

Mental Health and Safe Communities Act: The Good, the Bad, and the Fixable

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In the wake of a tragic summer in which mass shootings seemed rampant, Senator John Cornyn (R-TX) introduced S. 2002, the *Mental Health and Safe Communities Act*. Touted as a response to these horrific acts of gun violence, the bill indeed includes pieces that could benefit our mental health care system, but it would not improve gun laws as they relate to mental illness. In fact, the sad truth is that it would *weaken* them. Senator Cornyn is right that it's time to have a conversation about mental health and invest in treatment and training. But the intersection between gun laws, mental health, and the more than 33,000 Americans who die by guns each year is far more complicated than the bill makes it seem. To the extent the *Mental Health and Safe Communities Act* attempts to address this intersection, it would actually take us backwards. But there may be ways to salvage its strong points while negating these flaws. This memo breaks down what's good, what's bad, and what could be done to fix it.

The Good

If you look at the *Mental Health and Safe Communities Act* as a bill to improve mental health care—particularly as it interacts with the criminal justice system—there is a lot to like.

- **It improves funding for mental health care—especially related to the criminal justice system.** The bill authorizes funding for a variety of services at the intersection of criminal justice and mental health, including for identification, treatment centers, crisis response and intervention, re-entry and transition assistance, and mental health courts.

- **It collects more data.** It improves data collection so we have a better understanding of the incidence and role of mental illness in homicide cases and in cases where law enforcement officers are killed or injured.
- **It trains law enforcement.** The bill funds active-shooter trainings to better prepare police officers to protect citizens in these horrific scenarios.
- **It reauthorizes funding for the background check system.** The bill would fund the National Instant Criminal Background Check System (NICS) used to run background checks on gun purchasers, which is the only way to keep guns out of the hands of those who are dangerously mentally ill.
- **It updates legal terminology.** It corrects the out-of-date, offensive language in existing gun laws by replacing the terms “mental defective” with “mentally incompetent” and “mental institution” with “psychiatric hospital.”
- **It converges inpatient and outpatient involuntary commitment.** Finally, the bill codifies the recent and not-yet-finalized regulatory effort by the Obama Administration to clarify that regardless of whether involuntary treatment takes place as an inpatient or as an outpatient, such treatment being mandated is sufficient to label the patient “mentally incompetent” under federal gun laws and thus make him or her ineligible to purchase or possess a firearm.

The Bad

While there are certainly commendable aspects of the *Mental Health and Safe Communities Act*, as drafted it would also make it easier for some dangerously mentally ill people to get guns.

- **It narrows the categories of people prohibited from buying a gun because of mental illness.** Perhaps most importantly, the bill as written would codify and narrow the definition of “mentally incompetent” significantly. Under existing regulations, there are effectively three ways someone can be disqualified from owning or buying a gun due to their mental health: (1) having been adjudicated mentally ill (such as when a court finds someone not guilty by reason of insanity), (2) having been involuntarily committed, or (3) having been found to lack the mental capacity to contract or manage one’s own affairs. But Senator Cornyn’s bill would do away with the entire third category. That means that if a soldier returns from war with a traumatic brain injury or severe PTSD, the Veterans Administration (VA) would no longer be able to stop him from buying a gun—or a dozen—on the grounds that his illness makes him incapable of managing his own affairs. Faced with a tragic epidemic of suicide among our nation’s veterans, this language would make it *harder* to put those who might be a danger to themselves or others onto the prohibited buyer list.
- **It makes it harder to flag people for dangerous mental illness.** Under existing regulations, a court, board, commission, or other lawful authority can determine that someone is a danger to him or herself or others or unable to manage his or her own affairs, and thus rule that he or she should not be able to own or purchase a gun. But this bill makes that process much more difficult, excluding federal agencies like the VA and Social Security Administration and even doctors, who have the authority in some states and situations to commit their patients involuntarily in times of crises. Additionally, it demands that such a finding can only be made after a full hearing with a right to counsel.

- **It allows people committed involuntarily to buy guns as soon as their commitment order expires.** Under current law, someone who is involuntarily committed for mental illness is permanently prohibited from purchasing or possessing a firearm unless they go through an appeals process and convince a judge that it is safe to reinstate those rights. But under this bill, the gun prohibition ends as soon as the commitment order expires. That means a mentally ill patient could walk out of a treatment facility and head directly to the gun store to stock up on as many guns as they'd like, with no legal limitations.
- **It deletes existing legitimate records from the NICS system.** Because these changes to who qualifies as mentally incompetent are retroactive, many records currently in the system will be deleted—either because a person was in the system due to a finding of mental incapacity, which would no longer be sufficient to put them on the list, or because their commitment order has expired and they have been released from a treatment facility. This would mean removing from the prohibited buyer list many people who are still a danger to themselves and others.
- **It lowers the bar for a state to be considered compliant submitting records.** Under current law, a state must submit 90% of required records to be considered compliant under the *NICS Improvement Amendments Act of 2007*. This bill would also qualify states as compliant if they have merely passed a law requiring the submission of records—even if they haven't submitted any. The goal of the *NICS Improvement Amendments Act* was to increase the percentage of mental health and other prohibiting records getting into NICS, not just to incentivize states to pass laws that they can ignore, underfund, or fail to implement.

The Fixable

The *Mental Health and Safe Communities Act* need not be a lost cause. Because it would do so much good for the mental

health care system, it may be worth trying to fix its biggest flaws instead of throwing the baby out with the bathwater. There are several ways to mitigate the worst of the bill's weaknesses.

- **Include mental incapacity as a category of mental illness.**

Our veterans are heroes, and we support creating an expedited system similar to the review board established by this bill to hasten their appeals when they have been listed as prohibited buyers for mental health reasons. However, that doesn't mean we should stop putting them in the system in the first place. The *Mental Health and Safe Communities Act* should be amended to include "lacking mental capacity to manage one's own affairs or enter into contracts" as a qualifier for being placed on the prohibited buyer list. Alternatively, the bill could be changed to delete the definition of mentally incompetent entirely, not codifying it but instead leaving the details in regulations where they exist now. That path would allow easier updating of the definition in the future, without Congress needing to amend the law, as medical science advances to give us a better understanding of mental illness and who may be a danger to themselves or others.

- **Allow lawful authorities to find people mentally incompetent.** We know that too few people are stopped by the background check system for reasons of mental illness. The best way to fix that isn't to make it harder to put people on the prohibited buyer list. That means lawful authorities, like the VA, the Social Security Administration, or doctors, should be able to put people on the prohibited buyer list if they find them to be mentally incompetent—not just over-crowded and backed-up courts that can't move with the alacrity mental health crises require.

- **Continue the lifetime prohibition on involuntary commitment.** Federal law already incentivizes states to establish appeals processes so that people who have previously been committed involuntarily for mental health reasons can have their gun rights restored. But immediate restoration of the right to possess or purchase a gun as soon as a commitment order expires means that someone could potentially get their hands on a gun immediately after they are released from a psychiatric hospital where they were being held against their will.
- **Preserve the current list of prohibited buyers.** Changes to who qualifies as mentally incompetent for purposes of the NICS system should only apply going forward rather than retroactively. Anything else would delete records that were already intended to be included in the system in perpetuity. The NICS system is only as strong as its database is comprehensive, and no one should fall off the prohibited buyer list because of a technicality.

Conclusion

The time is long overdue for Congress to take action to improve our aging and underfunded mental health care system. In many ways, the *Mental Health and Safe Communities Act* is a good start in that direction. But to the extent that this bill does good things, the link to guns is tenuous at best. Despite proponents' claims to the contrary, the bill wouldn't actually close any of the mental health cracks or loopholes in the background check system through which so many recent high-profile shooters have fallen. And not only does it fail to improve the mental illness portion of our gun laws, it weakens them significantly and perhaps unintentionally makes it easier for someone who is dangerously mentally ill to get their hands on a gun.

But at the end of the day, even if it were amended to remedy these problems, this bill won't resolve our gun violence problem. If Congress wants to actually do something on guns that will make a difference and save lives, they should pass Senator Amy Klobuchar's (D-MN) *Protecting Domestic Violence*

and Stalking Victims Act to expand protections against domestic abusers or Senator Barbara Boxer's (D-CA) *Pause for Safety Act*, which would allow moms and dads to temporarily add their children to the prohibited buyer list if a judge agrees they are a danger to themselves or others. And if keeping guns out of the hands of criminals and those who are dangerously mentally ill is the goal, it cannot be accomplished without comprehensive background check legislation. Because no matter how much we improve the NICS system and update the list of prohibited buyers, it won't stop them from getting guns if they can simply go online or to a gun show and skip the background check altogether.

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