



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

September 29, 2023

Andrew Block
America First Legal Foundation
600 14th Street NW, 5th Floor
Washington, DC 20005
foia@aflegal.org

Re: FOIA-2021-01790
22-cv-2850 (DDC)
VRB:JMB:CEY

Dear Andrew Block:

This is a first interim response to your Freedom of Information Act (FOIA) request dated June 24, 2021, and received in this Office on July 21, 2021,¹ in which you requested various records pertaining to judicial nominations.²

Please be advised that initial searches have been conducted and records responsive to your request have been located. At this time, I have determined that eleven pages containing records responsive to your request are appropriate for release without withholdings, and copies are enclosed. Please be advised that we have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Christopher Lynch of the Department's Civil Division, Federal Programs Branch at 202-353-4537.

Sincerely,

Jonathan Breyan
Senior Supervisory Attorney
for
Vanessa R. Brinkmann
Senior Counsel

Enclosures

¹ You directed your request to the Department's Mail Referral Unit (MRU), which forwarded it to this Office for handling. The MRU tracking number associated with your request is EMRUFOIA072021.

² Through counsel, the parties have subsequently reached agreements regarding the scope of this request.

MEMORANDUM OF UNDERSTANDING

Between the

DEPARTMENT OF JUSTICE

and the

PRESIDENT OF THE UNITED STATES

Regarding Name Checks and Background Investigations
Conducted by the Federal Bureau of Investigation

1. Purpose

This Memorandum of Understanding (MOU) replaces the previously executed MOU between the Department of Justice and the President-elect¹, to reflect changes in name checks and background investigations conducted by the Federal Bureau of Investigation (FBI). This MOU also updates titles, procedures, and responsibilities. This MOU covers the procedures for the President of the United States (President) to submit requests for name checks and background investigations, as well as the FBI's responsibilities in conducting the requested investigations, so that key Administration positions can be assumed without undue delay.

2. General

a. The FBI will conduct file reviews ("name checks"²) and background investigations³ at the request of the President or his designated representative, for applicants, employees, or any other persons who will perform services for, or receive an award or recognition from, the President (hereafter the individual who is the subject of a requested name check or background investigation shall be referred to as the "Appointee").

b. Name checks and background investigations shall be conducted only to ascertain facts and information relevant to the Appointee's: (1) suitability for Federal government employment or retention in such employment; (2) suitability to provide services to the

¹ Executed November 10, 2008.

² A name check consists of searching names that have been indexed as part of FBI criminal or national security investigations or as part of FBI background investigations. Additionally, a search of FBI electronic case files will also be conducted to determine whether the individual is or has been the subject of, or has been referenced in, an FBI investigation.

³ A background investigation may be a full-field background investigation ("Level 1," to the 18th birthday; "Level 2," 15-year scope; "Level 3," 10-year scope; or "Level 4," 5 year scope), a 5-year re-investigation, an expanded name check, a limited update, or a limited inquiry (such as follow-up inquiries conducted to resolve particular issues/questions).

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President as a contractor, volunteer, etc.; (3) trustworthiness for clearance to access information classified under the provisions of Executive Order 12958, as amended by Executive Order 13292, and Executive Order 12968 (or any successor Executive Orders) and their implementing directives; or (4) trustworthiness for access to locales in close proximity to or frequented by the President. The results of these name checks and background investigations will permit adjudication of the Appointee by the respective agency for appropriate clearance, to include access to Sensitive Compartmented Information (SCI).⁴

3. Procedures for Submitting Requests

- a. Requests for FBI background investigations and name checks of Appointees shall be made in writing by the President or an official who has been designated in writing to make such requests (Requesting Official). All requests made by the Requesting Official must be approved by the Counsel to the President or an official designated in writing to approve such requests (Approving Official). The Requesting Official and Approving Official may be the same individual, if he or she is appropriately designated by the Counsel to the President.
- b. The President or his designee will provide the FBI, via official correspondence, with the title(s), name(s), and specimen signature(s) of the person(s) designated to act as Requesting Official(s) and Approving Official(s), and will apprise the FBI by official correspondence of any changes in approval authority.
- c. All name check and background investigation requests must be on the request form provided by the FBI and must contain the original signature of the President or the Requesting Official. The Requesting Official must certify, subject to the criminal penalties for making a false statement, that information is sought only for official purposes. All requests must also contain the original signature of the Approving Official. In addition, requests must include the Appointee's signature.
- d. An updated consent is not required for follow-up inquiries that are reasonably viewed as within the ambit of a previously-provided consent (e.g., when the President asks the FBI to develop further matters raised in a report of background investigation to which the Appointee consented). Requests for supplemental inquiries made within 6 months of the date of the Appointee's signed consent, within 30 days of the FBI's final report, or while an Appointee's confirmation is pending will be presumed to be within the ambit of the original consent.
- e. The reason for each background investigation will be indicated with specificity (which may be accomplished by checking the appropriate boxes on the form), and if known, shall include the position for which the Appointee is being considered. No material changes will be made to the form's content or format without the written concurrence of the FBI.

⁴ Access to SCI is determined under the standards set forth in Director of National Intelligence (DNI) Intelligence Community Directive 704, and by any modifying policy memorandum or successor directive.

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f. Each request for a background investigation shall also include: (1) a completed Standard Form 86 (SF-86) (Questionnaire for National Security Positions); (2) a set of the Appointee's fingerprints either on a standard fingerprint card or electronically submitted; and (3) a statement signed by the Appointee acknowledging his or her consent to be investigated and acknowledging that facts or information gathered shall be retained consistent with the applicable FBI Privacy Act Records Systems Notices, Records Retention Plan, and Disposition Schedule.⁵

g. A signed consent is not required to accompany a name check request if the subject is an organization or institution rather than an individual person. Such name check requests do require the signatures of the Requesting and Approving Officials, however.

h. The FBI's points of contact for background investigations and for name check requests are the Special Inquiry and General Background Investigations Unit (SIGBIU) (202-324-2568) and the National Name Check Program Unit (NNCPU)(540-868-4962).

i. While a background investigation is pending, if the President or his designated representative determines that the Appointee is not to be employed or appointed, the President or his designated official will promptly notify the FBI so the investigation can be discontinued.

4. Reporting Investigation Results

a. Except as provided below, if during the course of the background investigation the FBI discovers any adverse or medical information bearing on the suitability or trustworthiness of the Appointee, the FBI will promptly inform the President or his designated representative.

b. Subject to the Federal Privacy Act of 1974, persons interviewed during these investigations may be assured that their identity will be kept confidential to the extent permitted by law.

c. The FBI generally does not continue to actively monitor an Appointee following the completion of its final background investigation report, and the President or his designated representative should submit a new request if updated information is desired. However, prior to an Appointee's assuming the nominated position or being adjudicated for the clearance for which the investigation was conducted, if the FBI becomes aware of new information that raises questions about the suitability or trustworthiness of an Appointee to perform services for the President, the FBI will so apprise the President or his designated representative as soon as possible.

d. If the FBI's investigation reveals a pending Federal civil or criminal investigation involving the Appointee, dissemination of any information relating to the pending investigation will be halted. The FBI General Counsel (or her designee) will consult with

⁵ See Section (e)(3) of the Federal Privacy Act of 1974.

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cognizant FBI Headquarters officials to determine what information can be disseminated without harming the pending investigation. The FBI General Counsel will refer the matter to the Deputy Attorney General (or his/her designee), who will determine what information will be disseminated to the President or his designee.

- e. The FBI will furnish summary memoranda, investigative reports or supporting materials (hereafter collectively referred to as reports) containing the results of its investigations to the President or his designated representative and will retain records identifying the persons to whom such reports are furnished.
- f. The Department of Justice (DOJ) and the FBI may consider a request from the President for a name check or background investigation without the consent of the Appointee if justified by extraordinary circumstances. Such circumstances shall be documented in writing from the President or his designee to the Deputy Attorney General and the FBI General Counsel and should explain why the Appointee's consent cannot be obtained or should not be sought.

5. Use and Maintenance of Investigative Reports

- a. The President or his designated representative will ensure that access to FBI reports is restricted to persons directly involved in ensuring the safety and security of the President or in determining an Appointee's suitability for employment, appointment, recognition or trustworthiness for access to sensitive⁶ or classified information. The President or his designated representative may also afford access to these reports to the United States Secret Service or the Office of Security and Emergency Preparedness for the Executive Office of the President, or to the security office of the agency or department to which an Appointee is reporting, upon a determination that any such additional recipient has a legitimate need to know the information for the proper performance of official responsibilities and that any such disclosure is not otherwise precluded by applicable law.
- b. The President or his designated representative shall maintain records identifying all persons receiving access to the reports, and such records shall be furnished to the FBI upon request. No person having access to the reports will reproduce or disseminate the reports except in accordance with procedures agreed to by the President or his designated representative and the Director of the FBI or the Director's designated representative.
- c. The President or his designated representative shall not allow the Appointee or any person outside of the appointment, employment, security clearance, confirmation, Presidential recognition, or Presidential protection process access to the reports, copies of the reports, or any information derived from the reports. If it is necessary to discuss the contents of reports with the Appointee, the President or his designated representative will ensure that the confidentiality of the sources contained therein is protected. Any request by the Appointee for access to the reports will be referred to the FBI for processing in

⁶ Sensitive information includes law enforcement matters, personal information about individuals, privileged commercial or financial information, etc.

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accordance with both the Federal Privacy Act of 1974 and the Freedom of Information Act.

d. Information obtained during an investigation will be retained at FBI Headquarters and FBI field offices in accordance with the FBI's Privacy Act records systems notices, Records Retention Plan, and Disposition Schedule. Certain information relating to pending Federal civil or criminal matters may be disseminated on a need-to-know basis to other officials of the DOJ or other appropriate agency to which the DOJ refers the matter. No further dissemination shall be made of information obtained during any investigation conducted pursuant to this agreement, except as part of the investigation of a violation of law or as otherwise permitted or required by Federal statute, FBI/DOJ regulation or policy, or Presidential Directive or Executive Order.

e. No person employed by the President shall be given access to any sensitive or classified information or material until appropriate clearance has been granted.

6. Effect of this Agreement

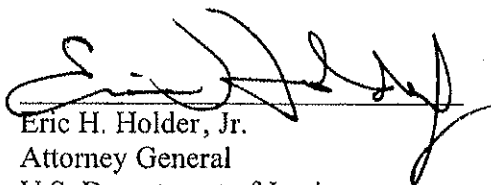
a. The procedures set forth in this MOU shall remain in effect until otherwise directed by the President consistent with applicable law. Any issues involving interpretation of these procedures will be resolved in accordance with applicable laws, rules, regulations, directives, and customary practices that may apply with regard to interpretation of Executive Branch documents.

b. This MOU is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law or otherwise by any third party against any of the parties, their parent entities, the United States, or the officers, employees, agents, or other associated personnel thereof.

c. This MOU is not an obligation or commitment of funds, nor a basis for transfer of funds, but rather is a basic statement of the understanding between the parties of the matters described herein. Expenditures by each party will be subject to its budgetary processes and to the availability of funds and resources pursuant to applicable laws, regulations, and policies. The parties expressly acknowledge that the language in this MOU in no way implies that funds will be made available for such expenditures.

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7. Signatures



Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice



Robert F. Bauer
Counsel to the President
The White House

Dated: 3/3/2010

Dated: 3-4-10

**MEMORANDUM OF UNDERSTANDING BETWEEN THE SENATE JUDICIARY
COMMITTEE AND THE COUNSEL TO THE PRESIDENT REGARDING FBI
BACKGROUND INVESTIGATION REPORTS ON NOMINEES**

September 22, 2009

This memorandum of understanding between the U.S. Senate Committee on the Judiciary ("the Committee") and the Counsel to the President sets forth the procedures under which the Committee shall have access to background investigation reports prepared by the Federal Bureau of Investigation ("FBI") on judicial nominees and other Presidential nominees submitted to the Senate for confirmation and referred to the Committee.

1. FBI Background Reports and Summaries

- a. Full FBI background investigation reports shall be provided to the Committee for judicial nominees, United States Attorney nominees, United States Marshal nominees, and nominees for the following senior positions at the Department of Justice: Attorney General, Director of the FBI, Administrator of the Drug Enforcement Administration, Assistant Secretary for Immigration and Customs Enforcement, and Director of U.S. Marshals Service
- b. Summaries of FBI background investigation reports prepared by the FBI shall be provided for all other Department of Justice and non-judicial nominees referred to the Committee, except that the full FBI background investigation reports for these nominees shall be provided to the Committee upon request of the Chairman and/or Ranking Member. (Hereinafter, reference to FBI background investigations reports shall include summaries of FBI background investigation reports.)

2. Access to FBI Background Reports

- a. Senators: Senators who are members of the Committee, as well as the Majority and Minority Leaders, may review FBI background investigation reports and receive an oral briefing by any Designated Staff Member. Home State Senators who are not members of the Committee may review FBI background reports and receive an oral briefing from a Designated Staff Member with the approval of the Chairman and/or Ranking Member.
- b. Supreme Court Nominations: For nominations to the Supreme Court, in addition to the aforementioned Members, an oral briefing conducted by any Designated Staff Member on the contents of the FBI background investigation will be made available to any Senator upon request.
- c. Designated Staff Members: Six (6) majority staff members and four (4) minority staff members who have "top secret" clearance or interim clearance awaiting final "top secret" clearance from the appropriate federal agency and have a need for

access in connection with the performance of their duties shall be considered "Designated Staff Members" and have access to FBI background investigation reports. No other staff member from the Committee or other Senate office or other Committee may review FBI background reports relating to a nominee or be briefed on the contents of an FBI background investigation report.

- d. A current list of Designated Staff Members, and any changes to such list, shall be provided in writing by the Chairman to the Counsel to the President.
- e. Designated Staff Members shall be informed in writing at the time of their employment with and departure from staff that information from the FBI background investigation reports is to be kept confidential and that unauthorized release of information from FBI background investigation reports is cause for the imposition of appropriate penalties, including summary dismissal.
- f. Physical custody of FBI background reports shall be strictly controlled to limit access to authorized Senators and Designated Staff Members. The FBI background reports constitute confidential business of the Senate Committee on the Judiciary and unauthorized disclosure of information in the reports is cause for the imposition of punishment under RULE XXIX(5) of the Standing Rules of the Senate.

3. Security Manager

- a. The Chairman shall assign one (1) Designated Staff Member to serve as the Security Manager.
- b. The Security Manager will be trained by the Office of the Senate Security to maintain custodial responsibility over the FBI background investigation reports to ensure their confidentiality. The Security Manager's responsibilities shall include maintaining logs listing the names of the specific nominees for whom FBI background investigation reports have been received; the dates and times such reports are removed from the secured office area for review by Designated Staff Members; the dates and times such reports are returned to the secured office; and the dates and times such reports are returned to the Department of Justice.

4. Delivery of FBI Background Investigation Reports

- a. The FBI background investigation reports shall be delivered by the Department of Justice or the Office of the Counsel to the President directly to a Designated Staff Member of the Chairman. Delivery shall be acknowledged by a receipt signed by that Designated Staff Member and returned to the individual making the delivery.
- b. The Security Manager shall maintain in a locked safe a log that reflects the date, time, and particular FBI background investigation report received by the Committee.

- c. A Designated Staff Member of the Chairman shall immediately notify a Designated Staff Member of the Ranking Member of receipt of all FBI background reports.

5. Physical Custody of FBI Background Reports

- a. The Security Manager shall maintain a secure office space, have possession of keys for the secure office space and know the combinations for the locked safes maintained in the secure office space where FBI background investigation reports are stored.
- b. Designated Staff Members of the Ranking Member shall be granted reasonable entry to the Chairman's secure office space and shall sign the log sheet prior to removing any FBI background investigation report for review in an alternative secure office that is locked and has a combination safe to which only Designated Staff Members have the combination. Designated Staff Members will maintain strict control of FBI background reports in their custody.
- c. Document control experts from Senate Security will periodically review the effectiveness of procedures used by the Designated Staff Members to maintain physical custody and control of FBI background investigation reports.

6. Use of the FBI Background Reports

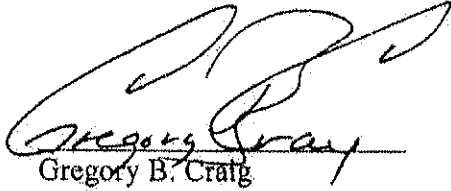
- a. Designated Staff Members may review and summarize the FBI background reports to assist the Chairman and the Ranking Member or other Members of the Committee in assessing a nominee's fitness and qualifications. The Chairman and the Ranking Member of the Committee may authorize Designated Staff Members to brief Members orally as set forth in Section 2.
- b. Photocopying or other reproduction of the FBI background reports is prohibited.
- c. Notes and memoranda derived from the contents of the FBI background investigation reports may be made and shall, in whatever form (including hard copy and computer disk), be destroyed or secured in the same manner as FBI background investigation reports. Destruction of any such notes and memoranda, and other materials derived from FBI background investigation reports, shall be accomplished in a secure fashion.

7. Return of FBI Background Reports

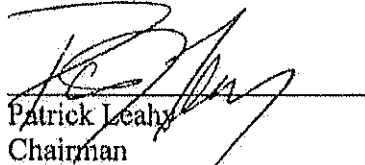
- a. Within 5 days of final Senate action on the nomination, the Security Manager shall arrange for the return, in a secure manner, of the FBI background

investigation report to the Department of Justice. The Security Manager shall note in the Committee's log the return of the FBI background investigation report.

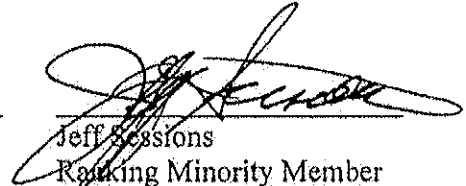
This Memorandum of Understanding is agreed to for the purpose of assisting the Senate in the execution of its constitutional advice and consent responsibilities.



Gregory B. Craig
Counsel to the President



Patrick Leahy
Chairman
Senate Judiciary Committee



Jeff Sessions
Ranking Minority Member
Senate Judiciary Committee

**Background Investigation Request Form**

From: The White House, Office of White House Counsel

To: Federal Bureau of Investigation, Security Division

Return to:

1. Candidate Information

Candidate's Name (first, middle, last name)

Other Names Used (birth, prior married, nickname)

Social Security Number

Date of Birth

Place of Birth

Permanent Address

Current Address (if different)

Phone Number

Email Address

Current Employer

Candidate's Consent: I hereby authorize the FBI to provide the information specified below to the Office of White House Counsel.

Signature/Date _____

2. Request of FBI

Use of this form to request information developed by the FBI or contained in FBI files requires the candidate's consent. Expectations will only be permitted as authorized by the Attorney General/Deputy Attorney General.

Request Date

Type of Investigation

☐ Full Field Investigation☐ Level I (back to 18th birthday)☐ Level II (back 15 years)☐ Level IV (back 5 years)☐ Periodic Reinvestigation☐ Limited Update Investigation☐ Limited Inquiry☐ Other _____

Type of Position

☐ Executive - Cabinet-level Presidential Appointment with Senate Confirmation☐ Executive - Presidential Appointment with Senate Confirmation☐ Executive - Presidential Appointment (no confirmation needed)☐ Judicial - U.S. Judge☐ Judicial - U.S. Attorney☐ Judicial - U.S. Marshal☐ Other _____

Attachments Included

☐ SF-86 Date Certified _____☐ SF-86 Supplement☐ Release Forms☐ Fingerprint Card – Hard Copy☐ Fingerprint Card – Electronic☐ Other _____

Title of Position Candidate is Being Considered for

3. White House Certification

I certify, subject to 18 U.S.C. § 1001, that the above is sought for official purposes only and I understand that obtaining this information under false pretenses or any unauthorized disclosure may be a violation of the Privacy Act, 5 U.S.C. § 552a.

Requested by _____ Signature/Date _____

This request has been reviewed and approved by the Office of White House Counsel's Office.

Approved by _____ Signature/Date _____

effective: January 20, 2021