An Applicant’s (and Counselor’s) Quick Guide to Background Checks for Federal Judicial Clerks

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You’ve been lucky enough to land a judicial clerkship at a federal court — now you just need to show up for work on the first day, right? Well, not so fast — because a law clerk is classified as a sensitive position, you will have to complete a background check. [A cursory investigation of state courts quickly revealed that their practices with respect to background checks are all over the map. Some states do not require them for judicial clerks, others do — but the type and amount of information varies. For state clerkships, the safest advice is to check with the jurisdiction(s) of interest.]

As you might expect, federal judges have a good deal of latitude regarding background checks, in terms of both what they can request and how they interpret the results. In other words, there are none of the “automatic disqualifiers” you might have seen with some federal agencies — it’s all up to the judge.

There is a single, uniform starting point. All federal law clerks must complete form AO 78 (or a substantially similar form), which is the “Federal Judicial Branch Application for Employment.” You can find it on the federal judiciary’s website under “Careers.”
(www.uscourts.gov/Careers.aspx). The AO 78 asks applicants about:

- Past convictions for both felonies and misdemeanors
- Past courts-martial
- Current charges for violations of law
- Instances of being fired
- Delinquency on federal debt

The AO 78 specifies that applicants do not need to include:

- Traffic fines of $300 or less
- Any violation of law committed before your 16th birthday
- Any violation of law committed before your 18th birthday if finally decided in juvenile court or under a Youth Offender law
- Any conviction set aside under the Federal Youth Corrections Act or similar state law
- Any conviction for which the record was expunged under state or federal law

Applicants will also be asked to complete an FBI “fingerprint check.” As the nickname implies, this is a search of your fingerprints in the criminal history records in the FBI national fingerprint database. This check can disclose any data that was collected through fingerprints taken for citizenship, arrests, past employment, or military service. The report indicates either “no arrest record,” or an arrest record is attached.

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So, if you were ever arrested and processed and fingerprints were taken, there’s a very good chance that will show up. If you’re unsure what might appear, or simply curious, you may request an “Identity History Summary Check” from the FBI. For information on how to request your Identity History Summary (a/k/a “rap sheet”), see www.fbi.gov/about-us/cjis/identity-history-summary-checks (there are some modest fees).

The processing time for the background check will vary greatly by court. Some courts submit the fingerprints electronically and receive information within 48 hours; others do the traditional fingerprint cards, which can take up to 12 weeks to process. You should check directly with your judge for specific information about processing time.

Judges can request some additional checks, but our conversations with colleagues — in and out of courts — indicate those additional requests are rare. A judge may sometimes request a credit check, which is a report from a national credit bureau. Another option, even less common, is an FBI “name check,” which entails searching the FBI central records system on the name and other biographical information such as Social Security number, or date/place of birth.

Once you’ve gotten through the process, what about the duration of the background check? If you do two clerkships, will you need to have two background checks? No surprise, the answer will depend on the specific judge, but usually if you do two consecutive clerkships without a break in service, you will not have to submit to a new background check. However, if there is a break in service with an intervening job, you may have to submit a new application. You’ve heard this before, but it’s still the best answer: check with your judge.

It is important to be prepared for the background check, but there is little reason to be intimidated by it. The information sought is largely a matter of public record, and it’s being evaluated by a judge who already liked you enough to give you a job. Be prompt, be clear, be scrupulously honest — and then enjoy your time in chambers! ☑️