



May 7, 2015

President Barack Obama  
The White House  
1600 Pennsylvania Avenue, NW  
Washington, D.C. 20500

Dear President Obama:

We write to express our grave concerns regarding the regulations and practices that the Department of Veterans Affairs (“VA”) and Department of Justice (“DOJ”) have developed for the reporting of veterans found to be in need of a fiduciary to manage their affairs to the National Instant Criminal Background Check System (“NICS”), resulting in these veterans losing their rights to lawfully own firearms. We believe that these regulations and practices unfairly harm veterans. We also believe that, in many cases, they unconstitutionally deprive those who have served our country of their constitutional rights. Given these problems, we would ask that you reexamine your administration’s approach to this issue.

As you know, federal statute prohibits individuals who have been “adjudicated as a mental defective” from shipping, transporting, possessing, or receiving firearms or ammunition.<sup>1</sup> The clear rationale for this prohibition is public safety. Congress enacted it to prevent mentally unstable individuals who could be dangerous to themselves or others from accessing weapons and committing crimes, not to restrict the rights of law abiding citizens.<sup>2</sup>

Unfortunately, however, VA has interpreted the “adjudicated as a mental defective” language so broadly that it covers any veteran who has had a fiduciary appointed to handle his or her VA benefits.<sup>3</sup> For obvious reasons, this interpretation is problematic. A veteran might have a fiduciary appointed because he or she is aging or cannot navigate the benefits process. This does

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<sup>1</sup> The Gun Control Act of 1968 (the “GCA”), Pub. L. No. 90-617; The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159 (1993); NICS Improvement Amendments Act (the “NIAA”), Pub. L. No. 110-180 (2007).

<sup>2</sup> See, e.g., GCA sec. 101 (“[T]he purpose of this title is to provide support to . . . law enforcement officials in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law abiding citizens. . .”).

<sup>3</sup> William J. Krouse, Congressional Research Service, Gun Control Proposals in the 113th Congress: Universal Background Checks, Gun Trafficking, and Military Style Firearms (2014) (“[B]y having a fiduciary appointed on their behalf [veterans] will be considered ‘mentally incompetent’ and, as a consequence, will lose their firearms eligibility under federal law.”).





not necessarily indicate that he or she would be unsafe with firearms or ammunition.<sup>4</sup> Many individuals who lack financial capacity nonetheless retain the ability to safely exercise their Second Amendment rights. To interpret the “adjudicated as a mental defective” language to cover situations where VA appoints a fiduciary for finances ignores the statute’s public safety rationale.

We understand that VA claims that the DOJ regulations interpreting the federal statute require it to report veterans for whom a fiduciary has been appointed. These regulations define “mental defective” as not only those who are a danger to themselves or others but also those who “lack the mental capacity to contract or manage [their] own affairs.”<sup>5</sup> We do not agree that this definition requires VA to report all veterans for whom a fiduciary has been appointed. Should that be the administration’s interpretation, however, we believe these regulations ignore the intent of the law and should be amended.<sup>6</sup>

Further, the DOJ regulations, as interpreted by VA, raise significant due process concerns. In determining whether to appoint a fiduciary, VA does not engage in a formal, adversarial process taking into account the veteran’s Second Amendment rights. In fact, VA often appoints a fiduciary without even hearing from the veteran, for example upon a tip from a VA doctor.<sup>7</sup> This is hardly the sort of adversarial adjudication that is appropriate before a veteran loses his or her fundamental Second Amendment rights.<sup>8</sup>

Finally, the existing approach also presents an Equal Protection issue. To our knowledge, VA is the only agency with a practice of regularly referring those for whom a fiduciary has been appointed to NICS. This disparate treatment is evidenced by the fact that 99.3% of those referred

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<sup>4</sup> 38 C.F.R. § 3.353 (determining competency for benefits purposes based on whether the veteran can manage finances and enter into financial transactions, not based on dangerousness or risk to public safety).

<sup>5</sup> 27 C.F.R. § 478.11(a).

<sup>6</sup> We also take issue with the fact that these regulations define “adjudicated” to include “[a] determination by a court, board, commission, or other lawful authority.” *Id.* This covers VA actions despite the fact that veterans are not afforded the same protections in those proceedings that they would be afforded in a court of law.

<sup>7</sup> 38 C.F.R. § 3.353 (not considering dangerousness or public safety in the determination of competency and not requiring the Veteran Service Center Manager or the ratings agency to hear from the veteran prior to a declaration of incompetency).

<sup>8</sup> We understand that, in light of the NIAA, VA instituted a process by which a veteran can, in theory, appeal the VA action reporting him or her to NICS. This process, however, is skewed against the veteran and therefore wholly insufficient to remedy the constitutional and fairness issues outlined above. This bias is apparent from the VA’s own guidelines to personnel who would consider appeals. These guidelines state that, in deciding appeals, “principles common to the VA adjudication process, such as benefit of the doubt and duty to assist . . . do not apply. The beneficiary seeking relief from the NICS reporting requirements has the burden of proof . . . , and failure to meet that burden is sufficient to deny the request.” They further specify that relief may only be granted “on the basis of clear and convincing evidence” and that the VA officer “must deny” any appeal in which the veteran is diagnosed with a mental disability. United States Department of Veterans Affairs, Letter from Compensation Service and Pension and Fiduciary Service to All Veterans Service Center and Pension Management Center Personnel (February 20, 2014) (emphasis in original) (on file and available upon request).





by agencies as “mental defectives” are veterans.<sup>9</sup> We can think of no justification for treating veterans differently than other populations when it comes to fundamental constitutional rights.

We are not alone in our concern about this situation; we have heard frustration from a number of the wounded veterans that we serve. Many of them are upset that, merely because they need a fiduciary to navigate a cumbersome benefits process, they risk being stripped of fundamental Second Amendment rights. Not only is this fundamentally unfair, but it breeds suspicion of VA and inhibits veterans who might benefit from seeking fiduciary status or treatment for mental health or other conditions.

We ask that you take a hard look at the regulations and practices that have given rise to this situation. Constitutional rights – particularly the Second Amendment rights of our national heroes – should not be seized by arbitrary means. As you review, we hope you will allow us to serve as a resource. On behalf of the almost 70,000 veterans and caregivers we serve, Wounded Warrior Project can assist you in crafting a solution that both protects public safety and prevents discrimination against the veteran population.

Sincerely,

Steven F. Nardizzi  
Chief Executive Officer  
Wounded Warrior Project, Inc.

cc:

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<sup>9</sup> William J. Krouse, Congressional Research Service, Gun Control Proposals in the 113th Congress: Universal Background Checks, Gun Trafficking, and Military Style Firearms (2014).



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