A photograph of the United States Capitol building in Washington, D.C., featuring its iconic white dome and classical columns, set against a clear blue sky with some greenery in the foreground.

# The Legislator's Guide to Background Screening

*An Inside Guide on the U.S.'s  
Criminal Data Environment and  
How Background Checks are Performed*

## Introduction

Legislators are key decision makers in the regulations surrounding employment background screening. There are many federal and states laws in existence which mandate screening for certain types of workers. Much of this legislation not only requires screening but dictates the process or methodology with a large percentage requiring background checks be submitted through a home state repository and the FBI. There is also key legislation surrounding the rights of the consumer as dictated in the Fair Credit Reporting Act (FCRA) when criminal history is used in hiring decisions.

What if using a state repository and the FBI database caused millions of reports every year to include inaccuracies, preventing individuals from gainful employment? What

if these databases had gaping holes and missing records, which allowed predators to gain access to vulnerable populations?

What if there was a more reliable and efficient way to screen that afforded protection for consumers?

There is no if. The FBI database has serious flaws. It is not the highest quality screen. Its inaccuracies unfairly preclude people from employment as well as allow others to screen clear. And it offers citizens ZERO consumer protection. There is a better way to screen for employment purposes.

*The following provides a comprehensive review of:*

- › [The complex data environment of U.S. criminal records](#)
- › [Why state repositories and the FBI database have enormous limitations](#)
- › [The impact of faulty FBI screens on consumers](#)
- › [How a commercial grade screen is different and more comprehensive](#)

*Contrary to popular opinion, the FBI Database does not provide the highest quality screen.*

What is a background check? Simply said, *a background check is the compiling of public records associated with someone's criminal or civil history.* Because the data is publically available it is a commodity. But if it's publically available then why such differences between fingerprinting and a commercial grade background screen? The difference lies in the method in which the data is collected and aggregated.

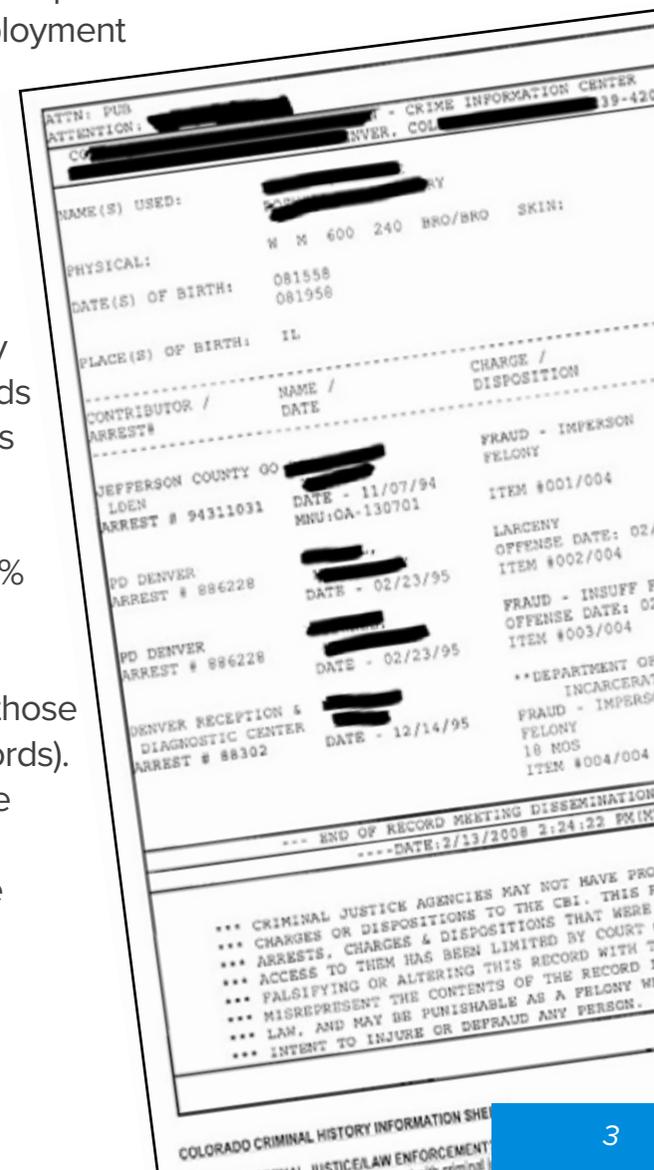
## A Complex Data Environment

There are 3,144 counties in the U.S., each with its own court system or systems, and approximately 5,400 courts. There is no standardization across the country relating to criminal records. For example, there is no consistency in the personal identifiers provided within records. One jurisdiction may include full name, DOB and address. Other jurisdictions may only include full name and age. Name variations also create challenges. An individual can have multiple AKAs (*also known as*) names because of nicknames, maiden names or aliases. The way in which names are entered is problematic as well. Names with hyphens, apostrophes or other symbols can be keyed in numerous ways.

This creates challenges to identifying every record that may belong to an individual. Unique identifiers such as Social Security numbers are rarely provided within court records, which is a huge misconception. Background screening for employment purposes does not occur by keying in a SSN with records suddenly appearing. That's TV. Not reality.

There is no database, either held by the FBI or commercially available, which contains records from every county in the U.S. It's simply impossible. At best, a commercial database includes records from approximately 50% of U.S. courts (over 400 million criminal records), and the FBI database has about a tenth of those (around 40 million criminal records). The most complete and reliable records are never found in a database; they are found at the county level, which is the court of record.

*Rap Sheets typically have limited personal identifiers, and even those can be wrong.*



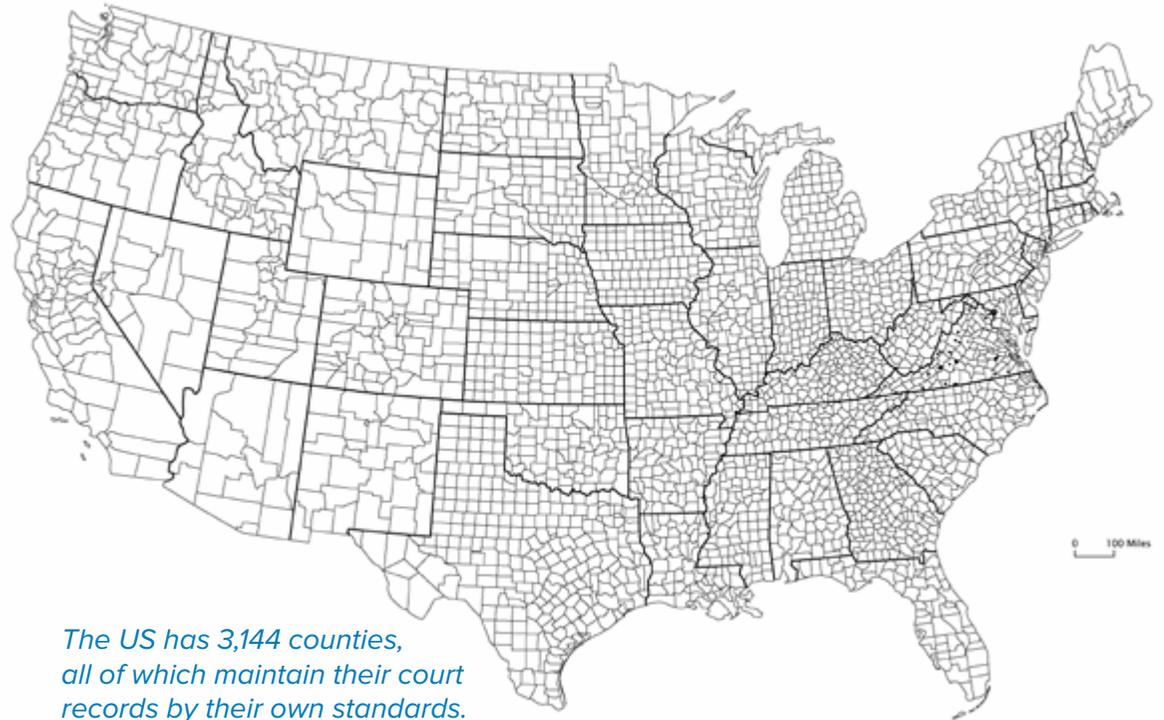
### Are “National” databases a better source?

Although it has over 10 times the amount of records as the FBI database, a commercial database should still never be used as a single source. There are countless examples of the inaccuracies that can befall users of these databases including missed records, incomplete records or the association of criminal histories to the wrong person. Unfortunately, some unscrupulous vendors have sold these to employers as a reliable search.

These databases do have a critical purpose as a secondary source to find records outside of an individual’s residential history. But no record should be reported directly from a database without verification at the court of record. A national record locator is an essential tool in a quality screen but never a single source.

#### *Legislative Note:*

To ensure protection for consumers and accuracy in reporting, legislators can create language that restricts the reporting of a record directly from a database without verification at the court of record.



*The US has 3,144 counties, all of which maintain their court records by their own standards.*

## State Repositories: Limitations & Concerns

A state repository does not gather or collect records from public agencies within its borders. It only receives records. Every jurisdiction within the state must send arrest and subsequent disposition information to the state. Because it's a receiver, not a gatherer, gaps and holes are inevitable. Some jurisdictions like Maricopa County in Arizona, which includes Phoenix and represents a population of over four million, do not report any records to the state or any other repository. If you need to find a record there, you have to go to the source - the county court. **The 2010 U.S. Justice Department Survey of State Criminal History Information Systems revealed additional problems of statewide databases:**

- › 23 states report that less than 60% of their arrest records include final disposition.
- › Only seven states reported that 90% or more felony charges have a final disposition. (Maryland reported only 5% of felonies had dispositions!)
- › For arrests in the last five years, there were six states that reported less than 40% of these had final dispositions; the lowest being California (11%), which has a population of over 38 million, representing more than 12% of the U.S. population.
- › In 2010, there were 3,492,900 felony arrests in the U.S. in which fingerprinting was conducted. The backlog for unprocessed or partially processed fingerprint cards for the FBI database was 215,597. Thus over 16% of felony arrests in 2010 were not part of the FBI database at the end of that year.
- › Proper Linking: Many states use codes or tracking numbers to link arrest and disposition information. This requires any agency who touches the record to tag it with this tracking system; the accuracy and completeness of information hinges on there being no errors in the tracking numbers, which is highly unlikely.

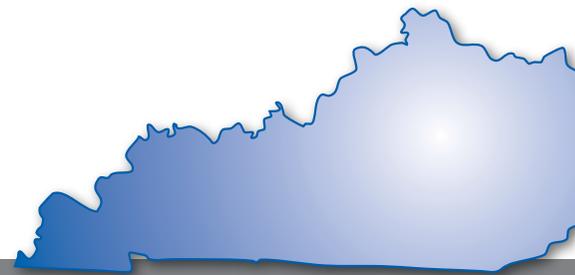
*Since Phoenix doesn't report to the FBI Database, if someone commits a crime here and is checked via fingerprint, they could screen clear for teaching or healthcare positions across the country.*

## State Repositories (cont.)

### The Missing Misdemeanor

Other offenses that may be missing are misdemeanors. These charges do not get added to rap sheets in many states because law enforcement agencies do not fingerprint for these violations. In Texas, only Class B misdemeanors or greater are reported to the state repository. Class C misdemeanors are not reported and could include: public intoxication, bad checks, simple assault and petty theft.

Even if a candidate was a lifelong resident of one state, there is no guarantee that the FBI database has all the criminal record files from every county in that state. And the records they do have could be riddled with errors.



*Disposition Data:*  
For Kentucky, only:  
**39%** of all arrests  
**18%** of arrests in last 5 years  
**32%** of all felonies  
*had dispositions!\**

*A Typical Example:*  
In 2010, if a school district in Kentucky screened an applicant with a Kentucky arrest, there was less than a one-third chance the disposition would be available.

If that same person was screened via the FBI for a teaching job in Idaho, there is a 16% chance the arrest record would not even be present.\*

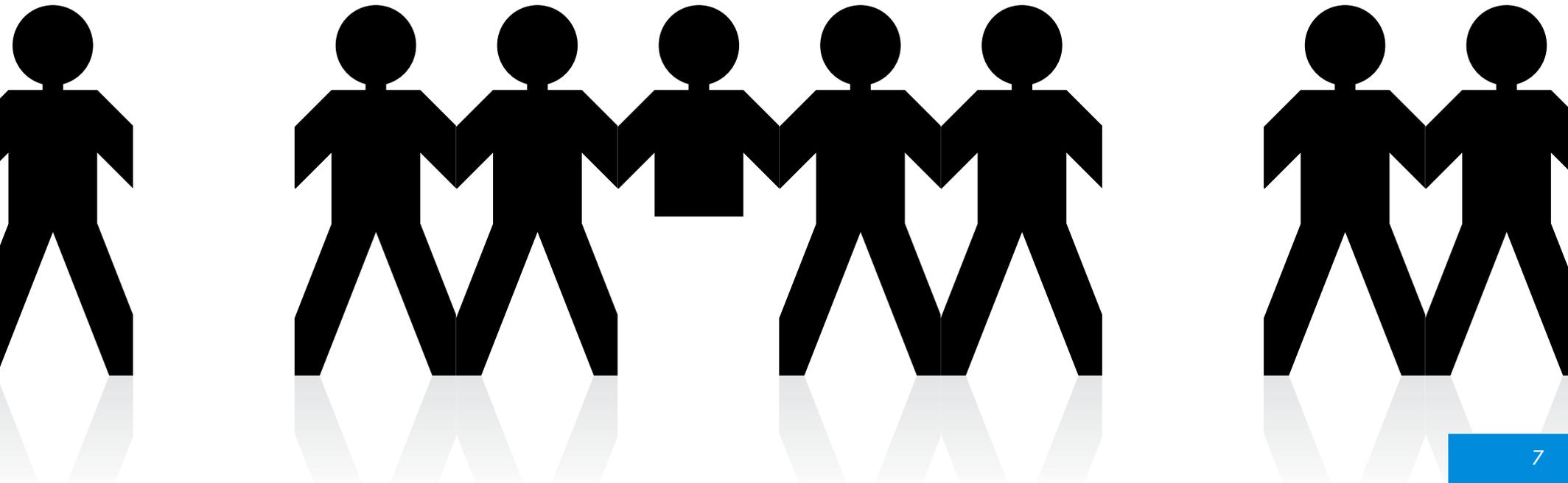
*\*According to 2010 U.S. Justice Dept. Survey of State Criminal Information Systems*

## FBI Database: Flaws & Shortcomings

The National Employment Law Project (NELP) recently submitted a report entitled, **“Wanted: Accurate FBI Background Checks for Employment”** highlighting the inaccuracies of the FBI Criminal Database. The report found that over 50% of the FBI’s records do not include final dispositions or outcomes. NELP’s report shined an important light on how these inaccuracies can have a dramatic impact on job seekers.

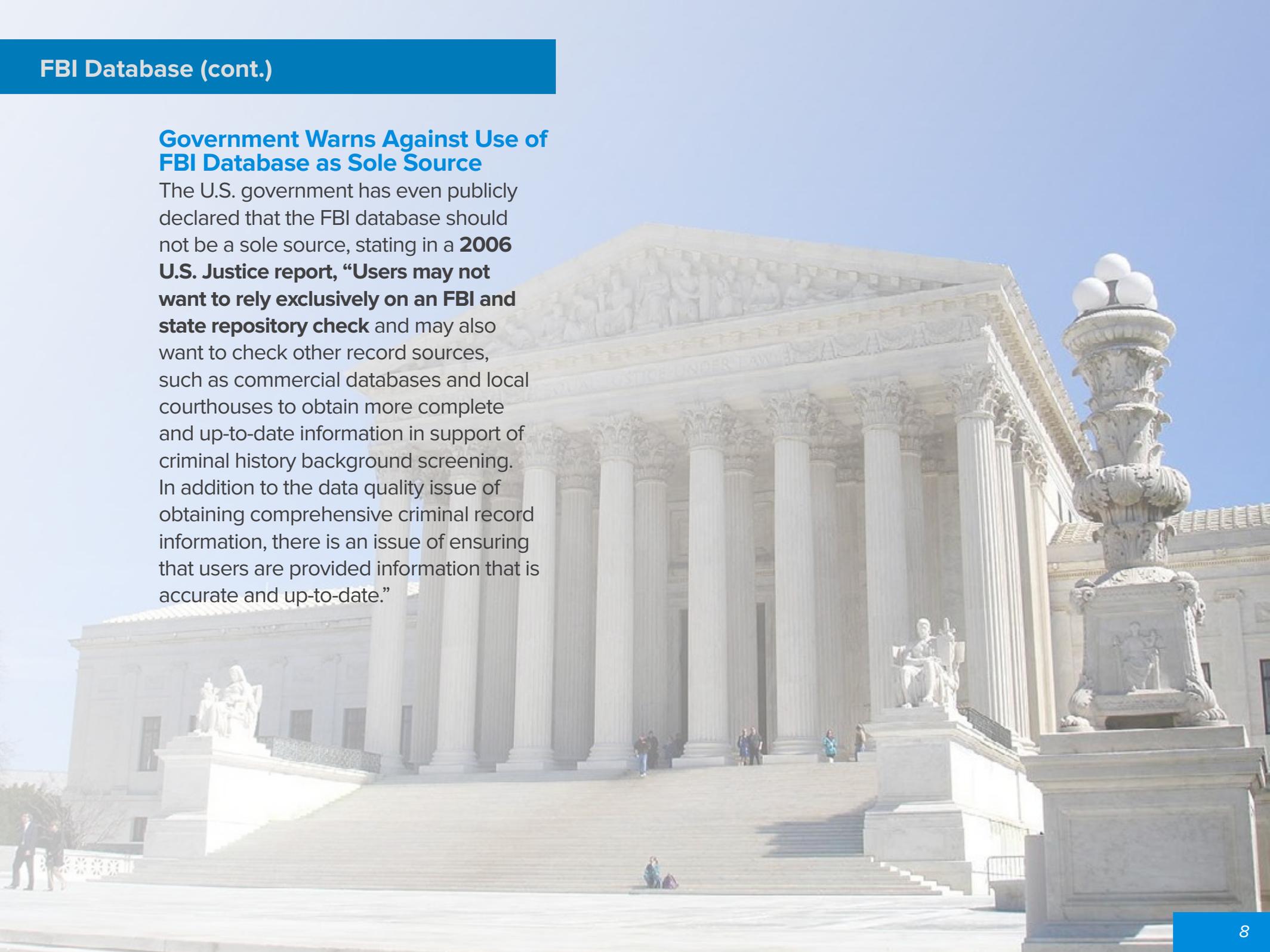
That is one shortcoming of the FBI database; however, there is more to this story than just the millions of partial records: the missing records. The FBI database does not contain every criminal record reported in every county court, which is the official court of record in most jurisdictions. The other side of this story is that many employers utilizing the FBI database as the single source of screening, which in most cases is legislatively mandated, are not finding all the criminal records, potentially exposing their organization, employees, customers and vulnerable populations to risk.

*Sadly, the FBI Database does not tell you what records are missing or incomplete, so many assume the records are accurate.*



### Government Warns Against Use of FBI Database as Sole Source

The U.S. government has even publicly declared that the FBI database should not be a sole source, stating in a **2006 U.S. Justice report**, “Users may not want to rely exclusively on an FBI and state repository check and may also want to check other record sources, such as commercial databases and local courthouses to obtain more complete and up-to-date information in support of criminal history background screening. In addition to the data quality issue of obtaining comprehensive criminal record information, there is an issue of ensuring that users are provided information that is accurate and up-to-date.”



### The Origins of the FBI Database: Intended as an Index

To understand fully why the FBI Criminal Database is so insufficient, it's important to understand that this database was never intended to be a comprehensive listing of every criminal offense committed in the U.S., nor was its inception tied in any way to screening employees. It was conceived to be an index of arrests, which is exactly what it is. A report or rap sheet from

the FBI on a subject is typically a list of arrests with dates and charges. No other information is included in at least half of its records, which means employers who utilize this as a screening mechanism do not have a complete story and must make a decision based on the information provided.

And without a complete view of an individual's criminal history, employers are most definitely making mistakes, either passing on candidates whose records are not correct or employing those that have serious criminal offenses because of missing records.



### How Does the FBI Compile Its Data?

Because of the very complex data environment of criminal records and a lack of transparency on the part of governing agencies, determining how the FBI compiles and maintains its databases involves rigorous investigation. The FBI was very quick to place blame on the states after the NELP report was published, stating that it depends on state repositories to report all information to the FBI database. So again, the FBI database is a receiver of data not a gatherer.

### Some states can take up to 665 days to enter final dispositions into record!

Thus, the arrest record may be in the FBI database, but no disposition information is available.

*Take the Advice of the Justice Department*

*The Justice department recommends using multiple sources like commercial databases and county courts to ensure complete information.*

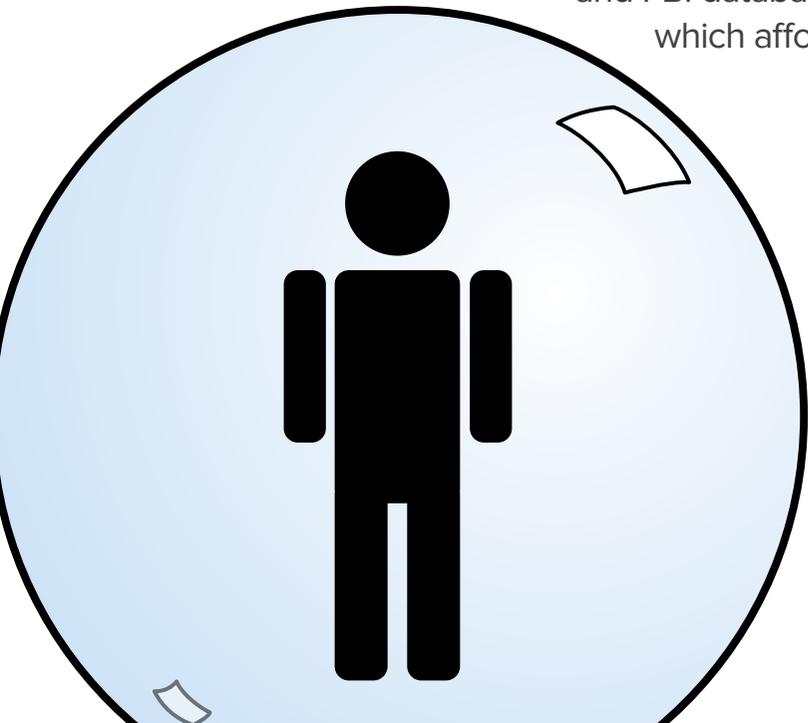
*When drafting legislation, focus less on defining an exact methodology.*



## FBI Database: Zero Consumer Protection

The federal government enacted FCRA specifically to protect consumers and regulate the data that CRAs can report for employment screening purposes. The Federal government continues to aggressively enforce the regulations of FCRA. The EEOC has also filed suit against employers it believes have created a disparate impact in their use of criminal history to preclude applicants. This law and guidance are in place to protect workers.

Yet, there are currently state and federal laws which mandate the use of state and FBI databases, which affords



zero consumer protection for applicants. The laws mandating the use of this methodology are in direct contraction to the regulations set forth to protect consumers. **Why would legislators want to erase consumer rights and promote a process that causes disparate impact?**

Based on the NELP report from 2013, 1.8 million workers are subject to FBI screens which contain inaccurate information resulting in at least 600,000 consumers being removed from employment consideration. So why are these records inaccurate? Generally, it's because they lack dispositions.

### Dispositions Reveal the Whole Story

Federal law prohibits a CRA from reporting inaccurate records that could adversely impact an application for employment. FCRA also prohibits the inclusion of non-convictions older than seven years on consumer reports.

### *Additional Employer Burdens*

Not only does fingerprinting place the burden of making employment decisions with insufficient information on employers, it also saddles them with high costs.

Fingerprinting can cost anywhere from \$35 to \$75. Because these mandates are often placed on public schools or non-profits that have dwindling budgets, they have to make sacrifices in other areas.

Quality commercial grade screens are typically a third the cost and are returned in days, not weeks like most FBI reports.

But this type of protection only applies when CRAs submit reports; states and the FBI are not held to this standard. Because so many records within these databases are incomplete, employers are forced to make a decision without knowing the whole story. Unfortunately, many people are inclined to believe an arrest is the same thing as guilt. The reality is that cases are dismissed, and people are found not guilty. Yet their FBI report may still only contain the arrests. Using arrest records to make employment decisions is not only unfair but is also in direct opposition to the EEOC's 2012 guidance. The guidance recommends that employers should conduct individualized assessments on applicants who have pending charges or convictions.

The NELP report found that minorities were the most impacted, as they are consistently arrested at higher rates than the general population. And because not all arrests end up as convictions, minorities are much more likely to have incomplete reports. The EEOC points out minorities as being disparately impacted by the use

of criminal records in hiring practices. FBI screens only add to this disparate impact, creating more barriers for minorities seeking employment.

### **Little Help for Applicants With Incorrect Records**

If there is something on a report provided by the FBI that is inaccurate or does not belong to the applicant, individuals have very few resources to have a record corrected or removed. This type of search, used on its own, could be wrongly excluding candidates that could have been outstanding employees. Because the search is not conducted through a CRA, FCRA does not apply.

Most candidates never even receive a copy of their FBI record, making it impossible to understand if a criminal offense disqualified them from employment. Even if the job applicant does try to pursue changing a record, including just adding a "final adjudication" of dismissed it can take months.

## About Professional Grade Screens



*Relying on the FBI Database and State Repositories is a lot like only using half an umbrella.*

### How is a Commercial Grade Screen Different?

With a commercial grade screen conducted by a reputable CRA that performs best-practices, employers are utilizing every source available to ensure that the information received is the most reliable and complete. CRAs are gatherers not receivers. They go out and get all the records that are available and aggregate them in a large database. But that's not the start of a commercial grade screen.

A CRA conducts a search much differently, beginning with an "Address History Trace" to create a jurisdictional profile. Each jurisdiction uncovered would be searched at the county court level. An additional state and national search would be conducted as an overlay with any records found in these databases verified at the court of record.

### A Professional Grade Screen includes:

**Address History Trace (AHT)** - This is a report revealing various names, DOBs and addresses associated with a specific Social Security number. An AHT should go back at least seven years.

**Why it's important:** Because an AHT creates a profile of an individual's residence history; *this profile determines what jurisdictions should be searched.*

**County Searches** - Based on the profile created from the AHT, each jurisdiction/county identified should be searched.

**Why it's important:** County courts are considered the official court of record because most cases are filed and maintained here, meaning *the most complete and accurate information is located at the county level, not the database level.*

**Criminal Record Database** - A database search of over 450 million criminal records regularly collected from over 2,600 court sources.

**Why it's important:** Because supplementing a county search with databases casts a wider net and helps find more records. *Any records here should always be verified at the court of record or county court to ensure complete information.*

**National Sex Offender Database** - A comprehensive, real-time search of registered sex offender registries in all 50 states plus Washington D.C., Puerto Rico, Guam and Native American Tribal Registries.

**Why It's important:** Because *searching every available sex offender registry in real-time provides maximum protection* from registered sex offenders gaining access to vulnerable populations.

A best-practice screen should also include searches of AKAs and name variations to ensure discovery of all records.

## Legislative Recommendations

Focusing on minimum requirements rather than the methodology or source can improve employment background screening for all stakeholders. Making these points in legislative language will **maximize consumer protection, ensure quality screening, reduce costs and help employers put people into jobs faster:**

- › Restrict the use of unverified records from any database (state, FBI or commercial) and insist that records be verified at the court of record.
- › Require that all employment background screens include an Address History Trace and county level searches performed based on the applicant's residence history.
- › Mandate consumer protection regardless of how the search is performed that includes the same rights afforded to consumers under FCRA.
- › Allow for reputable CRAs to provide screening to organizations as an option as a supplement to fingerprinting or as an equivalent search.
- › Ensure legislatively mandated background checks standards are in line with other laws and regulations like FCRA and the EEOC guidance.

## Commercial Screens vs. Fingerprinting

	FBI Searches	Statewide	Best Practices
Provides Consumer Protection Against Inaccurate Reports			✓
Uses an Address History Trace to determine jurisdictional profile			✓
Uses County Level Searches Based On an Applicant's Residence			✓
Requires verification of records found in databases at the court of record			✓
Restricts the use of arrest records for employment screening purposes			✓
Returns reports with all felony and misdemeanor offenses			✓
Provides an aggregated real-time national sex offender registry search			✓
Uses fingerprints as a means of identification	✗	✗	

## Conclusion

To make the best decisions regarding background screening methodology mandates, especially those related to screening of individuals with access to vulnerable populations, understanding the intricacies and challenges of criminal record data is imperative. The perception in Washington seems to be that the FBI database is the gold standard; however, the government has submitted its own warnings about the database's completeness. The fundamental difference between a commercial grade screen and fingerprinting is the source. A commercial grade screen will always search and/or validate at the court of record. Fingerprint checks simply find what is available and do not attempt to gather additional information or verify that the record is accurate.

Legislators wield great influence and have the power to change policies. When provided all the facts regarding background screening as noted in this resource, policymakers are armed with knowledge allowing them to make the best decisions for the country's citizens.



# Legislator's Quick Reference Guide

## Seven Reasons to Stop Requiring Fingerprinting for Employment Screening



### #1 - Statewide Problems

Statewide repositories are subject to missing and inaccurate records because states don't acquire data; they must receive it from each county. Only a small percentage of state repositories are considered reliable. And what the state does collect doesn't always go to the FBI. A recent USA TODAY investigation revealed that in Michigan, only about 7% of arrests warrants are shared with the FBI, meaning that the FBI database is missing more than 900,000 Michigan arrest warrants!

### #2 - Consumer Protection

There is zero protection for consumers subject to FBI background searches. Most applicants never even receive a copy of the report—leaving them completely blindsided as to why they were disqualified. A 2013 NELP report estimated that 1.8 million applicants a year are subject to FBI screens that include incomplete or erroneous information!

### #3 - Cost

Fingerprinting is extremely expensive, and often that cost is pushed back on taxpayers because many fingerprinting mandates are

directed at government jobs like teachers. School districts may be paying as much as \$65 for a fingerprint background check. With their budgets already lean, the cost of fingerprinting is cutting out other needed items. Commercial background screening is typically one third the cost of fingerprinting.

### #4 - Turnaround Time

With employment screening, there is typically urgency for the return of the background check in order to reduce time to hire and place needed employees in their roles. Depending on the backlog and access to fingerprint sites, typical turnaround times for fingerprinting can be three to four weeks. That delay causes ripple effects in organizations that already must do more with less. Turnaround times for commercial grade screening are on average 48 to 72 hours.

### #5 - The Data

When FBI reports are inaccurate, there are a lot of casualties. When the record is missing disposition, an employer doesn't have a full story to make a hiring decision, and a job seeker has little recourse. When records are missing, and an applicant "passes" the

screen, an organization can be exposed to significant risk. No one should be making employment decisions, especially those that involve vulnerable populations, with half the story. Based on the data provided by states and the FBI, a conservative estimate of the reliability of these records is less than 50%.

### #6 - The Government Warning

Even the U.S. government has made repeated statements about the accuracy of the FBI database and cautions against using as a sole source. So why mandate something for employers to use that the government does not qualify as sufficient?

### #7 - CRAs Collect Data Better

CRAs are gatherers of data. They collect and aggregate any records available to the public. CRAs have built sophisticated data acquisition technology to directly interface with records available electronically and have professionals on the ground in counties that only offer hand or clerk searched records. States and the FBI simply wait for a record to be pushed to them and do not actively seek dispositions to arrest records.



# BIB

## About BIB

BIB offers background screening with integrity. We screen, test and verify the backgrounds of your employees and volunteers. Clients love our responsive service and how we accelerate their speed to hire while reducing their costs. With BIB, you get reliable results and easy technology. We're good at what matters and have been since 1995. BIB is a founding member of NAPBS and a member of SHRM, AASPA, ASA, NACBA and NRPA.

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