AMERICA FIRST LEGAL

September 14, 2023

The Honorable Jim Jordan
Chairman, House Judiciary Committee
2138 Rayburn House Building
Washington, DC 20515

The Honorable Dick Durbin
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable James Comer
Chairman, House Committee on Oversight and Accountability
2157 Rayburn House Building
Washington, DC 20515

The Honorable Gary Peters
Chairman, Senate Homeland Security & Governmental Affairs Committee
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairmen Jordan, Comer, Durbin, and Peters:

The federal background investigation ("BI") process is broken. During the Trump Administration, candidates for presidential appointments were subject to a BI process that involved the FBI's repeated, agency-wide violations of the Privacy Act and the Paperwork Reduction Act, among other laws. During the Biden Administration, opportunities to thwart compliance with laws have been magnified because the Department of Justice's Office of Legal Policy rescinded regulations designed to protect individuals subject to the BI process.

The attached report makes the following findings reflecting an institution-wide violation by the FBI of the Privacy Act, the Paperwork Reduction Act, the Freedom of Information Act, and the applicable FBI Manual of Investigative Operations and Guidelines (MIOG):

Finding: The FBI violates the Paperwork Reduction Act's requirements at 44 U.S.C. § 3506(c)(1)(B) by not ensuring that the form it uses to obtain consent from applicants contains a valid control number; by failing to disclose that the information is "being collected" or "to be used" for a law enforcement purpose or to determine suitability for federal civilian employment (which the FBI has claimed); and by failing to disclose that the information would be shared with the relevant Senate committee for its use in determining a nominee's fitness and qualifications.

Finding: The FBI violates the Paperwork Reduction Act's requirements at 44 U.S.C. § 3512(a) because it collects information from the public and third parties concerning nominees without using a form with a valid OMB-approved control number.

Finding: Neither the FBI nor the DOJ complies with the Privacy Act's requirement that disclosure to the relevant Senate committee staff be a publicly noticed and approved Routine Use.

Finding: The FBI violates FOIA because it fails to publicly disclose its pattern and practice of disregarding legal rules when obtaining third-party information.

Finding: The FBI violates 5 U.S.C. §§ 552a(e)(6) by no longer enforcing the MIOG standards, which requires the FBI to seek to offset derogatory information. As such, the FBI does not "make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes."

Finding: Again, because it disregards the MIOG, the FBI violates 5 U.S.C. §§ 552a(e)(1), (e)(2), (e)(3), and (e)(5) because the FBI or DOJ maintains in its records information about applicants that is likely irrelevant to their qualifications to fairly and competently adjudicate cases arising under the Constitution and statutes in conflict with (e)(1); does not collect positive information directly from applicants in response to potentially derogatory information, thus conflicting with (e)(2); does not use an OMB-approved form to collect information from third parties about applicants, which form must specify the FBI's authority and purpose in conducting the background investigation, specifying that information would not only be shared with the White House but would ultimately be shared with both political parties making up the Senate committees and their staff and those committees would make an adjudication decision, thus conflicting with 44 U.S.C. §§ 3506 & 3507 in violation of (e)(3); and, for all of the above reasons, did not provide applicants with fundamental fairness.

Finding: In response to America First Legal's investigative efforts, the Biden Department of Justice released new rules rescinding the Privacy Act protections for candidates undergoing BI reviews. The new Biden regulations permit the White House to direct the FBI's investigation of any person because it is no longer bound by requirements to obtain the written consent of candidates, and the

White House and FBI can disclose those BIs outside the Executive Branch without notice. Finally, the regulations exempt BI files from the Privacy Act's correction or amendment procedures. The Biden Administration's further exempting BI files from Privacy Act and Paperwork Reduction Act requirements only risks further politicization of the FBI.

We hope this report can assist the committee in its oversight and reform efforts concerning the Federal Bureau of Investigation.

Sincerely,

/s Gene P. Hamilton
Gene P. Hamilton
Vice President and General Counsel
America First Legal

cc: The Honorable Jerry Nadler, Ranking Member
The Honorable Jamie Raskin, Ranking Member
The Honorable Lindsey Graham, Ranking Member
The Honorable Rand Paul, Ranking Member

Unsecure: The FBI's Politicization of Background Investigations Process During the Trump Administration

I. The FBI Has Violated Congressionally Established Procedures Governing Background Investigations

It is an axiom of American political history that when a presidential administration routinely violates the Privacy Act, it is to politicize an otherwise neutral process. Congressional investigations during the Clinton Administration revealed that the Clinton White House improperly accessed the FBI files of nominees and appointees from the prior presidency.[1] Subsequent to this crisis, known as "Filegate," the White House entered into an agreement, still in effect today, with the FBI subjecting presidential appointee background checks to the Privacy Act.[2] The DOJ's Office of Legal Policy, which coordinates background investigations with the FBI on appointees to the courts and law enforcement positions, established regulations to prevent the Clinton Administration's politicization of privacy to spy on its political enemies. Yet, as this report reveals, those protections have been rescinded by the Biden Administration. Worse, this report evidences a pattern and practice by the FBI of routinely violating applicable privacy and information collection protections established in federal law.

The FBI's routine denigration of procedures during the Trump Administration is no small irony. In 2018, due to concerns that Supreme Court nominee Brett Kavanaugh may have committed inappropriate activities when he was a minor, the Senate Judiciary Committee sought—and the White House complied with—a supplemental FBI investigation into the allegations.[3] After Justice Kavanaugh was confirmed with no findings of wrongdoing, Senate Democrats determined that the FBI supplemental investigation was "fake" and that "proper oversight" must be made into how

[1] U.S. H. Comm. On Govt' Reform & Oversight, Investigation Into The White House And Department Of Justice On Security Of FBI Background Investigation Files: Interim Report, H.R. Rep. No. 104-862, 104th Cong., 2d Sess. (1996), *available at* http://bit.ly/1OQ8twW; *accord* William Neikirk, *FBI Charges Abuse Over Files*, CHI. TRIB. (June 15, 1996), http://bit.ly/1Z45C9k (describing the lack of a process leading to "egregious violations of privacy").

[2] Memorandum of Understanding Between the Department of Justice and the President of the United States Regarding Name Checks and Background Investigations Conducted by the Federal Bureau of Investigation (Signed by Eric H. Holder, Jr., Attorney General, U.S. Department of Justice, March 3, 2010, & Robert F. Bauer, Counsel to the President, The White House, March 4, 2010) (attached as "Exhibit 2").

[3] Erin Kelly, GOP Releases Summary of FBI Report on Kavanaugh: 'No Corroboration of the Allegations', USA TODAY (Oct. 5, 2018), https://bit.ly/3Zh0nJJ.

thoroughly the FBI investigated Kavanaugh during his confirmation hearing.[4] The Kavanaugh confirmation theatrics raise several questions about the FBI background investigation (BI) process during the Trump Administration. First, if the process is thorough and objective, supplemental inquiries would never be needed. That the BI process can be steered by either the Senate or the White House is evidence that it is subject to significant bias. Second, and related, as revealed from numerous official investigations and credible reports, the FBI Washington, DC field office was replete with politically biased agents, which only further creates risks to the objectivity or validity of BI reports. Special Counsel John Durham confirmed that the FBI acted without appropriate objectivity and overly relied on information from individuals connected to political opponents.[5]

This report is based on a multi-year investigation by America First Legal, which reveals procedural infirmities that biased the FBI BI process in ways that benefited those politically opposed to former President Trump. It outlines the problems of a process used to create agency records disclosed to the Senate. Congressional reform should focus on correcting these procedural violations or categorize BI files as presidential records (or otherwise privilege-protected agency records) exempt from the Privacy Act, Paperwork Reduction Act, Administrative Procedure Act, and other applicable statutes. Further, the expectation should be that the President has full control over BI files and should exercise discretion as to what information the Senate obtains. Notwithstanding the principle—articulated most recently in *Buzzfeed v. FBI*[6]—that administrative procedures do not normally apply to the President's nomination process, the FBI during the Trump Administration agreed to rules that it subsequently failed to follow.

Finding: The FBI violates the Paperwork Reduction Act's requirements at 44 U.S.C. § 3506(c)(1)(B) by not ensuring that the form it uses to obtain consent from applicants contains a valid control number; by failing to disclose that the information is "being collected" or "to be used" for a law enforcement purpose or to determine suitability for federal civilian employment (which the FBI has claimed); and by failing to disclose that the information would be shared with the relevant Senate committee for its use in determining a nominee's fitness and qualifications.

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[4] See e.g., Stephanie Kirchgaessner, FBI Facing Allegation That Its 2018 Background Check of Brett Kavanaugh Was 'Fake,' GUARDIAN (Mar. 16, 2021), https://bit.ly/3Z9Cjsp.

[5] Special Counsel John H. Durham, Report on Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns at 8–10, 17–19, 81–84, 89–91, 170–71, 265–66, 305, U.S. DEP'T JUST. (May 12, 2023), https://bit.ly/3QyLaBm ("Durham Report"); *see id.* at 18 (A "serious lack of analytical rigor, apparent confirmation bias, and an overwillingness to rely on information from individuals connected to political opponents" caused the government "to act without appropriate objectivity or restraint in pursuing allegations of collusion or conspiracy between a U.S. political campaign and a foreign power.").

[6] U.S. Dist. LEXIS 80640, *23-24 (D.D.C. 2020).

America First Legal's litigation against the FBI reveals that the 2010 Memorandum of Understanding (MOU) between the Department of Justice and the President (via his Counsel) is still valid.[7] The stated purpose of the 2010 MOU is to fill "key Administration positions … without undue delay."[8] Further, the MOU is drafted with a particular focus on the President's nomination of appointees within, versus outside, the executive branch. Paragraph 2 of the MOU states, "[t]he FBI will conduct file reviews and background investigations … for applicants, employees, or any other persons who will perform services for, or receive an award or recognition from, the President."[9] The FBI relies upon the MOU in conducting background investigations on judicial nominees and, in abiding by the terms of the MOU, is bound by the Privacy Act in collecting facts for purposes of creating a BI file.

These concerns are particularly stark when it comes to nominations that go through the Senate Judiciary Committee. Given the FBI's MOU with the White House and the White House's MOU with the Senate Judiciary Committee,[10] as well as the Senate Judiciary Committee's sole power to determine whether a judicial nominee goes to the Senate floor, and the presumption that the FBI's disclosure of BI files to the Senate Judiciary Committee does not create a publicly accessible record,[11] at least one, if not arguably the sole, relevant agency purpose for the BI is the Senate Judiciary Committee's decision-making authority. During the Trump Administration, the FBI did not obtain candidate consent before disclosing an individual's BI file to Senate committees. As such, the Senate Judiciary Committee gave no deference to the President's designee's determination, or that of the Office of Legal Policy (OLP) at the Department of Justice, to evaluate the BI file for "assessing a nominee's fitness and qualification."[12] This gave Senate committees the power to unconstitutionally veto a nominee without a hearing.

Before the Biden Administration, a background investigation began with a candidate for appointment signing a form developed by the DOJ Office of Legal Policy for the White House identified as "DOJ-OLP-1/12/10."[13] AFL's litigation with the Department of Justice reveals that this form is no longer used; instead, the FBI has created an unnumbered form, not approved by the Office of Management and Budget, for the White House's use.[14] Both forms—the OLP and the FBI ones—indicate that the background investigation file would only be provided to the White House (i.e., not further disclosed to the Senate). Even if the White House, not the FBI, provides the

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[7] *See* Exhibit 2.
[8] Memorandum of Understanding Between the Department of Justice and the President of the United States 1, ¶ 1.
[9] *Id*.
[10] 2009 MOU Between the White House and the Senate Judiciary Committee, https://bit.ly/45Sqppq (hereinafter "2009 MOU").
[11] *See* discussion of inter-agency disclosures in *Buzzfeed, infra.*
[12] 2009 MOU.
[13] *See e.g.*, U.S. DEP'T JUST., "OLP Records Regarding Judgeship Nominations – Part 1 Interim" at 19, https://bit.ly/3sPgcvc.
[14] *See* Exhibits 1a, 1b, & 1c.

file to the Senate, the MOU the White House has with the Department of Justice states at §3(e), "[t]he reason for each background investigation will be indicated with specificity (which may be accomplished by checking the appropriate boxes on the form), and if known, shall include the position for which the Appointee is being considered."

The FBI acts without the candidate's consent. Neither form used by the FBI indicates that the primary reason for the background investigation is not simply to inform the president's nomination of an applicant but to determine whether the applicable Senate committee "clears" that applicant for a hearing. None of the publicly noticed[15] routine uses of background investigation files state that the files are routinely disseminated to the Senate.[16] Even if the FBI does not directly provide the file to the Senate, the FBI is obviously aware that the White House and/or OLP at DOJ (in the case of judicial nominees) provide that information to the Senate Judiciary Committee. To the extent that BI files are treated as agency records that are routinely disclosed to, e.g., the Senate Judiciary Committee (by anyone other than a nominee), a nominee's not having direct notice of the fact has meant that information risks being incomplete and/or irrelevant—if not subject to serious bias.

The FBI ignores legal requirements when it collects information from witnesses. The FBI, in conducting information collections of members of the public as part of an appointee's background investigation without using an Office of Management and Budget-approved form and control number, conflicts with the Paperwork Reduction Act.[17] The Paperwork Reduction Act applies to FBI background investigations because the FBI's oral solicitations to third parties are not an administrative action, nor does it involve the FBI "*against* specific individuals."[18] The BI inquiries are general investigations with reference to the category of individuals identified in an SF-86,[19] or otherwise are inquiries contained in a rule of general applicability, e.g., that all judicial nominee BI's proceed from an SF-86 form that goes back to the candidate's eighteenth birthday.[20]

The FBI failed to inform either candidates for appointment or witnesses contacted about those candidates that the ultimate arbiter of the BI is not the President but a Senate Committee. Neither Form DOJ-OLP-1/12/10 nor the current FBI forms[21] are OMB-approved information collections. The Paperwork

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[15] 5 U.S.C. § 552a(e)(4)(D).

[16] *Covert v. Harrington*, 876 F.2d 751, 755-756 (9th Cir. 1989) ("Under the plain terms of the statute, a collecting agency is under a duty to inform the individuals from whom it is collecting information of the routine uses to which that information may be put. The statute gives the agency no discretion not to discharge this duty").

[17] 44 U.S.C. §§ 3506(c)(1)(B)(iii)(V) ("an agency may not conduct or sponsor … a collection of information unless it displays a valid control number").

[18] 44 U.S.C. § 3518(c)(1)(B)(ii) (emphasis added).

[19] 44 U.S.C. § 3518(c)(2).

[20] 5 C.F.R. § 1320.3(c)(4)(i).

[21] Exhibits 1a, 1b, & 1c.

Reduction Act at 44 U.S.C. § 3506(c)(1)(B) requires the FBI to ensure that the form it uses to obtain consent from judicial candidates contains a valid control number. Further, the form must disclose to candidates that the information is "being collected" or "to be used" by the relevant Senate committee in determining a potential nominee's fitness and qualifications.[22] 44 U.S.C. § 3512(a) states that a candidate should not be subject to any penalty due to the BI consent form not being OMB-approved.[23] The denial of a privilege, such as a hearing on a nomination, is covered by the Act's definition of a penalty.[24] These regulations do not simply apply to nominees before the Senate Judiciary Committee but any Senate Committee that relies on a candidate BI for purposes of "clearing" that nominee for a hearing. Several of President Trump's nominees, including Representative Darrell Issa, Representative Ronny Jackson, Judge Sul Ozerden, Jeffrey Byard, and William Bryan were denied confirmations on the basis of FBI BI issues.[25]

Finding: The FBI violates the Paperwork Reduction Act's requirements at 44 U.S.C. § 3512(a) because it collects information from the public and third parties concerning nominees without using a form with a valid OMB-approved control number.

Although the constitutional norms recognized in *Buzzfeed v. FBI* support the idea that the FBI is preparing BI reports solely for the President's use and control, the FBI relies upon its MOU with the White House in conducting background investigations on judicial nominees and the MOU manifests the FBI's intent to maintain control over the record with the White House's agreeing to this manifestation of control.[26] Despite these concessions of agency control, the FBI does not seek OMB approval of its information collections as required by law. The FBI clearly has the ability to use a form in compliance with the Paperwork Reduction Act. For instance, the United States Marshals Service uses OMB-approved Form CSO-005 for Background Checks. That form complies with both the Privacy Act and

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[22] 44 U.S.C. §§ 3506(c)(1)(B)(iii)(V) ("an agency may not conduct or sponsor … a collection of information unless it displays a valid control number").

[23] *United States v. Hatch*, 919 F.2d 1394, 1398 (9th Cir. 1990).

[24] 44 U.S.C. § 3502(14).

[25] E.g., Juligrace Brufke, Issa's Senate Confirmations Hearing Delayed Over Concerns About Background Check, THE HILL (Sep. 19, 2019), https://bit.ly/3sK3RYZ (Rep. Darrell Issa); Marianne Levine, Republican Senators May Sink Another Trump Judicial Nominee, POLITICO (July 16, 2019), https://bit.ly/45R8a3t (Judge Sul Ozerden); Laura Strickler and Tim Stelloh, Trump's Former Pick to Lead FEMA Resigns From Agency, NBC NEWS (updated Jan. 6, 2020), https://bit.ly/3ZjVoIs (Jeffrey Byard); Joshua Eaton, Federal Agency Ordered to Investigate Homeland Security Nominee, ROLL CALL (Sep. 19, 2019), https://bit.ly/3RhAJTb (William Bryan); Juana Summers, et al., Whistleblowers Spoke to Lawmakers About VA Nominee, CNN (Apr. 24, 2018), https://bit.ly/3PgND1h (Ronny Jackson).

[26] MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE PRESIDENT OF THE UNITED STATES § 3(c) ("[a]ll name check and background investigation requests must be on the request form provided by the FBI[.]"); *id.* §3(e) ("[t]he reason for each background investigation will be indicated with specificity (which may be accomplished by checking the appropriate boxes on the form), and if known, shall include the position for which the Appointee is being considered.").

Paperwork Reduction Act in ways the FBI fails to do: it identifies the primary purpose for obtaining information and provides information concerning the mandatory nature of the check for hiring purposes.

The WH-FBI MOU indicates FBI control of the records in §3(f): "a statement signed by the Appointee acknowledging his or her consent to be investigated and acknowledging that facts or information gathered shall be retained consistent with the applicable FBI Privacy Act Records Systems Notices, Records Retention Plan, and Disposition Schedule."[27] Because the FBI controls the BI record, it must comply with the Paperwork Reduction Act, 44 U.S.C. § 3501, the Privacy Act, 5 U.S.C. 552a(b), and the Freedom of Information Act.

Finding: Neither the FBI nor the DOJ complies with the Privacy Act's requirement that disclosure to the relevant Senate committee staff be a publicly noticed and approved Routine Use.

The FBI must conduct background investigations on appointees with that candidate's consent. The Privacy Act, 5 U.S.C. § 552a(b) states, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person … except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains[.]" While the Privacy Act, 5 U.S.C. § 552a(b)(9), permits disclosures without consent to the Senate or a committee or subcommittee of the Senate, the Office of Legal Counsel has stated that such provisions of law apply only to requests from a committee or subcommittee chairman and certainly not requests from committee staff.[28] The WH-SJC MOU permits disclosure to the Senate by the FBI without a candidate's consent.[29]

5 U.S.C. § 552a(e)(6) bars disclosure to a "person other than an agency" unless it is a "routine use" disclosure or a § (b)(2) disclosure in response to a request from a duly authorized Committee of Congress. 5 U.S.C. § 552a(e)(6) requires the FBI "make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes" and 5 U.S.C. §§ 552a(e)(2) ensures such accuracy by mandating that information about candidates is collected "directly from the subject individual."[30] The FBI's authorized routine uses depend, in part, on which statement

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[27] Citing section (e)(3) of the Federal Privacy Act of 1974; *accord id.* at § 5(d) ("[i]nformation obtained during an investigation will be retained at FBI Headquarters and FBI field offices in accordance with the FBI's Privacy Act records systems notices, Records Retention Plan, and Disposition Schedule").

[28] Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members, 25 Op. O.L.C. 289, 289–90 (2001).

[29] 2009 MOU BETWEEN THE WHITE HOUSE AND THE SENATE JUDICIARY COMMITTEE, https://bit.ly/45Sqppq (mandating disclosure of the FBI BI file to Committee for the purpose of "assessing a nominee's fitness and qualification").

[30] *Waters v. Thornburgh*, 888 F.2d 870, 873–75 (D.C. Cir. 1989) ("in the context of an investigation that is seeking objective, unalterable information, reasonable questions about a subject's credibility cannot relieve an agency from its responsibility to collect that information first from the subject. [The Privacy

of records notice applies to judicial background investigation files.[31] To the extent the FBI believes that FBI-002—the FBI Central Records System—governs the treatment of BI files, the Attorney General exempted from disclosure and amendment "cards on persons who have been the subject of a full field investigation in connection with their consideration of employment in sensitive positions with Department of Justice, such as U.S. Attorney, Federal judges, or a high-level Department position. It is active at FBI Headquarters."[32] This authority is attenuated as applied to federal judicial nominees because judges are not considered for employment with the Department of Justice. Notwithstanding this fact, in disclosing the "routine uses" of BI files, the notice states, as applied to disclosures to Congress, "[i]nformation contained in this system, may be made available to a Member of Congress or staff acting upon the member's behalf when the member of staff requests the information *[o]n behalf of and at the request of the individual who is the subject of the record*."[33] Thus, under the system of records notice (SORN) governing FBI-002, unless a candidate requested the FBI to disclose to Congress, the FBI may not disclose it.

A more germane notice reflects that "United States Judge and Department of Justice Presidential Appointee Records" reside in the Office of the Deputy Attorney General. Notice No. DAG-10. This regulatory notice[34] is more particularized to background files for federal judges as presidential (rather than DOJ) appointees, identifying "Categories of Records in the System" as including "a confidential evaluation of [the judicial nominee's] qualifications for the position [and] completed background investigations on the individual." Further, the Privacy Act notice claims no Privacy Act exemptions and specifically clarifies the "routine use" of the relevant files: "[a]fter a candidate is nominated and his nomination is pending[35] Senate confirmation, the background investigation is routinely provided to [the] Chairman of the Senate Judiciary Committee."[36] Under this notice, only the Senate Judiciary Chairman (not the staff) is provided the BI file.

The DOJ ODAG 1985 Privacy Act notice, which is available at the DOJ's website for its Systems of Records Notices,[37] and has not been materially updated since 1985, appears to meaningfully govern the "routine use" disclosures of judicial BI files to the

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Act] is fundamentally concerned with privacy. It supports the principle that an individual should, to the greatest extent possible, be in control of information about him which is given to the government … a principle designed to insure fairness in information collection which should be instituted whenever possible.") (omission in original); *Dong v. Smithsonian Inst.,* 943 F. Supp. 69, 72 (D.D.C. 1996) (same).

[31] *See* U.S. DEP'T JUST., *DOJ Systems of Records*, https://bit.ly/44Ny2Mf.

[32] 63 Fed. Reg. 8659, 8678 (Feb. 20, 1998), *available at* https://bit.ly/45N92Gh.

[33] 63 Fed. Reg. at 8682–83 (emphasis added).

[34] *See e.g.*, 50 Fed. Reg. 42607, *available at* https://bit.ly/488siQd.

[35] "Pending" in the context of a nomination means before the full Senate. *United States v. Phlipot*, 1988 U.S. App. LEXIS 8244, *10 (6th Cir. 1988).

[36] 50 Fed. Reg. at 42608.

[37] U.S. DEP'T JUST., *DOJ Systems of Records*, https://bit.ly/44Ny2Mf.

Senate Judiciary Committee.[38] However, to the extent the WH-SJC MOU authorizes disclosure of BI files to the Ranking Member or to any staff, that would violate the Privacy Act, which requires a Federal Register notice of routine use disclosures. When the Sixth Circuit interpreted the meaning of "pending Senate confirmation" for purposes of the vacancy provisions for U.S. Attorneys under 28 U.S.C. § 546, it defined the term to mean a vote on the floor.[39] To disclose the BI file before a floor vote would empower a Committee and its unelected staff to veto a presidential nomination without the required "advice and consent" of the full Senate body as constitutionally required.

Notwithstanding the constitutional problems with disclosing files to committee staff, the Department of Justice Deputy Attorney General's "routine use" disclosures simply do not include disclosure of nominee files to the Senate as an approved routine use.[40] As such, those disclosures are legally prohibited.

Finding: The FBI violates FOIA because it fails to publicly disclose its pattern and practice of disregarding legal rules when obtaining third-party information.

The Paperwork Reduction Act requires that interviewed subjects (i.e., witnesses) provide information on an OMB-approved form.[41] Required use of an OMB-approved form deters third parties from providing misleading or inaccurate information to the FBI by subjecting them to potential prosecution for misleading the government.[42]

Further, federal law requires that "rules of procedure" and "interpretations of general applicability formulated and adopted by the agency" must be published in the Federal Register.[43] These policies can also be clarified in the FBI's Systems of Records Notice under the Privacy Act, but no such policy is disclosed. This failure to publish these policies harmed President Trump's nominees (Darrell Issa, Ronny Jackson, Sul Ozerden, Jeffrey Byard, and William Bryan, among others).[44]

The law protects candidates from being "adversely affected" due to the FBI's failure to provide "actual and timely notice" of its policy not to ensure that individuals for

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[38] *See e.g.* 50 Fed. Reg. 42603, at 42608 ("[a]fter a candidate is nominated and his nomination is pending Senate confirmation, the background investigation is routinely provided to [the] Chairman of the Senate Judiciary Committee"), *available at* https://bit.ly/488siQd.
[39] *United States v. Phlipot*, 1988 U.S. App. LEXIS 8244, *10 (6th Cir. 1988).
[40] *See e.g.* 50 Fed. Reg. 42607, available at https://bit.ly/488siQd.
[41] 44 U.S.C. §§ 3506–07.
[42] 5 U.S.C. § 552a(e)(3), §§ (e)(3)(B), (e)(4)(C), & (e)(4)(D); *Covert v. Harrington*, 876 F.2d 751, 755–56 (9th Cir. 1989) ("Under the plain terms of the statute, a collecting agency is under a duty to inform the individuals from whom it is collecting information of the routine uses to which that information may be put. The statute gives the agency no discretion not to discharge this duty").
[43] 5 U.S.C. §§ 552(a)(1)(C) & (E).
[44] *See* 5 U.S.C. §§ 552a(e)(6) (requiring the FBI to "make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes.").

whom information is being collected provide that information on an OMB-approved form.[45] Because it fails to follow Paperwork Reduction Act and Privacy Act procedures, as it pertains to the BI files of Darrell Issa, Ronny Jackson, Sul Ozerden, Jeffrey Byard, and William Bryan, the FBI "fail[ed] to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual."[46]

Because the FBI discloses the BI to Senate committees and their staff as part of its clearance process, its policy of informally obtaining information from third parties, which fails to ensure only credible information is disclosed, invites non-credible and inaccurate information into BI files, which adversely affects those candidates who are refused clearance on the basis of the BI file. This violates the "fundamental fairness" requirement of 5 U.S.C. § 552(e)(5).

Finding: The FBI violates 5 U.S.C. §§ 552a(e)(6) by no longer enforcing the MIOG standards, which requires the FBI to seek to offset derogatory information. As such, the FBI does not "make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes."

Finding: Again, because it disregards the MIOG, the FBI violates 5 U.S.C. §§ 552a(e)(1), (e)(2), (e)(3), and (e)(5) because the FBI or DOJ maintains in its records information about applicants that is likely irrelevant to their qualifications to fairly and competently adjudicate cases arising under the Constitution and statutes in conflict with (e)(1); does not collect positive information directly from applicants in response to potentially derogatory information, thus conflicting with (e)(2); does not use an OMB-approved form to collect information from third parties about applicants, which form must specify the FBI's authority and purpose in conducting the background investigation, specifying that information would not only be shared with the White House but would ultimately be shared with both political parties making up the Senate committees and their staff and those committees would make an adjudication decision, thus conflicting with 44 U.S.C. §§ 3506 & 3507 in violation of (e)(3); and, for all of the above reasons, did not provide applicants with fundamental fairness.

[45] 5 U.S.C. § 552(a)(1).
[46] *See* 5 U.S.C. § 552a(g) *et seq*.

In an e-mail from an FBI insider (the Washington field agent in charge of sensitive background investigations) to AFL staff, the agent stated:

> The short answer is that MIOG was discontinued in 2008. The longer answer follows. MIOG was replaced by a dissimilar Domestic Investigations and Operations Guide (DIOG) that was implemented under the direction of the AG. FBI background investigation cases are all run out of FBIHQ. Although the EOP BIs are now guided by government-wide Federal Investigative Standards (FIS), those standards do not apply to cases involving Senate confirmation. The judgeship leads that we get are still similar to what we got in the MIOG days, but I am not positive what guidance FBIHQ now uses for those. Under DIOG, other FBI investigations with which I am familiar now rely on program guides, and I would suspect that to also be the case with judgeship BIs. Again, FBIHQ runs the cases and sets leads for field offices (such as the one to which I am assigned) to cover. Hopefully, my response has been helpful.[47]

AFL investigators discovered that what the FBI agent believed and what his entire staff likely implemented was materially false. The Domestic Investigations and Operations Guide ("DIOG") used by the FBI did not supersede the Manual of Investigative Operations and Guidelines ("MIOG") in its entirety. In particular, the MIOG section granting individuals undergoing a BI the right to respond to derogatory information presented by interviewees has not been superseded.[48] It is, therefore, telling that an FBI Washington Field Office insider, who himself conducted BI interviews and compiled reports, believed the "MIOG was discontinued in 2008."[49] Clearly, the FBI, when conducting vets for presidential nominees, believed the whole process was subject to the President's discretion and, therefore, did not require any adherence to legally required procedures.

The MIOG is important for due process reasons. Part II, Pages 17–15 of the MIOG states that if unfavorable comments are provided about an applicant, the FBI must "obtain specific details including whether the information is based on direct knowledge or hearsay."[50]

The MIOG requires that for any derogatory information, the FBI "must ensure that sufficient investigation is conducted in an attempt to verify or disprove the allegation."[51] The MIOG states that individuals providing derogatory information

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[47] E-mail from [redacted] to AFL Staff (Aug. 23, 2020) (on file with author).

[48] Page 663/698 (Appendix R) of the current DIOG (*available at* https://bit.ly/3RjremI) indicates that Part II, Section 17 (page 166/208, Part 2/4) of the Manual of Investigative Operations and Guidelines (*available at* https://bit.ly/3sQOqhV) has not been superseded.

[49] E-mail from [redacted] to [redacted] (Aug. 23, 2020) (on file with author).

[50] MIOG, 17-5(6).

[51] MIOG, 17-5.1; *accord*. DOJ report, *infra* at 20 (1983), https://bit.ly/3RkgmVs.

about an applicant must be advised to provide a signed statement and affirm their availability to testify at a hearing precisely because these requirements ensure that those providing derogatory information are credible.[52] As shown below, the Biden OLP's new regulations, however, prevent the MIOG's due process requirements from being enforced.

The FBI's discontinuing the use of MIOG standards meant that the FBI no longer complied with requirements to include "favorable information which offsets the derogatory information" (called "mitigation"), which is necessary to protect "the nominee's interest in not having his reputation damaged by unsubstantiated allegations which may arise during the background investigation."[53]

II. The Biden Administration has further politicized the BI process.

During the Reagan Administration, a committee of administration officials analyzed the constitutional principles involved in the President's nomination process with particular attention paid to the FBI's role in informing the President about potential appointees. As the Report stated, "[i]n balancing the Senate's need for information against the interest of the Executive Branch in maintaining the confidentiality of its investigative reports, the President may choose to follow either of two courses: (1) he may refuse to disclose some, or all, investigative material compiled to assist him in selecting nominees; or (2) he may arrange for the disclosure of relevant information concerning his nominees, under terms which safeguard the interests of the Executive Branch."[54] Furthermore, the Report stated, "the FBI historically has furnished the results of its background investigations on Presidential nominees solely to the White House and, at times, the Attorney General. It has not generally provided information concerning a nominee to the Senate Committee considering confirmation."[55]

The Reagan Justice Department recognized that the Senate's need for information on a nominee must be balanced by the need to avoid disclosing "unsubstantiated allegations."[56] During the Trump Administration, the FBI provided files directly to the Senate without filtering unsubstantiated allegations or making determinations about what information may be irrelevant. The White House deferred to an FBI process that did not itself follow procedures designed to ensure accuracy of information obtained or fairness to candidates for appointment. And the White House disclosed these unedited accounts to the relevant Senate committees. Ironically, the

[52] MIOG, 17-5.7.
[53] DOJ Report *infra* at 37, https://bit.ly/3RkgmVs.
[54] Departmental Study Committee: Special Inquiries on Presidential Nominees, Report to the Attorney General, §I: Constitutional Background Regarding the Presidential Appointment Process ("DOJ Report) at 11 (1983), *available at* https://bit.ly/3RkgmVs.
[55] *Id*. at 24.
[56] *Id*. at 43.

White House refused to review or modify the FBI BI files for purposes of ensuring accuracy or fairness on "Privacy Act" grounds.

Allowing the disclosure of legally flawed BI files to the Senate not only invites bias into the nomination process but inappropriately subjects the FBI to political scrutiny. The Reagan Department of Justice Report concluded that the FBI should not be involved directly with the Senate concerning the consideration of nominees, stating "[t]he FBI has no stake in the appointment and placing it in this position will only endanger the independence and objectivity upon which both the White House and the Senate must necessarily rely."[57] The Report substantiated that the FBI should not provide BI files to the Senate and that, instead, the ideal process is one where "the FBI provides information concerning a potential nominee to the White House Counsel's Office, which would then forward this information to the appropriate Senate Committee."[58]

The Report made clear that FBI BIs are conducted "for the White House in connection with a Presidential appointment … to provide White House officials with information from which they can make an informed judgment as to whether the President should proceed with a nomination."[59] As such, the BI files are created by the FBI as a service to the President in exercising a constitutional duty.[60] The President, not the FBI, has legal control over BI files.[61]

In *Buzzfeed v. FBI*, the U.S. District Court for the District of Columbia determined that a federal judicial nominee's background investigation differs from any other FBI-conducted suitability review because the file is itself both "'solicited and received by the White House Counsel's Office" and the background investigation is conducted solely to assist "the President [to] 'effectively and faithfully carry out his Article II duties'[.]"[62] The *Buzzfeed* court's determination to protect judicial nominee background investigation (BI) files from public disclosure under the Freedom of Information Act as presidential communications, 5 U.S.C. § 552(b)(5), depended upon its conclusion that such files are not compiled for law enforcement purposes nor for determining suitability for employment in, or access to classified information in, the executive branch, 5 U.S.C. § 552a(k)(2) & (5), but instead are solicited and received

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[57] *Id*.
[58] *Id*.
[59] *Id*. at 17.
[60] Doyle v. U.S. Dep't of Homeland Sec., 331 F. Supp. 3d 27, 38 (S.D.N.Y. 2018), aff'd sub nom. Doyle v. United States Dep't of Homeland Sec., 959 F.3d 72 (2d Cir. 2020); accord. Ariane De Vogue, FBI Says It Got More Than 4,500 Tips on Kavanaugh, Providing 'Relevant' Ones to Trump White House, CNN (July 23, 2021), https://bit.ly/3qZrkVS ("Tyson reiterated comments that FBI Director Christopher Wray made in past congressional testimony: that the FBI serves as an "investigative service provider" for federal background investigations, and that its role in the Kavanaugh matter was to respond to requests from the White House counsel").
[61] Id.
[62] U.S. Dist. LEXIS 80640, *23-24 (D.D.C. 2020).

by the President's designees for the purposes of advising the President in carrying out his constitutional power to nominate judges.

In its Motion for Summary Judgment filed in *Buzzfeed et al. v. FBI*, the FBI made its authority and purpose in conducting background investigations for judicial candidates clear.[63] The Department of Justice, through the FBI, conducts background investigations "[t]o assist the President with [his] constitutional decisionmaking responsibility" to nominate and appoint federal judges.[64] Further, the FBI stated, "[t]he purpose of the investigation … is to aid and inform the President in his determination of a person's suitability for a certain position, and the President's ultimate decision whether (or not) to move forward with a particular nomination or appointment."[65]

In theory, the President has complete control over information in a BI report and can determine what information is disclosed to the Senate. Of course, the fact that the FBI, as a "routine use" of BI files, discloses them to Senate committees reflects the extent to which the President is not the ultimate decision-maker as to suitability, for the 2009 MOU between the Senate Judiciary Committee and the White House reflects that the Senate Judiciary Committee gives no deference to the qualifications and fitness determinations by the Office of Legal Policy or the White House concerning a judicial nominee.[66]

The Reagan DOJ Report noted that only if the President proceeds with a nomination must he provide the complete BI report to the Senate. As then-Associate Counsel John Roberts wrote on the margins around this claim in the Report, "NO—IT DOESN'T HAVE TO BE GIVEN TO THE SENATE AT ALL."[67]

- ***Finding***: In response to America First Legal's investigative efforts,[68] the Biden Department of Justice released new rules rescinding the Privacy Act protections for candidates undergoing BI reviews. The new Biden regulations permit the White House to direct the FBI's investigation of any person because it is no longer bound by requirements to obtain the written consent of

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[63] Defs.' Mot. Summ. J., Jason Leopold and Buzzfeed, Inc. v. Federal Bureau of Investigation, Case No. 13-2567 (D.D.C. Oct. 25, 2019).
[64] *Id*. at 4 (citing U.S. CONST. art. II, § 2).
[65] *Id*. at 5.
[66] *Buzzfeed, Inc. v. FBI*, 2020 U.S. Dist. LEXIS 80640, *19 (D.D.C. May 7, 2020) (relying on *Dep't of Interior v. Klamath Water Users Protective Ass'n.,* 532 U.S. 1, 8–11, 121 S. Ct. 1060 (2001); *Judicial Watch, Inc. v. Department of Energy*, 412 F.3d 125, 130–31 (D.C. Cir. 2005)); *accord Murphy v. Department of Army*, 613 F.2d 1151, 1156–57 (D.C. Cir. 1979) (where congressional committee requesting information from an executive agency is treated as an "agency").
[67] DOJ Report at 38, https://bit.ly/3RkgmVs (emphasis in original).
[68] *Compare* Letter from Andrew J. Block, America First Legal Found., to Bobak Talebian, Dir., Off. Info. Pol'y, U.S. Dep't Just. (June 24, 2021), https://bit.ly/3PeThRr *to* Privacy Act of 1974; Systems of Records, U.S. DEP'T JUST., 86 Fed. Reg. 54368-54371 (Effective November 1, 2021), https://shorturl.at/aFIRS.

candidates, and the White House and FBI can disclose those BIs outside the Executive Branch without notice. Finally, the regulations exempt BI files from the Privacy Act's correction or amendment procedures. The Biden Administration's further exempting BI files from Privacy Act and Paperwork Reduction Act requirements only risks further politicization of the FBI.

President Biden was not bound to let the FBI's violations of the Privacy Act and Paperwork Reduction Act interfere with him pushing forward ideologically preferred nominees. It is obvious the Trump White House deferred to the Privacy Act, which the FBI used as a shield to prevent the White House from ensuring only credible BI files were produced and as a sword when the FBI routinely violated procedural requirements designed to prevent bias in the process.[69]

Effective November 1, 2021, the Biden DOJ amended its Privacy Act regulations concerning the DOJ's Office of Legal Policy exemption of nominee BI files from the Privacy Act.[70] While Privacy Act exemptions can be established by regulation, the Biden Administration's regulations skirt several longstanding principles.

First, before 2021, 28 C.F.R. § 16.73(c) required that "all name check and background investigation requests must be on the request form provided by the FBI."[71] This requirement corresponded to the Paperwork Reduction Act's information collection requirements, where the use of forms protects the integrity of the process. **The Biden Administration removed this requirement.**

Second, the regulation required "a statement signed by the Appointee acknowledging his or her consent to be investigated and acknowledging that facts or information gathered shall be retained consistent with the applicable FBI Privacy Act Records Systems Notices, Records Retention Plan, and Disposition Schedule"[72] Consent for BI files protects individual rights and ensures that disclosures to third parties (like Senate staff) or reinvestigations are done with consent. **The Biden Administration removed this requirement.**

AFL's litigation against the Biden Administration revealed that the effective date of the forms used by the Biden Administration to obtain nominee consent was January 20, 2021. After November 1, 2021, we can assume the Biden Administration ceased using consent forms for FBI background investigations.[73]

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[69] A White House either treats the Privacy Act and the Paperwork Reduction Act as applying to BI files and ensures that the FBI complies with the process, or it takes the position that the FBI is merely a service provider and that the BI reports are exempt from the Privacy Act and related statutes.
[70] *See e.g.*, 28 C.F.R. § 16.73(c), https://bit.ly/3ri4pVA (effective November 1, 2021); *see* Privacy Act of 1974; Implementation, 86 Fed. Reg. 54368 (Oct. 1, 2021), https://bit.ly/467a93u.
[71] 28 C.F.R. § 16.73(c) §3c (prior to 2021 deletions).
[72] *Id*. § 3f.
[73] *See* Exhibit 2.

The Biden Administration can now conduct background investigations on individuals without their consent. **This raises the same risk that occurred during the Clinton Administration, where President Clinton accessed information about his political enemies.**

Moreover, the old regulations required that the President or his designated represented restricted access to BI files only "to persons directly involved in ensuring the safety and security of the President or in determining an Appointee's suitability for employment, appointment, recognition or trustworthiness for access to sensitive or classified information."[74] **The Biden Administration removed this requirement.** This requirement prevents political groups from accessing private or sensitive information about individuals.

III. Congress Must Clarify the FBI's Role in Conducting Background Investigations for Candidates for Presidential Appointments

Despite existing laws and well-understood Constitutional principles, a biased FBI has scuttled potential appointments of a presidency it politically opposed, and an unscrupulously partisan President has abused FBI background investigations to potentially access information about his political enemies while pushing his ideological partisan allies into lifetime appointments without having to be slowed down by complying with legal procedures. Accordingly, Congress must reform the existing legal framework to clarify the FBI's role in conducting background investigations for candidates for presidential appointments so the process cannot be weaponized against partisan enemies.

[74] *Id*. § 5a.

EXHIBIT 1a

Federal Bureau of Investigation
Client Request Sheet

From: The White House
Office of White House Counsel

To: FBI, Security Division
Background Operations Security Section
Other Government Agency Background
Investigations Unit I

Return Completed BI To: Please select

1. Candidate Information

Title of Position Candidate is Being Considered for _____

☐ Presidential Appointment (PA)
☐ PA with Senate Confirmation

Candidate's Name (first, middle, last name) _____
Other Names Used (maiden name, nickname) _____
Social Security # _____
Date of Birth _____
Place of Birth _____
Permanent Address _____
Current Address (if different than permanent address) _____
Current Employer/Address _____

Candidate's Consent:
I hereby authorize the FBI to provide the information specified below to the White House.

_____
Signature/Date

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2. Request of FBI

Use of this form to request information developed by the FBI or contained in FBI files requires the candidate's consent. Exceptions will only be permitted as authorized by the Attorney General / Deputy Attorney General.

Request Date _____

☐ URGENT – 14 days ☐ EXPEDITE – 21 days ☐ STANDARD

Type of Investigation
☐ Full Field Investigation
- ☐ Level 1 (back to 18th birthday)
- ☐ Level 2 (back 15 years)
- ☐ Level 4 (back 5 years)

☐ Limited Update Investigation

Attachments Included
☐ SF-86 Date Certified _____
☐ SF-86 Supplement
☐ Release Forms
☐ Fingerprint Card – Hardcopy Forthcoming
☐ Fingerprint Card – Previously Conducted
☐ Other – (specify) _____

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3. White House Certification

I certify, subject to 18 §U.S.C. 1001, that the above is sought for official purposes only and I understand that obtaining this information under false pretenses or any unauthorized disclose may be violation of the Privacy Act, 5 U.S.C. §522a.

Requestor's Name _____ Requestor's Signature/Date _____

This request has been reviewed and approved by the Office of White House Counsel

Approver's Name _____ Approver's Signature/Date _____

EXHIBIT 1b

Background Investigation Request Form

From: The White House, Office of White House Counsel

To: Federal Bureau of Investigation, Security Division

Return to: _____

1. Candidate Information

Candidate's Name (first, middle, last name)

_____

Other Names Used (birth, prior married, nickname)

_____

Social Security Number

_____

Date of Birth

_____

Place of Birth

_____

Permanent Address

_____

_____

_____

Current Address (if different)

_____

_____

_____

Phone Number

_____

Email Address

_____

Current Employer

_____

Candidate's Consent: I hereby authorize the FBI to provide the information specified below to the Office of White House Counsel.

Signature/Date _____

2. Request of FBI

Use of this form to request information developed by the FBI or contained in FBI files requires the candidate's consent. Expectations will only be permitted as authorized by the Attorney General/Deputy Attorney General.

Request Date

_____

Type of Position

- ☐ Executive - Cabinet-level Presidential Appointment with Senate Confirmation
- ☐ Executive - Presidential Appointment with Senate Confirmation
- ☐ Executive - Presidential Appointment (no confirmation needed)
- ☐ Judicial - U.S. Judge
- ☐ Judicial - U.S. Attorney
- ☐ Judicial - U.S. Marshal
- ☐ Other _____

Title of Position Candidate is Being Considered for

_____

_____

_____

Type of Investigation

- ☐ Full Field Investigation
  - ☐ Level I (back to 18th birthday)
  - ☐ Level II (back 15 years)
  - ☐ Level IV (back 5 years)
- ☐ Periodic Reinvestigation
- ☐ Limited Update Investigation
- ☐ Limited Inquiry
- ☐ Other _____

Attachments Included

- ☐ SF-86 Date Certified _____
- ☐ SF-86 Supplement
- ☐ Release Forms
- ☐ Fingerprint Card – Hard Copy
- ☐ Fingerprint Card – Electronic
- ☐ Other _____

_____

3. White House Certification

I certify, subject to 18 U.S.C. § 1001, that the above is sought for official purposes only and I understand that obtaining this information under false pretenses or any unauthorized disclosure may be a violation of the Privacy Act, 5 U.S.C. § 552a.

Requested by _____ Signature/Date _____

This request has been reviewed and approved by the Office of White House Counsel's Office.

Approved by _____ Signature/Date _____

effective: January 20, 2021

EXHIBIT 1c

Background Investigation Request Form
From: The White House, Office of White House Counsel
To: Federal Bureau of Investigation, Security Division

Return to: _____

1. Candidate Information

Candidate's Name (first, middle, last name) _____

Other Names Used (birth, prior married, nickname) _____

Social Security Number _____

Date of Birth _____

Place of Birth _____

Permanent Address _____

Current Address (if different) _____

Phone Number _____

Email Address _____

Current Employer _____

Candidate's Consent: I hereby authorize the FBI to provide the information specified below to the Office of White House Counsel.

Signature/Date _____

2. Request of FBI

Use of this form to request information developed by the FBI or contained in FBI files requires the candidate's consent. Expectations will only be permitted as authorized by the Attorney General/Deputy Attorney General.

Request Date _____

☐ PRIORITY
Only check for the utmost priority cases.

Type of Position
- ☐ Executive - Cabinet-level Presidential Appointment with Senate Confirmation
- ☐ Executive - Presidential Appointment with Senate Confirmation
- ☐ Executive - Presidential Appointment (no confirmation needed)
- ☐ Judicial - U.S. Judge
- ☐ Judicial - U.S. Attorney
- ☐ Judicial - U.S. Marshal
- ☐ Other _____

Title of Position Candidate is Being Considered for _____

Type of Investigation
- ☐ Full Field Investigation
  - ☐ Level I (back to 18th birthday)
  - ☐ Level II (back 15 years)
  - ☐ Level IV (back 5 years)
- ☐ Periodic Reinvestigation
- ☐ Limited Update Investigation
- ☐ Limited Inquiry
- ☐ Other _____

Attachments Included
- ☐ SF-86
- ☐ SF-86 Supplement
- ☐ Release Forms
- ☐ Fingerprint Card – Hard Copy
- ☐ Fingerprint Card – Electronic
- ☐ Other _____

3. White House Certification

I certify, subject to 18 U.S.C. § 1001, that the above is sought for official purposes only and I understand that obtaining this information under false pretenses or any unauthorized disclosure may be a violation of the Privacy Act, 5 U.S.C. § 552a.

This request has been reviewed and approved by the Office of White House Counsel's Office.

Signature/Date _____

EXHIBIT 2

MEMORANDUM OF UNDERSTANDING

Between the

DEPARTMENT OF JUSTICE

and the

PRESIDENT OF THE UNITED STATES

Regarding Name Checks and Background Investigations
Conducted by the Federal Bureau of Investigation

1. Purpose

This Memorandum of Understanding (MOU) replaces the previously executed MOU between the Department of Justice and the President-elect', to reflect changes in name checks and background investigations conducted by the Federal Bureau of Investigation (FBI). This MOU also updates titles, procedures, and responsibilities. This MOU covers the procedures for the President of the United States (President) to submit requests for name checks and background investigations, as well as the FBI's responsibilities in conducting the requested investigations, so that key Administration positions can be assumed without undue delay.

2. General

a. The FBI will conduct file reviews ("name checks"[2]) and background investigations[3] at the request of the President or his designated representative, for applicants, employees, or any other persons who will perform services for, or receive an award or recognition from, the President (hereafter the individual who is the subject of a requested name check or background investigation shall be referred to as the "Appointee").

b. Name checks and background investigations shall be conducted only to ascertain facts and information relevant to the Appointee's: (1) suitability for Federal government employment or retention in such employment; (2) suitability to provide services to the

[1] Executed November 10, 2008.

[2] A name check consists of searching names that have been indexed as part of FBI criminal or national security investigations or as part of FBI background investigations. Additionally, a search of FBI electronic case files will also be conducted to determine whether the individual is or has been the subject of, or has been referenced in, an FBI investigation.

[3] A background investigation may be a full-field background investigation ("Level 1," to the 18th birthday; "Level 2," 15-year scope; "Level 3," 10-year scope; or "Level 4," 5 year scope), a 5-year re-investigation, an expanded name check, a limited update, or a limited inquiry (such as follow-up inquiries conducted to resolve particular issues/questions).

President as a contractor, volunteer, etc.; (3) trustworthiness for clearance to access information classified under the provisions of Executive Order 12958, as amended by Executive Order 13292, and Executive Order 12968 (or any successor Executive Orders) and their implementing directives; or (4) trustworthiness for access to locales in close proximity to or frequented by the President. The results of these name checks and background investigations will permit adjudication of the Appointee by the respective agency for appropriate clearance, to include access to Sensitive Compartmented Information (SCI).[4]

3. Procedures for Submitting Requests

a. Requests for FBI background investigations and name checks of Appointees shall be made in writing by the President or an official who has been designated in writing to make such requests (Requesting Official). All requests made by the Requesting Official must be approved by the Counsel to the President or an official designated in writing to approve such requests (Approving Official). The Requesting Official and Approving Official may be the same individual, if he or she is appropriately designated by the Counsel to the President.

b. The President or his designee will provide the FBI, via official correspondence, with the title(s), name(s), and specimen signature(s) of the person(s) designated to act as Requesting Official(s) and Approving Official(s), and will apprise the FBI by official correspondence of any changes in approval authority.

c. All name check and background investigation requests must be on the request form provided by the FBI and must contain the original signature of the President or the Requesting Official. The Requesting Official must certify, subject to the criminal penalties for making a false statement, that information is sought only for official purposes. All requests must also contain the original signature of the Approving Official. In addition, requests must include the Appointee's signature.

d. An updated consent is not required for follow-up inquiries that are reasonably viewed as within the ambit of a previously-provided consent (e.g., when the President asks the FBI to develop further matters raised in a report of background investigation to which the Appointee consented). Requests for supplemental inquiries made within 6 months of the date of the Appointee's signed consent, within 30 days of the FBI's final report, or while an Appointee's confirmation is pending will be presumed to be within the ambit of the original consent.

e. The reason for each background investigation will be indicated with specificity (which may be accomplished by checking the appropriate boxes on the form), and if known, shall include the position for which the Appointee is being considered. No material changes will be made to the form's content or format without the written concurrence of the FBI.

[4] Access to SCI is determined under the standards set forth in Director of National Intelligence (DNI) Intelligence Community Directive 704, and by any modifying policy memorandum or successor directive.

f. Each request for a background investigation shall also include: (1) a completed Standard Form 86 (SF-86) (Questionnaire for National Security Positions); (2) a set of the Appointee's fingerprints either on a standard fingerprint card or electronically submitted; and (3) a statement signed by the Appointee acknowledging his or her consent to be investigated and acknowledging that facts or information gathered shall be retained consistent with the applicable FBI Privacy Act Records Systems Notices, Records Retention Plan, and Disposition Schedule.[5]

g. A signed consent is not required to accompany a name check request if the subject is an organization or institution rather than an individual person. Such name check requests do require the signatures of the Requesting and Approving Officials, however.

h. The FBI's points of contact for background investigations and for name check requests are the Special Inquiry and General Background Investigations Unit (SIGBIU) (202-324-2568) and the National Name Check Program Unit (NNCPU)(540-868-4962).

i. While a background investigation is pending, if the President or his designated representative determines that the Appointee is not to be employed or appointed, the President or his designated official will promptly notify the FBI so the investigation can be discontinued.

4. Reporting Investigation Results

a. Except as provided below, if during the course of the background investigation the FBI discovers any adverse or medical information bearing on the suitability or trustworthiness of the Appointee, the FBI will promptly inform the President or his designated representative.

b. Subject to the Federal Privacy Act of 1974, persons interviewed during these investigations may be assured that their identity will be kept confidential to the extent permitted by law.

c. The FBI generally does not continue to actively monitor an Appointee following the completion of its final background investigation report, and the President or his designated representative should submit a new request if updated information is desired. However, prior to an Appointee's assuming the nominated position or being adjudicated for the clearance for which the investigation was conducted, if the FBI becomes aware of new information that raises questions about the suitability or trustworthiness of an Appointee to perform services for the President, the FBI will so apprise the President or his designated representative as soon as possible.

d. If the FBI's investigation reveals a pending Federal civil or criminal investigation involving the Appointee, dissemination of any information relating to the pending investigation will be halted. The FBI General Counsel (or her designee) will consult with

[5] See Section (e)(3) of the Federal Privacy Act of 1974.

cognizant FBI Headquarters officials to determine what information can be disseminated without harming the pending investigation. The FBI General Counsel will refer the matter to the Deputy Attorney General (or his/her designee), who will determine what information will be disseminated to the President or his designee.

e. The FBI will furnish summary memoranda, investigative reports or supporting materials (hereafter collectively referred to as reports) containing the results of its investigations to the President or his designated representative and will retain records identifying the persons to whom such reports are furnished.

f. The Department of Justice (DOJ) and the FBI may consider a request from the President for a name check or background investigation without the consent of the Appointee if justified by extraordinary circumstances. Such circumstances shall be documented in writing from the President or his designee to the Deputy Attorney General and the FBI General Counsel and should explain why the Appointee's consent cannot be obtained or should not be sought.

5. Use and Maintenance of Investigative Reports

a. The President or his designated representative will ensure that access to FBI reports is restricted to persons directly involved in ensuring the safety and security of the President or in determining an Appointee's suitability for employment, appointment, recognition or trustworthiness for access to sensitive[6] or classified information. The President or his designated representative may also afford access to these reports to the United States Secret Service or the Office of Security and Emergency Preparedness for the Executive Office of the President, or to the security office of the agency or department to which an Appointee is reporting, upon a determination that any such additional recipient has a legitimate need to know the information for the proper performance of official responsibilities and that any such disclosure is not otherwise precluded by applicable law.

b. The President or his designated representative shall maintain records identifying all persons receiving access to the reports, and such records shall be furnished to the FBI upon request. No person having access to the reports will reproduce or disseminate the reports except in accordance with procedures agreed to by the President or his designated representative and the Director of the FBI or the Director's designated representative.

c. The President or his designated representative shall not allow the Appointee or any person outside of the appointment, employment, security clearance, confirmation, Presidential recognition, or Presidential protection process access to the reports, copies of the reports, or any information derived from the reports. If it is necessary to discuss the contents of reports with the Appointee, the President or his designated representative will ensure that the confidentiality of the sources contained therein is protected. Any request by the Appointee for access to the reports will be referred to the FBI for processing in

[6] Sensitive information includes law enforcement matters, personal information about individuals, privileged commercial or financial information, etc.

accordance with both the Federal Privacy Act of 1974 and the Freedom of Information Act.

d. Information obtained during an investigation will be retained at FBI Headquarters and FBI field offices in accordance with the FBI's Privacy Act records systems notices, Records Retention Plan, and Disposition Schedule. Certain information relating to pending Federal civil or criminal matters may be disseminated on a need-to-know basis to other officials of the DOJ or other appropriate agency to which the DOJ refers the matter. No further dissemination shall be made of information obtained during any investigation conducted pursuant to this agreement, except as part of the investigation of a violation of law or as otherwise permitted or required by Federal statute, FBI/DOJ regulation or policy, or Presidential Directive or Executive Order.

e. No person employed by the President shall be given access to any sensitive or classified information or material until appropriate clearance has been granted.

6. Effect of this Agreement

a. The procedures set forth in this MOU shall remain in effect until otherwise directed by the President consistent with applicable law. Any issues involving interpretation of these procedures will be resolved in accordance with applicable laws, rules, regulations, directives, and customary practices that may apply with regard to interpretation of Executive Branch documents.

b. This MOU is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law or otherwise by any third party against any of the parties, their parent entities, the United States, or the officers, employees, agents, or other associated personnel thereof.

c. This MOU is not an obligation or commitment of funds, nor a basis for transfer of funds, but rather is a basic statement of the understanding between the parties of the matters described herein. Expenditures by each party will be subject to its budgetary processes and to the availability of funds and resources pursuant to applicable laws, regulations, and policies. The parties expressly acknowledge that the language in this MOU in no way implies that funds will be made available for such expenditures.

7. Signatures

Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice

Dated: 3/3/2010

Robert F. Bauer
Counsel to the President
The White House

Dated: 3-4-10