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United States Senate

COMMITTEE ON THE JUDICIARY

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July 24, 2015

VIA ELECTRONIC TRANSMISSION

Acting Commissioner Carolyn W. Colvin
Social Security Administration
6401 Security Boulevard
Baltimore, Maryland 21235-6401

Dear Acting Commissioner Colvin:

On April 13, 2015, I wrote to the Department of Justice (DOJ) questioning the process by which hundreds of thousands of veterans have been added to the National Instant Criminal Background Check System (NICS) list's "mentally defective" category. As you are aware, NICS is effectively a national gun ban list and placement on the list precludes the ownership and possession of firearms. In the letter to DOJ, I identified several concerns about the Department of Veterans Affairs' (VA) process and procedure including the VA's habit of reporting veteran names to the list simply because a veteran has been appointed a fiduciary to help manage benefit payments. This is inconsistent with the standard required in Bureau of Alcohol, Tobacco and Firearm (ATF) regulations, which only authorizes prohibiting firearm ownership to those who have been determined to be a danger to themselves or others.¹ As a result of the VA's inaccurately low standard to report names, 99.3% of all names in the "mental defective" category are from the VA.² According to a recent *L.A. Times* article, the Social Security Administration (SSA) is taking steps to use the same unauthorized VA standard to report Social Security beneficiaries to the DOJ for subsequent placement on the NICS list.³

¹ The standard adopted by ATF is a "mental defective" standard that, at its core, allows regulation only when someone is a danger to themselves and/or others. The regulation itself even states that the standard does not include persons suffering from mental illness but who are not a danger to themselves. See (95R-051P), 61 Fed. Reg. 47095, 47097 (Sept. 6, 1996) (codified at 27 C.F.R. § 478.11).

² 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); Senate Report, 113-86, Veterans Second Amendment Protection Act (2013).

³ Zarembo, Alan. "Obama Pushes to Extend Gun Background Checks to Social Security." LOS ANGELES TIMES. (July 18, 2015) Accessed July 20, 2015.

The *L.A. Times* noted that 4.2 million Americans receive their Social Security benefits through what is known as a “representative payee.”⁴ A representative payee is a person or organization that accepts payment on behalf of a beneficiary in the event that the beneficiary is not able to manage or direct the management of payments in his or her own interest.⁵ The need for representative payment can be determined by mental or physical conditions.⁶ Importantly, SSA may even appoint a representative payee if the beneficiary is a *legally* competent individual.⁷ As such, it appears that just like the VA, SSA’s regulatory action will not require the government to first prove that the individual is a danger to self or others – the standard required to be placed on the NICS list.⁸

The proposed SSA standard appears to lack any authority to impose restrictions on gun ownership beyond the ATF regulatory standard, and threatens the constitutional rights of Social Security beneficiaries. Given that 4.2 million Americans have been appointed representative payees by the SSA, the new regulatory scheme would result in one of the largest gun bans in United States history.

It is essential to ensure that the process by which the SSA, and all federal agencies, report names to the DOJ for placement on the NICS list recognizes and protects the fundamental nature of the Second Amendment. In order to more fully understand SSA’s potential regulatory actions, please answer the following:

1. Have any employees within the SSA met with White House officials or other Executive Branch agency officials regarding the SSA’s efforts to report names to the DOJ for placement on the NICS list? If so, please provide all communications between or among SSA employees and employees of the White House or any other Executive Branch agency or department referring or relating to the promulgation of the proposed regulation.
2. According to the *L.A. Times*, the SSA spokeswoman, Ms. LaVenía LaVelle, stated that at one point SSA determined it was not required to submit records to the NICS list. Why has that determination changed?
3. Is the SSA using the VA’s regulatory standard as a template for reporting names to the DOJ? If not, in what ways is the SSA’s regulatory scheme different from the VA’s?

⁴ 20 C.F.R. § 416.601.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ (95R-051P), 61 Fed. Reg. 47095, 47097 (Sept. 6, 1996) (codified at 27 C.F.R. § 478.11).

4. Do you believe that a beneficiary who is appointed a representative payee to manage finances is likewise mentally defective under the ATF standard?⁹ If so, please explain how the need for assistance in managing payments for mental, *or physical* reasons equates to being a danger to one's self or others.
5. Before reporting beneficiaries to the DOJ, will the SSA first seek a court order finding a beneficiary is a risk to self or others? If not, why not?
6. Please explain in detail the process by which the SSA plans to report names to the DOJ and provide answers to the following points within your explanation:
 - a. Is an SSA employee required to interview the beneficiary before reporting their names to the DOJ? If so, what criteria triggers the interview? If no interview is to occur, why not?
 - b. Will the beneficiary receive a letter notifying them of a hearing and the potential that his or her name could be reported to the NICS list depending on the result of the hearing? If so, please provide a copy of the letter SSA intends to use. If a letter is not planned, why not?
 - c. If no hearing is provided, will a letter be sent to the beneficiary notifying them of their eventual placement on the NICS list? If so, on what factual and legal basis will SSA base its decision to report that beneficiary's name? In addition, please provide a copy of the letter SSA intends to use.
 - d. If a hearing is to take place, what will its purpose be? What factual and legal issues will potentially be resolved?
 - e. If a hearing is to take place, will the burden be on the government to justify its effort to report the beneficiary's name to the DOJ for eventual placement on the NICS list? If not, why not?
 - f. What evidentiary standard of review will be required of the SSA to prove that the beneficiary should be reported to the DOJ?
 - g. At the conclusion of the hearing process, who will render the final decision on the matter?

⁹ The standard adopted is a "mental defective" standard that, at its core, allows regulation only when someone is a danger to themselves and/or others. The regulation itself even states that the standard does not include persons suffering from mental illness but who are not a danger to themselves. See (95R-051P), 61 Fed. Reg. 47095, 47097 (Sept. 6, 1996) (codified at 27 C.F.R. § 478.11).

7. In light of the fact that the Supreme Court has held the Second Amendment to be a fundamental right, what steps will SSA take to ensure that names reported to the DOJ for subsequent placement on the NICS list comply with the requirements of the Second Amendment? Please explain in detail.
8. Does the potential standard employed by the SSA to report names to the DOJ for subsequent placement on the NICS list comply with the requirements of constitutional procedural due process? If so, please explain in detail.

Please number your responses according to their corresponding questions. Please submit your responses by August 6, 2015. In addition to the above questions, I request that you brief my staff on this subject. If you have any questions, contact Josh Flynn-Brown of my Committee Staff at (202) 224-5225. Thank you for your cooperation.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary