



¹ 81 Fed. Reg. 27059 (May 5, 2016).

affairs.² The purpose of this regulation is to preclude such persons from possessing or owning firearms. As such, the level of impairment of one's mental state that justifies taking away the right to own firearms must rest at a severe and substantial level – where the mere possession of a weapon constitutes a danger to self or the public. Otherwise, the government has no compelling reason to preclude firearm possession or ownership.

Although the proposed SSA regulation shares some language with the ATF's "mental defective" regulation, it does not analyze whether a beneficiary is a danger to self or others – a key determinant for whether someone is a "mental defective." The SSA's proposed regulation also reads eerily similar to the VA's regulation that reports names to the NICS simply because a veteran cannot manage his or her finances. This is problematic because the VA regulatory structure, constructed roughly three decades before the Supreme Court held the Second Amendment to be a fundamental right, does not take that fact into account. For example, the proposed SSA rule states,

First, our determination regarding an individual's claim for benefits, specifically our determination regarding the appointment of a representative payee, which we make in accordance with the authority granted to the Commissioner under the Act, constitutes a determination by a "lawful authority." Second, the regulation's focus on an individual's lack of "mental capacity to contract or manage his or her own affairs" makes our appointment of a representative payee the determination that makes a person subject to the Federal mental health prohibitor. The DOJ Guidance discussed above makes that point clear, specifying that relevant records for the Federal mental health prohibitor include "certain agency designations of representative or alternate payees for program beneficiaries." [...] Finally, the regulation requires that the individual lack the mental capacity to manage his or her own affairs "as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease."³

This rule makes clear that the second factor – determining whether a beneficiary lacks the "mental capacity to contract or manage his or her own affairs" – is the key determinant for the SSA in whether a representative payee is needed. In your October 8, 2015 and January 4, 2016, follow up letters to me, you noted that "SSA, however, has not provided any names of beneficiaries to the NICS and is not considering sending names based solely on beneficiaries having representative payees." While that may be technically true under the proposed regulation, it appears that all beneficiaries who will be reported to the NICS will be those who have been assigned a representative payee. And, just like the flawed VA reporting standard, it appears the SSA intends to report names of beneficiaries who have merely been found to be unable to manage their finances, rather than determining if the individual is a danger to self or others. In essence, the inability to manage one's finances appears to be the core or, at minimum, one of the main reasons for reporting names to the NICS.

² 27 C.F.R. § 478.11(a)(1)-(2).

³ 81 Fed. Reg. 27059, 27062 (May 5, 2016).

Further, the proposed regulation does not afford the beneficiary a formal hearing to challenge the SSA's position that a representative payee is required and that the beneficiary's name should be reported to the NICS. Instead, the SSA will only provide oral and written notification to beneficiaries that their right to own and possess firearms may be infringed by the government. Thus, the beneficiary's Second Amendment rights will be infringed without first having a formal hearing or process by which he or she can challenge the government's position.

This process effectively reverses what should be a burden on the government to strip a fundamental Constitutional right and instead requires the citizen to seek to restore it. Under SSA's proposed rule, after a beneficiary is found to require a representative payee and that individual's name is reported to the NICS, the beneficiary would be allowed, by the grace of the government, to petition for relief via administrative measures. So, SSA places the burden of proof on the beneficiary and does not provide a formal hearing to challenge the government action against him or her before it goes into effect.

This regulatory scheme creates significant substantive and procedural constitutional issues. The failure to adequately address them is unacceptable, especially in light of the Supreme Court holding that the Second Amendment is a fundamental right. That holding changed the legal calculus by which a regulatory scheme can survive constitutional scrutiny and it is not clear how this proposed regulation could survive under that increased scrutiny. It is essential to ensure that the process by which the SSA, and all federal agencies, report names to the NICS list recognizes and protects the fundamental nature of the Second Amendment. This proposed regulation appears to fall short of that standard.

Accordingly, please answer the following:

1. Why does the SSA believe it is not required to find that a beneficiary is a danger to self or others before reporting names to the NICS?
2. Given that the SSA requires the beneficiary to prove he or she is not a public danger in order to be removed from the NICS, why does SSA not have to make that showing in order to report names to the NICS in the first instance?
3. Why is the SSA not providing a formal hearing by which the beneficiary can contest the potential reporting of their name to the NICS before the gun ban goes into effect?
4. Why is the burden placed on the beneficiary to prove that their name should not be placed on the NICS?
5. What evidentiary standard of review will be required of the SSA to prove that the beneficiary should be reported to the NICS?
6. Before reporting a beneficiary's name to the NICS, does the SSA first reach a determination that the beneficiary is mentally ill? Please explain.

7. What evaluation and analysis, if any, was performed to determine whether the SSA's proposed regulation complied with the Second Amendment as the Supreme Court has interpreted it? Please explain and provide a copy of the analysis.

Please number your responses according to their corresponding questions. Please submit your responses by June 9, 2016. In addition to the above questions, we request that you brief our staff on this subject matter. If you have questions, please contact Josh Flynn-Brown of Senator Grassley's Judiciary Committee staff at (202) 224-5225 and Senator Lee's Judiciary Committee staff. Thank you for your cooperation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike Lee".

Mike Lee
Member

A handwritten signature in blue ink, appearing to read "Chuck Grassley".

Charles E. Grassley
Chairman