

Government Interests and Individual Privacy

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Do individuals have a right not to have information about their private lives disclosed by the government? In *National Aeronautics and Space Administration v. Nelson, et al.*, 131 S. Ct. 746 (Jan. 19, 2011), the U.S. Supreme Court was asked to decide whether a background check imposed on existing and prospective employees violated a constitutional right to informational privacy, or the "interest in avoiding disclosure of personal matters" delineated in the earlier cases of *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Since then, no additional Court rulings had addressed the informational privacy issue.

The National Aeronautics and Space Administration (NASA), a federal agency, owned the Jet Propulsion Laboratory (JPL), staffed exclusively by contract employees. At the time these workers were hired, federal law required background checks only for non-contract employees. In the wake of 9/11 and increased concerns about security at federal facilities, the rules changed and a Homeland Security Presidential Directive came into force, requiring standard background checks for the JPL workers. They were told to comply or risk being fired. One of the questions on the form used asked whether the employee had "used, possessed, supplied, or manufactured illegal drugs" within the last year. If the answer was yes, the employee was required to provide details, including information about "any treatment or counseling received." The employee had to certify that all of the responses were true, and sign a release authorizing the government to obtain additional information from schools, former employers, landlords, and others during its investigation. The government then sent out a form to such contacts and references, asking if they had "any reason to question" the employee's honesty, and asking if the respondent knew of any "adverse information" concerning the employee's "violations of the law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters." (A government witness testified that this kind of open-ended question could turn up "all kinds of information you wouldn't have gotten any other way.") All of the information furnished was subject to the protections of the federal Privacy Act.

The employees sued, challenging the section of the questionnaire that asked about illegal-drug use and treatment, and the open-ended questions used in the follow-up investigations. They claimed the investigations constituted unreasonable searches prohibited by the Fourth Amendment and violated their constitutional right to informational privacy. The district court denied their motion for a preliminary injunction, holding that a background investigation was not a "search" within the meaning of the Fourth Amendment, and that, although the questionnaire implicated privacy rights, it was narrowly tailored to further a legitimate interest in security.

On appeal, the U.S. Court of Appeals for the Ninth Circuit agreed that the Fourth Amendment claim was untenable because the government activity was not a search, but ruled that portions of the form were likely unconstitutional. The question about illegal drugs did implicate the privacy right, but was narrowly tailored to achieve the government's legitimate interest in battling the "war on illegal drugs." The same could not be said for the question about drug-related treatment or counseling, and the open-ended questions. "It is difficult to see how the vague solicitation of derogatory information concerning the applicant's 'general behavior or conduct' and 'other matters' could be narrowly tailored to meet any legitimate need, much less the specific interests that [the Federal government] offered to justify the new requirement."

The Supreme Court reversed and remanded, in an opinion delivered by Justice Alito. "We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*. We hold, however, that the challenged portions of the Government's background check do not violate this right in the present case. The Government's interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act of 1974 ... satisfy any 'interest in avoiding disclosure' that may 'arguably ha[ve] its roots in the Constitution.' "

Here, it was critical that the government conducted the vetting and checks primarily "in its capacity 'as proprietor' and manager of its 'internal operation.'" Acting as an employer and not a regulator, the government had more latitude to deal with citizens as its employees that it would otherwise have, and this was supported further by a strong interest in "ensuring the security of its facilities and in employing a competent, reliable workforce." The challenged questions, including the open-ended questions, were "reasonable, employment-related inquiries that further[ed] the Government's interests in managing its internal operations," and the Court rejected the argument that the government had to first demonstrate that its questions were necessary or the least restrictive means of furthering its interests.

Justice Scalia's concurrence in the judgment could be summarized as one of those jokes that asks what drug

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(2010). A copy is available online at http://tinyurl.com/4omg5ch.
3. [1972] 2 All E.R. 353 (C.A.); *aff'd on other grounds*, [1973] 2 All E.R. 1169 (H.L.).
4. *Id.* at 376. (Quoted with approval in *R v. Campbell and Shirose* [1999] 1 S.C.R. 565, at para. 50).
5. For example, those called to the Bar in Alberta swear the following oath: "That I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors according to the law. That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta." The oath in Ontario is: "I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. I shall protect and defend the rights and interests of such persons as may employ me. I shall conduct all cases faithfully and to the best of my ability. I shall neglect no one's interest and shall faithfully serve and diligently represent the best interests of my client. I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon frivolous pretences. I shall not pervert the law to favour or prejudice any one, but in all things I shall conduct myself honestly and with integrity and civility. I shall seek to ensure access to justice and access to legal services. I shall seek to improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession. All this I do swear or affirm to observe and perform to the best of my knowledge and ability." There is an optional oath of allegiance to the Sovereign. Law Society of Upper Canada, By-Law 4, Sections 22, 23(1) and 24 (optional), respectively.
6. Melissa Dunne, *In-house counsel must act as the company moral compass*, In-house Counsel (Spring 2009) at 6.
7. Andrew C. Varga, On Being Human 138 (Paulist Press 1978). ML

Federal

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WL 285683 (N.D. Fla. Jan. 31, 2011), was filed minutes after the President signed the bill into law, and included, as parties, 26 States' Attorney Generals or Governors.

Judge Vinson agreed that a person's private decision not to buy health insurance was economic "inactivity," and the reach of the Commerce Clause was limited to individuals and entities engaged in "activity." In every Supreme Court case decided thus far, he said, "Congress was not seeking to regulate under its commerce power something that could even arguably be said to be 'passive inactivity,'" and it was a "radical departure" to accept that it could. Further, because the Necessary and Proper Clause could not be utilized to "pass laws for the accomplishment of objects" that were not within Congress' enumerated powers, the individual mandate could not be otherwise authorized by an assertion of power under that clause. Severability "ultimately turn[ed] on the nature of the statute at issue," and, while a severability clause was included in an earlier version of the Act, it had not been carried forward. The court concluded that "the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently. I must conclude that the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit."

On February 03, Virginia's Attorney General announced that he would seek an expedited review of the health care ruling by the U.S. Supreme Court, bypassing the Circuit Court of Appeals; the U.S. Department of Justice has likewise announced its intention to appeal Judge Vinson's decision to the Eleventh Circuit Court of Appeals. ML

Supreme Court

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addicts, outer space, and the Due Process Clause have in common. He began with an outright rejection of any federal constitutional right to informational privacy. Pointing out that the employees' brief did not once identify the portion of the Constitution that gave rise to such right, he added that this approach "was refreshingly honest. One who asks us to invent a constitutional right out of whole cloth should spare himself and us the pretense of tying it to some words of the Constitution." In any event, the Due Process Clause, the likely choice, was inapposite as it protected those fundamental rights and liberties which were "deeply rooted in this Nation's history and tradition." The employees, he said, did not even attempt to argue that the claim at issue passed that test, "perhaps recognizing the farcical nature of a contention that a right deeply rooted in our history and tradition bars the Government from ensuring that the Hubble Telescope is not used by recovering drug addicts." ML

Inside Canada

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of the SPP and pay the benefits until the dispute was decided. Because it was previously decided that the City could not do both things, "it would be an abuse of process to revisit that issue, and it [was] equally an abuse of process to attack that substantive conclusion by challenging the process used to decide it.... it offend[ed] the integrity of the administration of justice to attempt to litigate the process by which a decision was made, after the decision itself ha[d] been fully litigated." It was time for