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THE WHITE HOUSE

WASHINGTON

June 24, 1983

NOTE FOR JOHN G. ROBERTS
PETER J. RUSTHOVEN

FROM: RICHARD A. HAUSER RAH

Please review Section IV of the attached draft report and provide your comments to Sherrie Cooksey as soon as possible.

Thank you.

Attachment

U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

June 17, 1983

MEMORANDUM FOR: Departmental Study Committee
on Special Inquiries on
Presidential Nominees

FROM: Stanley E. Morris
Chairman

SUBJECT: Final Draft of SPIN Report

Attached for your review is the final draft of the Committee's Report to the Attorney General.

Also included at the front of the report is a draft of the transmittal letter to the Attorney General. In the next few days, we will be circulating the original of the letter for your signature.

I would like to release the report as soon as possible, certainly no later than the end of June. Therefore, I would ask that you provide your comments to me or Bob Foley (272-6269) no later than Wednesday, June 22.

Finally, I would appreciate your suggestions on what the Committee's recommendations should be to the Attorney General and Director Webster regarding the ultimate release of the report to the Congress, the press, and the public.

Attachment

U.S. Department of Justice

Departmental Study Committee: Special Inquiries On Presidential Nominees

Report to The Attorney General

DRAFT

June 198

U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

Honorable William French Smith
The Attorney General
Washington, D.C. 20530

Dear Mr. Attorney General:

The Departmental Study Committee on Special Inquiries on Presidential Nominees is pleased to submit its report and recommendations to you. Upon request of Director Webster, you asked that we examine the nature of the Special Inquiry (SPIN) process, identify any problems associated with that process, and suggest solutions.

The Committee believes that a brief explanation of the delay in our submission to you is in order. As you are aware, the Special Counsel of the Senate Committee on Labor and Human Resources finally released his report on the Federal Bureau of Investigation's (FBI) disclosures in the Donovan matter on April 22, 1983. We postponed completion of the report anticipating that the Special Counsel's report might raise certain facts or issues that would have a bearing on our findings and recommendations. As it turned out, however, it did not contribute anything of significance to our effort. In that light, the release of this report at this time should enhance its significance and usefulness.

A major finding of the report--one that applies equally to the SPIN process within the Executive Branch and to the issue of Congressional access--is that many of the criticisms and misperceptions associated with SPIN have arisen because agreements and understandings have been made on an informal or ad hoc basis. Generally, there has been an absence of formal, written documents governing SPIN policies and procedures. Therefore, our recommendations focus on the need for better understanding, such as an Executive Order, to govern more clearly the SPIN process and to clarify relationships and responsibilities both within the Executive Branch and between the Executive Branch and the Senate.

The Committee's recommendations set forth formally the authority of the President and his Counsel and the role of the FBI in the SPIN process. Specific recommendations in this area focus not only on means by which the Department of Justice and the FBI can assist their White House clients in this process, but also on measures the White House can take which, through clearer guidance and more specific tasking, should permit the FBI's conduct of SPIN investigations to be even more responsive to the needs of the President.

The recommendations addressing Congressional relations attempt to strike a balance between the legal authority of the President in making nominations and the requirements of the Senate in carrying out its advise-and-consent responsibilities. The recommendations, if implemented, would provide both the Executive Branch and the Senate with a clearer understanding of their respective rights and obligations concerning access to SPIN information, as well as clarify the FBI's responsibility vis-a-vis the Senate.

We appreciate the opportunity to have served you in the review of this important issue. Should you approve any of our specific recommendations, we stand ready to assist in their implementation.

Respectfully submitted,

Stanley E. Morris
Chairman

Theodore B. Olson

Oliver B. Revell

F. Henry Habicht II

William P. Tyson

John B. Hotis

Renee L. Szybala

DEPARTMENTAL STUDY COMMITTEE:

SPECIAL INQUIRIES ON PRESIDENTIAL NOMINEES

* * *

REPORT TO THE ATTORNEY GENERAL

June 1983

Committee Members:

Stanley E. Morris, Chairman
Associate Deputy Attorney General

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

William P. Tyson
Director
Executive Office for U.S. Attorneys

Renee L. Szybala
Deputy Associate Attorney General

F. Henry Habicht II
Deputy Assistant Attorney General
Land and Natural Resources Division

John B. Hotis
Special Assistant to the Director
Federal Bureau of Investigation

Oliver B. Revell
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigation

TABLE OF CONTENTS

Page

INTRODUCTION AND OVERVIEW

The Federal Bureau of Investigation (FBI) is charged with the responsibility for conducting background investigations of numerous categories of applicants for Federal employment and employees of a number of Federal agencies. Since the end of World War II, this responsibility has included background investigations of candidates for nomination for Presidential appointments. An investigation carried out by the FBI in response to such requests from the White House, termed "Special Inquiry" (SPIN), has essentially followed--albeit with a heightened urgency--the same procedures as the standardized full-field background investigation. Historically, considering the thousands of SPIN investigations conducted for incoming Administrations, this procedure has been an effective and useful one, serving the task of clearing nominees for high office in the United States Government. In rare instances, an exceptional event has occurred concerning a particular candidate for nomination or an appointee which gives visibility to, and generates publicity about, that background investigation in particular or the procedures followed in general.

On June 25, 1982, Attorney General William French Smith, at the suggestion of FBI Director William H. Webster, established a Departmental Study Committee on Special Inquiries on Presidential Nominees. Director Webster's proposal was, in part, stimulated by "changing perceptions of the nature of a Special Inquiry (SPIN) on Presidential Nominees and the need for a reexamination of the purpose and procedures under which such inquiries take place," as well as "the obligations and scope of disclosure." (Appendix A-1) He asked for the Attorney General's guidance and direction and suggested that a Departmental committee review the SPIN process.

Attorney General Smith asked the Committee to assist him and Director Webster "in clarifying the issues and in finding solutions for any problems that may exist." (Appendix A-2) This report is in response to that request.

The Committee has chosen to postpone submission of the final report until now in deference to the Committee on Labor and Human Resources of the United States Senate. In May 1983, the Special Counsel of the Senate Committee issued his Report on "The Timeliness and Completeness of the Federal Bureau of Investigation's Disclosures to the United States Senate in the Confirmation of Labor Secretary Raymond J. Donovan." Having reviewed that document, however, the Committee has determined that the Special Counsel's Report does not add significantly to the breadth and scope of the present reexamination of SPINs. Therefore, the timing of this Report to the Attorney General should increase its usefulness and interest to the Senate and other interested parties.

Our response to the Attorney General has been extremely broad in scope for two principal reasons. First, in order to analyze the purpose and expectations regarding SPIN inquiries, the Committee addressed historical, legal and procedural issues. Second, a full understanding of the process required

an analysis of the relationships and expectations both within and between the Executive and Legislative Branches. Because of these interbranch considerations, a review of related constitutional and legal issues was also required.

The Committee's goal, then, has been to outline the roles and responsibilities of the President, the White House staff, the Department of Justice, the FBI, and the Congress in the nominating process, and particularly the SPIN process, and to develop recommendations which may help to improve it.

The Committee has turned to a number of sources to address these issues. Committee inquiries have included review and analysis of legal and constitutional authorities, historical documents and official correspondence, examination of Congressional testimony and committee reports, and interviews with knowledgeable officials--present and former--of the Department of Justice and the FBI. To obtain a clearer view of the White House perspective, the Committee also interviewed present and past members of White House staffs who had responsibility for reviewing applicants for Presidential nominations.

The report is outlined as follows: Section I gives the constitutional background of the Presidential appointment process. Section II describes the purpose of, and procedures followed in, SPIN investigations. Section III is a historical discussion of SPIN investigations. Section IV analyzes the roles of the Executive Branch and the Congress, with emphasis on the White House-FBI relationship and problems of disclosure and access. The final Section contains the Committee's conclusions and recommendations.

In brief, the Committee's recommendations are designed both to increase the understanding of the purpose and scope of SPIN investigations within and between the White House and the Senate, and to improve the utility of the process itself. We recommend a formalization of the procedures by means of an Executive Order and Attorney General Guidelines. The Committee further proposes that greater consideration be given to the time requirements for SPIN investigations. As regards Congressional access, we recommend that each Administration conclude a formal agreement with the Senate concerning the provision of SPIN material, and that such an agreement stipulate that the Senate obtain the information it requires directly from the White House.

SECTION I

CONSTITUTIONAL AND LEGAL ANALYSIS

Constitutional Background Regarding the Presidential Appointment Process

Article II, § 2, cl. 2 of the Constitution sets out the appointment power of the President, and the role which the Senate plays in the appointment process.1/ It provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause represents an important manifestation of the twin principles of checks and balances and separation of powers which underlie the constitutional structure of our government. A discussion of this Clause therefore must begin with a brief review of these principles.

Checks and Balances and Separation of Powers

It is fundamental to the constitutional structure that "the powers of the three great branches of the National Government be largely separate from one another." Buckley v. Valeo, 424 U.S. 1, 120 (1976). See United States v. Nixon, 418 U.S. 683, 704 (1974); Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935). As Madison declared:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution . . . chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. 2/

The accumulation of power most feared by the Founders was that residing in the Legislative Branch:

> [I]n a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so

> numerous as to be incapable of persuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.3/

The debates at the Constitutional Convention repeatedly revealed concern over the "tendency in our [state] governments to throw all power into the Legislative vortex. The Executives of the States," Madison declared, "are in general little more than Cyphers; the legislatures omnipotent."4/

In order to protect against legislative dominance in the new national government, the President was given a number of exclusive powers, among them, the power to negotiate with foreign nations;5/ to pardon; to veto congressional legislation; and to nominate and appoint all ambassadors, judges, and "officers" of the United States. The Appointments Clause was intended to play a key role in checking congressional power. As the Supreme Court has noted:

> An interim version of the [Appointments Clause] had vested in the Senate the authority to appoint Ambassadors, public Ministers, and Judges of the Supreme Court, and the language of Art. II as finally adopted is a distinct change in this regard. We believe that it was a deliberate change made by the Framers with the intent to deny Congress any authority itself to appoint those who were "Officers of the United States."6/

As important as the independence of the Executive was to the Founders, it is also obvious from the very structure of the Constitution that the Founders did not intend any "hermetic sealing off of the three branches of Government from one another"7/ that would preclude effective, coordinated government on the one hand, or allow uncontrolled abuses on the other. Instead, they incorporated a system of checks and balances into a tripartite structure designed to prevent tyranny by any one branch over the others.

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other -- that the private interests of every individual may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.8/

This system of checks and balances is not inconsistent with the principle of separation of powers; rather, the two concepts complement each other. As one scholar has observed: "An institution cannot check unless it has some measure of independence; it cannot retain that independence without the

power to check."9/ Together the principles of checks and balances and separation of powers guard against tyranny by limiting the ability of any branch of government to govern without approval -- tacit or otherwise -- of the other branches whose natural interests are distinct from its own.

The Founders were also sensitive to the danger that a government of diffused powers could be stymied at every turn, thereby frustrating the dreams they had for the new nation. Indeed, the instability and incompetence of a weak national government was the fundamental motivation underlying the abandonment of the Articles of Confederation in favor of the new Contitution.10/ As Madison wrote, "[e]nergy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government."11/ To achieve energy and efficiency in a government with separated powers and checks and balances, however, requires public officials to act with moderation and respect not only for the constitutional role of the coordinate branches, but for the "larger purposes of government."12/

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.13/

The lesson to be gleaned from this brief review of the constitutional principles underlying the appointments process is that Congress and the Executive must exercise their prerogatives with sensitivity to the mutual dependence each has upon the other in promoting the general welfare of the nation.

The Appointments Clause

Except for officers of the Congress,14/ all "Officers of the United States" are appointed to their positions in one of the four ways specified by the Appointments Clause:15/ by the President "by and with the advice and consent of the Senate;" by the President alone; by a federal court; or by "Heads of Departments."16/

All officers who are not deemed "inferior," as that term is used in the Clause, must be appointed by means of the first-mentioned process. That process consists of three stages: (1) the nomination of a candidate by the President; (2) the advice and consent of the Senate to the candidate's appointment; and (3) the nominee's appointment and commission by the President.17/ Our focus is upon the first and second stages of the process. In the first (and third) stage the Constitution vests power exclusively in the President; in the second stage, the Senate shares in the appointment power by granting or withholding its consent.18/

It has been the consistent view of the Attorneys General that the Senate plays no role in the first stage of the appointment process, viz., the nomination of a candidate by the President.

> The Senate has no power to originate an appointment; its constitutional action is confined to a simple affirmation or rejection of the President's nomination. Whenever the Senate disagrees to such nomination, it fails; and no appointment can be made, except on a new nomination to be made by the President. Suggestions as to the views of the Senate in cases where that body disagrees to the President's nomination, may, no doubt, be informally communicated to him; but should he think it proper to conform to those views, I know of no way in which it can be done, consistently with . . . the constitution, except by the making of a new nomination in accordance therewith.19/

This view is supported not only by the opinion of the Founders20/, but also by Supreme Court precedent21/ and historical practice.22/

The President's exclusive role in nominating all executive officers of the United States was affirmed in Buckley v. Valeo, 424 U.S. 1 (1976), where the Supreme Court held that appointment by the President pro tempore of the Senate and the Speaker of the House of a majority of the voting members of the Federal Election Commission violated the Appointments Clause. The Court described the history of the drafting of the Appointments Clause and found that "all officers of the United States are to be appointed in accordance with the Clause."23/ The Court went on to hold that a governmental body comprising members not selected pursuant to the Appointments Clause may not exercise executive functions:

> The [Federal Election] Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3.
>
> Congress may undoubtedly under the Necessary and Proper Clause create "offices" in the generic sense and provide such method of appointment to those "offices" as it chooses. But Congress' power under that Clause is inevitably bounded by the express language of [the Appointments Clause], and unless the method it provides comports with the latter, the holders of those offices will not be "Officers of the United States." They may, therefore, properly perform duties only in aid of those functions that Congress may carry out by itself, or in the area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not "Officers of the United States."24/

Notwithstanding the President's exclusive authority to nominate all officers of the United States, Congress has on numerous occasions formally limited the President's discretion by specifying detailed qualifications for officers of the United States pursuant to its exclusive constitutional power to create "inferior" offices.25/ As Edward Corwin has noted:

> First and last, legislation . . . has laid down a vast variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, political, industrial, or regional affiliations, and so on and so forth. It has even confined the President's selection to a small number of persons to be named by others. Indeed, it has contrived at times, by particularity of description, to designate a definite eligible [sic], thereby, to all intents and purposes, usurping the appointing power. [Nevertheless,] the proposition is universally conceded that some choice, however small, must left the appointing authority.26/

Presidents and Attorneys General27/ have steadfastly resisted these legislative attempts to restrict the President's discretion to choose nominees. President James Monroe, for example, took what is perhaps the extreme position that, as "a general principle,"

> Congress [has] no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow citizens.28/

Notwithstanding Monroe's views, however, the law seems settled that although the President's power of nomination is exclusive, it may be regulated by Congress through reasonable statutory specifications regarding qualifications for office.29/

Within these formal specifications regarding the appointment process, there exists a complex set of practical accommodations between the Congress and the Executive which has evolved, largely without judicial interference, from the sparse dictates of Art. II, §2.30/ The Senate may not dictate any particular choice to the President, but neither can the President grant a commission to any "officer of the United States" without the consent of the Senate. Because the constitutional arrangement so clearly contemplates a spirit of accommodation and cooperation between the Legislative and Executive Branches, the policies governing the President's submission of nominations to the Senate and the scope of the background information which will be provided must take account of the very real "balance of power" which governs the appointment process.

In discussing that process, the Founders repeatedly used terms such as "cooperation," "jointly," "junction . . . of power," and "concurrent authority."31/ Alexander Hamilton, for example, emphasized the twin benefits of Presidential nomination and Senate confirmation in The Federalist No. 76:

> one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men of equal or perhaps even superior discernment. The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretentions to them.

On the other hand, he wrote:

> the necessity of [Senate] concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Hamilton believed that "co-operation" between the President and the Senate would result in an optimal mechanism for the appointment of government officials. Such "co-operation" represents the keystone of the constitutional structure of the Appointments Clause.

Disclosure of Executive Branch Background Checks to the Public and to Congress

Public Disclosure

Sensitive FBI background checks of presidential nominees are shielded from public disclosure by the Privacy Act, 5 U.S.C. § 552a(b), and are exempt from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5), (b)(6), (b)(7).32/ Material gleaned through background investigations is particularly sensitive from a privacy standpoint because, unlike other investigations conducted by the FBI, they are conducted without any basis for belief that criminal activity will be discovered. Indeed, a background check is usually undertaken with respect to someone who has been recommended to the President as possessing qualities of leadership and character which support a reasonable expectation that no criminal activity will be uncovered. Because the Government normally has no legitimate interest in performing such investigations into a citizen's private life, information thus obtained is entitled to the most diligent protection.

Disclosure to Congress 33/

The principle of cooperation which underlies the entire constitutional process of appointment is particularly important in the context of information disclosure. Whenever Congress requests disclosure from the Executive of sensitive, confidential background information during the appointment process, vital interests of both Branches must be carefully considered and accommodated. Over the years the Executive has voluntarily provided appropriate Senate committees with substantial summary information gleaned from background investigations on presidential nominees. Such disclosures, however, have not been unlimited, and have been made consistent with the Executive's interest in protecting the confidentiality of certain information.

There are two bases for declining to release certain SPIN information to Congress: the need to protect law enforcement processes; and the need to protect the privacy of those nominees under investigation, and those from whom information is obtained respecting nominees. In a litigation context these interests have traditionally received protection through the informant's privilege34/ and the investigative files privilege.35/ The informant's privilege is designed to protect those who provide sensitive information to law enforcement officers, and to encourage others to provide such information.36/ It traditionally extends to protect statements made to the the Government in return for a pledge of confidentiality.37/ Such statements often represent an essential feature of SPIN-type investigations.38/ The investigative files privilege similarly protects the integrity of law enforcement processes by encouraging a free flow of information to law enforcement officers, by protecting the rights of individuals under investigation, and by shielding enforcement techniques from disclosure to violators who could use such information to avoid apprehension.

These privileges of confidentiality have been applied by analogy to requests from Congress for certain investigatory materials.39/ In 40 Op. A.G. 45, 46 (1941), Attorney General Robert Jackson declared:

> It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.

Attorney General Jackson went on to emphasize the twin interests served by protecting the confidentiality of FBI investigative reports:

> [D]isclosure of [such] reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. . . . [M]uch of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants -- sometimes in their employment, sometimes in their social relations, and in extreme cases

> might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensible condition of future efficiency.
>
> Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.40/

The Attorney General concluded by noting that he was "following the conclusions reached by a long line of distinguished predecessors in this office who have uniformly taken the same view."41/

Of course, Congress also has important interests at stake which must be considered and balanced against those of the Executive Branch. It is firmly established that decisions by the Executive not to supply information to Congress require a balancing of the public interests at stake in disclosure, on the one hand, and confidentiality on the other. In the leading Supreme Court case treating the power of the President to protect certain information from disclosure to the coordinate Branches, United States v. Nixon, 418 U.S. 683, 708 (1974), the Court held that there existed an Executive privilege which was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." The Court declined, however, to hold that the privilege was absolute in the case of confidential deliberative communications.42/ Instead, it viewed its task as a balancing process:

> In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice.

Id. at 711-12. On the particular facts of the case before it, the Court held that the President's "generalized interest in confidentiality" did not outweigh the need for the "production of relevant evidence in a criminal proceeding." Id. at 713.

United States v. Nixon involved a claim of Executive privilege in the context of a court proceeding, but the analysis is similar when Executive privilege is asserted in response to congressional demands for information. Although Presidents throughout our history have from time to time declined to provide information to Congress, there is only one judicial decision directly on point.43/ That decision upheld the President's claim of Executive privilege against releasing deliberative communications to a Congressional committee.

In the context of the appointment process, it is unlikely that the President would be compelled formally to assert Executive privilege in response to a Senate subpoena for information about one of his nominees.44/ Nevertheless, the balancing process which the courts use to evaluate claims of Executive privilege is appropriately used here to resolve the conflicting interests of the Executive Branch and the Senate. The Senate, after all, does possess a textually explicit constitutional duty to provide "advice and consent" to the President in his choice of nominees for federal offices. This duty may be said to imply a concomitant power to obtain relevant information on the nominee to assist the Senate in "the responsible fulfillment of [its] function."45/ In 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.

The first option is legally supportable, but may present practical problems. After describing the privilege generally applicable to sensitive investigative files, a former Assistant Attorney General for the Office of Legal Counsel stated:

> We believe that an argument can be made that investigative reports compiled in aid of the President's constitutional power to nominate and appoint officers of the United States are protected by a similar privilege -- although the privilege would be difficult to assert as a practical matter because it would always be possible for the Senate or a Committee to refuse to pass on a particular nomination unless the relevant FBI materials were made available. Nevertheless, reference to the confidentiality normally accorded investigative reports compiled in aid of the President's constitutional duties may properly serve as a basis for discouraging Senate access to the reports as a matter of course.46/

A far better alternative would be to seek a mutually satisfactory accommodation with the Senate through which relevant material necessary for the fulfillment of the advice and consent function would be provided to the Senate, under conditions which secure the confidentiality of all sensitive information. Such an agreement could be embodied in an Executive Order, in a resolution of the Senate, or in a written understanding between the President and appropriate Senate leaders and committee chairmen.

The two Branches of Government must agree upon a sensible accommodation of their legitimate and occasionally competing interests. It will undoubtedly be less difficult to agree upon general principles than upon the implementation of those principles. Both Branches are likely to agree, for example, that the Senate should have the relevant information regarding an appointee. Precisely what may be "relevant," and how that information should be transmitted and retained, may prove to be more difficult to resolve.

FOOTNOTES

1/ The Constitution provides no role for the House of Representatives in the appointment process. Congress as a whole, however, possesses exclusive authority under the Necessary and Proper Clause to establish or abolish those offices to which persons may be appointed by the President. United States v. Maurice, 26 F. Cas. 1211 (1823)(No. 15,747); 18 Op. A.G. 171 (1890); 10 Op. A.G. 11 (1861); 5 Op. A.G. 88 (1849).

2/ The Federalist, No. 47.

3/ The Federalist, No. 48.

4/ 2 Max Farrand, ed., The Records of the Federal Convention of 1787, at 35 (1937); see also 1 id. at 107 (James Wilson); 2 id. at 52 (Governeur Morris); 2 id. at 298 (John Mercer).

5/ See generally United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936).

6/ Buckley v. Valeo, supra, 424 U.S. at 129.

7/ Id. at 121.

8/ The Federalist, No. 51.

9/ L. Fisher, The Politics of Shared Power: Congress and the Executive 4 (1981).

10/ See e.g., The Federalist, Nos. 1, 15, 16, 21, 22, 38.

11/ The Federalist, No. 37.

12/ Fisher, supra, at 12.

13/ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). See also R. Neustadt, Presidential Power 33 (1960):

> The constitutional convention of 1787 is supposed to have created a government of "separated powers." It did nothing of the sort. Rather, it created a government of separated institutions sharing powers. [Original emphasis.]

14/ See generally Buckley v. Valeo, supra, 424 U.S. at 127-28.

15/ U.S. Const. Art. II, § 2, cl. 2. Whether a person is an "officer" rather than an "employee" of the United States depends on the nature of the office he fills, not on the method of his appointment. See generally United States v. Germaine, 99 U.S. 508 (1879); Auffmordt v. Hedden, 137 U.S. 310, 327 (1890).

16/ See United States v. Smith, 124 U.S. 525, 532 (1888).

17/ See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155-56 (1803):

> They [the clauses of the Constitution] seem to contemplate three distinct operations: 1st. The nomination. This is the sole act of the President, and is completely voluntary. 2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate. 3d. The Commission. To grant a Commission to a person appointed, might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."

18/ See generally 3 J. Story, Commentaries on the Constitution of the United States § 1525 (1833); Matter of Hennen, 38 U.S. (13 Pet.) 230, 259 (1839); Marbury v. Madison, supra note 17.

19/ 3 Op. A.G. 188 (1837).

20/ See 5 Works of Thomas Jefferson 161-62 (P. Ford ed. 1904); 9 Writings of James Madison 111-13 (G. Hunt ed. 1910); see also 3 J. Story, Commentaries on the Constitution of the United States §§ 1525-26 (1833).

21/ See Springer v. Philippine Islands, 277 U.S. 189, 202 (1928) (the legislative branch may not exercise executive authority by retaining the power to appoint those who will execute the law); United States v. Ferreira, 54 U.S. 40, 50-51 (1852) (Congress may not designate a person to fill an office).

22/ See E. Corwin, The Constitution of the United States of America: Analysis and Interpretation 528 (Cong. Research Serv. 1973).

23/ 424 U.S. at 132 (emphasis in original).

24/ Id. at 138-39.

25/ See generally Myers v. United States, 272 U.S. 52, 265-74 (1926) (Brandeis J. dissenting) (cataloging numerous examples); note 1 supra.

26/ E. S. Corwin, The President: Office and Powers 88-9 (1948).

27/ See e.g., 13 A.G. 516 (1871) (power of Congress to prescribe qualifications for office limited by necessity of leaving scope for judgment and will of the appointing power).

28/ 2 J. Richardson, Messages and Papers of the Presidents 129, 132 (1896). See also Memorandum from Frederick W. Ford, Acting Assistant Attorney General, Office of Legal Counsel to William F. Rogers, Deputy Attorney General (Dec. 7, 1955) (bill requiring that nominees for Associate Justice of the Supreme Court must have ten years of judicial service would unconstitutionally restrict the President's power of appointment).

29/ See Myers v. United States, 272 U.S. 52, 128-29 (1926); Mow Sun Wong v. Hampton, 435 F.Supp. 37, 41 n.6 (N.D. Cal. 1977), aff'd, 626 F.2d 739 (9th Cir.1980), cert. denied, 450 U.S. 959 (1981).

30/ For example, alongside the formal limits on the President's discretion to nominate whomever he chooses is the informal but important custom of "senatorial courtesy," which in practice means that, before selecting a nominee to fill an office within a particular state, the President generally seeks the advice of those Senators from his own party representing that state. Failure to do so may doom the nomination because the Senate will customarily refrain from acting on the nomination absent some manifestation of approval by the appropriate Senator or Senators.

Senatorial courtesy represents a practical accommodation of the President's exclusive power to choose nominees and the Senate's exclusive power of consent to appointments. It applies primarily to nominees for field offices of departments and administrative agencies, and to district court judgeships. In these instances the Senators involved cannot compel the President to nominate someone to whose selection the President is opposed, but they are often successful in confining the President's choice to someone on a Senator's approved list. J. Kallenbach, The American Chief Executive 394 (1966). Knowing this, the President usually solicits the Senate's "advice" in advance of his nomination.

In a second category of offices, which includes Cabinet, sub-Cabinet and diplomatic posts, the Senate's practical influence in the nomination process is far less pronounced. Between 1789 and 1966, for example, only eight Cabinet nominations were rejected by the Senate (four of them occurred when President Tyler lost the support of his own Whig party in the Senate in 1841). Kallenbach, supra, at 392. Senatorial influence in the choice of Supreme Court Justices, Court of Appeals Judges, members of administrative agencies, and sub-Cabinet level positions, falls somewhere in between that of the first two categories.

Senatorial courtesy is not a constitutionally mandated practice, there being no textually explicit basis for the custom. However, "no usage of the Constitution affecting the powers of the President is more venerable." E. S. Corwin, supra, at 73. See also Kallenbach, supra, at 394.

31/ See The Federalist, Nos. 66, 67, 77.

32/ See generally Memorandum from Assistant Attorney General Theodore Olson to the Attorney General (June 14, 1982); Memorandum from Deputy Assistant Attorney General Mary Lawton to Senior Associate Counsel to the President Michael Cardozo (September 13, 1977); Memorandum from Assistant Attorney General John Harmon to Counsel to the President Robert Lipshutz (June 29, 1977) ("Lipshutz Memorandum").

33/ Although the protective strictures of FOIA and the Privacy Act do not shield information from Congress, neither Act requires the Executive Branch to provide Congress with access to SPIN data, or any other investigative information.

34/ See, e.g., Roviaro v. United States, 353 U.S. 53 (1957); United States v. Tucker, 380 F.2d 206 (2d Cir. 1967); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); 8 Wright & Miller, Federal Practice and Procedure § 2019; 2 Weinstein's Evidence ¶ 510[02].

35/ See, e.g., Black v. Sheraton Corp. of America, 564 F.2d 531, 546 (D.C. Cir.1977); Association for Women in Science v. Califano, 566 F.2d 339 (D.C. Cir.1977); Brown v. Thompson, 430 F.2d 1214 (5th Cir. 1970); Note, Discovery of Government Documents and the Official Information Privilege, 76 Colum. L. Rev. 142 (1976).

36/ [I]t has been the experience of law enforcement officers that the prospective informer will usually condition his cooperation on an assurance of anonymity, fearing that if disclosure is made, physical harm or other undesirable consequences may be visited upon him or his family. By withholding the identity of the informer, the Government profits in that the continued value of informants placed in strategic positions is protected, and other persons are encouraged to cooperate in the administration of justice.

United States v. Tucker, supra, 380 F.2d at 213.

37/ See 2 Weinstein's Evidence ¶ 509[05].

38/ See Memorandum of Understanding Between Attorney General Civiletti (signed Dec. 2, 1980) and President-elect Reagan (signed Nov. 28, 1980) ("persons interviewed during these investigations may be assured that to the extent permitted by law information identifying such persons will be kept confidential"). (Appendix E)

39/ The Office of Legal Counsel has previously noted that "there are often significant factors weighing against the release of investigative information to the Congress." Lipshutz Memorandum, cited at footnote 32, supra.

40/ 40 Op. A.G. at 46-7.

41/ Id.

42/ The Court strongly implied that the privilege was absolute in the case of "military, diplomatic, or sensitive national security secrets." 418 U.S. at 706.

43/ Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc), was a suit by the Senate Watergate Committee to compel enforcement of a subpoena duces tecum served on the President for production of tape recordings of conversations between the President and a principal aide. The District Court refused to compel enforcement and, on appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed. Citing its earlier case of Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973), which had involved a Presidential claim of privilege against a grand jury subpoena, the court held that "application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would

be served by disclosure in a particular case." Id. at 729. Because there was a "great public interest" in maintaining the confidentiality of presidential conversations, the court held the conversations "presumptively privileged" even from in camera examination in court. The presumption could be overcome "only by a strong showing of need by another institution of government--a showing that the responsibilities of that institution cannot responsibly be fulfilled" without access to the requested conversations. Id. at 730. Applying this standard, the court ruled that because the subpoenaed information was not "demonstrably critical to the responsible fulfillment of the Committee's functions," Id. at 731, the President's claim of Executive privilege would be upheld.

44/ The Senate is unlikely to resort to issuance of a subpoena to the President in this context, since it has a more effective tool at its disposal--refusal to approve the nomination.

45/ Senate Select Committee, supra, 498 F.2d at 731. Of course the Senate's power to obtain relevant information does not depend exclusively--or even primarily--on the cooperation of the Executive Branch. In weighing the Senate's need for Executive Branch investigative files, therefore, it is appropriate to take account of the Senate's independent investigative powers to call witnesses to testify and to subpoena relevant documents from private parties in aid of its constitutionally assigned tasks.

46/ Lipshutz Memorandum, cited at footnote 32, supra. Assistant Attorney General Harmon also stated in a Memorandum to all Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice (May 23, 1977), that "principles of nondisclosure may be relaxed in situations where the public interest would justify it. For example, materials properly subject to claims of Executive privilege may be disclosed to Congress in cases involving Senatorial confirmation of Presidential nominations. . . ."

SECTION II

PURPOSE AND PROCEDURES OF SPECIAL INQUIRY INVESTIGATIONS

The FBI is authorized to conduct background investigations of persons seeking government employment and employed in the Federal Government pursuant to laws and Executive orders and by agreements between the Bureau and the President, the Departments, and other governmental agencies. Among the many categories of applicant investigations for which the FBI has responsibility are Departmental Applicant Investigations (DAPLI) of candidates for Federal judicial positions, U.S. Attorneys, U.S. Trustees, U.S. Marshals, and other top-level officials of the Department of Justice; United States Courts Applicant Investigations; and for the Department of Energy and the Nuclear Regulatory Commission, among others. Special Inquiry (SPIN) is a term used by the FBI to characterize background investigations conducted for the President, the National Security Council, and various Congressional committees. SPIN requests received from the White House include Presidential appointments (some of which require Senate confirmation), White House staff employees, and persons having access to the White House. In general, the FBI's full-field background investigation is standardized and is applicable to the inquiries performed for all of these clients.

Purpose

The purpose of a SPIN investigation conducted for the White House in connection with a Presidential appointment is 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. The investigation focuses on the character, associates, reputation, and loyalty of the nominee and not on substantive ability in the area of the particular appointment. The scope and focus of the investigation and the manner in which it is reported are intended to meet the specific needs only of the President through his Counsel, the FBI's client in these matters.

It is important to note here that the FBI's SPIN investigation is not the only basis on which the President's staff reviews and makes judgments regarding potential nominees. Other information reviewed by the White House includes Personal Data Questionnaires (PDQ), financial data questionnaires, checks of IRS tax records, name checks, and personal interviews.

Workload and Resource Allocation

During FY 1982, the FBI conducted a total of 988 SPIN investigations, or 24.4 percent of the total of all background investigations for that year. In terms of resources expended, 36.8 workyears--of a total of 129.6 workyears for all background investigations--were devoted to SPINs. Workload and workyear figures for the 5-year period from FY 1978 to FY 1982 are summarized in the following table:

Background Investigation Workload

Number of Cases	FY 1978	FY 1979	FY 1980	FY 1981	FY 1982
All Background Investigations (BI)	3,936	3,676	4,269	4,326	4,047
SPIN Investigations*	774	646	833	1,329	988
Resources Used					
Direct Workyears, all BI	137	139.3	134.6	155.2	129.6
Direct Workyears, SPINs	35	25.7	26.4	50.5	36.8

*Includes some Congressional committee requests.

It is clear from the FY 1981 data that SPIN-related workload increases markedly during periods of Presidential transition.

Administrative Process

Requests to initiate SPIN investigations are forwarded by courier from the Office of the Counsel to the President to FBI Headquarters, along with appropriate background forms (SF-86, Security Investigation Data for Sensitive Position) and necessary waivers for access to records. These are delivered directly to the FBI Headquarters SPIN Unit. The background data is thoroughly reviewed to determine whether specific areas need to be explored, such as arrests, discharge from employment, and extensive foreign travel. This data is also closely examined in order to determine if the records of any particular Federal, State, or local agency should be reviewed. Checks are also initiated of records systems located at FBI Headquarters. The FBI is also working with the White House staff to develop a supplement to the standard background form (SF-86) which will provide additional information useful in conducting an investigation.

Before the request for investigation is forwarded to the field offices, FBI Headquarters establishes an investigative deadline for its completion. The FBI has engaged in discussions with the White House Counsel's Office to develop a balance between the need for a timely investigation and the constraints on FBI resources. Where extremely short deadlines are involved, an effort will be made to conduct a thorough investigation, but the White House will be informed if the short time frame necessitates a more limited inquiry. For Presidential appointments in general, the FBI imposes a deadline of 10 workdays (about 14 calendar days) on its field offices and attempts to have the completed results to the White House in 25 calendar days. These deadlines represent ideal time frames and must often be extended because of investigative problems which are encountered or administrative difficulties (such as availability of resources) which develop.

The request is forwarded by teletype to the field offices covering areas where the nominee has resided, gone to school, or been employed. Upon receipt, a search is immediately made of field offices' records, a case is opened, and assignment is made to an investigative agent. This agent conducts much of the investigation, but, if required to complete all the necessary work in a short time period, other personnel are assigned to assist. The agent prepares a communication to Headquarters containing the investigative results; the communication is reviewed by the field office supervisor prior to transmittal. The results from each field office are then reviewed and evaluated at Headquarters to ensure a thorough and complete investigation has been conducted.

Results of SPIN investigations are furnished to the White House Counsel's office in a summary memorandum, rather than in investigative reports, which is prepared at Headquarters based upon results sent in from field offices by teletype and report. The summary memorandum is then forwarded by courier to the White House.

The FBI has offered to provide full reports to the White House reviewing officials and is ready to make the detailed reports available whenever requested by them; at present, however, White House officials consider the summary memorandum to be adequate for their needs. A recent procedure has been introduced to forward to the White House with the summary memorandum the complete text of interviews containing derogatory information extracted from the full reports. When such information is provided, if the individual interviewed has specifically requested that his identity not be disclosed outside the FBI, that request is honored and the identity is not included in any materials disseminated.

The FBI has been engaged in an ongoing effort to ensure the thoroughness of SPIN investigations and to keep response time to the White House to the minimum. To make the process more efficient, the FBI is introducing word processing capabilities into this system and is also developing a computerized capacity to manage and monitor these investigations.

Investigative Process

The basic areas of inquiry in all applicant-type investigations, including SPIN, normally concern the individual's entire adult life and include information pertaining to birth and naturalization, education, marital status, arrest checks concerning close relatives, employment, military service, and credit and arrest checks, as well as the results of interviews of neighbors, references, and associates, and other interviews and checks as appropriate. In each type of investigation, the results are provided to the agency which made the request. Appendix B contains a more detailed outline of the scope of the investigation.

In addition, instructions have been issued by the FBI for investigations of Presidential appointments involving Senate confirmation to ensure that general and special indices at FBI Headquarters and in all field offices are reviewed. Further, a check is made of the Office of the United States Attorney in any district where the nominee has resided, gone to school, or been employed in an effort to resolve if Federal prosecutive action has ever been considered

concerning the nominee. In these, as well as other background investigations where an individual has been employed by the Federal Government, the Office of the Inspector General at the agency for which the individual works or worked is routinely checked.

Each investigation is somewhat tailored to the individual's background. Other variations in investigative activity involve principally the number of individuals who are normally interviewed. In most investigations, a minimum of 20 individuals having knowledge of the applicant are interviewed. In SPIN investigations involving Presidential appointments, the minimum is expanded to 35 interviews in order to obtain a broader perspective on the nominee.

If derogatory information is received, the FBI Manual of Investigative Operations and Guidelines contains instructions that such information be thoroughly investigated and resolved. Allegations should be traced to their original source. Such allegations are scrutinized at all levels of review to ensure that every effort has been made to verify or disprove the allegation. All investigative steps undertaken to resolve an allegation are reported to FBI Headquarters.

When allegations of criminal misconduct are received during a background investigation, the FBI has basically two courses to follow. If the information is sufficiently explicit to warrant a criminal investigation, then a separate case is opened under the substantive violation and is pursued independently of the background investigation. When the results of the background inquiry are forwarded to the requesting agency, notification of the pending criminal investigation would be made. If the information would not trigger a criminal investigation, then an effort is made during the background inquiry to resolve the matter either by developing sufficient data to warrant a criminal case or by disproving the allegation. The information developed would be appropriately reported to the requesting agency and, if pertinent, a prosecutive opinion may be obtained from the United States Attorney's Office and reported.

There are some areas of interest concerning a nominee for which the FBI does not have primary investigative responsibility. The FBI does not check IRS records in background investigations. The requesting agency contacts IRS directly, and the FBI is not involved in any exchange of information. In SPIN cases involving Presidential appointments, the FBI has not been tasked with investigating a nominee's sources of income. Financial statements are reviewed by White House personnel. If allegations or improprieties are developed from these reviews, however, the FBI would undertake the necessary investigation to resolve them.

Appendix C contains a copy of instructions in the FBI Manual of Investigative Operations and Guidelines which set forth the general level of investigation undertaken by the FBI in applicant inquiries requested by other Federal agencies. This manual is currently being revised to incorporate instructions concerning expanded investigation, to address other procedural changes, and to clarify existing instructions. The general scope, however, remains similar to that set forth in the attachment. A copy of the specific instructions pertaining to SPIN matters which supplement the general instructions is also included.

Summarization Process

As noted above, the information provided by field offices is reviewed at FBI Headquarters and condensed into a summary memorandum. The summary sets forth data under topical headings concerning birth, education (dates, schools, degree earned), employment (date, employer, position held), military service, family status, credit and arrest checks, and the identity of other Federal agencies checked. If information is favorable, a summary paragraph is prepared condensing into a few descriptive words or sentences the comments of persons interviewed, number interviewed, and their general category (reference, professional associate, neighbor, etc.). In Presidential appointee summaries, the identities of 8 to 10 persons interviewed are usually furnished.

If derogatory information is developed, it is set forth in the summary memorandum. If it is of particular significance, the information is orally provided to the designated White House officials before the written summary. If the individual who furnished the information requests confidentiality, his or her identity is concealed, but a description of the individual's association and basis for knowledge is included so that the reviewer can place appropriate weight on the information. In addition, favorable information which offsets the derogatory information is also included. Complete texts of interviews containing derogatory information are now being provided to the White House along with the summary memorandum.

SECTION III

CHAPTER IV: HISTORICAL BACKGROUND

A reexamination of the purpose of SPIN investigations and the obligation and scope of disclosure necessarily requires a historical review. Much of this history looks at the dissemination of the results of background investigations to the White House, the Department of Justice, and, sometimes, the Senate Committee responsible for confirmation. Although it focuses largely on SPINs of White House nominees, the treatment of background investigations on Departmental applicants is also considered at some length for the purpose of comparison and to place the SPIN process in a broader perspective.

White House Requests for Background Investigations

On August 13, 1945, the FBI received its first request from the White House to conduct a background investigation. Up to that time, the FBI conducted routine background investigations on only two categories of Federal applicants and employees. First, it conducted background investigations on all Department of Justice applicants, including U.S. Attorneys, U.S. Marshals, and Federal Judges. Second, during World War II, it was granted approval by the Attorney General to examine the backgrounds of applicants and employees in certain wartime agencies, such as the Office of Production Management. In addition, the FBI conducted loyalty investigations on applicants and employees of all other Federal agencies when there was a charge of subversive activity.

Although the Truman Administration initiated the practice of requesting White House investigations, it did not routinely make such requests; only 334 background investigations were asked for during its almost eight years in office. The Eisenhower Administration was the first to require background investigations on all top officials and White House staff members. In November 1952, the President-elect asked the FBI to investigate all his Cabinet appointees. In fact, he required his appointees to call Director J. Edgar Hoover and request their own investigations. He later extended this program to include all sub-Cabinet positions, most sensitive executive positions in government agencies when requested by the Cabinet members, and virtually all White House staff employees. In all, the FBI conducted approximately 3,500 background investigations on White House request during the Eisenhower Administration.

President Kennedy requested background investigations on 1,427 individuals during his 1,000 days in office, including all members of his Cabinet, except his brother Robert. In the first 11 months of the Johnson Administration, only 273 background investigations were requested, perhaps because so few Kennedy appointees were replaced during the transition. However, on October 15, 1964, Presidential Assistant Bill Moyers requested the FBI to conduct full-field investigations of all White House civilian personnel, regardless of rank or position, and to reinvestigate those individuals every three years. After that order, the FBI conducted more than 3,600 background investigations and reinvestigations for the Johnson Administration, including all Cabinet appointees except Postmaster General John A. Gronouski and Secretary of

Health, Education and Welfare Anthony J. Celebrezze. The policy of reinvestigating all civilian White House staff employees was reaffirmed in a letter from Philip Buchen, Counsel to President Ford, to Attorney General William Saxbe on October 25, 1974, and reinvestigation every three years was the policy through the Carter Administration. However, on July 27, 1982, Presidential Counsel Fred Fielding advised Bureau officials that the Reagan Administration will only request reinvestigation every four years.

The number of background investigations requested by the Nixon and Ford Administrations is not readily available at this time. In FY 1980, President Carter requested 767 background investigations on Presidential appointees, White House staff members, and National Security Council employees. In FY 1981, which includes parts of both the Carter and Reagan Administrations, 1,284 background investigations were requested by the White House; in FY 1982, President Reagan requested 950 background investigations.

Distribution Within the Executive Branch

Historically, when the Department of Justice or a Cabinet official has requested a background investigation, the FBI has provided the results of its investigation in the form of a compendium of agents' reports. However, when the White House has requested a background investigation, the results have been furnished in the form of a summary memorandum. As described in a memorandum written by Director Hoover, this practice was initiated by the Bureau "on its own motion" after President Eisenhower's election to avoid sending innumerable agents' reports to transition headquarters and various government departments. Because summaries were prepared for convenience and expediency, the Director hoped to discontinue the practice and return to providing reports once the bulk of the investigations were concluded. However, the White House came to prefer summaries and it appears that the FBI never returned to giving the White House investigative reports.

The FBI continued to provide the White House with a compendium of agents' reports only when a previous background investigation was brought up to date or when the White House requested a background investigation on an individual who had recently been the subject of a full-field FBI investigation initiated by someone other than the White House. However, even these exceptions were eliminated before the end of the Eisenhower Administration. Summaries were requested in the first situation in August 1955 by J. William Barber, Assistant to the Special Counsel to the President, and in the second by Presidential Assistant Sherman Adams in April 1957. Since that time, the White House has received summary memoranda in all full-field background investigations. The White House's desire to continue to receive summary memoranda was reaffirmed in November 1968 by Henry McPhee of President-elect Nixon's staff, and in Memoranda of Understanding agreed to by both Presidents-elect Carter and Reagan.

In March 1983, the White House agreed to an FBI proposal to supplement the summary memoranda furnished to the White House with the full text of interviews containing derogatory information. If the White House wishes to share these interviews with the Senate Committee considering confirmation, the FBI will further review the text to excise the name of any person who requested confidentiality and any information that might tend to identify that person. The identity of individuals who specifically requested that their name not be revealed outside the FBI will have already been concealed.

After reviewing the summary memorandum on its nominee, the White House occasionally has asked the FBI to conduct additional background investigation. Generally, these requests have been initiated by the White House, but, in a few instances, the Committee considering confirmation has asked for additional information and the White House has agreed to forward its request to the FBI.

During the Eisenhower years, FBI summaries prepared in background investigations requested by the White House on Presidential appointees were provided to both the White House and the Attorney General, and the full reports prepared in response to Cabinet officer requests for investigations were provided to the Cabinet officer, the White House, and the Attorney General. This practice ended at the beginning of the Kennedy Administration. In a January 24, 1961, FBI memorandum, Director Hoover approved a new policy that treated the Attorney General as any other Cabinet officer by providing him access only to reports of background investigations requested by the Department of Justice. The file is unclear as to whether this policy was carried out at the request of the White House or initiated by the FBI.

This policy changed again in September 1966 when Attorney General Nicholas Katzenbach requested copies of all FBI communications to the White House, the Vice-President, and Cabinet officers. He further instructed that if, for some reason, the Attorney General is not provided with such a copy, the correspondence should specifically state, "The Attorney General has not been provided a copy of this communication."

This policy was reversed again in January 1969 when President Nixon specifically requested Director Hoover to provide the results of background investigations only to him or his personal representative. Since this instruction countermanded any policy providing the Attorney General with copies of these results, it was deemed unnecessary to state on the summary memoranda that the Attorney General had not been furnished a copy. President Nixon's instructions were not interpreted to prohibit the Attorney General from being advised of criminal violations that may have been uncovered during a background investigation. The policy set forth by President Nixon constitutes the current practice of the FBI.

Furnishing Reports to Congress

White House Appointees

As set forth above, 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. A June 1954 FBI memorandum provides early evidence of the FBI's policy of not dealing directly with Senate Committees in these matters. At that time, a Committee requested the FBI's investigative summary concerning Presidential appointee Lawrence Quincy Mumford. Charles Willis, Jr., of the White House advised the FBI that the Committee should be referred to the Office of Presidential Assistant Sherman Adams, and was told by an FBI official that this was the FBI's usual procedure in such cases.

When President Nixon nominated Congressman Gerald Ford for the Vice-Presidency, Acting Attorney General Robert H. Bork sent letters to Chairman Cannon of the Senate Committee on Rules and Administration and Chairman Rodino of the House Committee on the Judiciary in August 1974 offering to provide the Chairman and the Ranking Minority Members of the Committees with access to the FBI investigative reports in their entirety, rather than summaries of the reports. However, he requested that access to these reports not be extended to other Committee members or staff members. In addition, all FBI materials would remain in the custody of Department of Justice officials, and no materials would be left with the Committee. Senator Cannon accepted these conditions, but Congressman Rodino did not, requesting instead that the reports be made available to him and seven other Committee members. Acting Attorney General Bork accepted the Congressman's conditions to avoid any delay in the confirmation hearings. He also noted that the Congressman had suggested he would subpoena the reports unless his request was honored. Similar procedures were reportedly employed in the confirmation of Vice-President Rockefeller.

On March 23, 1977, the Senate Committee on Government Operations in a report entitled "Study on Federal Regulations: The Regulatory Appointments Process" recommended that the Chairman of the Committee considering confirmation, the Ranking Minority Member, and a staff member designated by each be given access to "investigative findings" prepared by the FBI from its background investigation. The "investigative findings" appear to be the summary memoranda provided to the White House. The Committee specifically rejected the argument that sufficient safeguards cannot be developed to maintain the confidentiality of background information, noting that its proposal strictly limited the number of persons given access to this information. It also called for the creation of a Senate Office on Regulatory Appointment Investigations to provide independent background checks on all Presidential nominees to regulatory positions. The Director of this proposed office was to have access to FBI summaries to eliminate duplication and provide leads for further inquiries.1/

In June 1977, Senator Warren G. Magnuson, Chairman of the Senate Committee on Commerce, Science, and Transportation, asked the White House for a copy of an FBI summary memorandum on a Presidential nominee for Vice-Chairman of the Civil Aeronautics Board. At a meeting held at the White House to discuss this request, Deputy Associate FBI Director James B. Adams pointed out the FBI's longstanding concerns of protecting the innocent from unfounded allegations and maintaining a relationship of confidentiality with persons interviewed. It was noted at that meeting that the Ford and Rockefeller nominations were the only times members of Congress were permitted to review the results of FBI SPIN investigations. It was also noted that any change in procedure would have to be approved by the Attorney General. There is no subsequent record in the file indicating how this issue was resolved.

It is not clear from FBI files and personal recollections when the White House began to make these summaries available to the Committees. The understanding of the current White House Counsel's Office is that their predecessors in the Carter Administration permitted staff members of the Committee responsible for confirmation to review the FBI summaries at the White House. Notes were

allowed to be taken, but copies of the summaries could not be retained. President-elect Reagan's transition team permitted only the Chairman and Ranking Minority Member of the Committee considering confirmation to read the summaries in the presence of a member of the President-elect's Counsel's Office. As in the Carter Administration, notes could be taken, but copies could not be made. This procedure continues to be employed by the Reagan Administration.

The confirmation hearings on Secretary Raymond J. Donovan apparently represented the first occasion in which the FBI directly furnished the written results of a SPIN investigation to a Senate Committee. The White House requested the FBI to conduct a full-field investigation of Donovan on December 30, 1980. The next day, Chairman Orrin Hatch and Ranking Minority Member Edward Kennedy of the Senate Committee on Labor and Human Resources co-signed a letter to Director William Webster asking the FBI to provide them with a report regarding "all the information the FBI has already assembled in connection with your background investigation of Mr. Donovan" and "all matters relating to the prior Department of Justice inquiries relating to the Schiavone Construction Company or Mr. Donovan." In response to this letter, a one-page FBI letterhead memorandum on the connection between the Schiavone Construction Company and a company which had been the subject of an FBI investigation into possible Hobbs Act violations was transmitted to the Committee after being approved by the Department of Justice.

Meanwhile, the FBI delivered a summary memorandum of its SPIN investigation of Donovan to Conflict of Interest Counsel Fred Fielding on January 5, 1981, and a supplemental memorandum on January 12, the same day Donovan testified before the Committee. The next day, protected Government witness Ralph Picardo alleged that Donovan had paid him on 15 or 20 occasions to ensure "labor peace." A brief FBI report describing Picardo's allegations was provided to the Committee on January 14 after being approved by the Office of Legislative Affairs at the Department. A copy of the report was furnished to Fielding.

On January 15, the FBI briefed Committee staff members in detail concerning the Picardo allegations, and later that evening, two of the staffers interviewed Picardo at FBI Headquarters. Fielding attended the briefing, but did not join in the interview of Picardo. The information provided to the Committee staff at the briefing was summarized in a letterhead memorandum and, with the approval of the Office of Legislative Affairs, delivered to Senator Hatch on January 19 with a copy provided to Fielding.

During the additional investigation provoked by Picardo's allegations, Committee investigators provided the FBI directly with allegations they had received in the course of their independent investigation, apparently with the expectation that the FBI would follow up on them. The FBI, in fact, pursued these allegations when they reasonably could be resolved through appropriate investigation.

A 19-page summary memorandum describing the additional investigation the FBI had conducted on Donovan and the Schiavone Construction Company was approved by the Department of Justice on January 24 and furnished that day to Senator Hatch and Fielding. On January 27, at the second Senate hearing on Donovan's confirmation, a "sanitized" version of this summary memorandum

was placed in the record by Senator Kennedy, and Senator Hatch read portions of the report verbatim in questioning Committee witnesses. At this hearing, Executive Assistant Director Francis Mullen, Assistant Director Charles Monroe of the Criminal Investigative Division, and SPIN Unit Chief Anthony Adamski testified before the Committee regarding the results of the Donovan background investigation. A file review and interviews to date fail to disclose any prior occasion in which the Bureau cooperated to this extent with a Senate Committee in confirmation hearings.

Departmental Applicants

Different procedures have evolved for providing information to the Senate Judiciary Committee on Departmental applicants, i.e., U.S. Attorneys, U.S. Marshals, and Federal judgeships. In a letter dated April 30, 1941, to Congressman Carl Vinson, Chairman of the House Committee on Naval Affairs, Attorney General Robert Jackson reported that he has "taken the position that Committees called upon to pass on the confirmation of persons recommended for appointment by the Attorney General would be afforded confidential access to any information that we have -- because no candidate's name is submitted without his knowledge and the Department does not intend to submit the name of any person whose entire history will not stand light." 2/

Less than a year later, however, early in the tenure of Attorney General Francis Biddle, a dispute arose with the Judiciary Committee over its request to see the confidential FBI report on Pierson Hall, a nominee for a Federal Judgeship in California. At that time, Assistant to the Attorney General James Rowe, Jr., who acted as liaison to the Judiciary Committee, advised the Attorney General that the practice of his predecessor was, in rare cases, to show the report personally to an interested Senator on the Committee. He later learned from members of the Judiciary Committee that the general practice of his predecessor was to make the FBI files available to any Senator.

The arguments presented by the Department of Justice, the FBI, and the Judiciary Committee during that dispute have a familiar ring. Rowe called for a definite policy to be established for all FBI reports pertaining to Presidential appointments. He believed that furnishing members of Congress with FBI background investigation reports would destroy their value, because the public would quickly learn that the FBI could not ensure the confidentiality of their identity or their information. Attorneys would be especially reluctant to speak against a judicial nominee from their state if they believed that their comments would be seen by the sponsoring Senator. Moreover, FBI agents would adapt to the more extensive disclosure by preparing their reports with an eye on the prospective audience and supplementing orally their written statements.

Rowe specifically cautioned that "the Department of Justice cannot play favorites. If it is known -- and inevitably it becomes known -- that the Department has shown an FBI report in one particular field on a particular person to a member of Congress, the inevitable trend is that all reports on all matters must be shown to all members of Congress."3/ Rowe's concern about favoritism anticipated remarks he heard a few weeks later when the Judiciary Committee maintained that it was distinguishable from all other Committees. Rowe replied that he was agreeable to this point, but no other Congressional Committee would be. It is worth noting that Chairman Vinson

tried a similar approach a year earlier with Attorney General Jackson when he requested FBI criminal investigative reports concerning labor disputes involving naval contractors. The Attorney General's response mirrored that of Rowe:

> [A] policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee.4/

FBI Director Hoover concurred with Rowe's arguments and supported a policy of showing FBI reports "to absolutely no one outside the Department except, of course, the President."5/ He advised the Attorney General that, if a decision was made to forward reports to a Senate Committee or individual Senators, FBI agents interviewing persons regarding an applicant would have to inform them that what they say will not be treated confidentially, but will be forwarded to the Senate. He believed this would render FBI background investigations "very definitely incomplete and more or less sketchy." "I do not see that there can be any middle ground in this situation," he concluded.6/

The position of the Judiciary Committee, apart from protesting its uniqueness, was that it could not perform its confirmation function without the same information relied upon by the Attorney General in making his nomination. Its duty to confirm, it maintained, implied a right to see the FBI reports.

Attorney General Biddle disagreed with Rowe and Hoover, and worked out a procedure with the Judiciary Committee whereby a representative of the Department of Justice would appear before the Committee "and make frank disclosure of the material in the FBI reports, without indicating the sources from which the material was obtained." It was further agreed that "the members of the Committee would regard this material as completely confidential, and that if any material derogatory to a candidate was sufficiently serious, the Committee would through its own investigation develop such information at a public hearing, without revealing that the information originally came from FBI reports."7/

The first two nominations in which the new procedures were employed produced ominous forebodings. The first, involving Pierson Hall, was delayed by Senator McCarran because, as Rowe was informed confidentially by another Senator, McCarran was convinced that Rowe was withholding something from the FBI reports and wanted personally to read them in their entirety. In the second, concerning Thomas F. Meaney, Senator Austin took notes during Rowe's confidential discussion of the FBI reports and inserted those notes into the public record at an open Committee hearing. Rowe had earlier protested to Austin that his intentions were contrary to the agreement between the Attorney General and the Judiciary Committee, but the Senator responded that he did not feel bound by that agreement. In fact, after the Austin episode, Rowe recommended to the Attorney General that he rescind the agreement with the Committee. He drafted two letters for the Attorney General to Senator Van Nuys

complaining of Senator Austin's conduct. The first rescinded the agreement as "unworkable" and advised of a return to the "traditional practice of the Department of Justice that these reports be regarded as completely confidential, and available only to the President and the Attorney General."8/ The second letter asked that the agreement be strictly enforced by the Committee. The second letter was sent.

Although the agreement survived its shaky start, it apparently evolved into a practice whereby the investigative reports were made available to the Chairman of the Judiciary Committee and only occasionally to the full Committee. In one instance in October 1949 where portions of the reports were read to the Committee as a whole, the Senator sponsoring the judicial nominee was present at the briefings even though he was not a member of the Committee. Later, derogatory information from the reports appeared in columns written by Drew Pearson and Fulton Lewis, Jr. In a memorandum to the Attorney General dated October 19, 1949, Director Hoover wrote with regard to this situation:

> The task of obtaining accurate pertinent information during the course of investigation of individuals under consideration for judicial and other important Government positions is rendered most difficult when it is known that information which is obtained by this Bureau for the confidiential use of the Attorney General of the United States becomes available to unauthorized sources. More and more a definite reluctance has been encountered on the part of judges, other officers of the Court, prominent members of the bar and other individuals possessing pertinent information to comment upon the qualifications, or lack thereof, of an individual under consideration for a judicial appointment. Unless information furnished by such people can be maintained confidential it is understandable that these avenues will be closed to representatives of this Bureau in the future.
>
> It is suggested that if it is necessary for the results of an investigation conducted by this Bureau to be made available to the Senate Judiciary Committee or to any other Congressional Committee the reports should be carefully edited first and a closer control should be exercised over the information in order to prevent its dissemination to individuals who have no right to it.

Perhaps in response to Director Hoover's suggestion, the Department by the early 1950s made agents' reports available only to the Chairman of the Committee and furnished him as well with a summary prepared by the Deputy Attorney General's Office. In March 1953, the Attorney General challenged this practice at a luncheon briefing and stated that agents' reports should not be furnished to any Committee of Congress. Deputy Attorney General William Rogers responded that he concurred in principle, but urged that the policy not be changed at that particular time with respect to the Judiciary Committee Chairman. The Attorney General finally agreed to showing agents' reports to the Chairman of the Judiciary Committee provided they were read to him by an official from the Deputy Attorney General's Office and not left with him.

This practice appears to have continued virtually unchanged into and through the long Chairmanship of Senator James Eastland from 1957 to 1979. After a Presidential appointee was nominated, a liaison from the Department of Justice would meet alone with Eastland in the Senator's Office and brief him on any derogatory information in the file. The full file was taken along and Eastland was referred to relevant portions of it and permitted to read any other portions he was interested in. The file was taken back to the Department at the conclusion of the briefing. Eastland did not receive any copies or make notes from the file.

On several occasions other members of the Committee, or of the three-member subcommittee which handled confirmations, requested access to background investigation materials from the Department and were referred to Senator Eastland. Eastland sometimes asked the Deputy Attorney General for permission to share information with, or for the file to be made available to, the Ranking Minority Member of the Committee. Such requests were never refused.

Most of Senator Eastland's questions concerning a nominee were answered directly from the information contained in the reports. There was no formal Committee investigative staff through most of this period, although Eastland occasionally asked his staff counsel to check on certain information or made some phone calls himself. Senator Eastland very rarely asked for the FBI to conduct a follow-up investigation, but when he did, he was always accommodated.

The only known exception to this procedure occurred with the nomination to the Supreme Court of Justice John Paul Stevens in 1975. At Senator Eastland's request, the Department liaison gave a briefing for all interested members of the Committee. Although he brought the file with him, it was not reviewed by the members. Also, beginning in 1975, the Deputy Attorney General occasionally attended the briefings.

Sometime after President Carter assumed office in 1977, the three-member subcommittee was disbanded and the full Committee held confirmation hearings. Senator Eastland permitted Senator Dennis DeConcini to chair these hearings and to be briefed by the Department. The process was much the same with DeConcini as it had been with Senator Eastland. On at least two occasions, however, DeConcini was permitted by the Department liaison to retain a file overnight.

Senator Edward Kennedy succeeded Senator Eastland as Chairman of the Judiciary Committee in January 1979. At about the same time, the Omnibus Judgeship Act, enacted in 1978, created 152 judgeships and greatly increased the confirmation workload of the Committee. In addition, President Carter's establishment in 1978 of a Circuit Judge Nominating Commission to implement a merit selection system appears to have increased the Judiciary Committee's interest in the manner and criteria of judicial selection.9/

With these changes in the workload and interest of the Committee came a significant revision in the procedures governing Committee access to the results of FBI background investigations. Senator Kennedy, early in his tenure as Chairman, reached an oral agreement with Attorney General Griffin Bell

which contemplated that the Chairman, Ranking Minority Member, and an investigator designated by each would review the reports at the Department of Justice. By letters to the Attorney General dated February 9 and 16, 1979, Chairman Kennedy and Ranking Minority Member Thurmond each designated an investigator as the person who would have access to the FBI reports and other relevant Department of Justice files. By response to each, dated March 2, 1979, Attorney General Bell stated that the Associate Attorney General's Office would provide these designees with access to the reports for all Department of Justice nominees requiring confirmation.

In practice, Senator Kennedy sent six or seven staff members, while Senator Thurmond sent only his investigator. These representatives from the Committee were permitted to make notes or use dictaphones, but could not make copies of the file. In addition, the Committee member who was to chair the hearing was permitted to have access and sometimes was given briefings.

Requests for additional investigation by the FBI were made directly to the Department or were referred to the Department by the FBI and were usually accommodated. In at least one instance, however, such a request was denied. By letter dated June 11, 1979, Senator Kennedy requested additional investigation of a particularly controversial judicial nominee. The Department refused, stating that it was satisfied with the investigation. It offered, however, to detail an FBI agent to the committee if it lacked sufficient resources to conduct its own investigation. The offer was accepted and an agent was detailed to the Judiciary Committee from approximately June 1979 to February 1980 where he reported to the Chief Investigator and reviewed the background investigations on this and approximately seven other nominees.

At the beginning of the Reagan Administration in January 1981, Senator Strom Thurmond became Chairman of the Judiciary Committee. During Attorney General William French Smith's confirmation hearing on January 15, 1981, Senators Thurmond and Biden stressed the importance of Committee access to the results of background investigations and asked whether Smith would permit the Committee to keep the files in a locked room to which the Chairman and Ranking Minority Member and one person from each of their staffs would have access. The Attorney General declined to make a commitment, but promised to work towards a mutually satisfactory arrangement.10/

The arrangements were subsequently worked out along the lines the Senators had suggested. The files now are sent to the Committee after the nomination and kept in a vaulted room under the direct control of the Committee's Chief Investigator, Duke Short. Under the agreement, Chairman Thurmond, Short, Ranking Minority Member Biden, and one staff member designated by Biden have access.

In a few cases, the Chief Investigator has asked the Department of Justice for additional information or investigation. Such requests have generally been accommodated in some fashion. For instance, when the Committee asked that an FBI agent be detailed to the Committee to assist in the investigation of a particular nominee for U.S. Attorney, the FBI instead conducted additional investigation for the Department and the results were shared with the Committee.

Attempts to Further Formalize Procedures

A number of efforts have been made to impose formal, written rules on the initiation of White House background investigations and the dissemination of the results, but none have proved enduring. The "White House Personnel Security Procedures," prepared by the FBI on October 27, 1964, recommended that all requests for White House investigations, including up-dated investigations, should be in writing and forwarded to the FBI by the White House Personnel Security Officer. In a letter dated November 17, 1964, President Johnson agreed to this recommendation and designated his Associate Counsel as White House Security Officer.

Guidelines on "White House Personnel Security and Background Investigations" were prepared in 1975 and 1976 by the Attorney General's Committee on Guidelines for FBI Information-Gathering and Retention Policies. These Guidelines (see Appendix D), which for the most part merely formalized existing Bureau procedures, provided that requests by the White House for full-field background investigations had to be made or confirmed in writing and the official initiating the investigation had to be specified. The request had to be accompanied by a statement signed by the subject of the investigation acknowledging his consent. Information obtained from field investigations requested by the White House was to be furnished to the White House, and the FBI was requested to keep a record of all persons to whom such information was furnished. Access to the investigative files, reports, and summaries was to be carefully restricted to persons with a need to know, and records were required to be maintained listing all persons who requested access. Unless there was some indication that the person under investigation may have committed a crime, the results of the background investigation could not be disseminated outside the White House without the express approval of the President or his Counsel or Associate Counsel. These guidelines were never officially promulgated, however, because they placed restrictions on the White House that could only be imposed by Executive Order, but the FBI continues to adhere to their general principles.

An Executive Order setting forth similar procedures was submitted by the Associate Counsel to the President in March 1975, but never signed by the President. This proposed two-page Order, entitled "Requests for Security Investigations, Inspection of Investigative Files and Use of Investigative Information," permitted the FBI to initiate a background investigation on a Presidential appointee only on the request of the Counsel or Associate Counsel to the President made through the White House Security Office, with the approval of the candidate for appointment. Inspection of background investigative files was limited to the Counsel and Associate Counsel to the President, and others designated by the President. Disclosure of background investigative information was limited to those involved in making Presidential decisions concerning personnel matters, and any additional disclosure was prohibited without the express approval of the President or his Counsel.

Restrictions similar to those contained in the proposed Executive Order and Attorney General Guidelines were agreed to during the transition of both Presidents-elect Carter and Reagan via virtually identical Memoranda of Understanding with the FBI. However, these Memoranda of Understanding expired upon the inauguration of the Presidents-elect. Moreover, neither these Memoranda of Understanding nor the proposed Executive Order and Guidelines considered the issue of Congressional access to results of FBI background investigations. (Appendix E contains a copy of the Memorandum of Understanding between President-elect Reagan and Attorney General Civiletti.)

FOOTNOTES

1/ Study, pp. 184-185.

2/ 40 Op. A.G., 45, 51.

3/ Internal Department of Justice Memorandum from Assistant to the Attorney General James Rowe, Jr., to the Attorney General, March 4, 1942 (emphasis in original).

4/ 40 Op. A.G. at 50-51.

5/ Internal FBI memorandum from Director Hoover to the Attorney General, March 7, 1942.

6/ Internal FBI memorandum from Director Hoover to the Attorney General, March 25, 1942.

7/ Letter from the Attorney General to Senator Van Nuys, May 26, 1942.

8/ Proposed letter from the Attorney General to Senator Van Nuys, May 26, 1942.

9/ See Hearing before the Committee on the Judiciary, "Selection and Confirmation of Federal Judges," U.S. Senate, 96th Congress, 1st Session, January 25, 1979.

10/ Hearing before the Committee on the Judiciary, U.S. Senate, 97th Congress, 1st Session, January 15, 1981.

SECTION IV

THE RELATIONSHIP BETWEEN THE WHITE HOUSE AND THE FBI, AND THE WHITE HOUSE AND THE SENATE

At the core of a reexamination of the conduct of Special Inquiry background investigations lies the need to better understand the relationships between the White House and the FBI, and between the White House and the U.S. Senate. The purpose of this chapter is to review both of these relationships.

Relationship Between the White House and the FBI

With two major exceptions, the President has delegated to his Counsel's Office the responsibility for reviewing FBI SPIN reports and making recommendations concerning the background and qualifications of potential nominees. The exceptions involve nominations for ambassadorships, which have been delegated to the Secretary of State, and for judgeships, U.S. Attorneys and U.S. Marshals, which have been delegated to the Attorney General. Yet, even with these exceptions, the final recommendations of each Department are subject to de novo review, when appropriate, by the Counsel to the President. The Department of Justice, except in unusual circumstances, plays no role in the SPIN process; rather, there is a direct relationship between the White House Counsel and the FBI.

The FBI's objective in SPIN inquiries is to conduct a thorough investigation of the background of prospective senior Executive Branch officials, and to provide the results to the White House Counsel in a form that can be easily but effectively reviewed. The investigation focuses principally upon the character, associations, reputation, and loyalty of the nominees. In essence, the report should identify any potential problem areas in the candidate's background so that they may be considered as part of the total evaluation of the individual's qualifications to hold high public office.

Notwithstanding the FBI's experience of more than three decades in conducting background investigations on Presidential nominees, certain misunderstandings concerning SPIN inquiries can occur between the White House and the FBI. Inasmuch as Executive Branch routines and relationships with respect to the SPIN process largely take shape during a Presidential transition and in the first months of a Presidency, this period must be the focal point of any effort to clarify or improve the process.

The members of each President-elect's Transition Team and the White House staff of a newly inaugurated President are often new to the Washington environment, and unfamiliar with the details of the appointments process. They are faced with enormous pressures to process a large volume of applications, identify nominees, and put the new Administration in place as rapidly as possible. Moreover, they are constrained to avoid or minimize premature publicity about potential nominees.

The pressures of a Presidential transition are shared by those in the FBI responsible for conducting SPIN inquiries. They must conduct hundreds of background investigations on high-level nominees during the first year of the

new Administration. This is a tremendous burden; in Fiscal Year 1981, which covers most of President Reagan's first year in office, the FBI conducted 1,329 SPIN investigations using 50.5 agent work-years. The burden is made even greater by the short deadlines often imposed. When the Transition Team and White House officials settle on a nominee for an important or controversial position, they usually want the background investigation completed promptly so that the President can begin his term with his own team in place. When a nomination must be confirmed by the Senate, a date for a Committee hearing may be set even before the background investigation has begun. Sometimes, short deadlines are set by the Transition Team and White House staff to lessen the risk that news of the appointment will leak before it is announced or that erroneous rumors will gain currency.

The imposition of short deadlines inevitably has an impact upon the conduct of a background investigation. When the Transition Team requests the FBI to do in 5 days what generally takes 14, it must recognize that it is getting a "best efforts" investigation. Perhaps most troubling, this effect may not be observable to those unfamiliar with background investigations, because it may result from subtle shortcuts rather than glaring omissions. For instance, interviews that would generally be conducted in person may be handled by telephone, where an individual may be less likely to be candid and open. Leads that are not likely to be productive, but conceivably may open new avenues of investigation, are less likely to be pursued.

The problem of short deadlines points to a more fundamental issue in the SPIN process--the different institutional interests of the FBI and the Transition Team. The FBI's interest is to conduct a high-quality SPIN investigation and provide the results in a clear, complete, and timely manner to the Transition Team. It is not interested in whether or not the report is favorable to the nominee, as long as it is accurate and fair. The Transition Team, of course, is deeply interested in the content of the report; it does not want to nominate an individual who will embarrass the President or not serve him with integrity. However, before an individual's name is provided to the FBI for background investigation, his credentials and talents have already been carefully examined by the Transition Team and found worthy of consideration for an appointment. Once this decision is made, the background investigation may be treated as a procedural hurdle to be overcome without complications, particularly if they result in delay and controversy. Ideally, the Transition Team should view the background investigation as an opportunity for a more informed selection and not merely as a necessary formality in the selection process.

This difference in institutional interests is most pronounced when a background investigation is requested after public announcement of the nominee's name. A Common Cause critique of the nomination process in the Carter Administration addressed this phenomenon. It cited a Senate staff member's criticism that, once a decision to nominate someone had been made by the President, the Counsel's Office was placed in a defensive posture and became an advocate for the nominee, a process that did not lead to meaningful scrutiny.1/ Moreover, individuals may be more reluctant to provide the FBI with information adverse to the nominee if the President has already formally

declared his selection. For these reasons, premature public announcement is discouraged by the White House Counsel's Office, but it can sometimes not be helped, such as when an official is removed and his replacement must be immediately named or when false rumors of an appointment create a political problem for the Administration.

Another major problem faced during transition is that the Transition Team handling this onslaught of appointments generally has little or no benefit of the experience gained by earlier White House staffs in reviewing SPIN reports and making applicant determinations. As a result, each new Transition Team and White House staff must be told anew about the scope and depth of a SPIN investigation, so that they understand what it is--a series of interviews and record checks--and what it is not--a certification that the nominee is fit to hold office. They must be advised how to assess the reliability and knowledge of confidential sources providing derogatory information, and they must be informed that the FBI can seek to resolve their questions either by providing them access to more detailed investigative reports or by conducting additional investigation. Moreover, they should understand their prerogative to request the FBI to broaden its SPIN investigation beyond its usual confines to focus on certain areas of concern for a particular nominee, such as potential conflicts of interest.

The FBI in the past has briefed relevant Transition Team members concerning the SPIN process, but the briefings do not appear always to have achieved the necessary degree of understanding. It would be helpful if the FBI prepared a detailed briefing book describing the SPIN process and the relationship between the Transition Team and the FBI. The oral briefing provided by the Bureau could then correct misunderstandings, answer questions, and build the personal rapport that will be essential during this critical time. The Section Chief and Unit Chief in charge of SPINs must continue to be available to the Transition Team on a daily basis.

One additional measure might be taken to enhance the White House's understanding of the SPIN process. At the present time, senior officials of different offices within the Department of Justice have separate responsibility for the review of individual categories of DAPLI reports, for example, judgeships and U.S. Attorneys. No one official in the Department has an overall review role or central coordinating responsibility. If one official was selected to provide a central point of control within the Department for DAPLI reports, his experience and insight would also be available to the White House Counsel's Office if it sought his advice. Of course, this DAPLI coordinator would play solely an advisory role in SPIN nominations and would not supervise, coordinate, or review SPIN investigations or reports.

The problems of short deadlines and misunderstandings grow less serious after the early months of an Administration; by then, the pace of new appointments slackens and the Counsel to the President becomes more accustomed to the SPIN process. However, one problem that does not face the Transition Team emerges once the new President takes office--the absence of a formal document governing the authorization of a SPIN investigation, the steps taken to protect the privacy of SPIN reports, and the safeguards provided for those interviewed who requested confidentiality. The formal document could be in the form of a memorandum of understanding, or possibly an Executive Order or other official guidelines.

Each of these areas was covered during the transition periods of both Presidents-elect Carter and Reagan by a Memorandum of Understanding signed by the President-elect and the Attorney General. The Memorandum of Understanding protects against background investigations being requested for improper purposes by requiring the request to be in writing from the President-elect or his designee, and to be accompanied by the written consent of the person to be investigated. It protects against the unnecessary dissemination of SPIN reports by restricting access to the material to the President-elect, his designated representatives, and others directly involved in deciding the individual's suitability for the position. To give teeth to the need-to-know requirement, it prohibits copies to be made of the reports, mandates that records be kept of who is given access, and requires the reports to be returned to the FBI if a decision is made not to employ the candidate. Finally, the Memorandum of Understanding recognizes the interest of those interviewed in confidentiality and the importance of such confidentiality to the success of a background investigation by promising to keep identifying information confidential to the extent permitted by law.

However, the Memorandum of Understanding does not apply beyond the transition, and efforts to replace it with an Executive Order have not been pursued. Guidelines were formulated under Attorney General Levi, but they were never enacted by Executive Order. Fortunately, the absence of an Executive Order has not yet created significant problems, because both the White House and the FBI informally follow the procedures embodied in the Memorandum of Understanding. Yet, there remains a need for such a document to serve as a safeguard against possible misuse and as a formal statement of the role and responsibilities of each participant in the SPIN process.

Relationship Between the White House and the Senate

As described in Section I, the appointment of such high Government officials as Cabinet Secretaries, Ambassadors, and Judges requires the President to nominate and the Senate to confirm. To perform these separate constitutional roles, the President and the Senate each need accurate and candid information about the character and integrity of the nominee. It is the FBI's task to investigate the background of the nominee and provide this essential information. TO THE PRESIDENT

The need of the President and the Senate for the results of the FBI's investigation, however, must be balanced with two other important considerations--the nominee's interest in not having his reputation damaged by unsubstantiated allegations which may arise during the background investigation and the interest of those interviewed in not having their identities revealed. These latter interests are consistent with the larger institutional interests of the White House and the Senate. Leaks of information that unfairly challenge the integrity and reputation of nominees harm the innocent and discourage individuals of ability from accepting positions in Government. Breaches of promises of confidentiality injure those individuals who often were most candid in discussing the nominee and make future background investigations less effective by discouraging that candor in others.

Unfortunately, individuals in both the White House and the Senate may sometimes lose sight of these larger interests in focusing upon transient political or personal interests, and publicly reveal information that should best remain private. The Transition Team, in its Memorandum of Understanding with the Attorney General, has sought to limit this danger by imposing the restrictions cited above.

The safeguards of limited access and accountability provided in the Memorandum of Understanding should be adopted by the White House and the Senate in a formal agreement governing the consideration of all advise-and-consent nominations. These matters are too important to be left to informal understandings or ad-hoc agreements with different Committee Chairmen. Moreover, for many nominations, time is of the essence, and an agency should not be left without leadership while the White House and the confirming Senate Committee hammer out their differences concerning access to background material. A single agreement, signed by the President and approved by the Senate, should govern the manner in which every Committee receives and protects information regarding the background of an advise-and-consent nominee.

Currently, the FBI provides the Office of the Counsel to the President with a summary memorandum reporting the results of the SPIN investigation and with the full text of interviews containing derogatory information. Once this information is provided to the White House Counsel, the FBI's role in the nomination ends, unless, of course, additional information or investigation is requested. The FBI plays no part in providing the necessary information to the Senate; that task is handled by the White House Counsel. If the full text of derogatory interviews is provided to the Senate, the FBI should have an opportunity to excise the text to protect the confidentiality of the individuals interviewed.

It is essential to preserve the FBI's role as an impartial, nonpartisan investigator providing background information to the President concerning a political nominee for high office. First, it is only fair that the President have the benefit of this information before it reaches the Senate. He enjoys the constitutional prerogative to nominate, and he deserves the opportunity to study the SPIN report and decide whether to pursue the nomination or withdraw it. Only if he decides to pursue it need the information be provided to the Senate. Second, the FBI should not be asked to provide SPIN information directly to the Senate. The appointment of an advise-and-consent nominee requires the interplay and ultimate agreement of the White House and the Senate. If the Senate believes it needs additional information to carry out its advise-and-consent function, it should request such information from the White House. If the White House concurs, it can request the FBI to provide it with additional information and pass on this information to the Senate. If it demurs, it can negotiate a satisfactory arrangement with the Senate, recognizing that the fate of the nomination may lie in the balance. The FBI should not be drawn into this essentially political dispute. The 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.

Similarly, the FBI should not be requested by the Senate Committee considering confirmation to testify regarding the background investigation of the nominee. Such testimony almost inevitably places the FBI in the uncomfortable and untenable position of being asked to characterize the fitness of the nominee. The FBI investigates the background of a nominee; it is neither its role nor does it have the special expertise to determine his fitness for office. Such a determination must be left to White House officials and the Senate on the basis of information provided by the FBI. Moreover, it is extremely difficult for an FBI official during Senate testimony to answer questions candidly and completely, and, at the same time, protect the identity of confidential sources. This delicate task is best performed in writing, where words can be chosen more carefully and agents involved in the background investigation can examine the work product to ensure that the identities of sources cannot be determined from the information provided. Putting all information in writing also means that the White House can effectively serve as the conduit for both the questions and the answers, thereby giving the President the benefit of the information before it goes to the Senate and protecting the FBI from being caught in the middle of a political dispute.

FOOTNOTES

1/ Bruce Adams and Kathryn Kavanaugh-Baran, Common Cause, Promise and Performance: Carter Builds a New Administration (Lexington, Massachusetts; Toronto: Lexington Books, D.C. Heath and Company, 1979), p. 94.

SECTION V

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

The FBI and the White House have developed a workable arrangement for investigating the backgrounds of Presidental nominees.

A request for a background investigation is made in writing by the Office of the Counsel to the President, accompanied by appropriate waivers from the prospective nominee. This request specifies whether or not the position is subject to Senate confirmation. The scope of the basic SPIN inquiry is formally set forth, but the White House has the opportunity to state more precisely its requirements or priorities in particular cases.

The FBI imposes a usual deadline of 10 workdays on its field offices to complete the SPIN investigation and attempts to provide the White House Counsel's Office with the results of the investigation in 25 calendar days.

The results of SPIN inquiries are furnished in a summary memorandum supplemented with the complete text of interviews containing derogatory information. The names of those who requested that their identity not be disclosed outside the FBI are not furnished to the White House. The White House Counsel's Office may request the FBI to conduct additional investigation if deemed necessary, or may ask to review the investigative reports, albeit with appropriate safeguards to preserve the confidentiality of sources. The FBI provides assistance to the White House in assessing the weight to be given to information furnished by persons afforded confidentiality.

When the President decides to present the nomination to the Senate for advice and consent, the White House Counsel provides the appropriate Senate Committee with the FBI background information necessary to make an informed decision about confirmation.

These procedures are sensible and should be continued. However, shortcomings and misunderstandings remain in the SPIN process which need to be addressed as recommended below.

Recommendations

1. Formalization of Procedures

There have been a number of attempts over the years to formalize SPIN procedures, including the preparation of guidelines and the drafting of an Executive Order, but none have been formally implemented. The only exceptions have been pre-inaugural Memoranda of Understanding between the President-elect and the Attorney General, which have no formal application beyond the transition period.

The absence of an Executive Order has not yet created significant problems, because both the White House and the FBI informally follow the procedures embodied in the Memorandum of Understanding. Yet, there remains a need for such a document to serve as a safeguard against possible misuse and as a formal statement of the role and responsibilities of each participant in the SPIN process. Formalization of mutually agreed-upon procedures, which could either be modified or adopted in whole by each incoming Administration, would help in resolving misunderstandings which have arisen over the use and interpretation of SPIN inquiries, as well as permit a degree of flexibility over time.

Recommendation: Procedures governing the initiation of background investigations of White House nominees and dissemination of the results should be established by Executive Order and appropriate Attorney General Guidelines.

2. Investigative Deadlines

The Transition Team and the staff of a newly inaugurated President are faced with enormous pressures to process a large volume of applications, identify nominees, and put the new Administration in place as rapidly as possible. These pressures are shared by those in the FBI responsible for conducting SPIN inquiries. Hundreds of background investigations on high-level nominees are conducted during the first year of a new Administration. This is a tremendous burden, one that is made even greater by the short deadlines often imposed.

When the Transition Team and White House officials settle on a nominee for an important or controversial position, they usually want the background investigation completed promptly. When a nomination must be confirmed by the Senate, a date for a Committee hearing may be set even before the background investigation has begun. Sometimes, short deadlines are set by the Transition Team and White House staff to lessen the risk that news of the appointment will leak before it is announced or that erroneous rumors will gain currency.

The imposition of short deadlines inevitably has an impact upon the conduct of a background investigation. When that happens, the Transition Team must recognize that it is getting a "best efforts" investigation.

Recommendation: To the extent possible, the White House Counsel's Office should avoid the imposition of short investigative deadlines and allow adequate time for complete and comprehensive background investigations of all nominees.

3. Scheduling of Confirmation Hearings

The White House Counsel's Office comes under particular pressure when a background investigation is requested after public announcement of the intended nomination or when confirmation hearings on the nominee have been scheduled prior to completion of the background investigation. Reviewing officials in the White House may be forced prematurely into a defensive posture or an advocacy position on behalf of the nominee. From the FBI's perspective, an individual being interviewed may be more reluctant to provide information potentially adverse to the nominee if the President has already formally declared his selection.

Recommendation: As a general rule, the name of a nominee should not be formally announced nor should confirmation hearings be scheduled until the White House Counsel's Office has had an opportunity to review the results of the background investigation.

4. Formal White House-Senate Agreement

The constitutional arrangement regarding Presidential appointments clearly contemplates a spirit of accommodation and cooperation between the Executive and Legislative Branches. Therefore, the policies governing the President's submission of nominations to the Senate, and the scope of the background information which is provided, must take into account the sharing of power which governs the appointment process.

To perform their respective constitutional roles, the President and the Senate must have accurate information about the character and integrity of a nominee. These needs, however, must be balanced both with the nominee's concern that his reputation not be damaged by unsubstantiated allegations and with the sensitivity of those interviewed to not having their identities revealed.

The safeguards of limited access and accountability are too important to be left to informal understandings or ad hoc agreements with Committee chairmen. An agreement signed by the President and approved by the Senate should govern the manner in which every Committee receives and protects information regarding the background of a Presidential nominee.

Recommendation: Each Administration should reach a formal agreement with the Senate through which all SPIN material necessary for the fulfillment of the "advise and consent" function would be provided under conditions which secure the confidentiality of all sensitive information, sources, and methods.

5. Role of the FBI

The Donovan matter resulted in the unprecedented occurrence of FBI officials testifying at the Senate confirmation hearing as to the conduct and results of a background investigation. This case was also unique in two other respects. It was the first time that the FBI has furnished such information directly to the Senate, rather than by way of the White House, and it was the first occurrence of Senate committee staff members being permitted to interview an FBI source in a background investigation.

It is essential to preserve the FBI's role as an impartial, nonpartisan investigator providing background information to the President concerning a political nominee for high office. This is best accomplished when 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. The appointment of an advise-and-consent nominee requires the interplay and ultimate agreement of the White House and the Senate. The FBI should not be drawn into this essentially political dialogue. The 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.

Nor should the FBI be requested by the Senate Committee considering confirmation to testify regarding the background investigation of the nominee. Such testimony almost inevitably places the FBI in the uncomfortable and untenable position of being asked to characterize the fitness of the nominee. The FBI investigates the background of a nominee; it is not its role, nor does it have the special expertise, to determine his fitness for office. Such a determination must be left to White House officials and the Senate on the basis of information provided by the FBI.

Recommendation: The FBI should be neither expected nor requested to provide background information from SPIN investigations directly to the Senate. The Senate should obtain the information it requires directly from the White House in accordance with mutually satisfactory agreements.

6. Departmental Applicant Coordinator

The Department of Justice has traditionally played no role in the SPIN process; the relationship has always been a direct one between the White House and the FBI. It is the Committee's view that this relationship be continued.

The Department of Justice has had, however, a longstanding responsibility for the review of individual categories of Departmental Applicant investigative reports, e.g., for judgeships and U.S. Attorneys. This responsibility has been decentralized within the Department, with no single office or individual having an overall review role or central coordinating function. If such an official were designated, there would result not only inherent advantages for the Department's internal review process, but also for the White House Counsel's Office should advice on such matters be sought.

Recommendation: The Department of Justice should designate an individual as a central review and coordination official for the Departmental Applicant process.

APPENDIX A-1

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

June 22, 1982

Honorable William French Smith
The Attorney General
Washington, D.C.

Dear Mr. Attorney General:

In personal discussions with you, I have expressed my concern about changing perceptions of the nature of a Special Inquiry (SPIN) on Presidential nominees and the need for a reexamination of the purpose and procedures under which such inquiries take place. I now request your guidance and direction in establishing a Departmental study committee to review the SPIN process.

Historically, SPIN investigations are conducted at the request of the White House or incoming Administration pursuant to a Memorandum of Understanding between the Attorney General and the President-elect. They are usually conducted on a very short time frame established by the White House or incoming Administration, as the case may be. They consist principally of running FBI indices, checking with other Government agencies with whom the nominee may have had a past association, and conducting a series of interviews, leads for which are initiated from a nominee's resume prepared by the nominee. Additional leads are then developed and additional interviews are conducted. Primary emphasis has been upon information pertaining to character associates, reputation and loyalty. Credit checks may be conducted, but financial information is usually obtained by the White House through other sources.

In the past, the information developed in this manner has been furnished in summary form on letterhead memorandum to the designated official in the White House. Additional informatio

is furnished as requested or as it comes into the FBI and is pertinent to the inquiry. It has in the past been the responsibility of the White House to determine the manner and extent to which this information is available to the Committee considering the confirmation. Senate investigators are free to conduct follow-up or independent investigation if they are instructed to do so by their committee. I am advised that the Donovan hearing is the first occasion in memory in which an FBI Agent was called upon to provide testimony to the committee or express a view as to the content of the investigation. Thus the committee appears to have cast the FBI in a different role than it has been accustomed to in the past and raises significant questions about the obligations and scope of disclosure.

If a "best efforts" inquiry on relatively short time frame to assist the President in his nominating function is to be receive in the Senate as a certification of completeness, then it is obvious that a change in procedures must take place, including in some cases the application of additional time and resources. Considerable thought must be given to the handling of unproved derogatory information. Past history dictates that the FBI must not be associated with the dissemination of non-pertinent, unproved scurrilous information. Substantially better procedures must be developed with Senate committees to safeguard the integrity of the process.

The FBI is prepared to be fully responsive to our responsibilities in this area, but it is apparent that there are differing perceptions of the nature and scope of that responsibility. That may well go even to the nature and scope of the advise and consent function.

I therefore request your guidance and suggest that the first step might be the formation of a study committee within the Department and including appropriate representatives of the FBI.

Respectfully,

William H. Webster

William H. Webster
Director

Office of the Attorney General
Washington, D. C. 20530

June 25, 1982

Honorable William H. Webster
Director
Federal Bureau of Investigation
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Bill:

Thank you for your letter of June 22, 1982, suggesting that a study committee be formed within the Department of Justice to review the purpose of and procedures followed in Special Inquiries on Presidential nominees (SPIN).

I agree that reexamination of this process is warranted in the light of changing perceptions about its nature and scope. Your suggestion that a Departmental study committee be formed is an excellent one and will be promptly acted upon.

I am, therefore, asking Associate Deputy Attorney General Stanley Morris, who will chair the committee, to proceed expeditiously. The committee membership will include representatives from the Attorney General's office, the Associate Attorney General's office, the Director of the Executive Office for United States Attorneys, a representative of the Office of Legal Counsel and two representatives, designated by you, of the Federal Bureau of Investigation. The committee will report its findings and recommendations to me within 60 days of its first meeting.

I am confident that this committee will greatly assist us in clarifying the issues and in finding solutions for any problems that may exist.

Sincerely,

Bill

William French Smith
Attorney General

FBI BACKGROUND INVESTIGATIONS CONDUCTED AT THE REQUEST OF THE WHITE HOUSE: SCOPE AND AREAS OF COVERAGE

Scope

Entire adult life, usually commencing with graduation from high school. Occasionally, however, the FBI does investigate the period during which the applicant was in high school, when so requested by The White House. If the FBI has previously conducted a full-field applicant-type investigation concerning the applicant, it will cover the period since the prior investigation. At the specific request of The White House, the FBI does update work of other agencies.

Areas of Coverage

Birth. Verification of date and place of birth. This is normally done from school, employment, military or other records. If a discrepancy is found, or some particular reason exists, the FBI will check vital statistic records.

Naturalization. Court and/or INS records are checked if applicant and/or present spouse was/were not U.S. citizens at birth. The FBI normally does not conduct such investigation concerning other close relatives.

Education. Attendance and degrees earned at all institutions of higher learning are checked. In White House cases, the FBI verifies high school attendance, no matter how long ago, if there was no education beyond high school. Instructors and fellow students, if identifiable, are interviewed.

Marital Status. Marriages are not verified; however, divorces are. Divorced spouse(s) of applicant are interviewed if their locations are known.

Employment. Generally all employments are verified, and periods of unemployment are accounted for. Supervisors, co-workers, and subordinates are interviewed.

Military Service. Service record is checked. Interviews will normally be conducted at any places of assignment within a period of approximately three years prior to the investigation.

Neighborhoods. Interviews are conducted in neighborhoods of residences for preceding five-year period. Occasionally, the FBI does not conduct neighborhood inquiries during investigations of highly prominent persons.

References and Associates. All listed references and associates (normally a total of six on SF 86) are interviewed.

Other Interviews. In Presidential cases, the FBI attempts to interview a total of not less than thirty to thirty-five persons (including persons in the categories previously mentioned) who are in position to knowledgeably comment concerning the appointee. In staff and access cases, the FBI strives for approximately twenty interviews. These totals are appropriately scaled down in "update" investigations.

Credit Checks. Records of credit bureaus covering all places of residence, employment and education for the last seven years are checked.

Arrest Records. Records are checked at all places of residence, employment and education for the entire adult life.

Close Relatives. Defined as spouse, parents, siblings, and children. Records of law enforcement agencies, covering current places of residence of adult close relatives are checked. The Bureau also checks FBI field office files covering places of current residences.

National Agencies. Division of Personnel Investigations, Office of Personnel Management; United States Secret Service, and FBI central files and Identification Division are checked in all White House cases. Other agencies will be checked depending upon appointee's employment/military background.

Miscellaneous. Normally, no investigation is conducted in areas other than the fifty States, U.S. Possessions, and occasionally in Canada if appointee has had significant educational or employment experiences in Canada. Records of CIA are checked if appointee has studied or been employed abroad for significant periods of time.

Updated Investigations. Essentially, in updates, the FBI verifies all educational, military and employment activity occurring since prior investigation. A divorce since prior investigation is checked and former spouse interviewed. Credit, arrest, national agency and FBI record checks are brought up to date. Neighborhood, reference and associate interviews are conducted. Law enforcement checks are again made on close relatives.

PART II

SECTION 17. APPLICANT AND EMPLOYEE INVESTIGATIONS CONDUCTED FOR OTHER GOVERNMENT AGENCIES - GENERAL INSTRUCTIONS

17-1 BASIC AUTHORIZATION

Bureau is required to conduct applicant-type investigations of persons seeking Government employment and employed in Federal Government as a result of laws and Executive orders in certain categories and by agreements between Bureau, Department, President, and other governmental agencies. In addition, Bureau is required to conduct investigations in certain instances of nongovernmental employees or applicants (1) whose duties require access to highly restricted data, and (2) U.S. citizens employed or being considered for employment by public international organizations. Specific information concerning authority to conduct these investigations will be furnished by FBIHQ to field offices upon request. The term "applicant," as used hereinafter, is synonymous with the term "employee."

17-2 CLASSIFICATIONS COVERED

The following classifications are covered by instructions in this section and special instructions relating to each classification are contained in appropriate sections of Part I of this manual:

(1) 73 - Application for Pardon After Completion of Sentence (APACS)

(2) 77 -

(a) U.S. Courts Applicant (USCAPLI)

(b) Departmental Applicant (DAPLI)

(c) Maintenance Employee (name of field office)

[[(d) Contract/Noncontract Personnel]

(3) 116 - Department of Energy - Applicant or Employee (DOE-A or DOE-E); Nuclear Regulatory Commission - Applicant or Employee (NRC-A or NRC-E)

(4) 138 - Loyalty of Employees of the United Nations and Other Public International Organizations (LEUN) (EO 10422)

(5) 140 - Security of Government Employees (SGE) (EO 10450)

(6) 151 - Referrals from Office of Personnel Management (OPM)

(a) Peace Corps (ACTION-OPM)

(b) Department of Energy (DOE-OPM)

(c) National Aeronautics and Space Administration (NASA-OPM)

(d) Nuclear Regulatory Commission (NRC-OPM)

(e) U.S. Arms Control and Disarmament Agency (ACDA-OPM)

(f) International Communication Agency (USICA-OPM)

(7) 161 - Special Inquiries for the White House, Congressional Committees, and other Government Agencies.

17-3 ADMINISTRATIVE PROCEDURES

17-3.1 Initiation of Investigation

Personal history data as received by FBIHQ is forwarded to field. If data is inadequate, see "Who's Who in America"; "Who's Who in (State, City, or Section)"; "Who's Who in (Profession)"; Directory of Directors; Martindale-Hubbell Law Directory; and other professional directories. Information in Identification Division files and FBIHQ files is sent to field if pertinent for investigation and inclusion in report.

17-3.2 Assignment of Cases

Must be searched, opened, and assigned immediately. Investigation is to commence immediately.

17-3.3 Indices Searches

FBIHQ indices in applicant cases are searched only against applicant's name, names of deceased relatives, and names of relatives residing in foreign countries. Each field office must carefully search names of the following against indices:

(1) Applicant - Include variations and additional names developed during investigation. Advise FBIHQ and interested offices of additional names developed.

(2) Close relatives residing in field office territory - Search must include all names used by relatives. Include maiden name of applicant's spouse. Questionable identity must be resolved. Include in search not only names of close relatives known when investigation was initiated, but also those identified during investigation. Not necessary to search names of relatives under 15 years of age.

(3) References - Name should be searched through office indices where reference resides. Names may be searched only as they appear in reference material furnished. Searches of variations in name and initials not required, unless developed during investigation.

(4) Others - It may often be necessary to search against indices names of other persons and names of organizations with which applicant has been identified. Where common sense dictates, names of persons with whom applicant has been closely associated during [his/her] adult life, such as roommates, close social friends, divorced spouses, and others where relationship would warrant, must be searched against field office indices.

17-3.4 Deadlines

(1) Deadline date is date report to be received at FBIHQ. All deadlines are figured from date of order letter and cannot be changed without FBIHQ authority.

(2) Deadline must be met unless delay beyond office control.

SECTION 17. APPLICANT AND EMPLOYEE INVESTIGATIONS CONDUCTED FOR OTHER GOVERNMENT AGENCIES - GENERAL INSTRUCTIONS

(a) If deadline will not be met and no administrative action deemed warranted, form FD-205 or other communication must reach FBIHQ by deadline date advising: Reason for delay; when report will reach FBIHQ; and, no administrative action warranted - This decision must be made by SAC or ASAC.

(b) If deadline will not be met and adminstrative action deemed warranted, letter must reach FBIHQ by deadline date advising: reason for delay; when report will reach FBIHQ; type of administrative action recommended and reason therefore; and, identity of personnel involved, together with memoranda of explanation from such personnel.

17-3.5 Prior Applicant Investigation

If field files disclose previous applicant-type investigation conducted by Bureau, following steps should be taken in all cases:

(1) Bring previous investigation thoroughly up to date and supplement it as necessary so total scope of investigation will conform in all respects to current standards. Recontact persons previously interviewed who furnished derogatory information (if such persons are in a position to furnish current pertinent information and if such inquiry is practicable.)

(2) If all leads were covered in previous investigation, RUC case by routing slip so advising FBIHQ.

(3) If previous investigation was made within six months preceding receipt of new request and if it was then complete, conduct no investigation and RUC.

17-3.6 Leads for Other Offices

(1) Set out leads for other offices immediately when they become known during investigation. Use most expeditious means of communication commensurate with economy to meet deadline.

(2) Furnish FBIHQ copy of communications setting out leads.

(3) In general, following information should be included in communications setting out leads for other offices which have not received copy of FBIHQ letter initiating investigation:

(a) Name, aka's, and any other title information, such as zone designations in title of 116 cases

(b) Character

(c) Bureau deadline

(d) Any data necessary to identify applicant, such as birth data, description, and social security number if lead is to check employment

(e) Specific lead

(f) Brief description of any derogatory information developed.

17-3.7 Receipt of Additional Information in Closed Case

(1) Recheck office indices.

(2) Determine identities of original sources of all new derogatory data and interview if possible. Furnish FBIHQ information without delay in letterhead memorandum or supplemental report. Use teletype if case warrants, such as Presidential appointee.

(3) If circumstances warrant, e.g., additional investigation appears involved and cannot be immediately completed, advise FBIHQ by appropriate means prior to initiating additional investigation.

(4) If indication individual no longer Government employee, verify current employment immediately at inception of investigation.

17-3.8 Discontinuance of Investigation

If information is received indicating investigation should be discontinued, promptly notify FBIHQ and interested offices to hold investigation in abeyance. Thereafter, FBIHQ will contact interested agency on Headquarters level for confirmation regarding employment and will immediately advise the field regarding discontinuance. If instructed to discontinue, submit RUC communcation to FBIHQ containing results of investigation conducted to date.

17-4 OBJECTIVES OF INVESTIGATION

(1) Character - actions and statements revealing person's attitude trustworthiness, reliability, and discretion; activities revealing lack of such qualities

(2) Loyalty - actions and statements revealing person's attitude and allegiance to U. S. and its constituted form of government or sympathies with any foreign government or ideology

(3) Associations - types of persons, groups, organizations, or movements with which the person has been associated, with particular concern as to whether any of his associations have been of disreputable or disloyal nature.

(4) Qualifications and Ability - inquiries concerning qualifications and ability not necessary except in certain type of cases (see specific classification) or unless so instructed by Bureau in a specific case. If necessary, questions should be directed toward obtaining all available data regarding past employment experiences, positions held, and duties and responsibilities involved in those positions. (For purposes of our investigations, ability is defined as one's capacity or competence, native or acquired, to perform well in an occupation or field of employment. Comments in this regard should cover past and present employment.)

17-5 GENERAL INSTRUCTIONS

PART II

SECTION 17. APPLICANT AND EMPLOYEE INVESTIGATIONS CONDUCTED FOR OTHER GOVERNMENT AGENCIES - GENERAL INSTRUCTIONS

(1) Results are furnished other Government agencies for examination and adjudication.

(2) Investigation must be painstakingly exact, fair, and unbiased.

(3) Interviews must be thorough and exhaustive and include persons in same age group as applicant.

(4) Purpose of interviews is to get information, not to give information. Avoid possibility for accusation of character assassination or spreading of rumors.

(5) Do not convey impression that person investigated is under suspicion or that investigation is of criminal or subversive nature.

(6) Advise persons interviewed that investigation is personnel-type background inquiry conducted because individual is under consideration for Government employment, employment by a public international organization, or may have access to restricted or secret information in which Government has interest.

(7) Unless so instructed by FBIHQ, do not disclose identity of requesting agency or position involved.

(8) No such thing as routine investigation. Imperative each case be approached with investigative inquisitiveness to secure all information both favorable and unfavorable.

17-6 SCOPE OF FULL FIELD INVESTIGATIONS

17-6.1 Birth

(1) Ascertain date and place of birth. This may be done from such sources as school and employment records.

(2) Verify at bureau of vital statistics when -

(a) Parents foreign born

(b) Investigation develops inconsistencies in birth data

(c) Investigation otherwise indicates necessity for verifying birth data

17-6.2 Naturalization

If applicant or spouse foreign national or obtained citizenship through naturalization or naturalization of parents, check Immigration and Naturalization Service or court records.

17-6.3 Education

(1) Verify college attendance and degrees. Detailed record of studies and grades not desired; (however, report overall grade point average and class standing, if available.) Interview teachers and fellow

students; mere verification of attendance is not sufficient.

(2) Cover high school attendance only if it was within preceding six years, or if special reason exists for doing so.

17-6.4 Marital Status

(1) If any question, resolve through appropriate records.

(2) Verify divorce and determine reasons if pertinent.

(3) Interview divorced spouse if appropriate.

17-6.5 Employment

(1) Verify all employments, including any additional ones developed during investigation; examine all pertinent files at places of employment; ascertain why employment was terminated in each instance. Ascertain dates of employment and positions held; note discrepancies with questionnaire or application form. If employment records are unavailable for extended period, set out that fact in report, together with results of efforts to verify employment through other sources; this will eliminate delays resulting from unavailable records. Interview supervisors, fellow employees, and other appropriate personnel.

(2) If applicant has been in business for himself/herself interview competitors and neighboring businessmen/businesswomen.

(3) Periods of unemployment must be investigated and accounted for.

17-6.6 Military Service Records

(1) Review if indication applicant served in armed forces.

(2) Report complete military record, including honors bestowed, type of discharge received, and Reserve status.

(3) If military records have been destroyed, verify service through other means.

17-6.7 Neighborhoods

(1) Interview neighbors at applicant's places of residence during past five years.

(2) If derogatory information is developed, interview persons in logical neighborhoods without limitation to preceding five years.

(3) Do not waste effort in endeavoring to conduct inquiries in neighborhoods where applicant resided for very brief periods, such as one month in a trailer camp.

[(4) Favorable neighborhood may be summarized; however, any derogatory information developed should be set forth in detail. Include identity, address, and number of years known applicant, for each person contacted.]

17-6.8 References and Associates

Interview all references and associates except:

(1) Do not interview individual concerning whom information is known which would preclude interview, but if appropriate, characterize individual.

(2) An isolated individual who cannot be contacted without expenditure of unreasonable time and travel, or individual whose unavailability for other reasons would delay investigation, need not be interviewed provided satisfactory investigation can be conducted without interview. When such an individual is not interviewed, show in details of report individual unavailable and amplify circumstances on cover page if needed. If derogatory information exists concerning a reference or associate, ascertain nature and extent of his/her association with applicant.

17-6.9 Relatives

(1) Each field office must develop identity of all close relatives and appropriately advise each interested field office. Close relatives under ordinary circumstances include spouse, parents, brothers, sisters, and adult offspring. Special instances, such as more distant relatives who occupy same residence as applicant, will require broadening of this definition.

(2) Independent investigation to verify residence is not normally conducted on close relatives. Derogatory allegations, incomplete police records, or indefinite places of residence may require discreet inquiries of informants and reliable sources to verify or refute allegations, clarify a police record, or fix a current place of residence. If derogatory information exists concerning relative, ascertain nature and extent of association with applicant.

17-6.10 Law Enforcement Agencies and Credit Agencies

(1) Check applicant's name against files of local law enforcement [agencies and[the files of credit record repositories in all localities [covering residence, education and employment; however, credit inquiries should [be limited to the most recent seven-year period.] To comply with the Right to Financial Privacy Act of 1978 (RFPA) in accessing records concerning applicant, the applicant is to be furnished with a copy of Department of Justice (DOJ) letterhead memorandum captioned, "Statement of Customer Rights under the Right to Financial Privacy Act of 1978," which must be executed by the interviewing Agent. The applicant must execute form DOJ-462 captioned, "Customer Consent and Authorization for Access to Financial Records." Copy of executed DOJ-462 should be furnished to each office where financial records are to be reviewed. For effective use of this customer consent and authorization form, ensure applicant identifies all financial institutions anticipated to require access. The purpose should also be stated broadly on the form. In addition, form DOJ-461 captioned, "Certificate of Compliance with the Right to Financial Privacy Act of 1978," must be executed by a "supervisory official" and transmitted along with DOJ-462 to the financial institution before financial records may be obtained. The certification of compliance requirement is an absolute prerequisite to Government access to financial records under RFPA. See MIOG, Part II, 23-6.

(2) Check names of close (adult) relatives against files of local law enforcement agencies at present place of residence. Do not conduct credit, traffic violations or Motor Vehicle license checks on close relatives.

(3) If record is located, obtain in detail all necessary identifying data which identifies applicant or applicant's relative with person on whom record is located. As to applicant, verify if there is an arrest record involving a criminal offense or a traffic offense other than a parking violation. Ascertain not only disposition but check existing court docket, blotter, or case file for any additional data that might be available. Should it be necessary, interview arresting officer if available.

(4) Frequently arrests are made on charges which are generic and indefinite in nature. Examples of such vague charges are disorderly conduct, loitering, etc. In such instances, it is not sufficient merely to report that applicant was arrested on such a charge, but exact nature of applicant's activities resulting in arrest must be ascertained. Charge of disorderly conduct might encompass activities ranging from sexual deviation to distribution of communist literature. Exact nature of such charge must be ascertained for inclusion in report.

(5) Some law enforcement agencies departmentalize their operations making it necessary to check records of various squads and bureaus within agency. Checks of records of each such individual squad or bureau must be made. Check should include traffic violations for the applicant or employee only.

(6) Checks should not be limited to police departments but must include records of sheriff's offices and other duly constituted law enforcement agencies.

17-6.11 Affiliation With Questionable Organizations

(1) [Determine whether applicant has been affiliated with organizations or groups which involve the use of force or violence, which advocate the overthrow of legally constituted forms of government by unconstitutional means, or which deprive individuals of their civil rights under the Constitution, laws or treaties of the United States. Ascertain knowledge of or agreement with policies of such organizations as well as dates of affiliation and extent of participation as member or officer. Conduct inquiries to verify or disprove alleged affiliation and also provide characterization of organization involved.

(2) Contact logical informants familiar with organization or allegations involved.]

SECTION 17. APPLICANT AND EMPLOYEE INVESTIGATIONS CONDUCTED FOR OTHER GOVERNMENT AGENCIES - GENERAL INSTRUCTIONS

17-6.12 Association with Questionable Individuals

(1) Ascertain degree of association and awareness on part of person under investigation of activities of questionable individual.

(2) Extent of influence questionable individual exercises over applicant.

(3) If questionable individual previously investigated under Executive Order 9835, Executive Order 10450, or Executive Order 10422, report should so state. Include title of position, agency where employed, and year investigation conducted. Also report any pertinent data received subsequent to above investigation.

(4) Search names of questionable associates through office indices.

SECTION 17. APPLICANT AND EMPLOYEE INVESTIGATIONS CONDUCTED FOR OTHER GOVERNMENT AGENCIES - GENERAL INSTRUCTIONS

17-6.13 Signed Statements

(1) Press to obtain from persons furnishing derogatory data re applicant and disloyal data on references, relatives, or close associates. Include in opening paragraph of signed statement desires regarding testifying before hearing board and any request for concealment of identity; e.g.,

"I,_____, furnish the following voluntary statement to _____, who has identified himself to me as a Special Agent of the FBI, United States Department of Justice. I am (not) willing to testify before a hearing board in the presence of the employee and his counsel and be cross-examined. (My unwillingness to testify is due to business commitments. I request my identity not be disclosed.)"

Do not include reasons for unwillingness if such will disclose identity and concealment of identity has been requested.

(2) Reason for refusal to furnish signed statement should be set out in report. If person refuses to furnish signed statement, FD-302 should be used.

17-6.14 Availability for Testimony Before Hearing Board

(1) Persons furnishing derogatory data - Determine availability to testify of persons furnishing dederogatory data.

(a) Strive to have individuals express willingness to testify as interest of Government and employee's retention in employment may be affected by testimony. Do not furnish advice.

(b) Inform testimony may have to be in presence of employee and counsel and subject to cross-examination.

(c) Individual's desires regarding testifying should be set out in report, including any conditions under which willing to testify. Reasons for unwillingness to testify should be shown in report.

(d) Persons inquiring re time and place of hearing, reimbursement for expenses, etc., should be informed such matters should be discussed with agency requesting their testimony.

(2) Informants - Bureau does not contemplate making established active informants available for testimony before hearing boards.

(a) Report informant unavailable for testimony.

(b) If informant later becomes available and is willing to testify, submit letter bearing informant caption, with copy for all cases in which informant previously furnished information. Set forth brief background data re informant. Comment specifically whether or not informant's identity may be revealed to outside agencies. Include in detail any data which would indicate inadvisability for informant to testify. Set out following re each case identified: Bureau file number; title and character (John Doe, Treasury, SGE); T symbol used to conceal informant's identity in report; and page number containing information from informant.

(3) Special Agents of FBI

(a) Will be made available for testimony if they possess competent evidence of own knowledge

(b) Will not be made available merely to interpret information in report

17-6.15 T Symbols

(1) Where individual is willing to have his name made known to hearing board or agency but requests identity not be disclosed to person under investigation, openly report individual's name, together with his desires regarding use of his name. Where individual desires his identity not be disclosed outside FBI, utilize T symbol.

(2) When interviewing an individual to solicit information concerning someone other than the interviewee (thereby classifying that individual as a source of information) the interviewing Agent must also follow the procedure relating to promises of confidentiality as described in MIOG, Part I, 190-7 (FOIPA).

(3) Information from confidential investigative techniques

(a) Care must be exercised to insure report does not leave erroneous impression that informant involved is personally acquainted with person mentioned.

(b) Report informant unavailable for recontact. No comment necessary regarding furnishing signed statement or testifying.

17-6.16 Exhibits

(1) Submit if suitable for dissemination to support derogatory information.

(a) Since exhibits may be made available to person investigated during adjudication, do not submit if this will jeopardize security operations of office.

(b) If not submitted, information contained on exhibit, without mentioning exhibit's existence, should be reported. Cover page(s) should show existence of exhibit and reasons not submitted.

(2) Submit one copy with each copy of report. If bulky, requiring extensive reproduction, promptly advise FBIHQ on UACB basis indicating two copies will be submitted.

(3) Submit copies of previous loyalty hearings afforded applicant.

(4) Writings of applicant

(a) Submit copies of any pertinent to security determination.

(b) If writings not pertinent to investigation; list in report, and state in cover page(s) writings not pertinent to security determination.

(5) Submit to FBI Laboratory pertinent exhibits containing questioned handwriting.

(a) Secure handwriting specimens for comparison from sources other than direct contact with person under investigation.

(b) Obtain at outset of investigation.

(c) Handwriting specimens should include, if possible, specimens written during period of questioned material.

(d) Describe specimens objectively.

17-6.17 Tax Matters

Check for tax liens (state and local) when there is questionable financial status concerning Presidential appointments, Federal judgeships, USAs, U. S. Marshals, Deputy Attorney General, Assistant Attorneys General, Department heads, members of U. S. Parole Commission and U. S. Courts applicants. Furnish questionable financial standing to auxiliary offices for appropriate checks. Where check of IRS records is necessary, interested agency will provide appropriate waiver or FBIHQ will issue instructions to appropriate office to obtain waiver from applicant.

17-6.18 Newspaper Morgues

Check newspaper morgues for pertinent information on Presidential appointments, prominent people, individuals outstanding in their field of endeavor, or any other person under investigation where indication check would be productive. If some indication exists to make check undesirable, so state on cover page of report.

17-6.19 Information from Other Government Agencies

(1) Reinterview individuals who furnished derogatory information.

(a) Where ~~interviewee~~ on current interview furnishes same information, not necessary ~~to~~ report he previously furnished this information to other Government agency

(b) Where interviewee contradicts information attributed to him by other Government agency; quote information from other Government agency, report discrepancies in information called to person's attention, and report ~~interviewee~~'s explanation for discrepancies.

(2) Determine identify of original source for any pertinent

information and interview. If agency unwilling or unable to identify its source, indicate reason and agency's evaluation.

(3) When interviewing person previously interviewed by another Government agency do not reveal interview based on previous investigation unless absolutely necessary. Such revelation necessary where contradictory information received, but identity of other Government agency should not be made known.

17-6.20 Applicants Not to Be Interviewed

(1) Persons under investigation are not to be interviewed without FBIHQ authority. If situation arises necessitating such interview, furnish facts to FBIHQ for approval.

(2) Be guided by instructions regarding interviews of individuals with subversive background.

(3) If person under investigation offers to furnish information, inform him/her that information furnished will be made available to interested department or agency. If possible, secure signed statement.

(4) Pertinent results of previous interviews should be reported.

(5) Exception - Person under investigation may be interviewed without Bureau authority for purpose only of supplementing personal history data. If done, include results of interview in report or other appropriate communication to FBIHQ. The FBI conducts these interviews with the understanding the referral agency notifies each person it solicits information from of the Privacy Act requirements described in Part I, 190-5, subparagraphs (2) and (3) of this manual.

17-6.21 Agency Checks

(1) Leads for various national agency checks are set out by FBIHQ to appropriate offices (Washington Field in most instances). If nature of applicant's past employment, military service, or foreign travel so requires, [applicant's name is searched against records of[Office of Personnel [Management,]Central Intelligence Agency, armed forces intelligence agencies, and any other appropriate agencies. If special circumstances so dictate, the applicant's name can also be searched against records of the Passport Office, U.S. Department of State.

(2) If applicant is known to have been previously processed for clearance by Atomic Energy Commission, Department of Energy, or Nuclear Regulatory Commission, security files of appropriate area office or offices of Department of Energy or Nuclear Regulatory Commission which handled clearance procedures should be checked.

17-6.22 Terminology

(1) Refrain from stating interviewee "unable to furnish any derogatory information." Report specifically what interviewee furnishes.

(2) Refrain from using "pattern language" in reporting interviews

such as language indicating all persons described employee as "100% American."

17-6.23 Admissions, Denials, or Falsifications

(1) Report pertinent admissions, denials, or explanations of membership in subversive organizations.

(2) Develop any misrepresentations, falsifications, or omissions of material facts.

17-7 DEROGATORY INFORMATION

17-7.1 Necessity for Thoroughness

(1) Many agencies for which we conduct investigations have set up hearing boards to consider derogatory information in FBI reports. These reports may be used by agency to interview individual or they may furnish statement of charges to applicant and afford him a hearing. Publicity may result. It is most essential that investigations be thorough, complete, and factual to avoid any basis for criticism of Bureau and its investigation.

(2) Ascertain facts on which are predicated any derogatory conclusions on part of person interviewed. If it is impossible to obtain information resolving a question of identification, report shall definitely show this to prevent any person reading report from drawing conclusion that question of identification has been resolved.

(3) Identify and interview original sources of derogatory information. It is not sufficient to receive such information indirectly or secondhand. If for some reason it is impossible to interview original source, report should clearly show reason. Documents on which allegation first recorded in office files must be carefully reviewed.

(4) Field offices discovering derogatory data must insure that sufficient investigation is conducted to verify or disprove it. Advise expeditiously other offices which should be cognizant of derogatory information in order to conduct adequately their part of investigation. If agency check discloses derogatory data and a question of identity is involved, office checking agency is to report fully information obtained; initiate necessary investigation to resolve question of identity; and set out leads to interview original sources.

17-7.2 Handling Information Derived from File Searches

Data derived from file searches on applicant, relatives, references, and associates should be utilized in connection with investigation and as lead material. Pertinent information from files should also be organized for inclusion in report.

(1) Information on applicant - Office discovering derogatory information in its files on applicant should organize and report it unless data are contained in case in which another office is origin which division has received copy of FBIHQ communication initiating investigation. In latter event, only office of origin in previous case should report data.

(2) Information on reference or other person to be interviewed - Office conducting interview has primary responsibility to report derogatory information. If this office has incomplete information but another office, such as office of origin, has complete information, office conducting interview must insure that office having complete data reports it fully.

17-8 FRAUD VIOLATIONS

Possible fraud against the Government (FAG) violations are sometimes detected during applicant-type investigations. They result from falsification or concealment in questionnaire or application executed and submitted to Government by applicant in apparent belief that true recitation of facts would prejudice opportunity for employment. For additional instructions, see section of this manual concerning Fraud Against the Government.

17-8.1 Applicable Statutes

(1) Title 5, USC, 3333 and 7311

(2) Title 18, USC, 1001 and 1918

17-8.2 Violations Involving Security Aspect

(1) Examples: false denial of arrest or misrepresentation of other material facts.

(2) These cases are to be presented to the USA: however, in order that employing agency can first be apprised of fact case is to be presented, advise FBIHQ by teletype of pertinent facts, including intent to present USA. As soon as employing agency is notified by FBIHQ on Headquarters level, field will be advised so case can be presented USA as early as feasible to avoid unnecessary investigation in event he would not authorize prosecution.

(3) Cases involving petty or immaterial offenses, such as an arrest for drunkenness or other minor misrepresentations, are brought to FBIHQ's attention by cover page(s) accompanying investigative report, and are not presented to USA.

(4) Investigate possible fraud violations simultaneously with applicant-type investigation. Do not open separate case. When fraud matter presented to USA, add "Fraud Against the Government" to character. Set forth in report opinion of USA, and insure venue discussed.

(5) When applicant phase of investigation is completed, but prosecutive action is awaited, submit pending report.

17-8.4 Discontinued Investigations

(1) If facts indicate possible violations of above statutes, add "Fraud Against the Government" to character of applicant case following receipt of prosecutive opinion.

(2) Submit reports including facts developed up to discontinuance of investigation, pertinent information from office files, facts indicating possible violation, and opinion of USA or Department.

SECTION 161. SPECIAL INQUIRIES FOR WHITE HOUSE, CONGRESSIONAL COMMITTEES, AND OTHER GOVERNMENT AGENCIES

161-1 GENERAL INSTRUCTIONS

These instructions supplement those contained in Part II, Section 17, of this manual.

161-2 "SPIN"

Code word "SPIN" in all communications in this category indicates request for investigation emanates from office of the President or other top governmental officials and therefore demands every possible priority. Code word "SPIN" will be substituted for following specific instructions:

(1) Handle promptly and thoroughly. Assign experienced personnel and sufficient personnel to assure completion by deadline date. Set out leads by airtel, or teletype, directing all such correspondence to FBIHQ, as well as to offices receiving leads. This correspondence must also include code word "SPIN" to ensure that these instructions will be followed. [Complete name of all close relatives and their current addresses are normally furnished to FBIHQ by the official requesting the investigation. Should a field office determine that the data furnished is incomplete, not current, or in error, FBIHQ and interested field offices should be promptly advised by telephone or teletype.] Where appointee is an attorney, pertinent bar and grievance records must be checked. Those cases involving possible Presidential appointees must include a determination of individual's ability, as previously defined; and if poor financial background is developed, special inquiry must be made to determine whether any tax liens have been filed and results of any litigation regarding bad debts must be obtained. Do not divulge position involved to persons interviewed.

(2) Professional titles of persons interviewed must be complete; i.e., Major General John J. Jones, United States Army, retired, should be set out rather than merely General John J. Jones, United States Army.

161-3 EDUCATION

When no college attendance is indicated, high school records should be checked. It will not be sufficient to merely check attendance at business or commercial institutions without ~~also~~ checking high school records.

161-4 MEDICAL

If background furnished or investigation indicates person under investigation has been treated for physical or mental problem no checks with doctor's or medical institutions should be made unless so instructed by FBIHQ.

161-5 INTERVIEWS

In the investigation of prospective Presidential appointees, a sufficient number of interviews of knowledgeable individuals must be conducted covering the individuals entire adult life to permit a valid evaluation by the requesting agency. In most instances the principal

office, that is, the office which covers the individuals past five years of residence and/or last employments would be expected to obtain the bulk of these interviews.

161-6 PRIVACY ACT - REQUIREMENTS

When interviewing anyone in the above classification, in order to solicit information about himself or his own activities, the interviewing Agent must follow the procedures described in MIOG: Part I, 190-5, subparagraphs (2) and (3).

When interviewing an individual to solicit information concerning someone other than the interviewee (thereby classifying that individual as a source of information) the interviewing Agent must follow the procedure relating to promises of confidentiality as described in MIOG: Part I, 190-7.

APPENDIX D

UNPROMULGATED GUIDELINES

WHITE HOUSE PERSONNEL SECURITY AND BACKGROUND INVESTIGATIONS

I. COLLECTION OF INFORMATION

A. Initiation of Investigation

1. White House investigations involving file reviews or field investigations conducted by the FBI shall be initiated only to ascertain facts and information relevant to the suitability of persons being considered for Presidential appointment; staff of the Executive Office; clearance for access to classified information; granting clearance for access to or service at the White House or other places under the protection of the U.S. Secret Service in connection with its duties to protect the President and the Vice President of the United States.

2. White House investigations involving file reviews or field investigations shall be initiated as follows:

   a. The President of the United States, and the Counsel or Associate Counsel to the President or the Attorney General may initiate investigations directly with the FBI.

   b. The Secretary of State and the Director of the National Security Counsel may request the FBI to conduct White House investigations when authorized by formal agreements with the Attorney General. These agreements shall designate by title all persons authorized to request White House inquiries, shall be consistent with the provisions of these guidelines, and are to be published in the Federal Register.

3. Requests for White House investigations involving file reviews shall be made or confirmed in writing; specify the official initiating the request; identify the person under investigation for appointment, clearance or service; and the purpose of the investigation as described in A(1) above.

4. Requests for White House investigations involving field investigations shall be made or confirmed in writing; specify the official initiating the investigation, and identify the person under investigation for appointment, clearance, or service. The request shall be accompanied by a statement signed by the subject of the investigation acknowledging that he has consented to the investigation with the knowledge that facts or information gathered shall be retained consistent with the FBI records retention plan. The requesting official must certify the subject of the investigation has been apprised of the provisions of Section (e)3 of the Privacy Act of 1974.

B. Investigation

1. White House investigations involving file reviews or field investigations must be thorough, precise, and fair.

2. Persons interviewed during White House field investigations shall be told that the individual under investigation is being considered for a position of trust involving the Government. The name of the official or agency initiating the investigation, or the position for which the individual is being considered shall not be disclosed unless specifically authorized by the requesting official.

3. Subject to the Freedom of Information Act and Privacy Act of 1974, persons interviewed during White House field investigations may be assured that, to the extent permitted by law, information identifying such persons will be kept confidential.

4. Where a person is the subject of a subsequent White House field investigation, information contained in the earlier report reflecting adversely on the person shall be re-investigated, where such inquiry is likely to yield information relevant to the current investigation and where such inquiry is practicable.

C. Reporting

1. Information obtained during White House file reviews or field investigations shall be furnished to the initiating authority and/or the White House. The FBI shall retain a record of persons to whom such information is furnished.

2. Any investigative efforts to determine the truth or falsity of reported derogatory allegations or information shall be reported.

3. Where the identity of the source of information is not reported in a White House file review or field investigation, an assessment shall be provided of the reliability of such source.

II. DISSEMINATION AND RETENTION OF INFORMATION

A. Retrieval

1. The FBI shall retain a record of all relevant information gathered during the course of White House investigations consistent with these guidelines.

2. Information obtained during these investigations may be indexed in such a manner as to assist in its subsequent retrieval.

B. Access

1. The Director of the FBI shall insure that access to White House investigative files under his control is restricted and that stringent controls are maintained over such files limiting their use to official purpose.

2. Officials outside the FBI to whom White House file review and field investigations reports are furnished shall insure that internal access thereto is restricted to persons directly involved in making Presidential appointments; determining Executive Office staffing; granting clearance to classified information; approving access to or service at the White House or other place under the protection of the U.S. Secret Service as described in these guidelines. A record shall be maintained of the identity and organizational unit of officials requesting access to White House investigative files, as well as the dates these files are issued and returned.

C. Dissemination

1. Where during the couse of a White House field investigation the FBI finds some indication that the person under investigation may have committed a crime or other violation of law the FBI shall notify the initiating official thereof; and either investigate the crime if within its jurisdiction or refer the facts or information of the possible violation to appropriate authorities for determination.

2. No subsequent dissemination shall be made by the FBI of the results of White House field investigations or file reviews, conducted for the incumbent Administration, without the express approval of the President, Counsel, or Associate Counsel to the President, except as expressly required by federal statute or as part of an investigation of a violation of law.

3. No one receiving FBI reports of White House file reviews or field investigations shall reproduce or disseminate these materials other than in accord with B(2) above without the express consent of the FBI. Such dissemination must be predicated upon the request of an official authorized by or in accordance with these guidelines to initiate a White House investigation, and only for a purpose authorized by these guidelines.

4. The FBI and officials receiving reports of White House file reviews or field investigations shall maintain a record of all dissemination of these materials to other agencies.

D. Retention of Information

1. Information obtained during White House file reviews or field investigations shall be retained at FBI Headquarters and at FBI field offices as prescribed by the FBI Records Retention Plan.

2. Results of White House investigations maintained by the FBI shall be destroyed _____ years after completion of the investigation subject to the following conditions:

   a. files and information determined by the Archivist of the United States to be of historic interest shall be transferred to

the custody of the National Archives and Records Service _____ years after the completion of the investigation.

b. files and information relating to persons who have been re-investigated may be retained _____ years from the date of the latest investigation.

3. Anyone receiving FBI reports of White House file reviews or field investigations shall destroy such reports within ninety (90) days after receiving them, unless notice in writing is given to the FBI that an additional period of time, not exceeding ninety (90) days, is needed to complete a decision relating to the White House investigation.

4. The provisions of paragraphs two (2) and three (3) above apply to all inquiries completed after the promulgation of these guidelines. The provisions of paragraph two (2) apply to inquiries completed prior to promulgation of these guidelines when use of these files serves to identify them as subject to destruction or transfer to the National Archives and Records Service.

5. When an individual's request pursuant to law for access to files pertaining to him identifies files as being subject to destruction or transfer under paragraph two (2), he shall be furnished all information to which he is entitled prior to destruction or transfer.

NOTE: The primary reference of "pursuant to law" in this paragraph is to the Privacy Act of 1974, which specifically authorizes access to background investigation files.

MEMORANDUM OF UNDERSTANDING

FEDERAL BUREAU OF INVESTIGATION BACKGROUND INVESTIGATIONS FOR THE PRESIDENT-ELECT OF THE UNITED STATES OF AMERICA

The Federal Bureau of Investigation (FBI) will conduct file reviews or background investigations (hereinafter both referred to as investigations) at the request of the President-elect or his designated representative of applicants, employees or any persons engaged by contract or otherwise to perform services for the President-elect. These investigations shall only be conducted pursuant to the agreement between the Attorney General and the President-elect to ascertain facts and information relevant to the applicant's or the employee's suitability for employment and/or trustworthiness for clearance for access to information classified under the provisions of Executive Order 11652 and where necessary for clearance for access to compartmented information in accordance with the standards set forth in Director of Central Intelligence Directive 1/14.

Requests for investigations by the FBI shall be made in writing from the President-elect or his designated representative to the Director of the FBI enclosing a completed Standard Form 86 (Security Investigation Data for Sensitive Position) which provides the necessary background data and a set of the individual's fingerprints for a check of FBI Identification Records. To enable the FBI to comply with Section (e) (3) of the Federal Privacy Act of 1974 and in keeping with the spirit of this Act, the request shall be accompanied by a statement signed by the subject of the investigation acknowledging that he or she has consented to the investigation with the knowledge that facts or information gathered shall be retained consistent with the FBI Records Retention Plan.

The President-elect or his designated representative is to secure a written consent from the person under investigation authorizing the FBI to conduct a file review and investigation; granting it access to educational, credit and employment background records; and permitting its dissemination of all information, whether newly developed or already contained in existing files, to the President-elect or his designated representative, and to appropriate Federal agencies where necessary to obtain clearance to classified information. If a person furnishes medical information bearing on suitability or trustworthiness, the President-elect or his designated representative will secure a

signed medical release from the person under investigation and furnish such release at the time the investigation is requested. If medical information bearing on the suitability or trustworthiness of the applicant is developed through investigation, the FBI will advise the President-elect or his designated representative. President-elect or his designated representative will advise whether further investigation is desired and will either furnish to the FBI a release to review necessary medical records and interview the physician or advise if it desires the FBI to contact the persons under investigation for the appropriate medical releases.

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

The FBI will furnish summary memoranda and supporting materials containing the results of its investigation to the President-elect or his designated representative and retain a record of the person to whom such information is furnished. The President-elect or his designated representative will insure that access to these summary memoranda and supporting materials is restricted to persons directly involved in making a determination as to the person's suitability for employment by the President-elect and/or trustworthiness for access to classified information. The President-elect or his designated representative shall maintain records of the identities of persons receiving access to the aforementioned materials and such records shall be furnished to the FBI upon request. No person having access to the aforementioned materials will reproduce or disseminate such materials.

The President-elect or his designated representative will insure that summary memoranda and supporting materials and any copies received will be retained until January 20, 1981, at which time they will become part of the Presidential papers. The summary memoranda and supporting materials and any copies received shall be returned to the FBI when a decision is made not to employ an individual or whenever the individual terminates employment or when required by law or presidential directive or executive order or upon the termination of the President-elect's administration.

Under no circumstances should the President-elect or the designated representative allow the person who is the subject of an investigation direct access to the summary memorandum and supporting material. If necessary to discuss the contents of the summary memorandum and supporting material with the applicant or employee the President-elect or his designated representative will insure that the confidentiality of the sources contained therein is protected. Any request by the individual for access to the memorandum will be referred to the FBI for processing in accordance with the Privacy Act of 1974.

Information obtained during a background investigation will be retained at FBI Headquarters and FBI field offices in accordance with the FBI Records Retention Plan. Prior to January 20, 1981, no subsequent dissemination shall be made by the FBI of the results of the background investigation conducted for the President-elect without the express approval of the President-elect or his designated representative, except as expressly required by Federal statute or a part of an investigation of a violation of law.

The FBI will inform the President-elect or his designated representative of any adverse information developed during the FBI file review or during the background investigation. The FBI will also provide the President-elect or his designated representative with any adverse information and supporting materials which subsequently come to the attention of the FBI that question the suitability or trustworthiness of any employee or any person engaged by contract or otherwise to perform services for the President-elect. Information obtained during background investigations conducted pursuant to this agreement will not be disseminated outside the FBI except when necessary to fulfill obligations imposed by law, FBI regulation or presidential directive or executive order.

When a tentative decision is made to employ an individual who requires an appropriate clearance for access to classified information the President-elect or his designated representative shall confer with the Director of the FBI or his designated representative to ascertain the appropriate agency or department which is authorized to grant the necessary clearance to classified information and the President-elect

or his designated representative shall furnish a copy of the aforementioned summary memoranda and supporting materials to the Director of Central Intelligence (DCI) or the appropriate agency or department granting clearance to classified information. The DCI or the appropriate agency or department involved will insure that the summary memoranda and supporting materials furnished to them pursuant to this agreement will be returned to the President-elect within ninety (90) days of its receipt.

No person employed by the President-elect shall be given access to any classified information or material until appropriate procedures for granting clearance for access to classified information have been established and clearance granted. The President-elect will provide the FBI and the DCI with a list of persons cleared for access to classified information and the President-elect will advise the FBI and DCI when an individual granted a clearance terminates employment with the President-elect.

BENJAMIN R. CIVILETTI
Attorney General

dated: 12/2/80

RONALD REAGAN
President-elect

dated: 11/28/80

EDWIN MEESE
Chief of President-elect's Transition Staff

dated: 1 Dec 80

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 7, 1983

FOR: FRED F. FIELDING
RICHARD A. HAUSER

FROM: PETER J. RUSTHOVEN
SHERRIE M. COOKSEY
JOHN G. ROBERTS, JR.

SUBJECT: Final Draft of the SPIN Report for the Attorney General

OVERVIEW

We have reviewed the final draft of the SPIN report to the Attorney General and have the following comments:

As a general matter, we believe much of the report reflects an effort by the FBI to preclude any allegations, past or future, questioning its conduct of SPIN investigations. Moreover, we consider the report to be insulting at times and unfair in other instances in its characterizations of the knowledge and awareness of the White House and Office of the Counsel to the President in this and previous Administrations with respect to the conduct and sensitivity of SPIN investigations. Finally, we disagree with the report's recommendations of obtaining a Senate Resolution establishing a uniform procedure for the confidential treatment of SPIN investigation reports, and issuing an Executive Order formalizing all aspects of the SPIN process. In our view, these would serve only to institutionalize protections for the FBI and to frustrate Presidential needs for flexibility in the SPIN process. In addition to these general overview statements, set forth below are specific comments on Sections IV and V of the report.

COMMENTS ON SECTION IV

On page 34, paragraph 5, the statement is made that members of each President's transition team are unfamiliar with the details of the appointments process and new to the Washington environment. Implicit in this paragraph is the suggestion that the members of the 1980 Presidential transition and of previous transitions were ignorant of the traditional requirements of the Presidential appointments process. In our opinion, these suggestions are inaccurate; as best we can establish, each Republican President since Eisenhower has had experienced Washington hands helping him with his transition. Accordingly, we recommend that this paragraph be revised to eliminate the suggestions that Presidential transitions lack appointments process expertise.

On page 35, the first full paragraph states that short SPIN investigation deadlines are difficult for the FBI to meet and contains the sentence: "When the transition team requests the FBI to do in five days what generally takes 14, it must recognize that it is getting a 'best efforts' investigation." This sentence introduces a new term for the FBI, the "best efforts" investigation. We disagree with the term, and object to the concept the FBI is not responsible for providing to the President a full and complete SPIN investigation on each of his nominees; if the FBI cannot complete an investigation in the time requested, it should so advise the White House and should not provide the President an incomplete and potentially inaccurate and misleading report subsequently characterized as only a "best efforts" product.

The remaining paragraphs on page 35 introduce the concept that the FBI and the transition team have different objectives for SPIN investigations: the FBI's interest is to "conduct a high quality SPIN investigation and provide the results in a clear and complete and timely manner to the transition team"; the transition team is described, however, as requiring the SPIN investigation merely to ratify the President's decision to nominate an individual: "the background investigation may be treated [by the transition team] as a procedural hurdle to be overcome without complications, particularly if they result in delay and controversy." These paragraphs suggest that the President's Counsel will not have the integrity to act upon derogatory information provided by the FBI on a candidate after a public announcement of that candidate's pending appointment has been made. We find this suggestion both inaccurate and offensive; accordingly, we recommend that the provisions of these paragraphs describing "different institutional interests" of the FBI and the transition team in the SPIN process be deleted.

The first full paragraph on page 36 suggests that it is a difficult burden for the FBI to explain the SPIN process to the transition team so that it can understand the scope and depth of SPIN investigations. This is unnecessary and, in the case of the last transition, incorrect. Also, the last sentence in this paragraph states that the White House should understand that it is its "perogative" to request the FBI "to broaden" the SPIN investigation beyond its usual confines. We believe that the FBI is attempting to shift the burden for the investigative process and the integrity of the SPIN investigations to the transition team and the White House rather than to acknowledge that the scope and quality of the SPIN investigation is its responsibility. For these reasons, we believe that the last sentence in the first full paragraph on page 36 should be deleted.

The next three paragraphs on page 36 recommend the creation of an FBI briefing book describing the SPIN process and the relationship between the transition team and the FBI. While such a briefing book could be helpful to a transition team, we have several concerns about it. First, we would want to review the briefing book as it is prepared. As you can see by this memorandum, the creation of a briefing book or even a "report" by the FBI affords the Bureau the opportunity to tailor the text of that writing to laud the FBI's efforts, bemoan the difficulty of its tasks and, in general, to protect the Bureau against assignment of any specific responsibilities for the final product of its investigation. A more significant concern about a briefing book, however, is the fact that it could formalize the process for SPIN investigations to the point where it would reduce any flexibility necessary to deal with the unique problems of specific individual investigations. We question whether a briefing book would be similar to negotiating a treaty with the FBI on SPIN investigations. Will its existence preclude the President from asking for additional information where he deems necessary? Suffice it to say, that, as a result of our review of this report, we are leary of any "briefing book" that would be prepared by the FBI.

Another element introduced in these three paragraphs on page 36 is the concept of a "SPIN Czar". The FBI notes that there should be one individual responsible for the coordination of all SPIN reports and responses to any transition team requests. We are unclear as to whether such an individual exists now and if not, what such an individual would do.

The relationship between the White House and the Senate is discussed on pages 37-38. Implicit in the opening discussions of this relationship is the idea that the FBI has a co-equal obligation to the Senate with respect to SPIN investigations. We disagree with this concept and believe that the primary responsibility of the FBI, as an agency of an Executive Department, is to provide to the President full, complete and accurate information in a SPIN investigation. Any information that is subsequently provided to the Senate should be provided by the President, and should not be viewed as fulfilling a responsibility of the FBI to the Senate.

In the first paragraph on page 38, it is suggested that the White House transition team leaked confidential information developed in SPIN investigations to the Senate and to the public. We are unaware of any such leaks by this Office and believe that any suggestion to the contrary should be deleted from this report.

Paragraph two on page 38 recommends that a single agreement

signed by the President and approved by the Senate should govern the manner in which every Senate Committee receives, reviews and protects information regarding the background of Presidential nominees. Although there is some merit to this idea, we believe it is naive as a practical matter. As you know, there are separate agreements between the White House and various Senate committees with respect to Senate review of SPIN reports. For example, the Senate Judiciary Committee receives the complete background report on judicial and other nominees, and the staff of the Senate Judiciary Committee are allowed to review these reports. This procedure is unique to the Judiciary Committee and we are doubtful that we would want to extend it to other Senate committees.

It seems obvious to us, though, that if one were to attempt to negotiate a single agreement with the Senate, the most liberal aspects of any individual agreements previously entered into with separate Senate Committees, (e.g., permitting staff to review the report and allowing review not simply of the summary but of the entire background memorandum) would be the end result of any approved Senate resolution. Accordingly, we strongly recommend against the inclusion of this paragraph and recommendation.

In the third paragraph on page 38, it is stated that the FBI provides the Office of Counsel to the President with a summary memorandum reporting the results of the SPIN investigation and with the "full text of interviews containing derogatory information." To our knowledge, this statement is incorrect. Although we have received the full text of interviews containing derogatory information on some nominees, it is not provided to the White House as a matter of routine and is usually provided only upon specific request by the White House. This same paragraph goes on to note that the FBI plays no part in providing the necessary SPIN information to the Senate. We would point out, however, that the FBI acted directly contrary to this statment in the Donovan situation, responding directly to Senate inquiries on that SPIN investigation; indeed, that was part of the problem in the Donovan background investigation. Accordingly, we believe that paragraph 3 on page 38 must be revised.

On page 39, the SPIN report states that the FBI should not be requested by the Senate committees considering confirmation of a Presidential nominee to testify regarding the background investigations of the nominee. While we agree that the FBI should not, as a general matter, be required to testify before the Senate on its findings in a SPIN investigation, we do not agree that the FBI should be precluded from testifying before Senate committees on specific SPIN investigations. There may be times where it is appropriate for the FBI so to testify before the Senate, either in open or closed session.

COMMENTS ON SECTION V

We disagree with the recommendation set forth at the top of page 42 that an Executive Order and Attorney General guidelines should establish the procedures governing the initiation of SPIN investigations and dissemination of the results of such investigations. In our opinion, there should be no formalization of the Memorandum of Understanding (MOU) executed between the transition and the FBI other than to include within the MOU a clause that such memorandum will continue throughout the tenure of the President-elect's term in office. Obviously, MOU's are much more flexible (and less public) documents, whereas any change in an Executive Order to meet the problems of a particular case could invite public and media scrutiny and criticism.

The second recommendation on page 42 is not objectionable to the extent that it recommends that short investigative deadlines should be avoided wherever possible; however, we do disagree with the paragraph in that recommendation that refers to "best efforts" investigations. As stated previously, we do not believe this "category" of investigations should be created or recognized.

We do not disagree with the recommendation at the top of page 43 that, as a general rule, the name of a nominee should not be formally announced, and confirmation hearings should not be scheduled, until the White House Counsel's Office has an opportunity to review the results of the background investigation. We recommend, however, that the fact that this is the current practice in the White House be included in discussion of this recommendation. Furthermore, the process has to remain flexible to accomodate the occasional need of the President to announce immediately his intention to nominate an individual to fill a vacant position; thus, we recommend against an inflexible rule on announcements of intentions to nominate.

Recommendation number four on page 43 is one with which we absolutely disagree. As we have discussed previously, we do not believe that it is in the best interest of this Administration or any President to attempt to reach a formal agreement with the Senate through which all SPIN material necessary for the exercise of the Senate's advice and consent responsibilities would be provided to it by the FBI. We believe that providing any SPIN information to the Senate is wholly at the perogative of the President and should be governed by past practices and traditions as well as the facts of each particular nomination. We do not believe that a formal agreement would in any way advance the President's interests.

With respect to recommendation five on page 44, we note merely that we do not wish to foreclose the possibility that the FBI may be called upon to testify for Senate confirmation committees.

Finally, with respect to the recommendation on page 44 for a SPIN Czar, we cannot really comment until the proposal is better explained.

CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, we recommend you discuss this matter privately with Ed Schmults at your earliest convenience, and secure an agreement from Schmults that certain changes will be made in this report prior to its finalization. Additionally, we seriously question whether this report should be made public at any time. Finally, we recommend that you advise Schmults, if necessary, that we are prepared to disavow this report if it is not changed and is released in its current form, and that, if the Attorney General sends this report in its current form to us, we will not adopt its recommendations.

SECTION IV

THE RELATIONSHIP BETWEEN THE WHITE HOUSE AND THE FBI, AND THE WHITE HOUSE AND THE SENATE

At the core of a reexamination of the conduct of Special Inquiry background investigations lies the need to better understand the relationships between the White House and the FBI, and between the White House and the U.S. Senate. The purpose of this chapter is to review both of these relationships.

Relationship Between the White House and the FBI

With two major exceptions, the President has delegated to his Counsel's Office the responsibility for reviewing FBI background reports and making recommendations concerning the background and qualifications of potential nominees. The exceptions involve nominations for ambassadorships, which have been delegated to the Secretary of State, and for judgeships, U.S. Attorneys and U.S. Marshals, which have been delegated to the Attorney General. Yet, even with these exceptions, the final recommendations of each Department are subject to de novo review, when appropriate, by the Counsel to the President. The Attorney General, however, except in unusual circumstances, plays no role in the SPIN process; rather, there is a direct relationship between the White House Counsel and the FBI.

The FBI's objective in SPIN inquiries is to conduct a thorough investigation of the background of prospective senior Executive Branch officials, and to provide the results to the White House Counsel in a form that can be easily but effectively reviewed. The investigation focuses principally upon the character, associations, reputation, and loyalty of the nominees. In essence, the report should identify any potential problem areas in the candidate's background so that they may be considered as part of the total evaluation of the individual's qualifications to hold high public office.

Notwithstanding the FBI's experience of more than three decades in conducting background investigations on Presidential nominees, certain misunderstandings concerning SPIN inquiries can occur between the White House and the FBI. Inasmuch as Executive Branch routines and relationships with respect to the SPIN process largely take shape during a Presidential transition and in the first months of a Presidency, this period must be the focal point of any effort to clarify or improve the process.

The members of each President-elect's Transition Team and the White House staff of a newly inaugurated President are often new to the Washington environment, and unfamiliar with the details of the appointments process. They are faced with enormous pressures to process a large volume of applications, identify nominees, and put the new Administration in place as rapidly as possible. Moreover, they are constrained to avoid or minimize premature publicity about potential nominees.

The pressures of a Presidential transition are shared by those in the FBI responsible for conducting SPIN inquiries. They must conduct hundreds of background investigations on high-level nominees during the first year of the

new Administration. This is a tremendous burden, and the burden is made even greater by the short deadlines often imposed. When the Transition Team and White House officials settle on a nominee for an important or controversial position, they usually want the background investigation completed promptly so that the President can begin his term with his own team in place. When a nomination must be confirmed by the Senate, a date for a Committee hearing may be set even before the background investigation has begun. Sometimes, short deadlines are set by the Transition Team and White House staff to lessen the risk that news of the appointment will leak before it is announced or that erroneous rumors will gain currency.

The imposition of short deadlines inevitably has an impact upon the conduct of a background investigation. When the Transition Team imposes such deadlines on the FBI, it must recognize that it is getting a "best efforts" investigation. Perhaps most troubling, this effect may not be observable to those unfamiliar with background investigations, because it may result from subtle shortcuts rather than glaring omissions. For instance, interviews that would generally be conducted in person may be handled by telephone, where an individual may be less likely to be candid and open. Leads that are not likely to be productive, but conceivably may open new avenues of investigation, are less likely to be pursued.

The problem of short deadlines points to a more fundamental issue in the SPIN process--the different institutional interests of the FBI and the Transition Team. The FBI's interest is to conduct a high-quality SPIN investigation and provide the results in a clear, complete, and timely manner to the Transition Team. It is not interested in whether or not the report is favorable to the nominee, as long as it is accurate and fair. The Transition Team, of course, is deeply interested in the content of the report; it does not want to nominate an individual who will embarrass the President or not serve him with integrity. However, before an individual's name is provided to the FBI for background investigation, his credentials and talents have already been carefully examined by the Transition Team and found worthy of consideration for an appointment. Once this decision is made, the background investigation may be treated as a procedural hurdle to be overcome without complications, particularly if they result in delay and controversy. Ideally, the Transition Team should view the background investigation as an opportunity for a more informed selection and not merely as a necessary formality in the selection process.

This difference in institutional interests is most pronounced when a background investigation is requested after public announcement of the nominee's name. A Common Cause critique of the nomination process in the Carter Administration addressed this phenomenon. It cited a Senate staff member's criticism that, once a decision to nominate someone had been made by the President, the Counsel's Office was placed in a defensive posture and became an advocate for the nominee, a process that did not lead to meaningful scrutiny.1/ Moreover, individuals may be more reluctant to provide the FBI with information adverse to the nominee if the President has already formally

declared his selection. For these reasons, premature public announcement is discouraged by the White House Counsel's Office, but it can sometimes not be helped, such as when an official is removed and his replacement must be immediately named or when false rumors of an appointment create a political problem for the Administration.

Another major problem faced during transition is that the Transition Team handling this onslaught of appointments generally has little or no benefit of the experience gained by earlier White House staffs in reviewing SPIN reports and making applicant determinations. As a result, each new Transition Team and White House staff must be told anew about the scope and depth of a SPIN investigation, so that they understand what it is--a series of interviews and record checks--and what it is not--a certification that the nominee is fit to hold office. They must be advised how to assess the reliability and knowledge of confidential sources providing derogatory information, and they must be informed that the FBI can seek to resolve their questions either by providing them access to more detailed investigative reports or by conducting additional investigation. Moreover, they should understand their prerogative to request the FBI to broaden its SPIN investigation beyond its usual confines to focus on certain areas of concern for a particular nominee, such as potential conflicts of interest.

The FBI in the past has briefed relevant Transition Team members concerning the SPIN process, but the briefings do not appear always to have achieved the necessary degree of understanding. It would be helpful if the FBI prepared a detailed briefing book describing the SPIN process and the relationship between the Transition Team and the FBI. The oral briefing provided by the Bureau could then correct misunderstandings, answer questions, and build the personal rapport that will be essential during this critical time. The Section Chief and Unit Chief in charge of SPINs must continue to be available to the Transition Team on a daily basis.

There is an additional change that ought to be considered. At the present time, senior officials of different offices within the Department of Justice have separate responsibility for the review of individual categories of DAPLI reports, that is, U.S. Attorneys, U.S. Marshals, and Federal judges. No one official in the Department has an overall review role or central coordinating responsibility. If one official were selected to provide a central point of control within the Department for DAPLI reports, this could aid the FBI in setting priorities. This experience and insight would also be available to the White House Counsel's Office if it sought such advice.

The problems of short deadlines and misunderstandings grow less serious after the early months of an Administration; by then, the pace of new appointments slackens and the Counsel to the President becomes more accustomed to the SPIN process. However, one problem that does not face the Transition Team emerges once the new President takes office--the absence of a formal document governing the authorization of a SPIN investigation, the steps taken to protect the privacy of SPIN reports, and the safeguards provided for those interviewed who requested confidentiality.

Each of these areas was covered during the transition periods of both Presidents-elect Carter and Reagan by a Memorandum of Understanding signed by the President-elect and the Attorney General. The Memorandum of Understanding protects against background investigations being requested for improper purposes by requiring the request to be in writing from the President-elect or his designee, and to be accompanied by the written consent of the person to be investigated. It protects against the unnecessary dissemination of SPIN reports by restricting access to the material to the President-elect, his designated representatives, and others directly involved in deciding the individual's suitability for the position. To give teeth to the need-to-know requirement, it prohibits copies to be made of the reports, mandates that records be kept of who is given access, and requires the reports to be returned to the FBI if a decision is made not to employ the candidate. Finally, the Memorandum of Understanding recognizes the interest of those interviewed in confidentiality and the importance of such confidentiality to the success of a background investigation by promising to keep identifying information confidential to the extent permitted by law.

However, the Memorandum of Understanding does not apply beyond the transition, and efforts to replace it with an Executive Order have not been pursued. Guidelines were formulated under Attorney General Levi, but they were never enacted by Executive Order. Fortunately, the absence of an Executive Order has not yet created significant problems, because both the White House and the FBI informally follow the procedures embodied in the Memorandum of Understanding. Yet, there remains a need for such a document to serve as a safeguard against possible misuse and as a formal statement of the role and responsibilities of each participant in the SPIN process.

Relationship Between the White House and the Senate

As described in Section I, the appointment of such high Government officials as Cabinet Secretaries, Ambassadors, and Judges requires the President to nominate and the Senate to confirm. To perform these separate constitutional roles, the President and the Senate each need accurate and candid information about the character and integrity of the nominee. It is the FBI's task to investigate the background of the nominee and provide this essential information.

The need of the President and the Senate for the results of the FBI's investigation, however, must be balanced with two other important considerations--the nominee's interest in not having his reputation damaged by unsubstantiated allegations which may arise during the background investigation and the interest of those interviewed in not having their identities revealed. These latter interests are consistent with the larger institutional interests of the White House and the Senate. Leaks of information that unfairly challenge the integrity and reputation of nominees harm the innocent and discourage individuals of ability from accepting positions in Government. Breaches of promises of confidentiality injure those individuals who often were most candid in discussing the nominee and make future background investigations less effective by discouraging that candor in others.

Unfortunately, individuals in both the White House and the Senate may sometimes lose sight of these larger interests in focusing upon transient political or personal interests, and publicly reveal information that should best remain private. The Transition Team, in its Memorandum of Understanding with the Attorney General, has sought to limit this danger by imposing the restrictions cited above.

The safeguards of limited access and accountability provided in the Memorandum of Understanding should be adopted by the White House and the Senate in a formal agreement governing the consideration of all advise-and-consent nominations. These matters are too important to be left to informal understandings or ad-hoc agreements with different Committee Chairmen. Moreover, for many nominations, time is of the essence, and an agency should not be left without leadership while the White House and the confirming Senate Committee hammer out their differences concerning access to background material. A single agreement, such as an Executive Order, a resolution of the Senate, or a written understanding, signed by the President and approved by the Senate, should govern the manner in which every Committee receives and protects information regarding the background of an advise-and-consent nominee.

Currently, the FBI provides the Office of the Counsel to the President with a summary memorandum reporting the results of the SPIN investigation and with the full text of interviews containing derogatory information. Once this information is provided to the White House Counsel, the FBI's role in the nomination ends, unless, of course, additional information or investigation is requested. The FBI plays no part in providing the necessary information to the Senate; that task is handled by the White House Counsel. If the full text of derogatory interviews is provided to the Senate, the FBI is provided an opportunity to excise the text to protect the confidentiality of the individuals interviewed.

It is essential to preserve the FBI's role as an impartial, nonpartisan investigator providing background information to the President concerning a political nominee for high office. First, it is only fair that the President have the benefit of this information before it reaches the Senate. He enjoys the constitutional prerogative to nominate, and he deserves the opportunity to study the SPIN report and decide whether to pursue the nomination or withdraw it. Only if he decides to pursue it need the information be provided to the Senate. Second, the FBI should not be asked to provide SPIN information directly to the Senate. The appointment of an advise-and-consent nominee requires the interplay and ultimate agreement of the White House and the Senate. If the Senate believes it needs additional information to carry out its advise-and-consent function, it should request such information from the White House. If the White House concurs, it can request the FBI to provide it with additional information and pass on this information to the Senate. If it demurs, it can negotiate a satisfactory arrangement with the Senate, recognizing that the fate of the nomination may lie in the balance. The FBI should not be drawn into this essentially political dispute. The 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.

Similarly, the FBI should not be requested by the Senate Committee considering confirmation to testify regarding the background investigation of the nominee. Such testimony almost inevitably places the FBI in the uncomfortable and untenable position of being asked to characterize the fitness of the nominee. The FBI investigates the background of a nominee; it is neither its role nor does it have the special expertise to determine his fitness for office. Such a determination must be left to White House officials and the Senate on the basis of information provided by the FBI. Moreover, it is extremely difficult for an FBI official during Senate testimony to answer questions candidly and completely, and, at the same time, protect the identity of confidential sources. This delicate task is best performed in writing, where words can be chosen more carefully and agents involved in the background investigation can examine the work product to ensure that the identities of sources cannot be determined from the information provided. Putting all information in writing also means that the White House can effectively serve as the conduit for both the questions and the answers, thereby giving the President the benefit of the information before it goes to the Senate and protecting the FBI from being caught in the middle of a political dispute.

FOOTNOTES

1/ Bruce Adams and Kathryn Kavanaugh-Baran, Common Cause, Promise and Performance: Carter Builds a New Administration (Lexington, Massachusetts; Toronto: Lexington Books, D.C. Heath and Company, 1979), p. 94.

SECTION V

SUMMARY AND RECOMMENDATIONS

Summary

The FBI and the White House have developed a workable arrangement for investigating the backgrounds of Presidental nominees.

A request for a background investigation is made in writing by the Office of the Counsel to the President, accompanied by appropriate waivers from the prospective nominee. This request specifies whether or not the position is subject to Senate confirmation. The scope of the basic SPIN investigation is firmly established, but the White House has the opportunity to state more precisely its requirements or priorities in particular cases.

The FBI imposes a usual deadline of 10 workdays on its field offices to complete the SPIN investigation and attempts to provide the White House Counsel's Office with the results of the investigation in 25 calendar days.

The results of SPIN inquiries are furnished in a summary memorandum supplemented with the complete text of interviews containing derogatory information. The names of those who requested that their identity not be disclosed outside the FBI are not furnished to the White House. The White House Counsel's Office may request the FBI to conduct additional investigation if deemed necessary, or may ask to review the investigative reports, albeit with appropriate safeguards to preserve the confidentiality of sources. The FBI provides assistance to the White House in assessing the weight to be given to information furnished by persons afforded confidentiality.

When the President decides to present the nomination to the Senate for advice and consent, the White House Counsel provides the appropriate Senate Committee with the relevant FBI background information necessary to make an informed decision about confirmation.

These procedures are sensible and should be continued. However, some shortcomings remain in the SPIN process which need to be addressed as recommended below.

Recommendations

1. Formalization of Procedures

There have been a number of attempts over the years to formalize SPIN procedures, including the preparation of guidelines and the drafting of an Executive Order, but none have been formally implemented. The only exceptions have been pre-inaugural Memoranda of Understanding between the President-elect and the Attorney General, which have no formal application beyond the transition period.

The absence of an Executive Order or other formal agreement has not yet created significant problems, because both the White House and the FBI informally follow the procedures embodied in the Memorandum of Understanding. Yet, there remains a need for such a document to serve as a safeguard against possible misuse and as a formal statement of the role and responsibilities of each participant in the SPIN process. Formalization of mutually agreed-upon procedures, which could either be modified or adopted in whole by each incoming Administration, would help in resolving misunderstandings which have arisen over the use and interpretation of SPIN inquiries, as well as permit a degree of flexibility over time.

Recommendation: Procedures governing the initiation of background investigations of White House nominees and dissemination of the results should be established by Executive Order, or other formal agreement, and appropriate Attorney General Guidelines.

2. Investigative Deadlines

The Transition Team and the staff of a newly inaugurated President are faced with enormous pressures to process a large volume of applications, identify nominees, and put the new Administration in place as rapidly as possible. These pressures are shared by those in the FBI responsible for conducting SPIN inquiries. Hundreds of background investigations on high-level nominees are conducted during the first year of a new Administration. This is a tremendous burden, one that is made even greater by the short deadlines often imposed.

When the Transition Team and White House officials settle on a nominee for an important or controversial position, they usually want the background investigation completed promptly. When a nomination must be confirmed by the Senate, a date for a Committee hearing may be set even before the background investigation has begun. Sometimes, short deadlines are set by the Transition Team and White House staff to lessen the risk that news of the appointment will leak before it is announced or that erroneous rumors will gain currency.

The imposition of short deadlines inevitably has an impact upon the conduct of a background investigation. When that happens, the Transition Team must recognize that it is getting a "best efforts" investigation.

Recommendation: To the extent possible, the White House Counsel's Office should avoid the imposition of short investigative deadlines and allow adequate time for complete and comprehensive background investigations of all nominees.

3. Scheduling of Confirmation Hearings

The White House Counsel's Office comes under particular pressure when a background investigation is requested after public announcement of the intended nomination or when confirmation hearings on the nominee have been scheduled prior to completion of the background investigation. Reviewing officials in the White House may be forced prematurely into a defensive posture or an advocacy position on behalf of the nominee. From the FBI's perspective, an individual being interviewed may be more reluctant to provide information potentially adverse to the nominee if the President has already formally declared his selection.

Recommendation: As a general rule, the name of a nominee should not be formally announced nor should confirmation hearings be scheduled until the White House Counsel's Office has had an opportunity to review the results of the background investigation.

4. Formal White House-Senate Agreement

The constitutional arrangement regarding Presidential appointments clearly contemplates a spirit of accommodation and cooperation between the Executive and Legislative Branches. Therefore, the policies governing the President's submission of nominations to the Senate, and the scope of the background information which is provided, must take into account the sharing of power which governs the appointment process.

To perform their respective constitutional roles, the President and the Senate must have accurate information about the character and integrity of a nominee. These needs, however, must be balanced both with the nominee's concern that his reputation not be damaged by unsubstantiated allegations and with the sensitivity of those interviewed to not having their identities revealed.

The safeguards of limited access and accountability are too important to be left to informal understandings or ad hoc agreements with Committee chairmen. An agreement, such as an Executive Order, a resolution of the Senate, or a written understanding, signed by the President and approved by the Senate should govern the manner in which every Committee receives and protects information regarding the background of a Presidential nominee.

Recommendation: Each Administration should reach a formal agreement with the Senate through which all SPIN material necessary for the fulfillment of the "advise and consent" function would be provided under conditions which secure the confidentiality of all sensitive information, sources, and methods.

5. Role of the FBI

The Donovan matter resulted in the unprecedented occurrence of FBI officials testifying at the Senate confirmation hearing as to the conduct and results of a background investigation. This case was also unique in two other respects. It was the first time that the FBI has furnished such information directly to the Senate, rather than by way of the White House, and it was the first occurrence of Senate committee staff members being permitted to interview an FBI source in a background investigation.

It is essential to preserve the FBI's role as an impartial, nonpartisan investigator providing background information to the President concerning a political nominee for high office. This is best accomplished when 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. The appointment of an advise-and-consent nominee requires the interplay and ultimate agreement of the White House and the Senate. The FBI should not be drawn into this essentially political dialogue. The 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.

Nor should the FBI be requested by the Senate Committee considering confirmation to testify regarding the background investigation of the nominee. Such testimony almost inevitably places the FBI in the uncomfortable and untenable position of being asked to characterize the fitness of the nominee. The FBI investigates the background of a nominee; it is not its role, nor does it have the special expertise, to determine the nominee's fitness for office. Such a determination must be left to White House officials and the Senate on the basis of information provided by the FBI.

Recommendation: The FBI should be neither expected nor requested to provide background information from SPIN investigations directly to the Senate. The Senate should obtain the information it requires directly from the White House in accordance with mutually satisfactory agreements.