Employment Background Investigations: Federal Circuit Court Issues New Ruling That Supports Broad Employee Privacy Rights

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Human resources directors should heed the lessons of the recent decision by the U.S. Court of Appeals for the Ninth Circuit in the Nelson v. NASA *case: Threatening to terminate employees for not acquiescing to "over broad" governmental background investigations — especially involving medical treatment and psychological counseling information — may be considered a violation of the employee's constitutional rights.*

Earlier this year, the U.S. Court of Appeals for the Ninth Circuit issued a significant decision[1] in which it held that threatening to terminate employees for not acquiescing to "over broad" governmental background investigations may be considered a violation of the employee's constitutional rights.[2] On June 20, the Ninth Circuit vacated that opinion and substituted a new decision in its place, *Nelson v. NASA*,[3] that upheld the plaintiffs' constitutional privacy claim and that directed the federal district court to issue preliminary injunctive relief against the federal defendants — and against the employees' private employer.

The new decision makes it clear that employers must take care when

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obtaining information about the backgrounds of their employees — especially where that information involves medical treatment and psychological counseling or where the investigation is "over broad" — in light of employees' privacy rights.

BACKGROUND

The *Nelson* case involved scientists, engineers, and administrative support personnel ("Appellants") at the Jet Propulsion Laboratory ("JPL"), a research laboratory run jointly by the National Aeronautics and Space Administration ("NASA") and the California Institute of Technology ("Caltech"). JPL is located on federally owned land, but operated entirely by Caltech pursuant to a contract with NASA. Like all JPL personnel, the Appellants were employed by Caltech, not the government. The Appellants were designated by the government as "low risk" contract employees and did not work with classified material. The Appellants sued NASA, Caltech, and the Department of Commerce (collectively, "Appellees"), challenging NASA's recently adopted requirement that "low risk" contract employees like themselves submit to in-depth background investigations as a condition of retaining access to JPL's facilities. NASA's new policy required that every JPL employee undergo a National Agency Check with Inquiries ("NACI"), the same background investigation required of government civil service employees, before he or she could obtain an identification badge needed for access to JPL's facilities.

The NACI investigation required the applicant to complete and submit Standard Form 85 ("SF 85"), which asked for (1) background information, including residential, educational, employment, and military histories; (2) the names of three references who "know you well"; and (3) disclosure of any illegal drug use, possession, supply, or manufacture within the past year, along with the nature and circumstances of any such activities and any treatment or counseling received. This information was then checked against four government databases:

1. Security/Suitability Investigations Index;

2. The Defense Clearance and Investigation Index;
3. The FBI Name Check; and
4. The FBI National Criminal History Fingerprint Check.

Finally, SF 85 required the applicant to sign an "Authorization for Release of Information" that authorized the government to collect "any information relating to [his or her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information."

The information sought "may include, but is not limited to, [the applicant's] academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information."[4] It was not clear the exact extent to and manner in which the government would seek this information, but it was undisputed that each of the applicant's references, employers, and landlords would be sent an "Investigative Request for Personal Information" ("Form 42"), which asked whether the recipient had "any reason to question [the applicant's] honesty or trustworthiness" or had "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters."

The recipient would be asked to explain any adverse information noted on the form. Once the information was collected, NASA and the federal Office of Personnel Management determined whether the employee was "suitable" for continued access to NASA's facilities, although the Ninth Circuit observed that the exact mechanics of this suitability determination were in dispute.[5]

APPLICATION TO CONTRACT EMPLOYEES

As the Ninth Circuit pointed out, since it was first created in 1958, NASA, like all other federal agencies, had conducted NACI investigations of its civil servant employees but not of its contract employees. Around the year 2000, however, NASA determined that the incomplete screening of contractor employees posed a security vulnerability for the

agency and began to consider requiring NACI investigations for contract employees as well. In November 2005, revisions to NASA's Security Program Procedural Requirements imposed the same baseline NACI investigation for all employees, civil servant or contractor.

These changes were made applicable to JPL employees on January 29, 2007, when NASA modified its contract with Caltech to include the requirement. According to the circuit court, Caltech "vigorously opposed the change," but NASA invoked its contractual right to unilaterally modify the contract and directed Caltech to comply immediately with the modifications. Caltech subsequently adopted a policy — not required by NASA — that all JPL employees who did not successfully complete the NACI process so as to receive a federal identification badge would be deemed to have voluntarily resigned their Caltech employment.

On August 30, 2007, the Appellants filed suit alleging, both individually and on behalf of the class of JPL employees in non-sensitive or "low risk" positions, that NASA's newly imposed background investigations were unlawful. The Appellants brought three primary claims: (1) NASA and the Department of Commerce (collectively "Federal Appellees") violated the Administrative Procedure Act ("APA") by acting without statutory authority in imposing the investigations on contract employees; (2) the investigations constituted unreasonable searches prohibited by the Fourth Amendment; and (3) the investigations violated their constitutional right to informational privacy.

On September 24, 2007, the Appellants moved for a preliminary injunction against the new policy on the basis that any JPL worker who failed to submit an SF 85 questionnaire by October 5, 2007, would be summarily terminated. The district court denied the Appellants' request. It divided the Appellants' claims into two categories — those challenging the SF 85 questionnaire itself and those challenging the grounds upon which an employee might be deemed unsuitable — and found that the challenges to the suitability determination were highly speculative and unripe for judicial review. The district court rejected the Appellants' APA claim, finding statutory support for the investigations in the National Aeronautics and Space Act of 1958 (the "Space Act").[6] The district court also rejected the Appellants' Fourth Amendment argument, holding that a

background investigation was not a "search" within the meaning of the Fourth Amendment. Finally, the district court found that the SF 85 questionnaire implicated the constitutional right to informational privacy but was narrowly tailored to further the government's legitimate security interest. After concluding that the Appellants had little chance of success on the merits, the district court also found that they could not demonstrate irreparable injury because any unlawful denial of access to JPL's facilities could be remedied post hoc through compensatory relief.

On appeal, a motions panel of the Ninth Circuit granted a temporary injunction pending a merits determination of the denial of the preliminary injunction.[7] The panel concluded that the information sought by SF 85 and its waiver requirement raised serious privacy issues and questioned whether it was narrowly tailored to meet the government's legitimate interest in ascertaining the identity of its low-risk employees.[8] The panel further found that the balance of hardships tipped sharply in favor of Appellants, who risked losing their jobs pending appeal, whereas there was no exigent reason for performing the NACI investigations during the few months pending appeal given that it had been "more than three years since the Presidential Directive [upon which the government relied] was issued."[9] A three judge panel of the Ninth Circuit issued a full decision earlier this year, but that decision was vacated on June 20 and a new decision substituted in its place.

THE NINTH CIRCUIT'S NEW RULING

The Ninth Circuit's new ruling considered the Appellants' claims and found in favor of the Appellants on a variety of important privacy issues.

APA Claim

The Appellants first claimed that the Federal Appellees had violated the APA by imposing background investigations on contract employees without any basis in executive order or statute. The district court had ruled that Congress gave NASA the authority to conduct such investigations in the Space Act of 1958, which provides:

> The [NASA] Administrator shall establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security. The Administrator may arrange with the Director of the Office of Personnel Management for the conduct of such security or other personnel investigations of the Administration's officers, employees, and consultants, and its contractors and subcontractors and their officers and employees, actual or prospective, as he deems appropriate….[10]

The Appellants argued on appeal that the "security or other personnel investigations" described in the second sentence of § 2455(a) were examples of the "security requirements, restrictions, and safeguards" described in the first sentence and therefore could only be established "as…deem[ed] necessary in the interest of the national security." They then argued that this limiting clause must be read in light of *Cole v. Young*,[11] where the U.S. Supreme Court interpreted a statute giving certain government officials the power to summarily dismiss employees "when deemed necessary in the interest of the national security."[12]

In its decision, the Ninth Circuit explained that, in *Cole*, the Supreme Court found it clear "that 'national security' was not used in the Act in an all-inclusive sense, but was intended to refer only to the protection of 'sensitive' activities" and therefore held that "an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a 'sensitive' position."[13] The Appellants claimed that, by using identical limiting language in the Space Act so soon after Cole, Congress intended to authorize personnel investigations only of contractors in "sensitive" positions and not of the "low risk" contractors at issue in *Nelson*. The circuit court declared that it did not have to resolve whether the reference to the "interest of the national security" in § 2455(a) should be interpreted in light of *Cole*, because it read this limiting language to apply only to the "security requirements, restrictions, and safeguards" described in the first sentence and not to the "personnel investigations" described in the second sentence. It noted that the second sentence could plausibly be read as an example of the "security requirements, restrictions, and safeguards" described in the first sentence, but that the statute's legislative

history strongly suggested that it was instead meant to be a separate and distinct authorization of power. The appellate court pointed out that the Conference Report described the two sentences separately and noted that the Senate version of the bill contained the second sentence but not the first.[14] According to the Ninth Circuit, this suggested that § 2455(a) provided two distinct authorizations, the latter of which allowed the NASA Administrator to arrange for "security and other personnel investigations" of contractors "as he deems appropriate," regardless of whether these investigations are "necessary in the interest of the national security." It then ruled that because the Space Act appeared to grant NASA the statutory authority to require the investigations at issue in this case, the district court had correctly concluded that the Appellants were unlikely to succeed on the merits of their APA claim.[15]

Fourth Amendment Claims

The Ninth Circuit then turned to the Appellants' Fourth Amendment claims. Here, it also agreed with the district court's conclusion that the Appellants were unlikely to succeed on their claims, because the government's actions were not likely to be deemed "searches" within the meaning of the Amendment.

As the Ninth Circuit explained, an action to uncover information is generally considered a "search" if the target of the search had a "reasonable expectation of privacy" in the information being sought, a term of art meaning a "subjective expectation of privacy…that society is prepared to recognize as reasonable."[16] It added that a person did not have a "reasonable expectation of privacy" in one's information for Fourth Amendment purposes merely because that information was of a "private" nature; instead, Fourth Amendment protection could evaporate in any of several ways.[17] To succeed on their Fourth Amendment claim, therefore, the Appellants had to demonstrate that either the Form 42 inquiries sent to third parties or the SF 85 questionnaire itself violated a "reasonable expectation of privacy" so as to be considered a "search" within the meaning of the Amendment.

Form 42 Inquiries

The Ninth Circuit first addressed the Form 42 inquiries. It pointed out that "[w]hat a person knowingly exposes to the public…is not a subject of Fourth Amendment protection";[18] however, information did not lose Fourth Amendment protection simply because it was conveyed to another party. For example, it continued, in *Katz*, FBI agents attached an electronic listening device to the outside of a public telephone booth and recorded the defendant transmitting illegal betting information over the telephone.[19] Even though the booth's occupant had voluntarily conveyed the information in the conversation to the party on the other end of the line, the Supreme Court found that he was "surely entitled to assume that the words he utters into the mouthpiece w[ould] not be broadcast to the world," so the covert surveillance was considered a search within the meaning of the Amendment.[20]

On the other hand, the Ninth Circuit noted, in *United States v. White*, the Supreme Court held that the electronic surveillance of a conversation between a defendant and a government informant did not constitute a "search" for Fourth Amendment purposes.[21] The Ninth Circuit noted that the Supreme Court acknowledged that, as in *Katz*, the speaker likely expected the content of the conversations to be kept private; however, the Supreme Court held as a bright line rule that the Fourth Amendment "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'"[22] Then, in *United States v. Miller*,[23] holding that the government could subpoena private bank records without implicating the Fourth Amendment, the Supreme Court extended the bright line rule to all information knowingly revealed to the government by third parties:

> [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.[24]

Following this discussion of the law, the Ninth Circuit in *Nelson* pointed out that in the background investigations challenged by the Appellants, the government would send written Form 42 inquiries to the applicant's acquaintances. Through these inquiries, the third parties might disclose highly personal information about the applicant. As in *White* and *Miller*, the applicant presumably revealed this information to the third party with the understandable expectation that this information would be kept confidential. Nonetheless, the Ninth Circuit held, these written inquiries appeared to fit squarely under *Miller's* bright line rule and therefore could not be considered "searches" under the Fourth Amendment.[25]

SF 85 Questionnaire

The Ninth Circuit reached the same conclusion with respect to the SF 85 questionnaire, finding that it also was unlikely to be considered a Fourth Amendment "search." As the Ninth Circuit pointed out, requiring an individual to answer questions may lead to the forced disclosure of information that he or she reasonably expected to keep private. It stated that historically, however, when "the objective is to obtain testimonial rather than physical evidence, the relevant constitutional amendment is not the Fourth but the Fifth."[26]

The Ninth Circuit then noted that, as Judge Posner wrote in *Greenawalt*, direct questioning could potentially lead to a far greater invasion of privacy than many of the physical examinations that have in the past been considered Fourth Amendment "searches."[27] Nonetheless, applying the Fourth Amendment to such questioning would force courts to analyze a wide range of novel contexts (e.g., courtroom testimony, police witness interviews, credit checks, and, as here, background checks) under a complex doctrine, with its "cumbersome warrant and probable cause requirements and their myriad exceptions," that was designed with completely different circumstances in mind.[28] Moreover, declining to extend the Fourth Amendment to direct questioning would by no means leave individuals unprotected, as such contexts would remain governed by traditional Fifth and Sixth Amendment interrogation rights, and the right to informational privacy (discussed below).[29]

Accordingly, the Ninth Circuit held that because neither the written inquiries directed at third parties nor the SF 85 questionnaire directed at the applicants would likely be deemed "searches," Appellants were unlikely to succeed on their Fourth Amendment claims.

Informational Privacy Claim

The Ninth Circuit stated that although the district court "correctly found" that the Appellants were unlikely to succeed on their APA and Fourth Amendment claims, it "significantly underestimated the likelihood that Appellants would succeed on their informational privacy claim." The circuit court reached this conclusion by deciding that the district court had failed to consider "the most problematic aspect" of the government's investigation: the "open-ended Form 42 inquiries."

The appellate court observed that it had "repeatedly" acknowledged that the constitution protects an "individual interest in avoiding disclosure of personal matters."[30] This interest, it explained, covered a wide range of personal matters, including sexual activity,[31] medical information,[32] and financial matters.[33] It stated that if the government's actions compelled disclosure of private information, it had the burden of showing that its use of the information "would advance a legitimate state interest" and that its actions were "narrowly tailored to meet the legitimate interest."[34] Courts must "balance the government's interest in having or using the information against the individual's interest in denying access,"[35] weighing, among other things:

> the type of [information] requested,…the potential for harm in any subsequent nonconsensual disclosure,…the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access.

In the Ninth Circuit's view, both the SF 85 questionnaire and the Form 42 written inquiries required the disclosure of personal information and each presented a ripe controversy. Therefore, it considered the constitutionality of both aspects of the investigation in turn.

SF 85 Questionnaire

The Appellants conceded that most of the questions on the SF 85 form were unproblematic and did not implicate the constitutional right to informational privacy. They did, however, challenge the constitutionality of one group of questions concerning illegal drugs. The questionnaire asked the applicant:

> In the last year, have you used, possessed, supplied, or manufactured illegal drugs?….If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

The form indicated that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding."

The district court concluded that the requested information implicated the right to informational privacy, but found that there were "adequate safeguards in place [to deal with these] sensitive questions."

The Ninth Circuit pointed out that other courts have been skeptical that questions concerning illegal drug use — much less possession, supply, or manufacture — would even implicate the right to informational privacy. For example, in *Mangels v. Pena*,[37] the Tenth Circuit held that the disclosure of firefighters' past illegal drug use did not violate their informational privacy rights.[38] The Tenth Circuit held in that case that "[t]he possession of contraband drugs does not implicate any aspect of personal identity which, under prevailing precedent, is entitled to constitutional protection.…Validly enacted drug laws put citizens on notice that this realm is not a private one."[39] In addition, in *National Treasury Employees' Union v. U.S. Department of Treasury*,[40] the Fifth Circuit considered a similar form to the SF 85 questionnaire, with almost identical questions concerning illegal drugs, and rejected the applicants' informational privacy claims. The Fifth Circuit raised similar concerns to the Tenth Circuit:

> Today's society has made the bold and unequivocal statement that illegal substance abuse will not be tolerated. The government declared an all-out war on illegal drugs more than a decade ago.…Surely anyone who works for the government has a diminished expectation that his drug and alcohol abuse history can be kept secret, given that he works for the very government that has declared war on substance abuse.[41]

The Fifth Circuit also noted that the plaintiffs in that case were all federal employees in either "high" or "moderate" risk "public trust" positions, and were thus acutely "aware of [their] employer's elevated expectations in [their] integrity and performance."[42]

The Ninth Circuit in *Nelson* then stated that, like the Tenth and Fifth Circuits, it was "sensitive to the government's interest in uncovering and addressing illegal substance abuse among its employees and contractors, given the public stance it has taken against such abuse." This government interest, it stated, was undoubtedly relevant to the constitutional balancing inquiry: whether the forced disclosure "would advance a legitimate state interest and [is] narrowly tailored to meet the legitimate interest."[43] The Ninth Circuit then said that it was "less convinced, however," that the government's interest should inform the threshold question of whether the requested information was sufficiently personal to invoke the constitutional right to privacy. The appellate court declared that it doubted that the government could strip personal information of constitutional protection simply by criminalizing the underlying conduct — instead, to force disclosure of personal information, the government "must at least demonstrate that the disclosure furthers a legitimate state interest." Drug dependence and abuse carried an enormous stigma in our society and was "not generally disclosed by individuals to the public."[44] The Ninth Circuit then stated that if it had to reach the issue, therefore, it would "be inclined to agree" with the district court that SF 85's drug questions reached sensitive issues that implicated the constitutional right to informational privacy.

The Ninth Circuit found, however, that it did not need to decide this issue because even if the question requiring disclosure of prior drug use, possession, supply, and manufacture did implicate the privacy right, it

was narrowly tailored to achieve the government's legitimate interest. It continued by noting that the federal government had taken a strong stance in its war on illegal drugs, and it said that this stance would be "significantly undermined" if its own employees and contractors freely ignored its laws. By requiring applicants to disclose whether they had "used, possessed, supplied, or manufactured illegal drugs" within the past year, and, if so, to explain the "nature of the activity" and "any other details relating to [the applicant's] involvement with illegal drugs," the government had "crafted a narrow inquiry designed to limit the disclosure of personal information to that which is necessary to further the government's legitimate interest," the Ninth Circuit stated.

However, the Ninth Circuit reached a different conclusion with respect to the requirement that applicants disclose "any treatment or counseling received" for their drug problems. "Information relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy," it declared.[45] The Ninth Circuit found that the government had not suggested any legitimate interest in requiring the disclosure of such information; indeed, it said, any treatment or counseling received for illegal drug use would presumably *lessen* the government's concerns regarding the underlying activity. Because SF 85 appeared to *compel* disclosure of personal medical information for which the government had failed to demonstrate a legitimate state interest, the Ninth Circuit held that the Appellants were likely to succeed on this portion of their informational privacy challenge to SF 85.

Form 42 Inquiries

The circuit court next found that the Form 42 written inquiries were "much more problematic." Form 42 solicited "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters." These open-ended questions were designed to elicit a wide range of adverse, private information that "is not generally disclosed by individuals to the public" and therefore seemingly implicated the right to informational privacy.[46]

The government argued that even if the information disclosed in the investigation implicated the right to informational privacy, the scheme had to be upheld because the government had taken measures to keep the information from being disclosed to the general public. The Ninth Circuit noted that although the risk of public disclosure was undoubtedly an important consideration,[47] it was only one of "many factors" that had to be considered.[48] Therefore, it ruled, although safeguards existed to help prevent disclosure of the applicants' highly sensitive information, the Federal Appellees still had to demonstrate that the background investigations were justified by legitimate state interests and that Form 42's questions were "narrowly tailored to meet those legitimate interests."[49]

The circuit court agreed with the government that it had several legitimate reasons for investigating its contractors. "NASA has an interest in verifying its contractors' identities to make sure that they are who they say they are, and it has an interest in ensuring the security of the JPL facility so as not to jeopardize the costly investments housed therein," and these were "legitimate government interests," according to the circuit court.

However, the Ninth Circuit held, the government failed to demonstrate that Form 42's questions were "narrowly tailored" to meet these legitimate interests. Initially, it noted that although NASA had a general interest in keeping the JPL facility secure, there was no specific evidence in the record to suggest that any of the "low risk" JPL personnel posed such a security risk; indeed, it continued, NASA appeared to designate as "moderate risk" any individual who had the "opportunity to cause damage to a significant NASA asset or influence the design or implementation [of] a security mechanism designed to protect a significant NASA asset." More important, the Ninth Circuit stated, Form 42's "broad, open-ended questions" appeared to range far beyond the scope of the legitimate state interests that the government had proposed. Asking for "*any* adverse information about this person's employment, residence, or activities" could solicit some information relevant to the applicant's identity or security risk, but the Ninth Circuit noted, there were no safeguards in place to limit the disclosures to information relevant to these interests. Instead, it ruled, the form invited the recipient to reveal *any* negative information of which he or she was aware. In the Ninth Circuit's view, it was "difficult to see how the vague solicita-

tion 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 Federal Appellees have offered to justify the new requirement."

Finally, the circuit court stated, the context in which the written inquiries were posed further supported the Appellants' claim. It observed that in *Thorne v. City of El Segundo*,[50] it focused not only on the private nature of questions asked, but also on the lack of standards governing the inquiry. In *Thorne*, the Ninth Circuit held that questioning a female police applicant about her past sexual relations with another officer in the department violated her constitutional right to informational privacy,[51] finding that many of the questions posed went beyond any relevant lines of questioning.[52] Indeed, the Ninth Circuit observed in *Thorne*, the city had not set any *standards* for inquiring about the private information.[53] "When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests…, an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action."[54] In the *Nelson* case, the circuit court stated, the government's questions stemmed from SF 85's extremely broad authorization, allowing it "to obtain *any* information" from any source, subject to other releases being necessary only in some vague and unspecified contexts. It noted that the Federal Appellees had "steadfastly refused" to provide any standards narrowly tailoring the investigations to the legitimate interests they offer as justification. Given that Form 42's open-ended and highly private questions were authorized by this broad, standardless waiver and did not appear narrowly tailored to any legitimate government interest, the circuit court ruled that the Appellants were likely to succeed on their informational privacy claim.

Balance of Hardships

The circuit court then ruled that the balance of hardships tipped "sharply" toward the Appellants, who faced a stark choice: either violation of their constitutional rights or loss of their jobs. According to the circuit court, the district court had erroneously concluded that the

Appellants would not suffer any irreparable harm because they could be retroactively compensated for any temporary denial of employment. It noted that it was true that monetary injury was "not normally considered irreparable,"[55] and the JPL employees who chose to give up their jobs could later be made whole financially if the policy was struck down. However, in the meantime, the Ninth Circuit found that there was a "substantial risk" that a number of employees would not be able to finance such a principled position and so would be coerced into submitting to the allegedly unconstitutional NACI investigation. Unlike monetary injuries, constitutional violations could not be adequately remedied through damages and therefore generally constituted irreparable harm, it stated.[56]

Moreover, the circuit court explained, the loss of one's job did not carry merely monetary consequences; it carried emotional damages and stress, which could not be compensated by mere back payment of wages.

On the other side of the balance, the circuit court found, NASA had not demonstrated any specific harm that it would face if it was enjoined for the pendency of the adjudication from applying its broad investigatory scheme to "low risk" JPL contract employees, many of whom had worked at the laboratory for decades. The Ninth Circuit noted that, as Caltech argued, JPL had successfully functioned without any background investigations since the first contract between NASA and JPL in 1958, so it said that granting injunctive relief would make NASA no worse off than it had ever been. Moreover, it said, an injunction in this case would not affect NASA's ability to investigate JPL personnel in "high risk" or "moderate risk" positions, significantly undercutting any lingering security fears. Finally, the circuit court added that NASA had taken "years" to implement NACI at JPL, which it construed as weakening any urgency in imposing the investigations before the Appellants' claims were fully adjudicated on their merits.

INJUNCTIVE RELIEF

Significantly, Caltech argued that any injunctive relief should not encompass it because, as a private actor, it could not be held liable for constitutional violations that arose from the government-imposed background investigations. The Ninth Circuit found that Caltech was correct that there

existed a "presumption that private conduct does not constitute government action."[57] It stated that this presumption was rebutted, however, when a sufficient nexus "make[s] it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some *willful participation in a joint activity* by the private entity and the government."[58]

Caltech noted that it initially had opposed the new background investigations, which were conducted entirely by NASA and other government agencies; therefore, it claimed that the investigations were not "joint activities" and Caltech was not a "willful participant." The Ninth Circuit stated that it had "some sympathy" for this argument, and if Caltech had done nothing more than abide by the contract terms unilaterally imposed by NASA, it might agree with its position. The Ninth Circuit ruled, however, that the record was clear that Caltech did do more — "it established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment."

Importantly, the circuit court ruled that this decision did not necessarily render Caltech liable as a governmental actor, but it said that it raised serious questions as to whether the university had in fact become a willful and joint participant in NASA's investigation program, even though it was not so initially. Caltech's threat to terminate non-compliant employees was "central to the harm" the Appellants faced and created the coercive environment in which they had to choose between their jobs or their constitutional rights. Moreover, with the government enjoined, Caltech faced no independent harm to itself, so, the circuit court stated, the balance of hardships tipped overwhelmingly in the Appellants' favor. Therefore, the circuit court held that that preliminary injunctive relief should apply both to Caltech and to the Federal Appellees, and it remanded the case to the district court to allow it to fashion appropriate preliminary injunctive relief.

CONCLUSION

The original *Nelson* decision by the Ninth Circuit and the new decision amount to a huge victory for government contract employees, and

both rulings strike a blow to Homeland Security Presidential Directive 12, already under review by a House Committee on Oversight and Government Reform after a Government Accountability Office report finding that the program was incurring high costs but providing little benefit to date.[59] The Ninth Circuit made clear that the government's extending the National Agency Check with Inquiries investigation to "low risk" contract employees was going too far. Such a "broad inquisition" of these employees, in the view of the Ninth Circuit, was "standardless" and not narrowly tailored to serve any "legitimate government interest."

Human resources leaders would be wise to heed the lessons of the *Nelson* case. Though the government does indeed have a legitimate interest in protecting its citizens from the potential dangers of sensitive information falling into the wrong hands, at least in the Ninth Circuit, the government does not have unfettered access to background information on employees working in "low risk" positions. Moreover, private employers that threaten employees with termination for not acquiescing to "over broad" governmental investigations may very well be considered government actors and thus liable for violating the constitutional rights of employees.

NOTES

[1] *Nelson v. NASA*, 512 F.3d 1134 (9th Cir. 2008).

[2] For a discussion and analysis of that decision and its implications, see Victoria Prussen Spears, "Employment Background Investigations: How Far Can the Government Go?," *Privacy & Data Security Law Journal* (May 2008).

[3] No. 07-56424 (9th Cir. June 20, 2008).

[4] The form also noted that "for some information, a separate specific release will be needed," but did not explain what types of information will require a separate release.

[5] Appellants claimed that the factors used in the suitability determination were set forth in a document, temporarily posted on JPL's internal web site, labeled the "Issue Characterization Chart." The document identified within categories designated "A" through "D" "[i]nfrequent, irregular, but deliberate delinquency in meeting financial obligations," "[p]attern of irresponsibil-

ity as reflected in…credit history," "carnal knowledge," "sodomy," "incest," "abusive language," "unlawful assembly," "attitude," "homosexuality…when indications are present of possible susceptibility to coercion or blackmail," "physical health issues," "mental, emotional, psychological, or psychiatric issues," "issues…that relate to an associate of the person under investigation," and "issues…that relate to a relative of the person under investigation." NASA neither conceded nor denied that these factors were considered as part of its suitability analysis; instead, it suggested that the Appellants had not sufficiently proved that such factors would play a role in any individual case.

[6] 42 U.S.C. § 2455(a).

[7] *Nelson v. NASA*, 506 F.3d 713 (9th Cir. 2007).

[8] *Id.* at 716.

[9] *Id.* at 716.

[10] 42 U.S.C. § 2455(a).

[11] 351 U.S. 536 (1956).

[12] *Id.* at 538 (internal quotation marks omitted).

[13] *Id.* at 551.

[14] Conf. Rep. No. 2166 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3160, 3190, 3197-98.

[15] To the extent that NASA has authority to require drug tests for current contractors, that authority is spelled out in the Civil Space Employee Testing Act, codified at 42 U.S.C. § 2473c. Congress enacted the Testing Act as part of the National Aeronautics & Space Administration Authorization Act, Fiscal Year 1992, and not as part of the Space Act of 1958. With the Testing Act, Congress gave NASA the power to administer a drug testing program for those employees or contractors responsible for "safety sensitive, security, or national security functions." *Id.* § 2473c(c)(1)-(2). The "program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use…of alcohol or a controlled substance." *Id.* Moreover, the statute provides that any drug test "shall…provide for the confidentiality of test results and medical information of employees." *Id.* § 2473c(f)(7).

[16] *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1151 (9th Cir. 2007) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[17] *See, e.g., United States v. Miller*, 425 U.S. 435, 443 (1976) (holding that there was no reasonable expectation of privacy in bank records in part because the information was voluntarily disclosed to the bank).

[18] *Katz v. United States*, 389 U.S. 347, 351 (1967).
[19] *Id.* at 348.
[20] *Id.* at 352-53.
[21] 401 U.S. 745, 754 (1971) (plurality).
[22] *Id.* at 749 (quoting *Hoffa v. United States*, 385 U.S. 293, 302 (1966).
[23] 425 U.S. 435 (1976).
[24] *Id.* at 443.
[25] The Ninth Circuit noted that this analysis presupposed that the applicant voluntarily revealed the information to the third party. For example, it stated, the Fourth Amendment could still apply if the government actively used third parties to uncover private information. *See United States. v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (noting that the Fourth Amendment was implicated when "a private party acts as an 'instrument or agent' of the state in effecting a search or seizure.").
[26] *Greenawalt v. Ind. Dep't of Corr.*, 397 F.3d 587, 591 (7th Cir. 2005) (holding that a psychological examination required for continued government employment was not a search under the Fourth Amendment).
[27] *Id.* at 589-90.
[28] *Id.* at 590-91.
[29] *See id.* at 591-92.
[30] *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999).
[31] *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding that questioning police applicant about her prior sexual activity violated her right to informational privacy).
[32] *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality.").
[33] *Crawford*, 194 F.3d at 958 (agreeing that public disclosure of Social Security numbers may implicate the right to informational privacy in "an era of rampant identity theft").
[34] *Crawford*, 194 F.3d at 959 (internal quotation marks omitted).
[35] *Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991).
[36] *Id.* (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)) (alteration in original).
[37] 789 F.2d 836 (10th Cir. 1986).
[38] *Id.* at 839-40.

[39] *Id.* at 839 (internal citations omitted).
[40] 25 F.3d 237 (5th Cir. 1994).
[41] *Id.* at 243.
[42] *Id.* at 244.
[43] *Crawford*, 194 F.3d at 959.
[44] *Id.* at 958.
[45] *See Norman-Bloodsaw*, 135 F.3d at 1269; *Doe*, 941 F.2d at 796.
[46] *Crawford*, 194 F.3d at 958. The constitutional right to informational privacy is concerned with "the individual interest in avoiding disclosure of personal matters." In determining whether the right applies, cases have emphasized the *nature* of the information sought — in particular, whether it was sufficiently "personal" to merit protection, *see Crawford*, 194 F.3d at 958; Doe, 941 F.2d at 796 — rather than on the manner in which the information was sought. The highly personal information that the government sought to uncover through the Form 42 inquiries was protected by the right to privacy, the Ninth Circuit found, whether it was obtained from third parties or from the applicant directly. In this respect, the circuit court noted, the right to informational privacy differed from the Fourth Amendment, which, as a bright-line rule, "does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *Miller*, 425 U.S. at 443. Put differently, the Ninth Circuit added, this principle had occasionally been rephrased as a general holding "that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979). The circuit court stated that it was "clear," however, that the "legitimate expectation of privacy" described in this context was a term of art used only to define a "search" under the Fourth Amendment, and *Miller* and *Smith* did not preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters. If the constitutional right to informational privacy were limited to cases that involved a Fourth Amendment "search," the circuit court reasoned, the two rights would be entirely redundant. Indeed, although the two doctrines often overlap, *see Norman-Bloodsaw*, 135 F.3d at 1269, the Ninth Circuit stated that it had "repeatedly found the right to informational privacy implicated in contexts that did not involve a Fourth Amendment 'search,'" *see, e.g., Thorne*, 726 F.2d at 468.
[47] *See Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002).

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[48] *Id.* at 789-90 ("[T]he right to 'informational privacy'…applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public."); *Norman-Bloodsaw*, 135 F.3d at 1269 (noting that a government action can violate the right to privacy without disclosure to third parties); *Doe*, 941 F.2d at 796 (listing, as two factors among many, " 'the potential for harm in any subsequent nonconsensual disclosure [and] the adequacy of safeguards to prevent authorized disclosure.'" (quoting *Westinghouse Elec. Corp.*, 638 F.2d at 578)).

[49] *Thorne*, 726 F.2d at 469.

[50] 726 F.2d 459 (9th Cir. 1983).

[51] *Id.* at 468.

[52] *Id.* at 469-70.

[53] *Id.* at 470.

[54] *Id.*

[55] *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980).

[56] *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997).

[57] *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999).

[58] *Id.* at 843 (emphasis added).

[59] *http://governmentmanagement.oversight.house.gov/story.asp?ID=1833*.