



October 23, 2024

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:

We write to supplement our previously submitted report on the broken Federal Bureau of Investigation (“FBI”) background investigation (“BI”) process, particularly as it applies to nominees for positions confirmed by the Senate Judiciary Committee.¹ This matter is critical to address because the BI process can be weaponized against future nominees of any administration.

The House and Senate Judiciary committees play a necessary role in protecting sensitive information produced by the executive branch to Congress. In fact, Congress encoded this principle into law, including through 18 U.S.C. § 1905, which imposes criminal sanctions on government employees who unauthorizedly disclose sensitive information. The 2009 Memorandum of Understanding between the White House and the Senate Judiciary Committee (“2009 MOU”) and the 2010 Memorandum of Understanding between the White House and the Department of Justice (“2010 MOU”) create legal constraints on both the Senate Judiciary Committee and Department of Justice staff.² As such, any unauthorized disclosures by both the

¹ See Letter from Gene P. Hamilton, Vice President & Gen. Couns., Am. First Legal, to Hon. Jim Jordan, Chairman, H. Comm. on the Judiciary; Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability; Hon. Dick Durbin, Chairman, S. Comm. on the Judiciary; Hon. Gary Peters, Chairman, S. Comm. on Homeland Sec. & Governmental Affs. (Sept. 14, 2023) <https://perma.cc/Z4SQ-ZV6S>.

² See *Memorandum of Understanding Between the Senate Judiciary Committee and the Counsel to the President Regarding FBI Background Investigation Reports on Nominees* (Sept. 22, 2009), at § (2)(f),

Senate Judiciary Committee staff and the Department of Justice staff are “not authorized by law.”³

Our latest research has confirmed that improper handling of BI information appears to have continued during the Biden Administration, as new evidence has emerged showing substantial improprieties in the process.

Specifically, our investigation has revealed that:

- After receiving candidate BI files, Senate Judiciary Committee staff shared sensitive information from those files outside the security process delineated in the 2009 MOU.⁴ For instance, staff used non-secure Senate e-mail systems to disclose sensitive FBI and financial information of nominees.⁵
- Documents show that “flags” from the BI report of two judges were electronically disclosed to executive branch officials in violation of the MOU.⁶

As you know, the 2009 MOU plainly states:

Physical custody of FBI background reports shall be strictly controlled to limit access to authorized Senators and Designated Staff Members. The FBI background reports constitute confidential business of the Senate Committee on the Judiciary and unauthorized disclosure of information in the reports is cause for the imposition of punishment under RULE XXIX(5) of the Standing Rules of the Senate.⁷

Further, BI files must be managed securely, and only one Designated Staff Member, who serves as the Security Manager, can oversee them.⁸ The Security Manager must

<https://perma.cc/S93V-PBG7> (hereinafter “2009 MOU”); *Memorandum of Understanding between the Dep’t of Just. and the President of the U.S. on Name Checks and Background Investigations Conducted by the Federal Bureau of Investigation* (Mar. 4, 2010), <https://perma.cc/YKP5-UBFQ> (hereinafter “2010 MOU”).

³ *Chrysler Corp. v. Brown*, 441 U.S. 281, 318-319 (1979) (finding that liability under 18 U.S.C. § 1905 attaches whenever a disclosure of information violates a rule that has the “force and effect of law”). *Accord id.* at 295.

⁴ See E-mail from Phillip Brest, Staff Member, S. Comm. on Judiciary, to Lola Kingo, Off. of Legal Pol’y, U.S. Dep’t of Just. (July 29, 2021, 6:11 PM) (marked in the Appendix as Exhibit 1); E-mail from Lola Kingo, Off. of Legal Pol’y, U.S. Dep’t of Just., to Phillip Brest, Staff Member, et al., S. Comm. on Judiciary (July 22, 2021, 1:00 PM) (marked in the Appendix as Exhibit 2); see also E-mail from Phillip Brest, Staff Member, S. Comm. on Judiciary, to Lola King, et al., Off. of Legal Pol’y, U.S. Dep’t of Just. (July 27, 2021, 4:32 PM) (marked in the Appendix as Exhibit 3) (reflecting the disclosure of personal financial information of nominees via e-mail).

⁵ *Id.*; see also E-mail from Sarah Bauer, Staff Member, S. Comm. on Judiciary, to Lola Kingo, Off. of Legal Pol’y, U.S. Dep’t of Just., (July 29, 2021, 1:10 PM) (marked in the Appendix as Exhibit 4), *infra* at 3.

⁶ See Appendix, Exhibit 1.

⁷ See 2009 MOU at § (2)(f).

⁸ See 2009 MOU at § (3)(a).

“maintain custodial responsibility over the FBI background investigation reports to ensure their confidentiality.”⁹ Reports may not be removed from the custody of the Security Manager, which occurred through electronic communications among staff and to executive branch officials who are non-Designated Staff Members.¹⁰

Sharing information outside of authorized channels is inconsistent with the MOU’s custodial requirements and conflicts with the standard that the reports, when in the Security Manager’s custody, are for the appropriate Senate members’ and staffers’ eyes only.¹¹

BI information must only reach the executive branch upon those “dates and times such reports are returned to the Department of Justice.”¹² Disclosure by staff outside the Security Manager’s oversight is a *per se* confidentiality breach.

It is difficult to imagine that the Senate Judiciary Committee MOU with the White House contemplates electronic disclosure of sensitive information when the Security Manager is required to “maintain in a locked safe a log that reflects the date, time, and particular FBI background investigation report received by the Committee.”¹³ This is especially true when the Security Manager is required to “maintain a secure office space, have possession of keys for the secure office space and know the combinations for the locked safes maintained in the secure office space where FBI background investigation reports are stored.”¹⁴

Rather than provide access to background investigation information via e-mail, access must be limited to the “Chairman’s secure office space” and any removal of an FBI background investigation report for review must occur “in an alternative secure office that is locked and has a combination safe to which only Designated Staff Members have the combination.”¹⁵ If there was any doubt as to the inappropriateness of using e-mail to share FBI background investigation information, the MOU states plainly, “Photocopying or other reproduction of the FBI background reports is prohibited.”¹⁶

⁹ *Id.* at § (3)(b).

¹⁰ Appendix, Exhibits 1-2, 4; *see also* E-mail from Lola Kingo, Off. of Legal Pol’y, U.S. Dep’t of Just. to Phillip Brest, Staff Member, et al., S. Comm. on Judiciary (July 23, 2021, 6:03 PM) (marked in the Appendix as Exhibit 5); E-mail from Lola Kingo, Off. of Legal Pol’y, U.S. Dep’t of Just. to Phillip Brest, Staff Member, et al., S. Comm. on Judiciary (July 27, 2021, 7:32 AM) (marked in the Appendix as Exhibit 6).

¹¹ *See* 2009 MOU at § (3)(b); *see also id.* at § (6)(a) (“Designated Staff Members may review and summarize the FBI background reports to assist the Chairman and the Ranking Member or other Members of the Committee in assessing a nominee’s fitness and qualifications”).

¹² *Id.*

¹³ *See* 2009 MOU, § (4)(b).

¹⁴ *Id.* at § 5(a).

¹⁵ *Id.* at § 5(b).

¹⁶ *Id.* at (6)(b).

Senate Judiciary Committee staff appear to have failed to heed the command that “Designated Staff Members will maintain strict control of FBI background reports in their custody.”¹⁷

Additional security protocols govern the White House and Department of Justice pursuant to a 2010 MOU between those entities. Under section 5(c) of the MOU, “[t]he 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.”¹⁸ Notably, the 2010 MOU governs information shared between the White House and the Department of Justice, and the 2009 MOU governs information shared between the White House and the Senate Judiciary Committee. Yet the documents below reveal that Department of Justice officials, who are not signatories to any agreement with the Senate Judiciary Committee, routinely share BI and personal financial information with the Senate Judiciary Committee staff.¹⁹

At the same time as Senate majority staff were sending protected BI information to the executive branch, executive branch officials from the Department of Justice disclosed BI information via e-mail to Senate majority staff, thus violating the security protocols of the MOU (*see, e.g.*, the last redacted sentence below referring to an “FBI interview”).²⁰ Department of Justice officials also disclosed confidential financial information of nominees to Senate staff.²¹ Documents further reveal that Department of Justice official Lola Kingo submitted encrypted “additional serials” regarding two nominees’ BIs.²²

America First Legal’s prior report showed that the FBI’s overinclusive fishing expeditions were nevertheless underinclusive of the things that matter for judicial and Department of Justice nominees: leadership, character, loyalty, and candor. The findings elicited herein show that the Senate Judiciary staff are equally complicit in defying the law. The Department of Justice’s practices, combined with evident protocol violations by staff, reflect an irretrievably broken process.

¹⁷ *Id.* at § 5(b).

¹⁸ *See* 2010 MOU.

¹⁹ Appendix, Exhibits 1-6; *see also* E-mail from Lola Kingo, Off. of Legal Pol’y, U.S. Dep’t of Just. to Phillip Brest, Staff Member, et al., S. Comm. on Judiciary (July 23, 2021, 5:14 PM) (marked in the Appendix as Exhibit 7).

²⁰ *See* Appendix, Exhibit 3.

²¹ *See* Appendix, Exhibit 4.

²² *See* Appendix, Exhibits 5-7.

Your committees must use your oversight and legislative responsibilities to reform this process for the better.

Sincerely,

/s Gene P. Hamilton
Gene P. Hamilton
Executive Director
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

APPENDIX

Exhibit 1

From: Brest, Phillip (Judiciary-Dem)
Subject: RE: BI Follow-Up for Sung (9th OR) and Lerner (CFC)
To: Kingo, Lola A. (OLP)
Sent: July 29, 2021 6:11 PM (UTC-04:00)

I got the R flags on Lerner.

They did not actually have any of the flags that I noted as "likely Republican flags," but did have the following:

- A phone call to discuss (b) (6)
- Does the nominee recall (b) (6) ? If so, (b) (6) . (Per Raija, (b) (6))
- (b) (6)

Happy to chat about the above tomorrow morning.

From: Brest, Phillip (Judiciary-Dem)
Sent: Thursday, July 22, 2021 11:04 AM
To: 'Kingo, Lola A. (OLP)' (b) (6)
Subject: RE: BI Follow-Up for Sung (9th OR) and Lerner (CFC)

Here's what I had. Lerner is of course the priority among the two of them, given the potential for the 8/11 hearing.

Lerner

- Records Checks
 - (b) (6)
- SJQ Updates
 - The nominee's membership on the AFL-CIO Lawyers Coordinating Committee is missing
 - Page 2 of the Confidential SJQ is missing
- Likely Republican flags
 - I assume the Rs will flag the following:
 - (b) (6)
 - (b) (6)
 - (b) (6) I assume the Rs will want a call on this.

Sung

- Records check
 - (b) (6)
 - (b) (6)
 - (b) (6)
 - (b) (6)
- SJQ Update
 - SJQ lists the RA/TA position for Prof. Schultz as 2002; (b) (6) , so just need an amendment letter.
- Likely Republican flags
 - I assume the Rs will ask (b) (6)

Thanks!

Exhibit 2

From: Kingo, Lola A. (OLP)
Subject: [encrypt] Williams Follow-Up
To: Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Munk, Rajia Churchill (Judiciary-Rep);
Kenny, Gabrielle (Judiciary-Rep)
Sent: July 22, 2021 1:00 PM (UTC-04:00)
Attached: WilliamsOmar77N.LIMITED.pdf

CONFIDENTIAL

Good afternoon,

Attached are additional serials in connection with Omar William's BI. Thank you.

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

Exhibit 3

From: Brest, Phillip (Judiciary-Dem)
Subject: RE: Senate Questionnaire Updates - Financial Disclosure Reports
To: Kingo, Lola A. (OLP); Kader, Gabe (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Hopkins, Maggie (Judiciary-Dem); Giardina, Lane (Judiciary-Dem); Fragoso, Michael (Judiciary-Rep); Mehler, Lauren (Judiciary-Rep); Rodriguez, Tim (Judiciary-Rep)
Cc: Zubrensky, Michael A (OLP); Blau, Zachary (OLP); McCabe, Shannon (OLP)
Sent: July 27, 2021 4:32 PM (UTC-04:00)

Thanks very much, Lola.

From: Kingo, Lola A. (OLP) (b) (6)
Sent: Tuesday, July 27, 2021 3:42 PM
To: Brest, Phillip (Judiciary-Dem) (b) (6); Kader, Gabe (Judiciary-Dem) (b) (6); Bauer, Sarah (Judiciary-Dem) (b) (6); Hopkins, Maggie (Judiciary-Dem) (b) (6); Giardina, Lane (Judiciary-Dem) (b) (6); Fragoso, Michael (Judiciary-Rep) (b) (6); Mehler, Lauren (Judiciary-Rep) (b) (6); Rodriguez, Tim (Judiciary-Rep) (b) (6)
Cc: Zubrensky, Michael A (OLP) (b) (6); Blau, Zachary (OLP) (b) (6); McCabe, Shannon (OLP) (b) (6)
Subject: Senate Questionnaire Updates - Financial Disclosure Reports

Good afternoon,

Attached are copies of the filed Financial Disclosure Reports for the following nominees:

- Jane M. Beckering, of Michigan, to be United States District Judge for the Western District of Michigan, vice Janet T. Neff, retired.
- Armando O. Bonilla, of Virginia, to be a Judge of the United States Court of Federal Claims for a term of fifteen years, vice Edward J. Damich, term expired.
- Patricia Tolliver Giles, of Virginia, to be United States District Judge for the Eastern District of Virginia, vice Liam O'Grady, retired.
- Toby J. Heytens, of Virginia, to be United States Circuit Judge for the Fourth Circuit, vice Barbara Milano Keenan, retiring.
- Shalina D. Kumar, of Michigan, to be United States District Judge for the Eastern District of Michigan, vice Victoria A. Roberts, retired.
- Carolyn N. Lerner, of Maryland, to be a Judge of the United States Court of Federal Claims for a term of fifteen years, vice Margaret Mary Sweeney, term expired.
- Michael S. Nachmanoff, of Virginia, to be United States District Judge for the Eastern District of Virginia, vice Anthony John Trenga, retired.
- Jennifer Sung, of Oregon, to be United States Circuit Judge for the Ninth Circuit, vice Susan Graber, retiring.

Thank you.

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

Exhibit 4

From: Bauer, Sarah (Judiciary-Dem)
Subject: RE: Beckering and Kumar BI Follow Up
To: Kingo, Lola A. (OLP)
Sent: July 29, 2021 1:10 PM (UTC-04:00)

Hi Lola,

In addition to my items from last week, here is what the Rs requested (along with some of my own commentary):

Beckering

- (b) (6)
 - (b) (6)
- (b) (6)
- (b) (6)
- They indicated that the Biden/Harris questionnaire supplement cuts off in the middle of question eleven and is missing a page.
 - (b) (6)

Kumar

- (b) (6)
 - (b) (6)
 - (b) (6)
 - (b) (6)
 - (b) (6)
 - (b) (6)
 - Rs said they did not see (b) (6) (b)(6), (b)(7)(C) per FBI
 - (b) (6)
 - (b) (6)
- . Neither Phil nor I know what the precedent is for this.

The FBI interview indicates (b)(6), (b)(7)(C) per FBI

Thanks!

Exhibit 5

From: Kingo, Lola A. (OLP)
Subject: [encrypt] Nagala Follow-Up
To: Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Munk, Rajja Churchill (Judiciary-Rep);
Kenny, Gabrielle (Judiciary-Rep)
Sent: July 23, 2021 6:03 PM (UTC-04:00)
Attached: Nagala, Sarala - LIMITED Supplemental.pdf

CONFIDENTIAL

Good afternoon,

Attached are additional serials in connection with Sarala Nagala's BI. Please note, (b) (6)

I would note, however, that (b)(6); (b)(7)(E) per FBI

(b) (6)

. If you have any questions,

please don't hesitate to reach out.

Thank you.

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

Exhibit 6

From: Kingo, Lola A. (OLP)
Subject: [encrypt] Williams Update
To: Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Munk, Rajja Churchill (Judiciary-Rep);
Kenny, Gabrielle (Judiciary-Rep)
Sent: July 27, 2021 7:32 AM (UTC-04:00)

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Good morning,

Per the FBI, (b) (6)

Thank you,
Lola

Lola A. Kingo
Chief Nominations Counsel
Office of Legal Policy (OLP)
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Room 4239
Washington, D.C. 20530
(b) (6)

Exhibit 7

From: Kingo, Lola A. (OLP)
Subject: [encrypt] Williams Follow-Up
To: Brest, Phillip (Judiciary-Dem); Bauer, Sarah (Judiciary-Dem); Munk, Raija Churchill (Judiciary-Rep);
Kenny, Gabrielle (Judiciary-Rep)
Sent: July 23, 2021 5:14 PM (UTC-04:00)
Attached: Williams, Omar - LIMITED Supplemental.pdf

CONFIDENTIAL

Good afternoon,

Attached is an additional serial in connection with Omar William's BI. Thank you.

Lola A. Kingo
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(b) (6)