



NASA v. Nelson

131 S.Ct. 746 (2011)

Country: United States

Region: Americas

Year: 2011

Court: Supreme Court

Health Topics: Controlled substances, Health information

Human Rights: Right to due process/fair trial, Right to liberty and security of person, Right to privacy

Facts

This case involved a challenge to background checks for government jobs on the basis of constitutional privacy. Nelson and twenty-seven other federal contract employees, working for NASA at a government laboratory at the California Institute of Technology, claimed that two elements of a standard employment background investigation violated their constitutional rights: a questionnaire that asked potential employees about treatment or counseling for recent illegal-drug use and specific open-ended questions on a form sent to references designated by employees.

Contract employees like Nelson, who worked in "non-sensitive" positions, were required to complete Standard Form 85 (SF-85) prior to being hired. Although most of these questions were autobiographical—name, address, education, prior employment, and professional references—the final question asked whether the employee had "used, possessed, supplied, or manufactured illegal drugs" in the last year. The form stated that a "truthful response" could not be used as evidence against the employee in a criminal proceeding.

Once SF-85 was completed, a further questionnaire (Form 42) was sent to former employers, schools, landlords, and references listed on the form, asking if the reference had "any reason to question" the employee's "honesty or trustworthiness." Additionally, the form asked if the reference 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." The form provided space for additional information if "yes" was checked for any of these categories.

The respondents alleged that this background-check process violated their constitutional right to information privacy. The District Court denied the respondents' motion for a preliminary injunction. The Ninth Circuit Court of Appeals reversed the District Court's decision, finding that the portion of form SF-85 requiring disclosure of drug "treatment or counseling" and the "open-ended and highly private" questions of Form 42 were likely to be unconstitutional. NASA appealed the decision to the Supreme Court.

Decision and Reasoning

The Court held that the challenged portions of both SF-85 and Form 42 consisted of reasonable, employment-related inquiries that furthered the Government's interests in managing its internal operations, and that the collection of information for the purposes of the background check was thus constitutional.

The Court first considered that when the government conducted background checks, it was acting in its capacity as the manager of its own internal operations. It noted that millions of private employers used the same background check procedure, and the government likewise had the authority to assess the fitness of prospective employees. In this case, the employees were contract employees who would gain long-term access to federal facilities if hired, and background checks helped ensure the security of such facilities. It was also immaterial that Nelson was a contract employee and not a civil servant, because the two types of employees performed essentially equivalent duties.

The Court then rejected Nelson's challenge to SF-85 and Form 42. The court held that, like all employers, the government was entitled to ensure that it hired law-abiding employees. The questions on SF-85 could help make this determination. In particular, the Court noted that it was reasonable to ask whether individuals had received treatment for illegal-drug use, because this question allowed the government to separate individuals who had taken steps to overcome their drug use from those who had not. The Court also

considered the open-ended inquiries to referees on Form 42 to be reasonable because they were an effective way of obtaining candid answers from referees and thus separating strong candidates from weak ones, and because such open-ended questions were pervasive in both the public and private sector.

Moreover, the information collected in SF-85 and Form 42 was subject to substantial protections from disclosure to the public. The Privacy Act ensured that the information revealed by a background-check process could be maintained only to the extent the records were relevant to some lawful purpose. It required written consent before the government could disclose records pertaining to any individual, and imposed criminal liability for willful violations of its nondisclosure obligations. The collection of information therefore did not violate any constitutional right to information privacy.

Justice Scalia, joined by Justice Thomas, concurred with the majority's holding and added that Nelson failed to cite a specific provision that the background check process violated. Justice Scalia noted that a federal constitutional right to "informational privacy" simply did not exist, and that the Fourth and Fifth Amendment did not prohibit the Government from asking questions about private information.

Decision Excerpts

“The Government, recognizing that illegal-drug use is both a criminal and a medical issue, seeks to separate out those illegal-drug users who are taking steps to address and overcome their problems. The Government thus uses responses to the “treatment or counseling” question as a mitigating factor in determining whether to grant contract employees long-term access to federal facilities.” Para. 31.

“Asking an applicant's designated references broad, open-ended questions about job suitability is an appropriate tool for separating strong candidates from weak ones. It would be a truly daunting task to catalog all the reasons why a person might not be suitable for a particular job, and references do not have all day to answer a laundry list of specific questions.” Para. 36.

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