



## Government Contracts Advisory

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### CONTACTS

For further information regarding the topic discussed in this update, please contact one of the professionals below, or the attorney or public policy advisor with whom you regularly work.

**Robert R. Bohn**  
213.243.6131

**Phillip E. Carter**  
202.496.7244

### High Court Permits Contractor Employee Background Checks

On Wednesday, January 19, 2011, the Supreme Court unanimously authorized broad background checks into the personal lives, medical histories, and past incidents of substance abuse of federal government contractor personnel. See *NASA v. Nelson*, No. 09-0530 (January 19, 2011). The decision, while providing assurance to employers that background checks do not violate employees' constitutional rights to informational privacy, left unanswered the many questions regarding the scope and source of the so called "right to informational privacy."

As reported in our **October 11, 2010 advisory**, this 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 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.

The Supreme Court unanimously reversed the 9th Circuit, stating that "[w]e reject the argument that the government, when it requests job-related personal information in an employment background check, has a constitutional burden to demonstrate that its questions are 'necessary' or the least restrictive means of furthering its interests." Instead, the Court noted that the background checks were reasonable, employment-related inquiries that "aid the government in

ensuring the security of its facilities and in employing a competent, reliable workforce.”

The majority decision “assumed, without deciding,” that the appeal “implicated a privacy interest of constitutional significance” and cited to two 30-year old cases where the Court had broadly referred to a constitutional privacy interest in avoiding the disclosing personal information.

However, Justices Scalia and Thomas in their concurring opinions argued that the constitution offers no such right to “informational privacy.” Moreover, Scalia warned that assuming such right “will dramatically increase the number of lawsuits claiming violations of the right to informational privacy.”

While it appears that the scope and source of the so called “right to informational privacy” will be decided on another day, the noteworthy take away for private employers is that background checks, including those seeking sensitive personal information, do not unlawfully infringe on employees’ privacy rights.

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