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Gun Control, Mental Incompetency, and Social Security Administration Final Rule

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Summary

On February 2, 2017, the House of Representatives passed a Congressional Review Act disapproval resolution (H.J.Res. 40) to overturn a final rule promulgated by the Social Security Administration (SSA) regarding implementation of firearms restrictions for certain persons. On February 16, 2017, the Senate passed H.J.Res. 40 without any amendments. On February 28, 2017, President Donald Trump signed this resolution into law (P.L. 115-8). This enacted joint resolution vacates the SSA final rule. It also bars the SSA from promulgating any future rule that would be "substantially the same" as the vacated rule unless the agency receives a new statutory authorization to do so.

The vacated SSA final rule was intended to implement provisions of the NICS Improvement Amendments Act of 2007 (NIAA; P.L. 110-180) on reporting requirements for any federal agency holding records on persons prohibited from possessing firearms. NIAA mandates that agencies must share those records with the Federal Bureau of Investigation (FBI) for inclusion in a computer index accessible to the National Instant Criminal Background Check System (NICS). As described in this report, some of these prohibiting records are based upon findings of "mental incompetency" made during certain federal benefit claims processes administered by the Department of Veterans Affairs (VA) since 1998 and to be administered by the SSA beginning in December 2017.

Activated by the FBI, NICS is a national computer network that allows federally licensed gun dealers to initiate a background check through either the FBI or a state or local authority, before transferring a firearm to an unlicensed, private person. Under federal law, persons who are "adjudicated as a mental defective" are ineligible to ship, transport, receive, or possess firearms or ammunition. In 1998, the Bureau of Alcohol, Tobacco, Firearms and Explosives promulgated a rule that defined this term to include any individual that a court, board, commission, or other lawful authority has made a determination that—as a result of marked subnormal intelligence, mental illness, incompetency, condition or disease—he or she is a person who

- is a danger to himself or others;
- lacks the mental capacity to contract or manage his or her own affairs;
- is found insane by a court in a criminal case; or
- is found incompetent to stand trial, or not guilty by reason of lack of moral responsibility.

Since 1998, the Department of Veterans Affairs has referred the name of any beneficiary determined to be incompetent—because he or she lacks the mental capacity to contract or manage his or her own affairs due to injury or disease—to the FBI for inclusion in the NICS index pursuant to the Brady Handgun Violence Prevention Act, 1993 (Brady Act; P.L. 103-159). Under NIAA, since 2007, the VA must inform any benefits claimant that such determinations could lead to a loss of his or her firearms rights and privileges. But, NIAA also requires any federal authority that provides prohibiting mental health records to the FBI for inclusion in the NICS index to establish an administrative process, by which mentally incompetent, prohibited beneficiaries may petition to have those rights and privileges restored.

Pursuant to both the Brady Act and NIAA, the SSA final rule specified conditions under which individuals would have been reported for inclusion in the NICS index as Social Security or SSI disability beneficiaries who would have been deemed too mentally incompetent to be trusted with firearms or ammunition. The rule also outlined SSA's process for notifying affected individuals as well as an administrative appeals process under which such individuals may request relief from

the federal firearms prohibitions. The vacated rule was to have become effective on January 18, 2017; however, compliance would not have been required until December 19, 2017.

Since the release of this report, the House has passed a bill (H.R. 1181) that would clarify the conditions under which veterans and survivors who are beneficiaries of programs administered by the VA may be treated as "adjudicated as a mental defective." For further information, see CRS Report R44818, *Gun Control, Veterans Benefits, and Mental Incompetency Determinations*.

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Introduction

On February 2, 2017, the House of Representatives passed a Congressional Review Act disapproval resolution (H.J.Res. 40) to overturn a final rule promulgated by the Social Security Administration (SSA) regarding implementation of firearms restrictions for certain persons.[1] The House joint resolution passed by recorded vote: 235-180 (Roll no. 77). On February 15, 2017, the Senate passed this resolution by a recorded vote: 57-43 (Roll no. 66). On February 28, 2017, President Donald Trump signed this resolution into law (P.L. 115-8) effectively vacating the SSA final rule. The resolution also bars the SSA from promulgating any rule in the future that would be "substantially the same" as the disapproved rule unless the administration receives a new statutory authorization to do so.

The SSA final rule was intended to implement provisions of the NICS Improvement Amendments Act of 2007 (NIAA), which strengthened existing provisions of federal law that set out reporting requirements for any federal agency holding records on persons prohibited from possessing firearms.[2] NIAA mandates that agencies must share those records with the Federal Bureau of Investigation (FBI) for inclusion in a computer index accessible to the National Instant Criminal Background Check System (NICS). As described below, some of these prohibiting records are based upon findings of "mental incompetency" made during certain federal benefit claims processes administered by the Department of Veterans Affairs (VA) since 1998 and similar findings that would have been made by the SSA beginning in December 2017 under the vacated final rule.[3]

Such mental incompetency determinations hinge on a regulatory definition promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in 1998 that defines persons who are found to lack the mental capacity to handle their own affairs as "adjudicated as a mental defective" for the purposes of gun control. As a result, such persons are prohibited from shipping, transporting, receiving, or possessing firearms or ammunition. In the past, Congress has considered legislation that would redefine "mental incompetency" for the purposes of gun control, such that firearms ineligibility based on a person's mental incompetency would only be based on an involuntary commitment to a mental institution or finding by a magistrate or judicial authority ruling that the beneficiary is a danger to themselves or others.

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[1] For further information, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked Questions*, by Maeve P. Carey and Christopher M. Davis.

Also, see Social Security Administration, "Implementation of the NICS Improvement Amendments Act of 2007," 81 *Federal Register* 91702-91715, December 19, 2016.

[2] P.L. 110-180, January 8, 2008; 121 Stat. 2559.

[3] The SSA final rule reflects gun control initiatives pursued by President Barack Obama in January 2013 in response to the December 2012 Newtown mass shooting. The SSA rule took several years to develop. Alan Zarembro, "Move Would Extend Gun Checks: Obama Administration Pushes to Include Certain Beneficiaries of Social Security in National Database," *Los Angeles Times*, July 18, 2015, p. A1.

See also White House, *FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer*, January 4, 2016, https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our; White House, *Memorandum for Heads of Executive Departments and Agencies on Improving Availability of Relevant Executive Brand Records to the National Instant Criminal Background Check System*, January 16, 2013, https://obamawhitehouse.archives.gov/the-press-office/2013/01/16/presidential-memorandum-improving-availability-relevant-executive-branch; and White House, *Now Is the Time: The President's Plan to Protect Our Children and Our Communities by Reducing Gun Violence*, January 16, 2013, http://www.wh.gov/now-is-the-time.

Since the release of this report, the House has passed a bill (H.R. 1181) that would clarify the conditions under which veterans and survivors who are beneficiaries of programs administered by the VA may be treated as "adjudicated as a mental defective."[4]

Brady Act, NICS, and Firearms Ineligibility

As amended by the Brady Handgun Violence Prevention Act, 1993 (Brady Act), the Gun Control Act of 1968 (GCA) requires background checks to be completed for all unlicensed persons seeking to obtain firearms from federally licensed gun dealers (otherwise referred to as federal firearms licensees, or FFLs).[5]

Pursuant to the Brady Act, the FBI activated NICS on November 30, 1998. This national computer network allows FFLs to initiate a background check through either the FBI or a state point of contact (POC),[6] before transferring a firearm to an unlicensed, private person.[7]

Under the GCA, there are nine classes of persons prohibited from shipping, transporting, receiving, or possessing firearms or ammunition:

- persons convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
- fugitives from justice;
- unlawful users or addicts of any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802);
- persons adjudicated as "mental defective" or committed to mental institutions;
- unauthorized immigrants and nonimmigrant visitors (with exceptions in the latter case);[8]

[4] For further information, see CRS Report R44818, *Gun Control, Veterans Benefits, and Mental Incompetency Determinations*, by William J. Krouse and Scott D. Szymendera.

[5] P.L. 103-159, November 30, 1993, 107 Stat. 1536. Congress passed the Brady Act after nearly six years of sometimes contentious debate. As originally introduced in the 100th Congress, the Brady bill (H.R. 975 and S. 466) called for a seven-day waiting period on handgun transfers. Supporters deemed this waiting period necessary to give law enforcement officials the time necessary to conduct a thorough background check. Later versions of the bill would have implemented a five-business-day waiting period. Opponents of the waiting period called for an "instant" computerized criminal history background check systems as had been implemented in four states (VA, FL, MD, and DE).

[6] The FBI handles background checks entirely for most states, while other states serve as full or partial points of contact (POCs) for state and local firearms background check purposes. In POC states, federally licensed gun dealers contact a state agency, and the state agency contacts the FBI for background checks.

[7] Under federal law, persons who are not "engaged in the business" of dealing in firearms are not required to be licensed to ship, transport, receive, or possess firearms. Intrastate, firearms transactions between unlicensed persons are not covered by the recordkeeping or the background check provisions of the GCA. However, these transactions and other matters such as possession, registration, and the issuance of licenses to firearms owners may be covered by state laws or local ordinances.

[8] Until 2011, ATF interpreted this provision to apply to any noncitizen whose immigration status was "nonimmigrant alien," regardless of whether the alien had been required to obtain a visa prior to arrival at a U.S. port of entry. In 2011, ATF was informed by the DOJ Office of Legal Counsel (OLC) that its interpretation was too broad and that the prohibition "applies only to nonimmigrant aliens who must have visas to be admitted, not to all aliens with nonimmigrant status." See 2011 WL 6260326 (O.L.C) (Oct. 28, 2011). As such, nonimmigrants who enter the country validly without a visa (e.g., under the Visa Waiver Program) are eligible to purchase firearms and ammunition; however, those individuals must meet a residency requirement, which requires them to demonstrate that they have "the intention of making a home" in the state where they wish to purchase the firearm. See 77 *Federal Register* 33625-33634 (June 7, 2012).

- persons dishonorably discharged from the U.S. Armed Forces;
- persons who have renounced their U.S. citizenship;
- persons under court-order restraints related to harassing, stalking, or threatening an intimate partner or child of such intimate partner; and
- persons convicted of a misdemeanor crime of domestic violence.[9]

In addition, there is a 10th class of persons prohibited from shipping, transporting, or receiving (but not possessing) firearms or ammunition:

- persons under indictment in any court of a crime punishable by imprisonment for a term exceeding one year.[10]

It is also unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any of the prohibited persons enumerated above, if the transferor (seller) has reasonable cause to believe that the transferee (buyer) is prohibited from receiving those items.[11]

Mental Incompetency and Firearms Ineligibility

To implement the Brady Act, inter-agency discussions were held in 1996/1997 about who should be considered "adjudicated as a mental defective" for the purposes of gun control.[12] These discussions were largely led by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the agency principally responsible for administering and enforcing federal gun control laws. On June 27, 1997, the ATF promulgated a final rule defining the following terms:

> "Adjudicated as a mental defective" includes a determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence or a mental illness, incompetency, condition, or disease, (1) is a danger to himself or others, or (2) lacks the mental capacity to contract or manage his own affairs. The term also includes (1) a finding of insanity by a court in a criminal case and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. Sections 850a, 876(b).
>
> "Committed to a mental institution" means a formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes commitments: (1) to a mental institution involuntarily; (2) for mental defectiveness or mental illness; or (3) for other reasons, such as drug use. The term does not include a person who is admitted to a mental institution for observation or who is voluntarily admitted.
>
> "Mental institution" includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including psychiatric wards in general hospitals.[13]

In its final rule, ATF noted that the VA had commented on the proposed rulemaking and had "correctly interpreted" the proposed definition of "adjudicated as a mental defective" to include persons who have been determined to be "mentally incompetent" by the Veterans Benefits

[9] 18 U.S.C. §922(g).

[10] 18 U.S.C. §922(n).

[11] 18 U.S.C. §922(d).

[12] To reflect terms currently utilized in discussing this issue, to the extent possible, the term, "mentally incompetent" will be used in place of "mental defective."

[13] *Federal Register*, vol. 62, no. 124, June 27, 1997, p. 34634.

Administration (VBA).[14] Under current VA procedures, an individual is considered "mentally incompetent" if he or she lacks the mental capacity to contract or manage his or her own affairs for reasons related to injury or disease (under 38 C.F.R. §3.353).[15] In a proposed rulemaking, the ATF opined that the inclusion of "mentally incompetent" in the definition of "mental defective" was wholly consistent with the legislative history of the 1968 Gun Control Act.[16]

In the wake of the December 2012, Newtown, CT, mass shooting,[17] the ATF issued proposed regulations to clarify further individuals who might fall under this definition. This proposed regulation has not been made final.[18] It is significant to note that the NICS index is not intended to be a registry of all individuals diagnosed with a mental illness. The vacated SSA rule calls into question, who ought to be prohibited from receiving or possessing firearms and ammunition, among those persons deemed mentally incompetent for the purposes of federal benefit claims processing? Moreover, the subsequent legislative history shows that some Members of Congress have long taken issue with the ATF interpretation of the term "adjudicated as a mental defective."[19]

NICS Improvement Amendments Act of 2007

In April 2007, a lone assailant armed with two pistols shot to death 32 individuals and nonfatally wounded another 17, before shooting himself to death at the Virginia Polytechnic Institute and State University (Virginia Tech) in Blacksburg, Virginia. Due to his disturbing on-campus behavior, the assailant had previously been evaluated by health care professionals and ordered by a judge to undergo "outpatient" mental health treatment, because he was deemed to be a threat to himself or others.[20] At that time, however, Virginia state law only referred the subjects of "inpatient" court orders for such treatment to the FBI for inclusion in the NICS index.[21] Following this massacre, the Virginia governor, now-Senator Timothy Kaine, reviewed the state statute and determined that henceforward subjects of either court-ordered inpatient or outpatient mental health care under such circumstances would be referred to the FBI for inclusion in the NICS index.[22]

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[14] Ibid., p. 34637.

[15] *Federal Register*, vol. 61, no. 174, September 6, 1996, p. 47095.

[16] Ibid.

[17] On December 14, 2012, in Newtown, CT, a 20-year-old male entered Sandy Hook Elementary School and shot 20 1st graders and 6 adult staff members to death. He also shot his mother to death. For further information, see *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012*, November 25, 2013, 116 pp.

[18] U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, "Amended Definition of 'Adjudicated as a Mental Defective' and 'Committed to a Mental Institution' (2010R-21P)," 79 *Federal Register* 774, January 7, 2014.

[19] In the 110th, 111th, 112th, and 113th Congresses, either the Senate or House, or both, acted on bills that would have prohibited the VA from finding a veteran or other beneficiary to be "mentally incompetent" and thus a "mental defective" for the purposes of gun control, unless such a finding were made by a judge, magistrate, or other judicial authority based upon a finding that the beneficiary posed a danger to himself or others. None of these bills were enacted. For further information, see CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by William J. Krouse.

[20] For further information, see *Mass Shootings at Virginia Tech, April 16, 2007: Report of the Virginia Tech Review Panel Presented to Timothy M. Kaine, Governor, Commonwealth of Virginia*, August 2007, 147 pp.

[21] Ibid.

[22] Ibid.

In response to the Virginia Tech mass shooting, Congress passed the NICS Improvement Amendments Act of 2007 (NIAA).[23] This act includes provisions designed to encourage states to make available to the Attorney General certain records related to persons who are disqualified from acquiring firearms, particularly disqualifying records related to mental health adjudications, as well as domestic violence misdemeanor convictions and restraining orders. To accomplish this, the act establishes a framework of incentives and disincentives whereby the Attorney General is authorized to either waive a grant match requirement or reduce a law enforcement assistance grant depending upon a state's compliance with the act's goals of bringing such firearms-related disqualifying records online.

During congressional debate, however, some Members expressed opposition to the NIAA based on the assertion that, under these amendments, any veteran who was or had been diagnosed with Post Traumatic Stress Disorder (PTSD)[24] and was found to be a "danger to himself or others would have his gun rights taken away ... forever."[25] Members of Congress included a provision in NIAA that required agencies to inform a claimant beforehand that they could lose their gun rights and privileges if they are found to be mentally incompetent as a condition of a benefit program's administration and eligibility. In addition, as under the state grant provisions, NIAA required those referring agencies to establish a firearms disabilities relief program, whereby any individual referred to the NICS index for reasons related to mental incompetency would be able to petition to have his or her gun rights and privileges restored, if and when he or she had overcome the incapacities that led to the initial finding.

Thirty-two states and the VA have established disability relief programs under NIAA. The Bureau of Justice Statistics (BJS) has awarded $94.9 million in NICS improvement grants to state, local, and tribal governments from FY2009 through FY2015.[26] According to the BJS, there were 298,571 prohibiting records related to mental incompetency in the NICS index as of January 1, 2007.[27] Of those records, state and local authorities had contributed 159,418 records (53.4%).[28] According to the FBI, there were 4,658,573 active prohibiting records related to mental incompetency in the NICS index as December 31, 2016.[29] Of those records, state and local authorities had contributed 4,487,573 records (96.3%).[30] From the beginning of 2007 to the end of 2016, the number of those records contributed by state and local authorities to the NICS index had increased by 2,715%.

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[23] P.L. 110-180, January 8, 2008; 121 Stat. 2559.

[24] PTSD is a disorder that can occur after one has been through a traumatic event. Symptoms may manifest soon after the trauma, or may be delayed. For further information, see U.S. Department of Veterans Affairs, National Center for Posttraumatic Stress Disorder, Fact Sheet, http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_what_is_ptsd.html.

[25] Larry Pratt, "Veterans Disarmament Act to Bar Vets from Owning Guns," September 23, 2007, http://www.prisonplanet.com/articles/september2007/230907Disarmament.htm.

[26] SEARCH and National Center for State Courts Under Cooperative Agreement with the Bureau of Justice Statistics (BJS), *State Progress in Record Keeping for Firearms-Related Background Checks: Mental Health Submissions*, by Becki Groggins and Anne Gallegos, February 2016, p. 3.

[27] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2007—Statistical Tables*, July 16, 2008, Table 9, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=682.

[28] Ibid.

[29] U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, National Instant Criminal Background Check System (NICS) Section, *Active Records in the NICS Index as of December 31, 2016*, p. 6, https://www.fbi.gov/file-repository/active-records-in-the-nics-index-by-state.pdf/view.

[30] Ibid.

Federal agencies had contributed 171,083 such records to the NICS index, of which the VA had contributed 167,815 (98.1%), as of December 31, 2016.[31] By comparison, federal agencies had contributed 139,153 records to the NICS index as of January 1, 2007, the bulk of which were contributed by the VA.[32] The December 2016 SSA final rule established a similar program to the VA's; however, the SSA has not referred any disqualifying records to the FBI for inclusion in NICS.

Federal Department and Agency Requirements Under NIAA

NIAA included several provisions that address the submission of disqualifying records by federal departments and agencies to the FBI for inclusion in NICS.

Attorney General's Authority to Secure Records

NIAA (P.L. 110-180) amends the Brady Handgun Violence Prevention Act[33] to strengthen the Attorney General's authority to secure from any department or agency of the U.S. government information on persons who are prohibited from possessing or receiving a firearm under federal or state law.[34] The Brady Act, as amended by NIAA, requires those departments or agencies to (1) "furnish electronic versions" of that information quarterly; (2) update, correct, modify, or remove those records as required to maintain their timeliness, if those records are stored in any databases that are maintained or made available to the Attorney General, and (3) inform the Attorney General of any record changes so NICS could also be updated to reflect those changes. Furthermore, the act requires the Attorney General to submit to Congress an annual report on the compliance of each U.S. department or agency that possesses such disqualifying records.

Record Accuracy and Confidentiality

NIAA requires the Attorney General to ensure that any information submitted or maintained in NICS be kept accurate and confidential and that obsolete and erroneous names be removed from NICS and destroyed in a timely manner.[35] The act also requires the Attorney General to work with the states to develop computer systems that would electronically notify the Attorney General when a court order has been issued, lifted, or otherwise removed, or when a person has been adjudicated as mentally defective or committed to a mental institution.

Records Prohibited from Inclusion in NICS

NIAA prohibits any department or agency of the U.S. government from providing the Attorney General with any record regarding the mental health of a person, or any commitment of a person to a mental institution, if (1) the adjudication or commitment has been set aside or expunged, or the person has otherwise been fully released or discharged from all mandatory treatment,

[31] Ibid.

[32] U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics, Background Checks for Firearm Transfers, 2007—Statistical Tables*, July 16, 2008, Table 9, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=682.

[33] P.L. 103-159, Section 103(e).

[34] Section 101(a) of P.L. 110-180.

[35] Section 101(b)(2) of P.L. 110-180.

supervision, or monitoring; (2) the person in question has been found by a court, board, commission or other lawful authority to no longer suffer from a mental health condition; or (3) the adjudication or commitment is based solely on a medical finding of disability, without an opportunity for hearing by a court, board, or other lawful authority, and the person has not been adjudicated as a mental defective.[36]

Relief from Mental Defective Disability

NIAA requires that each department or agency of the U.S. government that makes adjudications related to the mental health of a person that impinges upon eligibility to possess or receive firearms to establish a process by which a person who is the subject of such an adjudication or determination could apply for relief from that disability.[37] (In this sense, the disability in question is the person's ineligibility to transfer or possess a firearm under 18 U.S.C. §922(d)(4) or (g)(4).) The act requires further that applications for disability relief be processed not later than 365 days after receipt, and if the agency fails to resolve an application within 365 days for any reason (including a lack of appropriated funds), the application is deemed to have been resolved, triggering de novo judicial review.[38]

In addition, administrative "relief and review" provided under the act (subparagraph 101(c)(2)(B)) is required to be made available according to standards outlined in 18 U.S.C. section 925(c).[39] For persons who are granted relief from disability under the act, or who are the subject of mental health records that the act prohibits from being turned over to the Attorney General, the underlying events that were the basis for those records are deemed not to have occurred for the purposes of determining firearms transfer and possession eligibility under federal law.

Notice of Firearms Eligibility Loss and Disability Relief

NIAA requires any federal department or agency that conducts proceedings to adjudicate a person as a mental defective to provide both oral and written notice to that person at the beginning of the adjudication process (1) that persons adjudicated as a mental defective are prohibited from purchasing, possessing, receiving, shipping or transporting a firearm or ammunition under federal law; (2) what the penalties are for violating related federal firearms provisions; and (3) what relief from such disability with respect to firearms is available under federal law.[40]

[36] Section 101(c)(1) of P.L. 110-180.

[37] Subparagraph 101(c)(2)(A) of P.L. 110-180.

[38] De novo review is a standard of review used by a court to rule on evidence and matters of law without giving deference to a lower court's legal conclusions or findings. As of December 2016, 32 states have established administrative relief programs to comply with the grant eligibility provisions of P.L. 110-180.

[39] Subparagraph 101(c)(2)(B) of P.L. 110-180. Under 18 U.S.C. §925(c), the Attorney General (previously, the Secretary of the Treasury) is allowed to consider petitions from a prohibited person for "relief from disabilities" and have his firearms transfer and possession eligibility restored. Since FY1993, however, a rider on the ATF annual appropriations for salaries and expenses has prohibited the expenditure of any funding provided under that account on processing such petitions. For FY1993, see P.L. 102-393; 106 Stat. 1732 (1992). For FY2015, see P.L. 113-235, 128 Stat. 2187 (2014).

[40] Paragraph 101(c)(3) of P.L. 110-180.

Senate Action in the 114th Congress

In the 114th Congress, the Senate considered several amendments following the December 2015 San Bernardino, CA, and June 2016 Orlando, FL, mass shootings. While the Senate blocked all these amendments on procedural grounds, Congress included a provision in an enacted bill that addresses VA procedures.[41]

Manchin-Toomey Amendment

On December 3, 2015, during Senate consideration of the Restoring Americans' Healthcare Freedom Reconciliation Act (H.R. 3762), Senators Joe Manchin and Patrick Toomey offered an amendment (S.Amdt. 2908) that would have amended veterans law to prohibit the VA from turning records on veterans or other beneficiaries who had been determined mentally incompetent over to the FBI for inclusion in NICS index unless certain notification and review conditions had been met.[42] Under the amendment, the Secretary of Veterans Affairs first would have been required to provide to a beneficiary, who had been deemed mentally incompetent for VA purposes, notification that included (a) the determination made by the Secretary; (b) a description of the implications of such a determination upon one's firearms eligibility under federal law; and (c) the right to request review by the board that would have been established by the VA or a court of competent jurisdiction.

Within 180 days of enactment, the Manchin-Toomey amendment would have required the Secretary of Veterans Affairs to establish a board that would have reviewed, upon request by a VA beneficiary, whether the individual's status as mentally incompetent for the purpose of receiving benefits prevented him from possessing firearms under the GCA. As mentioned above, a VA beneficiary would have had the option to request such a review from this board or from a court of competent jurisdiction. Under the Manchin-Toomey provision, the board would have been able to consider the individual's honorable discharge or decoration in determining whether he or she "cannot safely use, carry, possess, or store firearms due to mental incompetency." A beneficiary who received a determination from the board also would have been permitted to seek judicial review in federal court of the board's decision. It appears that until this review process was complete, a person would not have been considered "adjudicated as a mental defective" for purposes of firearms eligibility. As such, it appears that the Secretary, by implication, would not have been permitted to make a NICS referral during this period of time.

If a beneficiary did not request review by a board or court of competent jurisdiction within 30 days after receiving the initial notification from the Secretary, then the beneficiary who was to be determined mentally incompetent would have been considered "adjudicated as a mental

[41] For further information, see CRS Report R44655, *Gun Control: Federal Law and Legislative Action in the 114th Congress*, by William J. Krouse.

[42] On June 15, 2016, Senator Manchin submitted a nearly identical amendment (S.Amdt. 4716) during consideration of the FY2017 Departments of Commerce and Justice, Science, and Related Agencies (CJS) Appropriations bill (H.R. 2578, the expected vehicle for S. 2837); however, the amendment was not brought to a vote. Also, in the 114th Congress, Representatives Peter King and Mike Thompson introduced a measure, the Public Safety and Second Amendment Rights Protection Act of 2015 (H.R. 1217), which was nearly identical to the Manchin-Toomey amendment. For further information, see CRS Report R44655, *Gun Control: Federal Law and Legislative Action in the 114th Congress*, by William J. Krouse.

In addition, the Senate previously considered the Manchin-Toomey amendment (S.Amdt. 715 to S. 649, 113th Congress) following the Newtown, CT, mass public shooting in April 2013. For further information, see CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by William J. Krouse.

defective" for purposes of the GCA. This suggests that the Secretary would not have been able to make a NICS referral until the 30-day period had passed.

For VA beneficiaries who had already been considered "adjudicated as a mental defective" after being determined mentally incompetent by the VA, the Manchin-Toomey amendment would have required the Secretary to provide, within 90 days of enactment, written notice to these individuals of the opportunity for administrative review and appeal, as would have been established by the amendment. Furthermore, the amendment would have also required the Secretary to review and revise all policies and procedures whereby beneficiaries are determined to be mentally incompetent, so that any individual "who is competent to manage his own financial affairs, including receipt of Federal benefits, but who voluntarily turns over the management thereof to a fiduciary is not" considered "adjudicated mentally defective" for purposes of the GCA. Within 30 days of conducting this review, the Secretary would have been required to submit to Congress a report detailing the results of the review and any resulting policy and procedural changes.

Murphy Amendment

On June 16, 2016, by comparison, during Senate consideration of the Departments of Commerce and Justice, Science, and Related Agencies Appropriations Bill, 2017 (H.R. 2578, the expected vehicle for S. 2837), Senator Christopher Murphy offered an amendment (S.Amdt. 4750) that would have codified the ATF current regulatory definition of "adjudicated as a mental defective."[43]

Grassley Amendments

In the 114th Congress, Senator Charles Grassley offered amendments (S.Amdt. 2914 and S.Amdt. 4751), during consideration of H.R. 3762 and H.R. 2578, respectively. These Grassley amendments would have also amended the GCA and replaced the term "adjudicated as a mental defective" with the term "mentally incompetent" in both 18 U.S.C. Section 922(d) and (g). In addition, these amendments would have also amended the GCA to define the terms, "has been adjudicated mentally incompetent or has been committed to a psychiatric hospital," "order or finding," and "psychiatric hospital." These definitions and other language would have narrowed the scope of whose records, and under what circumstances, a federal or state agency could refer to the FBI for inclusion in the NICS mental defective file.

In addition, during the 114th Congress, Senator Grassley submitted an amendment (S.Amdt. 4120), during consideration of the National Defense Authorization Act for Fiscal Year 2017 (S. 2943). This amendment would have prohibited the VA Secretary from making a NICS referral to the FBI on any person as "adjudicated as a mental defective," "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." This amendment was not brought to a vote.

P.L. 114-255 Provision

In December 2016, Congress included a provision in the 21st Century Cures Act that codified VA implementation of NIAA.[44] This provision is discussed in greater detail below.

[43] The Murphy amendment reflects language previously included in a proposal introduced by Senator Chuck Schumer and Representative Jackie Speier, the Fix Gun Checks Act (S. 2934 and H.R. 3411) in the 114th Congress.

[44] P.L. 114-255, December 13, 2016; 130 Stat. 1307; codified at 38 U.S.C. §5501A.

VA Implementation of NIAA

As noted above, the VA has contributed the bulk of the federal records in the NICS index related to individuals who have been "adjudicated as a mental defective." Hence, the VA and its policies are one example of federal implementation of the Brady Act and NIAA. Under current VA regulations, the VA has the authority to determine the competency status of a person receiving VA benefits.[45] The VA may appoint a fiduciary to receive benefits on behalf of a beneficiary determined to be incompetent. In addition, the VA is to refer the name of any beneficiary determined to be incompetent to the FBI for inclusion in the NICS.[46]

Individuals Who Have Their Names Reported to NICS

The VA is to report the names of all beneficiaries determined to be incompetent to the FBI for inclusion in the NICS. The VA's regulations define a "mentally incompetent person" as

> one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.[47]

When making a determination as to the competency of a beneficiary, the regulations require that VA only make a determination of incompetency if either

- the medical evidence is clear, convincing, and leaves no doubt as to the beneficiary's incompetency; or
- there is a definite expression regarding the beneficiary's incompetency by responsible medical authorities.[48]

In addition, the regulations provide that if there is reasonable doubt as to the incompetency of the beneficiary, the beneficiary will be determined to be competent.[49]

How Are Affected Individuals Notified by the VA and What Information Is Provided?

Federal regulations require that a beneficiary be notified by the VA about the agency's proposed determination of incompetency.[50] It is the policy of the VA that both this notice, as well as the notice of the final determination of incompetency, include information on the impact of an incompetency decision on the beneficiary's right to purchase, possess, receive, or transport a firearm or ammunition.[51]

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[45] 38 C.F.R. §3.353.

[46] The authority for the VA to refer the names of beneficiaries determined to be incompetent to the FBI for inclusion in the NICS is not explicitly provided for in the VA regulations. However, it is described in Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.a., http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual.

[47] 38 C.F.R. §3.353(a).

[48] 38 C.F.R. §3.353(c).

[49] 38 C.F.R. §3.353(d).

[50] 38 C.F.R. §3.353(e).

[51] Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.b.

How Do Affected Individuals Have Their Records Removed from the NICS?

Beneficiaries who have had their names submitted by the VA to the FBI for inclusion in the NICS due to determinations of incompetency may contest both the determination and the inclusion of their names on the NICS. The VA's determination of incompetency is subject to the same due process and appeals procedures as other VA decisions.[52] For the purposes of a determination of incompetency, this includes the following procedures provided in regulation and codified in statute pursuant to Section 14017 of the 21st Century Cures Act:[53]

- notice by the VA to the beneficiary of the proposed determination and supporting evidence;
- the opportunity for the beneficiary to request a hearing;
- the opportunity for the beneficiary to present evidence, including the opinion of a medical professional or other person, as to the beneficiary's capacity to manage his or her benefits; and
- the opportunity to be represented by counsel, at no cost to the federal government, and bring a medical professional or other person to provide testimony at any hearing.

A beneficiary dissatisfied by the decision of the VA regarding his or her competency has the right to a hearing before the Board of Veterans Appeals (BVA) and the right of judicial review of the BVA's decision by the U.S. Court of Appeals for Veterans Claims. Decisions of the U.S. Court of Appeals for Veterans Claims may be appealed to the U.S. Court of Appeals for the Federal Circuit.

In addition to contesting or appealing the determination of incompetency, a beneficiary may separately seek relief from the VA's decision to report his or her name to the FBI for inclusion in the NICS. Because the decision of the VA to report a beneficiary to the FBI for inclusion in the NICS is not considered a decision by the agency on a benefit provided by law, the VA does not have a duty to assist the beneficiary with the request for relief, burden of proof is on the beneficiary requesting relief, and failure to meet the burden of proof is sufficient cause for the request for relief to be denied.[54]

When deciding whether or not to grant a veteran's request for relief, the VA must consider the following types of evidence:

- a current statement from the beneficiary's primary mental health physician that assesses the beneficiary's current and past mental health status; and
- evidence concerning the beneficiary's reputation.[55]

[52] 38 C.F.R. §§3.103 and 3.353(e).

[53] P.L. 114-255, December 13, 2016; 130 Stat. 1307; codified at 38 U.S.C. §5501A.

[54] Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.c. Federal law at 38 U.S.C. §5103A requires the VA to assist claimants in obtaining evidence necessary to substantiate their claims for benefits.

[55] Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.h.

The VA must deny a request for relief if there is clear and convincing evidence that the beneficiary would be a danger to himself/herself or others if the relief was granted.[56] If such evidence does not exist, the VA must consider granting the request for relief.[57] In order to grant relief, there must be clear and convincing evidence that affirmatively, substantially, and specifically, shows that

- the beneficiary is not likely to act in a manner that is dangerous to the public; and
- granting relief will not be contrary to the public interest.[58]

A decision of the VA to deny relief cannot be appealed to the BVA or U.S. Court of Appeals for Veterans Claims, but is subject to judicial review by a U.S. District Court.[59]

SSA Implementation of NIAA

In March 2013, the Department of Justice (DOJ) issued guidance to agencies regarding the identification and sharing of relevant federal records and their submission to the NICS. DOJ later determined that SSA must report to the Attorney General information about certain Social Security and Supplemental Security Income (SSI) beneficiaries for whom a representative payee (fiduciary) is appointed because they are determined by SSA to be unable to manage their benefits due to a mental impairment.

SSA issued a notice of proposed rulemaking concerning its implementation of the NIAA on May 5, 2016,[60] and published its final rule on December 19, 2016.[61] The rule specified the conditions under which SSA would have reported for inclusion in the NICS a Social Security or SSI disability beneficiary's disqualifying records. The rule also outlined SSA's process for notifying affected individuals as well as the administrative appeals process under which such individuals could have requested relief from the federal firearms prohibitions. The final rule became effective on January 18, 2017; however, compliance was not required until December 19, 2017.[62]

Individuals Who Would Have Had Their Records Reported to the NICS

Under the new rule, an individual would have been considered to be "adjudicated as a mental defective" by SSA if the individual meets all of the following requirements:

- has filed a claim for Social Security or SSI benefits based on a disability;

[56] Ibid., Section III.v.9.B.4.i.

[57] Ibid., Section III.v.9.B.4.j.

[58] Ibid.

[59] Ibid., Section III.v.9.B.4.g.

[60] Social Security Administration (SSA), "Implementation of the NICS Improvement Amendments Act of 2007," 81 *Federal Register* 27059, May 5, 2016.

[61] SSA, "Implementation of the NICS Improvement Amendments Act of 2007," 81 *Federal Register* 91702, December 19, 2016.

[62] See 20 C.F.R. §§421.100-421.170.

- has been determined to have an impairment (or combination of impairments) that meets or medically equals the criteria of one of the mental disorders specified in SSA's *Listing of Impairments* (Step 3 of the disability determination process);[63]
- has a primary diagnosis code based on a mental impairment;
- has attained age 18 but not yet attained Social Security's full retirement age (currently 66); and
- has had a representative payee appointed because he or she has been determined by SSA to be mentally incapable of managing benefit payments.

In general, adult Social Security and SSI disability beneficiaries are presumed to be capable of managing or directing the management of their benefits. However, if legal, medical, or lay evidence exists to the contrary, SSA will make a capability determination. If the agency determines that it is clearly in the best interest of the beneficiary to do so, it will certify benefit payments to another person as a representative payee. Within the context of SSA's policy under this rule, the appointment of a representative payee for a beneficiary with a listing-level mental impairment would have demonstrated that the individual "lacks the mental capacity to manage his own affairs."

According to the rule, SSA would have identified individuals who meet the aforementioned requirements on a *prospective* basis, meaning that the final rule would have largely affected certain new disability beneficiaries. However, the agency would have reported existing disability beneficiaries to the NICS who currently do not meet all five requirements but who later demonstrate a change in status that satisfies all five requirements. The Obama Administration estimated that the rule would have affected about 75,000 individuals annually.[64] A report by SSA's Office of the Inspector General found that about 81,000 Social Security and SSI disability awardees in FY2015 met all five requirements for reporting to the NICS, which was about 9% of the total disability awardee population.[65]

How Affected Individuals Would Have Been Notified by SSA and What Information Would Have Been Provided?

Under the rule, SSA planned to provide both oral and written notice to the affected individual that he or she meets all five criteria for reporting to the NICS and that when final, such reporting will prohibit the individual from possessing firearms. In addition, SSA planned to inform the affected

[63] Section 12.00 of appendix 1 to subpart P of 20 C.F.R §404. SSA employs a five-step sequential evaluation process for determining whether an adult is disabled for Social Security and SSI purposes. According to the agency, claimants determined to meet the criteria at Step 3 of the process are the most severely disabled because they are awarded benefits based solely on medical evidence, whereas claimants awarded at the later steps are awarded benefits based on a combination of medical and vocational evidence. Because SSA will not report to the NICS individuals whom the agency finds disabled at Step 5 of the process, the new rule will affect a subsample of the disability beneficiary population who have a representative payee and whose primary impairment is a mental disorder. For more information on the sequential evaluation process, see CRS Report RL32279, *Primer on Disability Benefits: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI)*, by William R. Morton.

[64] Obama Administration, "FACT SHEET: New Executive Actions to Reduce Gun Violence and Make Our Communities Safer," https://obamawhitehouse.archives.gov/the-press-office/2016/01/04/fact-sheet-new-executive-actions-reduce-gun-violence-and-make-our.

[65] SSA, Office of the Inspector General, *The Social Security Administration's Implementation of Reporting Information to the National Instant Criminal Background Check System*, A-01-16-50218, September 2016, http://oig.ssa.gov/audits-and-investigations/audit-reports/A-01-16-50218. Figure includes awards issued only at the initial and reconsideration stages of the adjudicative process. The total disability awardee population includes children under age 18.

individual of his or her ability to request relief from the federal firearms prohibitions at any time after SSA's adjudication became final.

How Affected Individuals Would Have Had Their Records Removed from the NICS?

SSA planned to notify the Attorney General that an affected individual's record should be removed if (1) the individual were later capable of managing his or her benefit payments, (2) the individual died, (3) SSA received information that it reported the record to the NICS in error, or (4) the agency granted the individual's request for relief under the new rule.[66] In requesting relief, an affected individual would have been required prove that he or she was not likely to act in a manner dangerous to public safety and such relief would not have been contrary to the public interest. Affected individuals denied relief by SSA would have been able to file a petition seeking judicial review in U.S. district court.

Conclusion

As discussed above, Congress has passed legislation to encourage state, local, tribal, and territorial governments to submit prohibiting records to the FBI for inclusion in the NICS index for individuals who have been "adjudicated as a mental defective," including some federal benefit claimants deemed to be too mentally incompetent to contract or handle their own affairs. Under the GCA, such persons are prohibited from shipping, transporting, receiving, or possessing firearms or ammunition. The legislative record suggests that some Members of Congress have taken issue with the current regulatory definition of "adjudicated as a mental defective," while other Members would prefer to have it codified.

The VA has implemented the Brady Act and NIAA and submitted prohibiting records on beneficiaries "who because of injury or disease lack the mental capacity to contract or to manage his or her own affairs." After the December 2012 Newtown, CT, tragedy, the Obama Administration directed the SSA to administer the Brady Act and NIAA in a similar manner.

The SSA adopted a final rule that was not completely parallel to the VA's administration of these laws, in that it would have resulted in a narrower set of prohibiting records of beneficiaries being submitted to the FBI for inclusion in the NICS index. As described above, the SSA tied such "adjudications" to "mental impairments," in addition to a beneficiary's ability to handle his or her day-to-day affairs, whereas the VA only ties it to the beneficiary's ability to manage his or her day-to-day affairs.

As the legislative record shows, some Members of Congress oppose NICS referrals based solely on the grounds that an individual "lacks the mental capacity to manage his [or her] own affairs."[67] Opponents of the SSA final rule contend that a mental impairment, even when tied to an incapacity to manage one's own affairs, is not sufficient grounds to make such NICS referrals to the FBI, without an "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."[68] They also

[66] The decision to appoint a representative payee is subject to SSA's formal appeals process with certain exceptions.

[67] American Civil Liberties Union, *Vote YES on the Resolution of Disapproval, H.J. Res. 40 (Social Security Administration NICS Final Rule)*, by Faiz Shakir and Vania Leveille (February 1, 2017), https://waysandmeans.house.gov/wp-content/uploads/2017/01/ACLU.pdf.

[68] Senator Richard Burr, "S.Amdt. 720, Sec. 114. Conditions for Treatment of Certain Persons as Adjudicated Mentally

pointed to the position taken by mental health advocates that reporting the incapacitated or mentally disabled under current VA procedures and the SSA final rule, without any regard to their propensity to be violent, reinforces ingrained stereotypes about the disabled.[69]

Proponents maintain that the VA has been, and SSA would have been, faithfully addressing public safety by implementing provisions of the Brady Act and NIAA.[70] They argued that measures to prevent mentally incompetent persons from acquiring firearms are justified because firearms in their view are dangerous instruments that amplify violence in the United States to unacceptable levels.[71] They underscore that issues related to notification of loss and restoration of gun rights and privileges were addressed in NIAA, incorporated into the current VA procedures and the vacated SSA final rule, and codified in P.L. 114-255.[72]

Opponents of the SSA final rule maintain that it was not substantive enough on its own to justify the taking of a constitutionally enumerated right to keep and bear arms under the Second Amendment. Opponents of the SSA final rule contend that it was unbalanced, because the SSA would have had to show that the beneficiary was "mentally incompetent" due to a diagnosed "mental impairment," whereas the beneficiary would have had to demonstrate to the SSA that he or she was not a threat to himself or herself, or others to regain his or her Second Amendment rights. In other words, the bar for the beneficiary to regain his or her gun rights would have been higher than for the initial SSA mental incompetency determination.

Author Information

William J. Krouse
Specialist in Domestic Security and Crime Policy

William R. Morton
Analyst in Income Security

Scott D. Szymendera
Analyst in Disability Policy

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Incompetent for Certain Purposes," Senate Debate on Safe Communities, Safe Schools Act of 2013, *Congressional Record*, vol. 159 (April 17, 2013), pp. S2719-S2720.

[69] Consortium for Citizens with Disabilities, *CCD Rights TF Letter of Support for the House CRA on the SSA NICS Rule*, January 26, 2017, http://www.c-c-d.org/fichiers/CCD-Rights-TF-House-Letter-of-Support-for-CRA-on-SSA-NICS-Jan-2017.pdf.

[70] Everytown for Gun Safety, *January 2016 Executive Actions*, January 5, 2016, https://everytownresearch.org/january-2016-executive-actions/.

[71] Americans for Responsible Solutions, "ARS Denounces House GOP Vote to Weaken the National Instant Criminal Background Check System," February 2, 2017, http://americansforresponsiblesolutions.org/2017/02/02/ssarule/.

[72] Ibid.

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