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Gun Control, Veterans Benefits, and Mental Incompetency Determinations

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Scott D. Szymendera
Analyst in Disability Policy

The federal Gun Control Act of 1968, as amended, prohibits certain classes of persons from purchasing or possessing firearms and ammunition. One of the classes of prohibited persons are those who have been “adjudicated as a mental defective” or committed to a mental institution. Under the provisions of the Brady Handgun Violence Prevention Act of 1993, the Federal Bureau of Investigation (FBI) administers the National Instant Criminal Background Check System (NICS) that allows federally-licensed firearms dealers to perform a required background check on potential buyers to ensure they are not prohibited from purchasing firearms and ammunition.

The Department of Veterans Affairs (VA) has the authority to determine if a VA program beneficiary is incompetent based on the beneficiary’s inability to manage his or her own affairs. Beneficiaries who are determined to be incompetent have their benefits paid on their behalf to a third-party fiduciary. It is the policy of the VA to refer the names of all beneficiaries determined to be incompetent to NICS under the category of “adjudicated as a mental defective.” The VA is responsible for approximately 98% of the NICS referrals based on mental health conditions made by federal agencies. Under the provisions of the NICS Improvement Amendments Act of 2007 and the 21st Century Cures Act, VA beneficiaries have certain rights to challenge the VA’s determination of incompetency and referral to NICS before and after the agency has taken action.

Since the 110th Congress, the Veterans 2nd Amendment Protection Act has been introduced in each Congress. This legislation would prohibit the VA from referring a beneficiary to NICS solely on the determination that the beneficiary must have a fiduciary to manage his or her benefits, unless there is a finding from a judicial authority that the beneficiary is a threat to self or others. In the 118th Congress, the Veterans 2nd Amendment Protection Act has been introduced in the House of Representatives by Representative Mike Bost (H.R. 705) and in the Senate by Senator John Kennedy (S. 1875).

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Prohibited Persons Under the Gun Control Act

The Gun Control Act of 1968, as amended (GCA), makes it illegal for nine classes of persons to ship, transport, possess, or receive firearms and ammunition. The classes of prohibited persons under the GCA are:

1. persons convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
2. fugitives from justice;
3. unlawful users or addicts of any controlled substance as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802);
4. persons “adjudicated as a mental defective” or committed to mental institutions;
5. unauthorized immigrants and nonimmigrant visitors (with exceptions in the latter case);¹
6. persons dishonorably discharged from the U.S. Armed Forces;
7. persons who have renounced their U.S. citizenship;
8. persons under court-ordered restraints related to harassing, stalking, or threatening intimate partners or children of such intimate partners; and
9. persons convicted of misdemeanor crimes of domestic violence.²

In addition, persons under indictment in any court for a crime punishable by imprisonment for a term exceeding one year are prohibited from shipping, transporting, or receiving (but not possessing) firearms and ammunition.³

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, whether federally licensed or unlicensed) has reasonable cause to believe that the transferee (buyer or recipient) is prohibited from receiving those items.⁴

The Attorney General may consider a petition from a prohibited person for “relief from disabilities”⁵ and have his or her firearms transfer and possession eligibility restored.⁶ The decision of the Attorney General on such petitions is subject to judicial review by the U.S. District Court for the district of residence of the petitioner. Since FY1993, however, a policy rider

¹ Until 2011, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (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 port of entry. In 2011, the ATF was informed by the Department of Justice’s Office of Legal Counsel (OLC) that the ATF 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” (Department of Justice, Office of Legal Counsel, *Firearms Disabilities of Nonimmigrant Aliens Under the Gun Control Act*, 35 Op. O.L.C. 171 (2011), October 28, 2011, <https://www.justice.gov/d9/opinions/attachments/2021/02/18/2011-10-28-firearms-nonimmig-aliens.pdf>). Under current ATF regulations at Title 27, Part 478, of the *Code of Federal Regulations*, nonimmigrants who enter the country validly without visas (e.g., under the Visa Waiver Program) are eligible to purchase firearms and ammunition. However, those individuals must demonstrate that they are “present in a State with the intention of making a home in that State.”

² 18 U.S.C. §922(g).

³ 18 U.S.C. §922(n).

⁴ 18 U.S.C. §922(d).

⁵ In this context, the term *disability* refers to a prohibited person’s inability to purchase or possess firearms and ammunition.

⁶ 18 U.S.C. §925(c).

attached to Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) annual appropriations for salaries and expenses has prohibited the expenditure of any funding provided under that account on processing such petitions.⁷

The Brady Act and NICS

Section 103 of the Brady Handgun Violence Prevention Act of 1993 (Brady Act; P.L. 103-159) required the Attorney General to establish a National Instant Criminal Background Check System (NICS) within five years of enactment. Under the Attorney General's delegated authority, the Federal Bureau of Investigation (FBI) established NICS, which became operational on November 30, 1998. Administered by the FBI, NICS is a computer system used to query federal, state, local, tribal, and territorial criminal history record information and other records to determine an individual's eligibility to transfer, receive, or possess firearms and ammunition.⁸

Section 102 of the Brady Act requires any federally licensed gun dealer (federal firearms licensee, or FFL) to use NICS to conduct a background check on a potential transferee or buyer before providing the transferee/buyer with a firearm or ammunition. An FFL initiates a background check by contacting either the FBI or a state or local agency serving as a point of contact (POC) for NICS.⁹ A NICS check cannot be initiated until the FFL and transferee/buyer have completed and signed ATF Form 4473.¹⁰ Only FFLs are permitted to use the NICS system.¹¹

Section 103(e) of the Brady Act authorized the Attorney General to secure from any federal department or agency information on any person whose receipt or possession of firearms and ammunition would violate the GCA.

On ATF Form 4473 the transferee/buyer attests that he or she is not a prohibited person and is not misrepresenting his or her identity. The FFL attests that it has examined government-issued identification documents, verifying that the transferee/buyer has completely and properly recorded his or her identity, address, and other biographical information. By signing ATF Form 4473, both the FFL and the transferee/buyer attest that all the information provided on the form is truthful.

Definition of “Adjudicated as a Mental Defective”

One of nine classes of persons prohibited by the GCA from shipping, transporting, receiving, or possessing firearms or ammunition are persons who have been “adjudicated as a mental defective” or have been committed to mental institutions.¹² Neither the GCA nor the Brady Act

⁷ For FY2023, P.L. 117-328. The FY2023 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).”

⁸ For additional information on NICS, see CRS Report R45970, *Gun Control: National Instant Criminal Background Check System (NICS) Operations and Related Legislation*.

⁹ The FBI handles background checks entirely for most states, while other states serve as full or partial POCs for state and local firearms background check purposes. In POC states, an FFL contacts a state agency, and the state agency contacts the FBI for background checks. The 13 full POC states are California, Colorado, Connecticut, Florida, Hawaii, Illinois, Nevada, New Jersey, Oregon, Pennsylvania, Tennessee, Utah, and Virginia. The four partial POC states (for handgun transfers only) are Maryland, New Hampshire, Washington, and Wisconsin. The three POC states (for handgun permits only) are Iowa, North Carolina, and Nebraska. All other states are non-POCs.

¹⁰ ATF Form 4473 is available at <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download>.

¹¹ Some states require that sales from private individuals go through NICS. In such cases the private seller can contract with an FFL to perform the NICS background check for the seller.

¹² 18 U.S.C. §922(g)(4).

define the term *mental defective* or provide any additional guidance on what would constitute such an adjudication.

The ATF's regulations implementing the Brady Act provide the following definition for the term *adjudicated as a mental defective*:

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

- (1) Is a danger to himself or to others; or
- (2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include—

- (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. 850a, 876b.¹³

NICS Improvement Amendments Act of 2007

The NICS Improvement Amendments Act of 2007 (NIAA; P.L. 110-180) was enacted on January 8, 2008, in the wake of the April 16, 2007, mass shooting at Virginia Tech, which was carried out by a student who was able to purchase firearms and ammunition despite a documented history of mental illness.¹⁴ The intent of this legislation was to strengthen the ability of NICS to prevent the purchase or ownership of firearms by prohibited persons, especially those prohibited due to adjudication as mental defectives or commitment to mental institutions.

Attorney General's Authority to Secure Records

Section 101(a) of the NIAA amended the Brady Act to strengthen the Attorney General's authority to secure from any federal department or agency information on persons who are prohibited from possessing or receiving firearms and ammunition under federal or state law. The Brady Act, as amended by the NIAA, requires federal departments or agencies to (1) "furnish electronic versions" of information on prohibited persons 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.

In addition, Section 101(a) of the NIAA requires the Attorney General to submit to Congress an annual report on the compliance of each federal department or agency that possesses such records on prohibited persons.¹⁵

¹³ 27 C.F.R. §478.11.

¹⁴ The mass shooting at Virginia Tech and a shooting in 2002 at a church in Lynbrook, New York, are both cited in the Findings section (Section 2) of the NIAA.

¹⁵ For a list of federal departments and agencies that make NICS referrals and data on these referrals, see FBI, *Active Records in the NICS Index as of January 3, 2023*, <https://www.fbi.gov/file-repository/active-records-in-the-nics-index-by-state.pdf/view>.

Accuracy and Confidentiality of NICS Records

Section 101(b)(2) of the 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 and information be removed from NICS and destroyed in a timely manner. This section 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 a mentally defective” or committed to a mental institution.

Records Prohibited from Inclusion in NICS

Section 101(c)(1) of the NIAA prohibits any federal department or agency 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, 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.”

Relief from Disability¹⁶

Section 101(c)(2)(A) of the NIAA requires that each federal department or agency that makes mental health adjudications or commitments to mental institutions that would affect the ability of persons to ship, transport, possess, or receive firearms and ammunition to establish processes in which such persons can apply for relief from disability. Applications for disability relief must be processed by federal departments and agencies within one year of receipt. If a federal department or agency fails to resolve an application for disability relief within one year for any reason, including a lack of appropriated funds, the application is deemed to have been denied without cause and subject to de novo judicial review.¹⁷ All denials of disability relief by federal departments and agencies are subject to judicial review by the U.S. district court for the district of residence of the petitioner.

Section 101(c)(2)(B) of the NIAA provides that for persons who are granted relief from disability or who are subjects of mental health records that are prohibited from being provided 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 eligibility to ship, transport, possess, or receive firearms and ammunition.

Notice of Opportunity for Disability Relief

Section 101(c)(3) of the NIAA requires any federal department or agency that adjudicates a person as a mental defective to provide both oral and written notice of the following to the person at the beginning of the adjudication process:

¹⁶ In this context, the term *disability* refers to a prohibited person’s inability to purchase or possess firearms and ammunition.

¹⁷ De novo review is a standard of review used by an adjudicative body to rule on evidence and matters of law without giving deference to the findings, rulings, or conclusions of a lower-level adjudicative body.

- that a person “adjudicated as a mental defective” is prohibited from shipping, transporting, possessing or receiving firearms and ammunition under federal law;
- the penalties for violating related federal firearms provisions; and
- the relief from such disability with respect to firearms that is available under federal law.

Department of Veterans Affairs Implementation of the Brady Act and NIAA

The Department of Veterans Affairs (VA) has the authority to determine the mental competency of VA program beneficiaries, such as veterans who receive disability compensation benefits due to service-connected disabilities. It is the policy of the VA to submit the names of beneficiaries determined to be incompetent to the Attorney General for inclusion in NICS. Beneficiaries have two avenues to challenge the submission of their names for inclusion in NICS. First, a veteran can challenge and appeal the VA’s determination of incompetency. Second, the veteran can petition the VA for relief from disability.

Determinations of Incompetency

Under the VA’s regulations, the VA has the authority to determine if a beneficiary in a VA program is mentally competent or mentally incompetent.¹⁸ The VA’s regulations provide the following definition of *mental incompetency*:

A mentally incompetent person is 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.¹⁹

The VA’s regulations require that no determination as to a beneficiary’s competency be made unless the “medical evidence is clear, convincing, and leaves no doubt as to the person’s incompetency” or there has been “a definite expression regarding the question by the responsible medical authorities.”²⁰ A determination of incompetency must be based on all evidence of record and be consistent with the percentage of disability and facts related to any hospitalization or commitment of the person. In a case in which there is a reasonable doubt as to the beneficiary’s competency to contract or manage his or her affairs, the regulations require the doubt to be resolved in favor of a determination of competency.²¹

Generally, if the VA determines that a beneficiary is incompetent, that person’s benefits will be paid on his or her behalf to a third-party fiduciary.²² The VA can later reverse a determination of incompetency based on evidence of the beneficiary’s competency.

Appeals of Incompetency Determinations

Unless a court has found the beneficiary incompetent or a guardian has been appointed for the beneficiary based on a court determination of incompetency, the VA is required to notify the

¹⁸ 38 C.F.R. §3.353.

¹⁹ 38 C.F.R. §3.353(a).

²⁰ 38 C.F.R. §3.353(c).

²¹ 38 C.F.R. §3.353(d).

²² For additional information on benefit payments to a fiduciary, see the VA website at <https://www.benefits.va.gov/fiduciary/>.

beneficiary of the proposed incompetency determination and the right to have a hearing before the VA before the decision is finalized in the same manner as other adverse actions by the VA are subject to hearings.²³ The determination of the VA that a beneficiary is incompetent can be appealed to the Board of Veterans Appeals, whose decisions are subject to judicial review by the U.S. Court of Appeals for Veterans Claims. The court's decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit.

In FY2022, VA data indicates there were 135 hearings on incompetency determinations, 24 of which resulted in competency determinations.²⁴

21st Century Cures Act Provision

Section 14017 of the 21st Century Cures Act (P.L. 114-255) codified the existing due process policies and regulations of the VA regarding determinations of incompetency. As codified by this legislation, the VA may not determine that a beneficiary is incompetent unless the VA has provided all of the following to the beneficiary:

- notice of the proposed determination and supporting evidence;
- an opportunity to request a hearing;
- an opportunity to present evidence, including evidence from a medical professional or other person, of the beneficiary's ability to manage benefits paid by the VA; and
- an opportunity to be represented, including by counsel, at no expense to the federal government, at a hearing and to bring a medical professional or other person to provide testimony at the hearing.²⁵

VA Submissions to NICS

It is the VA's policy to submit the names of all beneficiaries determined to be incompetent to the Attorney General for inclusion in NICS.²⁶ This policy has been consistent since the ATF first promulgated its regulations implementing the Brady Act. In the preamble to the publication of the final rule regarding categories of prohibited persons, the ATF addressed a comment submitted on the Notice of Proposed Rulemaking by the VA regarding how the VA would interpret the definition of *adjudicated as a mental defective* as follows, indicating that ATF considered the VA's planned interpretation to be correct:

In its comment, the U.S. Department of Veterans Affairs correctly interpreted the proposed definition of "adjudicated as a mental defective" to mean that any person who is found incompetent by the Veterans Administration under 38 CFR 3.353 will be considered to have been adjudicated as a mental defective for purposes of the GCA. Section 3.353 provides that a mentally incompetent person is one who, because of injury or disease, lacks the mental capacity to contract or manage his or her own affairs.²⁷

²³ 38 C.F.R. §3.353(e).

²⁴ VA data provided to CRS by the House Committee on Veterans' Affairs.

²⁵ 38 U.S.C. §5101A.

²⁶ VA, *M21-1 Adjudication Procedures Manual*, Part X, Subpart ii, Chapter 6, Section D, Topic 4.a, December 28, 2022, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4.

²⁷ ATF, "Definitions for the Categories of Persons Prohibited from Receiving Firearms," 62 *Federal Register* 34637, June 27, 1997.

As of the beginning of 2023, of the 266,804 active entries in NICS submitted by federal agencies for having been “adjudicated as a mental defective” or committed to mental institutions, 261,168 (97.9%) were submitted by the VA.²⁸

VA policy requires that the following statement (or one with similar language) be included in the letter notifying a beneficiary of a proposed incompetency determination:

The Brady Handgun Violence Prevention Act prohibits you from purchasing, possessing, receiving or transporting a firearm or ammunition based upon our determination that you are incompetent to handle your VA funds. You may be fined and/or imprisoned if you knowingly violate this law.

You may apply to VA for relief of firearms prohibitions imposed by the law by submitting your request to the address at the top of this letter on the enclosed VA Form 21-4138, Statement in Support of Claim. VA will determine whether such relief is warranted.²⁹

Petitions for Relief from Disability

The NIAA requires the VA to allow a beneficiary determined to be incompetent and referred to NICS to petition for relief from disability. As this relief is not provided by the VA, the VA does not have a statutory “duty to assist” a beneficiary in a request for relief, and a beneficiary is not entitled to the “benefit of the doubt” in the evaluation of a request for relief.³⁰ A denial of relief from disability may not be appealed to the Board of Veterans Appeals or U.S. Court of Appeals for Veterans Claims.³¹ The decision can, however, be appealed to the U.S. district court for the district of residence of the beneficiary.

The policy of the VA is to deny a request for relief if evidence shows the beneficiary would be a “danger to self or others” if relief were granted. The evidence must be “clear and convincing” to deny a request for relief, and according to the VA, claims processors must deny a request for relief from disability if any of the following is reflected in the beneficiary’s record:

- an assessment performed by the beneficiary’s primary mental-health physician that indicates the beneficiary would be a danger to self or others if VA granted the request;
- a diagnosis of mental disability with symptoms that include the presence of suicidal or homicidal ideations;
- a diagnosis of substance abuse with symptoms that would render the beneficiary a danger to self or others;

²⁸ FBI, *Active Records in the NICS Index as of January 3, 2023*, pp. 3-4, <https://www.fbi.gov/file-repository/active-records-in-the-nics-index-by-state.pdf/view>.

²⁹ VA, *M21-1 Adjudication Procedures Manual*, Part X, Subpart ii, Chapter 6, Section D, Topic 4.b, December 28, 2022, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4.

³⁰ Per Title 38, Section 5303A, of the *U.S. Code*, the VA has a “duty to assist” claimants with their claims for benefits administered by the VA. Per Section 5107(b), when there is an “approximate balance of positive and negative evidence regarding any issue material to the determination of a matter,” the VA must give the “benefit of the doubt” to the claimant.

³¹ VA, *M21-1 Adjudication Procedures Manual*, Part X, Subpart ii, Chapter 6, Section D, Topic 4.g, December 28, 2022, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000177977/M21-1-Part-X-Subpart-ii-Chapter-6-Section-D-Processing-Awards-to-Incompetent-Beneficiaries#4.

- a reputation for violence, which a claims processor has confirmed by personally contacting the person that cited the reputation;
- conviction of a felony unless the beneficiary presents evidence that, notwithstanding the felony conviction, the right to possess a firearm has been restored;
- conviction of a misdemeanor in the past five years for committing or attempting to commit a violent offense;
- pending felony or misdemeanor charge for committing or attempting to commit a violent offense (including, but not limited to, menacing, stalking, assault, or battery); or
- a charge for a violent offense (including, but not limited to, menacing, stalking, assault, or battery) that has not been brought to trial because a court, board, or commission has determined that the beneficiary lacks the mental capacity to proceed with a trial unless:
 - competency has been restored; or
 - the beneficiary has been rehabilitated through any procedure available under the law.³²

If clear and convincing evidence to deny a request for relief does not exist, the VA must consider granting the request. The VA must grant relief if clear and convincing evidence “affirmatively, substantially, and specifically” shows that:

- the beneficiary is not likely to act in a manner dangerous to the public; and
- granting relief will not be contrary to the public interest.³³

In FY2022, the VA indicates it processed 33 petitions for relief and did not grant relief in any of these cases. According to the VA’s data, 11 beneficiaries who petitioned for relief were determined to be competent and thus removed from NICS.³⁴

Veterans 2nd Amendment Protection Act

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 GCA “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.”

This legislation has been introduced in all subsequent Congresses. While these versions have included slight differences in language over the years, all maintain the key provision that the VA would not be permitted to make a referral to NICS on the basis of mental incompetency or the beneficiary being “adjudicated as a mental defective” solely on the basis of a determination by the VA to pay benefits to a fiduciary without an order or finding of a judicial authority that the beneficiary is a danger to self or others.

³² Ibid., Topic 4.i.

³³ Ibid., Topic 4.j.

³⁴ VA data provided to CRS by the House Committee on Veterans’ Affairs.

In the 118th Congress, the Veterans 2nd Amendment Protection Act has been introduced by Representative Mike Bost in the House of Representatives (H.R. 705) and Senator John Kennedy in the Senate (S. 1875).

Author Information

Scott D. Szymendera
Analyst in Disability Policy

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