

THE FBI AND THE SENATE CONFIRMATION PROCESS

Amidst growing interest in the interim security clearances given to Rob Porter, Jared Kushner, and other senior White House staff, it is worth widening the scope of inquiry.

This white paper asks us to consider whether the FBI background checks on Senate confirmed Cabinet officers were conducted properly, or whether the Trump Administration successfully pressured the FBI and Senate into inadequate and overly hasty background checks.

THE FBI BACKGROUND CHECK FOR NOMINEES HAS A LONG HISTORY

Since the presidency of Dwight Eisenhower, all nominees for Senate confirmed positions have been subject to intensive FBI background investigations.¹ Because the FBI's investigative resources complement Senate staff's issue area expertise, their investigations are critical to the fulfillment of Senate Committee's constitutionally granted "advice and consent" role.²

The seriousness with which these investigations have been taken is made clear by the early days of the Obama presidency, when Obama had to staff the government of a country fighting two wars amidst a collapsing global economy.

At that time, President Obama's nominations of Tim Geithner to head the Treasury Department and Tom Daschle to run Health and Human Services (HHS) ran into significant and fatal problems, respectively. In 2009, American Enterprise Institute's Norm Ornstein complained that the unwitting impact of those controversies was that it was not "going to be easy to push the FBI to move faster on key nominees." Indeed, what Ornstein was told by "insiders is that the opposite is true; the FBI, unwilling to be the scapegoat if some problem emerges in a nominee's background, is digging in its heels and even lengthening the amount of time needed to finish the security checks."³

Contrary to the Trump Administration narrative that the FBI is part of a "Deep State" sympathetic to Democrats and antagonistic to Trump,⁴ there is reason to believe that the Trump Administration successfully rushed the FBI background check process for Cabinet nominees amidst the chaos of the Trump transition.⁵

¹ <http://www.rollcall.com/news/-33458-1.html> ; <https://www.brookings.edu/wp-content/uploads/2016/06/20000711staffing.pdf>

² <https://constitutioncenter.org/interactive-constitution/articles/article-ii#section-2>

³ <http://www.aei.org/publication/confirmation-process-leaves-government-in-serious-gridlock/print/>

⁴ For evidence to the contrary, see, e.g., <https://www.thedailybeast.com/meet-donald-trumps-top-fbi-fanboy> and <https://www.theguardian.com/us-news/2016/nov/03/fbi-leaks-hillary-clinton-james-comey-donald-trump> It is deeply unlikely that the view of the FBI as either anti-Trump or pro-Clinton is accurate.

⁵ See, e.g., "Trump replaces Christie with Pence as head of transition team amid bumpy first steps to the White House," <http://www.latimes.com/politics/la-na-pol-trump-transition-20161111-story.html> ; "It went off the rails almost immediately': How Trump's messy transition led to a chaotic presidency," https://www.washingtonpost.com/politics/it-went-off-the-rails-almost-immediately-how-trumps-messy-transition-led-to-a-chaotic-presidency/2017/04/03/170ec2e8-0a96-11e7-b77c-0047d15a24e0_story.html?utm_term=.46bb482e3e16

Recall that,

In the weeks after the election, Trump made a show of naming members of his Cabinet in rapid succession, giving the impression that his transition was proceeding speedily, faster even than many people expected after such a shocking result on November 8. But the slew of nominations obscured an important detail: Trump's team had done little or no vetting of those appointees before or immediately after the election, as the Obama transition had done. Potential picks were rarely asked to submit information for a standard FBI background check or financial documents needed for disclosure requirements and an ethics agreement. That meant that a process that takes weeks or even months did not begin until late November or December in some cases.[...] "With these billionaires, it's going to take a lot more time," said Richard Painter, who served as the chief ethics lawyer in the Bush White House from 2005 to 2007.⁶

Typically, potential appointees begin assembling information well in advance of being nominated. Indeed, Politico ran a long article in October of 2016 about how many people who view themselves as likely nominees prepare for a possible nomination by paying major DC law firms \$50,000-\$100,000 to do "oppo research" on themselves and pull their finances and papers into order even before the election is concluded.⁷

However, given the chaos surrounding Trump's transition and the unexpectedness of his victory, that self-preparation didn't occur. Recall that "days after the election, the transition took an unexpected turn. New Jersey Gov. Chris Christie, the transition chairman, was removed from his position and replaced by the vice president-elect."⁸

The upshot? Trump's chaotic transition started over from scratch in mid-November, discarding the months of work that had already occurred. Such a late reboot ought to have led to a conspicuously slow confirmation process for his senior most nominees. But due to the muscle of Trump and McConnell, that largely did not occur. Instead, Senate committee hearings began in a rush in January, two months after the Trump transition started over from scratch.

As Politico noted on January 5, 2017 in a piece titled, "GOP jams Senate Dems with confirmation blitz," "Senate Republicans have heard the Democrats' demands for a deliberate confirmation process for Donald Trump's nominees. But they don't care."⁹ Politico went on to note that as with then-Minority Leader McConnell in 2009, Minority Leader Schumer had requested "tax returns for several nominees and for the standard FBI background checks and Office of Government Ethics procedures to be completed before proceeding with the confirmation process," but the process was moving forward irrespective of whether such processes would in fact be complete in time.¹⁰

⁶ <https://www.theatlantic.com/politics/archive/2017/01/trump-transition-cabinet-behind-schedule/511928/>

⁷ <https://www.politico.com/story/2016/10/white-house-transition-oppo-research-230180>

⁸ https://www.washingtonpost.com/politics/it-went-off-the-rails-almost-immediately-how-trumps-messy-transition-led-to-a-chaotic-presidency/2017/04/03/170ec2e8-0a96-11e7-b77c-0047d15a24e0_story.html?utm_term=.e63a35b3d80a

⁹ <https://www.politico.com/story/2017/01/senate-confirmation-trump-cabinet-nominees-233247>

¹⁰ <https://www.politico.com/story/2017/01/senate-confirmation-trump-cabinet-nominees-233247>

TRUMP TRANSITION SOUGHT TO MINIMIZE PUBLIC SERVANT SCRUTINY OF ITS NOMINEES

Walter M. Shaub Jr., director of the Office of Government Ethics, expressed public concerns during the Transition about the pressure from the incoming Trump Administration to rush the confirmation process without adequate vetting. The Washington Post noted that Shaub, ““A top ethics official,” was warning “that plans to confirm Donald Trump’s top Cabinet choices before background examinations are complete are unprecedented and have overwhelmed government investigators responsible for the reviews.”¹¹

Those warnings were picked up on by Senate Democrats, but unheeded by the Senate’s Republican majority, despite Shaub’s pleas against allowing nominations to go forward without completed ethics reviews. Shaub added, “I am not aware of any occasion in the four decades since OGE was established when the Senate held a confirmation hearing before the nominee had completed the ethics review process.”¹²

While Shaub’s complaints received a degree of attention, the same Washington Post piece noted that while “Sessions’s FBI check is complete, [...] **other nominees have yet to complete all of the paperwork required by committees, because the FBI and OGE reviews continue**, the aides said.”¹³ (emphasis added)

There is good reason to believe that the FBI contributions to the Senate was rushed in light of issues that arose with the incompleteness of information known to the Senate (and thus presumably the FBI) during the confirmation hearings of three Cabinet Officers: Wilbur Ross, Steven Mnuchin, and Jeff Sessions.

While Shaub was decrying the rush in light of the botched transition and delays in nominees providing basic paperwork, Trump himself was offering “repeated complaints” “that Democrats are slow-walking his administration with a historic delay in approving his Cabinet.” Indeed, “Senate Majority Leader Mitch McConnell declared that it’s the slowest confirmation process since the presidency of George Washington.”¹⁴

In the end, Trump and McConnell got what they wanted – relatively prompt qualification of individuals who were far from open and transparent with the Senate about their finances and their past actions.

¹¹ https://www.washingtonpost.com/politics/ethics-official-warns-against-confirmations-before-reviews-are-complete/2017/01/07/e85a97ee-d348-11e6-9cb0-54ab630851e8_story.html?utm_term=.f439b463cf20

¹² https://www.washingtonpost.com/politics/ethics-official-warns-against-confirmations-before-reviews-are-complete/2017/01/07/e85a97ee-d348-11e6-9cb0-54ab630851e8_story.html?utm_term=.f439b463cf20

¹³ https://www.washingtonpost.com/politics/ethics-official-warns-against-confirmations-before-reviews-are-complete/2017/01/07/e85a97ee-d348-11e6-9cb0-54ab630851e8_story.html?utm_term=.f439b463cf20

¹⁴ <https://www.politico.com/story/2017/02/senate-trump-cabinet-confirmations-breakthrough-234893>

WILBUR ROSS

The New York Post reported in February of 2017 that “Wilbur Ross failed to disclose to a Senate committee during his confirmation hearing last month that he is being sued by a former business partner who claims he was cheated out of profits from Ross’ hedge funds.”¹⁵

Despite the fact that “Ross was asked by a Senate committee to list all lawsuits filed against him,” Ross never disclosed an active 2015 breach-of-contract lawsuit filed by the “former partner, David Storper, who was the senior managing director at WL Ross.”¹⁶

Ross’ omission not only goes to his personal honesty or competence, but it also goes to the sufficiency of the FBI’s scrutiny. One would expect that public records searches by the FBI would have identified the lawsuit in question. Senate staff did independently find and question Ross about another omitted “lawsuit filed against him — by shareholders of a South Carolina company who claimed they were victims of double-dealing and a breach of fiduciary duty.”¹⁷

It is common to talk to litigation adversaries in order to better understand the potential vulnerabilities of the subject of a background investigation. It is not clear, but seems unlikely, that the FBI knew about these two lawsuits when investigating Ross. That is unfortunate, since knowledge of the litigation would seem likely to have helped them develop investigative leads into questions about Ross’ integrity, character, and honesty.

Ross’ litigation exposure has remained relevant during his tenure in his office, as a significant new lawsuit brought against him in November of 2017 by Storper. Now joined by two other former Ross associates and managing directors, the new Storper lawsuits claims “the corporate entities created to handle equity funds were improperly charged millions of dollars in fees. David H. Storper, David Wax and Pamela K. Wilson allege that the firm wrongfully charged the entities at least \$48 million in managements fees.”¹⁸

A better understanding of Ross’ litigation risks would have made clear that Ross faced an unusually high risk of distracting litigation developing while he served in the Cabinet.

But being accused of lacking integrity by his former colleagues is perhaps not the most disturbing revelation about Ross that the Senate did not know about when they confirmed him for the position of Commerce Secretary. Due to the work of The International Consortium of Investigative Journalists in revealing what became known as the Paradise Papers,¹⁹ Ross’ previously secret business ties to Russian President Vladimir V. Putin’s son-in-law are now clear.²⁰

If Mr. Ross stands to benefit, albeit indirectly, from a Russian firm controlled by members of Mr. Putin’s inner circle, it poses a potential conflict with his role as the lead cabinet member on trade policy, ethics experts said. Richard W. Painter,

¹⁵ <https://nypost.com/2017/02/20/wilbur-ross-failed-to-disclose-hes-being-sued-by-former-business-partner/>

¹⁶ <https://nypost.com/2017/02/20/wilbur-ross-failed-to-disclose-hes-being-sued-by-former-business-partner/>

¹⁷ <https://nypost.com/2017/02/20/wilbur-ross-failed-to-disclose-hes-being-sued-by-former-business-partner/>

¹⁸ <https://www.bloomberg.com/news/articles/2017-11-15/wilbur-ross-sued-by-his-firm-s-ex-directors-over-management-fees>

¹⁹ <https://www.icij.org/investigations/paradise-papers/> and <https://www.icij.org/investigations/paradise-papers/questions-circle-wilbur-ross-ethics-gao-investigation-requested/>

²⁰ <https://www.nytimes.com/2017/11/05/world/wilbur-ross-russia.html>

who served as chief ethics lawyer in the George W. Bush White House and has emerged as a frequent critic of the Trump administration, said that while Mr. Ross's continued investment in Navigator would not violate any laws, it created other ethical concerns. "Apart from those legal issues," Mr. Painter said, "I'd be very concerned that someone in the U.S. government was making money from dealing with the Russians."²¹

Painter's alarm was not idiosyncratic.

Analysts said the arrangement was troubling. Daniel Fried, an assistant secretary of state for European and Eurasian affairs under George W Bush, said Ross's connection to "cronies of Putin" threatened to undermine US sanctions. "I don't understand why anybody would decide to maintain this kind of relationship going into a senior government position," he said. "What is he thinking?"²²

The Senate did not ask Ross about his connection to Putin's family during his confirmation hearing because, as noted by Painter, "Ross had not made absolutely clear in his paperwork that he was retaining a stake in Navigator. "It is very difficult to figure out from the financial disclosure," said Painter. "He should have sold off any and all interests."²³

While it is possible that the FBI was aware that some of Ross' shell holdings brought him into such close connection with Putin, it seems unlikely that they would have failed to advise the Senate that someone nominated for a position within the presidential line of succession remained a business partner of Putin's son in law had they been aware of that fact.

That's especially true in light of the fact that the Commerce Secretary sits on Committee on Foreign Investment in U.S.²⁴ and "oversees ocean and coastal navigation,"²⁵ Ross' loyalty, integrity, and foreign entanglements are all germane to American national security.

Senate Democrats have asked Ross a series of as yet unanswered questions concerning a distinct set of troubling ties to Russia that were publicly known. Senators have "sent a third letter to Ross with more questions, including whether Ross had ever done business with companies that were under US sanctions," but as with previous letters, "Ross has said the White House has refused to allow him to respond to the queries."²⁶

It is disturbing to realize the perfunctory nature of scrutiny Ross seemingly received from the FBI, as well as Ross' non-responsiveness about concerns raised both before and after his confirmation. Senators have not been able to rely on either the FBI or Ross' cooperation to learn information that goes to Ross' fundamental patriotism or lack thereof.

²¹ <https://www.nytimes.com/2017/11/05/world/wilbur-ross-russia.html>

²² <https://www.theguardian.com/news/2017/nov/05/trump-commerce-secretary-wilbur-ross-business-links-putin-family-paradise-papers>

²³ <https://www.theguardian.com/news/2017/nov/05/trump-commerce-secretary-wilbur-ross-business-links-putin-family-paradise-papers>

²⁴ <https://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx>

²⁵ <https://www.commerce.gov/page/about-commerce>

²⁶ <https://www.theguardian.com/us-news/2017/mar/23/wilbur-ross-russian-deal-bank-of-cyprus-donald-trump-commerce-secretary>

Given Ross' inadequate vetting, the American public should not presume that just because Ross received Senate confirmation, he has the adequate integrity and loyalty to the country we expect in some in a serious job within the presidential line of succession.²⁷

MNUCHIN

Filling out copious forms is an important part of the background check. The FBI needs to know about the finances and litigation history of investigation subjects in order to understand their vulnerabilities. That is why it was disturbing that Steven T. Mnuchin, President-elect Donald J. Trump's choice to be Treasury secretary, "failed to disclose nearly \$100 million of his assets on Senate Finance Committee disclosure documents and forgot to mention his role as a director of an investment fund located in a tax haven."²⁸

The disclosure only "came hours before Mr. Mnuchin [...] began testifying."²⁹ That makes it inconceivable that the FBI was given enough time to look into the investment and what it did or not suggest about Mnuchin's business network. Mnuchin had omitted "several additional financial assets, including \$95 million worth of real estate — a co-op in New York City, a residence in Southampton, New York, a residence in Los Angeles, California, and \$15 million in real estate holdings in Mexico."³⁰ Additionally, "Mr. Mnuchin also initially failed to disclose that he is the director of Dune Capital International, an investment fund incorporated in the Cayman Islands, along with management posts in seven other investment funds. And he belatedly disclosed that his children own nearly \$1 million in artwork."³¹

Given that Mnuchin's honesty was the subject of the inquiry, it is worrisome that that the FBI had no opportunity to assess the credibility of Mnuchin's justification of his omissions, which is that they came about "due to a misunderstanding of the questionnaire" and "I assure you that these forms were very complicated."³² The FBI could have assessed whether Senator Robert Menendez was correct when he argued that, "It doesn't take a rocket scientist to understand the words 'list all positions.'"³³

Questions about Mnuchin's integrity and associations are not merely an issue for domestic economic policy. As the Treasury Department's website notes,

The Treasury Department also performs a critical and far-reaching role in enhancing national security by implementing economic sanctions against foreign threats to the U.S., identifying and targeting the financial support networks of national security threats, and improving the safeguards of our financial systems.

²⁷ <https://www.law.cornell.edu/uscode/text/3/19>

²⁸ <https://www.nytimes.com/2017/01/19/us/politics/steven-mnuchin-treasury-secretary-nominee-assets-confirmation.html>

²⁹ <https://www.nytimes.com/2017/01/19/us/politics/steven-mnuchin-treasury-secretary-nominee-assets-confirmation.html>

³⁰ <https://www.nytimes.com/2017/01/19/us/politics/steven-mnuchin-treasury-secretary-nominee-assets-confirmation.html>

³¹ <https://www.nytimes.com/2017/01/19/us/politics/steven-mnuchin-treasury-secretary-nominee-assets-confirmation.html>

³² <https://www.nytimes.com/2017/01/19/us/politics/steven-mnuchin-treasury-secretary-nominee-assets-confirmation.html>

³³ <https://www.nytimes.com/2017/01/19/us/politics/steven-mnuchin-treasury-secretary-nominee-assets-confirmation.html>

Treasury's Office of International Affairs works on a wide range of economic issues.³⁴

The FBI ought to have been given adequate time to assess the scope of Mnuchin's holdings, his business network, and his general trustworthiness before providing a final assessment of his worthiness to hold such a senior national security position to the Senate. We do not know what additional investigative leads the FBI would have found with full visibility into Mnuchin's holdings, and unless the FBI is asked to re-open its background check, we'll never know for sure.

It is also worth finding out how and why Mnuchin's confirmation hearing was held on such an accelerated timeline despite his failure to provide complete records in advance of the hearing. The Senate ought to investigate what reforms are needed to ensure that the confirmation process is never so rushed again.

JEFF SESSIONS

The Justice Department has released part of Sessions' SF 86 form, the detailed form which includes questions concerning "any contact with a foreign government, its establishment (such as embassy, consulate, agency, military service, intelligence or security service, etc.) or its representatives, whether inside or outside the U.S.?"³⁵

Not only did Sessions claim, wrongly, "No" such contact on his SF-86, he did not disclose his contacts with the Russian Ambassador at his Senate confirmation hearing.³⁶

Given the ongoing investigation into potential Trump Campaign – Russian collusion and presumably perpetual FBI constant counter-espionage surveillance of the Russian Ambassador, it seems unlikely that the FBI was unaware that Sessions' SF-86 was inaccurate. Given the enormous national security obligations of the Justice Department and the sensitivity of dishonesty about ties to Russia, it is disturbing that the Senate was not informed of Sessions' inaccurate answers before they voted to confirm him. The Senate should not have had to wait until a March Washington Post story to learn about Sessions' communications with the Russian government during the 2016 presidential campaign.³⁷

Obviously, there was a breakdown in information getting to the Senate, but what is not clear is why that occurred. The seriousness of the FBI's investigation into potential Trump-Russian cheating in the 2016 Election was not necessarily known to all FBI staff in January 2017. Regardless of whether the failure to share with the Senate relevant information almost certainly known by some within the FBI came about due to acquiescence to Trump's desire for haste in screening Sessions or because of information silos within the FBI, it is clear that the FBI let down the Senate by not adequately screening Jeff Sessions.

³⁴ <https://www.treasury.gov/resource-center/international/Pages/default.aspx>

³⁵ <https://www.npr.org/sections/thetwo-way/2017/07/13/536982193/justice-department-defies-court-deadline-to-release-sessions-contacts-with-russi>

³⁶ <https://www.npr.org/sections/thetwo-way/2017/07/13/536982193/justice-department-defies-court-deadline-to-release-sessions-contacts-with-russi>

³⁷ https://www.washingtonpost.com/world/national-security/sessions-spoke-twice-with-russian-ambassador-during-trumps-presidential-campaign-justice-officials-say/2017/03/01/77205eda-feac-11e6-99b4-9e613afeb09f_story.html

Questions about whether Russians may have been able to blackmail Sessions by publicizing the fact that at best he had been “forgetful” in his Senate confirmation hearings are made even more relevant by the fact that the Justice Department is a leading component of America’s counterintelligence infrastructure.³⁸ Jeff Sessions was confirmed as Attorney General with the Russian government holding knowledge of meetings he had with them that he had denied to the Senate and on his SF-86 -- and lying to the Senate or on an SF-86 is criminal.³⁹ That vulnerability to blackmail was a major national security risk.

CONCLUSIONS

Our national security depends on the senior figures in our government being of unquestioned integrity and loyalty to the country. The FBI’s background check and Senate confirmation process are supposed to ensure we have confidence that our national security is in vetted hands.

The Trump Administration’s chaotic transition, followed by their angry insistence on confirmations moving as quickly as if they had run their transition properly, created enormous pressure on the FBI and the Senate to move with excessive haste. Senate Majority Leader Mitch McConnell was all too eager to acquiesce to the Trump Administration’s unreasonable requests.

As a result of the success of the Trump Administration’s push for haste, the FBI conducted its investigations into Trump’s cabinet without the benefit of accurate financial disclosures and SF-86s from Ross, Mnuchin, and Sessions. What other information was kept from the FBI by these three figures -- or their fellow Administration officials -- is unclear. However, it is clear that we should not presume that all significant investigations that the FBI ought to have undertaken into Trump’s team actually occurred within the narrow window between nomination and confirmation.

That’s because the FBI and the Senate majority bent to pressure exerted by Trump. As a result, there are ongoing questions about the integrity of Ross, Mnuchin, and Sessions, and additional questions about where Ross’ personal loyalties lie. As Trump White House security clearance decisions are subjected to scrutiny, we should also re-examine whether other members of Trump’s Senate confirmed Cabinet have been properly vetted and can be trusted to act with integrity and in the nation’s interest.

³⁸ See, e.g., <https://www.justice.gov/nsd/about-division> ; <https://www.justice.gov/nsd/office-intelligence> ; and <https://www.fbi.gov/investigate/counterintelligence>

³⁹ See, e.g., <https://www.law.cornell.edu/uscode/text/18/1001>