



Government Contracts Advisory

October 11, 2010

FAPIS Disclosure Implementation Looms Closer

On Tuesday, October 5, 2010, the Supreme Court heard oral argument in *NASA v. Nelson* (Case No. 09-530), the appeal of a 9th 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 which inquire about an employee’s personal life, medical history, or past substance abuse.

At oral argument, 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.” The 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 implications for legality and scope of background checks as a whole, even those conducted by private employers.

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, CA. However, in *Nelson v. Nat’l Aeronautics and Space Admin.*, 530 F.3d 865 (9th Cir. 2008), the 9th 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 asked the references to indicate any reservations they may have about the applicant’s trustworthiness or reliability. In addition, the 9th 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.

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 9th Circuit erred in holding that a

CONTACTS

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

[Jason A. "Jay" Carey](#)
202.496.7711

[Erin B. Sheppard](#)
202.496.7533

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 9th 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 Breyer, and Ruth Bader Ginsburg expressed the most skepticism of 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 that 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 seemed similarly 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 9th Circuit's holding that government intrusions such as this background check should be justified, and that the 9th Circuit's requirement for a "narrowly tailored" 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]henver 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 it 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 seems 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 seems 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, provided sufficient justification by the government. 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 this case is unlikely to rule directly on matters affecting security clearances, the Court may offer dicta in its final opinion which bear indirectly on matters relating to national security and the government's prerogative to protect classified or sensitive information in that context. While this decision is pending, contractors holding classified contracts should continue to operate in accordance with their security agreements and the National Industrial Security Program Operating Manual ("NISPOM"). This case did not stay security clearance background checks, nor did it stay background checks for non-sensitive employees (other than for the 28 Caltech employees who filed suit). Contractors with a requirement to conduct background checks should continue to do so, in accordance with their contracts and applicable law.

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