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Security Clearances

Legal Issues Loom for Security Clearances As Supreme Court Considers *NASA v. Nelson*

BY PHILLIP CARTER

In early October, the U.S. Supreme Court heard oral argument in *NASA v. Nelson* (Case No. 09-530), the appeal of a Ninth Circuit opinion holding that background checks conducted by NASA for contractor personnel at the Jet Propulsion Laboratory (JPL) in Pasadena, Calif., were unlawful. The case raises broader issues of employment law and national security law, specifically the ability of employers and the government to conduct background checks involving open-ended questions that inquire about an employee's personal life, medical history, or past substance abuse.

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At oral argument in October, the Court seemed to wrestle with the tension between the government's interests in conducting background checks and the employees' claimed right to ''informational privacy.'' Based on questions asked during oral argument and the procedural posture of the case, the Supreme Court appears headed for a narrow decision limited to the facts of this case. However, the case raises a number of broader issues relating to government background checks and the suitability of government contractor personnel, and it is plausible that the Court may rule on those issues as well when it decides the matter. In the event that the latter occurs, the decision could have im-

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plications for legality and scope of background checks as a whole, even those conducted by private employers. In addition, the case highlights some important features of the legal terrain surrounding national security clearances, including the limited role of the courts, and the limited ability of applicants and companies to challenge national security clearance decisions by the executive branch.

Background. The underlying lawsuit stems from a 2007 decision by NASA to mandate that all contractor employees undergo a background check, including submission of the SF-85 form, in order to obtain a NASA facility badge. This requirement followed a series of government discussions and directives, including Homeland Security Presidential Directive 12, which required background checks for anyone with access to a federal facility. In 2007, NASA unilaterally modified Caltech's contract for the JPL facility to require background checks for all contractor employees there, regardless of their position and whether they had been judged ''low risk'' or ''non-sensitive'' by Caltech or NASA. In August 2007, a group of 28 employees challenged the constitutionality of these background checks.

This group's initial bid for a preliminary injunction was denied by a federal judge in Los Angeles. However, in *Nelson v. Nat'l Aeronautics and Space Admin.*, 530 F.3d 865 (9th Cir. 2008), the Ninth Circuit ruled for the plaintiffs, saying they were entitled to a preliminary injunction because the background checks raised ''serious questions'' about the constitutionality of this requirement. The most problematic requirement within the background check, according to the court, was the open-ended inquiry on Form 42, which was sent to listed references, and which asked references to indicate any reservations they may have about the applicant's trustworthiness or reliability. In addition, the Ninth Circuit criticized the SF-85 form's inquiries into past drug treatment or counseling, saying these were in tension with the constitutional right of informational privacy. The appeals court ruled that such intrusions must be ''narrowly tailored'' to meet a ''legitimate government interest,'' and that the NASA background checks did not meet this test.

Following this ruling, the government asked for an *en banc* hearing before the Ninth Circuit. The appeals court denied *en banc* review, over five judges' dissents. Chief Judge Alex Kozinski questioned in his dissent whether a constitutional right to informational privacy existed. And in her dissent, which was joined by three other Ninth Circuit judges, Judge Consuelo Callahan wrote that the Ninth Circuit's decision represented an ''unprecedented expansion of the constitutional right to informational privacy'' that ''reaches well beyond this case and may undermine personnel background investigations performed daily by federal, state and local governments.'' Given the stakes of the case and its potential impact not just on non-sensitive background checks, but also on security clearance investigations and other employment inquiries, the U.S. Department of Justice petitioned the Supreme Court for certiorari on Nov. 2, 2009. This petition came before the district court could act on the Ninth Circuit's ruling and before any district court ruling on the merits, solely on the basis of the preliminary injunction.

Oral Argument. Acting Solicitor General Neal Katyal represented the government, opening his argument by stating that ''background checks are a standard way of doing business,'' and that the Ninth Circuit erred in holding that a constitutional right to informational privacy precluded these checks, because the government's ''mere collection of information with accompanying safeguards vitiates no constitutional privacy interest.'' Throughout his argument, Mr. Katyal stressed that any potential right to ''informational privacy'' was protected by federal statutes such as the Privacy Act. When pressed by the Court to answer as to whether any constitutional right to informational privacy existed, Mr. Katyal said there was none.

Attorney Dan Stormer represented the JPL employees before the Court. He framed the issue in terms of ''how far may a government go . . . into the private lives of its citizens, both in positions that do not involve sensitive issues, classified issues, national security issues, or positions of public trust.'' He argued throughout this presentation that there was a constitutional right to informational privacy, which he located primarily in the 5th Amendment's guarantee of substantive due process, and what he described as the ''liberty to control information about oneself.'' In his answers to various justices, Mr. Stormer said the Ninth Circuit got it right by requiring the government to show these background checks were ''narrowly tailored'' to meet a ''legitimate government interest.'' Further, Mr. Stormer argued the background checks could not meet this standard because they were required for ''no- or low-risk employees'' whose misconduct or malfeasance would have ''little or no impact on the agency mission.''

During oral argument, Justices Sonia Sotomayor, Stephen Bryer, and Ruth Bader Ginsburg expressed the most skepticism about the government's case. (Justice Elena Kagan recused herself from this case due to her prior work on the matter as Solicitor General.) Justice Sotomayor asked Mr. Katyal repeatedly about what limits, if any, existed on the government's power to ask questions during such background checks. Mr. Katyal responded there were limits, but those were imposed by statutes such as the Privacy Act and Fair Credit Reporting Act, not by the Constitution. She pushed Mr. Katyal on this point, and whether the government could ask any questions it wanted in its role as employer. Mr. Katyal responded that the government sought a ruling in this case similar to *Whalen v. Roe*, 429 U.S. 589 (1977), ''which is assuming that there is some informational right to informational privacy . . . the use of a background check with accompanying safeguards to collect information doesn't violate [that] constitutional right to privacy.'' Similarly, Justice Ginsburg seemed sympathetic to the JPL employees' claim that their right to informational privacy was violated, but she said the Court need not reach that issue, because this matter involved review only of a very specific and confined lower court decision.

Justice Breyer also seemed sympathetic to the NASA scientists' case, coming to Mr. Stormer's assistance during oral argument by prompting him to articulate his detailed argument for a 5th Amendment liberty interest in this case. Breyer seemed to support the Ninth Circuit's holding that government intrusions such as this background check should be justified, and that the Ninth Circuit's requirement for a ''narrowly tailored''

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background check which served a ''legitimate state interest'' may have been correct.

On the other ideological side of the Court, the government appeared to have strong support from Justices Antonin Scalia, John Roberts, Samuel Alito, and Clarence Thomas. Justice Scalia clearly signaled his views by asking sharp questions of Mr. Stormer about where in the Constitution it says there is a right to ''informational privacy.'' Scalia responded negatively to Mr. Stormer's answers, saying that no such right existed, and it was more appropriate for statutes such as the Privacy Act to govern these matters. ''It's possible,'' Scalia said, ''that that's the protection the Framers envisioned, rather than having courts ride herd on government inquiries'' through the creation of constitutional rights.

Justices Roberts and Alito also sounded sympathetic to the government's arguments, but expressed some skepticism over the limitless argument being advanced by the government's counsel. At one point, Justice Roberts expressed surprise at the government's position that it could ask nearly any question it wanted, questioning whether there was truly ''no right of any kind for a citizen to tell the government: 'That is none of your business.' '' Later, Roberts seemed incredulous at the government's position that it was asking about past drug use and mental health counseling for the good of the employee. ''[W]henever the government comes and says, 'This is for your own good,' you have to be — you have to be a little suspicious,'' said Roberts.

Similarly, Justice Alito seemed sympathetic to the government, but disagreed with Mr. Katyal that the Court did not need to define some right to ''informational privacy'' in order to decide the case at bar. ''How can the Court determine that the right is not violated here without having some idea about either the existence or the contours of the right?'', Alito asked. Later, in questioning Mr. Stormer, Alito said he saw no way for the government to conduct background checks without asking precisely the kind of open-ended questions challenged by the JPL employees in this case.

During oral argument, both parties and the justices carefully noted that this case did not involve government background checks for security clearances, or other national security reasons, indicating that such checks would clearly be constitutional. *Cf. Dep't of Navy v. Egan*, 484 U.S. 518 (1988). However, in a colloquy with Justice Anthony Kennedy, Mr. Katyal alluded to security concerns at the heart of the government's interest, describing how Caltech was not a typical campus, and that these badges were an ''important credential that would allow [applicants] to get within, for example, 6 to 10 feet of the space shuttle as it is being repaired and readied for launch.''

Analysis. Following oral argument, it was unclear which direction the Supreme Court would take in its opinion in *NASA v. Nelson*. As veteran Supreme Court correspondent Lyle Denniston and others have noted, it seemed unlikely that the Court would follow Justice Scalia's lead by finding no right to ''informational privacy,'' and giving the government *carte blanche* in this area. On the other hand, it also seemed unlikely the Court would embrace the skepticism of Justice Sotomayor and establish hard limits on the government's collection, use, and disclosure of information. A more likely outcome is a narrow decision, limited to the facts and procedural posture of this case, which finds some right to ''informational privacy,'' but likely allows NASA (and by extension, the government) to continue collecting such information with sufficient justification. This approach would accord with past precedent such as *Whalen*, and also be consistent with the measured approach suggested by many of the Court's justices during oral argument.

Although the Court appears likely to rule narrowly on the issues presented by this case, the Court may offer dicta in its final opinion which bear indirectly on matters relating to national security and the government's broad authorities to protect classified or sensitive information in that context.

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Since World War I, the government has engaged in efforts to protect national security information by means of a classification system graded according to sensitivity, and personnel clearances corresponding to these levels of sensitivity. After World War II, certain government agencies, including the newly-created Department of Defense, Central Intelligence Agency, and Atomic Energy Commission, which were responsible for generating classified information, developed their own systems for administration of personnel security clearances. In 1959, the Supreme Court held in *Greene v. McElroy*, 360 U.S. 474 (1959), that the existing security clearance adjudication system used by DOD was inadequate. In response, then-President Dwight Eisenhower issued Executive Order 10865 on February 20, 1960, which established the forerunner of the personnel security clearance system in place today. This order required agencies to establish security clearance systems which included, among other things, an adjudication process whereby applicants denied a clearance could request a hearing before a neutral decisionmaker, where they could present a case, examine and cross-examine witnesses, and attempt to rebut the government's case. This process has evolved into systems such as that administered by DOD's Defense Office of Hearings and Appeals, under the authority of DOD Directive 5220.6, the Defense Industrial Personnel Security Clearance Review Program.

However, in subsequent cases, the Supreme Court and lower courts have held that there is no ''right'' to a security clearance, and that, consequently, the executive branch has broad latitude to establish procedures and make decisions affecting personnel security clearances. *See Dep't of Navy v. Egan,* 484 U.S. 518 (1989). In *Egan*, the Court ruled that the strong presumption in favor of appellate review of agency decisionmaking ''runs aground when it encounters concerns of national security'' and that, in this ''sensitive and inherently discretionary'' area of decisionmaking, the ''authority to protect [national security] information falls on the

President as head of the Executive Branch and as Commander in Chief.'' *Id*. at 527. In a case the same term involving a CIA clearance, *Webster vs. Doe*, 486 U.S. 592, the Court extended its ruling in Egan to preclude judicial review of the merits of security clearance decisions by the executive branch.

Since these two seminal cases, there have been few challenges to security clearance decisions that have made it beyond the initial stages of litigation. Federal courts have indicated that a challenge to security clearance decisions may be possible if an applicant can show the agency violated its own rules—but that this would be difficult given the Supreme Court rulings foreclosing judicial review of the merits of security clearance decisions. *See Chesna v. Dep't of Defense*, 822 F. Supp. 90, 95-96 (D.Conn. 1993). The courts also have suggested that constitutional challenges to security clearance decisions may be justiciable, a suggestion buttressed by the Court's decision in *Webster*, which stated that the federal statute establishing the CIA did not preclude judicial review of constitutional claims. *See Dubbs v. Central Intelligence Agency*, 866 F.2d. 1114 (9th Cir. 1989). However, such challenges have proven to be very difficult for security clearance applicants for a variety of reasons, including the deference paid to executive branch decisions in this context, the difficulty of proving a constitutional violation, and the continuing reluctance of federal courts to review the merits of security clearance decisions.

In *NASA v. Nelson*, it appears most likely that the Court will issue a narrow ruling that upholds the legality of the background checks required by NASA for non-sensitive contractor personnel. During oral argument, the Court's members expressed some skepticism about the government's case, but not enough to warrant reversal of the government's interest in the case, nor to disturb the systems for adjudication of national security clearances in other contexts. However, it is possible that the Court may place certain limitations on such background investigations, or establish a clearer judicial standard for review of government decisions in security clearance and non-sensitive background investigation adjudications. The Court's decision is expected sometime this term, between now and the end of June 2011.

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