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## U.S. Supreme Court Holds that Constitutional Privacy Rights Do Not Restrict the Government's Discretion to Background Check Federal Contractors

By Rod Fliegel and William Simmons

In *NASA v. Nelson*, 09-530 (Jan. 12, 2011), the U.S. Supreme Court rejected a constitutional challenge to the *collection* of certain background information by the U.S. Government as part of the process of credentialing federal contractors. The Court's decision acknowledges the legitimate interest that the Government has as an owner and employer in vetting workers. Because private sector employers plainly have the same interest in "employing a competent, reliable workforce" and "separating strong candidates from weak ones," the Court's decision may prove useful to private sector employers at a time when background checks are under heavy fire from groups such as the Equal Employment Opportunity Commission (EEOC) and state legislatures. That said, the Court's decision does not give public or private sector employers *carte blanche* to engage in background checks of direct or contingent workers. The Court's decision was limited to a consideration of federal constitutional privacy rights, and did not consider the various laws that regulate the collection and use of background information by private sector employers, including the Fair Credit Reporting Act (FCRA) and Title VII of the Civil Rights Act of 1964 (as interpreted by the EEOC).

### Facts

The suit in question was brought by 28 contract employees who worked for NASA's Jet Propulsion Laboratory in California, which was operated by the California Institute of Technology under a government contract. During the contract workers' employment, a Presidential Order was issued that resulted in a requirement that all contract employees undergo a background check entitled the National Agency Check with Inquiries (NACI), which is the standard background investigation used for prospective civil servants. Following the Presidential Order, NASA modified its contract with the California Institute of Technology to require that it comply with the new background check requirement. As a result, the California Institute of Technology informed the Lab employees that anyone failing to complete the new background check process by a certain date would be subject to termination.

Among other things, the NACI background investigation requires employees to answer whether they have used, possessed, supplied or manufactured *illegal* drugs in the past

year, and, if so, to provide further details, including whether they have received any treatment or counseling. The NACI background investigation also includes a reference check portion, in which the employee's references are sent a form that asks open-ended questions about the nature of the reference's relationship with the employee, whether the reference has any reason to question the employee's honesty or trustworthiness, and whether the reference knows of any adverse information concerning the employee's character.

Faced with having to complete the NACI background check, the employees filed a preemptive suit claiming that the process violated their constitutional rights relating to the collection of private information. The district court denied the employees' motion for a preliminary injunction, but the Ninth Circuit Court of Appeals granted an injunction pending its decision on appeal, and then later reversed the district court's order. The U.S. Supreme Court reversed the Ninth Circuit.

## The Supreme Court's Decision

The U.S. Supreme Court rejected the employees' constitutional challenge, holding that even assuming a constitutional right of "informational privacy" exists (a question the Court did not decide), the NACI background investigation inquiries are reasonable and would not violate any such privacy right. As the Court succinctly summarized: "the Government has an interest in conducting basic background checks." "Reasonable investigations of applicants and employees aid the Government in ensuring the security of its facilities and in employing a competent, reliable workforce."

The Court specifically approved the NACI's challenged questions regarding illicit drug use, holding that they were reasonable inquiries: "[t]he Government has good reason to ask employees about their recent illegal-drug use. Like any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will 'efficiently and effectively' discharge their duties. Questions about illegal drug use are a useful way of figuring out which persons have these characteristics."

The Court also found NACI's reference process was "reasonably aimed at identifying capable employees who will faithfully conduct the Government's business," and noted that the open-ended questions used to glean information from the references about various areas of the employees' characters were "an appropriate tool for separating strong candidates from weak ones." The Court emphasized that the questions the employees challenged "are part of a standard employment background check of the sort used by millions of private employers."

The Court also dismissed any concern that the background checks were conducted for individuals who had already been working for years at the Laboratory, reasoning, "the fact that Cal Tech once conducted a background check on respondents does not diminish the Government's interests in conducting its own standard background check to satisfy itself that contract employees should be granted continued access to the Government's facility."

In ruling that the balance of interests tipped in favor of the Government, the Court further reasoned that the federal Privacy Act provides "substantial protections" against the public disclosure of the employees' personal information. The Privacy Act restricts the Government's discretion to maintain certain personnel records, conditions disclosure of personnel records on the individual's consent, and imposes criminal liability for willful violations of its nondisclosure obligations.

## The Decision's Impact on Employers

The use of background checks is under heavy fire from groups such as the EEOC. Pursuant to its "E-RACE Initiative," the EEOC has filed several discrimination lawsuits relating to the use of criminal records and credit reports. At the investigation stage, the EEOC's "Systemic Unit" is also using single charging-party complaints as the springboard for sweeping informational requests, including demands in some instances that nationwide employers provide information not only about their hiring policies, but about their *entire workforce*. Other groups such as the New York Office of the Attorney General and the plaintiffs' bar are pursuing similar litigation, including class action claims.

The Court's NASA decision does not involve the fair employment laws *at all*, and thus it will not necessarily be controlling as to the above challenges. However, the Court expressly acknowledged the legitimate interest that the Government has in vetting workers as an owner

and employer. Because private sector employers plainly have the same interest in “employing a competent, reliable workforce” and “separating strong candidates from weak ones,” the Court’s decision may prove useful in some ways to private sector employers if their hiring practices are challenged by the EEOC or otherwise. That said, beyond Title VII, employers should continue to be mindful of the various federal and state laws that regulate the collection and use of background information by private sector employers. For example:

- The FCRA and its state law equivalents impose *notice* and *consent* obligations on employers when they order background checks from a background report vendor (“consumer reporting agency”). Although the name of the federal statute is literally the Fair *Credit* Reporting Act, the Act is applicable to requests for criminal records, motor vehicle records, employment verifications, credentialing checks, etc. The duties imposed by the FCRA include, but are not limited to, the obligation to secure advance authorization from job applicants to order background checks and to provide required “adverse action” notices.
- The Americans With Disabilities Act (ADA) restricts the collection of medical information in the hiring process, but, as interpreted by the EEOC and the Ninth Circuit, also regulates the *sequencing* of the background check relative to the timing of any pre-employment “medical examinations.” Medical data should only be collected on a post-offer, conditional offer basis.
- State laws in some jurisdictions regulate the use of criminal records, effectively making ex-offenders a “protected class.” These protections for ex-offenders include: workplace posting obligations; notice obligations; limitations on inquiries about a candidate’s criminal past; and substantive restrictions on when an employer may rely on conviction records to disqualify candidates from consideration.
- The laws in at least four states similarly regulate the use of credit history information: Washington; Oregon; Hawaii; and, most recently, Illinois. On January 19, 2011, Rep. Steve Cohen re-introduced a bill (H.R. 321) that would amend the FCRA to similarly restrict the use of credit history information by employers. Last year, the EEOC posted a related letter on its website, and it just recently held a hearing for public comment on the general topic. Further, other states are currently considering laws similar to those passed by Washington, Oregon, Hawaii and Illinois.

Because a wide range of bills are pending in many states, and court cases are pending on these issues as well, employers should be alert for further important changes in this area of the law.

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