

United States Senate

WASHINGTON, DC 20510

July 14, 2016

The Honorable Carolyn W. Colvin
Acting Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, Maryland 21235-6401

Dear Ms. Colvin,

Despite the urging of many not to do so, the Social Security Administration (SSA) appears intent on pursuing a fundamentally flawed scheme of reporting to the National Instant Criminal Background Check System (NICS) some of its beneficiaries who are deemed by SSA to be incapable of managing their own funds. SSA evidently is doing so because the Department of Justice (DOJ), urged on by a memorandum from the President, has interpreted existing law to mean that SSA beneficiaries who are deemed by SSA to be “mentally defective” and have a “representative payee,” constitute individuals “who have been determined to be a danger to themselves or to others or lack the mental capacity to contract or manage their own affairs.”

SSA has issued a proposal to send beneficiaries’ information to the NICS. Such information, according to the March 2013 DOJ “Guidance to Agencies Regarding Submission of Relevant Federal Records to the NICS,” would include “agency records of adjudications of an individual’s inability to manage his or her own affairs, if such adjudication is based on marked subnormal intelligence or mental illness, incompetency, condition or disease.” It is far from clear that SSA’s attempt to connect its field office workers’ assignments of representative payees, which could be based on “lay evidence of capability” (see, for example, GN 00502.030, SSA Program Operations Manual System), coupled with a mental health component of benefit determination corresponds with legal requirements associated with the NICS involving abilities of individuals to manage their affairs.

According to the National Council of Social Security Management Associations (NCSSMA), which represents SSA field office and teleservice center management: “Absent a finding of legal incompetence, a capability determination for an adult beneficiary is made by a claims specialist based on a brief interview and, *if available*, the opinion of a treating physician. The face-to-face interview, per GN 00502.050, elicits answers to such questions as, ‘Can you make change?’ and ‘Do you ever forget to pay some bills?’ Our process does not address issues relevant to the question of mental deficiency as described in 27 CFR Sec. 478.11, let alone the issue of whether or not a person constitutes a danger to themselves and others.” (Italics added.)

As stated in a 2013 report by the U.S. Government Accountability Office (GAO), SSA “struggles to effectively administer its Payee Program.” Yet, SSA believes that it can use its ineffectively administered Payee Program as a highly imprecise screening device to determine whether beneficiaries can exercise certain Constitutional Rights.

A March 2016 report by the Social Security Advisory Board (SSAB) found that: “...payees are appointed for not only minor children and adults that have been found to be incompetent after a full judicial hearing, but also for other adults through an administrative decision by an SSA field office (FO) employee.” The SSAB goes on to write that: “In light of the profound nature of this action, SSA needs to research, design, and then train staff on how to make payee determinations... Even if administrative budgets were considerably larger, SSA is neither staffed nor structured to perform extensive social welfare functions.” The SSAB also questions “whether claimants [in the existing Payee Program] understand their appeal rights and whether payees are appointed only when necessary.” Yet, SSA believes that it can use its ineffectively administered Payee Program as a highly imprecise screening device to determine whether beneficiaries can exercise certain Constitutional Rights.

Interestingly, according to data from SSA itself, beneficiaries with representative payees as a percentage of a State’s beneficiary population in 2014 vary widely across states. For example, the percentage is, for three States, between 16% and 18%, while for 12 other States is between 9% and 10.8%. Evidently, according to SSA’s procedures, someone with a mental health condition is roughly twice as likely to be unable to manage his or her own finances in a State like Louisiana as in a State like Oregon. Either abilities to make change or pay one’s bills, which SSA plans to use as a proxy for an American’s ability to manage his or her own affairs, are significantly less pronounced in some States than others, or there is simply regional or State SSA field office payee-determination variability that SSA cannot explain. The recent report by the SSAB counsels that the latter is the case, writing that “while variation across offices may be due to differences in the characteristics of the beneficiary population, SSA needs to analyze these data to understand if any of the factors accounting for variation are due to program management.” We are unaware of any such analysis having been done by SSA.

Despite independent evaluations by the NCSSMA, GAO, and SSAB questioning the integrity of the existing representative payee structure in place at SSA, and questions about whether SSA’s screening determines whether beneficiaries have abilities to manage their own affairs, SSA has decided to proceed with its flawed NICS reporting scheme by putting forward a proposed rule, based on a memorandum by the President and interpretations of by DOJ.

In its notice of proposed rulemaking (Docket No. SSA-201600011; RIN 0960-AH95), SSA writes that: “We recognize that there is no perfect fit between: (1) Our adjudication regarding a claimant’s entitlement to benefits and determination of whether to designate a representative payee; and (2) the regulatory definition of an individual who is subject to the Federal mental health prohibitor [on an ability of an individual to exercise his or

her Second Amendment Right].” Nonetheless, based on SSA introspection, SSA says that: “Considering the relevant regulatory factors...however, we believe that there is a reasonable and appropriate fit between the criteria we use to decide whether some of our beneficiaries are disabled and require a representative payee and the Federal mental health prohibitor.” That is, while SSA admits that “there is no perfect fit,” and has to our knowledge not provided evidence of any statistically significant fit, SSA has by itself determined that its proposed scheme to make decisions regarding individual Americans’ Second Amendment Rights is “reasonable and appropriate.”

As part of SSA’s scheme, SSA proposes also “to establish a program that permits individuals to request relief from the Federal firearms prohibitions based on our adjudication.” According to SSA’s proposed scheme, “this request for relief process would focus on whether the circumstances regarding the disability, and the applicant’s record *and reputation*, are such that *we find* the applicant will not be likely to act in a manner dangerous to public safety, and that the granting of relief would not be contrary to the public interest. To make these required findings, we propose to require the individual to provide us evidence [within 30 days], including evidence from his or her primary mental health provider regarding his or her current mental health status and mental health status for the past 5 years. We also propose to require an applicant for relief to submit written statements and any other evidence regarding the applicant’s reputation. As part of the relief process, we would also obtain a criminal history report on the applicant.” Furthermore, SSA says that: “We propose to include in the regulation that the individual may seek judicial review when *we deny* his or her request for relief through the filing of a petition for relief in the United States district court for the district in which the individual resides.” (Italics added.)

Of course, these proposed procedures, in SSA’s Federal firearms prohibition scheme, add to any existing stigmas for American workers applying for SSA-directed benefits based on mental health conditions and limited abilities to make change, pay bills, or otherwise manage finances. They would impose significant costs on SSA—an agency that persistently claims to lack resources to manage its own existing affairs—which SSA evidently believes it will obtain, without authorization, by diverting appropriated resources from its existing programmatic needs. They would impose costs on beneficiaries who may be low-income individuals. They also involve a unilateral decision by SSA to erect a brand new “relief” process, complete with SSA investigations into a beneficiary’s “reputation,” mental health conditions over the past 5 years, and criminal history.

After the extremely time limited “relief” process that SSA proposes to offer, SSA has decided also “to include in the regulation a provision that the individual may seek judicial review when *we deny* his or her request for relief through the filing of a petition for relief in the United States district court for the district in which the individual resides.” (Italics added.) That, of course, imposes additional burdens and costs on beneficiaries.

We urge SSA to cease action on its scheme to deny some of its beneficiaries their abilities to exercise their Constitutional rights. There is no legal requirement that SSA

construct its extremely imprecise proposed scheme, and no authorization to SSA to construct a fresh quasi-adjudication process to allow beneficiaries limited abilities to seek, at significant costs, relief from SSA's scheme.

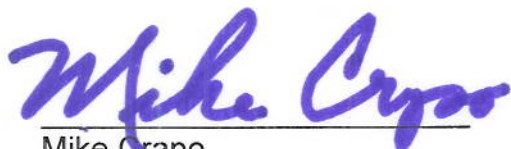
As part of our oversight responsibilities with respect to SSA, it is essential that Members of Congress have access to plans that SSA has been formulating, in conjunction with DOJ and others, to set up its scheme to provide quasi-adjudication of rights of Social Security beneficiaries. Toward that end, we note that the DOJ's March 2013 "Guidance to Agencies Regarding Submission of Relevant Federal Records to the NICS calls for SSA to submit plans on a regular basis and provides other information to SSA which we request that SSA make available to Congress. Specifically, based on the DOJ March 2013 guidance:

- It is identified (p.12) that: "agencies need not create records specifically for the purpose of submitting them to the NICS." And (p.7), with respect to the "mentally defective" prohibitor, DOJ identifies that "relevant records" include "agency records of adjudications of an individual's ability to manage his or her own affairs if such adjudication is based on marked subnormal intelligence or mental illness, incompetency, condition or disease. This last category includes certain agency designations of representative or alternate payees for program beneficiaries." What records does SSA envision it would supply to the NICS, based on SSA's proposed scheme? Please provide a random sample of 30 such records that SSA would report. Does SSA intend, in its scheme, to "create" records that differ from those that currently exist?
- It is identified that "an agency may believe that submission of certain records, such as medical records created in a clinical setting, would present a serious deterrent to people seeking treatment, benefits or other services that the agency provides" and that such an agency belief may justify exception to its "obligation" to submit records. Does SSA believe that there would be no deterrent to people seeking benefits from its proposed scheme to limit beneficiary rights?
- It is demanded (p.16) that "Within 60 days of the issuance of this Guidance, the Presidential memorandum directs all agencies to 'submit a report to DOJ advising whether they possess relevant records, as set forth in the guidance, and setting forth an implementation plan for making information in those records available to the NICS, consistent with applicable law.'" Please provide the report that SSA submitted to DOJ within 60 days of the March 2013 guidance.
- It is demanded (p.16) that "Agencies that possess relevant records consistent with this Guidance are further directed to 'submit a report to the President through the Attorney General' on an annual basis, describing their progress in submitting all relevant records to the NICS." Please provide each report that SSA submitted, in 2013, 2014, 2015, and 2016.
- It is demanded (p. 17) that "In addition to submitting a Report and Implementation Plan, agencies that possess relevant records must submit Annual Reports to the President through the Attorney General by October 1 of each year." Please provide each Annual Report to the President that SSA submitted in 2013, 2014, 2015, and 2016.

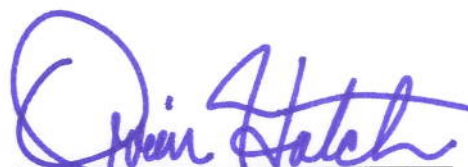
In addition to the information above, please provide a detailed assessment by SSA of the administrative costs, including number of full-time equivalent work years and associated dollar outlays, estimated to be associated with SSA's proposed firearms screening scheme, including the reporting requirements and construction and maintenance of the "relief" process.

Please provide the requested information and responses to questions posed above by July 30, 2016.

Sincerely,



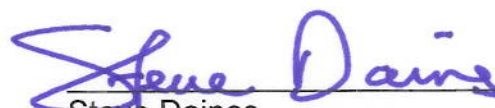
Mike Crapo
United States Senator



Orrin Hatch
United States Senator



James M. Inhofe
United States Senator



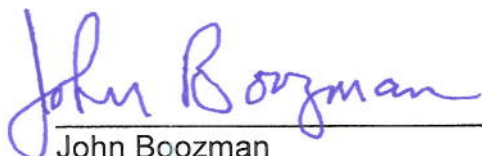
Steve Daines
United States Senator



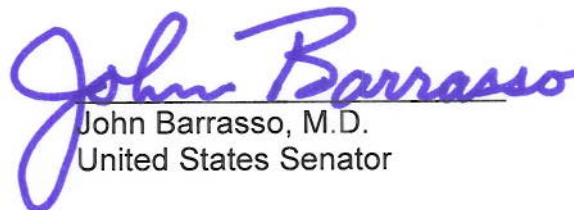
Michael B. Enzi
United States Senator



Jerry Moran
United States Senator



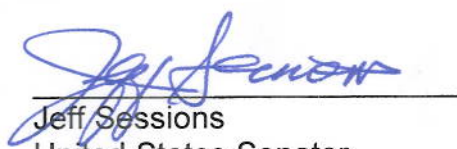
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United States Senator



John Barrasso, M.D.
United States Senator



James Lankford
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Jeff Sessions
United States Senator