****

**How the structure of the FBI’s disciplinary system makes the FBI vulnerable to the corrupt influence of partisan politics on the FBI’s decision-making**

1. **Statement of Purpose**

The inordinate power vested in the Assistant Director (AD) of the Federal Bureau of Investigation (FBI)’s Office of Professional Responsibility (OPR) – who is appointed by and reports to the FBI director – reflects a flawed FBI disciplinary system that is ripe for an ill-intentioned, partisan FBI director to co-opt the OPR AD and quietly purge employees unwilling to help advance his or her party’s political interests.

Due to the absence of effective checks and balances, the system makes personnel decisions by means of specious disciplinary charging possible. Such decisions can be achieved out of public view and without meaningful third-party scrutiny. They can be used to derail ongoing investigations that might affect a presidential administration or its allies. Worse, the system can be used to discourage an investigation of a political ally from being opened in the first place, or a whistleblower from reporting a politically-motivated decision.

This analysis is intended to establish a basis for policy change or legislation that would make the FBI less vulnerable to partisan politics through its disciplinary system.

1. **Background**

The FBI’s disciplinary system consists of four stages: *Investigation*, *Proposal of Penalty*, *Decision of Penalty*, and an *Appellate* process to review the *Decision*. Prior to 2004, the *Investigation*, *Proposal,* and *Decision* stages were administered by the FBI’s Office of Professional Responsibility (OPR), and the *Appellate* process was administered by the FBI’s Inspection Division.

In 2004, the FBI fundamentally altered the system by placing the *Investigation* stage in the Inspection Division, the *Appellate* process in the Human Resources Division, and by keeping the *Proposal* and *Decision* stages in OPR.

The restructuring created a barrier between the *Investigation* and *Proposal* stages, making it more difficult and time-consuming for a proposing official (normally, an OPR unit chief) to request the follow-up investigation frequently necessary to fully inform a proposal of discipline. Further, the barrier increased OPR’s propensity to propose discipline without all the relevant facts.

A smaller, leaner OPR Division also meant that the deciding official – the OPR AD – unlike in the old structure would now directly supervise the proposing officials. This new dynamic meant that, contrary to an established principle of judicial fairness, the OPR AD would effectively be prosecutor and judge: assembling the case against an FBI employee and then deciding the outcome of that same case.

Consequently, in 2009, the United States Department of Justice (USDOJ)’s Office of the Inspector General (OIG) criticized the OPR AD for supervising the proposing officials and recommended separating the *Proposal* and *Decision* stages of the FBI’s disciplinary process, something other USDOJ-component agencies had done to ensure a system of checks and balances.[[1]](#footnote-1) The FBI, however, at the insistence of the OPR AD, refused to make this change. This refusal came on the heels of a 2005 FBI decision – aggressively lobbied for by the OPR AD – to weaken the appellate standard for reviewing disciplinary decisions, thus undermining the *Appellate* stage’s effectiveness as a check and balance on a system that the 2004 restructuring had made inherently unfair.

To support this position, the OPR AD made misleading arguments about disciplinary procedure that cut in favor of OPR keeping control of the *Proposal* and *Decision* stages. The underlying motivation in making these arguments, however, had more to do with procedural power than procedural necessity. By keeping control of the *Proposal* and *Decision* stages in the face of a weak appellate standard, the OPR AD could decide the outcome of most disciplinary cases by charging *lack of candor under oath*.

The reason is that *lack of candor under oath* carries a mandatory-dismissal penalty that cannot be reduced on appeal. This meant that to retain his or her job, a charged employee would first have to accept the stigma of being fired and potentially become unemployable, then seek to overturn or “win” the charge in the *Appellate* stage. Most employees resigned. The ones that proceeded lost much more often than under the pre-2005 appellate standard.

Consequently, whenever the OPR AD subjectively believes an employee should potentially be fired despite facts that might suggest otherwise to an appellate board, the OPR AD concocts a specious *lack of candor under oath* charge, holds it in abeyance while weighing factors having nothing to do with the charge, and then finds, based on those factors, that the charge is correct.[[2]](#footnote-2)

1. **Significant events**
2. February 2004 – Bell-Colwell commission

In February 2004, pursuant to the recommendations of the Bell-Colwell commission, which was authorized by then-FBI director Robert Mueller to study the FBI’s disciplinary system and practices, the *Investigation* stage of the disciplinary process was moved to the Inspection Division and the *Appellate* process to the Human Resources Division. The *Proposal* and *Decision* stages remained in what became a leaner, more autonomous OPR.[[3]](#footnote-3)

The recommendations were made in a report entitled *STUDY OF THE FBI’S OFFICE OF PROFESSIONAL RESPONSIBILITY* (informally known as the Bell-Colwell report). Additionally, the report recommended a change in the appellate standard of review from *preponderance of the evidence* to *substantial evidence*, as well as steps the FBI should take to decrease the amount of time a disciplinary case took to complete, which had been a significant issue in the old structure.

1. August 2004 – Former FBI director Robert Mueller made OPR an autonomous FBI division, whose new AD, Candice M. Will, would report to the FBI director.

In August 2004, Director Mueller appointed Candice M. Will as the new OPR AD. Additionally, OPR’s offices were moved into a building a few blocks from FBI headquarters, which increased OPR’s newfound autonomy.

According to Will’s official biography on the FBI [website](https://www.fbi.gov/about/leadership-and-structure/fbi-executives/will), “under her leadership, OPR has eliminated its backlog, clarified its processes, and forged stronger relationships with internal and external entities, including the Office of Inspector General and Congressional oversight committees.

Will’s biography belies, perhaps, the most significant influence of the Bell-Colwell report on the FBI’s disciplinary practices. This influence resulted from the report’s criticism of the backlog of cases and the amount of time it took OPR to complete the adjudication process. Consequently, to eliminate the “backlog,” after she was hired, Will began a years-long practice of making speculative and aggressive disciplinary charges in the *Proposal* stage of the process without fully vetting those charges in the *Investigation* stage.

Put another way, instead of losing precious time by sending cases for additional investigation (to a unit the OPR AD did not directly supervise or control), the OPR AD simply charged the “worse-case scenario” based on an incomplete set of facts. This had the effect of moving the burden of proof from OPR to the charged FBI employee. Then, as more fully described in IV-C below, the OPR AD prevented the charged employee from adequately defending him- or herself by denying the ability to conduct the type of additional investigation that should have been completed in the *Investigation* stage of the process.

With these simple, but highly unethical practices, the OPR AD began to – as a matter of expedience – decide the outcome of any disciplinary case with impunity, either based on or without regard to the facts.

Ms. Will recently retired, but the position still reports to the FBI director and the structure and practices of the OPR AD remain the same.

1. August 2005 – The appellate standard of review was changed from *preponderance of the evidence* to *substantial evidence*.

In August 2005, the FBI changed the appellate standard of review in the disciplinary process.[[4]](#footnote-4) Previously, there was a *de novo* review of OPR's factual findings and penalty determinations such that appellate officials could make new factual findings or mitigate a penalty without deference to OPR's previous determinations. The changed policy permits only a *substantial evidence* review, which requires appellate officials to merely review findings of fact as opposed to making new factual findings. The *substantial evidence* standard permits the appellate official to evaluate only the reasonableness of the OPR AD's decision, and, if it falls in this broad category, requires the appellate official to uphold that decision even if the appellate official disagrees with it.

The *substantial evidence* standard inherently weights the procedure, more heavily biasing it against the employee than does the *preponderance of the evidence* standard used in the system’s *Decision* stage. It may be a fair standard in a process in which the charging and decision functions are separate, but in the FBI’s process where the charging and decision functions are supervised by the same individual, a *substantial evidence* review undermines the *Appellate* stage's effectiveness as a check and balance on a system that is already inherently unfair.

As late as 2009, four years after the standard was implemented, there continued to be confusion among appellate officials as to how to properly apply the *substantial evidence* standard.[[5]](#footnote-5)

1. In 2009, the USDOJ, Office of the Inspector General (OIG), Evaluation and Inspections Division (hereinafter “OIG”) made a recommendation to separate the *Proposal* and *Decision* stages of the disciplinary process, a recommendation that the OPR AD disregarded.

In May 2009, OIG recommended the FBI separate the *Proposal* and *Decision* stages of its disciplinary process, something other USDOJ-component law enforcement agencies had done to ensure a system of checks and balances.[[6]](#footnote-6) According to OIG, "through her review and approval of the Unit Chiefs' disciplinary proposals, the [OPR] Assistant Director can influence the content of the proposed discipline before making the final decision and imposing discipline."[[7]](#footnote-7)

The FBI, at the OPR AD’s insistence, did not make the recommended change. Instead, the OPR AD defended her supervision of the *Proposal* stage, stating she reviewed all proposals to ensure none were more lenient than what she was likely to ultimately decide. [[8]](#footnote-8)

Hence, by the OPR AD's own admission, the OPR AD regularly made an initial judgment about the facts and circumstances of a disciplinary matter before evaluating the employee's written response to the proposal and oral presentation and well in advance of her final decision. Such premature judgment by an adjudicator, before all the facts are gathered, is exactly the type of bias OIG sought to eliminate. The OPR AD's defense was paradoxical.

1. **Four unethical practices used to expediently decide disciplinary cases**

During the *Proposal* and *Decision* stages, the OPR AD regularly engages four unethical and potentially illegal practices that make it possible for the OPR AD to influence the content of the proposed discipline before making a final decision and imposing discipline, just as OIG found was likely to occur:

1. Practice 1 - Making specious *lack of candor under oath* and other insupportable proposals that do not meet a reasonable person *preponderant evidence* standard

The OPR AD routinely proposes specious *lack of candor under oath* and other insupportable proposals that would not meet a reasonable person's *preponderant evidence* standard in virtually any other forum. The poor quality of many of these proposals suggests that in many cases the OPR AD does not actually believe the employee lacked candor. More than just a “between the ears” practice, specious charging - especially specious lack of candor charging - is an openly evident part of OPR's adjudicative process.Its purpose is to make it possible to use *lack of candor under oath* - a disciplinary offense carrying a mandatory dismissal penalty that is difficult to overturn on appeal - as a pretense to terminate an employee or force their resignation.

During this process, instead of letting lack of candor present itself as a finding, it is contrived, either as a substitute for additional investigation in cases where the OPR AD has prematurely drawn a conclusion about the appropriate course of action, or because the OPR AD wants to preserve the ability to impose a penalty of dismissal if the OPR AD subjectively believes extraneous factors should supersede the hard facts of the case.

Consequently, such charges are often grounded in little more than the untested testimony of someone with an ax to grind or contrived by branding honest failures of recollection or candid clarifications as lies.

1. Practice 2 – Disregarding or misrepresenting evidence, or claiming the existence of non-existent evidence

After making specious *lack of candor under oath* and other specious proposals, the OPR AD routinely manipulates the investigative record to support these proposals by doing one or more of the following:

* Disregarding exculpatory evidence
* Misrepresenting the meaning, relevance, and/or significance of evidence, including subject testimony and documentary evidence
* Claiming the existence of inculpatory evidence that does not exist
1. Practice 3 – Preventing the acquisition of evidence to refute the proposal

After disregarding or misrepresenting evidence or claiming the existence of non-existent evidence to support its specious proposals, the OPR AD routinely limits follow-up investigation to acquire new evidence that may disprove an allegation, making it difficult or impossible for a charged employee to overcome a proposal on the facts. To accomplish this, the OPR AD routinely:

* Does not, even in the presence of a weak investigative record, conduct logical inves­tigation that may refute its specious proposals
* Denies requests for follow-up investigation that may refute its specious proposals
* Prohibits charged employees (by procedural rules) from conducting investigation that may refute its specious proposals
1. Practice 4 - Sustaining specious *lack of candor under oath* proposals to mitigate the chance of a successful appeal

After making specious *lack of candor under oath* proposals that do not meet a reasonable person *preponderant evidence* standard, disregarding or misrepresenting evidence to support the proposals, and/or preventing the acquisition of evidence to refute the proposals, the OPR AD sustains the proposals whenever the OPR AD subjectively believes a charged employee should be dismissed despite facts that may suggest otherwise to an appellate board.

This leaves the *Appellate* stage a charged employee's last chance for relief. However, an appellate official must either sustain or reject a *lack of candor under oath* finding because the official is not permitted to reduce the penalty as can be done with non-mandatory dismissal offenses. Since the steeply biased *substantial evidence* standard in most cases requires an appellate official to uphold an adjudicative decision even when the official disagrees with that decision, the likely consequence of appealing a *lack of candor under oath* finding is dismissal. This incentivizes a charged employee to resign rather than risk the stigma of being fired and potentially becoming unemployable.

1. **Example of how the OPR AD uses the four unethical practices to exert control over the entire disciplinary process and decide the outcome of a disciplinary case**

The four stages of the FBI's disciplinary system are *Investigation*, *Proposal of Penalty*, *Decision of Penalty*, and an *Appellate* process to review the *Decision*. The OPR AD supervises both the *Proposal* and *Decision* stages and can therefore influence the content of the proposed discipline before making a final decision and imposing discipline. The process employs a weak appellate standard, mitigating a charged employee's chance of a successful appeal, especially when *lack of candor* is charged.

In this system, by employing the four unethical practices described above, the OPR AD can exert inequitable control over the entire disciplinary process - not just the *Proposal* and *Decision* stages the OPR AD expressly controls, but the *Investigation* and *Appellate* stages that do not fall under the OPR AD’s direct supervision.

To illustrate this, a *lack of candor under oath* proposal from an FBI disciplinary case was analyzed below. The case concerned an FBI employee’s investment in a closely-held company with just two shareholders – something an FBI ethics official had approved 11 years earlier. The disciplinary case was opened in response to a complaint made by the non-FBI shareholder (hereinafter ‘Partner’) after a disagreement caused a shareholder deadlock. The OPR proposal concerned the amount of time the FBI employee claimed (when interviewed during the *Investigation* stage of the disciplinary process) to have spent on the bookkeeping and other tasks of the closely held entity.

* **The OPR AD engaged Practices 1, 2, and 3 in the *Proposal* stage to reach back and render the *Investigation* stage meaningless:**
* **Practice 1 -** The OPR AD proposed a specious a lack of candor charge that did not meet a reasonable person’s *preponderant evidence* standard. More specifically, the OPR AD:
* Alleged the charged employee misrepresented the amount of time he/she spent “working” at the company. The proposal was made without supporting evidence, such as corroborating witness testimony or work product, and despite reliable exculpatory testimony from an employee of the company who stated the charged employee did not work at the company.
* **Practice 2 –** The OPR AD disregarded or misrepresented evidence or claimed the existence of non-existent evidence to support the proposal. More specifically, the OPR AD:
* Improperly weighted a sensational Partner claim that the employee spent 20 hours per week working at the company for ten years while disregarding the testimony of an unbiased employee of the company who stated the charged FBI employee was “a non-active silent partner" who did not work at the company, nor had any authority over its day-to-day business.

* Misstated the charged employee’s testimony to make the company appear 18 times larger than it actually was. This, to imply a particular task the charged employee performed must have required more time than the charged employee acknowledged.[[9]](#footnote-9)
* Intentionally misrepresented the nature of the task the charged employee performed, claiming it to be multi-faceted and time-consuming when it was verifiably single-faceted and undemanding.
* Improperly characterized the task as unauthorized outside employment when, in fact, it explicitly fell under the IRS definition of passive, non-material, investor participation, the standard used by an FBI ethics official when authorizing the activity 11 years earlier.
* **Practice 3 -** The OPR AD prevented acquisition of evidence to refute the proposal:
* Despite the difference between Partner's “20-hours claim” and the reliable exculpatory witness testimony, the OPR AD refused the charged employee’s request for additional investigation to be conducted, including interviews of other company employees that would have tested the validity of Partner's “20-hours” claim. ​
* **By employing Practices 1, 2 and 3, the OPR AD:**
* Approved a *lack of candor under oath* proposal that (1) disregarded exculpatory witness testimony; (2) misstated the charged employee’s testimony; (3) intentionally misrepresented certain facts; and (4) claimed the existence of non-existent evidence by concluding the company was much larger than it was. The OPR AD then refused to conduct any investi­gation, including additional interviews, to test the validity of Partner's sensational “20-hours” claim or to determine whether Partner's motivation in filing a complaint affected his veracity.
* Effectively rendered the *Investigation* stage meaningless, first by forcing the charged employee to confront the unforeseen and insupportable lack of candor proposal for the first time in the *Proposal* stage after the *Investigation* stage interview had taken place, and then by preventing additional investigation to acquire the evidence needed to refute the proposal.
* **The OPR AD engaged Practice 4 in the *Decision* stage to reach forward and mitigate the chance the charged employee could gain relief in the *Appellate* stage:**
* **Practice 4 -** The OPR AD sustained the specious *lack of candor under oath* proposal:
* The finding was made despite that it was insupportable and did not meet a reasonable person's *preponderant evidence* standard as implied by the many errors and omissions.
* **By engaging Practice 4, the OPR AD:**
* Made the *Appellate* process the charged employee’s only chance for relief. However, the appellate procedure, characterized by the steeply-biased *substantial evidence* standard, offered little hope of reversing a *lack of candor under oath* charge. To challenge the findings, the charged employee would have had to first accept the stigma of being fired and potentially become unemployable.
* Hence, by finding for *lack of candor under oath*, in this case speciously, the OPR AD rendered the *Appellate* stage too perilous an avenue for the charged employee to seek relief.
* Consequently, the charged employee resigned.

This analysis demonstrates that in a system effectively controlled by one person, with no separation of powers and no effective outside scrutiny, the need to meet a reasonable person standard is mitigated. As a result, the OPR AD’s penchant for specious lack of candorcharging as a tool to decide disciplinary matters is widespread. Final decisions are effectively made in the *Proposal* stage and the written response and oral presentation by an employee to the OPR AD are reduced to little more than a personality test.[[10]](#footnote-10)

1. **Other issues**

Summary Dismissal Action

Since 1997, the regular disciplinary process and the protections it ostensibly provides, may not, according to FBI policy, apply to extraordinary cases which require immediate *summary dismissal action*. In such matters, the FBI director can use his or her discretion to act without hesitation where the safety of the public, FBI employees, national security interests, or other compelling considerations may be at stake.

According to FBI policy, to ensure *summary dismissal action* is exercised only under exigent and compelling circumstances, authority for that decision cannot be delegated below the rank of Assistant Director.

The OPR AD currently has delegated authority for *summary dismissal action*. Anecdotal evidence, including statements by current and former FBI Agents Association presidents, indicate *summary dismissal action* is used capriciously, often under the broad category of “other compelling circumstances.”

1. **Potential Legal approach**

*Protect the FBI* believes the culture created by the former OPR AD is such that the practice of specious *lack of candor under oath* charging to expediently decide disciplinary cases is openly encouraged. As such, the practice may constitute "mismanagement" or "an abuse of authority" pursuant to 28 CFR Part 27.1 (2).

1. **Potential Legislative Approach**

The FBI Agents Association has repeatedly petitioned the FBI to modify its disciplinary system to be consistent with the 2009 OIG recommendations. It has also requested the FBI to halt most uses of *summary dismissal* *action* to resolve disciplinary cases, a practice it deems the most serious of the issues described herein.

The FBI has repeatedly refused. This suggests the need for new legislation, something for which *Protect the FBI* is advocating.

1. **Conclusion**

Aside from the inherent political risk in the FBI’s disciplinary system, there is tremendous acrimony among FBI employees regarding OPR's deliberate use of specious disciplinary charges to decide disciplinary cases and the intentional errors and omissions that support these charges.

How the FBI treats its employees, in good times and bad, is important, not just to the organization's internal health, but to its credibility with the American people. If the FBI so carelessly claims its employees are lying as an excuse for what it believes to be the greater good or as a substitute for a diligent investigative effort, how can the public be certain the FBI will not do the same thing when it investigates them?

Maintaining the FBI's credibility with the public begins with maintaining the FBI's credibility with its employees. And this requires a disciplinary system that upholds integrity, reliability, and trust.

The FBI’s disciplinary system does not.

*Protect the FBI* is advocating for policy change and new legislation to safeguard the FBI’s disciplinary system from being co-opted by an ill-intentioned, partisan FBI director for political gain and to ensure that FBI policy reflects the values of the American people.

1. In contrast, most state and local police departments have separate charging and decision stages in their disciplinary processes. Many have a multi-step process in which the final step is an appeal to an independent citizen panel. [↑](#footnote-ref-1)
2. The charge is normally supported by employing three unethical practices, described in section III.B., III.C., and III.D., below. [↑](#footnote-ref-2)
3. Many FBI employees who conducted disciplinary investigations or worked in the appellate unit recommended that the *Investigation* and *Proposal* stages remain together to simulate the relationship between investigator and prosecutor and ensure the *Decision* stage (or judge) was independent of these functions. [↑](#footnote-ref-3)
4. The new appellate standard of review was adopted as FBI policy in an electronic communication entitled, *Policy Changes Related to the Disciplinary Appeals Process* (August 2005). [↑](#footnote-ref-4)
5. U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, [*Review of the Federal Bureau of Investigation's Disciplinary System* (May 2009)](https://oig.justice.gov/reports/FBI/e0902/final.pdf), p. 67. [↑](#footnote-ref-5)
6. U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, [*Review of the Federal Bureau of Investigation's Disciplinary System* (May 2009)](https://oig.justice.gov/reports/FBI/e0902/final.pdf), pp. 60-61. [↑](#footnote-ref-6)
7. U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, [*Review of the Federal Bureau of Investigation's Disciplinary System* (May 2009)](https://oig.justice.gov/reports/FBI/e0902/final.pdf), p. 61. [↑](#footnote-ref-7)
8. U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, [*Review of the Federal Bureau of Investigation's Disciplinary System* (May 2009)](https://oig.justice.gov/reports/FBI/e0902/final.pdf), p. 61. [↑](#footnote-ref-8)
9. The difference between the OPR AD’s misstatement and the charged employee’s recorded testimony was empirical. [↑](#footnote-ref-9)
10. In the FBI’s disciplinary system, the rules require an employee to provide OPR a written response to OPR’s proposal letter. If the proposed penalty is more than 15 days, the case is classified as an adverse action. In an adverse action, a charged employee is also permitted to defend himself or herself in an oral presentation to the OPR AD. [↑](#footnote-ref-10)