ARTICLE

IS ESQUIRE A HIGHER CLEARANCE THAN TOP SECRET?: A COMPARISON OF THE BAR ADMISSION AND NATIONAL SECURITY CLEARANCE PROCESSES

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ABSTRACT

In both the national security field and the legal profession, members are required to undergo significant background checks and appraisals before beginning work.[1] *While both lines of work involve significant amounts of trust, competence, and integrity, there is often far greater risk to the public at large from the unauthorized release of highly classified national security information than from a poorly performing, or even dishonest, attorney. Despite the heightened risk in the national security field, the information requirements for bar admission go beyond those of national security clearances. Given the higher stakes of national security clearances compared to attorney licensure, and that both processes currently seem to accomplish their respective goals effectively, there is no reason that the bar admission process should be more rigorous and extensive in scope than the national security clearance process.*

This Article compares the two processes with this thesis in mind, examining the provisions of the National Conference of Bar Examiners Character and Fitness Application in comparison with the U.S. government's Standard Form 86 (Application for National Security Positions of the United States

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[1] "For someone in the national security field, it's analogous to bar admission for a lawyer or a medical license for a doctor – it allows you to practice in the field, and if you don't have it you literally can't show up for work . . . ." Anna Mulrine Grobe, *Now, It's Trump's Turn to Wrestle with Classified Information*, CHRISTIAN SCI. MONITOR (Dec. 19, 2016), https://www.csmonitor.com/USA/Military/2016/1219/Now-it-s-Trump-s-turn-to-wrestle-with-classified-information [https://perma.cc/EM89-9DJK] (quoting Dakota Rudesill, Associate Professor of Law, Ohio State University Moritz College of Law).

Government) as well as other aspects of the two processes.[2] *Overall, this comparison leads to the conclusion that the bar admissions process should more closely parallel the procedures used for national security clearance decisions.*

CONTENTS

[2] This Article does not discuss the bar examination because it is generally treated as a separate portion of the licensing process for attorneys. However, the examination requirement for law licensure is an additional and very significant hurdle that national security clearance applicants need not endure. Whether the bar examination or character and fitness is the more arduous portion of the process is certainly debatable.

INTRODUCTION

To work in either the national security field or the legal profession, candidates must endure the substantial hurdle of a highly invasive background check. Submission of the Standard Form 86 (SF-86) is required of candidates for national security clearances.[3] Candidates for bar admission must complete a character and fitness form,[4] which the National Conference of Bar Examiners (NCBE) supplies many states.[5] Although there are other steps that may be required in these processes, completing their respective forms is a very substantial task that applicants must face.[6]

This Article compares the two processes primarily by examining the scope of the SF-86 and the NCBE Form. This comparison reveals that the SF-86 asks a significantly fewer percentage of questions without a time limit in their scope than does the NCBE Form. Furthermore, the questions in the SF-86 are more relevant to vetting national security clearance candidates than are the questions on the NCBE for bar applicants. Moreover, both clearance recissions and clearance refusals have generally low rates, as is the case with discipline imposed on attorneys. Although significant harm can come to the public from an unethical or inept lawyer, the harm that can come from misused or mishandled national security information is, in most instances, notably greater. This Article concludes that the national security clearance process provides significant guidance towards improving the bar admissions process, including that most of the questions on the NCBE should be limited in temporal scope instead of seeking information within the scope of a candidate's lifetime.

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[3] *See infra* Part I.B.

[4] *See Bar Admission*, YALE L. SCH., https://law.yale.edu/student-life/career-development/students/career-guides-advice/bar-admission [https://perma.cc/NA6S-4H36] (last visited Dec. 21, 2021) ("[Y]our character and fitness must be established as a prerequisite to licensure. To assess these qualities, you will be required to provide detailed information about your background.").

[5] *See infra* Part II.A.

[6] *See infra* Parts I.B, I.C, II.B, II.C, II.D.

I. THE NATIONAL SECURITY CLEARANCE PROCESS

A. Short History

The protection of state secrets for foreign policy reasons has been a concern of the United States since its founding.[7] Protecting war-time military information has also long been an undertaking.[8] Even in the days of the Continental Army, various officers, including George Washington himself, inscribed certain documents with "Confidential" or "Secret."[9] Though not immediately adopted, these procedures paved the way for the modern system of protecting national security information.[10]

During the 1800s, the government began placing terms "such as Secret, Confidential, or Private" on government information to that indicate such materials should not be publicly distributed.[11] Nevertheless, national security information was not guarded through any official protocol directly intended to shield it.[12] Also, the media and General McClellan agreed to

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[7] FOREIGN AFFS. DIV., LEGIS. REFERENCE SERV., LIBR. OF CONG., 92D CONG., 1ST SESS., SECURITY CLASSIFICATION AS A PROBLEM IN THE CONGRESSIONAL ROLE IN FOREIGN POLICY 1 (Comm. Print 1971); *see also id.* at 2 ("Secrecy has been practiced to some degree in diplomatic and military affairs throughout the nation's history."); ROBERT TIMOTHY REAGAN, FED. JUD. CTR., KEEPING GOVERNMENT SECRETS: A POCKET GUIDE ON THE STATE-SECRETS PRIVILEGE, THE CLASSIFIED INFORMATION PROCEDURES ACT, AND CLASSIFIED INFORMATION SECURITY OFFICERS 1 (2d ed. 2013) (quoting Classified National Security Information, Exec. Order No. 13,526, 75 Fed. Reg. 707, 707 (Jan. 5, 2010)), https://www.fjc.gov/sites/default/files/2016/Keeping-Government-Secrets-2d-Reagan-2013.pdf [https://perma.cc/D26F-M5R4] ("[T]hroughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations."); Faaris Akremi, Note, *Does Justice "Need to Know?": Judging Classified State Secrets in the Face of Executive Obstruction*, 70 STAN. L. REV. 973, 976 (2018) ("Some information is too sensitive to release to the public. Details of military strategies, sensitive technologies, and other state secrets could, in the wrong hands, endanger national security. The institutions of our government have recognized as much in creating the state secrets privilege. . . . Though the precise provenance of the privilege is unclear, its first precedents date from early British law and the founding of the United States.").

[8] *See* FOREIGN AFFS. DIV., *supra* note 7, at 1; s*ee also id.* at 2; REAGAN, *supra* note 7, at 1 (quoting Exec. Order No. 13,526, 75 Fed. Reg. 707, 707 (Jan. 5, 2010)).

[9] *See* HAROLD C. RELYEA, CONG. RSCH. SERV., RL33494, SECURITY CLASSIFIED AND CONTROLLED INFORMATION: HISTORY, STATUS, AND EMERGING MANAGEMENT ISSUES 1 (Feb. 8, 2008). Doing so "[f]ollow[ed] long-standing military practice . . . ." *Id.*

[10] *See id.*

[11] *See Developments in the Law: The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1192 (1972).

[12] *Id.* at 1192–93.

vague dissemination restrictions in the course of the Civil War.[13] The Civil Service Act of 1883 mandated that federal job candidates "possess the requisite character, reputation, trustworthiness, and fitness for employment."[14]

In February 1912, through General Orders No. 3, the War Department implemented record-based initial "systematic procedures for the protection of national defense information."[15] The "registry system" met its end after the United States joined World War I; the General Headquarters of the American Expeditionary Force replaced it in November 1917 with a three-component classification marking procedure.[16]

In 1940, President Franklin D. Roosevelt signed Executive Order 8,381.[17] In this Executive Order, which recognized the military classification system, when "defining . . . installations or equipment requiring protection against the dissemination of information concerning them, the President named as one criterion the classification as 'secret,' 'confidential,' or 'restricted' under the direction of either the Secretary of War or the Secretary of the Navy."[18] In 1950, the term "top secret" made its first formal appearance in President Harry Truman's Executive Order 10,104.[19] Classification protocols were formally expanded beyond military entities in 1951 in Executive Order 10,290, which also placed "security information" under the

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[13] *See id.* at 1193. This situation was not one-sided. Specifically, "[t]he press was requested to refrain from printing any matter which might furnish aid and comfort to the enemy, while the Government was urged to provide all information about military engagements which was suitable for publication." *Id.* (citing FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 247–29 (H. Nelson ed., 1967)).

[14] William Henderson, *A Brief History of the U.S. Personnel Security Program*, CLEARANCEJOBS (June 29, 2009), https://news.clearancejobs.com/2009/06/29/a-brief-history-of-the-u-s-personnel-security-program/ [https://perma.cc/Z7PL-4RYG].

[15] RELYEA, *supra* note 9, at 2. (Under this scheme, "[r]ecords determined to be 'confidential' were to be kept under lock, 'accessible only to the officer to whom intrusted [sic].'" Furthermore, "[s]erial numbers were issued for all such 'confidential' materials, with the numbers marked on the documents, and lists of same kept at the offices from which they emanated.")

[16] *See id.*

[17] FOREIGN AFFS. DIV., *supra* note 7, at 3.

[18] *Id.* at 4.

[19] *See id.* However, "this designation had been in use some years earlier." *See also* Exec. Order No. 10,104, 15 Fed. Reg. 597 (Feb. 1, 1950).

scheme.[20] Moreover, all Executive Department agencies and departments were empowered to classify material.[21]

In 1953, President Dwight D. Eisenhower issued Executive Order 10,450,[22] which directed the following:

> The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation . . . .[23]

This Executive Order also explicitly directed that:

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[20] *See* FOREIGN AFFS. DIV., *supra* note 7, at 4. The Executive Order "defined 'classified security information' to [be] 'official information the safeguarding of which is necessary in the interest of national security, and which is classified for such [reason] by appropriate classifying authority.'" *Id.* (quoting Exec. Order No. 10,290, pt. II, para. 4, 16 Fed. Reg. 9795, 9797 (Sept. 27, 1951)). Also, "[t]hese regulations shall apply only to classified security information as defined in paragraph 4 of Part II . . . ." Regulations Establishing Minimum Standards for the Classification, Transmission, and Handling, by Departments and Agencies of the Executive Branch, of Official Information Which Requires Safeguarding in the Interest of the Security of the United States, Exec. Order No. 10,290, 3 C.F.R. 471, 472 pt. I, para. 1(d) (1952).

[21] *See* FOREIGN AFFS. DIV., *supra* note 7, at 4; Exec. Order No. 10,290, pt. II, para. 4, 16 Fed. Reg. 9795, 9797 (Sept. 27, 1951); *cf.* REYLEA, *supra* note 9, at 3 ("[T]he order extended classification authority to nonmilitary entities throughtout [sic] the executive branch, to be exercised by, presumably but not explicitly limited to, those having some role in 'national security' policy.").

[22] The SF-86 specifically lists Executive Orders 10,450, 10,865, 12,333, and 12,968 as its "Authority to Request this Information[,] [d]epending upon the purpose of your investigation." U.S. OFF. OF PERS. MGMT., STANDARD FORM 86: QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS, INTRODUCTORY PAGES (Nov. 2016), https://www.opm.gov/forms/pdf_fill/sf86.pdf [https://perma.cc/B3J5-5LPT] [hereinafter STANDARD FORM 86]. It also mentions 5 U.S.C. §§ 3301, 3302, 9101; 42 U.S.C. §§ 2165, 2201; 50 U.S.C.; and 5 C.F.R. pts. 2, 5, 731, 732, 736. *Id.* It finally notes that Executive Order 9,397 (as amended by Executive Order 13,478) is its basis for seeking applicants' social security numbers. *Id.*

[23] Security Requirements for Government Employment, Exec. Order No. 10,450, 18 Fed. Reg. 2,489 (Apr. 27, 1953).

> The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following: (1) Depending on the relation of the Government employment to the national security: . . . (iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, sexual perversion.[24]

This "order . . . unleashed the targeted and relentless purging of all LGBT Americans from federal service."[25] Also in 1953, Executive Order 10,501 was signed, which superseded Executive Order 10,290.[26] This Executive Order "narrowed the number of agencies authorized to classify [material] and redefined the usage of the various security labels."[27]

Executive Orders 11,652 and 12,065, which Presidents Richard Nixon and Jimmy Carter signed, respectively, "narrowed the bases and discretion for assigning official secrecy to executive branch documents and

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[24] *Id.* § 8(a), at 74.

[25] MATTACHINE SOCIETY OF WASHINGTON, D.C. (PREPARED BY MCDERMOTT WILL & EMERY LLP), AMERICA'S PROMISE OF RECONCILIATION AND REDEMPTION: THE NEED FOR AN OFFICIAL ACKNOWLEDGMENT AND APOLOGY FOR THE HISTORIC GOVERNMENT ASSAULT ON LGBT FEDERAL EMPLOYEES AND MILITARY PERSONNEL 1 (2021); *see also* Judith Adkins, "*These People Are Frightened to Death": Congressional Investigations and the Lavender Scare*, 48 PROLOGUE MAG. (Summer 2016), https://www.archives.gov/publications/prologue/2016/summer/lavender.html [https://perma.cc/K6W3-GDLG] ("Beginning in the late 1940s and continuing through the 1960s, thousands of gay employees were fired or forced to resign from the federal workforce because of their sexuality. . . . President Dwight D. Eisenhower's 1953 Executive Order #10450, 'Security Requirements for Government Employment' . . . explicitly added sexuality to the criteria used to determine suitability for federal employment. With the stroke of a pen, the President effectively banned gay men and lesbians from all jobs in the U.S. government—the country's largest employer.").

[26] *See* FOREIGN AFFS. DIV., *supra* note 7, at 4.

[27] *Id.* According to Relyea, this Executive Order "withdrew classification authority from 28 entities; limited this discretion in 17 other units to the agency head; returned to the 'national defense' standard for applying secrecy; eliminated the 'Restricted' category, which was the lowest level of protection; and explicitly defined the remaining three classification areas to prevent their indiscriminate use." RELYEA, *supra* note 9, at 3.

materials."[28] Under Executive Order 11,652:

> [O]fficial information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of three categories . . . as follows:
> (A) "Top Secret." "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.
> (B) "Secret." "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.
> (C) "Confidential." "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be

[28] RELYEA, *supra* note 9, at 3 (citing Classification and Declassification of National Security Information and Material, Exec. Order No. 11,652, 37 Fed. Reg. 5,209 (Mar. 10, 1972) [hereinafter Exec. Order No. 11,652]); National Security Information, Exec. Order No. 12,065, 43 Fed. Reg. 28,949 (June 28, 1978).

> expected to cause damage to the national security.[29]

By way of the Executive Order, "[an] originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods and cryptography."[30] However, the Order also directed that "[n]o other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute."[31] In addition, it established protocol for lowering classification levels and "[d]eclassification."[32]

Executive Order 12,065 retained the same three-level scheme as Executive Order 11,652.[33] Executive Order 12,065 also directed that "[e]xcept as provided in the Atomic Energy Act of 1954, as amended, this Order provides the only basis for classifying information."[34] Furthermore, "[i]f there is reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used, or the information should not be classified."[35] The order further directs that:

> Declassification of classified information shall be given emphasis comparable to that accorded classification. Information classified pursuant to this and prior Orders shall be declassified as early as national security considerations permit. Decisions concerning declassification shall be based on the loss of the information's sensitivity with the passage of

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[29] Exec. Order No. 11,652 Introduction, § 1.
[30] *Id.* § 9.
[31] *Id.* § 1.
[32] *Id.* § 5. "Exemptions from [the Order's] General Declassification Schedule" were also set forth, *id.* § 5(B), as well as the requirement to "[r]eview . . . Exempted Material." *Id.* § 5(C).
[33] *See* National Security Information, Exec. Order No. 12,065 § 1–1, 43 Fed. Reg. 28,949 (June 28, 1978) ("1-102. 'Top Secret' shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security. 1-103. 'Secret' shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security. 1-104. 'Confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.").
[34] *Id.* § 1-101.
[35] *Id.*

> time or on the occurrence of a declassification event.[36]

In addition, "[c]lassified information constituting permanently valuable records of the Government, as defined by 44 U.S.C. 2103, and information in the possession and control of the Administrator of General Services, pursuant to 44 U.S.C. 2107 or 2107 note, shall be reviewed for declassification as it becomes twenty years old."[37] Furthermore, "[n]o person may be given access to classified information unless that person has been determined to be trustworthy and unless access is necessary for the performance of official duties."[38]

Executive Order 12,065 also discussed "Special Access Programs."[39] More specifically, under the Order:

> [Certain] [a]gency heads . . . may create special access programs to control access, distribution, and protection of particularly sensitive information classified pursuant to this Order or prior Orders. Such programs may be created or continued only by written direction and only by those agency heads and, for matters pertaining to intelligence sources and methods, by the Director of Central Intelligence. Classified information in such programs shall be declassified according to the provisions of Section 3. . . .
> Special access programs may be created or continued only on a specific showing that:
> (a) normal management and safeguarding procedures are not sufficient to limit need-to-know or access;
> (b) the number of persons who will need access will be reasonably small and commensurate with the objective of providing extra protection for the information involved; and

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[36] *Id.* § 3-301.

[37] *Id.* § 3-401. The Order also states that "the Secretary of Defense may establish special procedures for systematic review and declassification of classified cryptologic information, and the Director of Central Intelligence may establish special procedures for systematic review and declassification of classified information concerning the identities of clandestine human agents." *Id.* § 3-403. Nonetheless, "[t]hese procedures shall be consistent, so far as practicable, with the objectives of [certain other] Sections [of the Order]." *Id.* In addition, "[f]oreign government information shall be exempt from automatic declassification and twenty year systematic review. Unless declassified earlier, such information shall be reviewed for declassification thirty years from its date of origin." *Id.* § 3-404.

[38] *Id.* § 4-101.

[39] *Id.* § 4-2.

> (c) the special access controls balance the need to protect the information against the full spectrum of needs to use the information.[40]

Under President Ronald Reagan, the top secret/secret/confidential ranks stayed in force via Executive Order 12,356.[41] This Order directed that "[i]f there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority, who shall make this determination within thirty (30) days."[42] It also directed that "[i]f there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification pending a determination by an original classification authority, who shall make this determination within thirty (30) days."[43] In addition, "[t]his order expanded the categories of classifiable information."[44]

Following the Reagan and George H.W. Bush Administrations, "E.O. 12958 [signed by President William J. Clinton] set limits for the duration of classification, prohibited the reclassification of properly declassified records, [and] authorized government employees to challenge the classification status of records."[45] It also "reestablished [a] balancing test [from] E.O. 12065

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[40] *Id.* §§ 4-201-02. The Order also sets other requirements for special access programs. *See id.* §§ 4-203-04 ("All special access programs shall be reviewed regularly and, except those required by treaty or international agreement, shall terminate automatically every five years unless renewed in accordance with [proper] procedures . . . . Within 180 days after the effective date of this Order, agency heads shall review all existing special access programs under their jurisdiction and continue them only in accordance with [proper] procedures . . . . Each of those agency heads shall also establish and maintain a system of accounting for special access programs."); *id.* § 4-404 ("Records shall be maintained by all agencies that reproduce paper copies of classified documents to show the number and distribution of reproduced copies . . . of all documents covered by special access programs distributed outside the originating agency.").

[41] *See* National Security Information, Exec. Order No. 12,356, 3 C.F.R. 166, 166–67 § 1.1(a) (1983) ("National security information (hereinafter 'classified information') shall be classified at one of the following three levels: (1) 'Top Secret' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security. (2) 'Secret' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security. (3) 'Confidential' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.")

[42] *Id.* § 1.1(c), at 167.

[43] *Id.*

[44] RELYEA, *supra* note 9, at 4 (citing Richard C. Ehlke & Harold C. Relyea, *The Reagan Administration Order on Security Classification: A Critical Assessment*, 30 FED. BAR NEWS & J., 91, 91–97 (1983)).

[45] *Id.*

(weighing the need to protect information vis-a-vis the public interest in its disclosure)."[46] President Clinton also signed Executive Order 12,968, which "establishe[d] a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information."[47] This order directed that:

> Employees shall not be granted access to classified information unless they:
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> (1) have been determined to be eligible for access under . . . this order by agency heads or designated officials based upon a favorable adjudication of an appropriate investigation of the employee's background;
> (2) have a demonstrated need-to-know; and
> (3) have signed an approved nondisclosure agreement.[48]

Following a background check, and with U.S. citizenship a prerequisite,

> [E]ligibility for access to classified information shall be granted only to employees . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to . . . [properly work with] classified information.[49]

The Order also stated that "[e]mployees who are eligible for access to classified information . . . may . . . be reinvestigated if, at any time, there is reason to believe that they may no longer meet the standards for access established in this order."[50] The Order also mandates "periodic reinvestigations" after initial clearance.[51] In addition, the Order unambiguously states that "[t]he United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified

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[46] *Id*.
[47] Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).
[48] *Id*. § 1.2(c).
[49] *Id*. § 3.1(b) (This subsection allows "[e]xcept[ions] as provided in sections 2.6 and 3.3 of this order.").
[50] *Id*. § 3.4(b).
[51] *Id*.

information."[52] Obviously, such a statement is a remarkable change from Executive Order 10,450.

President Bush revised Executive Order 12,958 by way of Executive Order 13,292.[53] Executive Order 13,292 "eas[ed] the reclassification of declassified records; postpone[ed] the automatic declassification of protected records 25 or more years old[;] . . . [and] eliminat[ed] the requirement that agencies prepare plans for declassifying records."[54] President George W. Bush also revised Executive Order 12,968 by Executive Order 13,467.[55] This revision of Executive Order 12,968 inserted a "Sec. 3.5. Continuous Evaluation."[56] This new language states that "[a]n individual who has been determined to be eligible for or who currently has access to classified information shall be subject to continuous evaluation under standards (including, but not limited to, the frequency of such evaluation) as determined by the Director of National Intelligence."[57] Here,

> [f]or the purpose of this order:
> . . . .
> (d) "Continuous evaluation" means reviewing the background of an individual who has been determined to be eligible for access to classified information (including additional or new checks of commercial databases, Government databases, and other information lawfully available to security officials) at any time during the period of eligibility to determine whether

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[52] *Id.* § 3.1(c).

[53] Relyea, *supra* note 9, at 4; *see also* Further Amendment to Executive Order 12958, as Amended, Classified National Security Information, Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003); *1995 Executive Orders Disposition Tables*, OFF. OF THE FED. REG. (OFR), NAT'L ARCHIVES, https://www.archives.gov/federal-register/executive-orders/1995.html#12958 [https://perma.cc/S6RH-RBAS] (last visited Feb. 10, 2022); *2003 Executive Orders Disposition Tables*, OFF. OF THE FED. REG. (OFR), NAT'L ARCHIVES, https://www.archives.gov/federal-register/executive-orders/2003.html#13292 [https://perma.cc/YXV7-U8FE] (last visited Feb. 10, 2022).

[54] RELYEA, *supra* note 9, at 4–5.

[55] Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information, Exec. Order No. 13,467 § 3(b), 73 Fed. Reg. 38,103 (June 30, 2008) [hereinafter Exec. Order No. 13,467]; *see also 1995 Executive Orders Disposition Tables*, OFF. OF THE FED. REG. (OFR), NAT'L ARCHIVES, https://www.archives.gov/federal-register/executive-orders/1995.html#12968 [https://perma.cc/2K5K-YKK4] (last visited May 5, 2022); *2008 Executive Orders Disposition Tables*, OFF. OF THE FED. REG. (OFR), NAT'L ARCHIVES, https://www.archives.gov/federal-register/executive-orders/2008.html#13467 [https://perma.cc/8BMB-BM6R] (last visited May 5, 2022).

[56] Exec. Order No. 13,467 § 3(b)(i) (emphasis omitted).

[57] *Id.*

> that individual continues to meet the requirements for eligibility for access to classified information.[58]

In 2009, President Barack Obama signed Executive Order No. 13,526.[59] As with prior orders, this Order sets forth three classification categories for national security information: top secret, secret, and confidential.[60] The Executive Order defines these categories as follows:

> (1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.
> (2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.
> (3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.[61]

As before, the Executive Order also provides for the creation of "[s]pecial access program[s] established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level."[62]

Closer to the present, in 2017, Executive Order 13,764 altered Section 1.3(d) of Executive Order 13,467 to state that "'"Continuous evaluation (CE)' means a vetting process to review the background of an individual who has been determined to be eligible for access to classified information or to hold a sensitive position at any time during the period of eligibility"[63] and that "CE

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[58] *Id.* § 1.3.
[59] Classified National Security Information, Exec. Order No. 13,526, 3 C.F.R. 298, 298 (Dec. 29, 2009).
[60] *Id.* § 1.2(a) at 298–99.
[61] *Id.*
[62] *Id.* § 4.3(a) at 316; § 6.1(oo) at 325.
[63] Amending the Civil Service Rules, Executive Order 13,488, and Executive Order 13,467 to Modernize the Executive Branch-Wide Governance Structure and Processes for Security Clearances, Suitability and Fitness for Employment, and Credentialing, and Related Matters, Exec. Order No. 13,764, § 3(e), 82 Fed. Reg. 8,115 (Jan. 17, 2017).

leverages a set of automated record checks and business rules to assist in the on-going assessment of an individual's continued eligibility. CE is intended to complement continuous vetting efforts."[64] The Order additionally supplemented Executive Order 13,467 with a "[n]ew section[] . . . 1.3(f) . . . to read as follows: . . . (f) 'Continuous vetting' means reviewing the background of a covered individual at any time to determine whether that individual continues to meet applicable requirements."[65]

B. The SF-86

The primary form for national security clearances is the SF-86, which is ordinarily the start of clearance protocol.[66] The November 2016 SF-86 explicitly states that "[i]f you do not provide each item of requested information, . . . we will not be able to complete your investigation, which will adversely affect your eligibility for a national security position, eligibility for access to classified information, or logical or physical access."[67] Moreover, "[w]ithholding, misrepresenting, or falsifying

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[64] *Id*.

[65] *Id*. § 3(h).

[66] Akremi, *supra* note 7, at 999–1000 n.151 (citing ELIZABETH L. NEWMAN & ELAINE L. FITCH, SECURITY CLEARANCE LAW AND PROCEDURE 17 (3d ed. 2014); STANDARD FORM 86, *supra* note 22) ("The application process typically begins with an applicant completing a security questionnaire, Standard Form (SF) 86 . . . ."); *see* Dennis J. Sysko, *Understanding National Security Clearance Law*, *Recent Trends in National Security Law: Leading Lawyers on Balancing US National Security Concerns and the Rights of Citizens* *1 (2014), 2014 WL 2315050 ("The kick-off point for the application process is . . . the Standard Form 86 (SF86), which includes a ultra-detailed personal history, work history, numerous references, and specifics of where the individual has lived. . . . That information forms the baseline for the investigation.").

[67] STANDARD FORM 86, *supra* note 22, introductory pages (unnumbered). This version of the SF, which was revised in November 2016 and is the version that the author refers to throughout this Srticle, is the one available on the Office of Personnel Management's website. *See, e.g.*, *Standard Forms*, *Forms*, OFF. PERS. MGMT., https://www.opm.gov/forms/standard-forms/ [https://perma.cc/JHK4-6ESR] (last visited Mar. 6, 2022) (linking to STANDARD FORM 86, *supra* note 22). While the July 2017 Voice of Industry Newsletter of the Defense Security Service stated that "[t]he 2017 SF 86, Questionnaire for National Security Positions, will replace previous versions of the form on July 30, 2017[,]" *DSS Monthly Newsletter*, VOICE INDUS. NEWSL. (Def. Sec. Serv.), July 2017, at 2, https://www.dcsa.mil/Portals/91/Documents/CTP/tools/VOI_July_2017.pdf [https://perma.cc/STY2-BRCB], the Director of the National Background Investigations Bureau also stated that "[o]n July 30, 2017, the National Background Investigations Bureau (NBIB) enabled the 2016 SF 86 into the Electronic Questionnaires for Investigations Process (e-QIP) systems. The new form is available for use by investigative service providers (ISP)." FEDERAL INVESTIGATIONS NOTICE NO. 17-07: REVISED STANDARD FORM 86

information may . . . negatively affect your employment prospects and job status, and the potential consequences include . . . removal, debarment from Federal service, loss of eligibility for access to classified information, or prosecution."[68] The SF-86 explicitly notes that "[b]ackground investigations for national security positions are conducted to gather information to determine whether you are reliable, trustworthy, of good conduct and character, and loyal to the [United States]."[69] The SF-86 also makes clear that certain information beyond the questions asked may be sought, an interview is required for certain clearances, and "investigation may extend beyond the time covered by this form, when necessary to resolve issues."[70] The SF-86 takes an average of approximately two and a half hours to finish.[71]

The SF-86 begins with a request for basic information such as name, date of birth, Social Security number, and whether the applicant has had any prior names.[72] It also requests height, weight, hair and eye color, and sex.[73] The form continues with inquiries about the applicant's citizenship, including information about non-United States passports.[74] Residence history is next, which is limited to ten years in scope.[75] The SF-86 additionally requests the applicant's educational history, which, aside from "degree or diploma" awarding-institutions, is limited to ten years.[76] The applicant is asked to provide their last ten years of work history, including whether they have been

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IMPLEMENTATION, NAT'L BACKGROUND INVESTIGATIONS BUREAU, OFF. PERS. MGMT. 1 (Aug. 18, 2017), https://www.dcsa.mil/Portals/91/Documents/pv/GovHRSec/FINs/FY17/fin-17-07.pdf [https://perma.cc/3B6J-LNJB].

[68] STANDARD FORM 86, *supra* note 22, introductory pages (unnumbered).

[69] *Id.* The U.S. Supreme Court has stated the apparent opposite of the SF-86 in this regard. *See Dep't of Navy v. Egan*, 484 U.S. 518, 528 (1988). In the Court's view, "[a] clearance does not equate with passing judgment upon an individual's character. Instead, it is only an attempt to predict his possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information." *Id.* While "[i]t may be based . . . upon past or present conduct, [] it also may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States." *Id.* at 528–29.

[70] STANDARD FORM 86, *supra* note 22, introductory pages (unnumbered).

[71] *Id.*

[72] *Id.* §§ 1, 2, 4, 5 at 2.

[73] *Id.* § 5 at 2. Although the SF-86 requests the sex of the applicant, it does not request the applicant's gender identity. *Id.* Gender identity is explicitly included under sex, however, and sex is stated as non-grounds for granting or denying a clearance. *Id.* introductory pages.

[74] *Id.* §§ 9, 10 at 4–6.

[75] *Id.* § 11 at 7–10. Moreover, this information explicitly directs that "[y]ou are not required to list temporary locations of less than 90 days that did not serve as your permanent or mailing address." *Id.* § 11 at 7.

[76] *Id.* § 12 at 11–13.

subject to punitive measures or dismissed by an employer.[77] Notably, the punitive measures and dismissal questions are specifically limited to seven years.[78] The applicant is, however, also asked to list any "former federal civilian employment . . . NOT indicated previously"[79] as well as any military enrollment.[80] Similar to limits placed on other employment discipline, the form requests a seven-year window of disclosure of military discipline, including court martial, through the Uniform Code of Military Justice.[81]

The SF-86 queries whether the applicant has ever served in a foreign military or civilian government role.[82] The subsequent section asks for the applicant to list three references "whose combined association with [the applicant] covers at least the last seven (7) years."[83] The form further asks applicants to provide information about marriage, civil unions, domestic partnerships, and any current cohabitants, including citizenship information.[84] The application also requires the applicants to list their close relatives' names and citizenship.[85]

Continuing with the applicant's foreign ties, the form questions whether the candidate "ha[s] or ha[s] [] had, close and/or continuing contact with a foreign national."[86] Such contact is specifically limited to contact with persons to "whom [the candidate], or [the candidate's] spouse, or legally recognized civil union/domestic partner, or cohabitant are bound by affection, influence, common interests, and/or obligation."[87] This question has a seven-year scope.[88] If the applicant answers affirmatively, each entry contains questions regarding how the applicant has communicated with the foreign individual, how often communication occurred, and "the nature of [the] relationship" at issue.[89] The applicant must disclose whether they, their "spouse, legally recognized civil union/domestic partner, cohabitant, or dependent children" have ever "direct[ly]" engaged in foreign economic

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[77] *Id.* §§ 13A, 13C at 14–30.
[78] *Id.* §§ 13A.5, 13A.6, 13C at 17, 21, 25, 29–30.
[79] *Id.* § 13B at 30.
[80] *Id.* § 15 at 31.
[81] *Id.* § 15.2 at 32. However, discharge conditions must be listed for all military enrollments. *Id.* § 15.1 at 31.
[82] *Id.* § 15.3 at 33–34.
[83] *Id.* § 16 at 35 (emphasis omitted).
[84] *Id.* § 17 at 36–41.
[85] *Id.* § 18 at 42–59.
[86] *Id.* § 19 at 60.
[87] *Id.*
[88] *Id.*
[89] *Id.* § 19 at 60–63.

endeavors.[90] Further queries follow this question, including whether the applicant or the other same set of persons have ever had foreign monetary stakes that another person managed "on your behalf,"[91] or owns or plans to own any foreign real estate.[92] The form also asks the applicant whether they or the above-listed set of persons have received foreign government benefits in the last seven years.[93] Further life-scope foreign ties questions include whether the applicant has provided a foreign national with monetary assistance,[94] whether the applicant has obtained a foreign political position,[95] and whether the applicant has cast a ballot in a non-U.S. electoral contest.[96] Within a seven-year limit, the applicant is questioned about giving "advice or support" to foreign entities,[97] foreign employment overtures,[98] other foreign business endeavors,[99] foreign "conferences, trade shows, seminars, or meetings outside the U.S.,"[100] foreign government interactions,[101] and whether they have provided a foreign national with various types of sponsorship.[102] The form also asks the applicant about visits to foreign nations within a seven-year scope.[103]

The SF-86 asks several questions about mental health, including whether in the course of their life the applicant has been legally determined to be "mentally incompetent,"[104] has been sent via requirement of an administrative agency or a court directive to a mental health specialist,[105] has spent time with a mental health issue in a medical institution,[106] or has been

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[90] *Id.* § 20A.1 at 64. Matters of concern include "stocks, property, investments, bank accounts, ownership of corporate entities, corporate interests or exchange traded funds (ETFs) held in specific geographical or economic sectors . . . ." *Id.* "[F]inancial interests in companies or diversified mutual funds or diversified ETFS that are publicly traded on a U.S. exchange" need not be disclosed. *Id.*

[91] *Id.* § 20A.2 at 66.

[92] *Id.* § 20A.3 at 68.

[93] *Id.* § 20A.4 at 70. This question also asks whether the applicant or the same persons "are eligible to receive in the future . . . such benefit[s]." *Id.*

[94] *Id.* § 20A.5 at 72.

[95] *Id.* § 20B.8 at 80.

[96] *Id.* § 20B.9 at 80.

[97] *Id.* § 20B.1 at 73.

[98] *Id.* § 20B.3 at 74.

[99] *Id.* § 20B.4 at 75.

[100] *Id.* § 20B.5 at 76.

[101] *Id.* § 20B.6 at 77. This question includes the applicant's "immediate family" in its scope. *Id.*

[102] *Id.* § 20B.7 at 78.

[103] *Id.* § 20C at 81.

[104] *Id.* § 21A at 85.

[105] *Id.* § 21B at 87.

[106] *Id.* § 21C at 89.

determined to have one of several mental health problems, namely "psychotic disorder, schizophrenia, schizoaffective disorder, delusional disorder, bipolar mood disorder, borderline personality disorder, or antisocial personality disorder."[107] The form also asks if the applicant "ha[s] a mental health or other health condition that substantially adversely affects [their] judgment, reliability, or trustworthiness even if [they] are not experiencing such symptoms today."[108] If so, then the applicant may optionally disclose whether they "ever receive[d] or are [] currently receiving counseling or treatment," and whether they have complied with treatment requirements.[109]

The form asks the applicant whether they have been criminally convicted, charged, arrested, cited, or served a term of parole or probation within a seven-year window, or whether they are facing a criminal trial presently.[110] The form also asks the applicant whether they have a U.S. criminal conviction that led to one-year or longer term imprisonment or "been convicted of an[y] offense involving domestic violence," or faced felony charges or charges "involving firearms or explosives . . . [or] alcohol or drugs."[111] The form further asks if the candidate has ingested[112] or distributed illegal narcotics,[113] or has inappropriately ingested prescription medicine on purpose within a seven-year time period.[114] The form asks if they have taken illegal narcotics either at the same time they held a security clearance or during service "as a law enforcement officer, prosecutor, or courtroom official, or while in a position directly and immediately affecting the public safety" within their life.[115] The form also asks if the applicant has ever pursued, or been directed or been the recipient of a suggestion to pursue, treatment for illegal narcotics.[116] Similar questions follow regarding alcohol, most of which have a life scope.[117]

The applicant must state whether they have been vetted for and/or received a security clearance, if a conferred clearance has been rescinded or suspended, and whether any clearance request has been refused during their

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[107] *Id.* § 21D at 90.
[108] *Id.* § 21E at 93 (emphasis omitted).
[109] *Id.* § 21E at 93.
[110] *Id.* § 22.1 at 95–97.
[111] *Id.* § 22.2 at 99.
[112] *Id.* § 23.1 at 102.
[113] *Id.* § 23.2 at 103.
[114] *Id.* § 23.5 at 105 (§§ 23.1 and 23.2 are also seven-year scope questions).
[115] *Id.* §§ 23.3, 23.4 at 104. The form also raises these matters within the seven-year scope questions previously mentioned. *See id.* §§ 23.1, 23.2, 23.5 at 102–03, 105.
[116] *Id.* § 23.6 at 106; § 23.7 at 108.
[117] *Id.* §§ 24.1–24.4 at 109–12.

life.[118] Fiscal questions follow, and the SF-86 asks if the applicant has, within a seven-year window, made a bankruptcy filing,[119] received punishment for misuse of an employee credit card,[120] not met requirements for child support or alimony,[121] been on the receiving end of an entry of judgment,[122] faced a tax arrears "or other debt[]"-caused property lien,[123] missed a legally mandated tax payment or submission,[124] experienced a foreclosure,[125] had a loan in default,[126] had a liability given to collections,[127] lost a credit card for non-remittance,[128] been evicted after failing to pay rent,[129] "had wages, benefits, or assets garnished or attached for any reason,"[130] or, with regard to satisfying other fiscal liabilities, been behind more than 120 days.[131] The applicant is also asked if they "are currently delinquent on any Federal debt,"[132] if they "are currently over 120 days delinquent on any debt,"[133] or if gambling generated financial difficulties during their lives.[134]

The application further sets forth a series of questions regarding the applicant's "use of information technology systems"[135] and asks if the applicant has been "a party to any public record civil court action not listed elsewhere on this form."[136] The computer network questions have a seven-year scope, and the civil case question has a ten-year scope.[137] The application ends with a series of life-scope questions regarding the applicant's terrorism or revolutionary behavior or connections.[138]

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[118] *Id.* §§ 25.1–25.2 at 113–14.
[119] *Id.* § 26.1 at 115.
[120] *Id.* § 26.4 at 117.
[121] *Id.* § 26.6 at 118.
[122] *Id.*
[123] *Id.*
[124] *Id.* § 26.3 at 116.
[125] *Id.* § 26.7 at 120.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* § 26.6 at 118.
[133] *Id.* § 26.7 at 120.
[134] *Id.* § 26.2 at 116.
[135] *Id.* § 27 at 122–23.
[136] *Id.* § 28 at 124.
[137] *Id.* § 27 at 122–23; § 28 at 124.
[138] *Id.* § 29 at 125–29 (These Section 29 "Association Record" questions include § 29.5, which asks, "Have you EVER been a member of an organization that advocates or practices commission of acts of force or violence to discourage others from exercising their rights

C. Other Potential Requirements

Aside from the SF-86, an interview may take place.[139] Some candidates may be polygraphed.[140] A few agencies, such as the Drug Enforcement Agency, ask certain initial questions with longer scopes than the SF-86; regardless of whether such questions are depicted as for assessment of suitability,[141] they may be incorporated into evaluation for a national security clearance as National Security Adjudicative Guidelines direct that "[a]ll available, reliable information about [a] person, past and present, favorable and unfavorable, should be considered in reaching a

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under the U.S. Constitution or any state of the United States with the specific intent to further such action?" *Id*. at 128).

[139] *Id*. introductory pages (unnumbered).

[140] As two examples, polygraphs are conducted by both the Federal Bureau of Investigation, *Employment Eligibility*, FBIJOBS, https://www.fbijobs.gov/working-at-FBI/eligibility [https://perma.cc/62Y4-T4RU] (last visited Feb. 18, 2022), and the Central Intelligence Agency, *CIA Requirements, Careers Overview*, CENT. INTEL. AGENCY, https://www.cia.gov/cia-requirements/ [https://perma.cc/4CGL-G7JY] (last visited Feb. 18, 2022) ("All applicants must take part in a polygraph interview.").

[141] *See, e.g.*, DRUG ENFORCEMENT AGENCY, DRUG QUESTIONNAIRE, DEA FORM 341, 1 (expiration date Jan. 31, 2024), https://www.dea.gov/sites/default/files/2021-07/DEA-341_0.pdf [https://perma.cc/SDC5-BUZ2] (Asking "the date, if any, on which you last used . . . [illicit] substance[s]" with a life scope. The form states that "[t]he application of DEA's drug use policy guidelines, in conjunction with a case-by-case analysis, will determine if an applicant's prior drug usage or activity will result in the applicant's non-selection for employment with the DEA. Absent mitigating circumstances, an applicant will not be selected for employment if he or she used (or ingested anything containing) marijuana within the three (3) years preceding the date of the application for employment; or used any illegal drugs other than marijuana, within the ten (10) years preceding the date of the application for employment."); *see generally* William Henderson, *Employment Suitability Versus Security Clearance*, CLEARANCEJOBS (June 11, 2011), https://news.clearancejobs.com/2011/06/22/employment-suitability-versus-security-clearance/ [https://perma.cc/48GK-MX87] (describing the variance between security clearances and suitability assessment). Henderson notes "that suitability criteria can be influenced by the nature of the position for which you are applying, whereas security criteria is unaffected by the nature of the position. . . . For example, the Drug Enforcement Agency [sic] (DEA) [previously] consider[ed] applicants unsuitable for employment, if they ha[d] ever illegally used any drug. The only exception to this [was] for self-disclosed 'limited youthful and experimental use of marijuana.'"); *Before You Apply: Understanding Government Background Checks*, YALE L. SCH., https://law.yale.edu/student-life/career-development/students/career-pathways/public-interest/you-apply-understanding-government-background-checks [https://perma.cc/K4HA-CAP9] (last visited Feb. 20, 2022).

national security eligibility determination."[142] However, no agency asks for life scope on virtually every initial question. On the other hand, as mentioned previously, the SF-86 itself notes that "investigation may extend beyond the time covered by this form, when necessary to resolve issues."[143] Moreover, "[i]n addition to the questions on the form, inquiry also is made about [one's] adherence to security requirements, [one's] honesty and integrity, [one's] vulnerability to exploitation or coercion, falsification, misrepresentation, and any other behavior, activities, or associations that tend to demonstrate a person is not reliable, trustworthy, or loyal."[144]

II. THE BAR ADMISSIONS CHARACTER AND FITNESS PROCESS

A. Short History

In theory, "character and fitness requirements are designed to weed out candidates who are considered to be untrustworthy or unable to practice for one reason or another."[145] However, character and fitness review has been the subject of much scrutiny; as Professor Leslie Levin summarizes, "[t]he bar's character and fitness inquiry has no shortage of critics."[146] Recently, for example, Judge Justin Walker, then of the United States District Court for the

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[142] OFF. OF THE DIR. OF NAT'L INTEL., SECURITY EXECUTIVE AGENT DIRECTIVE 4: NATIONAL SECURITY ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION OR ELIGIBILITY TO HOLD A SENSITIVE POSITION 6 (June 8, 2017).
[143] STANDARD FORM 86, *supra* note 22, introductory pages (unnumbered).
[144] *Id*.
[145] Michael T. Kane, *The Role of Licensure Tests*, 74 BAR EXAM'R 27, 27 (Feb. 2005). Kane also states that "[t]he procedures used to evaluate character and fitness are not designed to identify candidates with especially good character or an especially high level of fitness, and the results of these evaluations are not expected to provide accurate predictions of future performance. Their function, rather, is to identify candidates whose past performance indicates a serious lack of character or fitness and who therefore represent a clear risk to the public." *Id*.
[146] Leslie C. Levin, *Rethinking the Character and Fitness Inquiry*, 22 PROF. LAW. 19, 19 (2014) (citing Jon Bauer, *The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act*, 49 UCLA L. REV. 93, 124–25, 150–52 (2001); Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 AKRON L. REV. 255 (2007); Sonya Harrell Hoener, *Due Process Implications of the Rehabilitation Requirement in Character and Fitness Determinations in Bar Admissions*, 29 WHITTIER L. REV. 827 (2008); Carol M. Langford, *Barbarians at the Gate: Regulation of the Legal Profession through the Admissions Process*, 36 HOFSTRA L. REV. 1193 (2008); Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984); Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985); Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U.L. REV. 331 (1995); Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character*, 82 ST. JOHN'S L. REV. 1037 (2008)).

Western District of Kentucky,[147] compared the "Bar Bureaucracy" in Kentucky to "an oil or drug cartel" with "a medieval approach to mental health that is as cruel as it is counterproductive."[148]

United States character and fitness review has immediate origins in England.[149] While "[h]istorically, public safety and promoting the general welfare of society have served as primary justifications for state regulation of licensed occupations,"[150] minorities and other groups have found themselves the desired target of the bar's character and fitness review in the past.[151] Character and fitness review's impact on women was severe.[152] Furthermore, "[m]uch of the initial impetus for more stringent character scrutiny arose in

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[147] Judge Walker is now a judge on the United States Court of Appeals for the District of Columbia Circuit. *Justin R. Walker*, U.S. CT. APP. D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+JRW [https://perma.cc/6BRZ-NGJ4] (last visited Dec. 21, 2021).

[148] Doe v. Sup. Ct. of Kentucky, 482 F. Supp. 3d 571, 575 (W.D. Ky. 2020).

[149] Lindsey Ruta Lusk, Note, *The Poison of Propensity: How Character and Fitness Sacrifices the "Others" in the Name of "Protection,"* 2018 U. ILL. L. REV. 345, 349 (2018). It is clear that "moral prerequisites were used as an exclusionary tactic to benefit the social status of attorneys." *Id.* at 350. Lusk notes that "barristers, in particular, were typically men from wealthy families with a high social status. Certification requirements for barrister admission were often waived for sons of these families, while strictly enforced to keep out others—men from 'presumptively unfit groups, including Catholics, tradesmen, journalists, and solicitors.'" *Id.* (quoting Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 494 (1985)). Additionally, "[b]eyond this classist use, there is no evidence that there was any systematic approach to character requirements, nor that they served any practical significance." *Id.* Furthermore, Lusk states that "[a]lthough the development of the American bar was deeply influenced by its British predecessors, there was actually very little substance—given the vague standards and haphazard enforcement—to inform American admissions standards." *Id.* at 351.

[150] Bobbi Jo Boyd, *Embracing Our Public Purpose: A Value-Based Lawyer Licensing Model*, 48 U. MEM. L. REV. 351, 355–56 (2017) (citing Dent v. West Virginia, 129 U.S. 114, 121–22 (1889)). *See also* Lusk, *supra* note 149, at 349 ("Character and Fitness . . . is rooted in the noble purpose of ensuring that only the most trustworthy and honest enter the profession, thereby protecting the public from those who might abuse the power lawyers wield.").

[151] LISA G. LERMAN, PHILIP G. SCHRAG & ROBERT RUBINSON, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 24 (5th ed. 2020). *See also* Boyd, *supra* note 150, at 371 ("Discrimination and bias have both excluded applicants seeking admission to the bar and hindered and obstructed the licensing process for other disadvantaged groups.").

[152] Kristen Clow, Note, *Mental Health and the Character and Fitness Examination: The Tide is Shifting*, 95 N.D. L. Rev. 327, 331 (2020). Clow notes that "[i]n . . . *In re Goodell*, the court stated that the: 'peculiar qualities of womanhood, its gentle graces its quick sensibility, its tender susceptibility, its parity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, [were] surely not qualifications for forensic strife.'" *Id.* (alteration in original) (footnote omitted) (quoting *In re Goodell*, 39 Wis. 232, 245 (Wis. 1875)).

response to an influx of Eastern European immigrants, which threatened the profession's public standing. Nativist and ethnic prejudices during the 1920s, coupled with economic pressures during the Depression, fueled a renewed drive for entry barriers."[153]

During the 1930s, the National Conference of Bar Examiners (NCBE) started offering bars "character and fitness investigation services."[154] In the 1990s, the current application began to take shape.[155] In 2001, NCBE began offering a downloadable form for candidates to enter character and fitness data, which involved mailing the data in hard copy and on floppy disk.[156] In 2003, the program's incarnation became "a modern web application with an interface that makes it possible to run in most standard web browsers without any additional software downloads, and all of the data is automatically uploaded and securely stored on NCBE servers."[157] As of September 2017, when twenty-nine bar admissions authorities incorporated investigative review by NCBE, NCBE retained twenty-three employees to conduct investigative work.[158] A bar admissions authority may choose to retain NCBE to scrutinize candidates based on an online application of the authority's creation.[159] Also, irrespective of whether a bar admissions authority retains NCBE to investigate candidates, the authority may employ NCBE's "Character Report Application."[160] Given the scope of NCBE's involvement in bar admissions, its form is by far the most relevant to consider when assessing what is asked of bar candidates.[161]

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[153] Rhode, *supra* note 149, at 499–500.

[154] Penelope J. Gessler & Kellie R. Early, *NCBE's Character and Fitness Investigation Services: A Look at the Present—A Vision of the Future*, 86 BAR EXAM'R 26, 26–31 (Sept. 2017).

[155] *Id.* at 27 n.2; *see also id.* at 27 ("More than 20 years ago, NCBE developed a character and fitness application form that has become 'the standard'—adopted in whole by many jurisdictions and adopted in part or liberally copied by the remaining jurisdictions, even if they do not use [NCBE's] investigation services.").

[156] Chris Christian, *NCBE Character and Fitness Investigations: The Electronic Application and Other Minor Processing Miracles*, 77 BAR EXAM'R 6, 6–7 (Feb. 2008).

[157] *Id.* at 7.

[158] Gessler & Early, *supra* note 154, at 26. In 2021, twenty-eight bar admission authorities incorporated NCBE investigative review. NATIONAL CONFERENCE OF BAR EXAMINERS, 2021 YEAR IN REVIEW 15 (2021), https://ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F302 [https://perma.cc/2X9P-D6GG].

[159] Gessler & Early, *supra* note 154, at 27.

[160] *Id.* at 26. As of September 2017, twenty-eight jurisdictions used NCBE's online application, while only two of those jurisdictions did not use NCBE's investigation services. *See id.* at 27 n.4. In 2021, twenty-five such entities employed the application. NATIONAL CONFERENCE OF BAR EXAMINERS, *supra* note 158, at 15.

[161] *See* Gessler & Early, *supra* note 154, at 27.

B. The National Conference of Bar Examiners Character and Fitness Form

The current NCBE Character and Fitness Form contains forty-five questions regarding the candidate's background.[162] The form begins with basic information regarding the candidate's name, birth date, sex, birth location, and citizenship.[163] The form also asks whether, during the course of their life, the candidate has filed "to register as a law student";[164] has requested to sit a bar examination;[165] has requested a Unified Bar Examination taken elsewhere be grounds for bar admission;[166] or has sought to be admitted to practice by motion.[167] The applicant is next asked if they have, within a life scope, sought bar admission via "diploma privilege";[168] logged themselves "as a foreign legal consultant"[169] or in-house lawyer;[170] or had or sought any other practice admission.[171] After admissions, the form moves to ask if the candidate has ever enrolled in any bar associations;[172] whether attorney discipline was imposed on the candidate at any time;[173] and whether "any charges, complaints, or grievances (formal or informal)" have been made against the candidate at any time either in their capacity as a lawyer[174] or as a result of claiming that they practiced law without permission.[175] The forms also asks the candidate if, at any time, they were removed from a case or sanctioned.[176]

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[162] NATIONAL CONFERENCE OF BAR EXAMINERS, STANDARD CHARACTER AND FITNESS FORM (Sample Application) (Jan. 1, 2021), https://www.ncbex.org/dmsdocument/134 [https://perma.cc/R5SR-D9UW] [hereinafter NCBE FORM].

[163] *Id*. "Personal Information." As the NCBE Form does not use page numbers, this article will cite to its question numbers. Since no question number is given for this requested information, its topic heading is referenced.

[164] *Id*. question 1.

[165] *Id*. question 2.

[166] *Id*. question 3.

[167] *Id*. question 4.

[168] *Id*. question 5.

[169] *Id*. question 6.

[170] *Id*. question 7.

[171] *Id*. question 8.

[172] *Id*. question 9. However, the candidate "do[es] not need to report membership when [they] were a law student." *Id*.

[173] *Id*. question 10.

[174] *Id*. question 11. The form uses the same quoted language in both this question and question 12.

[175] *Id*. question 12.

[176] *Id*. question 13.

Subsequent to bar admissions and discipline, the form turns to the candidate's educational history and inquires if the applicant has "engage[d] in law office study in lieu of receiving a J.D.";[177] requires the candidate to list every enrollment in law schools,[178] universities, and colleges;[179] and asks what, if any, punitive measures such institutions imposed upon them.[180] The candidate is asked to "[l]ist every permanent or temporary physical address where [they] have resided for a period of one month or longer for the last ten years or since age 18, whichever period of time is shorter."[181] They are instructed to chronicle "all employment and unemployment information for the last ten years or since age 18, whichever period is shorter. In addition, [the candidate must] list all law-related employment [they] have ever had"[182] and disclose any work-related punitive measures taken against them during their lifetime.[183]

The form asks if the candidate has served as a judge[184] or in the U.S. military.[185] With respect to enrollment in the military, candidates are required to disclose if they have faced court-martial, if they have been "awarded non-judicial punishment," if they were honorably discharged, if they were "allowed to resign in lieu of court-martial," or if they were "administratively discharged."[186] The next few questions involve whether the candidate has, in the course of their lives, obtained or sought "a license for a business, trade, or profession"[187] and whether such a license was rescinded or not granted.[188]

The application then turns to questions regarding "Character & Fitness."[189] The candidate is asked to disclose if, "as a member of another

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[177] *Id.* question 14.
[178] *Id.* question 15.
[179] *Id.* question 17.
[180] *Id.* questions 16, 18. Question 16 is quite detailed and asks, "Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled, requested to resign, allowed to resign in lieu of discipline, otherwise subjected to discipline, or requested to discontinue your studies by any law school?" Question 18 asks the same, substituting "any college or university" for "any law school." It is unclear, at least to this author, what "resigning" from an educational institution exactly means.
[181] *Id.* question 19 (emphasis omitted).
[182] *Id.* question 20.
[183] *Id.* question 21. This question, in part, asks the candidate to note if were "laid off [or] permitted to resign (in lieu of termination)."
[184] *Id.* question 22.
[185] *Id.* question 23.
[186] *Id.* questions 23(1)–23(5).
[187] *Id.* question 24.
[188] *Id.* question 25.
[189] *Id.* questions 26–31.

profession, or as a holder of public office," they have received any sort of punitive measure.[190] The form also asks if, in such a capacity, "any charges, complaints, or grievances (formal or informal)" have been made against them.[191] The candidate is also asked if "any surety on any bond on which you were the principal [has] been required to pay any money on your behalf."[192] They are further asked "[w]ithin the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?"[193] The application further queries the candidate regarding mental health problems and alcohol or narcotics issues "that in any way affect[] [their] ability to practice law in a competent, ethical, and professional manner."[194] If so, the candidate is also asked if "the [resultant] limitations . . . [are] reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program."[195] The candidate is additionally asked, if, during a five-year window, they "have . . . asserted any condition or impairment as a defense, in mitigation, or as an explanation for [their] conduct in" a variety of specific scenarios.[196]

The form further asks about the candidate's involvement in civil court cases,[197] "complaint[s] or action[s] . . . initiated against [them] in any administrative forum,"[198] convictions or arrests,[199] and traffic transgressions, which are generally limited to ten years in scope,[200] unless they embroiled narcotics or alcohol.[201] Within the scope of the previous decade, the candidate must also disclose their driver's licenses.[202]

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[190] *Id.* question 26.
[191] *Id.* question 27.
[192] *Id.* question 28.
[193] *Id.* question 29. This question is extremely problematic for reasons that this Article will discuss later in Part III.B.
[194] *Id.* question 30. The question includes the word "currently," which it defines as "recently enough that the condition or impairment could reasonably affect [the candidate's] ability to function as a lawyer." *Id.*
[195] *Id.*
[196] *Id.* question 31.
[197] *Id.* question 32.
[198] *Id.* question 33.
[199] *Id.* question 34. While this question's heading is "Criminal Action" (emphasis omitted), the question asks whether the candidate "[h]a[s] ever been cited for, arrested for, charged with, or convicted of *any violation of any law* other than a case that was resolved in juvenile court." *Id.* (emphasis added). The candidate is, however, told to "[o]mit traffic violations." *Id.*
[200] *Id.* question 36. This question specifically references "moving traffic violation[s]," and the candidate is told to "[o]mit parking violations." *Id.*
[201] *Id.* question 35.
[202] *Id.* question 37.

Nearing its end, the form seeks information on any educational loan defaults,[203] further debt defaults,[204] late debt payments,[205] late tax monies,[206] and bankruptcy.[207] The candidate also must state if they "[h]ave . . . ever had a credit card or charge account revoked."[208] All these questions are within a life scope,[209] except for the question pertaining to late debts.[210] The form concludes with a request that the candidate specify references[211] and offers an opportunity for the candidate "to provide additional information or further explain any of [their] previous responses."[212]

C. Forms in States That Do Not Use the NCBE Form

As noted previously, although many states use the NCBE Form, many others do not.[213] While this Article focuses on the NCBE Form given its widespread use, other bar applications may be more or less taxing in various ways than the NCBE Form, entirely at the discretion of the states at issue. Alaska, for example, has a less demanding form than the NCBE; for instance, it only requires six work positions to be listed.[214] In a ten-year window, Connecticut requires applicants to provide duplicates of every non-Connecticut bar application submitted.[215]

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[203] *Id.* question 39.

[204] *Id.* question 40 (The question asks if "you [have] ever defaulted on any debt other than a student loan that was not resolved in bankruptcy.")

[205] *Id.* question 41.

[206] *Id.* question 42. The form, however, does not ask about tax paperwork submissions.

[207] *Id.* question 43.

[208] *Id.* question 38. If bankruptcy proceedings disposed of the matters in question, they do not need to be disclosed in the answer. *Id.*

[209] *See id.* questions 38, 39, 40, 42, 43.

[210] *See id.* question 41. This question is limited to any "debt that has been more than 120 days past due within the past three years that was not resolved in bankruptcy." *Id.*

[211] *Id.* question 44.

[212] *Id.* question 45.

[213] *See supra* Part II.A.

[214] *See, e.g.*, *Admission Application*, ALASKA BAR ASS'N, https://admissions.alaskabar.org/browseform.action?applicationId=5&formId=1 [https://perma.cc/USH5-HHUZ] (last visited Feb. 19, 2022); *id.* § D, question 9 (last visited Feb. 19, 2022).

[215] *E.g.*, FORM 1E, APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY IN CONNECTICUT BY EXAMINATION, CONN. BAR EXAMINING COMM. (Bar Examination) 7, question 21 (July 2022), https://www.jud.ct.gov/cbec/July22/Form1E.pdf [https://perma.cc/QV3M-YFJD] ("Have you EVER filed an application for admission to the bar and/or to sit for the bar examination in a jurisdiction other than Connecticut? . . . Submit a copy of each application filed within the last ten years." (emphasis omitted)); FORM M1, APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY IN CONNECTICUT, CONN. BAR

D. Other Potential Requirements

While the character and fitness form is the primary step in the character and fitness process of bar admission, states are still free to impose different and additional requirements for licensure beyond character and fitness review and the bar examination.[216] New York, for instance, mandates "an in-person character and fitness interview [with] each candidate."[217] Highest state courts determine admissions protocol in the majority of states.[218] In others, the legislature and high court are both involved.[219] The Superior Court is responsible in Connecticut.[220]

III. THE NATIONAL SECURITY CLEARANCE PROCESS AND NCBE BAR ADMISSIONS PROCESS COMPARED

A. Scope and Content of Questions

The most notable distinction between the SF-86 and the NCBE Form is the drastic difference in the timeframes imposed for many of their respective questions. In the vast majority of questions, the NCBE Form seeks

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EXAMINING COMM. (Admission Without Examination) 7, question 24 (revised Jan. 2020), https://www.jud.ct.gov/cbec/Motion/Form%20M1_Savable21.pdf [https://perma.cc/M67R-U6Y3] ("List below all applications for admission to the bar and/or to sit for the bar examination filed in a jurisdiction other than Connecticut. . . . Submit a copy of each application filed within the last ten years.").

[216] For more, albeit incomplete, information regarding state requirements for licensure beyond the bar examination and standard character and fitness review, see COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, 2022 NAT'L CONF. OF BAR EXAM'RS & A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, Chart 13 & Supplemental Remarks, https://reports.ncbex.org/comp-guide/charts/chart-13/ [https://perma.cc/6DAW-S6NS] (last visited Apr. 29, 2022) [hereinafter 2022 COMPREHENSIVE GUIDE].

[217] *Admission by Exam or on Motion*, *Admissions to the New York Bar*, *The Legal Profession*, N.Y. STATE UNIFIED CT. SYS., https://ww2.nycourts.gov/attorneys/admissions/admission.shtml [https://perma.cc/U2W9-KEZG] (last visited Feb. 5, 2022).

[218] LERMAN, SCHRAG & RUBINSON, *supra* note 151, at 19. The 2022 COMPREHENSIVE GUIDE lists "[w]hat authority promulgates the rules for admission" broken down state by state. 2022 COMPREHENSIVE GUIDE, *supra* note 216, Chart 1 & Supplemental Remarks, https://reports.ncbex.org/comp-guide/charts/chart-1/ [https://perma.cc/5NMT-C8DA] (last visited Apr. 29, 2022).

[219] 2022 COMPREHENSIVE GUIDE, *supra* note 216, Chart 1 & Supplemental Remarks.

[220] *Id*.

the candidate's entire life history when it asks a question.[221] However, while the SF-86 also asks a substantial number of questions with life scope, the SF-86 limits its scope of inquiry to a narrower window of time in a notably higher percentage of questions than does the NCBE Form.[222] In other words, the NCBE Standard Form is much broader in scope and looks much deeper into an applicant's past than does the SF-86.

When the questions on the two forms are compared, the overlap is substantial in some ways, but not in others. First, the questions on the SF-86 relating to prior security clearances are reasonably equated to the NCBE's questions about prior licensure; both regard the candidate's prior access to the type of privilege that they are now requesting. However, while the SF-86 and NCBE Forms respectively inquire if an applicant has ever sought a clearance or license,[223] the SF-86 limits its questions beyond that to whether a clearance has been rescinded, suspended, , or refused.[224] While recission or suspension in this SF-86 question equates to disbarment or suspension for an attorney, the NCBE Form goes much further in its query on bar discipline and asks if the attorney has received discipline at any level in their lifetime or has received a complaint, even if no discipline was imposed.[225] The SF-86 also does not include questions elsewhere on professional complaints or discipline, nor does it ask if the applicant has held any form of professional license, whereas that the NCBE Form asks such questions outside of an attorney context without time-limitation.[226]

In terms of educational background, the SF-86 asks for life scope only for "degree[s] or diploma[s]."[227] While, unlike the SF-86,[228] the NCBE Form limits its requests to post-secondary instruction, it uses life scope both for institutions attended and additional questions on discipline imposed.[229] While

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[221] The NCBE Form lists forty-five numbered questions; the author treats the form as composed of forty-six questions (designating one question as two different queries), of which thirty-six (approximately 78.26%) are life-scope and eight (approximately 17.39%) have a time-limited scope.

[222] Twenty-nine numbered sections are on the SF-86; the author addresses it as composed of eighty-seven questions, of which forty (approximately 45.98%) are life-scope and forty (approximately 45.98%) have a time-limited scope. The author does not address Section 13C as a component of the eighty-seven questions.

[223] STANDARD FORM 86, *supra* note 22, § 25.1 at 113; NCBE FORM, *supra* note 162, questions 1–8 (question 1 relates to "Law Student Registration").

[224] STANDARD FORM 86, *supra* note 22, § 25.2 at 114.

[225] NCBE FORM, *supra* note 162, questions 10–13.

[226] *Id.* questions 24-27 (question 25 pertains to "License Denial/Revocation").

[227] STANDARD FORM 86, *supra* note 22, § 12 at 11.

[228] *See id.*

[229] NCBE FORM, *supra* note 162, questions 15–18.

both forms limit the scope of employment that needs to be listed in time,[230] the SF-86 only asks about work-related disciplinary matters within a seven-year scope.[231] The NCBE Form, on the other hand, asks about any work-related discipline, regardless of severity, in the applicant's lifetime.[232] Although both the SF-86 and NCBE Form ask if the candidate has had any military enrollment,[233] the SF-86 mostly limits questions about military discipline and crime to seven years.[234] Furthermore, whereas the NCBE Form asks applicants to disclose complaints made against them "as a holder of public office,"[235] the SF-86 does not.

Court-related questions are also less expansive on the SF-86. Civil actions are limited to ten years,[236] and many criminal matters are limited to seven.[237] The NCBE Form expands these scopes to life[238] (aside from traffic violations)[239] and adds a life-scope question about administrative actions.[240]

In terms of financial matters, the most crucial distinction is that the SF-86 only asks if the applicant has been late with a tax submission or payment in the last seven years or presently owes the federal government money (tax-related or otherwise).[241] Other financial issues are mostly limited to a seven-year window as well.[242] On the other hand, the NCBE Form asks fewer financial questions, but most are life-scope, including bankruptcy,[243] which is under a seven-year window for the SF-86.[244]

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[230] STANDARD FORM 86, *supra* note 22, § 13A at 14; NCBE FORM, *supra* note 162, question 20 (except for "all law-related employment," which is required to be noted with a life scope). *But see* STANDARD FORM 86, *supra* note 22, § 13B at 30 (asking about federal employment with a life scope).
[231] STANDARD FORM 86, *supra* note 22, §§ 13A.5, 13A.6, 13C at 17, 30.
[232] NCBE FORM, *supra* note 162, question 21.
[233] STANDARD FORM 86, *supra* note 22, §§ 15, 15.1, 15.3 at 31, 33; NCBE Form, *supra* note 162, question 23.
[234] *See* STANDARD FORM 86, *supra* note 22, §§ 15.2, 22.1 at 32, 95. The SF-86 does require listing service discharge categories and certain military crimes with a life scope. *See id.* §§ 15, 15.1, 22.2 at 31, 99.
[235] NCBE FORM, *supra* note 162, question 27.
[236] STANDARD FORM 86, *supra* note 22, § 28 at 124.
[237] *See id.* § 22.1 at 95; *but see* § 22.2 at 99.
[238] NCBE FORM, *supra* note 162, questions 32, 34, 35.
[239] *Id.* question 36.
[240] *Id.* question 33.
[241] STANDARD FORM 86, *supra* note 22, §§ 26.3, 26.6 at 116, 118.
[242] *See id.* §§ 26.1, 26.4, 26.5, 26.6, 26.7 at 115, 117, 118, 120; *but see* § 26.2 at 116.
[243] *See* NCBE FORM, *supra* note 162, questions 38–40, 42–43; *but see* question 41.
[244] STANDARD FORM 86, *supra* note 22, § 26.1 at 115.

Unlike the NCBE Form, the SF-86 contains a number of questions regarding the applicant's foreign ties and own citizenship.[245] The NCBE Form also does not contain any questions in line with the SF-86's queries regarding terrorism-related or similar activities[246] or computer access.[247] Furthermore, the SF-86 asks a number of mental health questions with a life scope,[248] and asks applicants to answer alcohol and drug abuse questions with a seven-year window,[249] except for life-scope queries about alcohol and drug counseling[250] and drug activity as a security clearance holder or the like.[251] In comparison, the NCBE Form only asks if the applicant has contended that "any condition or impairment" has impacted or driven their behavior during a five-year window[252] or if the applicant has a relevant "condition or impairment" presently.[253] Additionally, unlike the NCBE Form,[254] the SF-86 does not have a broad-based "catch-all" type question.

B. Reasonableness/Relevance of Questions

Before reviewing the reasonableness and relevance of the questions on the SF-86, it is worth briefly considering their legality. As a baseline, the government has a "'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."[255] While "required [SF-86] disclosures are invasive, [they] have nevertheless withstood constitutional challenge."[256] As such, this Section approaches the question of what should be asked on the SF-86 with the expectation that the Executive is acting legally in asking particular questions

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[245] *Id.* §§ 9, 9.1, 9.2, 9.3, 9.4, 10.1 at 3–5.
[246] *See id.* §§ 29.1, 29.2, 29.3, 29.4, 29.5, 29.6, 29.7 at 125–29.
[247] *See id.* §§ 27.1, 27.2, 27.3 at 122–23.
[248] *Id.* §§ 21A, 21B, 21C, 21D at 85, 87, 89–90. *But see id.* §§ 21D, 21D.1, 21E at 92–93.
[249] *Id.* § 23.1, 23.2, 23.5, 24.1 at 102–03, 105, 109.
[250] *See id.* §§ 23.6, 23.7, 24.2, 24.3, 24.4 at 106, 108, 110–12.
[251] *See id.* §§ 23.3, 23.4 at 104.
[252] NCBE FORM, *supra* note 162, question 31.
[253] *Id.* question 30.
[254] *See id.* question 29 (described as "a catch-all question" in Derek Davis, Harv. L. Sch. Ctr. on Legal Pro., *A Higher Bar: Revisiting Character and Fitness in the Profession*, 4 THE PRAC.: CHARACTER AND FITNESS (Mar./Apr. 2018)).
[255] Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980)).
[256] Akremi, *supra* note 7, at 999 n.151 (citing NEWMAN & FITCH, *supra* note 66, at 17). In an explanatory parenthetical, Akremi states that Nat'l Fed'n of Fed. Emps. v. Greenberg, 983 F.2d 286, 287–88, 295 (D.C. Cir. 1993) "uph[eld] [the] use of the Department of Defense's security clearance application form, which serve[d] the same purpose and ask[ed] comparably searching questions as [the] SF 86." *Id.*

of applicants, but is not necessarily making the optimal policy decision in doing so.

On the SF-86, first and foremost, loyalty to the United States is extremely important, and citizenship of the applicant is a basic disclosure that makes perfect sense, as is prior and dual citizenship. Asking about employment and residences within a ten-year period is a reasonable way to glean information about an applicant. Whether the applicant has registered for the Selective Service System pertains directly to national security and loyalty to the United States. Military history is also relevant for the same reason, as is service in a foreign military. Asking for close personal family members' information is reasonable since problematic affiliations in this regard can directly affect national security. Foreign ties also directly relate to a candidate's loyalty to the United States. Time-limited mental health and alcohol and drug use inquiries are also appropriate since a substance abuse problem can pose a security risk. However, some of the mental health questions that are life scope appear excessive, especially in asking whether the candidate has ever been in in-patient psychiatric treatment.

The SF-86's criminal conduct questions also appear reasonable and relevant. Felony charges or convictions are very serious matters that directly weigh on whether a candidate can appropriately handle national security information. While many of the SF-86's substance-based questions are time-limited, some are not, which in many instances seems to overextend their usefulness.

Questions regarding prior security clearances seem appropriate for a life scope. A government debarment inquiry is also relevant, as debarment indicates that a candidate may be poorly suited to work in a government position of significant responsibility. While financial mistakes can indicate risk of either exploitation or irresponsibility, the SF-86 mostly limits these questions to seven years in scope, with gambling as a notable exception. As such, the financial questions generally appear quite reasonable.[257] Asking if a candidate has accessed a computer network inappropriately within seven years is also a reasonable question with a reasonable window. Life questions regarding terrorism are also perfectly appropriate with a life scope, as a person who has terrorist ties or has engaged in terrorism should not hold a national security clearance. Moreover, failing to ask such a question, extreme though it might be, opens the door to an inappropriate "catch-all" question, such as what appears on the NCBE Form.

[257] Bankruptcy, however, might appropriately still be considered with a life scope given the enormous financial difficulties that often precede it.

On the NCBE Form, while many of the questions are seemingly relevant, some are questionable. For instance, there seems to be very little reason to examine if an applicant has ever missed a tax filing or payment in their lifetime. While current tax delinquency might well be cause for concern, a missed tax filing or payment from over a decade ago does not impact someone's ability to be an attorney. Moreover, there is no need to ask tax questions as a separate item at all. The form could expand the debt question explicitly to include taxes, a reasonable modification since no disclosure would be required if the applicant paid off all their taxes more than three years ago. Finally, flawless tax compliance is extraordinarily difficult in many situations and should not be used as a metric of an applicant's character and fitness.[258] The same issues arise with most of the other life scope questions regarding finances, where a ten-year scope also would appear to be more than sufficient.[259]

The form's inquiries about charges and complaints over ten years old are likewise excessive; actual convictions are much more relevant, although less so with time.[260] While a recent conviction or even allegation might have some merit, a charge or a complaint that led to no action or negative finding is not relevant ten years later. [261] Moreover, the term "public office" makes asking about such complaints extremely problematic since "[t]he dividing line between public offices and public employment generally is often hard to draw."[262] A ten-year time limited review of traffic violations that explicitly

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[258] The difficulties and complexities of tax law render unblemished compliance with tax requirements at least potentially extremely difficult. Two very burdensome taxes with which to comply are use taxes and the requirement to file taxes when working temporarily in another state. Given the difficult nature of tax compliance, candidates from a disadvantaged background are also more likely to be at high risk of non-compliance in some aspect of tax law and need to make disclosures.

[259] However, for the reasons noted above, bankruptcy might also be appropriately reviewed with a life scope on the NCBE Form.

[260] *See infra* Part IV.A.

[261] *See infra* Part IV.A.

[262] Fleming Bell, *What's a "Public Office"?,* COATES' CANONS NC LOCAL GOV'T L. (Feb. 17, 2010), https://canons.sog.unc.edu/2010/02/whats-a-public-office/ [https://perma.cc/F5X5-G4S3]; *see* 63C AM. JUR. 2D *Public Officers and Employees* § 2, Westlaw (database updated Feb. 2022) ("Whether a person holds a public office rather than mere employment does not depend upon what the particular office in question may be called, but upon the power granted and willed, the duties and functions performed, and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation.").

excludes parking tickets appears relevant, although not extremely so.[263] Requiring ten-year disclosure of drivers' licenses seems similarly appropriate, both for traffic violation purposes and for verifying other information.

Closely related, the relevance of attorney discipline shy of disbarment or suspension over ten years old does not seem especially relevant either. Something mild that happened in the past is of little consequence a decade later. Suspension or disbarment, however, is sufficiently serious that life-long disclosure is almost certainly appropriate.

The NCBE form's catch-all provision is perhaps the most inappropriate question on the entire form and requires applicants to speculate as to what might constitute problematic behavior. Such speculation is made particularly difficult given the extensive number of specific questions applicants must directly answer. Bar admissions inquiries need to be specifically tailored to their goals. If the bar investigators cannot come up with everything that they think they should ask, then it should not be upon the applicant to fill in the gap. While the burden of showing satisfactory character and fitness to practice law falls on the applicant, defining the scope of how that burden is met should fall on the investigator/adjudicator. In comparison, the SF-86 has no such catch-all provision. Even in matters of national security, the applicant is not expected to guess at what they might have done beyond the form that could be potentially problematic.

C. Comparison of Other Aspects of the Processes

As noted previously, both national security clearances and bar admissions may or may not always require an interview depending on the clearance at issue and the state. Another item of note is the thoroughness of the investigations. Regarding bar admissions, NCBE specifically notes that "[a]s part of each investigation, NCBE sends inquiries to the appropriate sources to verify information disclosed by the applicant in the character and fitness application."[264] Moreover, NCBE "conduct[s] analysis to detect inconsistencies and to discover undisclosed information."[265] Furthermore, NCBE's "inquiries request sources to provide any information relevant to the

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[263] One useful change would be to specify that if a traffic violation is reduced to a lesser non-moving violation of any civil law (including, but specifically not limited to, a parking ticket), the applicant does not need to disclose the lesser violation.
[264] Gessler & Early, *supra* note 154, at 26.
[265] *Id.*

applicant's character and fitness to practice law."[266] Similarly, the SF-86 makes clear that "[t]he information you provide on this form may be confirmed during the investigation, and may be used for identification purposes throughout the investigation process."[267]

Aside from interviews and verification, it is also worth noting that when an applicant is admitted to the bar in a jurisdiction, they do not need to take the bar examination again, nor are they subject to having their character and fitness reassessed at future intervals or monitored simply to maintain the license that they have been awarded. However, national security clearances function differently; as the various executive orders regarding security clearances make clear, scrutiny does not simply end after the candidate has received approval on a single occasion.[268] In addition, an individual can obtain a law license without planning to practice law and can keep the license if they do not need it. National security clearances can only be acquired if a candidate needs the clearance for government work.[269] At that work's

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[266] *Id.* at 26–27. Gessler and Early note that "[f]or example, [NCBE's] employment inquiry requests verification of dates of employment and position held but also specifically asks the employer to comment on the applicant's character and fitness." *Id.* at 27.

[267] STANDARD FORM 86, *supra* note 22, introductory pages (unnumbered).

[268] Protocol in this regard is evolving. Lindy Kyzer, *Periodic Reinvestigations Are Out, Continuous Vetting Is In for Security Clearance Holders*, GOV'T EXEC. (Mar. 11, 2020), https://www.govexec.com/management/2020/03/periodic-reinvestigations-are-out-continuous-vetting-security-clearance-holders/163695/ [https://perma.cc/A6QM-VMVW] ("In a significant change to personnel security policy, agencies are being encouraged to enroll all applicants for security clearances into continuous vetting and eliminate periodic reinvestigations." Doing so "is an effort to create a clearance system that's agile and better able to identify risks as they occur, not at 5-year or 10-year intervals."). *See also Continuous Evaluation: Frequently Asked Questions (FAQ)*, OFF. DIR. NAT'L INTEL., NAT'L COUNTERINTELLIGENCE & SEC. CTR. questions 3, 16 (Sept. 2020), https://www.dni.gov/files/NCSC/documents/products/CE_FAQ_Sep_2020.pdf [https://perma.cc/C2ZZ-KAXN] ("3. What was the impetus for CE? Implementing CE is a key component of the government-wide effort to modernize security clearance processes and increase the timeliness of information reviewed between periodic reinvestigation cycles. Mandated by Executive Order (E.O.) 13467, as amended, and 5 U.S.C § 11001, CE automated record checks are the cornerstone of the broader Continuous Vetting framework that is addressed by the ongoing Trusted Workforce initiative.") and ("16. Will CE replace clearance reinvestigations? No; however, some periodic reinvestigations are deferred if no security-relevant issues exist and the individual is enrolled in CE. Under the broader government-wide Continuous Vetting framework developed by the Trusted Workforce 2.0 initiative, the reinvestigation requirement will remain but they will be performed based on an event- or risk-driven model rather than a calendar-driven model.").

[269] Lindy Kyzer, *How to Obtain Security Clearance*, CLEARANCEJOBS (Feb. 11, 2021), https://news.clearancejobs.com/2021/02/11/obtain-security-clearance/ [https://perma.cc/8BWY-HTJS].)

conclusion, the individual only possesses a two-year long "current" clearance.[270]

D. Effectiveness of the Processes

While certainly not flawless,[271] the national security clearance process generally seems to work. In the 2017 fiscal year, 4,030,625 persons qualified for a security clearance.[272] 2,831,941 (approximately 70%) of those had actual use of classified information.[273] That fiscal year, of 10 intelligence agencies, clearance recission rates ranged from 0.0% to 2.3%, and clearance refusal rates ranged from 0.0% to 5.9%.[274] In the 2016 fiscal year, 4,080,726 persons qualified for a security clearance[275] (2,840,053, also approximately 70%, of those had actual use of classified information).[276] That fiscal year, of ten intelligence agencies, clearance recission rates ranged from 0.0% to 2.3%, and clearance refusal rates ranged from 0.0% to 6.6%.[277] Although an incomplete picture, these figures show that security clearance recission and refusal are infrequent and suggest that the national security clearance process is generally successful.

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[270] *Id.* ("Policy dictates that a clearance is 'current' for a period of two years after leaving service. If you move out of a cleared job and into another within that period, your clearance can be easily reinstated – assuming your investigation hasn't expired.").

[271] *See, e.g.*, GEOFFREY S. CORN, JIMMY GURULÉ & JEFFREY D. KAHN, NATIONAL SECURITY LAW AND THE CONSTITUTION 671 (2017) (citing Jill Lawless, *Guardian: We Have Published 1 Pct of Snowden Leak*, ASSOCIATED PRESS (Dec. 3, 2013), https://sports.yahoo.com/news/guardian-published-1-pct-snowden-163503415.html [https://perma.cc/E4JP-4KEU]) (summarizing Edward Snowden's disclosure of classified information).

[272] OFF. DIR. NAT'L INTEL., NAT'L COUNTERINTELLIGENCE & SEC. CTR., FISCAL YEAR 2017 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS 5 (2017).

[273] *Id.* at 4.

[274] *Id.* at 8 ("The difference in the percentage of denials and revocations among agencies can be attributed to the various processes employed by those agencies. For example, some agencies may discontinue security processing due to automatic disqualifiers found during a suitability for federal employment review before the case reaches the security clearance and adjudication phase. Some of these cases may be cancelled by human resources before security clearance determinations are rendered, and as a result, are not categorized as security clearance denials. Other IC agencies consider all relevant information in their security clearance adjudicative processes. These IC agencies render security clearance denials based upon the totality of the information contained in the case files, which results in a higher percentage of denials. In FY 2017, denials increased by 0.5 percent from FY 2016, and revocations increased by 0.6 percent from FY 2016.").

[275] OFF. DIR. NAT'L INTEL., NAT'L COUNTERINTELLIGENCE & SEC. CTR., FISCAL YEAR 2016 ANNUAL REPORT ON SECURITY CLEARANCE DETERMINATIONS 4–5 (2016).

[276] *Id.*

[277] *Id.* at 9 (containing a similar note to that in the 2017 Annual Report detailed in *supra* note 272).

Turning to bar admissions, first and foremost, it is worth noting that discipline against attorneys is rare. The American Bar Association's 2019 Survey on Lawyer Discipline Systems (S.O.L.D.) tallied an estimated 1,120,766 active status attorneys in the United States.[278] However, only an estimated 69,716 complaints were filed across the country.[279] Combined with an estimated 20,279 pre-existing unresolved matters,[280] an estimated 89,995 complaints were "live" in 2019, amounting to a "live" complaint filed against a total of approximately 8.03% of active status attorneys.

Of the 89,995 "live" complaints, an estimated 32,997 (approximately 36.67%) were dispatched on their face.[281] An estimated 45,642 were probed.[282] Of those, an estimated 27,870 were terminated following an inquiry.[283] Probable cause was only ultimately met to charge approximately 5,652 attorneys,[284] representing approximately 6.28% of all live complaints, or approximately 0.50% of all active status attorneys. An estimated 2,124 attorneys experienced "private / non-public discipline,"[285] representing

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[278] A.B.A. CTR. FOR PRO. RESP. STANDING COMM. ON PRO. REGUL., SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) 3 (2019) [hereinafter 2019 S.O.L.D.]. The survey does not note any distinction between whether an attorney is in active or other status regarding complaints or discipline. *See, e.g.*, *id.* at 1–3, 5–7, 15–17, 20–24. The author uses the number of active status attorneys as the baseline number of attorneys for computing figures, but does so with the caveat (and acknowledgement) that, since attorneys in other statuses can be subject to complaints and discipline, using only active status attorneys in this Article's figures is an incomplete lens for regulating attorney discipline. Also, throughout the 2019 S.O.L.D., various places do not contain information relating to some authorities. *See, e.g.*, *id.* Introduction to the 2019 S.O.L.D. Results, 4, 40–41.

[279] *Id.* at 3. This figure does not include "Complaints Handled Separately by [a] Central Intake/Consumer Assistance Program." *Id.* at 3. Such information is requested as a compartmented category "[i]f the total number of complaints received by the agency excludes matters handled by Central Intake or other Consumer Assistance Program." A.B.A. CTR. FOR PRO. RESP. STANDING COMM. ON PRO. REGUL., 2019 QUESTIONNAIRE, SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D) 7 (2019) (included at the end of 2019 S.O.L.D.). If such situations resulted in actions that were discipline-like or discipline, it is not entirely clear whether their outcomes would have appeared in other S.O.L.D. figures. *See, e.g.*, 2019 S.O.L.D., *supra* note 278, at 17.

[280] 2019 S.O.L.D., *supra* note 278, at 7.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.* at 17 (cleaned up). Here, whether certain types of actions constitute discipline is determined differently across authorities, and total disciplinary figures for each authority are calculated differently in different authorities' entries in this part of the chart. *See id.* at 15–19. Even using the combined figures from all total estimates from subsets of "private / non-

approximately 0.19% of all active status attorneys. An estimated 2,308 attorneys received some form of public punishment; probation was assigned to an estimated 297 attorneys (representing approximately 0.03% of active status attorneys); an estimated 988 attorneys were suspended (representing approximately 0.09% of active status attorneys); and an estimated 565 attorneys were disbarred (representing approximately 0.05% of all active status attorneys).[286] Overall, compared to an estimated 1,120,766 active status attorneys, only an estimated 4,432 attorneys were subject to any form of discipline (representing approximately 0.40% or one in two-hundred fifty active status attorneys).[287]

That discipline is imposed on approximately one in two hundred fifty attorneys suggests that the character and fitness process is not failing to properly screen out attorneys who might be problematic. Notably, in Alaska, which has a less arduous application form than the NCBE Form,[288] there were 3,096 active status attorneys and 212 complaints tallied in the 2019 S.O.L.D.[289] When combined with 119 pre-existing unresolved matters,[290] 331 complaints were "live" in that year, amounting to a "live" complaint being filed against approximately 10.69% of active status attorneys. Of those complaints, 194 (approximately 58.61%) were dispatched on their face.[291] 84 were probed.[292] Of those, 7 were terminated following an inquiry.[293] Probable cause was only ultimately met to charge a single attorney,[294] representing approximately 0.30% of all live complaints, or approximately 0.03% of all active status attorneys. No attorney actually experienced "private / non-public discipline[e],"[295] and a single attorney received public punishment

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public" actions that attorneys experienced that are both discipline-like and discipline, the new total estimate would only increase to 2,918 attorneys, or approximately 0.26% of active status attorneys. *Id.* at 17 (cleaned up).

[286] *Id.* at 24. Disbarment includes both disbarment that the attorney in question accepted and disbarment that the attorney did not agree to. *Id.* at 24. "Interim suspensions" are not involved in these estimated figures for suspended attorneys. *Id.* at 24 (cleaned up). Texas's suspension figures in this part of the chart encompass probation figures. *Id.* at 25.

[287] Incorporating the higher figure of 2,918 attorneys referenced *supra* note 285, the total would rise to 5,226 (approximately 0.47% of all active status attorneys).

[288] *See Admission Application*, *supra* note 214 (the author notes that he last viewed the *Alaska Bar Association Admission Application* on February 19, 2022, which is, obviously, more recently than the information compiled in the 2019 S.O.L.D.).

[289] 2019 S.O.L.D., *supra* note 278. Alaska does not have a "Central Intake or Consumer Assistance Program." *Id.*

[290] *Id.* at 5.

[291] *Id.* at 5.

[292] *Id.* at 5.

[293] *Id.* at 5.

[294] *Id.* at 5.

[295] *Id.* at 15 (cleaned up).

("admonished / reprimanded / censured").[296] As such, of 3,096 active status lawyers in Alaska, 1 (approximately 0.03%) received any form of discipline.[297] Accordingly, Alaska's approach of using a less panoptic application than the NCBE Form does not seem to have led to a less desirable outcome in terms of attorney discipline than appears nationwide.[298]

As such, both security clearance refusals and withdrawals, as well as the general frequency of discipline against attorneys (including in Alaska, a jurisdiction with a less demanding application than the NCBE Form), are overall quite low, indicating that the two processes are overall effective.

IV. ANALYSIS AND RECOMMENDATIONS

A. The Current Character and Fitness Process Is Too Broad and Operates in a Way That Conflicts with Other Goals of the Legal Profession

The national security clearance process limits the scope of questions on the SF-86 significantly. While some agencies have questions with wider scopes as previously described, no entity asks questions with a consistent life-scope.[299] On the other hand, the NCBE Form asks questions that cover the applicant's entire lifetime much more consistently. As described above, the questions on the SF-86 generally appear to have a valid relation to national security. The items on the NCBE Form are more questionable.

Turning to the scope of the two forms' questions, Shon Hopwood, who was once convicted of a felony and is now an Associate Professor of Law at Georgetown University Law Center,[300] notes that "social science research says that someone who has five years of clean conduct—whether in

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[296] *Id.* at 20 (cleaned up).

[297] This extraordinarily low percentage is also not unique to the timeframe of the 2019 S.O.L.D. The 2015 Survey on Lawyer Discipline Systems indicates that out of 3,102 active status attorneys in Alaska, 6 (approximately 0.19%) were subject to some form of discipline. *See* A.B.A. CTR. FOR PRO. RESP. STANDING COMM. ON PRO. REGUL., SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) 1, 13, 17 (2015). For that time period, Alaska also did not have a "Central Intake or Consumer Assistance Program." *Id.* at 1.

[298] In this comparison of Alaska and the national data, as well as in analyzing the national data generally, the author acknowledges the limitation that the data used in this Article are not further broken down to allow comparison of rates of complaints and discipline in states that use the NCBE Form with rates in states that do not.

[299] *See supra* Part I.C.

[300] *Shon Hopwood*, GEO. UNIV. L. CTR., https://www.law.georgetown.edu/faculty/shon-hopwood/ [https://perma.cc/NDE2-H5WH] (last visited Dec. 21, 2021).

the context of a criminal issue or an addiction issue—is at very low risk to commit a new crime or to relapse."[301] According to Professor Hopwood,

> [t]his five-year guideline does not mean automatic admittance, but it should help bar associations be more consistent in their policies about whom to admit and when. . . . If there was a five-year guideline, it would change bar associations from looking for the unicorn to admit, to looking for the unicorn not to admit.[302]

Moreover, "rules which bar [persons] from a legal career may perpetuate criminal recidivism, race-based discrimination, and underrepresentation of racial minorities in the legal profession, all of which are undoubtedly bad for the bar and worse for society."[303] Diversity is currently a prominent goal of the profession; the American Bar Association, for instance, includes "eliminat[ing] bias and enhanc[ing] diversity" as one of its four stated "Association Goals."[304] Excluding or hindering candidates on grounds that have a disproportionate consequence for members of minority groups not only fails to advance diversity in the legal profession, but also actively impinges its progress.[305]

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[301] Shon Hopwood & David P. Wilkins (Conversation), Harv. L. Sch. Ctr. on Legal Pro., *Against the Odds: Shon Hopwood on Reforming the Character and Fitness Requirement*, *Speaker's Corner*, 4 THE PRAC.: CHARACTER AND FITNESS (Mar./Apr. 2018), https://thepractice.law.harvard.edu/article/against-the-odds/ [https://perma.cc/GC9Y-934J].

[302] *Id.*

[303] Sydney Wright-Schaner, *The Immoral Character of "Good Moral Character": The Discriminatory Potential of the Bar's Character and Fitness Determination in Jurisdictions Employing Categorical Rules Preventing or Impeding Former Felons from Being Barred*, 29 GEO. J. LEGAL ETHICS 1427, 1434–35 (2016). While Wright-Schaner makes this statement referring to felons facing automatic licensure refusal, any sort of exclusionary admissions practice will likely have such an effect.

[304] POL'Y & PLAN. DIV., AM. BAR ASS'N, AMERICAN BAR ASSOCIATION POLICY AND PROCEDURES HANDBOOK 1 (2021–2022) (cleaned up); *see also, e.g.*, CONN. BAR ASS'N, STRATEGIC DIVERSITY AND INCLUSION PLAN: A FRAMEWORK FOR INCLUSION AND GROWTH 1 (adopted Oct. 5, 2015) ("The ultimate goal of the Diversity and Inclusion Plan is to have a genuine, sustainable diverse and inclusive environment within the Connecticut Bar Association ('CBA') throughout its membership and the Connecticut legal community at large in accordance with the CBA's Diversity and Inclusion Policy.").

[305] *See* T. Anthony Brown, *Bar Admission Question Is Illegal and Harms Diversity*, BLOOMBERG L. (Feb. 16, 2022), https://news.bloomberglaw.com/us-law-week/bar-admission-question-is-illegal-and-harms-diversity [https://perma.cc/PM79-LUQC]. Referencing that New York "not only ask[s] individuals to disclose incidents that ended in conviction, but any incident in the criminal justice system, regardless of justification or outcome[,]" the President of the New York State Bar Association states that "th[is] obstacle[] . . . looms large and dissuades untold numbers of individuals—especially people of color—

Furthermore, as Lindsey Ruta Lusk notes, "Character and Fitness stands in direct contradiction to a fundamental principle of evidence: the inadmissibility of character evidence to prove someone guilty or liable."[306] There are a number of reasons for this forbiddance:

> The primary concerns with character evidence are: (1) that jurors will give such evidence too much weight in their deliberations of the present charge, and (2) that jurors might use character to justify condemning someone regardless of the present charge or strength of evidence. . . . The prohibition on character evidence is also supported by the fact that character traits are not predictive of future behavior. . . . Behavior is more likely the result of immediate circumstances.[307]

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from ever embarking on the journey to induction. This impediment must be immediately removed if we are truly serious about improving diversity, equity, and fairness in our legal system." *Id.* He also states that this query "disproportionately impacts would-be attorneys of color, as ample data shows that members of Black, Latino, and other non-White communities are more likely to interact with the criminal justice system and therefore more likely to have to answer 'yes.'" *Id.* (also noting that "[a] 2018 analysis found Blacks make up only 15% of the New York population, but account for 38% of total arrests." Brown further notes that:

> [l]aw school deans of admissions, who are required by their accrediting agency, the American Bar Association, to not admit students who do not appear capable of being admitted to the bar, mirror [the query] on their own applications. Law school deans say there is ample anecdotal evidence that this question is deterring minority applicants, many of whom already face significant financial, academic, and bias-driven obstacles to entry.

Id. He argues that "[a]ny factor in the education pipeline—from elementary school on—that acts as a headwind to the legal industry's diversity crisis must be removed if we are to make progress on this intractable problem." *Id.* He makes the additional point that "[o]f those who do answer truthfully regarding their past criminal justice involvement, very few are actually denied admission to the bar, though they do undergo additional—and sometimes quite costly—scrutiny from Character & Fitness Committees, begging the question as to its utility." *Id.*

[306] Lusk, *supra* note 149, at 377.

[307] *Id.* (footnotes omitted) (but also expressing that "[t]he problem with such evidence is not that it is not relevant. Rather, the problem is that such evidence can cause *unfair prejudice*." *Id.* (cleaned up) (quoting GEORGE FISHER, EVIDENCE 153 (3d ed. 2013))). It is also worth noting that a 2013 report found "that many answers on [Connecticut] bar admission forms were statistically associated with an elevated risk of future discipline . . . . But the report also concluded that such variables 'nevertheless make very poor predictors of subsequent misconduct.'" Davis, *supra* note 254. It made this determination, noting that "even if some variable (e.g., having defaulted on a student loan) doubles the likelihood of subsequent disciplinary action—a very strong effect—the probability of subsequent discipline for

Overall, the character and fitness process not only asks multiple questions of questionable relevance in a way that the SF-86 does not, but also extends too far backward in scope beyond what is necessary to vet candidates properly, negatively impacting minorities, hindering diversity in the legal profession, and exacerbating the problems of using character evidence.

B. The Bar Admissions Character and Fitness Process Should More Closely Parallel the National Security Clearance Process

Given the effectiveness of the national security clearance process, the bar admissions process would overcome its major shortcomings by adopting the practices of the national security clearance process, which is more narrowly focused than the character and fitness process. Most importantly, bar applications should be limited in scope to reviewing no more than ten years of applicant history for all but the most serious issues.

Professor Hopwood argues that:

> a five-year guideline . . . would [be] [a] . . . small change in focus [that] would allow those communities that are overrepresented in the criminal justice system and underrepresented in the legal profession to be admitted to the profession. There is little doubt in my mind that the legal profession needs the perspective of people who went through struggle and came out the other side a better person.[308]

It is not readily apparent if Professor Hopwood advocates for not asking applicants any information outside of a five-year window, only considering conduct within a five-year scope but asking potentially a wider window, or only narrowing review to five years if the applicant has no disclosures in that time frame. It is not also completely clear whether he advocates that all bar application questions should be limited in their time frame, or just some depending on their subject. However, his argument supports the more time-limited approach taken in the SF-86. Just as the SF-86 can reasonably and effectively vet candidates for national security access without using a life scope for every question, so too can and should the bar process.

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someone with a student loan default is still only 5%." *Id.* (quoting a 2013 report that the Law School Admission Counsel commission).

[308] Hopwood & Wilkins (Conversation), *supra* note 301.

However, whereas Professor Hopwood advocates a five-year scope, a slightly longer scope might, in fact, be more appropriate. Even if Professor Hopwood's conclusion that recidivist behavior is unlikely after a five-year gap is entirely accurate, extending an additional five years would provide significant additional review of an applicant's background that might provide valuable additional information, but not go so far as to be overbearing or unfair to the applicant.[309] Moreover, there are a few items in an applicant's potential past that likely should be queried with a life scope. Felony convictions, suspension or disbarment from the legal profession or other professions, and bankruptcy should be among and most likely the only questions reviewed within a life scope timeframe.

Furthermore, as previously discussed, the SF-86 generally asks questions that have a clear relationship to an applicant's ability to properly handle classified information. The character and fitness process asks many queries with little relevance to its goals. Dropping unnecessary questions about unfounded complaints, tax filings of any amount of money, and vague catch-all provisions regarding any negative conduct that the applicant has engaged in (and must guess at) would also improve the process significantly.

Finally, one aspect of the national security clearance process that should not be adopted for bar admissions is its never-ending review after a clearance is initially approved. It is worth noting that Australia has an interesting alternative to United States licensure, as annual re-admission is functionally mandated there.[310] "[R]enewal applications include questions similar to United States Character and Fitness questionnaires--asking about bankruptcy, violations of law, or other questionable conduct. Applicants are also required by law to disclose any pertinent information not necessarily asked for."[311] Opining that "annual relicensing would be difficult in the United States—which has many more lawyers than Australia,"[312] Professor Levin has also stated that "periodic relicensing (e.g., every five years) would allow regulators to track the actual behavior of lawyers in practice, rather than make judgments at the outset of an applicant's career about whether that

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[309] Obviously, a ten-year range, or even the five-year review that Professor Hopwood advocates, does not remove the concerns that Lusk raised as discussed *supra* Part IV.A.

[310] Lusk, *supra* note 149, at 362. Lusk notes that "[f]or example, in New South Wales, practitioners must reapply from April to June of each year." *Id.* at 362 n.155. Lusk also notes that "[t]his renewal is different than simply participating in continuing legal education, the primary requirement in United States jurisdictions." *Id.* at 362.

[311] *Id.* at 362–63 (footnote omitted).

[312] Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement*, 2014 B.Y.U. L. REV. 775, 816 (2015).

individual is likely to be a problem lawyer."[313] However, given the low rates of discipline for U.S. attorneys, as previously described, such protocol or any other form of continued scrutiny[314] is unnecessary and risks repeatedly causing all the difficulties imposed by the initial character and fitness process. Any benefits are almost certain to be less than the burdens inflicted and problems caused.

Overall, despite the value of a slightly more extensive scope than Professor Hopwood advocates, and potential merit in retaining a few questions about the most serious possible misconduct on the character and fitness form with a life scope, most questions should be dramatically reduced in their timeframe. The current extensive scope used in the bar admissions process makes the process far more difficult than it needs to be and has the potential to keep applicants out of the profession for no valid reason. Furthermore, the questions should be more directly linked to relevant issues affecting attorneys. As described above, the low rate of attorney discipline in the United States does not indicate a crisis of attorney competence or integrity that seriously impacts the legal profession and merits the screening at issue. Since the stakes are higher in national security matters than in bar admissions, and since the national security clearance process is generally effective (as it leads to few clearance refusals and withdrawals),[315] there is no reason that the bar admissions process should be more demanding of applicants than what is asked of candidates for national security clearances. Moreover, the very low amount of discipline imposed on attorneys in Alaska, which has a more limited bar application than the NCBE Form, further indicates that the bar application should be restrained.

CONCLUSION

Both national security clearances and licenses to practice law place tremendous trust in their holders. The protocols in place for awarding both clearances and licenses are very rigorous. However, while the SF-86, the primary form used for the national security clearance process, asks intrusive and burdensome questions, these queries are generally more directly linked with the intended outcomes of the clearance process than the questions on the NCBE Form. Moreover, the SF-86 limits more of its questions in scope to a reasonable time period than the NCBE Form. Accordingly, the national

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[313] *Id.*

[314] For example, a character and fitness scheme that parallels how this aspect of national security protocol is evolving.

[315] *See supra* Part III.D.

security clearance process's SF-86 is a good template for bar admissions reform, which would improve greatly by adopting bar applications that more closely resemble SF-86 security clearance applications.