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April 13, 2015

VIA ELECTRONIC TRANSMISSION

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dear Attorney General Holder:

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 were provided by the Veterans Administration (VA) even though reporting requirements apply to all federal agencies.¹ And that percentage remained virtually unchanged as of April 2013.² 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:

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

“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 Most importantly, in addition to the regulation itself, the federal statutory provision granting the VA the authority to promulgate the regulation is squarely focused on financial matters and was not designed to impose firearm restrictions.⁵

Varying Standards

In accordance with the Brady Handgun Violence Prevention Act, the Bureau of Alcohol, Tobacco and Firearms (ATF) adopted a regulation that defined a different standard for firearm regulation than that imposed by the VA. The standard adopted is a “mentally 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.⁶

The VA’s regulation appears to omit important findings and never reaches the question of whether a veteran is a danger to himself, herself, or others. Thus, a VA determination that a veteran is “incompetent” to manage finances is insufficient to conclude that the veteran is “mentally defective” under the ATF’s standard that is codified in federal law.

Due Process Concerns

In addition, the procedural protections the VA affords to veterans are weak. First, the standard of review is particularly low for a fundamental constitutional right: clear and convincing.⁷ Hearsay is allowed.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. Of particular concern, although VA employees can personally meet with veterans and non-

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

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.

veteran dependents who are receiving VA benefits, only when VA personnel meet with veterans are they directed to consider whether competency is at issue.⁹ Thus, it appears that veterans are immediately targeted by VA personnel upon initial contact.

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.

In order to more fully understand the interplay between the differing standards of the VA and ATF, the procedural processes involved, and what effect it has on Second Amendment rights, please answer the following:

1. Is the primary purpose of the NICS list to preclude firearm ownership and possession by individuals who are a danger to themselves and/or others? If not, what is the primary purpose of the NICS list?
2. Is the primary purpose of the VA's reporting system to report the names of individuals who are appointed a fiduciary?
3. Out of all names on the NICS list, what percentage of them have been referred by the VA?
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?

⁹ M21-1MR Part 3, General Claims Process, U.S. DEP'T OF VETERANS AFFAIRS, Subpart IV –“General Rating Process,” Chapter 8 – “Competency, Due Process and Protected Ratings,” Section A Topic 2: “Considering Competency While Evaluating Evidence.” Accessible at http://www.benefits.va.gov/WARMS/M21_1MR3.asp.

5. Does the 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.
6. 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?
7. Is the DOJ satisfied that all names reported from the VA for placement on the NICS are, in fact and in law, 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?
8. Given that 99.3% of all names in the NICS "mental defective" category are reported from the VA, has the DOJ reviewed the VA'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.
9. What review process does DOJ have in place to ensure that names are properly on the NICS list?
10. How many individuals have appealed their placement on the NICS list? How many individuals were successful in their appeal?
11. In light of the fact that the Supreme Court has held the Second Amendment to be a fundamental right, has the DOJ changed any processes and procedures relating to the NICS system which were in existence prior to that holding?
12. Besides the VA, what other federal agencies have reported names to the NICS list since 2005? And how many names were reported by each agency since 2005?

Please number the responses according to their corresponding questions. Thank you in advance for your cooperation with this request. Please respond no later than April 30, 2015. If you have questions, contact Josh Flynn-Brown of my Committee staff at (202) 224-5225.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary