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Gun Control, Veterans Benefits, and Mental Incompetency Determinations

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Summary

On March 16, 2017, the House of Representatives passed the Veterans 2nd Amendment Protection Act (H.R. 1181) by a roll call vote (240-175). Under H.R. 1181, the Department of Veterans' Affairs (VA) would be prohibited from determining any beneficiary for whom a fiduciary is appointed, because he or she "lacks the capacity to contract or handle his or her own affairs," as "adjudicated as a mental defective" for the purposes of gun control, unless a magistrate or judicial authority also rules that the beneficiary is a danger to himself or herself or others.

Pursuant to the Brady Handgun Violence Prevention Act, 1993 (Brady Act; P.L. 103-159), since 1998, the VA has provided records on beneficiaries for whom a fiduciary has been appointed to the Federal Bureau of Investigation (FBI) for inclusion in the National Instant Criminal Background Check System (NICS). Pursuant to the NICS Improvement Amendments Act of 2007 (NIAA; P.L. 110-180), the VA was required to notify beneficiaries of the ramifications of mental incompetency determinations and a potential loss of their gun rights, as well as provide those beneficiaries with an avenue of administrative relief, by which they could appeal such determinations and have their rights restored. In the 21st Century Cures Act (P.L. 114-255), Congress included a provision that codified certain VA procedures related to mental incompetency determinations and potential loss of gun rights.

Since 2008, however, the legislative history also shows that some Members of Congress have viewed those VA procedures, even after the implementation of NIAA provisions, as inadequate. From the 110th through the 113th Congresses, proposals similar to H.R. 1181 were reported from committee, passed either the House or Senate, or both. In the 114th Congress, related amendments were considered, but not passed, on the Senate floor in the wake of mass shooting incidents in December 2015 in San Bernardino, CA, and in June 2016 in Orlando, FL. In the 115th Congress, moreover, a measure was passed that vacated a final rule issued by the Social Security Administration (SSA) in December 2016 that would have established parallel but different procedures for Social Security disability programs and NICS referrals (P.L. 115-8). Under the vacated rule, SSA disability beneficiaries who were appointed a "representative payee" to handle their day-to-day affairs and whose disability could be tied to a mental impairment would have been referred to the FBI for inclusion in NICS.

According to the FBI, as of December 31, 2016, federal departments and agencies had contributed 173,083 records in the NICS index "adjudicated mental health" file, of which the VA contributed 167,815 (98.1%). Supporters of H.R. 1181 view the existing VA procedures as an incongruity in the law. They ask why the VA is the only federal department or agency that has made substantial numbers of NICS referrals to the FBI based on mental incompetency determinations, even though other federal agencies that provide similar disability and income security benefits have not done so. In their opinion, this seeming incongruity calls into question whether the VA benefit claims and disability rating procedures are substantive enough on their own to justify the taking of a constitutionally enumerated right like the right to keep and bear arms under the Second Amendment. Opponents of H.R. 1181 contend that the VA has complied with the Brady Act and NIAA and that public safety is enhanced by its NICS referrals to the FBI. They contend further that the VA procedures act to protect VA beneficiaries from the harm that might result if they acquired firearms and used them improperly due to reasons possibly related to their mental incompetency. In their view, moreover, Congress seconded the VA procedures by codifying them in P.L. 114-255.

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Introduction

On March 10, 2017, the House Committee on Veterans' Affairs reported the Veterans 2nd Amendment Protection Act (H.R. 1181; H.Rept. 115-33). Representative David P. Roe, Chair of the House Committee on Veterans' Affairs, introduced H.R. 1181. This bill would clarify the conditions under which veterans and survivors who are beneficiaries of programs administered by the Department of Veterans Affairs (VA) may be treated as "adjudicated as a mental defective" under the Gun Control Act of 1968 (GCA).[1] On March 16, 2017, the House passed H.R. 1181 by a recorded vote: 240 to 175 (Roll no. 169).

Background

Under the Brady Handgun Violence Prevention Act, 1993 (Brady Act; P.L. 103-159), Congress required the Attorney General to establish a National Instant Criminal Background Check System (NICS) within five years of enactment.[2] Under the Attorney General's delegated authority, the Federal Bureau of Investigation (FBI) established NICS and through this system the permanent background check provisions of the Brady Act became operational on November 30, 1998.[3] Through NICS, federally licensed gun dealers (otherwise known as federal firearms licensees, or FFLs) initiate background checks through NICS on any customers who are not federally licensed gun dealers, before transferring a firearm to him or her. Through NICS, such checks query other government computer databases for criminal history and other public records on an unlicensed customer that could indicate that he or she is ineligible to receive, possess, ship, or transport a firearm under federal state, local, tribal, or territorial law.[4]

Under the Brady Act, Congress also authorized the Attorney General to secure from any federal department or agency information on any person whose receipt or possession of firearms would violate the GCA.[5] To implement such information sharing, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) promulgated a regulation and defined the term "adjudicated as a mental defective" to include any person whom a court, board, commission, or other lawful authority has determined that, as a result of marked subnormal intelligence, mental illness, incompetency, condition, or disease:

- is a danger to himself or herself, or others;

[1] 18 U.S.C. Chapter 44, §921 et seq.

[2] 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).

[3] 18 U.S.C. §922(t).

[4] Under the GCA, the "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone) (see 18 U.S.C. §921(a)(2)). U.S. territories include American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the Virgin Islands.

[5] P.L. 103-159, Section 103(e). Under the Brady Act, Congress also authorized a federal grant program known as the National Criminal History Improvement Program (NCHIP) to assist state, local, tribal, and territorial governments (hereinafter, state and local governments) in making disqualifying records accessible to NICS through existing national criminal justice information sharing computer networks, or to enter disqualifying records directly into a NICS Index in cases where there was no pre-existing, nationwide process and infrastructure for such information sharing. NCHIP is administered by the Bureau of Justice Statistics (BJS) at the Department of Justice's Office of Justice Programs.

- 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 mental responsibility, pursuant to certain provisions of the Uniform Code of Military Justice.[6]

Since 1998, the VA has been providing records to the FBI for inclusion in the NICS Index on beneficiaries for whom a fiduciary (a person selected to manage veteran's benefits) has been appointed by the VA on his or her behalf, because the appointment of a fiduciary is based on a VA determination that the beneficiary is "mentally incompetent" under veterans law.[7] Based on this VA determination, the beneficiary is also considered "adjudicated as a mental defective" under the GCA, because he or she "lacks the mental capacity to contract or handle their own affairs."[8]

Under such circumstances, a VA disability rating specialist notifies the benefits claimant that the VA proposes to "rate" them "mentally incompetent," at which point the claimant can request a hearing and submit evidence to the contrary if he or she wishes. The VA also advises the beneficiary regarding his or her right to appeal any final rating regarding the veteran's ability to receive and manage his or her own VA benefits.

For a time, however, the VA did not always inform the benefits claimant of the consequences of the mental incompetency determination with regard to his or her firearms eligibility under federal law. Notwithstanding the VA mental incompetency appeals procedures described above, until 2007, avenues of administrative relief by which a VA beneficiary deemed mentally incompetent could petition to have his or her gun rights restored were narrow, if not nonexistent.

Pursuant to the NICS Improvement Amendments Act of 2007 (NIAA; P.L. 110-180), the VA has been required to notify beneficiaries of the ramifications of mental incompetency determinations and a potential loss of their gun rights. The act also required the VA to provide those beneficiaries with an avenue of administrative relief, by which they could appeal such determinations and have their rights restored.[9] In the 21st Century Cures Act (P.L. 114-255), Congress included provisions that codified certain VA procedures related to mental incompetency determinations and potential loss of gun rights.[10]

Since 2008, however, the legislative history shows that some Members of Congress have viewed the VA procedures as inadequate. They particularly take issue with tying firearms ineligibility under the ATF definition of "adjudicated as a mental defective" solely to an individual's incapacity "to contract or manage his [or her] own affairs." From the 110th through the 113th Congresses, proposals similar to H.R. 1181 were reported from committee, passed either the House or Senate, or both. In the 114th Congress, related amendments were considered, but not passed, on the Senate floor in the wake of mass shootings in December 2015 in San Bernardino, CA, and in June 2016 in Orlando, FL.[11] In the 115th Congress, a measure was passed that vacated a final rule issued by the Social Security Administration (SSA) that would have established

[6] U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, "Definitions for the Categories of Persons Prohibited From Receiving Firearms (95R-051P)," 62 *Federal Register* 35634-34639, June 27, 1997.

[7] 38 C.F.R. §3.353(a).

[8] 18 U.S.C. 922(g)(4) and 27 C.F.R. §478.11.

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

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

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

parallel but different procedures for NICS referrals on Social Security disability programs beneficiaries (P.L. 115-8).[12]

Under H.R. 1181, the VA would be prohibited from determining any beneficiary for whom a fiduciary is appointed as "adjudicated as a mental defective" for the purposes of gun control, because he or she lacks the mental capacity to contract or handle his or her own affairs, unless a magistrate or judicial authority also rules that the beneficiary is a danger to himself or herself or others. Members of the House of Representatives made several arguments for and against H.R. 1181.[13] The discussion below reflects the debate on H.R. 1181 on the House floor on March 16, 2017.

Supporters of H.R. 1181 maintain that the existing VA benefit claims and disability rating procedures are not substantive enough on their own to justify the taking of a constitutionally enumerated right like the right to keep and bear arms under the Second Amendment. Supporters of H.R. 1181 underscore that the VA procedures are unbalanced, because the VA merely has to show that the beneficiary is "mentally incompetent" because he or she lacks the mental capacity to contract or handle his or her own affairs; yet, to regain his or her Second Amendment rights, the beneficiary must demonstrate to the VA that he or she is not a threat to himself or herself, or others. In other words, the bar for the beneficiary to regain his or her gun rights is much higher than for the initial VA mental incompetency determination.

Opponents of H.R. 1181 counter that the VA has complied with the Brady Act and NIAA and that public safety is enhanced by its NICS referrals to the FBI. Opponents note that Congress seconded the VA procedures by codifying them in P.L. 114-255. They contend that the VA procedures act to protect VA beneficiaries from the harm that might result if they acquired firearms and used them improperly due to reasons possibly related to their mental incompetency. To support this argument, they point to two factors: the gun-related suicide rate among veterans and the number of seriously mentally ill among VA beneficiaries who have been determined to be mentally incompetent.[14] Some opponents of H.R. 1181 also contend that the bill's provisions are retrospective, meaning the VA and FBI would be required to remove all existing VA referrals from NICS, possibly allowing seriously mentally ill VA beneficiaries to have future access to firearms.

Supporters of H.R. 1181 agree that there could be VA beneficiaries who have been determined to be mentally incompetent who are also seriously mentally ill, but they maintain that the bill's provisions are only prospective. For future determinations and NICS referrals, however, supporters of H.R. 1181 maintain that even seriously mentally ill beneficiaries would need to be found a danger to themselves or others based on a ruling by a magistrate or other judicial authority. They argue further that the existing VA procedures stigmatize the mentally ill

[12] For further information, see CRS Report R44752, *Gun Control, Mental Incompetency, and Social Security Administration Final Rule*, by William J. Krouse, Scott D. Szymendera, and William R. Morton.

[13] Veterans 2nd Amendment Act, *Congressional Record*, daily edition, vol. 163 (March 16, 2017), pp. H2102-2114.

[14] During House debate on H.R. 1181, Representative Elizabeth Esty cited statistics that out of 170,000 beneficiaries in 2015 who were deemed mentally incompetent, 20,000 were diagnosed with schizophrenia, over 11,000 with dementia, and 5,000 with Alzheimer's disease. Several Members, including Representative Esty, observed that the VA has reported that about 20 veterans per day commit suicide and that compared to other suicide victims nationwide a disproportionate share of those veterans commit suicide with a firearm. Ibid., pp. H2104 and H2106-H2107. According to the VA, about two-thirds of veterans who committed suicide in 2014 did so with a firearm. For further information on veterans and suicide, see U.S. Department of Veterans' Affairs, *VA Suicide Prevention Program: Facts About Veteran Suicide*, July 2016, https://www.va.gov/opa/publications/factsheets/Suicide_Prevention_FactSheet_New_VA_Stats_070616_1400.pdf.

disproportionately as perpetrators of criminal violence, when some research indicates that the mentally ill are more likely to be the victims of crime.[15]

If enacted, H.R. 1181 might raise several oversight issues for Congress because the Attorney General would still be required to secure prohibiting records from federal departments and agencies under the Brady Act and NIAA. For example, would the VA be obligated to establish an administrative process whereby beneficiaries who lacked the mental capacity to contract or handle their day-to-day affairs would also be evaluated to determine whether they were a danger to themselves or others? If the bill's provisions are retrospective, would the VA be obligated to cull through its existing NICS referrals to determine who among those beneficiaries should have their cases placed before a "magistrate or judicial authority" based on the grounds that they likely pose a danger to themselves or others? What precedent and expectations would the enactment of H.R. 1181 set for SSA and any other federal agencies that provide disability benefits?

NICS and Firearms Ineligibility

Through NICS, FFLs initiate a background check by contacting either the FBI or a state or local agency serving as a point of contact (POC).[16] Only FFLs are permitted to use the NICS system, and a NICS check cannot be initiated until the FFL and intending customer have completely filled out and signed an ATF Form 4473.[17] On this form the intending customer attests that he or she is not a prohibited person and that he or she are who they say they are. The FFL attests that it has examined government-issued identification documents, verifying that the intending customer has completely and properly recorded his or her identity, address, and other biographical information based on those identification documents. By signing the ATF Form 4473, both the FFL and intending customer attest that all the information is truthful. Under the GCA, there are criminal penalties for providing false information on the ATF Form 4473 for both the FFL and the intending customer.[18]

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

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[15] Liza Gold and Robert I. Simon, *Gun Violence and Mental Illness*, American Psychiatric Association Publishing, 2016, Introduction, p. XXIV.

[16] See 18 U.S.C. §922(t). 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. Thirteen full POC states include California, Colorado, Connecticut, Florida, Hawaii, Illinois, Nevada, New Jersey, Oregon, Pennsylvania, Tennessee, Utah, and Virginia. Four partial POC states (for handgun transfers only) include Maryland, New Hampshire, Washington, and Wisconsin. Three POC states (for handgun permits only) include Iowa, North Carolina, and Nebraska. All other states are non-POCs.

[17] ATF recently revised the ATF Form 4473—Firearms Transaction Record, effective January 16, 2017, https://www.atf.gov/firearms/atf-form-4473-firearms-transaction-record-revisions.

[18] Under 18 U.S.C. §922(a)(6), it is illegal for any person to make any false statement to a FFL with respect to any fact material to the lawfulness of a prospective firearms transfer. Violations are punishable by up to 10 years of imprisonment under 18 U.S.C. §924(a)(2).

Under 18 U.S.C. §924(a)(1)(A), it is illegal for any person knowingly to make any false statement with respect to the records that FFLs are required to maintain under 18 U.S.C. §924(a)(1)(A). Violations are punishable by up to five years of imprisonment under 18 U.S.C. §924(a)(1)(D).

Under 18 U.S.C. §922(b)(5), it is illegal for an FFL to dispose of a firearm without making entries in records required to be kept under 18 U.S.C. §923. Violations are punishable by up to five years of imprisonment under 18 U.S.C. §924(a)(1)(D).

- 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);[19]
- 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.[20]

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.[21]

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, federally licensed or unlicensed) has reasonable cause to believe that the transferee (buyer) is prohibited from receiving those items.[22]

Under the GCA, there is also a provision that allows the Attorney General to consider petitions from a prohibited person for "relief from disabilities" and have his firearms transfer and possession eligibility restored.[23] Since FY1993, however, a policy rider attached to ATF annual appropriations for salaries and expenses has prohibited the expenditure of any funding provided under that account on processing such petitions.[24] While a prohibited person arguably could petition the Attorney General, bypassing ATF, it appears that such an alternative has never been successfully tested. As a result, the only way a person can reacquire his or her lost firearms

[19] 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).

[20] 18 U.S.C. §922(g).

[21] 18 U.S.C. §922(n).

[22] 18 U.S.C. §922(d).

[23] 18 U.S.C. §925(c). See also Relief from Disabilities Under the Act, 27 C.F.R. §478.144.

[24] For FY1993, see P.L. 102-393; 106 Stat. 1732 (1992). For FY2016, see P.L. 114-113; 129 Stat. 2242, 2302 (December 18, 2015). The FY2016 limitation provides: "That none of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. §925(c)."

eligibility is to have his or her civil rights restored or disqualifying criminal record(s) expunged or set aside, or to be pardoned for his crime.[25]

According to the FBI, over the 16-year period 1999-2014, there were over 202.5 million NICS transactions made by either the FBI's NICS Section or state and local agencies serving as POCs. These transactions amounted to over 167.5 million background checks for either firearms transfers or state-issued licenses and permits and resulted in over 2.5 million initial denials.[26] Some of these denials were later overturned on appeal. In 2014, for example, about one-third of denials by the NICS Section were appealed and about one-in-seven of those appealed denials were overturned.[27]

Over the 16-year period, the NICS Section alone completed nearly 93.5 million background checks for firearms transfers and state-issued licenses and permits, resulting in nearly 1.17 million initial denials, or 1.2% of total checks for those years. Of these initial denials, 16,669 were based on mental health-related involuntary commitments or adjudications, or 1.5% of total denials for those years.

It is noteworthy that this percentage of denials based on mental health concerns has increased in recent years, reflecting federal efforts under P.L. 110-180 to encourage greater information sharing between the FBI and state and local authorities on involuntary commitments and adjudications. In calendar year 2014, for example, the NICS Section conducted nearly 8.3 million background checks, resulting in 90,895 denials: of these denials, about 3,557 denials were based on mental health involuntary commitments or adjudications, or 3.9% of total denials.[28] For the same calendar year, 2014, state and local agencies serving as POCs conducted over 6.7 million checks, resulting in 102,468 denials: of these denials, 3,134 were based on mental health involuntary commitments or adjudications, 3.1% of total denials.[29]

Mental Incompetency and Firearms Ineligibility

To implement the Brady Act, interagency discussions were held in 1996 and 1997 about who should be considered "adjudicated as a mental defective" for the purposes of gun control. These discussions were largely led by the ATF, the agency principally responsible for administering and

[25] Notwithstanding the appropriations limitation on this GCA provision, this avenue of discretionary relief probably would not have been available to VA beneficiaries who had a fiduciary appointed on their behalf, and thus were referred by the VA to the FBI NICS Index as mentally incompetent.

[26] For the FBI NICS Section, a single background check usually involves a single NICS transaction. For state and local agencies serving as POCs, however, a single background check sometimes involves more than one NICS transaction. The FBI reports checks and denials made by the NICS Section on a monthly basis. The FBI also reports NICS transactions made by state and local agencies serving as POCs on a monthly basis, but it does not report the corresponding NICS checks and denials made by those POCs. Under the direction of BJS, NICS transaction data are analyzed and checks and denials made by state and local agencies serving as POCs are reported, but there is a one-to-two year lag in that reporting. For example, BJS released the most recent NICS statistics for both the FBI NICS Section and the state and local agencies serving as POCs in June 2016 for calendar years 2013 and 2014. See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Background Checks for Firearm Transfers, 2013-2014 Statistical Tables, by Jennifer C. Karberg, Ronald J. Frandsen, Joseph M. Durso, Trent D. Buskirk, and Allina D. Lee, June 2016, NCJ249849, 28 pp.

[27] Data on appeals made by state and local agencies serving as POCs and estimates based on state surveys conducted by BJS are much more fragmentary, but suggest that the percentage of those overturned denials is higher than for the FBI.

[28] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearm Transfers, 2013-2014 Statistical Tables*, by Jennifer C. Karberg, et al., June 2016, NCJ249849, pp. 5 and 7.

[29] Ibid.

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).
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> "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.[30]

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 Administration (VBA).[31] In a proposed rulemaking, the ATF opined that the inclusion of "mentally incompetent" VA beneficiaries in the definition of "adjudicated as a mental defective," under the clause that a beneficiary "lacks the mental capacity to contract or handle his [or her] own affairs," was wholly consistent with the legislative history of the GCA.[32] In compliance with the GCA, as amended by the Brady Act, and the ATF definition of "adjudicated as a mental defective," the VBA provided the FBI with disqualifying records on 88,898 VA beneficiaries for the November 1998 implementation of NICS.

Under 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.[33] And, after 1998, these beneficiaries also fell under the definition of "adjudicated as a mental defective" under the administrative definition promulgated by ATF described above. Traditionally, the VA had used such determinations of mental incompetence as a basis for appointing a fiduciary to receive and manage a beneficiary's VA benefits. According to the VA, during the determination process beneficiaries were notified that VA proposed to rate them "incompetent" and that they were able to request a hearing and submit evidence to the contrary if they wished. The VA also advised these beneficiaries regarding their right to appeal any final rating regarding their ability to receive and manage their own VA benefits. The VA, however, did not necessarily inform a beneficiary that he or she would lose his or her gun rights as a consequence of a VA determination of mental incompetency. Nor were the beneficiaries informed of the subsequent VA referrals to the FBI NICS Section.

The Veterans Health Administration (VHA) has not, with any known frequency, submitted any disqualifying records on VA medical care recipients to the FBI for inclusion in NICS for any

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

[31] Ibid., p. 34637.

[32] Ibid.

[33] See 38 C.F.R. §3.353 and *Federal Register*, vol. 61, no. 174, September 6, 1996, p. 47095.

medical/psychiatric reason such as post-traumatic stress disorder (PTSD). Although veterans with PTSD or any other condition, who have been involuntarily committed under a state court order to a VA medical facility because they posed a danger to themselves or others, are ineligible to ship, transport, receive, or possess a firearm or ammunition under federal law, the VHA does not appear to make a related referral about that ineligibility to the FBI. Instead, the state in which the court resides may submit the disqualifying record to the FBI, if such a submission would be appropriate and permissible under state law.[34]

Nevertheless, the decision by the VA to submit VBA records on "mentally incompetent" veterans to the FBI for inclusion in the NICS mental defective file generated some degree of controversy in 1999 and 2000.[35] Critics of this policy underscored that veterans routinely consented to "mentally incompetent" determinations so that a fiduciary could be appointed for them. Those critics contended that to take away a veteran's Second Amendment rights without his foreknowledge was improper.[36] At that time, they also pointed out that no other federal agencies were providing similar disqualifying records to the FBI. VA spokespersons countered that they were required by law [the Brady Act] to provide those records to FBI and that the VA process for making mental incompetency determinations was not "haphazard."[37] This controversy eventually subsided, only to re-emerge when Congress considered NIAA in 2007.

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, VA. 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. 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. Following this mass shooting, 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.[38]

In response to the Virginia Tech mass shooting, Congress passed the NICS Improvement Amendments Act of 2007 (NIAA).[39] 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,

[34] For further information on the treatment of mental illness and substance abuse for the purposes of gun control, see Donna M. Norris, M.D. et al., "Firearm Laws, Patients, and the Roles of Psychiatrists," *American Journal of Psychiatry*, August 2006, pp. 1392-1396.

[35] John Dougherty, "VA Give FBI Health Secrets: Veterans' Records Could Block Firearms Purchases," *WorldNet Daily.com*, June 22, 2000; and "VA Defends Vets' Records Transfers to NICS System," *New Gun Week*, vol. 35, issue 1650, July 10, 2000, p. 1.

[36] Ibid.

[37] Ibid.

[38] 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.

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

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.

Among some gun rights advocates, however, opposition to the NIAA arose based on the assertion that, under these amendments, any veteran who was or had been diagnosed with PTSD and was found to be a "danger to himself or others would have his gun rights taken away ... forever."[40] 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.

The Bureau of Justice Statistics (BJS) has awarded $109.8 million in NICS improvement grants to state and local governments from FY2009 through FY2016.[41] According to the BJS, there were 298,571 prohibiting records related to persons "adjudicated as a mental defective" or "committed [involuntarily] to a mental institution" in the NICS index as of January 1, 2007.[42] Of those records, state and local authorities had contributed 159,418 records (53.4%).[43] According to the FBI, there were 4,658,676 active prohibiting records on persons "adjudicated as a mental defective" or "committed [involuntarily] to a mental institution" in the NICS index as of December 31, 2016.[44] Of those records, state and local authorities had contributed 4,487,573 records (96.3%).[45] 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%.

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.[46] By comparison, federal agencies had contributed 139,153 records to the NICS index as of January 1, 2007, the bulk of which were

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

[41] U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "NICS Act Record Improvement Program (NARIP) Awards FY 2009-2016," https://www.bjs.gov/index.cfm?ty=tp&tid=491#funding. Over the last 22 fiscal years (FY1995-FY2016), Congress appropriated nearly $772.8 million for NCHIP, or an annual average of $35.1 million. The initial goal of NCHIP was to improve electronic access to firearms-related disqualifying records, particularly felony indictment and conviction records. In the last three fiscal years, not less than $62.0 million of NCHIP funding was set aside for purposes authorized under the NICS Improvement Amendments Act of 2007 (NIAA; P.L. 110-180). Over the five years (FY2009-FY2013), Congress appropriated an additional $63.6 million for purposes authorized under NIAA, under a grant program that the BJS designated the NICS Amendments Record Improvement Program (NARIP). The goal on NARIP is to improve electronic access to disqualifying records on persons "adjudicated as a mental defective," convicted of a domestic violence misdemeanor, or subject to a domestic violence restraining order. BJS administers both NCHIP and NARIP.

[42] 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.

[43] Ibid.

[44] 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.

[45] Ibid.

[46] Ibid.

contributed by the VA.[47] The December 2016 SSA final rule established a similar program to the VA's; however, the SSA had not referred any disqualifying records to the FBI for inclusion in NICS Index before Congress passed legislation to vacate its rule.[48]

NIAA Requirements for Federal Departments and Agencies

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[49] 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.[50] 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.[51]

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.[52] NIAA 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

[47] 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.

[48] P.L. 115-8, February 28, 2017, 131 Stat. 15. For further information, see CRS Report R44752, *Gun Control, Mental Incompetency, and Social Security Administration Final Rule*, by William J. Krouse, Scott D. Szymendera, and William R. Morton.

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

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

[51] For a list of federal departments and agencies that make NICS referrals, see 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.

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

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, 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."[53]

Relief from Mental Defective Disability

NIAA requires further 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.[54] (In this sense, the disability 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.[55]

In addition, administrative "relief and review" provided under NIAA (subparagraph 101(c)(2)(B)) that would allow a prohibited beneficiary to petition to have his or her guns rights restored is required to be made available according to standards outlined in 18 U.S.C. section 925(c).[56] 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 of the following to the benefits claimant at the beginning of the adjudication process:

- that persons "adjudicated as a mental defective" are prohibited from purchasing, possessing, receiving, shipping or transporting a firearm or ammunition under federal law;
- what the penalties are for violating related federal firearms provisions; and

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

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

[55] 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.

[56] Subparagraph 101(c)(2)(B) of P.L. 110-180. Under 18 U.S.C. §925(c), the Attorney General 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).

- what relief from such disability with respect to firearms is available under federal law.[57]

VA Implementation of Brady Act and 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, as amended by NIAA. Under current VA regulations, the VA has the authority to determine the competency status of a person receiving VA benefits.[58] 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.[59]

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.[60]

This regulatory definition of a "mentally incompetent person" does not include any consideration of whether the person is considered to have a propensity for violence or is considered a threat to himself or herself or others. Thus, for example, a veteran who during the determination process for Veterans Disability Compensation (VDC) indicates that because of a traumatic brain injury he is experiencing some short-term memory loss which affects his ability to manage his finances, could be determined to be "mentally incompetent" even if there is no evidence that this veteran's condition would impair his ability to safely own or handle a firearm or that he is a threat to himself or others.

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.[61]

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.[62]

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

[58] 38 C.F.R. §3.353.

[59] 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/554400000004210/M21-1-Adjudication-Procedures-Manual.

[60] 38 C.F.R. §3.353(a).

[61] 38 C.F.R. §3.353(c).

[62] 38 C.F.R. §3.353(d).

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.[63] 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.[64]

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.[65] 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:

- 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.[66]

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.[67]

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[63] 38 C.F.R. §3.353(e).

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

[65] 38 C.F.R. §§3.103 and 3.353(e).

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

[67] Department of Veterans Affairs, *M21-1 Adjudication Procedures Manual*, Section III.v.9.B.4.c. Federal law at 38

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.[68]

The VA must deny a request for relief if there is clear and convincing evidence that the beneficiary would be a danger to himself or herself or others if the relief was granted.[69] If such evidence does not exist, the VA must consider granting the request for relief.[70] 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.[71]

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.[72]

Legislation in the 114th Congress

During the seven-year period 2008-2014, the Senate and the House both acted on proposals that would basically prohibit 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.

In the 114th Congress, the Senate considered several amendments that addressed gun control, mental incompetency, and or veterans' benefits following the December 2015 San Bernardino, CA, and June 2016 Orlando, FL, mass shootings. Although the Senate blocked all these amendments on procedural grounds, Congress included a provision in an enacted bill that addresses VA procedures.[73] Discussion of similar legislation considered in the 110th through the 113th Congresses is included in an **Appendix** to this report.

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

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U.S.C. §5103A requires the VA to assist claimants in obtaining evidence necessary to substantiate their claims for benefits.

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

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

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

[71] Ibid.

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

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

over to the FBI for inclusion in the NICS index unless certain notification and review conditions had been met.[74] 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 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. The Senate blocked this amendment on procedural grounds.

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.

[74] As described in the **Appendix** to this report, 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 also CRS Report R42987, *Gun Control Legislation in the 113th Congress*, by William J. Krouse.

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."[75] The Senate blocked this amendment on procedural grounds.

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 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. The Senate blocked this amendment on procedural grounds.

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 elements of the VA's implementation of NIAA.[76] Section 14017 of this act amended 38 U.S.C. with a new section, 5501A, to prohibit the VA Secretary from making certain determinations of mental competency about VA benefits claimants, unless the claimant is:

- notified of the proposed adverse determination and the supporting evidence;
- provided an opportunity to request a hearing to address such a proposed adverse determination;
- given the opportunity to present evidence, including an opinion from a medical professional or other person, on his or her capacity to manage his or her own monetary benefits paid to or for him or her by the Secretary under this title; and
- given the opportunity to be represented by counsel at a hearing and to bring a medical professional or other person to provide relevant testimony at any such hearing at no expense to the government.

[75] 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.

[76] P.L. 114-255, December 13, 2016; 130 Stat. 1307; codified at 38 U.S.C. §5501A. For further information, see CRS Report R44718, *The Helping Families in Mental Health Crisis Reform Act of 2016 (Division B of P.L. 114-255)*, coordinated by Erin Bagalman.

In short, this provision gives benefit claimants the ability to present evidence from their own health care providers and have counsel present during an administrative hearing to contest a determination of mental incompetency by the VA.

Related Congressional Action in the 115th Congress

In the wake of the December 2012 Newtown, CT, mass shooting,[77] 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 was appointed because they were 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,[78] and published its final rule on December 19, 2016.[79] The final 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 would have requested relief from the federal firearms prohibitions. The final rule became effective on January 18, 2017; however, compliance would not have been required until December 19, 2017.[80]

In addition, the ATF issued proposed regulations to clarify further individuals who might fall under this definition. This proposed regulation has not been made final.[81] It is significant to note that the NICS index is not intended to be a registry of all individuals diagnosed with a mental illness. Nonetheless, 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."[82]

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 SSA regarding implementation of firearms restrictions for certain persons.[83] The House joint resolution passed

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[77] 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.

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

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

[80] See 20 C.F.R. §§421.100-421.170.

[81] 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.

[82] 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.

[83] For further information, see CRS Report R43992, *The Congressional Review Act (CRA): Frequently Asked*

by recorded vote: 235-180 (Roll no. 77). The joint resolution also bars the SSA from promulgating any rule in the future that would be "substantially the same" as the disapproved rule unless the agency received a new statutory authorization to do so. On February 15, 2017, the Senate passed the House disapproval resolution (H.J.Res. 40) 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.

Possible Issues for Congress

Prior to the Brady Act, there were no systematic, nationwide efforts to collect electronic records at the federal level on persons "adjudicated as a mental defective" or "committed to a mental institution" for the purposes of gun control. Hence, to more fully implement the Brady Act and develop NICS, efforts were made to acquire records on such persons from federal departments and agencies, as well as state and local governments. To advance these efforts, the ATF promulgated a regulation defining the term, "adjudicated as a mental defective." As discussed above, this definition was developed in consultation with the VA, and was reviewed by then Attorney General Janet Reno's Department of Justice. The existing VA benefit claims and disability ratings procedures for making "mental incompetency" determinations based on the need to appoint a fiduciary for a beneficiary were deemed substantive enough to consider a person "adjudicated as a mental defective" under the GCA. During the FBI's initial rollout of NICS, the SSA reviewed its procedures and decided they were not substantive enough to justify making mental incompetency determinations for the purposes of gun control. In the wake of the December 2012 Newtown, CT mass shooting, however, the White House under then-President Barack Obama and then-Attorney Generals, Eric Holder and Loretta Lynch, directed the SSA to reconsider that decision.

Congress, meanwhile, passed the 21st Century Cures Act (P.L. 114-255) in the last days of the 114th Congress. As described above, this law included provisions that codified the VA procedures related to mental incompetency determinations and potential loss of gun rights that Congress required under NIAA. Some observers view the codification of the VA procedures as a congressional endorsement of those procedures. They argue that post-NIAA VA procedures strike the correct balance between protecting mentally incompetent VA beneficiaries from the harm they might do themselves, and protecting the public from the harm they might do to others, while protecting their rights under the Second Amendment.

In December 2016, the SSA published a final rule that would have established similar, but slightly different, procedures for certain disability compensation beneficiaries. The SSA rule would have not only based the mental incompetence determination on an inability to handle one's day-to-day affairs, but would have also tied that determination to certain diagnosed mental impairments. In addition, the SSA rule would have also placed lower and upper age limits on those determinations for the purposes of NICS referrals.[84] Consequently, the SSA final rule would not have been as inclusive as the VA benefit claims and disability rating procedures, possibly calling into question

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.

[84] Under the now vacated SSA final rule, NICS referrals would not have been made for beneficiaries under the age 18 years or over Social Security's full retirement age (currently 66 years). Under the Obama Administration, ATF considered whether a lower bound age limit ought to be promulgated in a proposed rule, but it made no specific proposal with regard to such an age limit in that rule, which has not been finalized. 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.

whether the VA procedures were overly inclusive. Nonetheless, the SSA final rule did not address whether such beneficiaries also demonstrated that they were a danger to themselves or others. As noted above, under the Congressional Review Act, Congress passed a bill that vacated that SSA final rule in the early days of the 115th Congress (P.L. 115-8).

Supporters of H.R. 1181 have stated that they believe that the existing VA benefit claims and ratings procedures are not substantive enough to justify taking a person's gun rights, calling into question where, when, how, and by whom would it be appropriate to make mental incompetency determinations for the purposes of gun control. Under H.R. 1181, the VA could still be obligated to make such determinations as part of its benefit claims and disability ratings procedures. If so, would the VA be required to establish new policies and procedures, under which cases for final mental incompetency determinations for the purposes of gun control would be placed before a "magistrate or judicial official"? In addition, if the provisions of H.R. 1181 are retrospective, could the VA also be required to cull through all its active NICS referrals and submit administrative cases against some, but not all, of those beneficiaries to a "magistrate or judicial official" on the grounds that they could be a threat to themselves or others?

These circumstances also call into question what obligations the SSA might still have, if any, under the GCA in light of the recently vacated final rule and the possible enactment of H.R. 1181. Should the VA and SSA place such mental incompetency determination cases for the purposes of gun control before the same adjudicative body? Would they have parallel administrative processes, and common adjudicative bodies that handle similar mental incompetency cases? Or would the VA and SSA have separate processes and adjudicative bodies? Or would they take those cases to state and local magistrates and judicial officials to adjudicate?

Another set of questions relates to whether other federal departments and agencies, such as, for example, agencies of the Department of Health and Human Services, ought to be contributing records to NICS on mentally incompetent beneficiaries who potentially pose a danger to themselves or others. For example, how would those departments and agencies handle mental incompetency determinations for the purposes of gun control? It is unclear what either set of requirements, the existing VA procedures or the possible enactment of H.R. 1181, could mean for state and local governments that have submitted, or would submit, records on persons deemed too mentally incompetent to be trusted with a firearm. If the VA procedures stand or H.R. 1181 is enacted, the Attorney General might be called to set expectations in terms of guidance for state and local governments, especially absent any state laws governing the referral of such records to the FBI for inclusion on the NICS Index. For now, there appears to be a lack of consensus about the type and severity of mental incompetence or mental illness that ought to be the basis for including a prohibiting record on an individual in a nationwide information sharing platform like the NICS Index for the purposes of gun control.

Appendix. Legislative History 110th-113th Congresses

Proposals similar to H.R. 1181 were reported from committee, and passed either the House or Senate, or both from the 110th through the 113th Congresses (2007-2014).

110th Congress

In the 110th Congress, Senator Richard Burr first introduced the Veterans' 2nd Amendment Protection Act (S. 3167). This bill would have provided that "a veteran, surviving spouse, or child who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness shall not be considered adjudicated as a mental defective" for purposes of the Gun Control Act, "without the order or finding of a judge, magistrate, or other judicial authority of competent jurisdiction that such veteran, surviving spouse, or child is a danger to him or herself or others." Later, Senator Burr successfully offered similar language as an amendment to the Veterans' Medical Personnel Recruitment and Retention Act of 2008 (S. 2969) that included similar language, during Committee on Veterans' Affairs markup of that bill on June 26, 2008. However, Senate leadership did not bring S. 2969 to the floor for further consideration.

111th Congress

In the 111th Congress, Senator Burr reintroduced his proposal (S. 669) to change the effect that being determined mentally incompetent has on one's eligibility to possess or purchase a firearm under federal law. The Senate Veterans' Affairs Committee reported this stand-alone bill on June 16, 2009 (S.Rept. 111-27), which included the following assessment:

> Under a Memorandum of Understanding entered into between the FBI and VA, VA agreed to make available for inclusion on the NICS database information about VA beneficiaries who are determined to be mentally incompetent on account of their inability to contract or manage their own affairs pursuant to part 3.353 of title 38, Code of Federal Regulations. Determinations of incompetency under part 3.353 result in an appointment of a fiduciary.
>
> The evidence gathered to support a finding of incompetency, under part 3.353 of VA's regulations, is used to inform a judgment about whether a beneficiary is capable of managing their VA benefit payments. No evidence is gathered as part of this process to inform a judgment about whether a beneficiary presents a danger to themselves or others, or whether they should be prohibited from purchasing, possessing, or operating a firearm. Furthermore, although beneficiaries are entitled to a hearing once notified that it is proposed they will be determined incompetent, the initial hearing is before VA personnel, not an independent authority. From the date of the initial request of the Attorney General through October, 2007, VA has shared information with NICS on over 116,000 individuals for whom it has appointed a fiduciary. VA was unable to provide the Committee with updated information about how many additional names have been added or removed from NICS since October 2007. Despite the fact that other agencies, such as the Social Security Administration, appoint fiduciaries to manage benefit payments for their beneficiaries in a manner similar to VA's process, VA beneficiaries constitute the overwhelming majority of individuals referred to the FBI by the Federal government.[85]

However, Senate leadership did not bring S. 669 to the floor for further consideration.

The House Veterans' Affairs Committee considered and approved a similar proposal that Representative John Boozman offered as an amendment to a draft bill—the Veterans Benefits and

[85] U.S. Congress, Senate Committee on Veterans' Affairs, *Veterans' 2nd Amendment Protection Act*, 111th Cong., 1st sess., June 16, 2009, pp. 2-4.

Economic Welfare Improvements Act of 2010—in full committee markup on September 15, 2010. The Boozman amendment was included in the reported version of the bill (H.R. 6132; H.Rept. 111-630), which included the following passage:

> The Committee agrees that there is a non sequitur in rationale under current law in assuming that simply because a veteran, or other beneficiary, needs to have a fiduciary appointed, then the veteran is mentally defective and should go on the NICS list. The NICS Improvement Amendments Act of 2007, P.L. 110-180 (121 Stat. 2559), allows those veterans whose names are given to NICS to appeal the action to the agency that made the decision.

However, when the House considered H.R. 6132 under suspension of the rules, the version of the bill that was called up did not include the Boozman amendment. Representative Jerry Moran introduced a similar bill (H.R. 2547), but no further action was taken on that measure.

112th Congress

In the 112th Congress, the House reconsidered the issue of veterans, mental incompetency, and firearms eligibility, and passed a bill, but it was not enacted. On May 13, 2011, Representative Denny Rehberg introduced the Veterans 2nd Amendment Protection Act (H.R. 1898). This bill would have prohibited the VA from determining a beneficiary to be mentally incompetent for the purposes of gun control, unless such a determination were made by a judge, magistrate, or other judicial authority based upon a finding that the beneficiary posed a danger to himself or others. On July 22, 2011, the House Committee on Veterans' Affairs Subcommittee on Disability and Memorials marked up and reported the Veterans' Benefits Training Improvement Act of 2011 (H.R. 2349). During markup, Representative Denny Rehberg successfully offered language that was nearly identical to H.R. 1898 as an amendment to H.R. 2349. On October 6, 2011, the full committee reported this bill (H.Rept. 112-241), which included the following paragraphs:

> Testimony submitted by the Reserve Officers Association (ROA) in connection with the Subcommittee on Disability Assistance and Memorial Affairs hearing on July 7, 2011, pointed out the risks of VA assigning labels through an administrative process to those who have served in the military, which only serve to inflame the public's distrust of the mental capacity of those same individuals. In this case, VA's designation of veterans appointed a fiduciary as ''mentally incompetent'' automatically attaches to it a placement on the NICS list, a list filled with criminals and others who have demonstrated through their actions that they present a danger to society. The GCA process [that the] VA has been directed to follow unfairly labels veterans as potentially dangerous without appropriate due process.
>
> The Committee is in absolute agreement that individuals who are a danger to themselves or others should not be permitted to own or possess a firearm. However, the Committee is deeply troubled with what appears to be an arbitrary and discriminatory process that allows a non-judicial authority to presume individuals seeking help from VA as threats to society when they may only need help managing their financial affairs. The Committee believes a rational process, in an appropriate forum, is an absolute necessity before Constitutional rights are abridged for any American, but especially America's veterans.[86]

On October 11, 2011, the House considered and passed H.R. 2349 by a voice vote with the Rehberg amendment. Senator Burr subsequently reintroduced his bill (S. 1707)—the Veterans Second Amendment Protection Act—on October 13, 2011, but no further action was taken on this bill.

[86] U.S. Congress, House Committee on Veterans' Affairs, *Veterans Benefits Act of 2011*, 112th Cong., 1st sess., October 6, 2011, pp. 14-15.

113th Congress

In the 113th Congress, on May 8, 2013, the House Committee on Veterans' Affairs approved the Veterans 2nd Amendment Protection Act (H.R. 602), by voice vote. Under H.R. 602, a person who is a beneficiary of disability compensation and pension programs administered by the VA, who is mentally incapacitated, deemed mentally incompetent, or experiencing an extended loss of consciousness could not be considered "adjudicated as a mental defective" for the purposes of federal firearms eligibility determinations, 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. H.R. 602 was introduced by Representative Jeff Miller. An identical bill (H.R. 577) was introduced by Representative Steve Stockman.

Senator Burr reintroduced his bill (S. 572), which was identical to the two House proposals. On June 12, 2013, in testimony before the Senate Committee on Veterans' Affairs, the Administration voiced its opposition to S. 572 and, by implication, to H.R. 602:

> The bill would, in effect, exclude VA determinations of incompetency from the coverage of the Brady Handgun Violence Prevention Act. VA does not support this bill.
>
> VA determinations of mental incompetency are based generally on whether a person, because of injury or disease, lacks the mental capacity to manage his or her own financial affairs. We believe adequate protections can be provided to these Veterans under current statutory authority. Under the [National Instant Criminal Background Check System] NICS Improvement Amendments Act of 2007, individuals whom VA has determined to be incompetent can have their firearms rights restored in two ways: First, a person who has been adjudicated by VA as unable to manage his or her own affairs can reopen the issue based on new evidence and have the determination reversed. When this occurs, VA is obligated to notify the Department of Justice to remove the individual's name from the roster of those barred from possessing and purchasing firearms. Second, even if a person remains adjudicated incompetent by VA for purposes of handling his or her own finances, he or she is entitled to petition VA to have firearms rights restored on the basis that the individual poses no threat to public safety. VA has relief procedures in place, and we are fully committed to continuing to conduct these procedures in a timely and effective manner to fully protect the rights of our beneficiaries.
>
> Also, the reliance on an administrative incompetency determination as a basis for prohibiting an individual from possessing or obtaining firearms under Federal law is not unique to VA or Veterans. Under the applicable Federal regulations implementing the Brady Handgun Violence Prevention Act, any person determined by a lawful authority to lack the mental capacity to manage his or her own affairs is subject to the same prohibition. By exempting certain VA mental health determinations that would otherwise prohibit a person from possessing or obtaining firearms under Federal law, the bill would create a different standard for Veterans and their survivors than that applicable to the rest of the population and could raise public safety issues.[87]

During Senate consideration of the Safe Communities, Safe Schools Act of 2013 (S. 649), language regarding veterans and firearms was included in amendments offered by Senators Joe Manchin and Patrick Toomey, Senator Charles Grassley, and Senator Burr. The Senate rejected these amendments, but a final vote was not taken on S. 649.

[87] U.S. Department of Veterans Affairs, written statement of Curtis L. Coy, Deputy Under Secretary for Economic Opportunity, Veterans Benefits, presented to the Senate Committee on Veterans' Affairs, June 12, 2013, available at http://www.veterans.senate.gov/hearings.cfm?action=release.display&release_id=6d839502-3b01-4a1f-9dd2-6292724455a0.

Senator Burr's amendment was identical to his bill (S. 572) and the House-reported bill (H.R. 602) described above. While similar in spirit, the Manchin-Toomey amendment would have established more specific requirements than the amendment offered by Senator Burr (S.Amdt. 720), which is identical to Senator Burr's bill (S. 572), and the House-reported bill (H.R. 602). The Burr amendment was rejected by a recorded vote: 56-44 (Record Vote Number: 102).

Under the Manchin-Toomey amendment (S.Amdt. 715), the Secretary of Veterans Affairs first would have been required to provide to a beneficiary, who has been deemed mentally incompetent for VA purposes, notification that includes (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 be established by the VA or a court of competent jurisdiction. The Manchin-Toomey amendment was rejected by a recorded vote: 54-46 (Record Vote Number: 97).[88]

Alternatively, the Grassley amendment (S.Amdt. 725), which was commonly referred to as the "GOP substitute," would have substituted the term "mentally incompetent" in both 18 U.S.C. §922(d) and (g), in lieu of "adjudicated as a mental defective," and would have amended the GCA to define "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 arguably narrowed the scope of whom, and under what circumstances, a federal agency like the VA could refer a record on an individual to the FBI for inclusion in the NICS mental defective file. If enacted, this amendment might have required the VA to revise its policies and procedures with regard to NICS referrals, because a narrower scope of mentally incompetent veterans would have probably fallen under this definition than does today under the current mental defective definition. It is also questionable whether the amendment would have had wide effect on state procedures, because a thorough, published review and comparison of state NICS referral procedures on mentally incompetent persons has not been conducted by DOJ or any other federal agency. Arguably, few states, if any, have adopted administrative procedures that would match the scope of the VA administrative procedures with regard to mental incompetency and NICS referrals. The Grassley GOP substitute amendment was rejected by a recorded vote: 52-48 (Record Vote Number: 98).

[88] For a more detailed description of the Manchin-Toomey Amendment, see discussion in "Legislation in the 114th Congress" in the main body of this report. The language in the Manchin-Toomey amendment in the 113th Congress (S.Amdt. 715) is identical to the Manchin-Toomey amendments in the 114th Congress (S.Amdt. 2908 and S.Amdt. 4716).

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