



STREAMLINING THE BACKGROUND INVESTIGATION PROCESS FOR EXECUTIVE NOMINATIONS

Report to the President and the Chairs and
Ranking Members of the Senate Committee on
Homeland Security & Governmental Affairs and the
Senate Committee on Rules & Administration

Working Group on Streamlining
Paperwork for Executive Nominations

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Table of Contents

| | |
|--|-----------|
| Executive Summary | 1 |
| Part I: Evaluating the Appropriate Scope of PAS Background Investigations | 3 |
| Background | 3 |
| Findings | 6 |
| Recommendations. | 7 |
| Part II: Evaluating the Potential Use of Non-FBI Investigative Resources. | 13 |
| Background | 13 |
| Findings | 14 |
| Recommendations. | 17 |
| Part III: Recommendations for Further Evaluation | 21 |
| Conclusion | 23 |



Executive Summary

In recent decades, the appointment process for individuals nominated by the President and requiring Senate confirmation (the “PAS” appointment process) has become increasingly complex, labor-intensive, and resource-intensive. In order to preserve the government’s ability to attract talented leaders to federal service and to fill key posts in a timely manner, the Presidential Appointment Efficiency and Streamlining Act of 2011 (Streamlining Act), a bipartisan measure which the President signed into law on August 10, 2012, took an important step towards reforming the PAS appointment process. Among its provisions, it established a Working Group on Streamlining Paperwork for Executive Nominations (Working Group) comprised of current and former government officials with expertise in the nominations process. Congress directed the Working Group to report to the President, the Senate Committee on Homeland Security & Governmental Affairs (HSGAC), and the Senate Committee on Rules & Administration (Rules) with recommendations that would help both branches move nominees through the process more expeditiously. This is the second report of the Working Group. It is focused on identifying and addressing inefficiencies in the background investigation process to avoid delays in candidates’ nominations.

In conducting its review of the PAS background investigation process, the Working Group consulted with stakeholders, including White House and Senate staff. The Working Group also solicited the input of agency personnel with expertise in the background investigation process both inside and outside the PAS context, including staff at the Federal Bureau of Investigation (FBI), Office of Personnel Management (OPM), and Office of the Director of National Intelligence (ODNI). The Working Group is pleased to present the results of its inquiry in this report.

The Working Group found that the vast majority of PAS candidates undergo a background investigation that covers the last 15 years of their lives, regardless of the nature of the positions for which they are being considered. This 15-year background investigation exceeds the broadest scope of investigation in use throughout the rest of the Executive Branch, where a 10-year investigation is sufficient for even the most sensitive national security positions.

This report recommends that the PAS investigation framework be brought in closer alignment with the well-established framework employed in other parts of the Executive Branch. Specifically, the Working Group recommends that the White House consult with the Senate and consider the following steps to streamline the PAS background investigation process: (1) adopting a 10-year investigative scope as a presumptive default for PAS candidates; and (2) developing a framework for determining appropriate exceptions to the 10-year default in certain circumstances—for example, requiring less extensive investigations for part-time positions without national security sensitivity and more extensive ones for a limited number of senior positions. These reforms would reduce unnecessary burdens on both the candidates and the FBI. They would also improve the efficiency of the entire process, thereby allowing the White House and Senate to obtain the information they do need as expeditiously as possible.

At the direction of Congress, the Working Group also examined the possibility of relying on personnel outside of the FBI to support or complete PAS investigations as a means of improving the efficiency of the process. After an examination of available data and interviews with FBI and White House staff, the Working Group found that the FBI has successfully met White House performance requirements for PAS

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

investigations to date, without the need for assistance from other investigative entities. The Working Group, however, recognizes that the needs of the White House and the resources available from the FBI are subject to change, and an increase in demand for PAS investigative capacity may be inevitable as future Administrations strive to fill a great percentage of PAS positions at the start of a Presidential term. The Working Group therefore examined the feasibility of engaging non-FBI resources from the perspective of increasing capacity to handle future surges that would exceed historical levels.

As a result of its inquiry, the Working Group determined that it is feasible to leverage OPM's Federal Investigative Services (FIS) as a means of increasing total capacity beyond the level of current demand. There remain, however, several administrative issues that must be addressed in advance of any decision to leverage FIS investigative services for PAS appointees. These include areas in which the current FIS process may need to be adjusted in order to meet the unique requirements of PAS investigations such as records access, content of investigative products, requirements for records storage, and budget and accounting issues. The Working Group therefore recommends that the FBI and OPM work jointly to evaluate and outline the actions necessary to address these administrative issues prior to engaging FIS to support PAS investigations. FBI and OPM should report results to the White House within the next year (*i.e.*, by mid-2014) in order support a fully-informed decision regarding engaging FIS to support PAS investigations prior to the start of the next Presidential term. If this joint inquiry demonstrates that leveraging FIS investigative capacity would be practical and beneficial, the Working Group further recommends that the White House consult with the Senate and consider tasking FIS with a pilot program limited to background investigations for part-time, non-sensitive positions.

This report builds on the Working Group's previous findings, detailed in a November 2012 report, which outlined steps for streamlining the paperwork required for executive nominations, including adoption of a common core of questions for all nominees. This latter proposed reform remains the single most important step that the Executive Branch and Senate could take to expedite and streamline the nominations process. The Working Group appreciates the positive reception of its first report by the Senate and the White House and is pleased to report that several Senate committees—including HSGAC, Rules, the Committee on Health, Education, Labor, and Pensions (HELP), and the Committee on Veterans' Affairs—have committed to use the common core of questions as the primary basis for their questionnaires to nominees.



Part I: Evaluating the Appropriate Scope of PAS Background Investigations

Background investigations have been an important tool for evaluating candidates for government service at least as far back as the Eisenhower administration.¹ All candidates for nomination to Senate-confirmed positions undergo a background investigation conducted by the Federal Bureau of Investigation (FBI)—or, in the case of candidates for positions with the Department of State, by the Bureau of Diplomatic Security—as one aspect of the larger vetting process. In the Presidential Appointment Efficiency and Streamlining Act of 2011, Congress directed the Working Group to examine whether the scope of that background investigation can and should be modified to reduce the burden on candidates and allow investigations to be completed more expeditiously.

Background

Basic Outline of the PAS Background Investigation Process

The process for FBI background checks begins with each PAS candidate completing the Standard Form 86 Questionnaire for National Security Positions (SF-86) using the Electronic Questionnaires for Investigation Processing (e-QIP) system operated by OPM. Candidates also complete a Supplement to the Standard Form 86 that includes questions about a candidate’s criminal history, memberships and associations, and involvement in civil litigation. Once this paperwork is complete, the White House requests that the FBI initiate a background investigation. With rare exceptions, this involves a full-field investigation with interviews of the candidate, his or her associates, and current and former employers, as well as a check of FBI and other records.²

When the investigation is complete, the FBI provides the White House with a final report that outlines the results of the inquiry. White House staff review the report to determine whether there is anything about the candidate’s background or prior conduct that would cast doubt on his or her fitness to serve in a Senate-confirmed position. Because the background investigation contains sensitive and personal information, its distribution is restricted, even among White House staff. Upon request and pursuant to established protocols to ensure confidentiality, the results of the background investigation may also be shared with members of the relevant Senate committee.

The Dual Function of Background Investigations

The PAS background investigation process is an adaptation of a process that takes place more than 2 million times a year throughout the government, differing in scope according to the nature of the position

1. Exec. Order 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953).

2. Where the FBI has already recently conducted a background investigation of a candidate—for instance, in connection with an earlier nomination—the White House may instead request that the FBI simply update the existing investigation to reflect any new information.

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

in question. For that reason, it is important to evaluate the framework for PAS background investigations within the broader context of other Executive Branch background investigations.

Throughout all levels of the Executive Branch, background investigations are used as the basis for two distinct types of assessment: (1) the evaluation of an individual’s suitability or fitness to serve in the position in question; and (2) and the adjudication of an individual’s eligibility to occupy a national security position and/or access classified information.³

Suitability. All positions in the Executive Branch require an evaluation of an individual’s suitability or fitness to serve. Suitability refers not to an individual’s qualifications but to his or her ability to carry out the duties of the position for which he or she is being considered with responsibility and integrity. The greater the degree of public trust that a position enjoys, the greater the scrutiny of a candidate’s integrity and prior conduct. The majority of federal positions are classified in accordance with guidance issued by OPM, which categorizes positions as Low-Risk, Medium Risk Public Trust, and High-Risk Public Trust, based on the degree to which an individual’s misconduct could adversely affect government activities.⁴

The White House is responsible for determining the suitability of candidates for nomination to PAS positions, and it uses the results of the FBI background investigation to make this determination. PAS positions are expressly exempt from OPM’s suitability designation framework, given the unique nature of the appointment process and the special responsibility that the Constitution vests in the President to appoint officers with the advice-and-consent of the Senate.⁵ The White House therefore has significant flexibility to determine the appropriate suitability requirements for PAS nominees.

National Security Eligibility. Background investigations are also used for national security purposes, but only where the position in question requires the incumbent to access classified information or is otherwise designated as a national security position pursuant to Executive Orders 10450 and 12968 by virtue of the material adverse effect that an individual in the position could have on national security. National security positions are categorized as Non-Critical Sensitive (NCS), Critical-Sensitive (CS), or Special-Sensitive (SS) based on the degree of potential harm:

| National Security Sensitivity | Definition | Security Clearance Associated ⁶ |
|-------------------------------|--|--|
| Noncritical-Sensitive (NCS) | Potential to cause damage to national security | Confidential or Secret |
| Critical-Sensitive (CS) | Potential to cause exceptionally grave damage to national security | Top Secret |
| Special-Sensitive (SS) | Potential to cause inestimable damage to national security | Sensitive Compartmented Information (SCI) |

Positions without any national security sensitivity are considered “non-sensitive.”

3. Exec. Order 12968 § 2.1 (noting that national security eligibility decisions are distinct from suitability decisions).
 4. 5 U.S.C. § 731.106.
 5. See 5 C.F.R. § 731.101(b); 5 U.S.C. § 2102(a).
 6. Not all employees holding national security positions require access to classified information. A position may be categorized as a national security position, for example, where it involves protection of the nation’s borders or ports from terrorism, even if no access to classified information is required. See 75 Fed. Reg. 77783 (Dec. 14, 2010).

STREAMLINING THE BACKGROUND INVESTIGATION PROCESS FOR EXECUTIVE NOMINATIONS

The White House does not adjudicate a PAS candidate's eligibility to access classified information or make any other national security eligibility determination. Instead, personnel security adjudicators for each agency are responsible for determining PAS candidates' national security eligibility, using standards generally applicable throughout the Executive Branch. Because personnel security adjudicators base these determinations on the same background investigation reports used by the White House to make suitability determinations, the White House must take care to ensure that the background investigation it requests for a PAS candidate is at least sufficient to meet the minimum requirements for any national security eligibility decisions that may be required.

Existing Frameworks for Determining the Appropriate Investigative Scope

Throughout the Executive Branch, the minimum level of background investigation required for a particular position is a function of the position's suitability designation and its national security sensitivity (if any). Outside the PAS context, the appropriate investigative scope is governed by the Federal Investigative Standards, which are jointly issued by the Director of OPM (the "Suitability Executive Agent") and the Director of National Intelligence (the "Security Executive Agent"). Pursuant to these standards, higher risk positions are subject to one of the following types of background investigations:

- **Minimum Background Investigation (MBI):** Comprehensive background investigation spanning a 5-year history, with a subject interview and written inquiries only. Allows eligibility for Noncritical-Sensitive positions (and/or Secret clearance) and non-sensitive Moderate Risk Public Trust Positions not requiring security clearance.⁷
- **Background Investigation (BI):** Comprehensive background investigation spanning a 5-year history, including field interviews. Used for High Risk Public Trust Positions that are non-sensitive and do not require security clearance.
- **Single Scope Background Investigation (SSBI)**—Comprehensive background investigation spanning a 10-year history, including field interviews. Allows eligibility for all public trust positions and all levels of national security sensitivity (including Special-Sensitive and SCI access).

The framework for PAS background investigations, which traces its roots to 1990, involves greater temporal coverage than what is contemplated by the Federal Investigative Standards for non-PAS positions. The PAS framework encompasses four different levels of field investigation:

- **Level I Investigation:** Covers a candidate's entire adult life (back to age 18)
- **Level II Investigation:** Covers a 15-year scope
- **Level III Investigation:** Covers a 10-year scope
- **Level IV Investigation:** Covers a 5-year scope

Currently, the vast majority of PAS candidates—roughly 83% percent—undergo a 15-year scope Level II investigation prior to nomination. Candidates for Cabinet-level positions and their equivalent, as well

7. Candidates for Noncritical-Sensitive positions must fill out the SF-86 as the basis for an MBI, whereas candidates for non-sensitive public trust positions can fill out the less extensive SF-85P.

STREAMLINING THE BACKGROUND INVESTIGATION PROCESS FOR EXECUTIVE NOMINATIONS

as for positions in the Department of Justice, undergo a Level I background investigation covering their entire adult lives. Level I investigations comprise approximately 4% percent of total PAS investigations.⁸

The 5-year scope Level IV investigation is currently used for some, but not all, part-time PAS positions not requiring a security clearance, or roughly 13% of all PAS positions. The 10-year Level III investigation—the investigation most closely analogous in scope to the SSBI that is the gold standard for highly sensitive national security positions throughout the Executive Branch—is not currently being used by the White House for any PAS candidates.

The scope of the investigation requested by the White House determines how far back in a candidate's life the FBI conducts its inquiries. So, for example, a 15-year investigation will involve inquiries into the last 15 years of a candidate's employment history, credit history, and involvement in civil litigation. Certain aspects of the investigation, however, extend to a candidate's entire adult life, regardless of the investigative scope requested by the White House. These include, for example, certain aspects of a candidate's criminal history and history of substance abuse.

Findings

The current framework for determining the scope of PAS background investigations is characterized by two notable features: (1) different PAS positions tend to be subject to uniform levels of scrutiny, with limited variance; and (2) in almost all cases, PAS investigations are broader in scope than investigations of other candidates for federal employment—even those who are being considered for the most sensitive national security positions.

Limited variance. The scope of PAS background investigations does depend at least to some extent on the nature of the position for which an individual is being considered. The most extensive PAS investigation, covering a candidate's entire adult life, is reserved for those individuals—including Cabinet-level officials—with the highest degree of responsibility and the closest association with the President and his Administration. On the other end of the spectrum, some (but not all) part-time positions on advisory boards and commissions are subject to reduced scrutiny, in the form of a 5-year investigative scope—the same basic scope used in the non-PAS context for High Risk Public Trust positions without any national security sensitivity.

But by and large, the variation in investigative scope for PAS candidates exists only at the margins. The vast majority of PAS candidates receive a 15-year Level II background investigation, from the Under Secretary of Defense for Intelligence to Members of the Board of Trustees for the James Madison Memorial Foundation, an independent entity that funds graduate fellowships for future American history teachers.

Broad Temporal Scope. The 15-year Level II investigation that serves as the default standard for PAS candidates exceeds the standards that have been employed successfully for many years throughout the

8. These numbers exclude candidates for the federal judiciary, U.S. Attorneys, U.S. Marshals, and military and foreign service officers, as these positions are vetted through a separate nomination and confirmation process.

STREAMLINING THE BACKGROUND INVESTIGATION PROCESS FOR EXECUTIVE NOMINATIONS

rest of the Executive Branch. PAS positions are the only positions in the Executive Branch that require a 15-year investigative scope for purposes of a suitability determination. And for purposes of national security determinations, the successful completion of a 10-year background investigation is sufficient for the highest levels of access to classified information.

Notably, the use of a 15-year investigation for PAS positions is not required by law and can be administratively updated, as appropriate.⁹ Although the PAS framework is the product of many years of presidential practice, it is not clear how recently the process has been evaluated in its entirety to determine whether elevated levels of coverage are truly necessary for assessing a candidate's suitability for nomination. The present moment offers a valuable opportunity for reevaluation of this framework to ensure that it does not impose unwarranted burdens on candidates for nomination or prevent the White House and Senate from expeditiously receiving the background information truly necessary to a considered decision-making process.

Recommendations

The Working Group's examination of the PAS background investigation process begins with the premise that any recommended changes should:

- ensure that relevant decision-makers receive the information necessary to evaluate a candidate's suitability for nomination and confirmation expeditiously;
- ensure that candidates receive a level of investigation sufficient to allow adjudication of any necessary national security eligibility decisions by appropriate personnel security adjudicators;
- provide for consistency and coherency across the more than 1150 PAS positions;
- align the scope of investigation more closely to the model that has been applied successfully outside the PAS context for decades;
- allow easy implementation without significant additional burden.

The Working Group believes that the following recommendations will advance these objectives while simultaneously reducing unnecessary burdens and streamlining the background investigation process.

Recommendation 1: The White House Should Consult with the Senate and Consider Adopting a 10-Year Investigative Scope—Consistent with the Government-Wide Gold Standard—as the Presumptive Standard for PAS Candidates

Approximately 87% of all PAS candidates are currently subject to FBI background investigations that exceed the broadest temporal scope in use elsewhere in the Executive Branch. Of particular note, the White House generally requires a higher level of background investigation (*i.e.*, 15 years) to assess a PAS

9. See S. REP. NO. 112-24, at 10 (2011) (recognizing that "FBI background checks for individuals nominated to a position in the executive branch are not statutorily required but are a matter of presidential practice").

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

candidate's suitability for nomination than ODNI requires to evaluate whether the candidate should be entrusted with access to Top Secret or Sensitive Compartmented Information (*i.e.*, 10 years). The Working Group recommends that the White House consult with the Senate and consider adopting a 10-year investigative scope as the presumptive standard for PAS candidates. This reform would bring the PAS background investigation process in closer alignment with well-established standards in use throughout the rest of the Executive Branch, even for the most sensitive national security positions. It would also reduce unnecessary burdens on the candidate and the FBI and ensure that key decision-makers in the White House and Senate receive the information they truly need to evaluate candidate suitability as expeditiously as possible.

A Single Scope Background Investigation (SSBI), with a general 10-year scope, is the gold standard for background investigations in the federal workforce.¹⁰ The SSBI has been employed successfully for more than two decades to evaluate the background of tens of thousands individuals, including those occupying among the most sensitive national security positions in the federal government and those requiring access to highly-controlled Sensitive Compartmented Information (SCI). Moreover, the current framework for national security investigations and security clearance adjudications is the product of extensive inter-agency collaboration, research, and reform over the past decade.¹¹

The Working Group finds it significant that the default standard employed by the White House—the 15-year Level II investigation—is 50% more extensive in scope than what is used by the national security community for even the highest levels of national security access. To be clear, the Working Group expresses no independent opinion on the appropriate investigative standards for making national security determinations. However, inasmuch these standards reflect the judgment of relevant agency experts after considerable study, they may serve as a useful baseline for the White House to evaluate its own requirements.

A reevaluation of the PAS default standard is particularly appropriate in light of the historical backdrop against which it was adopted. In 1990, when the White House adopted a 15-year Level II investigation for most PAS positions, a 15-year investigation was necessary at all levels of the government to allow access to Sensitive Compartmented Information (SCI). Although this minimum investigative standard for SCI access was reduced to 10 years one year later,¹² the default standard for PAS investigations has remained unchanged since that time.

The current PAS framework was also adopted at a time when much less information was publicly available or otherwise accessible without manual, in-person investigation. In 1990—before the advent of the internet—there were far fewer resources for assessing a candidate's background and suitability. Today, a vast amount of information can be verified electronically, without the burden and expense of

10. Although the precise scope of each investigative element of an SSBI varies, consideration of this level of detail is unnecessary for purposes of this report. It is sufficient that both the SSBI and the analogous Level III investigation would allow adjudication of any level of security clearance.

11. This process of reevaluation and reform began with the enactment of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), which set ambitious goals for improving the process for granting national security clearances government-wide. These reforms were implemented jointly by the Office of Management and Budget, the Office of the Director of National Intelligence, the Office of Personnel Management, and the Department of Defense.

12. See National Security Directive 63 (1991).

STREAMLINING THE BACKGROUND INVESTIGATION PROCESS FOR EXECUTIVE NOMINATIONS

sending FBI agents into the field. For example, court records can often be obtained electronically, where in the past they may only have been available with a visit to the local courthouse. The Working Group believes that the 15-year default standard should be reexamined in light of current realities, including the existence of other less-resource intensive vetting tools, which are equally available to both the White House and the Senate.

It is also significant that the temporal scope requested by the White House does not apply to certain critical elements of the investigation, which always cover a candidate's entire adult life. For example, a candidate is required to disclose to the FBI all felony charges, regardless of whether they occurred within the relevant scope of the investigation. And if an FBI records check returns derogatory information about a candidate, that information will be reported to the White House, regardless of when the underlying incident occurred. Accordingly, a realignment of the temporal scope of PAS investigations to a 10-year default would not affect the capture of this type of information.

In order to evaluate whether continued use of a 15-year scope is justified, the White House should undertake to examine the frequency with which 15-year background investigations have returned information relevant to a nomination decision that would not have been uncovered by a 10-year investigation. This is precisely the process used by the personnel security community to validate the existing scope of investigations necessary for national security positions.¹³

If, after conducting such an assessment, the White House concludes that a full-field investigation of candidates' activities occurring from 10 to 15 years ago would not shed light on their current fitness to serve, it makes little sense to continue to subject candidates to the burden of such an investigation. The greater the investigative scope, the more work a candidate has to undertake to provide the FBI with his or her background information. Under the current system, candidates must track down and disclose old residential addresses, contact information for former employers, and dates of foreign travel from more than a decade ago. Requiring a candidate to fill out the SF-86 for a period covering the last 15, rather than 10, years thus imposes a significant additional burden on the candidate—one that may even discourage some qualified candidates from entering the nominations process. Candidates should not be put to this cumbersome task where it does not meaningfully contribute to an evaluation of their suitability for nomination.

Adoption of a presumptive 10-year investigative scope would also reduce unnecessary burdens on the FBI and allow FBI resources to be channeled to other more critical tasks. Although the expected time savings of moving from a 15-year to 10-year scope will vary from one investigation to the next, based on each candidate's individual circumstances, when aggregated across more than 1150 PAS positions, it is expected to be significant. The less time that the FBI spends unnecessarily verifying information that is more than a decade old—and is required neither to assess suitability nor to adjudicate national security eligibility—the more time it can devote to providing truly relevant background information as expeditiously as possible. This streamlining effect will benefit not only the FBI, but also the White House and the Senate, which may expect to see candidates move to nomination more quickly.

13. See, e.g., Ralph M. Carney, SSBI Source Yield: An Examination of Sources Contacted During the SSBI, Defense Personnel Security Research Center (March 1996).

Recommendation 2: The White House Should Consider Limited Exceptions to a 10-Year Presumptive Scope Where a 5-Year or 15+-Year Scope May Be Appropriate, Based on the Nature of the Position in Question

The adoption of a presumptive 10-year investigative scope for PAS positions would be a positive step in streamlining the role of the background investigation in the nominations process. The Working Group recognizes, however, that exceptions to this presumptive scope may be appropriate for a minority of positions that require a greater or lesser degree of scrutiny. In particular, a 10-year investigative scope may be unnecessarily burdensome for candidates to part-time positions without any national security sensitivity; and it may be insufficient to allow the White House to evaluate the suitability of Cabinet-level or other similarly high-level officials. Therefore, following adoption of a 10-year investigative default, the White House should review the list of PAS positions to identify those positions that may require greater or lesser scrutiny and adjust the background investigations for those positions accordingly.

A. Consider a 5-Year Scope for Part-time Positions with No National Security Sensitivity¹⁴

In its first report, the Working Group recommended that candidates for part-time positions with no national security sensitivity be subject to less intensive paperwork burdens than other PAS candidates. This principle of proportionality is equally applicable to the background investigation process. The Working Group believes that candidates for part-time positions with no national security sensitivity should be subject to a 5-year—rather than 10- or 15-year—background investigation consistent with the more limited nature of the duties they are being asked to perform.

Candidates for part-time positions who serve 60 days or less during a calendar year—nearly 30 percent of all PAS positions—are already subject to different financial disclosure requirements than candidates for full-time appointments. As discussed in greater detail in the Working Group's first report, OGE permits these individuals to fill out the OGE Form 450, Confidential Financial Disclosure Report, rather than the more extensive OGE Form 278 that other candidates must complete. Indeed, Congress created a special designation for part-time advisory positions precisely to make it easier to capitalize on the skills and knowledge of individuals in the private, non-profit, or academic sectors on an interim or part-time basis.¹⁵ Decreasing the burden of the background investigation on this category of PAS positions aligns perfectly with this congressional aim.

Moreover, the Senate has expressly recognized the need to streamline the appointment process for part-time PAS positions. In 2010, having identified some 233 part-time PAS positions that merited a lesser degree of scrutiny than the typical PAS positions, the Senate established an expedited process for considering these nominations.¹⁶ And during the debate on the Presidential Appointment Efficiency

14. The Working Group believes this recommendation can and should be implemented even if the White House chooses to retain its existing 15-year default scope.

15. Pub. L. No. 87-849, 76 Stat. 1119 (1962).

16. S. Res. 116, 112 Cong. (2011).

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

and Streamlining Act of 2011, special attention was given to whether candidates for part-time positions should receive the same degree of vetting as candidates for full-time government service.¹⁷

Pursuant to OPM guidance on suitability determinations outside the PAS context, a 5-year investigation would be sufficient to allow an individual to serve in positions bearing the highest degree of public trust (where no separate national security adjudication is required). Inasmuch as this requirement is the product of considered judgment by OPM, the Working Group believes that it can provide meaningful guidance within the PAS context as well. Accordingly, the Working Group recommends that candidates for part-time positions without any national security sensitivity be required to undergo only a 5-year investigation, unless there is specific reason to believe that the position requires the same degree of scrutiny as a full-time position.¹⁸

Current White House practice is already consistent with this recommendation to some extent. A 5-year Level IV investigation is used for roughly 150 part-time PAS positions. But an estimated 174 part-time positions are still subject to a 15-year background investigation. While some percentage of these positions may be national security-sensitive—and therefore may require a 10-year investigation—others have no national security sensitivity. For example, the six members that the President nominates to the Board of Trustees for the James Madison Memorial Foundation undergo a 15-year Level II investigation, even though the position involves fewer than 60 days of federal service and requires no security clearance. To allow the White House to achieve greater consistency across all part-time positions, ODNI should provide the White House with a list of PAS positions and their associated national security sensitivities—information that agencies report to ODNI on a periodic basis.¹⁹ The White House should then move part-time positions identified as having no national security sensitivity to a 5-year investigative scope.

As Senator Collins noted during the debate on the Streamlining legislation, the burdens of the appointment process “should not be so onerous as to deter qualified people from public service, particularly when they are being asked to serve as a part-time member of an advisory board.”²⁰ This proposed streamlining of the vetting process for part-time positions would advance the ability of the Executive Branch to attract corporate and civic leaders to serve in advisory roles by reducing the unnecessary burdens they face prior to nomination. When these individuals respond to the call for service, they already subject themselves to a nomination and confirmation process that is, by all regards, burdensome and personally taxing, often without any promise of remuneration. They should not also be subject to

17. For example, Senator Alexander observed that “whether you are Secretary of the Treasury or a member of the part-time advisory board might have a little different level of vetting.” 157 CONG. REC. S3991, S4007 (daily ed. June 22, 2011) (stmt. of Sen. Alexander).

18. In its first report, the Working Group recommended that the White House consider allowing candidates for part-time positions not requiring a security clearance to fill out the SF-85 or SF-85P as the basis for FBI background investigations, rather than the more extensive SF-86 currently in use for all PAS positions. The SF-85P, which is used for Non-Sensitive Public Trust positions, is currently the subject of extensive revisions by OPM. Once a revised version of the form has been finalized, the White House should assess whether movement to the SF-85P for this discrete category of candidates would reduce unnecessary burdens on the candidate while still providing decision-makers with all necessary information.

19. ODNI collects and maintains information on national security requirements for PAS positions as part of its responsibility for coordinating security clearances during periods of Presidential Election and Transition. ODNI should continue to share this information with the White House on a go-forward basis whenever it is updated.

20. 157 CONG. REC. S3991, S3999 (daily ed. June 22, 2011) (statement of Senator Collins).

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

burdens in the background investigation process that are wholly out of proportion with the nature of the advisory role they have been asked to undertake.

B. Consider a Level I (Adult Life) or Level II (15-Year) Scope for Positions That May Warrant Elevated Background Investigations

Even if the White House determines, consistent with the Working Group's recommendations, that a 10-year background investigation is sufficient for the majority of PAS positions, it may also reasonably determine that elevated scrutiny is appropriate for identified positions of unique responsibility or sensitivity. The Working Group recognizes the unique nature of certain PAS positions—in particular, high-level officials who may interact closely with the President and who may be deemed to speak on his behalf. Accordingly, any framework for PAS investigations must allow the White House flexibility to elevate the scope of a background investigation to reflect the increased degree of scrutiny that may be warranted for particularly high-level positions. It is not unreasonable, for instance, for the White House to require a candidate for Secretary of Defense to undergo a broader scope of background investigation than is used for a lower-level DoD official, even where both individuals would require the same level of security clearance.

Categories for which the White House might reasonably determine, at its discretion, that a longer span of a candidate's history is relevant to his or her suitability for nomination include:

- Cabinet-level positions or their equivalent;
- Positions with a high degree of access to the President;
- Positions in which a candidate would speak directly on behalf of the President; and
- Positions that do not report directly to any other Senate-confirmed official.

In acknowledging the White House's need for flexibility and in making recommendations for how that flexibility could be exercised in a manner consistent with the purpose of the background investigation, the Working Group does not mean to suggest that a 10-year investigation—an investigatory scope sufficient for even the most sensitive national security positions—would necessarily be insufficient for any PAS position. And the Working Group recommends that the decision to subject a candidate to a Level I (adult life) or Level II (15-year) background investigation, in excess of the government-wide gold standard, should be made only after a considered determination that such elevated scrutiny—and the burden associated with it—is necessary in light of the nature of the position in question.

Implementation of the foregoing recommendations for reevaluating the PAS background investigation framework will ensure that the burdens involved in the process—from the perspective of both the candidate and the FBI—are appropriate and proportional, and do not unnecessarily prolong the nominations process. It will also ensure that key decision-makers in both branches of government get the information they need without undue delay.



Part II: Evaluating the Potential Use of Non-FBI Investigative Resources

At the direction of Congress, the Working Group has also reviewed the feasibility of relying on non-FBI resources to conduct some PAS investigations as a means of moving nominees through the process more quickly. In undertaking this inquiry, the Working Group was guided by the principle that the White House must have the ability to obtain background investigation results quickly, even during periods of high volume, to ensure that nominations are not delayed even during the early period of an administration.²¹

Background

Overview of Federal Investigative Agencies

There are some 22 investigative entities responsible for conducting suitability and security background investigations for government employees and contractors. Three of these components are highlighted below.

FBI/SIGBIU. The FBI has been responsible for conducting background investigations for the White House since the Eisenhower administration. The FBI's Special Inquiry and General Background Investigation Unit (SIGBIU) investigates the background of hundreds of PAS candidates every year. PAS investigations comprise approximately 15% of SIGBIU's total investigative workload. The FBI/SIGBIU is also responsible for background investigations for staff of the Executive Office of the President and the Department of Justice, as well as for certain sensitive positions at the Department of Energy.

SIGBIU is staffed by 60 full-time employees dedicated to overseeing background investigations and ensuring the return of complete and satisfactory investigatory reports. The field work for PAS investigations is conducted by agents located at any of the FBI's 56 field offices nationwide.

Department of State / DS. The Department of State's Bureau of Diplomatic Security (DS) conducts background investigations for Department of State employees. DS, which is staffed by law enforcement personnel, has special expertise in conducting background investigations for candidates stationed overseas and for candidates who will be stationed overseas. DS is responsible for background investigations for virtually all of the roughly 250 PAS positions within the Department of State, including some 185 ambassadors.

OPM/FIS. OPM's Federal Investigative Services (FIS) is responsible for roughly 90% of all background investigations government-wide, or a total of more than 2 million per year. FIS offers a range of investigative products that match the types of investigations commonly in use outside the PAS context, from automated records checks to full-field investigations. In FY 2012, the more workload-intensive investigations (MBIs, BIs, and SSBIs) made up roughly 15% of FIS's total workload.²²

21. See S. REP. NO. 112-24, at 9-10 (2011).

22. Federal Investigative Services, Annual Stakeholder Report for Fiscal Year 2012 at 8.

STREAMLINING THE BACKGROUND INVESTIGATION PROCESS FOR EXECUTIVE NOMINATIONS

The majority of FIS investigations are conducted by private contractors, which allows FIS to increase capacity quickly. FIS also employs approximately 1600 federal investigators to conduct investigations that are deemed particularly sensitive or “inherently governmental.” FIS operates under a different budgetary model than other federal investigative entities, charging client agencies a fee per background investigation according to a fixed pricing model. FIS draws its operating budget from the fees collected.

Findings

Current Performance of PAS Investigations

When Congress directed the Working Group to look into the feasibility of leveraging non-FBI resources to conduct PAS investigations, it did so with an eye toward whether use of those resources would improve the efficiency and timeliness of the PAS nomination process.²³ Accordingly, an evaluation of this issue would not be complete without an understanding of the FBI’s role in the current process.

FBI Timeliness. Currently, the standard benchmark for the FBI’s completion of a Level II (15-year) background investigations is 35 days from the date of request.²⁴ Where there is a need for a quicker turnaround time—which often occurs at the beginning of an administration but may occur at any point when a crucial position is vacant—the White House can request an expedited investigation. Depending on the availability of witnesses and records, the FBI can complete an expedited background investigation in as little as 5 days. White House staff report that they have had success obtaining expedited investigations when necessary.

The White House does not track how often a nomination, which might otherwise be ready to announce, is delayed because the FBI has not yet completed the candidate’s background investigation; therefore it is not currently possible to quantify the number of instances in which delays in background investigations may delay the confirmation process.²⁵ In interviews, however, White House staff indicated that the FBI’s timeliness in completing background investigations is not commonly the cause of delay in the nominations process. In addition, and as discussed further below, White House staff also reported that factors outside the FBI’s control—such as the amount of time it takes for a candidate to complete the background investigation paperwork—may contribute to the overall time it takes to secure the results of an investigation.

External Limits on Timing. Any analysis of the timeliness of PAS background investigation must also acknowledge that there are certain limiting factors outside the control of the investigating agency. These include delays in the availability of the candidate or third-party associates or employers to be interviewed. Additional delays may occur if investigative leads require that the FBI secure state records, in particular state tax records. The FBI reports that, on occasion, it has taken as long as several weeks to obtain particular local or state records that are not available electronically and that this delay is outside its control.

23. S. REP. NO. 112-24, at 9-10 (2011).

24. By way of comparison, the Director of National Intelligence has adopted an 80-day goal for completion of 10-year SSBIs used to adjudicate Top Secret security clearances outside the PAS context.

25. The White House should consider tracking this information, as it would give a fuller picture of the role of the background investigation process in the overall nominations timeline. It should also consider monitoring the “spread” of FBI timeliness—*i.e.*, not only the average time to complete an investigation, but also how often an investigation takes 10 or more days longer than the benchmark to complete.

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

Finally, it is worth noting that the longer that it takes for a candidate to complete the FBI paperwork at the outset of the vetting process, the greater the delay before the FBI can begin work on—and thus complete—an investigation. Although this delay is not reflected in the FBI’s timeliness statistics—because it occurs before a background investigation has even been requested—discussions with vetting staff indicate that this is an area of potential delay. This is the case even though vetting staff routinely emphasize to candidates the importance of timely completion of FBI paperwork. As discussed in detail in the Working Group’s first report, the sheer volume of paperwork that PAS candidates must fill out during the nomination and confirmation process is extraordinary, and in many cases, duplicative and unnecessary. Reduction in unnecessary or duplicative paperwork, consistent with the Working Group’s earlier recommendations, would not only allow a candidate to tackle the requisite forms more quickly, but would also ensure that a candidate’s background investigation is not delayed by missing paperwork.

FBI Capacity. During hearings to discuss the PAS nominations process, Senators and commenters expressed particular concern about the capacity of the FBI to handle a “surge” in the demand for background investigations that occurs at the beginning of every new administration.²⁶ As the 9/11 Commission recognized in its report, it is critical to the national security that a new administration be fully staffed as quickly as possible.²⁷ If the background investigation is the limiting factor in how quickly this occurs, additional capacity to conduct investigations may be necessary.

The FBI has the capacity to shift resources within its organization to manage a temporary increase in workload such as that found at the beginning of an administration. As noted previously, PAS investigations comprise 15% of the overall workload of the FBI’s Special Inquiry and Background Investigation Unit (SIGBIU), the unit responsible for responding to White House background investigation requests. As such, SIGBIU reports that it can readily shift employees from other less time-sensitive tasks to accommodate a surge of requests from the White House. Moreover, the FBI’s Security Division—the umbrella organization in which SIGBIU is located—has some 250 employees responsible for FBI employee background investigations who can be temporarily assigned to assist with PAS investigation where demand cannot be met within SIGBIU. The FBI reports that it was not necessary to leverage non-SIGBIU personnel during the most recent 2008-2009 Transition. And while agents in FBI field offices, rather than SIGBIU personnel, conduct the field work for PAS investigations, this work comprises such a small fraction of the FBI’s overall investigative fieldwork that the FBI has capacity to absorb increased demands in this area.

26. See, e.g., *Eliminating the Bottlenecks: Streamlining the Nominations Process: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 1 (2011) (Stmt. of Sen. Lieberman).

27. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT*, 422 (2004).

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

The FBI has historically outperformed its 35-day benchmark for PAS background investigations during periods of presidential transition:²⁸

| Administration | Time Period | No. of Level I Cases ²⁸ | Avg. Days to Complete | No. of Level II Cases | Avg. Days to Complete |
|----------------|-------------|------------------------------------|-----------------------|-----------------------|-----------------------|
| Clinton | 11/92—4/93 | 30 | 17 | 100 | 27 |
| | 4/93—8/93 | 1 | 16 | 219 | 29 |
| Bush | 11/00—4/00 | 22 | 11 | 101 | 28 |
| | 4/00—8/00 | 0 | 11 | 323 | 34 |
| Obama | 11/08—4/09 | 39 | 15 | 151 | 31 |
| | 4/09—8/09 | 1 | 17 | 227 | 33 |

Thus, for example, during the first six months following the 2008 election, the FBI took an average of 31 days to complete a Level II (15 year) investigation and 15 days to complete a Level I (adult life) investigation. The fact that the most labor-intensive Level I investigations took, on average, half as much time to complete as the Level II investigations likely reflects that the Level I investigations for Cabinet-type officials were expedited at the request of the White House. That the FBI continued to meet or exceed its 35-day benchmark for Level II investigations even while completing a significant number of expedited investigations suggests that the FBI was able to meet the demand for “surge” capacity.

This does not, of course, guarantee that this will always be the case, especially if future administrations undertake to increase the rate at which they fill key positions—something that observers of the nominations process have long encouraged. It is difficult to predict what future demands for PAS investigations may be at peak periods, and it is therefore also not possible to conclude that the FBI will always have sufficient capacity to meet White House demands for PAS investigations, notwithstanding other demands on its resources.

Available Federal Investigative Services (FIS) Capacity

As noted above, OPM’s Federal Investigative Services (FIS) conducts the overwhelming majority of background investigations for federal employees. A side-by-side comparison between FIS’s completion of non-PAS investigations and the FBI’s completion of PAS investigations would not be expected to shed light on the Working Group’s fundamental inquiry, given the significant differences in the two processes. These include differences in the applicable scope of investigation, as well as the fact that most agencies typically do not request background investigations to be completed within the time frames requested by the White House.

Within the context of the investigations it conducts for federal employees, FIS has made impressive advances in timeliness and capacity over the last few years in order to handle an increased demand

28. The relatively high proportion of Level I investigations – which cover a candidate’s entire adult life – during this period reflects the high number of Cabinet or other very high-level positions that are filled in the initial months of a new administration.

STREAMLINING THE BACKGROUND INVESTIGATION PROCESS FOR EXECUTIVE NOMINATIONS

for background checks outside the PAS context. In FY 2012, the fastest 90% of all FIS security clearance investigations were completed in less than 40 days.²⁹

The Working Group believes that, from a performance perspective, it is feasible for FIS to conduct a portion of the total PAS investigative workload in the event that the White House seeks to increase PAS investigative capacity. The Working Group has nevertheless identified certain practical and administrative issues—unrelated to FIS timeliness or performance—that must first be addressed before a final decision to leverage FIS resources can be made. These are discussed in further detail below.

Recommendations

Based on currently available data, the FBI has successfully met White House performance requirements for PAS investigations without the need for assistance from other investigative entities. Accordingly, any decision to engage other entities to perform some PAS investigations should be based on a desire to create additional future flexibility rather than an expectation that doing so would address existing delays—as the Working Group did not identify such delays on any systematic level.

The Working Group concludes that it is feasible to engage non-FBI resources—in particular, OPM's Federal Investigative Services (FIS)—as a means of creating additional capacity to perform PAS investigations, in recognition of the fact that White House needs and available FBI resources may change over time. This increase in capacity beyond the level of current demand would provide additional flexibility to this and future administrations to be able to move a larger volume of candidates through the system more quickly.

The Working Group has also identified several implementation matters that must first be addressed before a decision to engage FIS can be made. It therefore recommends that OPM and FBI work jointly to address these matters and report on them to the White House. If this joint inquiry demonstrates that it would be practical and beneficial for FIS to conduct a portion of the PAS investigative workload, the Working Group recommends that the White House consult with the Senate and consider tasking FIS with a pilot program as a preliminary step towards potentially engaging FIS to support background investigations for part-time, non-sensitive positions.

Recommendation 1: OPM and FBI Should Work Together to Identify and Address Potential Challenges to Leveraging FIS to Perform Some PAS Investigations

As noted above, the Working Group found that it would be feasible to have FIS conduct some PAS investigations, since FIS has available capacity and broad experience conducting investigations in the non-PAS context. Nevertheless, further inquiry should be conducted to evaluate and address the practical implications of such a decision, since a transition to a dual-entity process would not be entirely costless or effortless. The Working Group recommends that the FBI and OPM work jointly to map out the

29. This average includes both 10-year SSBI's used to adjudicate Top Secret clearances, as well as the less-extensive checks used to adjudicate Secret clearances. See Federal Investigative Services, Annual Stakeholder Report for Fiscal Year 2012 at 13.

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

practical steps that would need to be taken to put FIS in a position to conduct part of the PAS workload and report the results to the White House within the year (or by mid-2014) to enable a fully-informed decision regarding engaging FIS prior to the start of the next Presidential term.

Among other things, the joint OPM/FBI inquiry should address the following potential implementation issues identified by the Working Group:

- **Verifying PAS Coverage Requirements and Aligning FIS Products Accordingly.** As discussed in Part One of this report, the PAS and non-PAS investigative landscapes have evolved over time in slightly different ways. As such, PAS investigations may not be entirely identical in all of their individual elements as non-PAS investigations. For example, there may be differences in the temporal or scope of individual investigative elements, as well as in the types of agency record checks conducted. Because FIS currently offers investigative products tailored to the non-PAS context, adjustments may need to be made to its existing products to allow it to conduct PAS investigations. The FBI should work with OPM to verify PAS coverage requirements, as well as any gaps between PAS coverage requirements and the existing products offered by FIS.
- **Access to Records.** OPM and FBI should work together to ensure that FIS would have the same level of access to records that FBI agents have in the course of conducting PAS investigations.
- **Ensuring a Consistent Deliverable.** To promote efficient review, the White House should receive a report of investigation that is consistent in presentation, regardless of the reporting agency. FIS deliverables will need to be adjusted to enable this to happen. OPM and the FBI should work together to identify appropriate adjustments.
- **Information Maintenance.** Before FIS can be tapped to conduct PAS investigations, guidelines would need to be developed for protecting PAS investigative information and maintaining it separately from other non-PAS materials. This could include the establishment of a new structure for information ownership.
- **Use of FIS Contractors vs. Employees.** As noted above, FIS uses contractors to perform the majority of its workload but also employs 1600 permanent employees to conduct sensitive or inherently governmental investigations. There would need to be a determination about whether FIS could rely on contractors to perform PAS investigations. At least as a preliminary matter, FIS has indicated that their preference would be to rely solely on full-time employees for PAS investigations.
- **Budgetary and Accounting Issues.** Any consideration of leveraging FIS to conduct PAS investigations requires an evaluation of the budgetary and accounting implications of that decision. As noted above, the cost of conducting PAS investigations for the White House is covered by the FBI through existing appropriations in the context of FBI's ongoing operations, whereas FIS must charge the requesting party a fixed fee per investigation. A decision by the White House to engage FIS could not feasibly be made without first resolving this difference in budgetary and accounting treatment and identifying an appropriate funding source from which to pay FIS.

If significant challenges are identified in response to this further inquiry, they should be presented to the White House for evaluation as they arise. This will allow the White House to make a decision about

STREAMLINING THE BACKGROUND INVESTIGATION
PROCESS FOR EXECUTIVE NOMINATIONS

whether to leverage FIS resources with a full appreciation of what that decision would entail. Ultimately, a transition to partial reliance on FIS would only be practicable where it can be accomplished without impairing the functioning of the existing system, which meets the current needs of the White House.

Recommendation 2: Dependent on the Results of Recommendation 1, the White House Should Consider Tasking FIS to Conduct 5-Year Investigations for Part-Time, Non-Sensitive Positions

If, at the conclusion of the foregoing inquiry, the White House finds that use of FIS resources to conduct PAS investigations would be a practical and efficient means of increasing future capacity, the Working Group recommends that the White House consult with the Senate and focus on a discrete category of investigations to be completed by FIS (or other investigative entity), rather than transferring investigations on an ad-hoc basis. The most practical category for transfer would be background investigations for part-time positions without national security sensitivity. The White House would already have identified the universe of positions that fall within this category in order to implement the Working Group's recommendation to move these positions to a 5-year investigative scope. Engaging FIS, initially as a pilot project, to complete this discrete and identifiable set of investigations would provide clarity and transparency to the White House, Senate, FBI, and FIS, and it would facilitate easy tracking and evaluation by the White House. In addition, investigations for candidates to part-time boards and commissions are among those PAS investigations most likely to be delayed in the event the FBI experiences capacity constraints, given the need to concentrate resources on the highest priority cases. Enlisting FIS to complete background checks on candidates to part-time, non-sensitive positions would allow the FBI to continue to devote resources to more sensitive, high-level background investigations while also allowing the White House to staff advisory boards and commissions expeditiously.

Evaluation of FIS's work on this pilot program may inform whether such work should continue or be expanded to include additional levels of PAS background investigations in the future.

Recommendation 3: The White House Should Capitalize on Quality Assessment Resources Found Elsewhere in the Executive Branch

Finally, the White House should avail itself of existing resources for evaluating and improving the background investigation process. In particular, the inter-agency Quality Assessment Working Group (QAWG) is currently working on a comprehensive plan to achieve consistency in quality in background investigations across the government. The QAWG is co-led by ODNI, OPM and DoD and has some 22 participating agencies, including the FBI. This sort of coordination among different investigative entities provides a valuable opportunity for sharing of best practices between the numerous entities that conduct investigations. Although the group is focused on quality assessment government-wide, rather than within the specific context of PAS investigations, it can be a useful resource as the White House evaluates its own process.



Part III: Recommendations for Further Evaluation

The Working Group recommends that the Director of the Office of Management and Budget (OMB) conduct two follow-up assessments of the PAS background investigation process to ensure that the streamlining recommendations outlined in this report are implemented in a manner that enhances the efficiency and effectiveness of the vetting process. In particular, the Working Group recommends that the Director of OMB report to the President on the following elements of the PAS background investigation process:

- **Distribution of Investigative Scope for PAS Candidates:** How are the 1150+ PAS positions distributed among the four different “levels” of background investigation (I-IV)? Currently, 83% of positions receive 15-year Level II investigations. With meaningful implementation of the recommendations in the first part of this report, we would expect to see a significant decrease in this percentage and a corresponding increase in the percentage of positions receiving a 10-year Level III or 5-year Level IV investigation.
- **Time and Paperwork Savings:** What is the average time-to-completion for PAS background investigations? And how long, on average, does it take candidates to complete the paperwork for the FBI background investigation? The Working Group anticipates that the recommended streamlining of the scope of PAS investigations will result in a reduction in both the time-to-completion by the FBI and the paperwork burden on candidates. A follow-up report on the time and paperwork savings of any reforms will help validate this expectation.
- **Further Evaluation of Practical Implications of Leveraging FIS.** In Part Two of this report, the Working Group recommended that OPM and the FBI work together to evaluate certain practical considerations in leveraging FIS to perform some PAS investigations. OPM’s follow-up assessment on implementation of the recommendations in this report should present and evaluate the results of that inquiry.

The Working Group recommends that the first report be completed in 2015 to allow sufficient time for the recommendations in this report to be implemented. Because the efficient functioning of the background investigation process is most critical during the period of peak activity immediately following a new election, the Working Group further recommends that the second report be conducted in 2018 to capture data from the period following the 2016 election.

Based on the results of these follow-up assessments, OMB will provide, as appropriate, updated suggestions to the White House to ensure that the underlying objectives of PAS Streamlining are met.



Conclusion

The Working Group believes that the recommendations in this report for streamlining the background investigation process are both meaningful and achievable. Adoption of these recommendations will address a discrete, but significant, source of burden for PAS candidates and allow nominees to move more quickly through the system.

In the coming weeks, the Working Group will continue to work with key stakeholders to assist them in implementing the recommendations in both its first and second reports. The greatest challenge will be in embracing change to a process that has historically moved in only one direction—toward more complexity, not less. The Working Group is gratified by the opportunity to participate in this important reform process and is hopeful that its recommendations will be met with the same spirit of cooperation and commitment that gave rise to the Streamlining Act.

