement of benefits."[3]

Thus, the regulation's core purpose applies to matters of competency for financial purposes in order to appoint a fiduciary. This financial/fiduciary standard has been employed since the regulation's initial promulgation in the 1970s and it has nothing to do with regulating firearms.[4] However, when the VA determines that a veteran requires a fiduciary the end result is a limitation on owning and possessing firearms because the VA reports that veteran to the NICS list – a harsh result that could sweep up veterans that are fully capable of appropriately operating a firearm for self-defense purposes.[5]

Importantly, 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.[6] 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. 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

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[3] 38 C.F.R. §3.353

[4] 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.").

[5] 38 U.S.C. § 501(a)(1)–(4). 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.

[6] 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.

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.

The use of the VA regulation, adopted for a totally unrelated purpose, is suspect, especially in light of the Supreme Court holding that the Second Amendment is a fundamental right. That holding changed the legal calculus by which a regulatory scheme can survive constitutional scrutiny and it is not clear how these regulations would fare under that increased scrutiny.

Due Process Concerns

In addition, the procedural protections that the VA affords to veterans are weak. First, the standard of review, clear and convincing, is particularly low for a fundamental constitutional right.[7] Hearsay is allowed during the hearing process.[8] And, there are no significant checks and balances in place to ensure that there is any evidence to conclude that a veteran is a risk to the public or themselves.

Furthermore, when a veteran receives a letter stating that the VA believes he is unable to manage his finances, that veteran now has the burden of proving that he is in fact competent to manage his benefit payments and does not need a fiduciary. However, underlying the hearing is a real possibility that the right to firearms will be infringed. Therefore, in light of the liberty and property interests involved, placing the burden of proof on the veteran is highly suspect. Under similar circumstances, the burden is generally on the government. Further, the hearing that takes place is inside the VA administrative system and composed of VA employees rather than a neutral decision maker.

Under the current practice, a VA finding that concludes that a veteran requires a fiduciary to administer benefit payments effectively voids his Second Amendment rights—a consequence which is wholly unrelated to and unsupported by the record developed in the VA process. Accordingly, Congress needs to understand what justifies taking such action without more due process protections for the veteran.

Please answer the following:

1. Prior to reporting a name to the DOJ, does the VA determine that person to be a serious safety risk to themselves or the public? If so, please describe the process in detail including the standard used to make that determination.

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[7] 38 C.F.R. § 3.353(c)

[8] Procedural Due Process and Appellate Rights, 38 C.F.R § 3.103, 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.

2. Does the VA use a metric to flag certain veterans for further investigation and possible reporting to the DOJ? If so, what is that metric?

3. During the hearing that ultimately determines whether a veteran will be placed on NICS, it appears the burden is not on the government to justify its effort to report the name to the DOJ for eventual placement on the NICS. How does that comply with fundamental due process?

4. Do you believe that a veteran adjudicated as incompetent to manage finances and appointed a fiduciary is likewise mentally defective under the ATF standard? If so, what is the basis for that conclusion?

5. Given that the VA adjudication process can result in a complete infringement of a person's fundamental Second Amendment right, do you believe that the use of the "clear and convincing" evidentiary standard is proper? If so, why?

6. Does the financial incompetence standard employed by the VA to report names to the DOJ for subsequent placement on the NICS list comply with the protections of the Second Amendment? If so, please explain how, in light of due process concerns described above.

7. Do you believe that the financial incompetence standard as used by the VA to appoint a fiduciary satisfies the Second Amendment as the Supreme Court has interpreted it? Please explain.

8. Do you believe that the process by which a veteran is analyzed for competency and appointed a fiduciary by the VA is constitutionally sound? Please explain.

9. Is the VA satisfied that all names reported for placement on the NICS are persons who should not own or possess a firearm because they are dangers to themselves and/or others? If so, what evidence supports that conclusion?

10. Given that 99.1% of all names in the NICS "mental defective" category are reported from the VA, has the VA reviewed it's reporting standards and procedure? If so, please provide a copy of the review that took place. If no review took place, please explain why not.

11. How many individuals have appealed a finding that would have resulted in their name being reported to the NICS? How many individuals were successful in their appeal?

12. In light of the fact that the Supreme Court has held the Second Amendment to be a fundamental right, has the VA changed any processes and procedures relating to the NICS system which were in existence prior to that holding? If so, what changes have been implemented? If not, why not?

In addition to the above questions, I request that you brief my staff on these issues. Please number the responses according to their corresponding questions. Thank you in advance for your cooperation with this request. Please respond no later than March 30, 2016. If you have questions, contact Josh Flynn-Brown of Senator Grassley's Committee staff at (202) 224-5225 or David Shearman of Senator Isakson's Veterans' Affairs Committee staff at (202) 224-9126.

Sincerely,

Charles E. Grassley
Chairman
Committee on the Judiciary

Johnny Isakson
Chairman
Committee on Veterans' Affairs