



What Should Presidential Candidates Tell Us About Themselves? Proposals for Improving Transparency in Presidential Campaigns

Democracy and the Constitution Clinic
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Executive Summary

When Americans cast their ballots for president every four years they often do so without essential information about the candidates. In a government of, by, and for the people, the people have the right to know pertinent information about candidates for the nation's highest office.

New policies are needed for disclosure of: (1) tax returns and financial information, (2) health information, and (3) criminal and intelligence background checks. This report outlines the historical context, legal precedent, and current state of the law for these three areas and advocates for new approaches to disclosure of essential information about candidates.

I. Tax Returns and Financial Information

Federal law should require candidates to submit to the Federal Election Commission ("FEC") a full copy of their federal income tax returns for at least the five most recent taxable years. Candidates should submit their returns within 60 days of formally declaring that they are running for president. After personal information is redacted from the tax returns, the FEC should make the returns publicly available on its website. Candidates who fail to submit tax returns should be fined \$10,000.

Tax returns inform the public about a candidate's financial dealings, charitable contributions, political connections, and possible conflicts of interest. They may even reveal illegal activity or fraud. Every major party nominee since 1976 has released his tax returns, except Gerald Ford, who released only a summary of his tax data, and Donald Trump. While there is no law that requires candidates to release their returns, it has become an accepted norm for candidates to do so.

To codify this norm, the House of Representatives passed a bill in March 2019 that would require presidential candidates to release ten years of tax returns. U.S. Senators and lawmakers in 28 states have proposed laws that would create similar requirements. Critics of these proposed bills argue that they unconstitutionally add qualifications for the presidency beyond those in the Constitution. However, proponents assert that the proposals are constitutional because they only impose a non-substantive, procedural requirement on candidates. In July 2019, California's governor signed into law a requirement that presidential candidates release their tax returns as a condition of appearing on the ballot. The law prompted lawsuits from President Donald Trump, his campaign, the Republican National Committee, and a group of California voters.

The financial penalty in our proposal for candidates who refuse to release their tax returns is supported by the Supreme Court's analysis in *Buckley v. Valeo*. In *Buckley*, the Court upheld requirements for candidates to disclose financial information about their campaigns because those requirements served significant government interests. Disclosure of candidates' tax returns also serves significant government interests, such as informing the electorate and deterring corruption, which would outweigh any First Amendment considerations.

Because tax returns do not necessarily include all pertinent information about candidates' finances, other financial disclosures are essential. We recommend updating the current annual Office of Government Ethics Public Financial Disclosure Reports that presidents and presidential candidates must complete. Congress should establish a committee to make recommendations for additional disclosure requirements to ensure that the form is adapted to modern day business holdings. This committee should consist of individuals from government agencies, such as the Office of Government Ethics ("OGE"), FEC, and Internal Revenue Service ("IRS"), as well as individuals from outside of government, such as experts who work at nongovernmental organizations ("NGOs") that focus on ethics issues.

The inclusion of individuals from NGOs and other outside experts would ensure that the committee has members of varying political beliefs and different areas of expertise. This diversity would ensure the updated form is not politicized or designed to target certain politicians. The committee would benefit from inclusion of representatives from various government agencies, such as the FEC and IRS, because they could contribute knowledge and experience about financial disclosures. Individuals from the OGE can bring their familiarity with the financial disclosure forms.

Because the requirement to complete the Financial Disclosure Report was established in 1978, the report does not address questions about modern business dealings and holdings, such as disclosure of debts held by candidate's businesses, foreign investments, identities of business partners or customers, and transactions in which assets are transferred to family and friends.

The intent of the Public Financial Disclosure Reports when it was established in 1978 was to ensure the public knows key information about a candidate's financial dealings and ties. This proposal aims to establish a committee that will recommend the appropriate updates so that the intent is fulfilled in the 21st century.

II. Health Information

Congress should create a panel of physicians to conduct voluntary examinations of presidential candidates and issue reports on the health of participating candidates.

Allowing candidates to voluntarily submit to medical examinations, as opposed to requiring examinations or disclosure of medical records, would avoid challenges to the policy's constitutionality and strike an appropriate balance between candidates' privacy and the public's right to know. It would also protect against the potential negative side effects of mandating complete transparency, such as the possibility that stigmas attached to certain physical and mental ailments would cause a candidate undue political harm. Despite the voluntariness of the process, political pressure would encourage candidates to undergo the examinations. After one candidate agreed to an examination, there would be a political risk for the others to forgo it.

Many presidents and presidential candidates have had physical and mental ailments that they hid from the public, and several presidents' ailments may have severely impacted their ability to fulfill their duties as president. If the public knew about these ailments prior to the election, this information may have been a factor in voters' decisions.

Some presidents and presidential candidates have voluntarily disclosed their health information. Since the 1976 election, every nominee of a major political party has revealed some information about their health. Candidates have taken different approaches to releasing health information, including giving interviews to journalists, allowing their doctors to speak with journalists, and releasing medical records and doctors' letters attesting to the candidates' good health.

III. Criminal and Intelligence Background Checks

Congress should require the FEC to request limited background checks for presidential candidates. The FEC should request the background checks when candidates formally declare that they are running for president. Candidates should be required to consent to releasing the results of their background checks to the Gang of Eight, the group of congressional leaders who

receive briefings on sensitive intelligence and national security matters. If the candidates fail to do so, they should be fined \$10,000. If a supermajority of six members of the group agrees there is reason for concern, they should pass the information to the relevant political party, which would then be responsible for addressing the issue. The Gang of Eight should create standards in advance for information that requires referral to the political parties. Reasons for concern might include abnormalities in foreign contacts or credit checks, discrepancies in statements about educational and employment backgrounds, or any sealed records that may not be publicly available.

Presidential candidates are not required to undergo any type of background check before gaining access to the nation's most closely guarded secrets. Even though thousands of government employees and private contractors must undergo background checks and receive security clearance before gaining access to classified information, the president and members of Congress automatically gain access to this information by becoming elected officials. Determining whether federal employees are vulnerable to manipulation by foreign agents is one of the primary reasons they undergo background checks before gaining security clearances. The founding fathers recognized that one of the most serious threats that their new government faced was the rise of a puppet executive vulnerable to foreign powers.

Although there are no background check requirements for elected officials, Gerald Ford was required to undergo background checks when President Richard Nixon nominated him to be vice president. Ford underwent confirmation hearings in the House and Senate, and was required to disclose his tax returns and medical records. His bank records, campaign speeches, and payroll records were scrutinized. The FBI conducted the investigation, interviewing more than 1,000 people and collecting over 1,700 pages of documents. Vice President Nelson Rockefeller underwent a similar investigation when Ford nominated him to be vice president.

Requiring presidential candidates to undergo background checks, similar to what thousands of government employees must undergo, would ensure that the nation's commander-in-chief does not pose a national security concern and is not vulnerable to foreign powers. The proposal allows for background checks without violating the candidate's privacy rights, while protecting the public's right to make informed choices in presidential elections.

Introduction

The Constitution’s framers included eligibility requirements for the presidency in Article II. To comply with those requirements, candidates must be natural born citizens, who have attained the age of 35 and have been residents of the United States for at least 14 years.¹

In his “Commentaries on the Constitution,” Joseph Story analyzes the justifications for these qualifications. He writes that the age restriction reflects the wisdom and experience the office requires and that by middle age a person’s character and talents have fully developed.² Story argues that middle-aged people have had the opportunity to serve in public office and have developed good judgment and gained public confidence.³ While there was very little discussion about the natural-born requirement during the Constitutional Convention, statements by George Mason regarding eligibility for congressmen and letters between John Jay and George Washington suggest the framers feared that foreigners, especially European aristocracy or royalty who were not loyal to the United States, would

attempt to influence the functions of the new American government.⁴ The framers particularly feared the prospect of a disloyal foreigner serving as commander-in-chief.⁵ In sum, the framers believed the president should be a person of strong character, intelligence, and experience who is unquestionably loyal to the United States.

Unfortunately, voters sometimes lack the information needed to determine whether candidates have these traits. Candidates may have financial interests and personal relationships that call into question what should be an undivided loyalty to the interests of the United States. And health issues they may privately suffer could compromise their abilities to carry out the responsibilities of the nation’s highest office.

Accordingly, new disclosure requirements and regimens are needed in three areas: (1) tax returns and financial information, (2) health information, and (3) criminal and intelligence background checks. This report discusses proposals for improving candidate disclosure in these areas. Before reaching that discussion, it presents in Part I the current disclosure requirements and the relevant legal framework for existing and potential requirements. Part II discusses disclosure of tax returns and financial information. Part III addresses the need for more transparency regarding information about presidential candidates’ health. Part IV discusses criminal and intelligence background checks for presidential candidates.

1 See U.S. CONST. art. II, § 1, cl. 5. The 22nd Amendment, which was ratified in February 1951, limits the eligibility to be elected as president to two terms and also limits the total time a person is allowed to serve as president to ten years. U.S. CONST. amend. XXII.

2 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 332 (1833).

3 *Id.*

4 JACK MASKELL, CONG. RESEARCH SERV., R42097, QUALIFICATIONS FOR PRESIDENT AND THE “NATURAL BORN” CITIZENSHIP ELIGIBILITY REQUIREMENT (2011).

5 *Id.*

I. Disclosure Requirements and Applicable Law

Presidential candidates currently must make some disclosures regarding their personal finances and those of their campaigns. These existing requirements as well as any additional requirements implicate various laws. Part I.A outlines the existing requirements and Part II.B discusses the applicable law.

A. Current Disclosure Requirements

There are no laws that require presidential candidates to make any tax or health disclosures or undergo any type of background check. Presidential candidates are required to file disclosure forms with the Federal Elections Committee (“FEC”) which are then forwarded to the Office of Government Ethics (“OGE”) for review and certification.⁶ The Executive Branch Personnel Public Financial Disclosure Report form (OGE Form 278e) requires candidates to publicly list their financial holdings, debt and sources of income.⁷ Additionally, presidents must annually file financial disclosure Form 278e with the OGE for review.⁸

B. Legal Doctrines

Before delving into proposals for tax, health, and background check disclosures, we discuss the relevant legal doctrines that define this area of the law and set the parameters of the constitutionality of these types of requirements. Accordingly, this Part describes the qualifications doctrine, the appointments of presidential electors, ballot access, and campaign finance disclosure requirements as set out in the Federal Electoral Campaign Act.

1. Qualifications Doctrine

The “qualifications doctrine” refers to the concept that Congress⁹ and the States¹⁰ cannot impose new “qualifications” by statute on federal elected officials beyond what is explicitly laid out in the Constitution.

The logic behind this doctrine is that “the United States . . . is not a confederation of nations in which separate sovereigns are represented by appointed delegates.”¹¹ Federal elected officials, therefore, “owe primary allegiance not to the people of a State, but to the people of the Nation.”¹²

In deciding the confines of the qualifications doctrine in the seminal cases of *Powell v. McCormack*¹³ and *U.S. Term Limits v. Thornton*,¹⁴ the Supreme Court referenced constitutional history, noting that it “viewed the Convention debates as manifesting the Framers’ intent that the qualifications in the Constitution be fixed and exclusive,”¹⁵ and that the ratification debates showed that the “Framers understood the qualifications in the Constitution to be fixed and unalterable by Congress.”¹⁶

Under this doctrine, neither Congress nor the States may impose additional qualifications beyond those explicitly enumerated in Article II and the Twenty-Second Amendment.¹⁷ This list of qualifications for the presidency, therefore, is exhaustive and cannot be further restricted by statute.

Although the qualifications doctrine represents a major hurdle for implementing disclosure requirements, there are several possible bases of support for such requirements.

2. State Appointment of Electors

The Constitution explicitly delegates an important role to the states in presidential elections. Article II states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”¹⁸

The Supreme Court has held that the states’ discretion to establish qualifications for presidential electors is extremely broad. In *McPherson v. Blacker*, for instance, the Court held that it was constitutional for Michigan to appoint, rather than elect,

6 *Presidential Candidate Financial Disclosures*, U.S. OFFICE OF GOVERNMENT ETHICS, <https://oge.gov/Web/OGE.nsf/Resources/Presidential+Candidate+financial+disclosures>.

7 *Public Financial Disclosure Guide*, U.S. OFFICE OF GOVERNMENT ETHICS, <https://www.oge.gov/web/278eguide.nsf/Chapters/Public%20Financial%20Disclosure%20Guide?opendocument>; see, e.g., Center for Responsive Politics, *Financial Disclosures*, OPENSECRETS.ORG, <https://www.opensecrets.org/pres16/financial-disclosures>.

8 *Public Financial Disclosure Guide*, *supra* note 7.

9 *Powell v. McCormack*, 395 U.S. 486 (1969).

10 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

11 *Id.* at 821.

12 *Id.* at 803.

13 *Powell*, 395 U.S. 486.

14 *U.S. Term Limits*, 514 U.S. 779.

15 *Id.* at 790.

16 *Id.* at 792.

17 Article II states, in relevant part, that “No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of [the] Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.” U.S. CONST. art. II, § 1, cl. 5. The Twenty-Second Amendment states that “No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.” U.S. CONST. amend. XXII.

18 *Id.*

its presidential electors.¹⁹ In this case and the 20th century case *Williams v. Rhodes*,²⁰ the Court noted that the states have exclusive discretion and authority to regulate the qualification and appointment of their electors within the confines of the other amendments to the Constitution, such as the Fourteenth, Fifteenth, and Nineteenth Amendments.²¹ Therefore, it is mostly political, rather than constitutional or legal constraints, that have given rise to the current dominant system of apportionment of electors based on the result of the popular vote in states.

3. State Jurisdiction Over Ballot Access and Election Administration

In addition to the qualifications of electors, the Constitution gives states the authority over the “Times, Places, and Manner of holding Elections.”²² This allows states to determine their own regulations for how candidates qualify for the ballot in both state and federal elections. States’ ballot access restrictions, however, frequently come into conflict with the First Amendment rights of free political speech and association. Accordingly, courts weigh these restrictions via either a tiered scrutiny²³ or sliding scale approach to weigh the state’s interest in the regulation against the precise First Amendment right at issue.²⁴ While states have the ability to regulate their elections to pursue compelling state interests, such as protecting against fraud, abuse, and confusion, they must do so within the confines of the First Amendment.

19 *McPherson v. Blacker*, 146 U.S. 1 (1892).

20 *Williams v. Rhodes*, 393 U.S. 23 (1968).

21 See, e.g., *Williams*, 393 U.S. at 29; *McPherson*, 146 U.S. at 37.

22 U.S. CONST. art. I, § 4; see also U.S. CONST. amend. XVII (providing for the popular election of Senators).

23 See, e.g., *Storer v. Brown*, 415 U.S. 724, 736–37 (1974); *Williams*, 393 U.S. at 31–32.

24 *Burdick v. Takushi*, 504 U.S. 428, 434, 438 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

4. Disclosure and the First Amendment

The Federal Election Campaign Act (“FECA”) requires candidate committees, party committees and Political Action Committees (“PACs”) to file periodic reports with the FEC disclosing the money they raise and spend. Candidates must identify, for example, all PACs and party committees that give them contributions, and they must identify individuals who give them more than \$200 in an election cycle.²⁵ Additionally, they must disclose expenditures exceeding \$200 per election cycle to any individual or vendor.²⁶

The Supreme Court upheld these disclosure requirements in *Buckley v. Valeo*.²⁷ While the Court noted that it had previously found that compelled disclosure, in itself, could infringe on the First Amendment right of freedom of association, it noted that there must be a substantial relation between the disclosure requirement and an important government interest. The Court acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement of First Amendment rights, particularly when the “free functioning of our national institutions” is involved. These interests included providing the electorate with information as to where campaign money comes from and how it is spent, deterrence of corruption and the appearance of corruption, and recordkeeping in order to detect violations of other campaign finance laws.²⁸

Most importantly, the Court seemed to weigh these disclosure requirements in terms of their burden on the First Amendment rights of the contributors, rather than the First Amendment rights of the candidate or party.²⁹ Since the proposed disclosures here would only have an effect on the individual running for office, these First Amendment issues are of less concern.

25 Federal Elections Campaign Act, 52 U.S.C. §§ 30104 et seq. (2015).

26 *Id.*

27 424 U.S. 1 (1976).

28 *Id.* at 66–68.

29 *Id.* at 68.

II. Tax Returns and Financial Information

This Part discusses disclosure of presidential candidates' tax returns and financial information. Part II.A examines the precedent set by previous presidential candidates in disclosing tax returns and the requirement that candidates complete an Office of Government Ethics Public Financial Disclosure Report. Part II.B discusses proposed and enacted state and federal bills that seek to require candidates to release their tax returns. Part II.C outlines a proposal for requiring candidates to release their tax returns and discusses possible alternatives to the proposal and Part II.D outlines a proposal for updating financial disclosure reports and discusses possible alternatives to the proposal.

A. History and Background

1. Tax Returns

A candidate's tax returns inform the public about the candidate's financial dealings, charitable contributions, political connections, possible conflicts of interest, and, in some cases, illegal activity or fraud. According to Americans for Tax Fairness:

Of course, the problem of undisclosed tax returns might not end with President Trump. By breaking a 40-year tradition, he has invited future presidential candidates to hide their tax returns as well. If they do, voters would be forced to choose their leaders while being entirely in the dark about the important issues of honesty, generosity and potential conflicts of interest that are illuminated by tax-return information.³⁰

Candidates are not required by law to disclose their tax returns, but it has become the accepted norm for them to do so.³¹ Every president since Richard Nixon has voluntarily released his tax returns except Presidents Gerald Ford and Donald Trump. In 1973, while under audit, President Nixon released returns dating back to 1969.³² He released these records due to immense public pressure following allegations of improper charitable deductions and low tax rates.³³ The Tax History Project's Joe

Thorndike observed, "One of the reasons that Nixon released his returns was that people were saying, 'Hey, how can we trust the IRS to investigate this guy honestly and fairly when he's their boss?'"³⁴ After releasing his tax returns, President Nixon famously said, "People have got to know whether or not their president is a crook. Well, I am not a crook."³⁵

Although President Ford did not release his tax returns, he did release summaries of his federal tax returns from 1966 to 1975.³⁶ According to Thorndike, Ford's summaries did not provide information regarding sources of income and charitable contributions.³⁷

Most candidates have filed their returns jointly with their spouses. That allows the public to see a full picture of the candidates' and their spouses' incomes, and possible conflicts of interest. But some candidates' spouses may choose to file separately. Teresa Heinz Kerry, wife of 2004 Democratic nominee John Kerry, filed her income tax returns separately from her husband.³⁸ Mrs. Kerry is the "heiress to the \$500 million Heinz Co. food fortune."³⁹ John Kerry released his personal tax returns during the 2004 presidential campaign,⁴⁰ but his wife released only a small part of her 2003 income tax return and did not disclose anything about the trusts that benefit her and her sons that were believed to be worth approximately one billion dollars.⁴¹

Similarly, the entire scope of John McCain's family wealth was not revealed when he released his returns during the 2008 presidential campaign. McCain only released his personal tax returns and not those of his wife, Cindy McCain, a significant stakeholder in the Phoenix-based beer distributorship, Hensley & Co.⁴² When releasing his returns, McCain's campaign stated

34 Disis, *supra* note 32.

35 *Id.*

36 *Presidential Tax Returns*, TAX NOTES, <http://www.taxhistory.org/www/website.nsf/web/presidentialtaxreturns>.

37 Tom Kertscher, *Is Donald Trump the Only Major-Party nominee in 40 years not to release his tax returns*, POLITIFACT WISCONSIN (Sept. 28, 2016), <https://www.politifact.com/wisconsin/statements/2016/sep/28/tammy-baldwin/donald-trump-only-major-party-nominee-40-years-not/>.

38 Lloyd Vries, *Bush, Kerry Release Tax Returns*, CBS NEWS (Apr. 13, 2014, 2:29 PM), <https://www.cbsnews.com/news/bush-kerry-release-tax-returns/>.

39 *Id.*

40 *Id.*

41 David Cay Johnston & Eric Lipton, *Kerry's Wife Releases Part of Her 2003 Income Tax Return*, N.Y. TIMES: THE CAUCUS (Oct. 16, 2004), <https://www.nytimes.com/2004/10/16/politics/campaign/kerrys-wife-releases-part-of-her-2003-income-tax-return.html>.

42 Barry Meier, *McCain's Tax Returns*, N.Y. TIMES (Apr. 18, 2008), <https://thecaucus.blogs.nytimes.com/2008/04/18/mccains-tax-returns/>.

30 Testimony in Support of California Senate Bill 149, the Presidential Tax Transparency and Accountability Act, Submitted by Frank Clemente, Executive Director, Americans for Tax Fairness, to S. Judiciary Comm. (Mar. 28, 2017), <https://americansfortaxfairness.org/wp-content/uploads/California-SB-149-ATF-Testimony-on-making-presidential-tax-returns-public-3-22-17.pdf>.

31 Kyle Sammin, *No, States Don't Get to Make Presidential Candidates Release Tax Returns*, FEDERALIST (Mar. 10, 2017), <http://thefederalist.com/2017/03/10/no-states-dont-get-make-presidential-candidates-release-tax-returns/>.

32 Jill Disis, *Presidential Tax Returns: It Started With Nixon. Will It End With Trump?*, CNN BUSINESS (Jan. 26, 2017, 2:06 PM), <https://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html>.

33 Brian Faler, *How Nixon's tax trouble could influence quest for Trump's returns*, POLITICO (Dec. 23, 2018), <https://www.politico.com/story/2018/12/23/nixon-trump-tax-returns-1050587>.

Mrs. McCain's personal taxes would not be released "in the interest of protecting the privacy of her children."⁴³

The extent of candidates' disclosures of their tax returns has significantly varied. Some have released returns dating back decades, while others have released much less.⁴⁴ For example, during the 2016 presidential campaign, Ted Cruz and Rick Santorum released four years of returns, John Kasich released seven years of returns, and Bernie Sanders released one year of returns.⁴⁵ In an apparent effort to pressure Trump to release his returns, Hillary Clinton released 16 years of returns and Jeb Bush released 34 years.⁴⁶ Mitt Romney released two years of returns during the 2012 campaign and John McCain released the same number in 2008.⁴⁷

Candidates' transparency with regard to their taxes has been a significant focus of the 2020 Democratic primary. This has been a result of both a rise in the public's interest in tax disclosures and the Democratic candidates' desire to distinguish themselves from Trump. Failing to release returns has led to criticism of some candidates, such as Senator Bernie Sanders,⁴⁸ who eventually released his returns for the past ten years.⁴⁹ As of June 2019, 11 of the 24 candidates for the Democratic nomination had released at least ten years of returns since announcing their candidacies.⁵⁰ Frontrunner Joe Biden had not released any tax returns since announcing his candidacy, but he previously released returns dating back to 1998. He released ten years of returns while running for vice president in 2008 and released his returns for every year after through 2015 while serving as vice president.⁵¹

43 *Id.*

44 Disis, *supra* note 32.

45 *Presidential Tax Returns*, *supra* note 36.

46 *Id.*

47 *Id.*

48 Helanie Olen, *Enough with the excuses. It's time for Sanders to release his tax returns*, WASH. POST (Apr. 3, 2019), <https://www.washingtonpost.com/opinions/2019/04/03/enough-with-excuses-its-time-sanders-release-his-tax-returns/>.

49 Edward Helmore, *Bernie Sanders and Beto O'Rourke release decade worth of tax returns*, GUARDIAN (Apr. 15, 2019), <https://www.theguardian.com/us-news/2019/apr/15/bernie-sanders-beto-orourke-release-tax-returns>.

50 See Julia Glum, *Here's Where to Find Every 2020 Presidential Candidate's Tax Returns (If They're Released Them)*, MONEY (June 10, 2019, 4:31 PM), <http://money.com/money/5642210/2020-presidential-candidates-tax-returns/>; The 2020 candidates who have released their latest tax returns, AXIOS (Apr. 30, 2019), <https://www.axios.com/2020-presidential-candidates-tax-returns-release-bec8b83a-8ab5-44e0-9b93-f7117c4ee449.html>.

51 See Glum, *supra* note 50.

2. Financial Disclosures

Presidential and vice presidential candidates "are required to file an annual Office of Government Ethics ("OGE") Public Financial Disclosure Report with the FEC within 30 days after becoming a candidate for nomination or election, or by May 15 of that calendar year, whichever is later, but at least 30 days before the election."⁵² Members of the public can obtain copies of these reports by submitting a request form to the FEC.⁵³ The records can also be viewed on the Office of Government Ethics' website.⁵⁴ If a candidate does not file this report, they face a fine of up to \$50,000.⁵⁵ If a candidate files the report later than 30 days before an election, they must pay a penalty of \$200 upon filing, unless a regulatory body waives the penalty.⁵⁶ A candidate who "knowingly and willfully" falsifies information on the report can be fined, imprisoned for no more than a year, or both fined and imprisoned.⁵⁷ The disclosure form requires candidates to disclose their assets, income, debts, and gifts.⁵⁸ Candidates only need to indicate assets and liabilities in "broad ranges" with the top range being "greater than \$50 million."⁵⁹ Similarly, the highest range on the form for income produced from these holdings is "greater than \$5 million."⁶⁰

The Financial Disclosure Report requirement was established by the Ethics in Government Act of 1978 ("EIGA") and is monitored by the OGE.⁶¹ President Jimmy Carter championed the EIGA in the wake of the Watergate scandal. It "created the modern executive branch ethics system, with mandatory financial disclosures for public employees, restrictions on conflicts of interest and a new agency to oversee it all, the Office of Government Ethics."⁶²

52 *Presidential, Senate and House Candidates*, FED. ELECTION COMM'N, <https://www.fec.gov/press/resources-journalists/presidential-senate-and-house-candidates/>.

53 *Id.*

54 *Presidential Candidate Financial Disclosures*, *supra* note 6.

55 Bryan Kappe & Prateek Reddy, *Personal Finance Disclosure Requirements for Public Officials*, PUBLIC CITIZEN (June 2011), <https://www.citizen.org/wp-content/uploads/personal-financial-disclosures-june2011.pdf>.

56 *Id.*

57 *Id.*

58 Chase Peterson-Withorn, *What You (Don't) Know About Trump: The Huge Holes in Disclosure Rules and How They Could Be Fixed*, FORBES (Oct. 24, 2018, 12:07 PM), <https://www.forbes.com/sites/chasewithorn/2018/10/24/what-you-dont-know-about-trump-the-huge-holes-in-disclosure-rules-and-how-they-could-be-fixed/>.

59 *Id.*

60 *Id.*

61 Kappe & Reddy, *supra* note 55, at 1, 6.

62 Peterson-Withorn, *supra* note 58.

Because the financial disclosure requirement was established in 1978, the current form does not address all modern types of business holdings, allowing candidates' possible conflicts of interest to remain hidden from the public.⁶³ For example, the financial disclosure forms do not require candidates to disclose debts held by their businesses, any foreign investments, the identities of their business partners, customers in their businesses (such as tenants in a commercially owned building), assets of theirs held by family and friends, and transactions in which assets are transferred to family and friends.⁶⁴ In a modern economy, presidential candidates, like Trump, may own numerous businesses, many with international interests and foreign investors, making it more important to expand the requirements for financial disclosure forms.⁶⁵ Norman Eisen, a former White House Special Counsel for Ethics and Government Reform, asserts that current disclosure requirements "were built for another day and time—not for the complicated financial entanglements of the Trump administration."⁶⁶

According to Marilyn Glynn, the OGE's acting director under President George W. Bush, the agency never anticipated the types of conflicts of interest problems seen within the Trump administration.⁶⁷ "The way the agency was created by Congress kind of assumes that the president and his people will be the ones standing on the shining pillar as an example to the whole rest of the government," she said.⁶⁸

In addition to the financial disclosure forms missing key questions, other obstacles with the OGE system include the agency's lack of ability to "investigate ethics violations, issue subpoenas, question witnesses, demand documents or punish people who violate the rules."⁶⁹ Further, the director of the OGE is appointed by the president and can be fired by him at any time.⁷⁰

B. Current State and Federal Proposals

In response to Trump's refusal to release his tax returns in the 2016 presidential campaign, politicians have proposed laws requiring presidential candidates to disclose their recent tax returns. The House of Representatives has passed legislation

that would require presidential and vice presidential candidates to release tax returns for their ten most recent taxable years.⁷¹ The requirement was part of a broad government reform measure: H.R. 1—the "For the People Act of 2019." Under the process outlined in the bill, candidates would submit their returns to the FEC, which would make them publicly available. If candidates did not submit their returns as required, the FEC chairman would be required to request the returns from Treasury Department.⁷²

In the Senate, Elizabeth Warren and Ben Sasse each introduced their own legislation mandating disclosure of candidates' tax returns.⁷³ Additionally, as of December 2018, lawmakers in at least 28 states had proposed legislation requiring presidential candidates to publicly release their tax returns.⁷⁴ In some states, multiple tax disclosures laws were introduced.⁷⁵ These bills were mostly sponsored by Democratic politicians. One of the proposals became law in California, but is facing legal challenges from President Trump, his campaign, the Republican National Committee, and several California voters.⁷⁶

Common provisions found within these proposed bills include: (1) how many previous years of returns must be submitted; (2) when the returns must be submitted; (3) consequences for failing to submit the returns; and (4) when and where the returns are to be made publicly available.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 For the People Act of 2018, H.R.1, 116th Cong. (2019).

72 *Id.* The proposal amends § 6103(1) of the Internal Revenue Code of 1986 to allow for the public disclosure of tax returns. *Id.* Professor Elizabeth Maresca suggested that amending this provision would allow the IRS to release tax returns of presidential candidates. Interview with Elizabeth Maresca, Clinical Professor of Law, Fordham Univ. Sch. of Law, in N.Y.C., N.Y. (Sept. 27, 2018).

73 Anti-Corruption and Public Integrity Act, S. 3357, 115th Cong. (2018); Presidential Tax Transparency Act, S.3450, 115th Cong. (2018).

74 See, e.g., S.B. 1500, 53rd Legis., 1st Reg. Sess. (Ariz. 2017); S.B. 149 (Cal. 2017); H.B. 17-1328, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017); H.B. 6575, Sess. 2017 (Conn. 2017); S.B. 28, 149th Gen. Assemb. (Del. 2017); H.B. 640, Reg. Sess. 2017-2018 (Ga. 2017); H.B. 1581, 29th Leg. (Haw. 2017); S.B. 982, 100th Gen. Assemb. (Ill. 2017); S.F. 159 (Iowa 2017); S.B. 253, Reg. Sess. (Ky. 2017); H.B. 517, Reg. Sess. (Md. 2017); S.B. 365, 190th Gen. Assemb. (Mass. 2017); L.D. 1422, 1st Reg. Sess. (Me. 2017); H.B. 4365 (Mich. 2017); S.F. 759, 19th Sess. (Minn. 2017); S.F. 358, 19th Sess. (Minn. 2017); H.B. 560, 65th Legis. (Mont. 2017); S.B. 3048, 217th Legis. (N.J. 2017); H.B. 204, 53rd Legis. (N.M. 2017); S.B. 26, 2017-2018 Reg. Sess. (N.Y. 2017); S.B. 587, Gen. Assemb., Sess. 2017 (N.C. 2017); H.B. 93, 132nd Gen. Assemb., 2017-2018 Reg. Sess. (Ohio 2017); S.B. 888, 79th Or. Legis. Assemb., 2017 Reg. Sess. (Or. 2017); S.B. 247, Gen. Assemb., 2017 Sess. (Pa. 2017); H.B. 5400, Gen. Assemb., Jan. Sess. (R.I. 2017); H.B. 1127, Gen. Assemb. (Tenn. 2017); H.B. 243, Gen. Assemb. (Vt. 2017); S.B. 1543, Gen. Assemb., 2017 Sess. (Va. 2017); S.B. 166, 2017-2018 Legis. (Wis. 2017).

75 See, e.g., S.F. 2203, 19th Sess. (Minn. 2017); S.F. 759, 19th Sess. (Minn. 2017); S.F. 358, 19th Sess. (Minn. 2017); H.F. 931, 19th Sess. (Minn. 2017); H.F. 704, 19th Sess. (Minn. 2017); H.F. 931, 19th Sess. (Minn. 2017).

76 John Myers, *Trump Wants to Keep His Tax Returns Private, Asks Courts to Stop California Law*, L.A. TIMES (Aug. 6, 2019, 2:00 PM), <https://www.latimes.com/politics/story/2019-08-06/trump-california-tax-returns-law-suit>.

The majority of the proposed bills require that both presidential and vice-presidential candidates submit tax returns for the past five years. Only a few of the bills limit the requirement to presidential candidates and only five of the proposals would require that three years of tax returns be submitted. The majority of proposed state bills penalize a candidate for failing to fulfill this requirement by keeping the candidate's name off the general election ballot and ten proposals restrict presidential electors from voting for a candidate who fails to submit tax returns.⁷⁷

77 See Table below for a numerical breakdown of key provisions within the proposed state bills.

Among these proposals, there are some noteworthy differences. For example, the Delaware bill only requires presidential and vice presidential candidates of a major party to submit their returns.⁷⁸ In Kentucky, the bill prevents presidential candidates who fail to submit tax returns from being certified as the winner of the state's electoral votes.⁷⁹ And two bills proposed in Wisconsin do not provide any penalty for failing to comply with their requirement that candidates release three years of returns.⁸⁰

78 S.B. 28, 149th Gen. Assemb. (Del. 2017).

79 S.B. 253, Reg. Sess. (Ky. 2017).

80 S.B. 257, 2017-2018 Legis. (Wis. 2017); S.B. 166, 2017-2018 Legis. (Wis. 2017).

Table Detailing Key Differences in Sample of Tax Return Disclosure Bills Proposed as of December 2018⁸¹

Requires Only Presidential Candidate Disclose Tax Returns	Requires Presidential and Vice Presidential Candidate to Disclose Tax Returns
8* (AZ, CA, CT, KY, IL, TN, VT, VA)	22* (CO, CT, DE, GA, HI, IA, IL, MA, MD, ME, MI, MN, MT, NC, NJ, NM, NY, OH, OR, PA, RI, WI)

* Some states appear in both boxes because multiple bills have been introduced in those states with differing disclosure requirements.

Require Release 5 Years of Returns	Requires Release of 3 Years of Returns
26* (AZ, CA, CO, CT, DE, GA, HI, IA, IL, MA, MD, ME, MI, MN, MT, NC,** NJ, NM, NY, OH, OR, PA, RI, TN, VT, VA)	5* (CT, GA, KY, MA, WI)

* Some states appear in both boxes because multiple bills have been introduced in those states with differing disclosure requirements. MA requires disclosure of five years to be on general election ballot and three years to be on the primary ballot.

** Another bill proposed in NC requires release of ten years of tax returns.

Require Written Consent for Release from Candidate	No Requirement for Written Consent
21 (CO, DE, GA, HI, IA, IL,* KY, MA, MD, MI, MN, MT, NC, NJ, NM, NY, OH, OR, PA, RI, VT)	8 (AZ, CA, CT, IL,* ME, TN, VA, WI)

* IL appears in both boxes because multiple bills have been introduced in that state with differing disclosure requirements.

Bar from General Election Ballot	Bar from Primary Ballot	Bar from Both Ballots	Restrict Presidential Electors from Voting For Candidates
19* (AZ, CO, DE, GA, HI, IA, IL, MD, ME, MI, MN, NC, NJ, NM, NY, OH, OR, PA, RI)	3* (CA, MN, PA)	9* (KY, MA, MN, MT, OH, OR, TN, VT, VA)	10* (AZ, CO, CT, HI, IL, MA, NJ, NY, OR, PA)

* Some states appear in multiple boxes because multiple bills have been introduced in those states with differing disclosure requirements.

81 For a chart comparing the aspect of each state's bill, see Appendix A. This chart is up to date as of December 2018.

Some opponents of these bills argue that they violate the Constitution's Qualifications Clause because they would require more of a presidential candidate than the specific requirements enumerated in the Constitution.⁸² Under these proposed bills, a candidate would need to submit their tax returns to be eligible to be on the ballot, a requirement never set forth in the Constitution.

But Harvard Law Professor Laurence Tribe believes these bills are constitutional.⁸³ He argues, "[O]ur federal constitution allows states to create ballot access requirements that ensure the ballots for every office, including the office of presidential elector, are comprehensible and informative."⁸⁴ He asserts that the proposed tax return disclosure laws are not prohibited qualifications because they do not impose any substantive requirements on candidates.⁸⁵ Additionally, he claims that these laws are not an "insurmountable barrier" for any candidates who meet the qualifications enumerated in the Constitution because they only require "a relatively minor process of tax disclosure."⁸⁶ Professor Tribe believes that "many states' efforts . . . are legitimate and are overwhelmingly likely to be upheld under legal challenge in the courts, whether state or federal."⁸⁷

In addition to the Qualifications Clause challenge, bills that make distinctions within the requirement, such as the Delaware bill that only requires returns from major party presidential candidates, raise legal concerns of unequal treatment.

Aside from the legal issues the proposed laws implicate, some critics argue they are bad policy. Maryland Senate Minority Leader J.B. Jennings argues voters should be left to decide if they want a candidate who has not disclosed their tax returns.⁸⁸

In response to a proposed bill requiring candidates to release five years of tax returns, Jennings said, "We don't reveal our tax returns as legislators. Why are you doing it for the president and not every other office too?"⁸⁹

The California and New Jersey bills were approved by each state's respective legislature but were both vetoed in 2017.⁹⁰ California Governor Jerry Brown, a Democrat, vetoed the bill because he worried "about the political perils of individual states seeking to regulate presidential elections in this manner."⁹¹ Governor Brown expressed concern about the precedent this type of law might set.⁹² He said, "Today we require tax returns, but what would be next? Five years of health records? A certified birth certificate? High school report cards? And will these requirements vary depending on which political party is in power?"⁹³ The California legislature subsequently approved another tax disclosure law in 2019.⁹⁴ Brown's successor, Governor Gavin Newsom, signed the legislation in July 2019. It bars candidates who do not disclose their returns from appearing on ballots for the presidential primaries.⁹⁵

Upon blocking the New Jersey bill, Republican Governor Chris Christie called it "an unconstitutional political stunt and 'form of therapy' for lawmakers unhappy" that Donald Trump won the presidency.⁹⁶ Following Christie's veto, Democratic Assemblyman John McKeon said lawmakers planned on proposing the bill to Governor Phil Murphy, who replaced Christie at the start of 2018.⁹⁷ The New Jersey Senate passed the proposal in February 2019,⁹⁸ but there has not been any action on the legislation in the Assembly as of May 2019.⁹⁹

82 See *supra* Part I.B.1. See, e.g., Sammin, *supra* note 31. Sammin agrees with the logic behind the court's ruling in *U.S. Term Limits*, asserting, "If one state can impose new qualifications for reasons of term limits, then another can impose them for any other purpose." For example, Sammin argues, "If the states can add the disclosure of income tax returns as a requirement, why could they not add other requirements? Could they keep candidates off the ballot if they do not own property? . . . Could a state require a presidential candidate to have served in the military? To have held elective office? To have worked in the private sector?" *Id.*

83 Telephone Interview with Laurence H. Tribe, Carl M. Loeb Univ. Professor, Harv. Law Sch. (Nov. 1, 2018).

84 See S. JUDICIARY COMM., 2017-2018 REGULAR SESSION, PRESIDENTIAL PRIMARY ELECTIONS: BALLOT ACCESS (Cal. 2017), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=2017201805B149#.

85 Substantive requirements are qualities that a candidate would have to meet in order to run for president, such as a requirement to be a certain age or a requirement to have a certain level of education.

86 S. JUDICIARY COMM., *supra* note 83.

87 *Id.*

88 See Fenit Nirappil, *Blue-state lawmakers want to keep Trump off 2020 ballot unless he releases tax returns*, WASH. POST (Jan. 3, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/01/03/blue-state-lawmakers-want-to-keep-trump-off-2020-ballot-unless-he-releases-tax-returns/>.

89 *Id.*

90 Mike Catalini & Geoff Mulvihill, *Democratic State Lawmaker Try to Get Trump Tax Returns, Too*, ASSOCIATED PRESS (May 7, 2019), <https://www.apnews.com/7f22f3f867794e73b1942aeadb7a473e>; Emily Tillett, *Calif. Gov. Jerry Brown Vetoes Presidential Candidate Tax Return Disclosure Bill*, CBS NEWS (Oct. 16, 2017, 11:22 AM), <https://www.cbsnews.com/news/calif-gov-jerry-brown-vetoes-presidential-candidate-tax-return-disclosure-bill/>.

91 Tillett, *supra* note 90.

92 *Id.*

93 *Id.*

94 Marina Pitofsky, *California Lawmakers Pass Bill Requiring Trump, Presidential Hopefuls Release Tax Returns to Appear on Ballot*, HILL (July 12, 2019, 8:10 AM), <https://thehill.com/blogs/blog-briefing-room/news/452757-bill-passed-by-california-lawmakers-would-require-trump>.

95 Myers, *supra* note 76.

96 Kate King, *Christie Halts Bill to Require Tax-Return Disclosures for Presidential Candidates*, WALL ST. J. (May 1, 2017), <https://www.wsj.com/articles/christie-halts-bill-to-require-tax-return-disclosures-for-presidential-candidates-1493669704>.

97 *Id.*

98 Brent Johnson, *NJ Dems could boot Trump from ballot in 2020 with this law*, NJ.COM (Feb. 23, 2019), <https://www.nj.com/politics/2019/02/trump-would-have-to-release-his-tax-returns-to-get-on-nj-ballot-if-this-bill-passes.html>.

99 Catalini & Mulvihill, *supra* note 90.

C. Proposal for Tax Return Disclosures

We propose a federal law requiring candidates to submit to the FEC a full copy of their federal income tax returns for at least the five most recent taxable years. The returns should be filed within 60 days from when the candidate files with the FEC his or her petition, statement of candidacy, or notice of candidacy. After the tax returns have been redacted of personal information, the FEC should make the returns publicly available on its website. Candidates can make their returns publicly available on their campaign websites with a document from the FEC certifying that this requirement has been fulfilled. Failure to submit these returns should result in the FEC fining the candidate \$10,000.¹⁰⁰

This proposal resembles many aspects of the states' proposed tax disclosure bills as well as the Presidential and Vice-Presidential Tax Transparency portion of H.R.1, the House of Representatives' governmental reform bill. Unlike the state bills, our proposal, like the House bill, implements the requirement on the federal level to ensure uniformity. A federal law will ensure that this requirement is not only for candidates of one political party. For example, if only states that Democrats typically win passed tax return disclosure legislation, Republican candidates may not feel pressure to disclose their returns.

Vikram Amar, the dean of the University of Illinois College of Law, asserted, "To be blunt, nothing in the presidential election in 2016 would have changed if the name of Donald Trump (or of electors pledged or inclined to support him) had not appeared on California's or New York's November ballots."¹⁰¹ Amar said for these laws to "have any beneficial real-world effect, it would have to be embraced by either a mix of blue and red States, or at least a number of swing states where neither party can feel assured of a victory."¹⁰²

Our proposal does not bar candidates from appearing on the ballot because such a restriction potentially violates the Constitution's Qualifications Clause. Instead, the proposal uses the threat of a fine to enforce the requirement. Although a \$10,000 fine still enables a candidate to evade disclosure, voters will likely be suspicious if the candidate chooses a hefty fine over transparency.

100 Professor Jerry H. Goldfeder proposed that a fine might be an effective way to enforce a tax disclosure requirement. Interview with Jerry H. Goldfeder, Special Counsel, Stroock & Stroock & Lavan, LLP, in N.Y.C., N.Y. (Oct. 9, 2018).

101 Vikram David Amar, *Can and Should States Mandate Tax Return Disclosure as a Condition for Presidential Candidates to Appear on the Ballot?*, VERDICT (Dec. 30, 2016), <https://verdict.justia.com/2016/12/30/can-states-mandate-tax-return-disclosure-condition-presidential-candidates-appear-ballot>.

102 *Id.*

This fine is supported by the Supreme Court's holding in *Buckley v. Valeo*. Requiring candidates to release their tax returns serves government interests similar to those the *Buckley* Court cited in upholding campaign finance disclosures enforced by fines.¹⁰³ Specifically, it provides voters with valuable information and deters corruption.

A candidate's tax returns inform the electorate about the candidate's financial status and possible conflicts of interests, which can predict a candidate's future performance in office and could deter unethical or illegal behavior. If candidates are aware that running for president requires tax return disclosure, they will also be deterred from being untruthful on their taxes and engaging in fraudulent behavior. Additionally, disclosure of tax returns might reveal conflicts of interest or identify people or entities who might have an undue influence over the president.

D. Proposal for Financial Disclosures

We propose that Congress create a committee to assess and recommend updates to Congress about the current required financial disclosure questionnaire to ensure that it covers all types of modern business dealings.¹⁰⁴ The committee should include individuals from inside and outside of government. The government personnel on the committee should include representatives of agencies like the Office of Government Ethics, IRS, and FEC.

Individuals from NGOs and other outside experts on the committee should include members of both major parties to prevent the process from becoming politicized. Individuals from government agencies should be part of the committee given their familiarity with the government's handling of information relating to personal finances, including procedures for public disclosure of that information.

Improving financial disclosure requirements may be more important than requiring candidates to release their tax returns because tax returns do not always reflect the type of business holdings that strengthened financial disclosure requirements, such as those proposed here, would capture.

103 See 424 U.S. 1.

104 Alan Rothstein suggested this proposal to us. Interview with Alan Rothstein, former General Counsel, New York City Bar Association, in N.Y.C., N.Y. (Oct. 10, 2018).

III. Health Information

This report next examines disclosure of health information of presidential candidates and the sitting president. Part III.A examines the history and background of health information disclosures. This Part also provides historical context for why disclosures may be necessary and discusses why such disclosures may present problems. Part III.B provides an overview of the different approaches to medical disclosures candidates have taken over the past several decades. Finally, Part III.C outlines medical disclosure proposals and possible alternatives.

A. History and Background

There are numerous examples of presidents and presidential candidates hiding health information from the public in ways that could have altered elections or left the unwitting public with a president unable to carry out the office's duties. President Grover Cleveland secretly had a cancerous tumor removed from his mouth in 1893, keeping the operation hidden from the public and even the vice president and members of the Cabinet.¹⁰⁵ Woodrow Wilson, who had a history of cardiovascular disease and strokes prior to his election, suffered a debilitating stroke near the end of his presidency that was hidden from the public and even several high-ranking Cabinet members.¹⁰⁶ By the time Franklin Delano Roosevelt ran in his final reelection campaign in 1944, he had developed a myriad of serious health problems, including chronic fatigue and heart disease, which was kept a

closely guarded secret, including from his running mate, Harry Truman.¹⁰⁷ Although Dwight D. Eisenhower was much more transparent about his health than some other presidents,¹⁰⁸ his doctors and staff initially misled the public after he suffered his first heart attack in 1955,¹⁰⁹ stating that Eisenhower suffered "a digestive upset during the night"¹¹⁰ and playing down the seriousness of a stroke Eisenhower suffered in 1957 that left him temporarily unable to speak.¹¹¹ While relying heavily on his image of youth and vigor during the 1960 campaign and throughout his presidency, John F. Kennedy was in fact

105 JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* 12 (3d ed. 2014); *A Yacht, A Mustache: How A President Hid His Tumor*, NPR (July 6, 2011, 12:01 AM), <https://www.npr.org/2011/07/06/137621988/a-yacht-a-mustache-how-a-president-hid-his-tumor>.

106 Michael Alison Chandler, *A President's Illness Kept Under Wraps*, WASH. POST (Feb. 3, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/02/AR2007020201698.html>. See generally EDWIN E. WEINSTEIN, *WOODROW WILSON: A MEDICAL AND PSYCHOLOGICAL BIOGRAPHY* (1981); Arthur S. Link, *Woodrow Wilson: A Cautionary Tale*, 30 WAKE FOREST L. REV. 585 (1995). Wilson's wife, Edith Boling Galt Wilson, carried out many functions of his job while Wilson was incapacitated due to his stroke. See generally WILLIAM HAZELGROVE, *MADAM PRESIDENT: THE SECRET PRESIDENCY OF EDITH WILSON* (2016); GENE SMITH, *WHEN THE CHEERING STOPPED: THE LAST YEARS OF WOODROW WILSON* (1964).

107 Joel Achenbach & Lillian Cunningham, *The Hidden History of Presidential Disease, Sickness and Secrecy*, WASH. POST (Sept. 12, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/09/12/the-secret-history-of-presidential-disease-sickness-and-deception/>. Frank Lahey, a doctor who examined FDR, wrote a document stating that Roosevelt would be dead before the end of his fourth term. Peter Schworm, *A Grim Warning to an Ailing President*, BOSTON GLOBE (Apr. 12, 2011), http://archive.boston.com/news/local/massachusetts/articles/2011/04/12/lahey_clinic_reveals_memo_of_concern_about_fdrs_health/. Although the contents of the memo had been suspected for years, the memo was not released to the public until 2011. See Carey Goldberg, *As Promised: Long-Lost Lahey Memo On FDR*, WBUR (Apr. 11, 2011), <http://www.wbur.org/commonhealth/2011/04/11/fdr-lahey-memo>; Jack Anderson & Joseph Spear, *Evidence Indicates FDR Knew of Cancer*, WASH. POST (July 2, 1987), <https://www.washingtonpost.com/archive/local/1987/07/02/evidence-indicates-fdr-knew-of-cancer/a93fa60d-cc57-4481-8c2b-905eacc25f18/>; *Roosevelt Memo Leads to Dispute*, N.Y. TIMES (Oct. 15, 1985), <https://www.nytimes.com/1985/10/15/us/roosevelt-memo-leads-to-dispute.html>. Lahey's predictions proved true, as FDR passed away 83 days into his final term. Jean Edward Smith, *FDR 635-36* (2007); Arthur Krock, *President Roosevelt is Dead; Truman to Continue Policies*, N.Y. TIMES (Apr. 12, 1945), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0412.html#article>.

108 See generally Myron K. Jordan, *Presidential Health Reporting: The Eisenhower Watershed*, 4 AM. JOURNALISM 147 (1987).

109 See generally CLARENCE G. LASBY, *EISENHOWER'S HEART ATTACK: HOW IKE BEAT HEART DISEASE AND HELD ON TO THE PRESIDENCY* (1997).

110 *Eisenhower Has Digestive Upset*, KENTUCKY NEW ERA (Sept. 24, 1955). Later that day, at Eisenhower's instruction, the White House released a statement confirming that the president had, in fact, suffered a heart attack. Jordan, *supra* note 108, at 146-48; Barron H. Lerner, *An M.D.'s Guide to Ike's Heart and Hearth*, N.Y. TIMES (Jan. 13, 2004), <https://www.nytimes.com/2004/01/13/health/an-md-s-guide-to-ike-s-heart-and-hearth.html>.

111 *President Suffers 'Mild Stroke', Will Need Several Weeks' Rest; Nixon Denies He'll Take Charge*, HARVARD CRIMSON (Nov. 27, 1957), <https://www.thecrimson.com/article/1957/11/27/president-suffers-mild-stroke-will-need/>; Rick Mertens, *Long Line of Presidents Who Concealed Ill Health*, FINANCIAL TIMES (Sept. 12, 2016), <https://www.ft.com/content/377f08c2-78f0-11e6-a0c6-39e2633162d5>; Spencer Rich, *Precedents of Disability In the White House*, WASH. POST (July 14, 1985), <https://www.washingtonpost.com/archive/politics/1985/07/14/precedents-of-disability-in-the-white-house/0482cf7c-4ff1-410a-b373-fb1ea71d92ef/> ("Initially, White House aides told the press that the president had suffered a "chill," but on Nov. 26 doctors revealed he had had an 'occlusion of a small branch of a cerebral vessel which has produced a slight difficulty in speaking' but no other abnormalities.").

concealing from the public an extensive array of serious health conditions, including Addison's disease.¹¹²

In addition to physical ailments, there are numerous examples of presidents and presidential candidates whose mental health or neurological capacity have been called into question. Some believe Ronald Reagan, who disclosed to the country in 1994 that he was suffering from Alzheimer's disease,¹¹³ began showing signs of the disease during his presidency, which ended at the start of 1989.¹¹⁴ But others, including biographers

of the former president and aides who worked for him in the White House, have forcefully rejected claims that he was cognitively impaired while in office.¹¹⁵ Many close aides of President Nixon later revealed that they worried about his drinking and his deteriorating mental state,¹¹⁶ especially during the closing days of the Watergate scandal.¹¹⁷ In the present day, many mental health professionals have expressed concern over Donald Trump's mental capacity.¹¹⁸

While these examples illustrate presidents and candidates withholding information about medical conditions that could have severely impacted their ability to carry out the duties of the office, it is also important to note a myriad of other examples of presidents and presidential candidates withholding information or privately dealing with illnesses and conditions that posed little risk of impairing their ability to carry out their duties. Although his condition was widely known,¹¹⁹ FDR took great care to hide his paralysis from the American people.¹²⁰ Photographers and the press avoided showing or mentioning the fact that he used a wheelchair.¹²¹ Historians have remarked

112 David Brown, *JFK's Addison's Disease*, WASH. POST (Oct. 6, 1992), <https://www.washingtonpost.com/archive/lifestyle/wellness/1992/10/06/jfks-addisons-disease/aceb473c-a5dc-4199-9453-d3fcd3b18312/>. The doctors who examined President Kennedy's body after his assassination confirmed in 1992 that the President had Addison's. *Id.* Even before his presidency, Kennedy was taking a wide array of medications for a large range of problems. According to Robert Dallek's comprehensive article in *The Atlantic*:

[N]ewly available records allow us to construct an authoritative account of JFK's medical tribulations. And they add telling detail to a story of lifelong suffering, revealing that many of the various treatments doctors gave Kennedy, starting when he was a boy, did far more harm than good. In particular, steroid treatments that he may have received as a young man for his intestinal ailments could have compounded—and perhaps even caused—both the Addison's disease and the degenerative back trouble that plagued him later in life. Travell's prescription records also confirm that during his presidency—and in particular during times of stress, such as the Bay of Pigs fiasco, in April of 1961, and the Cuban missile crisis, in October of 1962—Kennedy was taking an extraordinary variety of medications: steroids for his Addison's disease; painkillers for his back; anti-spasmodics for his colitis; antibiotics for urinary-tract infections; antihistamines for allergies; and, on at least one occasion, an anti-psychotic (though only for two days) for a severe mood change that Jackie Kennedy believed had been brought on by the antihistamines.

Robert Dallek, *The Medical Ordeals of JFK*, ATLANTIC (Aug. 2013), <https://www.theatlantic.com/magazine/archive/2013/08/the-medical-ordeals-of-jfk/309469/>.

113 Michael R. Gordon, *In Poignant Public Letter, Reagan Reveals That He Has Alzheimer's*, N.Y. TIMES (Nov. 6, 1994), <https://www.nytimes.com/1994/11/06/us/in-poignant-public-letter-reagan-reveals-that-he-has-alzheimer-s.html>.

114 Joseph J. Fins, *The Reagan Diaries Reconsidered*, 48 J. ALZHEIMER'S DISEASE 59, 59-61 (2015); Harriet Alexander, *Ronald Reagan's Speeches Showed The Beginnings of Alzheimer's Before Diagnosis*, TELEGRAPH (Mar. 31, 2015, 1:06 PM), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/11506047/Ronald-Reagans-speeches-showed-the-beginnings-of-Alzheimers-before-diagnosis.html>; Lawrence K. Altman, *Parsing Ronald Reagan's Words for Early Signs of Alzheimer's*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/health/parsing-ronald-reagans-words-for-early-signs-of-alzheimers.html>; Paul Bedard, *Reagan Son Claims Dad Had Alzheimer's as President*, U.S. NEWS (Jan. 14, 2011), <https://www.usnews.com/news/blogs/washington-whispers/2011/01/14/reagan-son-claims-dad-had-alzheimers-as-president>.

115 See Craig Shirley & John Heibusch, *President Reagan Didn't Have Alzheimer's While In Office*, CNN (Jan. 11, 2018), <https://www.cnn.com/2018/01/09/opinions/reagan-didnt-have-alzheimers-while-in-office-opinion-heibusch-shirley/index.html>; Craig Shirley et al., *What Bill O'Reilly's New Book On Ronald Reagan Gets Wrong About Ronald Reagan*, WASH. POST (Oct. 16, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/10/16/what-bill-oreillys-new-book-on-ronald-reagan-gets-wrong-about-ronald-reagan/>; A.B. Culvahouse, *Bill O'Reilly's 'Killing Reagan' Revives Debunked Myth*, USA TODAY (Oct. 9, 2015, 10:01 AM), <https://www.usatoday.com/story/opinion/2015/10/09/b-culvahouse-shameful-reagan-myth-making-resurges-column/73612714/>.

116 John A. Farrell, *The Year Nixon Fell Apart*, POLITICO MAG. (Mar. 26, 2017), <https://www.politico.com/magazine/story/2017/03/john-farrell-nixon-book-excerpt-214954>.

117 BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* 395, 422-24 (1976).

118 Editorial, *Shrinks Battle Over Diagnosing Donald Trump*, PSYCHOLOGY TODAY (Jan. 31, 2017), <https://www.psychologytoday.com/us/blog/brainstorm/201701/shrinks-battle-over-diagnosing-donald-trump>. See generally THE DANGEROUS CASE OF DONALD TRUMP: 27 PSYCHIATRISTS AND MENTAL HEALTH EXPERTS ASSESS A PRESIDENT (Bandy X. Lee ed., 2017).

119 See *Roosevelt's Polio Wasn't A Secret: He Used It To His Advantage*, WBUR NEWS (Nov. 25, 2013), <http://www.wbur.org/npr/247155522/roosevelts-polio-wasn-t-a-secret-he-used-it-to-his-advantage> ("When I've talked to people in the past ... I've always asked them, 'Did you know about FDR's condition?' And they've always said yes. What they say is, 'We realized later that he was more disabled than we knew, but we certainly knew he was disabled, we knew that he couldn't walk.'"). See also generally JAMES TOBIN, *THE MAN HE BECAME: HOW FDR DEFIED POLIO TO WIN THE PRESIDENCY* (2013).

120 See Michael E. Ruane, *A Newly Discovered Film Shows Franklin D. Roosevelt, Who Had Polio, Walking*, WASH. POST (June 27, 2018), <https://www.washingtonpost.com/news/retropolis/wp/2018/06/27/a-newly-discovered-film-shows-franklin-d-roosevelt-who-had-polio-walking/>.

121 Curtis Roosevelt, *FDR: A Giant Despite His Disability*, N.Y. TIMES (Aug. 5, 1998), <https://www.nytimes.com/1998/08/05/opinion/IHT-fdr-a-giant-despite-his-disability.html>.

on the extraordinary resolve and perseverance of these leaders who suffered through tremendous physical difficulty in order to serve their country.¹²²

Additionally, it is estimated that many presidents have suffered from some form of mental condition, such as depression or anxiety, including Abraham Lincoln,¹²³ who is consistently ranked by historians as the nation's greatest leader.¹²⁴

Candidate health became an issue in the early stages of the 2020 presidential campaign. Former Vice President Joe Biden, the current frontrunner for the Democratic nomination, faced questions about whether, at age 76, he was too old for the presidency.¹²⁵ And in April 2019, Senator Michael Bennet of Colorado announced that he was running for president and that he had been diagnosed with prostate cancer.¹²⁶ A few weeks later, he said surgery to remove the tumor had been successful.¹²⁷

Four presidents have died in office from natural causes. Two of these presidents, William Henry Harrison¹²⁸ and Zachary

Taylor,¹²⁹ died from infections that were not easily predictable based on their prior medical history. Accordingly, in deciding what health information a president or presidential candidate should disclose to the public, it is important to weigh candidates' privacy interests against the public's right to be informed about issues that could severely impact the nation. It is also important to acknowledge that much health information is irrelevant to the performance of the duties of the office and that disclosure might bring undue scrutiny and possible stigma to certain health conditions.

B. Candidates' Evolving Medical Disclosures

All health disclosures made previously by presidents and presidential candidates have been voluntary,¹³⁰ but there are several notable trends in the way these disclosures have occurred.

Starting with the 1976 election, every nominee of the two major political parties has revealed some information about their health.¹³¹ Since the practice first developed, the form of the disclosures has varied, from candidates or their doctors giving interviews to doctors releasing letters attesting to candidates' good health.¹³²

In the 1990s, presidential health disclosures became more of a priority following two incidents.¹³³ The first was Paul

122 Indeed, Robert Dallek puts President Kennedy into this latter category, despite acknowledging his administration's secrecy regarding his serious health problems. Dallek describes Kennedy's silence regarding his health as "the quiet stoicism of a man struggling to endure extraordinary pain and distress and performing his presidential (and pre-presidential) duties largely undeterred by his physical suffering." Dallek, *supra* note 112.

123 DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 102-03 (2005) ("Periodically . . . he was engulfed by tremendous sadness . . . To be sure, Lincoln was a melancholy man . . . Unlike depression, melancholy does not have a specific cause. It is an aspect of temperament, perhaps genetically based."); CARL SANDBURG, *ABRAHAM LINCOLN: THE PRAIRIE YEARS & THE WAR YEARS* 73 (Reader's Digest Illustrated ed. 1970) (noting Lincoln's "broodings over the mysteries of personality, man's behavior, the baffling currents of body and mind, [and] his ideas about his own shattered physical system"). See generally JOSHUA WOLF SHENK, *LINCOLN'S MELANCHOLY: HOW DEPRESSION CHALLENGED A PRESIDENT AND FUELED HIS GREATNESS* (2005).

124 See, e.g., Arthur M. Schlesinger, Jr., *Rating the Presidents: Washington to Clinton*, 112 *POL. SCI. Q.* 179 (1997); BRANDON ROTTINGHAUS & JUSTIN VAUGHN, *New ranking of U.S. presidents puts Lincoln at no. 1, Obama at 18; Kennedy judged most overrated*, *WASH. POST* (Feb. 16, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/02/16/new-ranking-of-u-s-presidents-puts-lincoln-1-obama-18-kennedy-judged-most-overrated/>.

125 See, e.g., Marc Caputo & Natasha Korecki, *It's not just Trump questioning Biden's age. Democrats are, too.*, *POLITICO* (June 13, 5:01 AM), <https://www.politico.com/story/2019/06/13/joe-biden-age-trump-2020-1361782>.

126 *Michael Bennet has prostate cancer but is still planning presidential run*, *CBS NEWS* (Apr. 4, 2019, 3:03 AM), <https://www.cbsnews.com/news/michael-bennet-has-prostate-cancer-but-is-still-planning-presidential-run/>.

127 Justin Wingerter, *Michael Bennet's cancer surgery was successful, clearing the way for presidential run*, *DENVER POST* (Apr. 19, 2019, 10:27 AM), <https://www.denverpost.com/2019/04/19/michael-bennet-cancer-2020-president/>.

128 Jane McHugh & Philip A. Mackowiak, *What Really Killed William Henry Harrison?*, *N.Y. TIMES* (Mar. 31, 2014), <https://www.nytimes.com/2014/04/01/science/what-really-killed-william-henry-harrison.html>.

129 Andrew Glass, *President Zachary Taylor Dies After 16 Months in Office: July 9, 1850*, *POLITICO* (July 8, 2016), <https://www.politico.com/story/2016/07/president-zachary-taylor-dies-after-16-months-in-office-july-9-1850-225115>.

130 Matt Pearce, *How much do presidents and candidates need to tell the public about their health?*, *L.A. TIMES* (Sept. 13, 2016), <http://www.latimes.com/nation/la-na-presidential-health-disclosure-20160912-snap-story.html>.

131 These disclosures were ushered in by a perceived need for "post-Watergate candor." Lawrence K. Altman, *Presidential Health: How Much Should Be Public?*, *N.Y. TIMES* (Oct. 31, 1976), <https://www.nytimes.com/1976/10/31/archives/presidential-health-how-much-should-be-public.html>.

132 For a more individualized examination of these disclosures from 1976 to 1988, see Second Fordham University School of Law Clinic on Presidential Succession, *Report: Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 *FORDHAM L. REV.* 917, 991-94 (2017) [hereinafter *Fordham Succession Clinic Report*]. In 1976, both Gerald Ford and Jimmy Carter released statements from their doctors about their most recent examinations. *Id.* at 993. In 1980, the 69-year-old Ronald Reagan gave a health-related interview to Dr. Lawrence Altman of the *New York Times*. *Id.* at 993-94; Lawrence K. Altman, *Reagan Vows to Resign if Doctor in White House Finds Him Unfit*, *N.Y. TIMES*, June 11, 1980, at A1. Carter did not give an interview, but the White House Doctor released a report and answered questions. *Fordham Succession Clinic Report*, *supra*, at 994. In 1984, Reagan and Walter Mondale allowed their doctors to speak to the press, and, in 1988, George H.W. Bush and Michael Dukakis both gave interviews alongside their respective doctors. *Id.*

133 Lily Rothman, *The Moment Presidential-Candidate Health Reports Became a Priority*, *TIME* (Sept. 12, 2016), <https://time.com/4472265/clinton-trump-health-reports-history/>.

Tsongas's run for the presidency in 1992. Tsongas had survived non-Hodgkins lymphoma in the 1980s, and was "the first presidential candidate to run openly as a cancer survivor."¹³⁴ He was praised for showing the nation what was possible after a cancer diagnosis, served as a powerful symbol to the survivor community, and emphasized his physical strength in campaign ads.¹³⁵ Although he did not win the nomination, his cancer returned in December 1992.¹³⁶ Had he been elected, he would have been undergoing cancer treatment for the entirety of his term. Tsongas passed away in 1997, two days before what could have conceivably been his second inauguration had he been elected and reelected.¹³⁷

The second event that caused a national conversation regarding health disclosures was President Reagan's 1994 admission that he had been diagnosed with Alzheimer's disease.¹³⁸ Reagan's predecessor, Jimmy Carter, proposed establishing a rule by which doctors would determine whether a president was fit to serve.¹³⁹

Although the Tsongas and Reagan incidents put a renewed emphasis on presidential health disclosures, the entire process remained entirely voluntary. The 1992 Democratic nominee, then-Arkansas Governor Bill Clinton, was criticized in a front-page story in the *New York Times* for not allowing his doctors to be interviewed regarding his health.¹⁴⁰ Clinton, in contravention of the predominant practice among previous nominees, had chosen to have three of his doctors issue separate letters assuring the public of his good health instead of making the doctors available for interviews, citing privacy concerns.¹⁴¹ But only days after the *Times* published its story, Clinton made his doctors available for interviews and released more detailed health information, though he still declined to personally take questions from the press about his health.¹⁴²

President Clinton was again criticized in his 1996 reelection campaign for not disclosing any medical records and refusing to submit to a health-focused interview. Clinton's opponent, Senator Bob Dole, released his medical records and agreed to an interview with the *New York Times'* medical reporter. Dole, however, was 23 years older than Clinton and was known to be suffering from latent effects from injuries he received during his service in World War II.¹⁴³ Following the *Times'* criticism, Clinton and White House physician Connie Mariano gave an interview to the paper.¹⁴⁴

In the 2000 election, both George W. Bush and Al Gore opted to submit to interviews and allow their doctors to do the same.¹⁴⁵ In 2004, John Kerry released a summary of his medical records dating back to his military service in Vietnam and allowed 19 reporters to view the full record, while forbidding them from making copies.¹⁴⁶ This disclosure showed that Kerry had been severely wounded by shrapnel during his war service and still had shrapnel in his leg.¹⁴⁷

The Republican nominee in 2008, Senator John McCain, opened up years of medical records and gave the press three

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 Jimmy Carter, *Presidential Disability and the Twenty-Fifth Amendment: A President's Perspective*, 272 J. AM. MED. ASS'N 1698 (1994).

140 Lawrence K. Altman, *Clinton, Citing Privacy Issues, Tells Little About His Health*, N.Y. TIMES (Oct. 10, 1992), <https://www.nytimes.com/1992/10/10/us/1992-campaign-candidate-s-health-clinton-citing-privacy-issues-tells-little.html> ("Mr. Clinton has been less forthcoming about his health than any Presidential nominee in the last 20 years.").

141 *Id.*

142 Lawrence K. Altman, *Doctors Call Clinton Healthy; Campaign Offers New Details*, N.Y. TIMES (Oct. 15, 1992), <https://www.nytimes.com/1992/10/15/us/1992-campaign-candidate-s-health-doctors-call-clinton-healthy-campaign-offers.html>.

143 Tim Weiner, *Dole Camp Seeks Disclosure Of Clinton's Medical Records*, N.Y. TIMES (Aug. 22, 1996), <https://www.nytimes.com/1996/08/22/us/dole-camp-seeks-disclosure-of-clinton-s-medical-records.html>.

144 Lawrence K. Altman, *Clinton, in Detailed Interview, Calls His Health 'Very Good'*, N.Y. TIMES (Oct. 14, 1996), <https://www.nytimes.com/1996/10/14/us/clinton-in-detailed-interview-calls-his-health-very-good.html>.

145 Lawrence K. Altman, *Doctors Say Republican Candidates Are in Good Health*, N.Y. TIMES (Nov. 2, 2000), <https://www.nytimes.com/2000/11/02/us/2000-campaign-medical-histories-doctors-say-republican-candidates-are-good.html>; Lawrence K. Altman, *Gore Appears in Excellent Health*, N.Y. TIMES (Oct. 25, 2000), <https://www.nytimes.com/2000/10/25/us/the-2000-campaign-the-fitness-report-gore-appears-in-excellent-health.html>.

146 See Jodi Wilgoren, *Files Show Kerry Earned Medals for Wounds From Shrapnel, Which Is Still in His Leg*, N.Y. TIMES (Apr. 24, 2004), <https://www.nytimes.com/2004/04/24/us/2004-campaign-medical-records-files-show-kerry-earned-medals-for-wounds-shrapnel.html>.

147 *Id.*

hours to review them.¹⁴⁸ McCain, then 71 years old, had suffered traumatic injuries years earlier as a prisoner of war in Vietnam and was known to have survived four bouts of melanoma.¹⁴⁹

McCain's opponent, then-Senator Barack Obama, released a summary of his health information via a six-paragraph letter from his primary care doctor.¹⁵⁰ The letter included information from his previous physical examination, such as his vital signs, blood pressure, and cholesterol. The letter also disclosed Obama's family history of cancer and acknowledged his cigarette smoking. The letter ultimately concluded that Obama was "in excellent health" and that he was "in overall good physical and mental health needed to maintain the resiliency required in the Office of President."¹⁵¹

In the 2016 presidential election, both candidates opted only to release letters by their personal physicians attesting to their good health, and both candidates were criticized for the way they handled their health disclosures.

Former Secretary of State Hillary Clinton released a two-page letter from her personal physician that discussed her medical history, including hypothyroidism and a concussion she suffered in 2012 after she fell during a bout with a stomach virus. The letter also disclosed her respiratory rate, cholesterol levels, blood pressure, and her exercise regimen. The letter stated that Clinton was "in excellent physical condition and fit to

serve as president of the United States."¹⁵² Nevertheless, after Clinton collapsed at a 9/11 memorial service,¹⁵³ speculation spread online that she was seriously ill.¹⁵⁴ When the campaign revealed that she was battling pneumonia, she was criticized for withholding that information from the press and the public, and she ultimately had her doctor release a follow-up letter with more details about her treatment.¹⁵⁵

Trump had his personal physician, Dr. Harold Bornstein, release two letters in December 2015 and September 2016, respectively. The 2015 letter was four-paragraphs long, stating that Trump had no significant health problems in the last 39 years and that he would "unequivocally" be "the healthiest person ever elected to the presidency."¹⁵⁶ This letter was mocked in the press for its hyperbole,¹⁵⁷ and Dr. Bornstein later revealed in 2018 that Trump had actually dictated the letter.¹⁵⁸ The second letter, released in response to Hillary Clinton's doctor's letter, stated more specific information including Trump's height, weight, cholesterol, and EKG and cardiac exam results.¹⁵⁹

C. Proposals for Medical Disclosures

In response to some candidates' insufficient transparency about their health, we propose the following in order to properly balance the concerns about privacy with the need for the public

148 Kelly O'Donnell, *What Candidates Can Learn From McCain About Health Records Disclosure*, NBC News (Sept. 15, 2016, 10:33 AM), <https://www.nbcnews.com/politics/2016-election/what-candidates-can-learn-mccain-about-health-records-disclosure-n648766>. Michael Shear of the WASHINGTON POST summarized the logistics of McCain's 2008 disclosure:

About 20 reporters—including CNN's Dr. Sanjay Gupta and NBC's Dr. Nancy Snyderman—were allowed to enter a room at the resort in the back of the Alchemy restaurant. We were allowed in at 7:30 and given three hours to review the records and take notes. Most reporters used computers to take notes from the three stacks of documents that were provided to each of them. The main stack, labeled "Records from Mayo Clinic, Scottsdale, Arizona, 2000-present" were the main documents and are summarized below. The other two stacks were backup documents, including handwritten notes, lab results and insurance documents. In all it was 1,173 pages, in addition to 1,500 pages distributed the last time he ran for president.

Marc Ambinder, *McCain's Health Records*, ATLANTIC (May 23, 2008), <https://www.theatlantic.com/politics/archive/2008/05/mccains-health-records/53290/>.

149 Susan Milligan & Stephen Smith, *Medical Records State McCain Fit, Cancer-Free*, BOSTON GLOBE (May 24, 2008), http://archive.boston.com/news/nation/articles/2008/05/24/medical_records_state_mccain_fit_cancer_free/; see also Lawrence K. Altman, *Many Holes in Disclosure of Nominees' Health*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2008/10/20/us/politics/20health.html>.

150 Letter from David L. Scheiner, M.D., Hyde Park Associates in Medicine, Ltd. (May 29, 2008), <https://www.politico.com/story/2008/05/obama-releases-health-record-summary-010686>.

151 *Id.*

152 Lawrence K. Altman, *No Serious Health Issues for Hillary Clinton, Her Doctor Reports*, N.Y. TIMES (July 31, 2015), <https://www.nytimes.com/politics/first-draft/2015/07/31/doctor-says-hillary-clinton-is-fit-to-serve/>; Letter from Lisa Bardack, M.D., Mount Kisco Medical Group, P.C. (July 28, 2015), <https://www.nytimes.com/interactive/2015/07/31/us/politics/hillary-clinton-doctor-letter.html>.

153 Abby Phillip & Anne Gearan, *Clinton falls ill during 9/11 memorial service in New York*, WASH. POST (Sept. 11, 2016), https://www.washingtonpost.com/politics/clinton-falls-ill-during-911-memorial-service-in-new-york/2016/09/11/a52e09c2-7855-11e6-ac8e-cf8e0dd91dc7_story.html.

154 Gregory Krieg, *A reader's guide to absurd Clinton health conspiracies*, CNN (Sept. 14, 2016), <https://www.cnn.com/2016/09/13/politics/hillary-clinton-health-conspiracy-theories/index.html>.

155 Sy Mukherjee, *Hillary Clinton Just Released a Lot More Information About Her Health*, FORTUNE (Sept. 14, 2016), <http://fortune.com/2016/09/14/hillary-clinton-releases-medical-records/>.

156 Jessica Taylor, *Doctor: Trump Would Be 'Healthiest Individual Ever Elected' President*, NPR (Dec. 14, 2015, 2:37 PM), <https://www.npr.org/2015/12/14/459700154/doctor-trump-would-be-healthiest-individual-ever-elected-president>.

157 See, e.g., James Hamblin, *The Bizarre Words of Donald Trump's Doctor*, ATLANTIC (Aug. 31, 2016), <https://www.theatlantic.com/health/archive/2016/08/bornstein-trump-linguistics/497840/>.

158 Rozina Sabur, *Donald Trump Dictated Letter Describing His Health as 'Astonishingly Excellent', Claims President's Former Doctor*, TELEGRAPH (May 2, 2018, 1:33 PM), <https://www.telegraph.co.uk/news/2018/05/01/white-house-defends-seizing-donald-trumps-medical-records-former/>.

159 Jessica Taylor & Joe Neel, *Trump Releases Weight, Cholesterol, Blood Sugar and Other Medical Information*, NPR (Sept. 15, 2016, 11:31 AM), <https://www.npr.org/2016/09/15/494081537/trump-releases-weight-cholesterol-blood-sugar-and-other-medical-information>.

to make an adequately informed electoral choice about who should lead the nation.

Congress should create a panel of physicians and give this panel the authority to examine presidential candidates and issue a report. Ideally, this examination would be mandatory because it would guarantee that voters would be kept informed about the candidates' health. However, mandating this type of examination would raise substantial privacy concerns and separation of powers issues in cases of sitting presidents that may prevent such legislation from passing. Due to these concerns, the best option for Congress is to establish the panel and encourage participation by all candidates, with the hope that some candidates will participate and create political pressure on others to do so as well. This panel should have the ability to evaluate each candidate declared for the presidency with the FEC, provided that the candidate chooses to undergo an examination.

There are several different ways that such a panel could operate. One of the strongest ideas for how to compose this panel came from Joseph J. Fins, M.D., M.A.C.P., F.R.C.P., the Chief of the Division of Medical Ethics and E. William Davis, Jr., M.D. Professor of Medical Ethics and Professor of Medicine at Weill Cornell Medical College and Solomon Center Distinguished Scholar in Medicine, Bioethics and the Law at Yale Law School. In an interview with us, Dr. Fins suggested a voluntary evaluation performed by a neutral, apolitical or bipartisan body of doctors.¹⁶⁰ The doctors who conducted the screening evaluation would be chosen from a panel of approximately 50 internists (board certified experts who provide general medical care to adult patients). If the panel were not apolitical, it should be constituted equally of liberals and conservatives. The panel could be formed either as a government body or as a private/public partnership in consultation with organizations such as the National Academy of Medicine of the National Academy of Sciences, the American Medical Association, and/or the American College of Physicians. This panel would be formed by Congress in midterm election years for the upcoming presidential election.

If a candidate opted into an evaluation, four doctors would be randomly chosen from the panel of 50 internists to conduct the evaluation. These doctors would then conduct an "executive physical" where they would examine the candidate and review

the candidate's medical records. The body of 50 doctors would also be tasked prospectively with creating the standards by which they would evaluate candidates, which could be bracketed for different age groups. If the doctors had a question about a specific condition, they could consult with a group of outside specialists, similarly constituted to ensure neutrality and expertise.

After the assessment, the doctors would write a report, which four other doctors from than panel would sign off on. Any specialist evaluation would be signed off on by two other specialists in that field. The report's purpose would not be to certify that a candidate is healthy, but to provide the public with factual educational information about the candidate's health based on the standards and criteria the panel had established in advance. Such a report would inform the public and would not be hampered by concerns of a political motive due to the review processes and the political diversity of the medical professionals involved.

Bandy X. Lee, M.D., M.Div., a psychiatry professor at Yale School of Medicine, has formed a working group that is exploring the creation of an independent expert panel that would take a slightly different approach to assessing candidates. She proposes a nongovernmental panel of mental health professionals and other medical doctors to examine the candidates' capacity according to the duties of the presidency, focusing on decisional capacity. Ideally, the examinations would be compulsory, but Dr. Lee supports a voluntary process because she views it as more practical. As is done for other fitness-for-duty examinations, the patient's personal medical information and the determination of capacity would be kept separate, thereby protecting privacy and emphasizing the assessment of function, regardless of the cause of incapacity, if present. When the panel determined whether a candidate had or did not have the capacity to serve as president, it would announce the determination without need to release any other information about the candidate's health. In the case of a lack of capacity, the candidate and the panel may choose to keep the results confidential on condition that the candidate drop out of the race. Similarly, if a sitting president showed signs of incapacity, the panel would be available for consultation, and if not sought, may take steps to ensure that the public is aware or protected.¹⁶¹

¹⁶⁰ Interview with Dr. Joseph J. Fins, Chief of the Division of Medical Ethics, Weill Cornell Medical College, in N.Y.C., N.Y. (Nov. 27, 2018).

¹⁶¹ Interview with Dr. Bandy X. Lee, Assistant Clinical Professor of Psychiatry, Yale School of Medicine, in N.Y.C., N.Y. (Mar. 7, 2019).

The certification of mental capacity may add to a candidate's credentials and might even encourage more candidates to participate in the process. But, as with practically all proposals in this area, it does come with a possible downside: that voters would not receive enough information to judge whether a candidate might become incapacitated in the future.

1. Alternative Proposals

There are other options for bolstering presidential candidate health disclosures. One possibility is an explicit statutory requirement, passed by Congress, for the disclosure of health information by presidential candidates. This statute would include requirements for the disclosure of relevant medical records related to "any condition that could significantly interfere with the successful performance of the duties of President of the United States." Under this proposed statute, candidates would be required to file this information with the FEC, as they do with campaign contribution information,¹⁶² and the information would then be made public.

Such a statutory requirement may face legal challenges. Most significantly, it could be argued that requiring disclosure of medical records to qualify for the presidency would create an unconstitutional qualification for the office.¹⁶³

Therefore, it may be more effective for the political parties to oversee disclosure of candidates' health information. The parties could adopt rules requiring all candidates seeking their nomination to disclose their medical records relating to "any condition that could significantly interfere with the successful performance of the duties of President of the United States." Candidates who failed to release such information could be excluded from party-sponsored debates.

But enforcement of a requirement that candidates release records relating to certain conditions—whether imposed by statute or political party rules—might be difficult because candidates could evade the requirement by hiding any condition that triggered the disclosure requirement.

A more realistic option for the parties would be to make it a formal policy to encourage all candidates to disclose recent medical records and any medical conditions that would significantly interfere with the successful performance of their duties. The parties could ask all candidates to take a pledge to disclose relevant health records. This approach would leave significant discretion to the candidates, while creating political pressure on candidates who did not display sufficient transparency.

In addition to deciding how to compel disclosure, Congress or the political parties would need to consider what information would be required disclosures. One option would be to work with medical professionals to develop a list of non-exhaustive, enumerated conditions that meet the threshold of conditions that would significantly interfere with the effective performance of the duties of the presidency. Such a list would need to be carefully tailored to avoid discriminating against persons with disabilities or stigmatizing certain conditions. While some may believe that complete and exhaustive disclosure of *all* medical history is the best policy, and that the American public should be trusted to determine which conditions are disqualifying, such an approach could potentially result in unfair stigma based on certain conditions and would likely be overly burdensome on candidates. Therefore, it would be best not to mandate complete disclosure. Another option would be to leave it to the discretion of the candidates and their doctors to determine what conditions would significantly interfere with the successful performance of their duties as president, though this option would represent only a small improvement over the current, norm-based system.

A final alternative proposal would involve the parties requiring candidates' personal physicians to release sworn affidavits attesting to the candidates' good health. This could be enforced by making the release of such letters a prerequisite for certain campaign opportunities traditionally provided by the parties to candidates, such as participation in party sponsored debates. Doctors may be hesitant to release such a letter under penalty of perjury and the proposal would still be reliant on the good faith of people close to the candidate.

¹⁶² See *Presidential, Senate and House Candidates*, *supra* note 52.

¹⁶³ See *supra* Part I.B.1.

IV. Criminal and Intelligence Background Checks

As this report has described, it has become common in recent decades for presidential candidates to release both financial and health information to the public. These norms have developed over time as the result of past practice and pressure from the media, rival candidates, and the public. But there has been little discussion about presidential candidates undergoing background checks before gaining access to the nation's most closely held secrets. Unlike government employees and private contractors, who must undergo background checks before accessing classified information, the president automatically gains access to all classified information upon taking office.¹⁶⁴ The president can set classification policy by executive order establishing the classification status of intelligence materials as well as providing for the handling and release of classified materials.¹⁶⁵ Additionally, the president can set parameters for granting and revoking security clearances.¹⁶⁶ The president has wide latitude when it comes to handling the nation's classified information, yet he or she is not necessarily immune to all temptations to misuse classified information.

Part IV.A discusses the philosophical justifications and historical precedent for requiring background checks on presidential candidates. Part IV.B discusses current background check

requirements for other government officials. Finally, Part IV.C outlines a proposal for background checks for presidential candidates.

A. Historical Context and Precedent

Requiring presidential candidates to undergo background checks would address vulnerabilities that the Constitution's framers identified. Furthermore, conducting background checks of individuals who have a chance of becoming president is not without precedent; the two people nominated to the vice presidency under the Twenty-Fifth Amendment process for filling vacancies in the office—one of whom became president—underwent extensive background checks.

1. Framers' Concerns About Foreign Influence

A primary benefit of requiring background checks for presidential candidates is that it would help prevent a person who is susceptible to manipulation by foreign governments from becoming president. The Constitution's framers were deeply concerned about the threat from foreign powers. Both James Madison and Alexander Hamilton were specifically worried about the influence of foreign powers on the electors or the executive. Hamilton wrote in Federalist 68, "These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendancy in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union?"¹⁶⁷ The framers recognized that one of the most serious threats their new government faced was the rise of a puppet executive beholden to foreign powers.¹⁶⁸

They designed an electoral system to counter this dire threat. Hamilton argued that the threat was mitigated by placing limits on the eligibility for electors.¹⁶⁹ James Madison also believed that a republican form of government would prevent this type of undue influence on elected representatives.¹⁷⁰ He wrote in *Vices of the Political System*, "An auxiliary desideratum for the melioration of the Republican form is such a process of elections as will most certainly extract from the mass of the society the purest and noblest characters which it contains; such as will at once feel most strongly the proper motives to

164 David Brown, *Does the President Have a Security Clearance?*, CLEARANCEJOBS (July 25, 2016), <https://news.clearancejobs.com/2016/07/25/kind-security-clearance-president-get/>.

165 See, e.g., Exec. Order No. 13,526 (2009). President Obama issued Executive Order 13,526 in 2009. It set up a "uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism." The E.O. lays out the standards which must be met in order for information to be "originally" classified, details the three levels of classification, lists classification authority and classification categories, sets parameters for the duration of classification, indicates identifying markers, lists prohibitions and limitations on classifications, and sets guidelines for challenges and reviews. *Id.*

166 Anita Kumar, *Trump uses more lenient requirements for security clearances. Thank Obama.*, McCLATCHY (Feb. 23, 2018, 1:08 AM), <https://www.mcclatchydc.com/news/politics-government/white-house/article201717344.html>. Just weeks before the end of President Obama's administration, Director of National Intelligence James Clapper signed a directive altering the criteria for security clearances:

"The new guidelines, for example, allow applicants with more than one passport to keep them instead of surrendering or destroying the non-U.S. one. They offer those with tax debt the opportunity to show they have made arrangements with tax authorities to pay what is owed. And they clarify that the judgments of polygraph technicians alone should not be the basis of an adverse action, according to multiple attorneys familiar with the guidelines."

See, e.g., Julie Hirschfield Davis & Michael D. Shear, *Trump Revokes Ex-C.I.A. Director John Brennan's Security Clearance*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/us/politics/john-brennan-security-clearance.html>. But see Andrew Restuccia, *Trump says he revoked Brennan's security clearance — but Brennan says he may still have it*, POLITICO (Aug. 29, 2018, 8:29 AM), <https://www.politico.com/story/2018/08/28/trump-security-clearances-john-brennan-799052>.

167 THE FEDERALIST NO. 68 (Alexander Hamilton).

168 *Id.*

169 *Id.*

170 James Madison, *Vices of the Political System of the United States*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-09-02-0187>.

pursue the end of their appointment, and be most capable to devise the proper means of attaining it.”¹⁷¹ The framers were confident the electoral process they designed was the answer to their concerns.

2. Precedent for Background Checks

Elected officials in the United States are not required to undergo background checks to take office and review classified information in their official capacities. But in the mid-1970s two vice presidents appointed under a process in the Twenty-Fifth Amendment did undergo background checks before assuming office.¹⁷² Following Vice President Spiro Agnew’s resignation in 1973 amid allegations of tax evasion, bribery, and other criminal charges,¹⁷³ President Richard Nixon nominated Gerald Ford to be vice president under the Twenty-Fifth Amendment’s vice presidential vacancy provision.¹⁷⁴ Ford faced confirmation hearings in the House and Senate.¹⁷⁵ The Senate and House committees required Ford to disclose extensive information, including his tax returns, which were then audited.¹⁷⁶ Additionally, Ford’s bank records, campaign speeches, and criminal records were scrutinized.¹⁷⁷ The FBI interviewed more than 1,000 people and collected over 1,700 pages of documents.¹⁷⁸

Ford was not the vice president for long. Following the Watergate scandal, President Nixon was pressured into resigning in August of 1974 and Ford became president.¹⁷⁹ With the vice president’s office vacant for the second time in as many years, Ford used the Twenty-Fifth Amendment to appoint another replacement vice president, New York Governor Nelson Rockefeller.¹⁸⁰ Rockefeller went through a background check similar to the one Ford underwent.¹⁸¹ His finances were particularly scrutinized due to his significant wealth.¹⁸²

¹⁷¹ *Id.*

¹⁷² FEERICK, *supra* note 105, at 135, 167.

¹⁷³ See *id.* at 125–34.

¹⁷⁴ *Id.* at 138.

¹⁷⁵ *Id.* at 143, 148.

¹⁷⁶ *Id.* at 143.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 162–65.

¹⁸⁰ *Id.* at 166; Remarks of the President Upon His Announcing Nelson Rockefeller as Vice President-Designate (Aug. 20, 1974), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=twentyfifth_amendment_watergate_era.

¹⁸¹ *Id.* at 170–81

¹⁸² *Id.*

B. Current Background Check Requirements

Federal employees at all levels of the government are required to undergo background checks, especially if they have access to secret or top-secret information.¹⁸³ Employees of the FBI, CIA, NSA, and Secret Service as well as Cabinet secretaries and federal prosecutors are among those who are required to undergo some type of background check.¹⁸⁴ The scope of these checks varies depending on an employee’s position.¹⁸⁵ The goal of these background checks is to determine an applicant’s suitability for their position as well as to assess whether the applicant has any conflicts of interest or poses a security risk.¹⁸⁶ Applicants for some positions, especially in the intelligence agencies, are required to take polygraph and drug tests.¹⁸⁷ Interviews with neighbors, friends, former professors, and others are sometimes conducted.¹⁸⁸ Additionally, criminal records and foreign contacts and travels are scrutinized.¹⁸⁹

Under the Constitution, the executive and legislative branches share the power to appoint Cabinet members and other top

¹⁸³ As of 2016, per Executive Order 13,467, the National Background Investigations Bureau (“NBIB”), which is part of the Office of Personnel Management, handles a majority of the background checks for federal employees and contractors. This organization and its predecessors have conducted background check investigations to determine applicants’ suitability and fitness for government positions and clearances. The special agents who conduct the investigations are independent and not members of the FBI or other intelligence agencies. NBIB conducts background checks for nearly 100 different federal agencies. They do not handle background checks for the intelligence agencies or for presidential appointee, Cabinet officers, or heads of agencies. *About Us*, NATIONAL BACKGROUND INVESTIGATIONS BUREAU, <https://nbib.opm.gov/about-us> (last visited Dec. 2, 2018); *Before You Apply: Understanding Government Background Checks*, YALE LAW SCH., <https://law.yale.edu/student-life/career-development/students/career-pathways/public-interest/you-apply-understanding-government-background-checks> (last visited Nov. 20, 2018); Appendix B (“Background Check Requirements Throughout Government”).

¹⁸⁴ *Careers & Internships*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/careers/application-process> (last visited Nov. 20, 2018); *Employment Eligibility*, FBI Jobs, <https://www.fbijobs.gov/working-at-FBI/eligibility> (last visited Nov. 20, 2018); *Background Checks for New Applicants*, FBI, <https://www.fbi.gov/audio-repository/news-podcasts-inside-background-checks-for-new-applicants.mp3/view> (last visited Nov. 20, 2018); *FAQ*, NATIONAL SECURITY AGENCY, <https://www.intelligencecareers.gov/nsa/nsafaq.html> (last visited Nov. 20, 2018); *Frequently Asked Questions, Secret Service*, <https://www.secretservice.gov/about/faqs/> (last visited Nov. 20, 2018); *Suitability and Background Information*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/oarm/suitability-background-investigation> (last visited Nov. 20, 2018).

¹⁸⁵ *Before You Apply*, *supra* note 184.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

officials.¹⁹⁰ The president chooses a prospective appointee before sending an official nomination to the Senate. During the pre-nomination selection process, the White House Office of Presidential Personnel vets candidates.¹⁹¹ Once the president makes a selection, the candidate is cleared for the nomination process. The candidate submits forms, including the Standard Form 86 Questionnaire for National Security Positions (SF86), the Supplement to the Standard Form 86, the Office of Government Ethics Form 278, Executive Branch Personnel Public Financial Disclosure Report, and sometimes a White House Personal Data Statement.¹⁹² The clearance process also includes a background investigation conducted by the FBI, which prepares a report that is delivered to the White House.¹⁹³

Under the current administration, background checks and the issuance of security clearances for executive branch employees, particularly White House staff, have come under significant scrutiny. In February 2018, White House Staff Secretary Rob Porter, who had been granted a temporary security clearance, was forced to resign after allegations of domestic abuse surfaced in the media. The White House had left him in the sensitive position for nearly a year after the FBI notified it of the allegations.¹⁹⁴ In April 2019, news reports revealed that a whistle-blower had told Congress that President Trump ordered the issuance of security clearances for at least 25 White House employees who had been denied security clearances by career officials.¹⁹⁵

While Trump had the legal authority in both of these cases to issue security clearances to those who had failed the background check process, the actions broke established norms. The incidents raise questions as to whether elected officials truly understand the seriousness of the background check process. As mentioned above, elected officials are exempt from the background check process and are granted

security clearances by virtue of being elected. By participating in background check process, like the majority of federal employees, elected officials may gain a better appreciation for the seriousness of the background check process and the dangers associated with granting security clearances to unqualified candidates.

C. Proposal and Alternatives

Limited background checks for presidential candidates would give the public, Congress, and the intelligence community confidence that candidates can be trusted with the nation's most valued secrets.

1. Proposal

We propose federal legislation requiring the FEC to request background checks of presidential candidates when they formally declare their candidacies.¹⁹⁶ Additionally, the candidates should consent to releasing the results of their background checks to the Gang of Eight, the group of congressional leaders customarily briefed on classified intelligence and national security matters as part of their oversight role.¹⁹⁷ If the candidates fail to do so, they should be fined \$10,000. This fine would serve the same purpose as the fine we propose for candidates who refuse to release their tax returns. It is not likely to prevent non-complying candidates from continuing to participate in the primary process, but a failure to pay will inform the electorate that the candidate is unwilling to undergo a background check at a substantial monetary cost.

Under this proposal, the FBI would conduct the background checks, following the same procedures used when conducting background checks on nominees for Senate-confirmed positions.¹⁹⁸ The background check should

190 HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., R40119, FILLING ADVICE AND CONSENT POSITIONS AT THE OUTSET OF RECENT ADMINISTRATIONS, 1981-2009 2 (2017), <https://fas.org/sgp/crs/misc/R40119.pdf>.

191 *Id.* at 3.

192 *Id.*

193 HOGUE ET AL., *supra* note 190, at 3.

194 Julie Hirschfeld Davis et al., *F.B.I. Letter Casts Further Doubt on White House's Rob Porter Timeline*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/us/politics/rob-porter-mcgahn-fbi-white-house.html>.

195 Nicholas Fandos & Maggie Haberman, *White House Whistle-Blower Tells Congress of Irregularities in Security Clearances*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/us/politics/trump-security-clearances.html>.

196 Professor Asha Rangappa suggested that the FEC would be a good conduit for requesting background checks from presidential candidates. Telephone Interview with Asha Rangappa, Senior Lecturer, Jackson Inst. of Global Affairs, Yale Univ. (Oct. 5, 2018).

197 See NAT'L TASK FORCE ON RULE OF LAW & DEMOCRACY, BRENNAN CNTR. FOR JUSTICE, PROPOSALS FOR REFORM 7-8 (2018), https://www.brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf. The report's third proposal recommends that Congress "require a national security financial review for incoming presidents, vice presidents, and other senior officials." The review would help determine whether any of these officials had financial holdings that pose a national security risk. *Id.*; see also ALFRED CUMMING, CONG. RESEARCH SERV., STATUTORY PROCEDURES UNDER WHICH CONGRESS IS TO BE INFORMED OF U.S. INTELLIGENCE ACTIVITIES, INCLUDING COVERT ACTIONS 5-8 (2006), <https://fas.org/sgp/crs/intel/m011806.pdf> (explaining the Gang of Eight's role).

198 *The FBI And The Senate Confirmation Process*, CNTR. FOR ECON. & POL'Y Res., <http://cepr.net/images/documents/fbi-and-senate-confirmation-process.pdf>.

include counterintelligence checks, which would disclose the candidate's foreign and domestic contacts and travel, as well as financial or personal information that can make the candidate vulnerable to blackmail. The FEC would verify that the candidates have completed a background check without making any conclusions. The FEC is the best conduit for requesting background checks because presidential candidates must already file their paperwork with the FEC when they declare their candidacies.

Once the results of a candidate's background check has been submitted to the Gang of Eight, if a supermajority of six members of the group agrees there is reason for concern, they should pass the information on to the candidate's political party, which will then be responsible for addressing the issue internally. This could include encouraging the candidate to drop-out of the primary process, encouraging the candidate to publicly disclose any information which may be a security threat if kept private, and, in the case of financial concerns, encouraging the candidate to divest from any financial holdings that might cause conflicts of interests. The party could also bar the candidate from participating in primary debates if he or she refuses to comply.

The Gang of Eight should predetermine standards for the type of information that will be considered sufficiently concerning to merit referral to a political party. We acknowledge that this system requires placing a great deal of trust in the Gang of Eight as well as the political parties. We also acknowledge that this proposal would not put the same pressures on independent and minor-party candidates. As such, these candidates may have very little incentive to participate in the background check process. Additionally, even if independent and third-party candidates did undergo background checks, a review process by a bipartisan committee consisting mostly of Democrats and Republicans could, at the very least, be perceived poorly. Furthermore, giving politicians access to potentially damaging information about members of the opposing party could result in leaks. Taking these concerns into consideration, we still believe that the traditional role of the Gang of Eight in reviewing classified materials in a historically nonpartisan manner makes them qualified for this role.

While there is a risk that details of background checks may be leaked to the public or that the political parties may ignore concerns about their candidates, this proposal allows for a background check process that balances the candidates'

privacy rights¹⁹⁹ and the public's right to make informed decisions in presidential elections.

2. Alternative Proposals

We also considered several alternative approaches to scrutinizing candidates' backgrounds.

a. Party Requirement

The political parties might independently require background checks of presidential primary candidates. Unlike our proposal, which would be implemented through federal law, the parties would be solely responsible for enforcing this requirement. This alternative would allow the parties to remain in control of the primaries and alleviate some of the concerns of partisan leaks and an unfair review processes. Due to privacy concerns, the parties should not be forced to release the results of the background checks to the public unless a candidate wishes to do so.

b. Security Clearance Requirement

Federal law could require presidential candidates to undergo background checks before accessing any classified information. Under this alternative, presidential candidates would undergo the same scrutiny into their backgrounds as is required of government employees who need security clearances. If a candidate failed to gain clearance, he or she would not gain access to classified information until the concerns in the background check can be remedied, even if the candidate becomes the president-elect.

This alternative raises serious practical concerns. It is necessary for major party nominees and presidents-elect to access classified information to prepare for serving as president. Presidential candidates receive intelligence briefings after they receive their parties' nominations.²⁰⁰ Presidents-elect receive far more detailed briefings after winning election.

199 Professor Laurence Tribe believes that there is no constitutional privacy concern in requiring presidential candidates to undergo background checks. He cites *NASA v. Nelson*, which held that background check forms SF-85 and Form 42, which are required to be filed by employees of NASA and contractors, did not violate the constitutional right to information privacy as they were "reasonable inquires" in the background check process for employees and were protected from public disclosure by the Privacy Act's nondisclosure requirement. Telephone Interview with Professor Laurence Tribe, *supra* note 83; *NASA v. Nelson*, 562 U.S. 134 (2011).

200 See Justin Fishel, *Classified Intelligence Briefing for Presidential Candidates: Questions Answered*, ABC NEWS (Aug. 5, 2016, 3:34 PM), <https://abcnews.go.com/Politics/classified-intelligence-briefings-presidential-candidates-questions-answered/story?id=41145433>.

Both of these practices ensure that presidents are familiar with the wide range of issues they must confront as soon as they take office.²⁰¹ Any policy that prevented these briefings from occurring might result in an unprepared president taking office on Inauguration Day.

c. *Journalistic Scrutiny*

The public typically learns about the presidential candidates' personal and professional background through investigative journalism. The federal government, a NGO, or a public/private partnership might take steps to assist journalists uncover pertinent information about candidates. Initiatives might include providing funding to news outlets to allow their journalists to partner with former FBI agents and national security experts to focus solely on investigating candidates' backgrounds. This would not require the same level of cooperation from the candidates as an official background check and would avoid privacy and constitutional concerns. This method may also give the public more information and more control over choosing the candidates they deem qualified to run for president.

²⁰¹ See Bob Woodward, *President-elect Donald Trump is about to lean the nation's 'deep secrets'*, WASH. POST (Nov. 12, 2016), https://www.washingtonpost.com/world/national-security/president-elect-donald-trump-is-about-to-learn-the-nations-deep-secrets/2016/11/12/8bf9bc40-a847-11e6-8fc0-7be8f848c492_story.html.

d. *Voluntary Background Checks*

Candidates might take the initiative to voluntarily undergo background checks and release the results to the public. This option follows the current model for the public release of candidates' financial and health information. If some candidates underwent background checks, political pressure would arise for others to undergo the checks.²⁰²

However, the FBI does not conduct background checks on all individuals who ask them to do so.²⁰³ Instead, the FBI is tasked with informing the appropriate agencies whether or not security clearances should be granted to applicants. Accordingly, Congress might need to pass a law to allow candidates to request background checks.

²⁰² In our interview with Asha Rangappa, she suggested that a government agency should be involved in requesting and conducting background checks so that they are more standardized and less biased. Additionally, the government understands what constitutes a security risk, which may not be true for private investigators or journalists. Telephone Interview with Asha Rangappa, *supra* note 196.

²⁰³ Asha Rangappa stated that the FBI would be unable to perform background checks and make recommendations for security clearances purely on the presidential candidates' requests. Requests for security clearances must be tied to a certain purpose. *Id.*

Conclusion

The president of the United States is the most powerful person in the world, yet far too little is mandatorily disclosed from those seeking the office. As recent history has indicated, presidential candidates can release as much or as little as they would like about their taxes, medical history, and backgrounds. Candidates who have disclosed more about themselves become more vulnerable to criticism and political attacks compared to candidates who avoid disclosures. Without improved disclosures by candidates, the American people must rely on journalists to discover pertinent information

which may come too late in the election process. The lack of mandated disclosures is a disservice to the American voters who should have the opportunity to be fully informed about their presidential candidates before heading to the polls. We, therefore, believe disclosures of financial, tax, and background information should be mandated and an improved system should be established to manage and incentivize disclosure of health information.

Appendix A: Legislative Proposals for Candidate Tax Disclosure (As of December 2018)

State	Who & Where	How many years	When	Failure to do so	Miscellaneous
Arizona: <i>SB 1500</i> <i>HB 2456</i>	Presidential candidates shall submit to the Secretary of State a copy of the candidate's federal and state income tax returns	Immediately preceding 5 years	Shall be submitted no later than the September 15th immediately preceding the general election	(1) Ineligible to appear on the general election ballot (2) The candidates for presidential elector for that presidential candidate's political party are ineligible to appear on the general election ballot	
California: <i>SB 149 (Presidential Tax Transparency and Accountability Act)</i>	Presidential candidates file with the Secretary of State a copy of income tax returns	5 most recent taxable years		Candidate's name shall not be printed on the primary election ballot	(1) If the candidate has not filed the return for the tax year preceding the primary election, he shall submit the tax return to the Secretary of State within 5 days of filing the return with the IRS (2) Prior to making it public on their website the Secretary of State shall redact private information
Colorado: <i>HB 1328</i>	Presidential and Vice Presidential candidates shall file with the Secretary of State a copy of their federal income tax returns and provide written consent for the public disclosure of the returns	5 most recent taxable years	No later than 90 days before a presidential election	(1) Neither the name of that candidate nor the name of his or her running mate shall be printed on the general election ballot (2) A presidential elector shall not vote for that Presidential or Vice Presidential candidate	Secretary of State should make the returns publicly available on its website no later than 7 days after the income tax return is filed & the returns should remain posted on the website until the end of the calendar year in which the presidential election for which those returns have been filed are held
Connecticut: <i>HB 6574</i> <i>HB 6575</i>	Presidential candidates publicly discloses candidates federal and state tax returns (<i>HB 6574</i>) Presidential and Vice Presidential candidates publicly discloses candidates federal tax returns (<i>HB 6575</i>)	Previous 5 years (<i>HB 6574</i>) Previous 3 years (<i>HB 6575</i>)		Presidential electors nominated to vote for candidates for President and Vice President shall not appear on the official ballot to be used at a presidential election	

Appendix A: Legislative Proposals for Candidate Tax Disclosure
(As of December 2018) *continued*

State	Who & Where	How many years	When	Failure to do so	Miscellaneous
Delaware: <i>SB 28</i>	Candidates of a major party for President and Vice President shall file with the Commissioner of Elections a copy of the federal income tax returns and provide written consent to the Commissioner of Elections for public disclosure of such returns	At least the 5 most recent taxable years for which such a return has been filed with the IRS	No later than 50 days before a general election	Candidate's name shall not be printed on the general election ballot	Tax returns shall be made publically available on the Department of Elections website no later than 7 days after such income tax returns have been filed subject to redaction of personal information
Georgia: <i>HB 640</i> <i>SB 255 (Transparency in Elections Act)</i>	Presidential and Vice Presidential candidates file with the Secretary of State a copy of their federal income tax returns and provide written consent to the Secretary of State for public disclosure of such returns	At least the 3 most recent taxable years for which the candidate has filed such a return with the IRS (<i>HB 640</i>) At least the 5 most recent taxable years (<i>SB 255</i>)	No later than 60 days before the general election	Candidate's name shall not be printed on general election ballot	Secretary of State shall post such income tax returns on the website no later than 7 days after the candidate files the tax returns and prior to making them public, in consultation with the AG, the Secretary of State shall redact personal information
Hawaii: <i>HB 1581</i> <i>SB 150</i>	Presidential and Vice Presidential candidates shall submit to the Office of Elections a copy of the federal income tax returns and provide written consent for the public disclosure of such returns	5 most recent taxable years that a return has been filed with the IRS	No later than 50 days before a general election	(1) Candidate's name shall not be printed on the general election ballot (2) Electors shall not vote for any candidate who does not release their tax returns	(1) Returns should be made publicly available on the website of the Office of Elections no later than 7 days after submission and prior to doing so the office should redact private information (2) Party official shall file a statement that each candidate's tax return has been timely posted on the internet for free access by the public (<i>SB 150</i>), if not done then the electors cannot vote for this candidate
Iowa: <i>SF 159</i>	Presidential and Vice Presidential candidates shall file with the State Commissioner a copy of the candidate's federal income tax returns and provide written consent for the public disclosure of such returns	At least the 5 most recent tax years for which a return has been filed with the IRS	Not less than 50 days before the general election	Candidate's name shall not be placed on the general election ballot	Within 7 days after receiving the filings, the State Commissioner shall publish the filings on the state commissioner's website subject to redaction of personal information

Appendix A: Legislative Proposals for Candidate Tax Disclosure
(As of December 2018) *continued*

State	Who & Where	How many years	When	Failure to do so	Miscellaneous
Illinois: HB 780 SB 762 SB 982	<p>Presidential and Vice Presidential candidates must file copies of their federal income tax returns with the State Board of Elections (HB 780; SB 982)</p> <p>Presidential candidates must file copies of their federal income tax returns with the State Board of Elections and provide written consent for public disclosure (SB762)</p>	5 most recent tax years	By August 15th of each year in which a President and Vice President are chosen	Candidate's name shall not appear on the general election ballot (HB 780; SB 982) Electors shall not cast votes for non-complying candidates and candidate's name shall not appear on the general election ballot (SB762)	State Board of Elections shall make the returns publicly available on its website subject to redaction of personal information
Kentucky: SB 253	<p>Presidential candidates shall file with Registry of Election Finance a copy of the candidate's federal income tax return and provide written consent for public disclosures of such returns</p>	3 most recent taxable years	At the same time a candidate for President files his or her petition, statement of candidacy, or notice of candidacy	(1) Candidate's name will not be printed upon the official ballot for a primary or general election (2) Will not be certified for the office of President by the Secretary of State	(1) When filing, must also file a notification and oath of declaration of compliance (2) Registry of Election Finance shall make the returns publicly available no later than 7 days after the candidate files the return subject to redaction
Massachusetts: SB 365	<p>Presidential and Vice Presidential candidates shall submit to the State Secretary a certified and complete copy of their federal income tax returns and provide written consent for public disclosure</p>	3 most recent available years (to be on primary ballot) 5 most recent available years (to be on general election ballot)	No later than 5 o'clock post meridian on the 31st of December (to be on primary ballot) No later than 2nd Tuesday in September immediately preceding a general election (to be on general ballot)	(1) Not appear on the presidential primary and general election ballots (2) Presidential elector shall not vote for any candidates who have failed to submit their returns	At least 50 days before the general election, the state secretary shall publish on the State Secretary's website all tax returns submitted
Maryland: HB 517 SB 358 (Presidential Candidate Tax Transparency Act)	<p>Presidential and Vice Presidential candidates, who are not write-in candidates, shall file with the State Board copies of their federal income tax returns and provide written consent for public disclosure of such returns</p>	5 most recent taxable years for which the candidate filed a return with the IRS	No later than 65 days before a presidential general election	Not appear on the general election ballot	State Board shall make the record publicly available no later than 7 days after the income tax returns are filed

Appendix A: Legislative Proposals for Candidate Tax Disclosure
(As of December 2018) *continued*

State	Who & Where	How many years	When	Failure to do so	Miscellaneous
Maine: <i>LD 1422</i>	Candidates nominated by petition for President or Vice President shall provide documentation of their federal income tax returns with the nomination petition	Previous 5 years	By 5 pm on August 1 of the presidential election year	Not appear on the general election ballot	Presidential and Vice Presidential candidates selected by political party at convention to be a nominee shall provide documentation of the previous 5 years of tax returns by 5 pm on the 3rd business day after the day on which the chair and the secretary of the political party's state committee certify to the Secretary of State the names of the party's candidates for presidential elector. The returns are subject to redaction and the Secretary of State shall post the income tax returns on its website
Michigan: <i>HB 436</i> <i>SB 216</i> <i>SCR 13</i>	Presidential and Vice Presidential candidates, other than write-in candidates who file a declaration of intent to be a write-in, shall file with the Secretary of State a copy of state income tax returns and provide written consent for public disclosure	At least the 5 most recent taxable years for which a return has been filed	No later than 60 days before a general November election in the year in which elections for the offices are held	Candidate's name is not on the general election ballot	No later than 30 days before the general November election, the Secretary of State shall make the returns publicly available subject to redaction
Minnesota: <i>HF 634</i> <i>HF 704</i> <i>HF 931</i> <i>SF 358</i> <i>SF 759</i> <i>SF 2203</i> <i>(Tax Returns Uniformly Made Public Act)</i>	Presidential and Vice Presidential candidates must file with the Secretary of State copies of their federal income tax returns and provide written consent for public disclosure (<i>HF 704; SF 358</i>)	At least the 5 most recent taxable years for which the candidate filed an income tax return with the IRS	Not later than 11 weeks before a general election (<i>HF 704; SF 358</i>)	Candidate's name is not on the primary and general elections ballot (<i>HF 634; HF 931; SF 759; SF 2203</i>) Candidate's name is not on the general election ballot (<i>HF 704; SF 358</i>)	Returns must be made publicly available on the Secretary of State's website no later than 7 days after the returns are filed subject to redaction (<i>HF 704; SF 358</i>)
Montana: <i>HB 560</i>	Presidential and Vice Presidential candidates whose electors have been certified shall submit to the Commissioner of Political Practices a copy of the candidate's federal income tax returns and a signed consent form for disclosure	5 most recent years	No later than 85 days before a general election	Candidate's name may not appear on the primary and general election ballots	Returns shall be made publicly available subject to redaction

Appendix A: Legislative Proposals for Candidate Tax Disclosure
(As of December 2018) *continued*

State	Who & Where	How many years	When	Failure to do so	Miscellaneous
North Carolina: <i>HB 684</i> <i>SB 587</i>	Presidential and Vice Presidential candidates file with the State Board of Elections a copy of their federal income tax returns and provide written consent for public	For the 10 years preceding the year of the general election (<i>HB 684</i>) For the 5 years preceding the year of the general election (<i>SB 587</i>)	No later than 50 days before the date of the general election (<i>HB 684</i>) No later than 70 days before the general election (<i>SB 587</i>)	Candidate's name shall not appear on the general election ballot	State Board of Elections shall make the returns publicly available on its website within 7 days after the income tax returns have been filed subject to redaction
New Jersey: <i>AB 4520</i> <i>SB 3048</i>	Presidential and Vice Presidential candidates file with the Division of Elections in the Department of State their federal income tax returns and provide written consent for the disclosure of such returns	At least the 5 most recent taxable years for which the candidate filed such returns with the IRS	No later than 50 days before the general election	(1) Name of the candidate will not be printed on the general election ballot (2) Presidential Electors shall not vote for a candidate unless the candidate has filed tax returns	Division of Elections shall post income tax returns filed on its website no later than 7 days after the candidate has filed the tax returns subject to redaction
New Mexico: <i>HB 204</i> <i>SB 118</i>	Presidential and Vice Presidential candidates shall file with the Secretary of State copies of their federal income tax returns and provide written consent for public disclosure	5 most recent taxable years for which a return was filed with IRS	At least 56 days prior to a general election	Candidate's name shall not be printed on the general election ballot	Returns shall be made publicly available on the website of the Secretary of State no later than 7 days after such returns have been filed subject to redaction
New York: <i>SB 26</i>	Presidential and Vice Presidential Candidates , other than write-in candidates, shall file with the State Board of Elections a copy of their federal income tax returns and provide written consent for the disclosure	At least the 5 most recent taxable years for which a return has been filed with the IRS	No later than 50 days before a general election	(1) Name of such candidate shall not be on the general election ballot (2) Electors shall not vote for any person who fails to comply with such requirements	Returns shall be made publicly available no later than 7 days after such returns have been filed subject to redaction
Ohio: <i>HB 93</i>	Presidential and Vice Presidential candidates shall file with the Secretary of State copies of federal income tax returns and provide written consent for the disclosure	5 most recent taxable years for which the candidate filed a return with the IRS		(1) Candidate's name shall not appear on the ballot (2) Candidate shall not be a valid selection as a write-in candidate	(1) If the candidate has not filed tax returns for the 5 recent taxable years, the candidate shall file a statement of that fact along with copies of every federal income tax return the candidate has filed with the IRS (2) Secretary of State shall put the returns on its website no later than 7 days after the filing subject to redaction

Appendix A: Legislative Proposals for Candidate Tax Disclosure
(As of December 2018) *continued*

State	Who & Where	How many years	When	Failure to do so	Miscellaneous
Oregon: HB 2909 HB 2949 SB 888	Presidential and Vice Presidential candidates shall file with the Secretary of State a copy of their federal income tax returns and provide written consent for public disclosure	5 years preceding the year of the general election (HB 2909/2949) Most recent federal income tax return (SB 888)	No later than the 70th day before the date of the general election (HB 2909/2949) No later than the 68th day before the date of the primary election to appear on the primary election ballot but to appear on the general election ballot no later than the 70th day before the general election (SB 888)	(1) Candidate's name will not appear on official general election ballot (HB 2909; HB 2949) Candidate's name not appear on official primary or general election ballots (SB 888) (2) Electors may not vote for a candidate who has not complied HB 2909; HB2949)	(1) Secretary of State shall make the returns publicly available subject to redaction (2) Secretary of State shall prepare a list of name of candidates at the general election who complied with these requirements
Pennsylvania: HB 222 SB 247	Presidential and Vice Presidential candidates must submit to the Secretary of the Commonwealth a complete copy of their federal income tax returns and provide written consent for public disclosure	At least the 5 most recent taxable years	No later than 50 days before the general election	(1) Candidate's name will not appear on the primary ballots (HB 222) or general election ballot (SB 247) (2) Presidential Electors may not vote for a candidate who failed to comply	(1) Publish the returns on the Bureau of Commissions, Elections and Legislation of the Department of State's website no later than 30 days prior to the primary election (HB 222) (2) Secretary of the Commonwealth shall post the returns on its publicly accessible website no later than 7 days after the returns have been submitted subject to redaction (SB 247)
Rhode Island: HB 5400 SB 91	Presidential and Vice Presidential candidates shall file with the State Board of elections a copy of their federal income tax returns and provide written consent for disclosure	At least the 5 most recent taxable years for which a return has been filed with the IRS	No later than 50 days before the general election	Candidate's name shall not appear on the general election ballot	State Board of election shall make the returns publicly available on the board's website no later than 7 days after such returns have been filed subject to redaction
Tennessee: HB 1127 HB 1182 SB 588 (Presidential Candidate Tax Return Disclosure Act)	Presidential candidates shall file their tax returns with the Secretary of State	Immediately preceding 5 years	No less than 50 days before the respective election	Candidate's name shall not appear on the primary or general election ballots	Secretary of state shall notify each candidate that a prerequisite of being place on any ballot is filing tax returns with the Secretary of State

Appendix A: Legislative Proposals for Candidate Tax Disclosure
(As of December 2018) *continued*

State	Who & Where	How many years	When	Failure to do so	Miscellaneous
Vermont: <i>HB 243</i> <i>SB 77</i>	Presidential candidates shall file with the Secretary of State a copy of their federal income tax returns and provide written consent for the disclosure	At least each of the 5 most recent taxable years for which the person filed a return		Candidate's name will not be printed on the primary or general elections ballots	(1) Within 10 days of receiving a federal return, the Secretary of State shall post a copy of the return on his official website subject to redaction (2) A candidate who wins the primary as a write-in candidate and has failed to file federal tax returns per this section has until 5:00 PM on the 30th day following the date of the primary to file with the Secretary of State the required tax returns and accompanying consent
Virginia: <i>SB 1543</i>	Presidential candidates shall be required to submit to the State Board the candidate's federal tax returns	5 year period immediately preceding the general election	By the 75th day before the presidential election	Primary and general election ballots shall not contain the name of the candidate	
Wisconsin: <i>AB 257</i> <i>SB 166</i>	Presidential and Vice Presidential candidates shall submit with their declaration of candidacy copies of their federal tax returns	3 most recent years for which the candidate filed tax returns			The commission shall post the returns on its website within 48 hours after receiving the returns subject to redaction
FEDERAL PROPOSALS					
Sen. Elizabeth Warren	Secretary shall provide to officers and employees of the FEC copies of the applicable returns of any Presidential or Vice Presidential candidates	8 most recent taxable years and every year the individual was in a federal elected office for which a return has been filed as of the date of the nomination		The Director of the Office of Public Integrity shall request the non-complying candidate's returns from the Treasury Secretary	FEC may disclose to the public any applicable return of any covered candidate that is required to be filed with the Commission
Sen. Ben Sasse <i>(Presidential Tax Transparency Act)</i>	Treasury Secretary shall make publicly available returns of Presidential and Vice Presidential candidates	10 taxable years preceding the year in which the individual becomes a candidate			
House Democrats <i>H.R.1</i> <i>(For the People Act of 2019)</i>	Candidates for President and Vice President shall submit to the Federal Election Commission a copy of the individual's income tax returns	10 most recent taxable years for which a return has been filed with the Internal Revenue Service.	Not later than the date that is 15 days after the date on which an individual becomes a covered candidate	The FEC chairman shall request the non-complying candidate's returns from the Treasury Secretary	

Appendix B: Background Check Requirements Throughout Government

Agency	Background Check (non-exhaustive list of requirements and factors)	Source
FBI	<ul style="list-style-type: none"> • Credit and criminal records check • Extensive interviews with colleagues, friends, neighbors, professors • Polygraph • Drug-testing • Automatic disqualifiers: (1) Non-U.S. citizenship; (2) felony conviction; (3) violation of drug policy; (4) default on student loan issued by US government; (5) failure of drug test; (6) failure to register with Selective Service System; (7) engaging in acts to overthrow US government; (8) failure to pay court ordered child support; (9) failure to file federal, state, or local income tax returns. <p><i>"If we find that that information you have provided to us is inaccurate, false, misleading, then at that point we can discontinue an applicant for lack of candor. If an individual has applied for the FBI and is deemed to show lack of candor in any issue during the process, that will eliminate that person from ever applying with the FBI ever again."</i></p>	<p>https://www.fbi.gov/audio-repository/news-podcasts-inside-background-checks-for-new-applicants.mp3/view</p> <p>https://www.fbijobs.gov/working-at-FBI/eligibility</p>
CIA	<ul style="list-style-type: none"> • Interviews with friends, neighbors, etc. • Conflicting allegiances • Potential for coercion, particularly financial • Drug testing • Medical records • Personal relationships • Polygraph test • Automatic disqualifiers: (1) illegal drug use in past 12 months and (2) felony convictions <p><i>"Think of this process as the first step in building a bridge of trust between you and the Agency. Candor is an essential ingredient in the establishment of that trust."</i></p>	<p>https://www.cia.gov/careers/application-process</p> <p>https://www.nytimes.com/2016/08/21/magazine/how-to-pass-a-cia-background-check.html</p>
Secret Service	<ul style="list-style-type: none"> • Employment history • Credit history • School transcripts • Neighborhood references • Military records • Polygraph and/or medical examination 	<p>https://www.secretservice.gov/join/apply/</p>
NSA	<ul style="list-style-type: none"> • Previous and current employment • Education and residency history • Interviews with friends, neighbors, supervisors, coworkers, etc. • Credit and criminal records checks • Polygraph • Psychological screening <p><i>"The background investigation helps determine the applicant's honesty, trustworthiness, reliability, discretion and unquestioned loyalty to the United States."</i></p>	<p>https://www.intelligencecareers.gov/nsa/nsafaq.html</p>
Federal Employee or Federal Contractor	<ul style="list-style-type: none"> • Potential searches at police departments, sheriff's offices, courts, creditors and other record repositories. • Contact with friends, co-workers, neighbors, landlords, and family to verify work and schooling information. • Personal interview 	<p>https://nbib.opm.gov/about-us/about-investigations/investigation-process/</p>

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