



ISSUE BRIEF | Center for Law & Justice

LIBERTY AND JUSTICE FOR ALL: AN AMERICA FIRST FBI

TOPLINE POINTS

- ★ Events over the past few years have cast public doubt on the Federal Bureau of Investigation's (FBI) commitment to the impartial administration of justice.
- ★ Restoring America's historic commitment to freedom and equality under the law requires reform measures to increase transparency and accountability within the FBI.
- ★ Congress must exercise its oversight authorities to ensure that adequate reform measures are pursued.

Introduction

The recently released Report on Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns—colloquially known as the Durham Report—provided perhaps the starkest evidence yet of the need for a substantial overhaul within the Federal Bureau of Investigation (FBI), an overhaul designed to restore accountability, humility, and integrity within the institution itself.

Specifically, the Durham Report examined the consistency in the FBI's application of Standard Operating Procedures (SOPs) in how it handled intelligence reports related to the possibility of foreign adversaries' attempts to influence political campaigns and how the FBI handled other “highly significant intelligence” concerning a “Clinton campaign plan ‘to vilify Donald Trump by stirring up a scandal claiming interference by Russian security services,’” among other considerations. The results of the Durham Reports' findings were “sobering” ([Durham Report, 2023](#)).

Among other conclusions, the Durham Report found that, “The speed and manner in which the FBI opened and investigated Crossfire Hurricane [the name of the internal FBI investigation related to possible collusion between the Trump campaign and Russia] during the presidential election season based on raw, unanalyzed, and uncorroborated intelligence also reflected a noticeable departure from how it approached prior matters



involving possible attempted foreign election interference plans aimed at the Clinton campaign” ([Durham Report, 2023](#)), confirming many of the concerns expressed by elected leaders and pundits over the apparent politicization of the investigative process ([Singman & Laco, 2022](#)).

Reforming the FBI

As a result of several notable events during the past few years, Americans have begun to lose faith in the impartiality of an agency tasked with undergirding one of the foundational pillars of our Republic, the rule of law (Fleck, 2022). From the questionable raid on former President Donald J. Trump’s Mar-a-Lago residence to labeling parents concerned over their children’s curriculum as “domestic terrorists” (Greenwald, 2019), the FBI has acted in ways that have diminished its credibility with the public at large.

These events have made clear the need for substantial reform and a cultural shift toward humility at the FBI. A DOJ Office of the Inspector General (OIG) 2019 report outlined several structural reforms designed to increase transparency and improve accountability measures within the FBI.

Unfortunately, many of those reform directives have not yet been adopted, leaving the public with an agency and broader justice system operating under the auspices of the impartial administration of justice, but for which the public is rapidly losing confidence (Jones, 2022).

An America First approach to restoring the integrity of the FBI as an institution involves improving accountability and fostering an institutional culture that embraces humility and discourages rogue or politically motivated enforcement actions. Doing so will be essential if the FBI is to claim any legitimacy as an unbiased law enforcement agency within the eyes of the American public.

To achieve those ends, the America First Policy Institute recommends the following reform measures.

Hold the FBI Accountable

Accountability is essential to the development and maintenance of a properly functioning workplace environment, particularly in one that exercises broad discretion. It breeds responsibility and builds trust throughout the organizational hierarchy. In the context of public institutions, it is also a necessary condition for sustaining public faith in the institution itself.



- **Separate the FBI’s counterintelligence and law enforcement authorities.** The FBI is unique in being empowered with broad law enforcement authorities while also possessing the ability to engage in domestic surveillance on U.S. citizens suspected of acting at the behest or interest of a foreign government.

Unlike other nations, which usually separate these authorities into distinctly separate entities, the FBI houses these uniquely powerful authorities under one roof, creating an environment prone to the particularly egregious abuse of conflating the counterintelligence powers of its domestic security authorities with its desire to pursue potentially distinct criminal charges against U.S. citizens.

Furthermore, the very nature of intelligence gathering activities and the pursuit of traditional law enforcement measures focused on criminal apprehensions and convictions, are wholly distinct to one another ([Posner, 2006](#)).

Removing the counterintelligence authorities from the FBI and placing them within a separate entity within the Intelligence Community (IC) would allow the FBI to focus solely on its law enforcement operations. Establishing clearly delineated mechanisms for intelligence sharing involving incidents of imminent public danger would allow for the proper separation of these unique authorities while still maintaining the necessary protocols to ensure domestic security considerations are not compromised.

- **Create specific guidance to increase the standards for initiating an investigation with potential First Amendment and/or significant political implications.** The threshold for initiating an investigation affecting the aforementioned areas should meet a higher bar than the criteria needed to initiate investigations that do not implicate core constitutionally protected activities. Those guidelines should be spelled out and understood by all FBI investigators (DOJ OIG, 2019).

While guidelines do exist for the initiation of a preliminary versus full investigation (Brennan Center, 2013), the broader implications of opening an investigation with the high potential for political fallout or which may question a citizen’s free exercise of their core First Amendment rights must endure greater scrutiny.

The FBI has endured past criticisms for the lack of clarity under which its agents can initiate a particular type of investigation known as an “assessment,” which allows for the “physical surveillance, database searches, interviews, racial and



ethnic mapping, and the recruitment and tasking of informants without any factual or criminal predicate, that is, without any objective basis to suspect the target of the investigation has violated any law, or is likely to in the future” (German & Hockett, 2017).

- **Enforce restrictions on unauthorized contact with the media.** Ensure appropriate controls, guidance, and enforcement options are in place to restrict unauthorized agent contact with media. Controlling the information, particularly related to sensitive investigative matters, that the FBI releases to the public should be viewed through the prism of balancing the due process rights of individuals against the need for public disclosure. When individual operators within the FBI circumvent the proper channels of public disclosure, any security clearance they hold should be immediately revoked and their service with the FBI should be terminated. This would serve the ends of deterrence for future would-be violators inclined to leak sensitive investigative information.

Several instances of leaked information make it abundantly clear that the controls currently in place are either inadequate or insufficiently enforced to protect against the inappropriate distribution of sensitive information (O’Neil, 2019).

- **Change leadership and hiring priorities to ensure greater accountability.** In addition to significant structural reforms, the agency needs a change of leadership at the top and a turnover of middle management at the change of the next administration. Perhaps most importantly, the FBI needs to rebuild its values and instill a culture of humility, starting with the hiring and training of new agents at Quantico. The long-term integrity of the institution requires that the agency pursue rigorous hiring standards that emphasize honesty, integrity, and humility over superficial immutable characteristics or political considerations.
- **Ensure appropriate upward notifications on sensitive cases.** Investigations concerning sensitive matters or areas outside the scope of an investigator’s official duties should require sufficient upward notification to ensure that accountability rests on officials who are most likely to be held politically and legally accountable, whether by the sunlight of congressional investigations or by scrupulous prosecutorial authorities less inclined toward the political misuse of discretion, such as the OIG. If additional information is obtained during an investigation, continually updating appropriate senior officials should be mandatory (DOJ OIG, 2019).

Although processes ostensibly exist to require such notifications, vigilant adherence to their implementation should be continually assessed, and deviations



from the normal practice thereof should be met with a sufficient reprimand to deter future malpractice.

- **Ensure accountability among those holding security clearances.** The Durham Report made evident just how deeply the politicization of the Russia-collusion investigation into former President Trump went. Unfortunately, despite these revelations, there is still no transparency regarding the security clearance status of FBI personnel who participated in the *Crossfire Hurricane* investigation. Congress should immediately initiate oversight hearings to uncover the FBI’s adherence to Standard Operating Procedures (SOPs) and best practices within the broader Intelligence Community (IC) regarding the issuance of security clearances and the process of reinvestigation or revocation upon receipt of allegations of misconduct.
- **Review personnel deployment to ensure it meets the unique needs of each community.** Conduct a review of the distribution of personnel within each field office to ensure that it appropriately corresponds to the FBI’s core mission areas. Distributing personnel based solely upon the dictates of FBI headquarters in Washington, D.C. may not comport with the unique needs of a particular community. Focusing more on the needs of the FBI field offices—and thus more on the unique needs of the Nation itself—would necessarily bleed power from the centralized, and relatively political, power center of FBI Headquarters in Washington, D.C.

The needs of a community in Iowa may differ dramatically from those in New York City, and as such, the investigative emphasis within each field office should shift accordingly. If a community is particularly affected by human trafficking, for instance, the local FBI field office should feel empowered to distribute its resources accordingly and not feel compelled to focus on other areas that may be deemed of higher priority to headquarters at any given time.

- **Ensure that only FBI personnel with a “need to know” have access to sensitive information.** Ensure appropriate controls, guidelines, and enforcement options are in place to restrict access to sensitive information unless it is germane to an agent’s area of investigative responsibility. Like other agencies operating within classified and unclassified settings, ensuring tight control of information is essential to avoid the intentional or unintentional release of sensitive information to individuals who otherwise have no investigative need to know.

Outside the realm of classified information, which itself has access controls in place, the internal distribution of details pertaining to the investigation of sensitive matters should be restricted to only personnel with a direct need to know.



Reform the Foreign Intelligence Surveillance Act (FISA)

The Foreign Intelligence Surveillance Act of 1978 established the procedures for the collection of intelligence between foreign powers and their alleged agents, adjudicated through the Foreign Intelligence Surveillance Court (FISC) (CRS, 2021). Though an understandably opaque process, the lack of accountability and oversight has allowed abuse of the FISA process to undermine its legitimacy (and the legitimacy of those agencies that utilize it) and implicate core First Amendment rights and the political process the First Amendment is meant to serve.

- **Create civil and/or criminal penalties for overt omissions or misrepresentations within the FISA application process.** Reliance upon evidence of dubious origin—particularly information linked to rival political entities—to obtain FISA warrants to surveil American citizens was at the root of the deeply flawed Russia collusion investigation that enveloped the Trump campaign in 2016. Unfortunately, when evidence of overt misrepresentations or omissions knowingly occurs within the FISA application process, there is no mechanism for accountability. Creating civil and/or criminal liabilities for such behavior—and ensuring prompt and credible enforcement—would discourage its proliferation.
- **Create an adversarial process within the Foreign Intelligence Surveillance Court.** FISA proceedings within the FISC are necessarily classified; however, the process is so uniformly one-sided that the rights of the accused are at grave risk of being neglected entirely. Ours is a system of justice predicated on the idea that the attainment of truth and the development of relevant facts is best achieved through the adversary structure and process. Installing a mechanism within the process that enshrines greater protections for the accused could legitimize the process and ensure greater accountability for those seeking FISA warrants.

A possible solution would be the placement of an internal “advocate” within the FISC arguing on behalf of the accused, challenging the central tenets justifying an affidavit’s pursuit of a warrant. An appropriately credentialed “advocate” could provide another level of scrutiny to ensure that an investigation’s case is sound (Vladeck, 2015).

The concept of an embedded adversary challenging investigations with a high potential for partisan influence was echoed within the Durham Report itself, which cited former National Security Agency general council Stewart Baker’s suggestion that a, “career position for a nonpartisan FBI agent or lawyer to challenge the FISA application and every other stage of the investigation,” could be a possible reform measure within the FBI ([Durham Report, 2023](#)).



Conclusion

Though its history has been dotted with numerous examples of indiscretions (Charles, 2017), the FBI has served an important role in the maintenance of a safe and secure American homeland. Acknowledging the hard work that tens of thousands of agents have done—from counterterrorism to child sexual exploitation investigations—underscores the importance of well-functioning federal law enforcement agencies operating within a diffuse and federated law enforcement ecosystem.

In addition to embedding stricter accountability measures within the FBI, Congress must take a more active and impartial role as a co-equal branch of government. When indiscretions or the appearance of outright misapplications of the law arise, it is incumbent upon Congress to exercise its oversight authority, irrespective of the political party in charge of Congress or the executive branch, at any given time.

The legislative and executive branches of government can take immediate measures to restore public faith in the FBI and should do so in the interest of the Nation. Americans and America's national security interests are best served when the diffuse mechanisms of law enforcement cooperate within our system of federalism and are ultimately accountable to the people themselves.



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