

United States Senate

WASHINGTON, DC 20510

May 6, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Denis McDonough
Secretary
Department of Veterans Affairs

Dear Secretary McDonough:

On April 15, 2015; March 16, 2016; and May 5, 2022, I wrote to the Department of Veterans Affairs (VA) about the reporting of veterans to the National Instant Criminal Background Check System (NICS) and my concerns with respect to the government ensuring that constitutional due process is followed when the fundamental Second Amendment rights of veterans are at issue.¹ Until the Consolidated Appropriations Act of 2024, which was signed into law on March 9, 2024, veterans were reported to NICS when they were appointed a fiduciary to receive their VA benefits under the determination that they were considered “adjudicated mental defective” for purposes of federal law.² My concern about this reporting structure has extended to other executive branch agencies. For example, I drafted and led a Resolution of Disapproval under the Congressional Review Act to repeal an Obama/Biden administration rule that required the Social Security Administration to report beneficiaries to the NICS list for purposes of taking away their firearms.³ I led that repeal to protect the Second Amendment rights of our Social Security beneficiaries. That repeal passed the Senate and House and was signed into law by President Trump on February 28, 2017.⁴

¹ Press Release, Sen. Charles E. Grassley, *Veterans, Dependents Account for Disproportionate Share of ‘Mental Defective’ Category on Gun Ban List* (April 15, 2015), <https://www.grassley.senate.gov/news/news-releases/veterans-dependents-account-disproportionate-share-mental-defective-category>; Press Release, Grassley *Stands up for Veterans’ Second Amendment Rights* (March 23, 2016), <https://www.grassley.senate.gov/news/news-releases/grassley-stands-veterans-second-amendment-rights>; Press release, Sen. Charles E. Grassley, *Grassley Demands Data from VA to Protect Second Amendment Rights of Veterans* (May 6, 2022), <https://www.grassley.senate.gov/news/news-releases/grassley-demands-data-from-va-to-protect-second-amendment-rights-of-veterans>.

² The Consolidated Appropriations Act, 2024 requires that “[n]one of the funds made available by this Act may be used by the Secretary of Veterans Affairs under section 5502 of title 38, United States Code, in any case arising out of the administration by the Secretary of laws and benefits under such title, to report a person who is deemed mentally incapacitated, mentally incompetent, or to be experiencing an extended loss of consciousness as a person who has been adjudicated 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.” Consolidated Appropriations Act, 2024, Pub. Law No. 118-42, Sec. 413. *See also*, 18 U.S.C § 922(d)(4). This change was required because the VA didn’t determine if a veteran was a danger to self or others before reporting them to NICS.

³ Press Release, Sen. Charles E. Grassley, *Grassley Resolution Would Reverse Obama-Era Regulation Limiting Second Amendment Rights Of Social Security Beneficiaries* (Feb. 2, 2017), <https://www.grassley.senate.gov/news/news-releases/grassley-resolution-would-reverse-obama-era-regulation-limiting-second-amendment>.

⁴ Press Release, Sen. Charles E. Grassley, *Senate Approves Grassley Resolution Protecting Second Amendment Rights For Disabled Americans* (Feb. 15, 2017), <https://www.grassley.senate.gov/news/news-releases/senate->

In my May 2022 letter, I asked you to provide data related to the VA's reporting of veterans to the NICS adjudicated mental health category from December 31, 2017, through December 31, 2021.⁵ The VA's July response provided data revealing that, from calendar year 2018 through 2021, it added over 103,000 veterans to the NICS adjudicated mental health category, only changed roughly 12,600 veterans' status to "[c]ompetent," had multiple cases adjudicated De Novo for failing to act within the required time period, and received 8,865 challenges to assignment of a fiduciary with over 6,000 of those challenges succeeding.⁶

The VA disclosed it does not track how many veterans appealed to federal court for removal from the adjudicated mental health category, how much money it remitted to attorneys representing plaintiffs in cases involving removal from that category, or how many erroneous VA records were removed from NICS.⁷

In the years since the VA's response, my cause for concern has not disappeared. The May 2022 letter noted that as of December 31, 2020, 97.9% of all names reported to the NICS list's "adjudicated mental health" category by federal agencies were provided by the VA even though reporting requirements apply to all federal agencies.⁸ The FBI reported that, as of January 3, 2023, 97.9% of all active entries in NICS under "adjudicated mental health" were still made by the VA.⁹ The VA has reported the most entries to NICS out of the 27 agencies listed for the adjudicated mental health category.

Today, I am writing to request updated data with respect to how the VA has handled the reporting of veterans to NICS in the past several years including the recent change in law. No later than May 20, 2024, please provide answers to the following with respect to the NICS adjudicated mental health category:

1. Total VA-referred active NICS records monthly from Dec. 31, 2021, through April 30, 2024. This year range applies to each subsequent question.
2. For each year, breakouts according to the subcategories listed below, as applicable:
 - a. The number of deceased beneficiaries removed from the adjudicated mental health category;
 - b. The number beneficiaries added to the adjudicated mental health category;

approves-grassley-resolution-protecting-second-amendment-rights-disabled; *See also*, Grassley Statement on Repeal of Overreaching Social Security Firearm Regulation (March 2, 2017), <https://www.grassley.senate.gov/news/news-releases/grassley-statement-repeal-overreaching-social-security-firearm-regulation>.

⁵ Letter from Senator Grassley, *supra* note 1.

⁶ Letter from Denis McDonough, Secretary, Department of Veterans Affairs, to Senator Charles Grassley, Ranking Member, Senate Judiciary Committee, (July 18, 2022) (on file with Comm. staff).

⁷ *Id.*

⁸ Letter from Senator Grassley, *supra* note 1. The FBI's datasheet lists the category as "adjudicated mental health" whereas federal law describes the category as "adjudicated as a mental defective."

⁹ FED. BUREAU OF INVESTIGATION CRIM. INFO. SERVS. DIVISION, NAT'L INSTANT CRIM. BACKGROUND CHECK SYS. (NICS) SEC., ACTIVE RECS. IN THE NICS INDICES AS OF JAN. 3, 2023 (Last visited May 6, 2024), <https://www.fbi.gov/file-repository/active-entries-in-the-nics-indices-by-state.pdf/view>.

- c. The number of beneficiaries who requested removal from the NICS adjudicated mental health category; and
 - d. The number of beneficiaries who were granted removal from the NICS adjudicated mental health category.
3. For each year, a breakdown of the fiduciary determinations based on:
 - a. Medical evidence
 - b. Court order.¹⁰
4. Has VBA ever determined a beneficiary to be a danger to self or others as part of the fiduciary assignment process? If so, how many?
5. Based on the new danger to self or others reporting standard in the Consolidated Appropriations Act of 2024, has the VA reported any beneficiaries to NICS?¹¹
6. For those beneficiaries added to the adjudicated mental health category, for each year provide the number who were unable to manage their financial affairs due to:
 - a. Injury;
 - b. Disease; or
 - c. Age-related illness.
7. For the number of beneficiaries who requested removal from the NICS adjudicated mental health category, for each year provide the reasons for the requests including:
 - a. The removal/confiscation of a firearm;
 - b. The inability to procure a weapon; and
 - c. Evidence that they no longer need a fiduciary to handle their financial affairs.
8. For each year, how many adjudicated mental health category removal cases were subject to:
 - a. De novo review, due to the VA failing to act on a request within the statutorily required 365 days; and
 - b. Plaintiffs prevailed against the VA based on a de novo hearing.
9. Has the VA started to track how many beneficiaries appealed to federal court and what was the outcome? If so, provide data for each year. If not, why not?

¹⁰ In its response letter to me, VA stated NICS “reporting arises solely from the Veterans Benefits Administration,” (VBA) which “determines whether a fiduciary must be appointed to manage the beneficiary’s benefits” upon receipt of “medical evidence or a court order.” Further, “[w]hen VBA determines a VA beneficiary to be unable to manage their financial affairs due to injury, disease, or age-related illness, it discloses that information to NICS....” Letter from Denis McDonough, Secretary, Department of Veterans Affairs, to Senator Charles Grassley, Ranking Member, Senate Judiciary Committee, (July 18, 2022) (on file with Comm. staff).

¹¹ See note 2.

10. Provide a list, and any related data, tracking who represents the beneficiaries when an assignment is challenged.
11. For each year, how many beneficiaries:
 - a. Accepted assignment of a fiduciary;
 - b. Challenged the assignment of a fiduciary; and
 - c. Successfully challenged the assignment of a fiduciary.
12. Has the VA started to track how much money in fees was remitted by the VA to attorneys representing plaintiffs in cases involving removal from the adjudicated mental health category? If so, provide data for each year. If not, why not?
13. Has the VA started to track how many erroneous VA records were removed from NICS? If so, provide data for each year. If not, why not?¹²

Thank you for your prompt attention to this matter. Should you have any questions, please contact Jace Pimentel of my Committee staff at (202) 224-0642.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Budget

¹² VA's claim that it does not track the number of erroneous records removed is surprising considering the Fix NICS Act of 2018 requires that "[t]he head of each Federal department or agency shall submit a certification to the Attorney General..." which must include "the efforts of the Federal department or agency to ensure complete and accurate reporting of relevant records, including efforts to monitor compliance and correct any reporting failures or inaccuracies." Consolidated Appropriations Act, 2018, Sec. 602.