

U.S. Supreme Court Avoids Creating Right to Informational Privacy

Allows For Continuation of Standard Government Background Checks

In a widely-watched case that pitted privacy rights against national security issues, the United States Supreme Court has issued a narrow ruling allowing the federal government to ask employees about drug counseling, medical treatment, sexual matters and other personal information. On January 19, 2011, the nation's highest court unanimously upheld the National Aeronautics and Space Administration's background checks in a defeat for scientists, engineers and others who argued the in-depth investigations were too intrusive. (NASA v Nelson et al, No. 09-530)

The Respondents in this case were longtime government contract employees at NASA's Jet Propulsion Laboratory (JPL) in California. At the time the Respondents were hired by NASA, there was no policy in place that required government background checks on contract employees, but the Department of Commerce later mandated that all contract employees with long-term access to federal facilities would have to undergo a standard background check by October 2007. As a result, the JPL announced that employees who did not timely complete the new required background check would be denied access to the JPL and face termination.

The background check at issue consists of a standard form (SF-85), which inquires into whether an employee has "used, possessed, supplied, or manufactured illegal drugs" within the last year. If a JPL employee answers in the affirmative, he or she must provide details about any treatment or counseling received and sign a release authorizing the government to obtain personal information from schools and employers, among others. Upon the completion of SF-85, the government mails a questionnaire (Form 42) to the employee's references that asks open-ended questions about the honesty and trustworthiness of the employee.

The constitutional right to "informational privacy" has only been discussed by the Supreme Court in two cases, and even there, the Court did not go so far as to acknowledge that there is such a right. In both cases, *Whalen v. Roe* and *Nixon v. Administrator of General Services*, the Court held that any concern about the violation of privacy rights was eliminated by existing legislation that provides sufficient protection against the dissemination of private information.

Prior to the JPL deadline, Respondents filed suit seeking an injunction and claiming a violation of their constitutional right. The District Court held in favor of the government, but the Ninth Circuit Court of Appeals reversed, ruling in favor of the employees.

In the Supreme Court, Judge Samuel Alito wrote a majority opinion that again refused to declare whether there is a constitutional right to informational privacy and opted instead to assume that, even if there were such a right, it would not prevent the government from asking the sort of questions included on SF-85 and Form 42. The government interest in obtaining background information for the sake of hiring a competent, reliable workforce was held to outweigh the privacy interests of the individual employee. The Court held that the questions at issue were reasonable, in light of the fact that millions of private employers use background checks in order to make hiring decisions, checks which include questions about drug use and treatment. Similar to its holdings in *Whalen* and *Nixon*, the Court concluded its decision by stating that the Privacy Act provides sufficient safeguards against the dissemination of any personal information revealed in the course of an employee background check.

Had the Court issued an opinion in favor of the JPL employees, and acknowledged a constitutional right to informational privacy, it is likely that both the government and private job application process would

have been tremendously affected. Employees and prospective employees who are asked to provide sensitive information in order to retain or gain clearance could have had the option of pursuing litigation if their refusal to respond to such inquiries resulted in a denial of access or employment. This narrow decision maintains the status quo and allows the government to continue with its standard background checks.