

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL AERONAUTICS AND SPACE :

4 ADMINISTRATION, ET AL., :

5 Petitioners : No. 09-530

6 v. :

7 ROBERT M. NELSON, ET AL. :

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9 Washington, D.C.

10 Tuesday, October 5, 2010

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:05 a.m.

15 APPEARANCES:

16 GENERAL NEAL K. KATYAL, ESQ., Acting Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf
18 of Petitioners.

19 DAN STORMER, ESQ., Pasadena, California; on behalf
20 of Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 09-530, National
5 Aeronautics and Space Administration v. Nelson.

6 Mr. Katyal.

7 ORAL ARGUMENT OF GENERAL NEAL K. KATYAL

8 ON BEHALF OF THE PETITIONERS

9 GENERAL KATYAL: Thank you,
10 Mr. Chief Justice, and may it please the Court:

11 Background checks are a standard way of
12 doing business. The Government has required them for
13 all civil service employees since 1953 and for
14 contractors since 2005. If the Ninth Circuit in this
15 case held that a constitutional right to informational
16 privacy precluded asking the questions it asks, that was
17 wrong for two basic reasons.

18 First, the background checks' mere
19 collection of information with accompanying safeguards
20 vitiates no constitutional privacy interest. These
21 checks have been going on for millions of employees for
22 dozens of years. They are part of the employment
23 process. They are manifestly not roving checks on
24 random individuals.

25 JUSTICE SOTOMAYOR: Mr. Katyal, is there any

1 limit to what questions the Government can ask --

2 GENERAL KATYAL: Well, the --

3 JUSTICE SOTOMAYOR: -- an applicant?

4 GENERAL KATYAL: The -- the limits are -- in
5 this case, are the ones on SF-85 and Form 42. And we do
6 think that that's a fairly restrict --

7 JUSTICE SOTOMAYOR: What does that mean?

8 GENERAL KATYAL: Well, those two --

9 JUSTICE SOTOMAYOR: Could you ask somebody,
10 what's your genetic make-up, because we don't want
11 people with a gene that is predisposed to cancer?
12 Whatever other -- could you ask that?

13 GENERAL KATYAL: Well, I think that the
14 Court doesn't need to confront that --

15 JUSTICE SOTOMAYOR: We do, because I have to
16 start with the question of: What are the limits on the
17 Government, if any? Are you taking the position that as
18 an employer, there are absolutely none, or are you
19 taking the position that there are some, and what would
20 they be?

21 GENERAL KATYAL: Our position is in a case
22 such as this, where there are collections on the
23 Government's dissemination of the information --

24 JUSTICE SOTOMAYOR: So what you are saying
25 is, there is no limit?

1 GENERAL KATYAL: I -- I think that this
2 Court in Whalen -- there is no decision thus far that
3 has recognized any constitutional limit on the
4 Government's collection of information, so long as there
5 are accompanying safeguards on the disseminations and --

6 JUSTICE GINSBURG: General Katyal, why are
7 we getting into this? Because this case, it seems to
8 me, is a challenge -- a challenge to a preliminary
9 injunction which was quite narrow. There was only one
10 question at issue. There is no cross-appeal, is there?

11 GENERAL KATYAL: There -- there is no
12 cross-appeal.

13 JUSTICE GINSBURG: So we have Form 85. The
14 only thing that's in contention there is the question
15 about treatment or counsel. Nothing else. So why are
16 we talking about the universe of what questions might be
17 asked?

18 And on the other form, I take it, it's just
19 the so-called open-ended questions, not everything on
20 the form.

21 GENERAL KATYAL: I quite agree, Justice
22 Ginsburg. That's what I was trying to say to Justice
23 Sotomayor; that is, I think that this case doesn't force
24 the Court to answer questions it has never really
25 answered, which are the outer limits of what the

1 Government can do in terms of the collection of
2 information.

3 Here you have a narrow decision by the Ninth
4 Circuit, one whose reasoning, I think, could radiate
5 very broadly and undermine government -- the
6 Government's background check --

7 JUSTICE GINSBURG: What do you think has
8 been -- there hasn't been a formal injunction entered, a
9 preliminary -- a preliminary junction, has there?

10 GENERAL KATYAL: It's only -- it's at the
11 preliminary injunction stage.

12 But our -- our point is that the reasoning
13 that the Ninth Circuit used, if adopted -- if adopted to
14 create a permanent injunction, could preclude the
15 Government from asking all sorts of questions in
16 background -- in background checks. Not just the ones
17 it isolated here, but more general ones, because the
18 Ninth Circuit decision is essentially a how-to manual on
19 how to question various individual questions and
20 micromanage them and inject Federal courts into --

21 JUSTICE GINSBURG: I thought that the -- the
22 entire Form 85 was approved. There's no questions you
23 could ask about, have you used drugs within the last
24 year? It's only the question about treatment and
25 counseling that is at issue. Right?

1 GENERAL KATYAL: That's -- that's all that
2 the Ninth Circuit ruled on at the preliminary injunction
3 stage.

4 CHIEF JUSTICE ROBERTS: Does that -- does
5 that ruling stop you from asking that question right now
6 throughout the Ninth Circuit?

7 GENERAL KATYAL: Which question? The drug
8 treatment question?

9 CHIEF JUSTICE ROBERTS: No, no, no. The --
10 yes. Yes, the counseling and treatment question.

11 GENERAL KATYAL: Well, there's a -- the
12 mandate has been stayed, so we haven't been able to --

13 CHIEF JUSTICE ROBERTS: Right. But if we
14 sustained -- if we sustain the preliminary injunction,
15 the Government can't ask that question throughout the --
16 the -- the reach of the Ninth Circuit?

17 GENERAL KATYAL: That's exactly correct.

18 JUSTICE KENNEDY: And -- and if we did so,
19 it would be because there is an underlying privacy right
20 that is somewhat ill-defined or undefined?

21 GENERAL KATYAL: Exactly, Justice Kennedy.
22 And if this Court were to embrace that reasoning -- and
23 this is my answer to you, Justice Ginsburg, as well --
24 then it doesn't just reach drug treatment. I could
25 imagine other litigants doing it for other forms of

1 questions, whatever they may be.

2 JUSTICE GINSBURG: But the -- the circuit
3 precedent, as far as the other questions on Form 85, the
4 circuit said that's okay. It's permissible to ask those
5 questions.

6 GENERAL KATYAL: Thus far, that's correct.
7 But I can imagine other litigants coming in, and maybe
8 not just with respect to these questions but questions
9 on SF-85P or Form 86, any number of other --

10 JUSTICE SCALIA: Mr. Katyal, what is the
11 well-defined, the well-defined, constitutional right to
12 institutional -- to informational privacy that the
13 Government is -- is willing to acknowledge? You -- you
14 apparently don't -- don't challenge the existence of
15 such a constitutional right.

16 GENERAL KATYAL: Justice Scalia, our
17 position is that the Court doesn't need to answer that
18 question. It's just like Whalen, because in Whalen this
19 Court assumed the existence of some sort of
20 constitutional right and then said: Is that right
21 violated here?

22 JUSTICE SCALIA: It's a strange way to
23 proceed. We normally don't do that, see? If there were
24 a constitutional right, would it cover this?

25 GENERAL KATYAL: I agree --

1 JUSTICE SCALIA: Do we do that in cases?

2 GENERAL KATYAL: I agree that in many other
3 contexts, it might not be appropriate, but here I think
4 there are some good reasons why. This Court has had
5 special reticence to the rule broadly in the range of
6 privacy, and I think the reason is privacy is something
7 that is in flux in ways that other things aren't, both
8 in terms of our social understandings, technology, and
9 legislation itself.

10 And for that reason, I think this Court has
11 spoken narrowly whenever it's dealt with --

12 JUSTICE SCALIA: That would justify not
13 defining it broadly or narrowly. It wouldn't justify
14 not reaching the question of whether there is any such
15 constitutional right at all.

16 GENERAL KATYAL: Justice Scalia, that's what
17 this Court has done throughout its history. Whalen was
18 a unanimous decision and Nixon, on that particular
19 question, I don't think there was a disagreement about.
20 So --

21 JUSTICE ALITO: How can the Court determine
22 that the right is not violated here without having some
23 idea about either the existence or the contours of the
24 right?

25 GENERAL KATYAL: Well, I think it would just

1 be like in Whalen itself. So in Whalen, the Court said
2 there might be some right to informational privacy, but
3 so long as there are safeguards on the disclosure, the
4 Government's dissemination of the information, that
5 means that there is no --

6 JUSTICE ALITO: Is it your argument that the
7 Government can collect whatever information it wants
8 from private individuals so long as the information is
9 not publicly disseminated?

10 GENERAL KATYAL: No, that's not our
11 position. Our position here is that the Government can
12 collect information so long as it is not disseminated in
13 the employment context. And this case, unlike Whalen,
14 is one that has that added fact to it, that the
15 Government here is asking --

16 JUSTICE KENNEDY: Well, does it help us in
17 finding what this residual background right is and
18 asking you: Why is it that you can't disclose it?

19 GENERAL KATYAL: I'm sorry?

20 JUSTICE KENNEDY: Why can't you disseminate
21 the information?

22 GENERAL KATYAL: Surely -- we are restricted
23 by statute, the privacy of --

24 JUSTICE KENNEDY: Let's assume no statute.

25 GENERAL KATYAL: If you assume --

1 JUSTICE KENNEDY: In other words, this is
2 just testing whether there is some background
3 constitutional right and how to define it, if we have to
4 use that as a beginning premise.

5 GENERAL KATYAL: Absolutely. If we took out
6 all of the safeguards that are at issue here, then the
7 case wouldn't be like Whalen or Nixon, in which you had
8 those -- in which you had safeguards in the
9 dissemination. And then you would have to confront the
10 question, which we think you shouldn't confront in this
11 case, for the reasons I said to Justice Scalia.

12 JUSTICE KENNEDY: And what would be your
13 position if the -- all this information were disclosed?
14 Or that there was an attempt to disclose all the
15 information, and they asked you for your advice on a
16 constitutional basis.

17 GENERAL KATYAL: Right. Right. I mean, our
18 position is that the Court really shouldn't, for all of
19 the reasons I said, get into it; but if the Court had to
20 get into it, and asked, is there some constitutional
21 right that would be violated, Justice Kennedy, by your
22 hypothetical, our answer would be no.

23 But we do think the way that this has been
24 traditionally been handled is legislation. Safeguards
25 for political --

1 CHIEF JUSTICE ROBERTS: So when you say your
2 position would be no, you mean that there is no right of
3 any kind under your -- I know you don't want us to reach
4 it, but you would say there is no right of any kind for
5 a citizen to tell the Government: That is none of your
6 business. The Government will decide that it can ask
7 anything of a citizen, so long as you don't disclose it.

8 GENERAL KATYAL: Well, in the
9 employment/proprietor context. Okay? So if the Court
10 had to confront that question, would it apply the matrix
11 that Justice Scalia has talked about, the Glucksberg
12 matrix, of whether a right -- the right is firmly rooted
13 in the traditions of the people, and ask: Is the
14 Government --

15 CHIEF JUSTICE ROBERTS: Do you think it's
16 firmly rooted in our traditions that there is some right
17 to tell the Government: That's none of your business?

18 GENERAL KATYAL: I think there is some
19 right. The question about whether it employs in the
20 unique employment/proprietor context is one the Court
21 hasn't confronted, and our strong position here is the
22 Court shouldn't confront it.

23 JUSTICE ALITO: What is the test -- what is
24 the test for determining what sort of questions can be
25 asked in the employment context? Is there any limit?

1 Suppose the -- suppose the Government says:
2 Well, we want to know all about your diet. We want to
3 know whether you smoke cigarettes. We want to know
4 everything you read. We want to know what your hobbies
5 are, what forms of entertainment you enjoy, sexual
6 practices, every aspect of your private life, just
7 because that gives us a better picture of who you are as
8 an employee. Is that okay?

9 GENERAL KATYAL: Sure. No, there are
10 limits, and I should have said this earlier. If the
11 Government's collection of information or the disclosure
12 of the information burdens some other fundamental
13 constitutional right, that is certainly one limit.

14 So if the Government were collecting
15 information, Justice Alito, on sexual practices of its
16 employees, it may burden the exercise of other rights.

17 CHIEF JUSTICE ROBERTS: Yes, but that's
18 putting those aside. I mean, what about some of the
19 hypotheticals that Justice Alito posed? Your diet,
20 right? That's certainly relevant in the employment
21 context, right? They are going to have to pay for your
22 healthcare, worry you might miss things, miss days of
23 work.

24 So I guess the point is: Do you think the
25 Government's right to inquire in the employment context

1 is exactly as broad as a private employer's right?

2 GENERAL KATYAL: I do think that if the
3 private employer -- the private employers are a good
4 template. If the Government is simply mirroring what
5 private employers do, as Justice Scalia said in O'Connor
6 v. Ortega, that's a good suggestion that what it's doing
7 is reasonable.

8 Now, to the extent, Justice Alito, that they
9 are gradating far beyond what private employers do, in
10 terms of asking about eating habits and the like, I do
11 think that that may pose -- that there may be some
12 limits. The Court doesn't need to confront that here.
13 It simply needs to look at the Ninth Circuit's decision,
14 which recognize a broad, free-standing right against
15 informational collection of its employees to make sure
16 and -- and realize that that is a serious problem for
17 the way the Government does business.

18 JUSTICE SCALIA: We do have a legislature,
19 don't we, that could place some limits on what the
20 Government asks employees or anybody else?

21 GENERAL KATYAL: Absolutely.

22 JUSTICE SCALIA: It's the same legislature
23 that prohibited the Government from disclosing a lot of
24 information, isn't it?

25 GENERAL KATYAL: That's precisely correct.

1 JUSTICE SCALIA: And it's possible that
2 that's the protection that the Framers envisioned,
3 rather than having courts ride herd on Government
4 inquiries.

5 GENERAL KATYAL: It's certainly possible,
6 Justice Scalia. I think that all of these hypotheticals
7 are enormously interesting, but the --

8 JUSTICE SOTOMAYOR: Were these two forms
9 approved by Congress?

10 GENERAL KATYAL: The forms themselves were
11 not approved by Congress, but the Privacy Act, which is
12 the main restriction --

13 JUSTICE SOTOMAYOR: That's a restriction on
14 disclosure, but the same Congress can change that,
15 correct?

16 GENERAL KATYAL: That's exactly correct.
17 The Privacy Act has been around since 1975 and the
18 Government has collected -- you know, it's been used
19 millions of times, SF-85. It's been used 553,000 times
20 in the last four years, and we have not seen the types
21 of disclosure or complaints that I think animate the
22 worry that my friends on the other side are saying.

23 CHIEF JUSTICE ROBERTS: What is the
24 reason -- I've had trouble putting my finger on it --
25 that you need the information about counseling?

1 You already have the information, have you
2 used drugs in the past year. I couldn't tell if you
3 thought the question about counseling was for the good
4 of the employee -- oh, you are taking steps to -- or was
5 it to allow you to show, well, it must be serious,
6 because you need counseling.

7 GENERAL KATYAL: It is for the good of the
8 employee.

9 CHIEF JUSTICE ROBERTS: Well, I've asked
10 you -- whenever the Government comes and says, "This is
11 for your own good," you have to be -- you have to be a
12 little suspicious.

13 I mean, if it's -- the employee gets to
14 expand upon his or her answer. They say, tell us about
15 it. And they can say, don't worry, I'm in counseling or
16 treatment. And even then it doesn't sound like it's for
17 their good. It's one thing to say, I had a drink. It's
18 another thing to say, I'm in AA.

19 GENERAL KATYAL: Mr. Chief Justice, the way
20 the question is framed is, first they are asked, have
21 you used illegal drugs in the last year? And then --
22 and then, if the answer is yes, provide details and then
23 indicate any treatment or counseling received.

24 CHIEF JUSTICE ROBERTS: I have a question
25 about the way it's worded. You're -- it says, if you've

1 used it in the last year, detail your involvement with
2 drugs and any counseling you received.

3 Do you understand the counseling question to
4 be limited to the past year, or to reach back as far
5 as --

6 GENERAL KATYAL: I think that the question
7 itself is vague.

8 Now, the way that the Office of Personnel
9 Management will process such a form is it will process
10 anything so long as there is information about just drug
11 use.

12 CHIEF JUSTICE ROBERTS: But do you think
13 it's required? I mean, you do sign at the end, this is
14 true to the best -- do you think it's required to
15 disclose counseling and treatment you received more than
16 a year back?

17 GENERAL KATYAL: No. This is unlike, for
18 example, SF-86, which does ask for treatment and
19 counseling back up to, I think, a 7-year period.

20 So I think this is a much more narrow
21 inquiry, and I think the reason for that inquiry is to
22 help the employee. The Government --

23 JUSTICE GINSBURG: The answer to that is
24 obvious. It was raised by the other side. If it is for
25 the good of the employee, make it voluntary.

1 GENERAL KATYAL: Well, Justice Ginsburg, I
2 think that that's the type -- think that's the type of
3 inquiry that this Court rejected in Whalen. Because in
4 Whalen, the whole debate in the Court and the district
5 court below was, well, if you want to stop doctor
6 prescription mills, people providing too many narcotics,
7 you don't need the names and ages of the patients. We
8 could change the triplicate forms and redact that.

9 But what this Court said on the second page
10 of its opinion was it called that Lochnerian, that
11 Federal courts shouldn't be policing forms and excising
12 or suggesting random different -- you know, a few
13 different words here or there.

14 And here, experts put this form together to
15 try and get at, basically, are you using drugs and are
16 you using treatment which might ameliorate the fact that
17 you had used illegal drugs in the last year.

18 JUSTICE ALITO: Well, I had thought before
19 the argument that one of the purposes for asking about
20 treatment was to identify employees who may have
21 undergone treatment on numerous occasions and dropped
22 out of programs and been unsuccessful, so as to identify
23 chronic drug abusers. But I guess in light of what
24 you've just said, that this only reaches back one year,
25 that is not a purpose of this.

1 GENERAL KATYAL: That is correct.

2 And in preparation for this we did survey
3 all of the NASA different centers to ask, has treatment
4 ever been used in any sort of way to hurt an employee?
5 And the answer that came back was, no, it has not been
6 used. It has only been used to help. It is to retain
7 someone who did use illegal drugs, but is taking steps
8 to mitigate.

9 CHIEF JUSTICE ROBERTS: Well, how do you
10 know -- how do you know that? I mean, you ask a lot of
11 questions on these forms and they say, well, we're not
12 going to hire you. How can you go back and say it was
13 because you put in, you know, in treatment for drug
14 abuse?

15 GENERAL KATYAL: Well, the process by which
16 this takes place is the form is filled out. It's
17 ultimately sent to an adjudicator if there is negative
18 information, and that -- and that information is then
19 discussed with the candidate for employment or the
20 employee to see if they have an explanation. And of the
21 times that this has happened, that someone has been
22 denied, and I think the number is 128 times over the --
23 over the last five years, none have been denied for a
24 positive answer to drug treatment.

25 CHIEF JUSTICE ROBERTS: Over the last five

1 years, this has only come into play 128 times across the
2 Federal bureaucracy?

3 GENERAL KATYAL: For Federal contractors.

4 That is correct.

5 CHIEF JUSTICE ROBERTS: Federal contractors.

6 GENERAL KATYAL: Yes.

7 JUSTICE SOTOMAYOR: I'm sorry. I'm not sure
8 I understand the answer. Only 128 times has somebody
9 identified themselves as a drug user?

10 GENERAL KATYAL: 128 times, the SF-85
11 process, is my understanding, has been used to deny
12 someone a credential of the Federal contractor --

13 JUSTICE SOTOMAYOR: So it could be for any
14 other answers as well?

15 GENERAL KATYAL: For anything. Exactly.
16 About -- and I think there have been about 74,000
17 contractors that have sought badges through the SF-85,
18 so --

19 JUSTICE SOTOMAYOR: Are you representing to
20 us that every employee who is rejected will know the
21 reason?

22 GENERAL KATYAL: That is correct. That is
23 part of -- that is part of the regulations that are in
24 place, so that if someone is denied a credential -- and
25 this is, I think, at Joint Appendix, page 180 -- they

1 are told the reason for that denial. They are given an
2 opportunity to explain themselves, and a process is then
3 put in place. There is then also robust appeal and
4 other things that may happen as well.

5 But one thing that doesn't happen, Justice
6 Sotomayor, is that JPL, the contractor, is not told the
7 basis for why the person is denied a credential. That
8 is, it's private as between the Government -- here,
9 NASA -- and the individual employee. And that is the --

10 JUSTICE SOTOMAYOR: So where does the
11 suitability matrix come in?

12 GENERAL KATYAL: It doesn't.

13 JUSTICE SOTOMAYOR: It doesn't?

14 GENERAL KATYAL: It doesn't.

15 JUSTICE SOTOMAYOR: And NASA has never used
16 it? You're representing that to the Court?

17 GENERAL KATYAL: I'm representing that NASA
18 has -- NASA will not and does not use this employment --
19 employee suitability chart to make contractor
20 credentialing decisions.

21 JUSTICE GINSBURG: Where did it come from?

22 GENERAL KATYAL: Well, it's -- it's been
23 hard to actually pin down where it came from. I think
24 it is derived from earlier Office of Personnel
25 Management materials at a time when it listed out what

1 various crimes were. And so some of those things that
2 are on there that are quite salacious are things that
3 OPM, at earlier points in time, looked to, not for
4 contractors, but for Government employees.

5 But I can represent to the Court that NASA
6 does not and will not use this chart for credentialing
7 decisions.

8 JUSTICE GINSBURG: Do you -- do you have a
9 clear idea of how the Form 42 would have to be amended
10 if the Respondents are correct? Form 85, we know we
11 excise "counseling or treatment." What in the Form 85
12 did the Ninth Circuit say?

13 It said "open-ended questions," but I looked
14 at the form and it is not clear to me which ones they
15 considered open-ended.

16 GENERAL KATYAL: Justice Ginsburg, I quite
17 agree with you. I don't think that the Ninth Circuit's
18 reasoning is capable of being ameliorated easily.

19 So we talked before about how the drug
20 treatment was just a narrow part of the Ninth Circuit
21 decision, but this Form 42, the invalidation of Form 42,
22 goes to the heart of what the Government does all the
23 time and what all employers do. They ask open-ended
24 questions to figure out whether someone is trustworthy
25 and reliable.

1 JUSTICE SOTOMAYOR: General -- I'm sorry.
2 Go ahead and finish.

3 GENERAL KATYAL: I think as Judge Kleinfeld
4 said, that's how law clerks are hired. That's how
5 baristas at Starbucks are hired. You have to ask these
6 open-ended questions because as an employer, you don't
7 really know what -- where the pressure points or danger
8 spots in an individual application are.

9 JUSTICE SOTOMAYOR: Is your position today
10 that our ruling should say that the Government is free
11 to ask, as a private employer or contractor -- it is
12 free to ask any question it wants whatsoever?

13 GENERAL KATYAL: That is not what we're
14 saying. We --

15 JUSTICE SOTOMAYOR: If you were not saying
16 that, then what is the narrower ruling? Because that's
17 what I thought I heard at the beginning of our colloquy
18 today.

19 GENERAL KATYAL: Justice Sotomayor, the
20 narrow rule is what we said in our petition and what we
21 said on the very last page of our reply brief and all
22 throughout, which is, this Court should simply say what
23 it said in Whalen, which is assuming that there is some
24 informational right to informational privacy. The --
25 the use of a background check with accompanying

1 safeguards to collect information doesn't violate the
2 constitutional right to privacy.

3 JUSTICE SOTOMAYOR: Well, why wouldn't that
4 violate it if the question involved a fundamental right?
5 If you were asking the question that Justice Alito
6 asked, which is, what's your sexual practices in the
7 bedroom, if there are security checks against you
8 disclosing it, you are saying even that would be okay?

9 GENERAL KATYAL: I could imagine a
10 circumstance far afield from this one in which the
11 Government's just mere collection of information about
12 sexual practices might burden the exercise of those
13 rights. I'm saying it's not at all present here, and I
14 don't think the Court should get into it.

15 But that's a really different question than
16 the one here, which is: Is there some free-standing
17 right to constitutional privacy that is unburdened by
18 the fact that there are protections against the
19 disclosure of information? Here, the Privacy Act
20 imposes strong protections against the disclosure of
21 information. And so what's left is a very residual
22 interest in the part of the employees.

23 JUSTICE SOTOMAYOR: Don't -- this is a bit
24 unsatisfying. Because you start by saying to us, as
25 long as there are some nondisclosure protections, then

1 virtually any question, whether it impinges a
2 fundamental right or not, would be okay, because
3 there's -- I don't even know what the Government's
4 interest is in asking every question it wants to.

5 There has to be a need for a set of
6 questions, doesn't there?

7 GENERAL KATYAL: Well, I could imagine an
8 as-applied challenge to, for example, you know, the
9 hypothetical on sexual practices or whatever.

10 I do think, as Justice Scalia said, the real
11 check on that is the political process check. The fact
12 is that the Government doesn't ask those kinds of
13 questions, and to the extent it ever did, the Court
14 could confront that in an as-applied challenge.

15 JUSTICE GINSBURG: I still don't see why
16 that -- why this is before us, because the Ninth Circuit
17 said some of this form is okay, most of Form 85 is okay,
18 and some of Form 42 is okay. I thought it was only the
19 questions under 7 and 8, the open-ended questions. I
20 didn't think the Ninth Circuit had enjoined anything
21 other than those questions.

22 GENERAL KATYAL: Those questions,
23 Justice Ginsburg, are really the heart of the form. I
24 mean, those are the most -- in many ways the most
25 important questions, because they're the ones that

1 employers have to ask because they don't know the
2 weaknesses in an individual applicant's background.

3 JUSTICE KENNEDY: There are a number of
4 statements in, I guess, the concurrence from the denial
5 of en banc, explaining how JPL is fairly open, and it is
6 close to the Pasadena courthouse. Pasadena residents
7 and judges visit JPL often.

8 Are there any statements of fact that you
9 don't agree with that are not in the record, other than
10 the matrix question? Leave that aside.

11 GENERAL KATYAL: Yes, I would say a few
12 things. Number one is I think that the -- the
13 concurring judge did, I think, underestimate how
14 important security is there.

15 First of all, there are armed guards when
16 you are coming in. It is not the campus-like
17 atmosphere. It's not like a campus that I'm familiar
18 that she described. The information at the debate at
19 JPL is sensitive, quite sensitive, both, you know, in
20 terms of scientifically and with respect to our nation's
21 secrets.

22 And the even more important point about this
23 is the badge that the Plaintiffs are seeking access to
24 don't -- doesn't just give them access to JPL. It will
25 also give them other access to all other NASA

1 facilities. And it's such an important credential that
2 it would allow them to get within, for example, 6 to 10
3 feet of the space shuttle as it is being repaired and
4 readied for launch. So this is a credential not just
5 for JPL and getting onto JPL, but other places as well.

6 If I could reserve the balance of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, General.

8 Mr. Stormer.

9 ORAL ARGUMENT OF DAN STORMER

10 ON BEHALF OF THE RESPONDENTS

11 MR. STORMER: Mr. Chief Justice, and may it
12 please the Court:

13 The issue as now characterized is really how
14 far may a Government go, may this Government go, to
15 intrude into the private lives of its citizens, both in
16 positions that do not involve sensitive issues,
17 classified issues, national security issues, or
18 positions of public trust?

19 JUSTICE SCALIA: Mr. Stormer, what provision
20 of the Constitution are you relying -- I looked at your
21 table of authorities in your brief, and you have cases
22 listed, you have statutes listed; there is not a single
23 citation anywhere in your brief to a provision of the
24 Constitution.

25 What provision of the Constitution are you

1 relying on.

2 MR. STORMER: It would mostly fall --

3 JUSTICE SCALIA: I think it's a very nice
4 thing that the Government shouldn't ask intrusive
5 questions. I also think that it's a nice thing that the
6 Government should pay a living wage to its employees,
7 but I don't feel authorized to go around saying how much
8 the Government should pay each of its employees because
9 there is nothing in the Constitution about that, and the
10 question is left to Congress.

11 What do you rely on in the Constitution that
12 enables me to decide how much intrusiveness is too much,
13 rather than leaving that to Congress?

14 MR. STORMER: It would flow from the ordered
15 concept of the liberty component of the Fifth Amendment,
16 as well as the First --

17 JUSTICE SCALIA: The Fifth Amendment, okay.
18 Which says no person shall be deprived of what?

19 MR. STORMER: Of life -- I mean, no person
20 shall be deprived of due process of law, and then the
21 last --

22 JUSTICE SCALIA: Due process of law.

23 MR. STORMER: -- refers to the concept of,
24 the ordered concept of liberty.

25 JUSTICE SCALIA: All right. That -- that's

1 what I thought. You are talking about substantive due
2 process here.

3 MR. STORMER: Well, the Whalen case, the
4 Nixon case, and to some extent, the Reporters Committee
5 case refer to this concept of privacy. And they are, in
6 fact, vague, but they do talk about the concept of
7 privacy as being the right to control information about
8 oneself.

9 And -- and both -- and all of the --

10 JUSTICE SCALIA: I mean, I like that, but I
11 just don't see it anywhere in the Constitution. That's
12 all I'm taking about.

13 MR. STORMER: Well, I -- there -- those
14 cases, in fact, do not refer to a term called
15 "informational privacy." Those terms have grown from
16 the various cases that have flown -- flowed from the
17 determinations in Whalen and Nixon and, to some extent,
18 Reporters Committee.

19 JUSTICE SOTOMAYOR: So that right is subject
20 to what level of scrutiny? Is it always strict
21 scrutiny? And how do you square Whalen and Nixon's
22 balancing with strict scrutiny?

23 MR. STORMER: The -- the standard would
24 be -- I think the appropriate standard was applied by
25 the Ninth Circuit, which is a legitimate State interest

1 narrowly tailored to meet that need.

2 In this case, there is some -- like the Von
3 Raab case, which is not cited in our brief but which is
4 a Fourth Amendment case, the -- this Court used a
5 compelling State interest standard for a Fourth
6 Amendment invasion. And in that case, the Court
7 remanded on the issue of whether or not the positions
8 involved classified or sensitive materials.

9 JUSTICE BREYER: So what is your view of
10 what the liberty -- you are saying that the words in the
11 Constitution that protect the right that you claim was
12 violated are the words, "No person shall be" -- I
13 guess -- "deprived of life, liberty, or property without
14 due process of law." I guess you mean the word
15 "liberty."

16 MR. STORMER: That's correct.

17 JUSTICE BREYER: All right. And in your
18 words, it is liberty -- define it. Liberty to what?

19 MR. STORMER: Liberty to control information
20 about oneself. The liberty to --

21 JUSTICE BREYER: There is a right to liberty
22 to control information about oneself?

23 MR. STORMER: Without governmental
24 intrusion.

25 JUSTICE BREYER: All right. And all

1 information? Some information?

2 MR. STORMER: Well there --

3 JUSTICE BREYER: Liberty -- there is a
4 liberty to control all information? Protected from --
5 from what? From the State? The State doesn't have a
6 right to give you any -- get any information about you?
7 On a driver's license? It's -- when does it come into
8 play?

9 MR. STORMER: It comes into play when the
10 Government, the State, seeks to intrude and obtain
11 information from an individual. The -- the --

12 JUSTICE BREYER: So the fact that the
13 Government says -- I go and I want my driver's license,
14 and they say, fill out the form, we want to see how
15 you -- if you can drive or not, that potentially could
16 violate the Constitution?

17 MR. STORMER: Well --

18 JUSTICE BREYER: Potentially. It might not,
19 because it might be justified, but each such case would
20 have to be justified. Is that -- is that your theory?

21 MR. STORMER: Any intrusion into private
22 lives would have to have some --

23 JUSTICE BREYER: It says "liberty." The
24 liberty, you said, was liberty to control information
25 about yourself.

1 MR. STORMER: That was the --

2 JUSTICE BREYER: So I want to know how that
3 works. Every time anyone in the Government asks a
4 question about you personally, of course, it wouldn't be
5 unconstitutional.

6 But every time it would have to be a
7 justified thing; is that -- is that your theory? I'm
8 just asking.

9 MR. STORMER: That -- yes, it is.

10 JUSTICE SOTOMAYOR: So that's all
11 information about yourself?

12 MR. STORMER: Well --

13 JUSTICE SOTOMAYOR: I think what Justice
14 Breyer is getting to and that I'm trying to figure out
15 is, you've used the word "privacy." What does privacy
16 relate to?

17 MR. STORMER: Privacy relates, in this case,
18 to the --

19 JUSTICE SOTOMAYOR: No, I'm talking
20 about -- answer his broad question, which is -- you've
21 defined the constitutional right to information about
22 yourself.

23 MR. STORMER: Correct.

24 JUSTICE SOTOMAYOR: Is that all information
25 about yourself, including your date of birth, your

1 Social Security Number, your -- where you live, where
2 you've gone to school, who are your friends, who your
3 references are? Because as broadly as you have defined
4 that, it would include all of that.

5 MR. STORMER: It -- the -- the nature of
6 what is included can be intruded upon based upon a
7 governmental need. So if there is a rational basis for
8 knowing Social Security Numbers, driver's license,
9 sensitive information, that type of information, then --
10 then there is not an issue.

11 CHIEF JUSTICE ROBERTS: So this gets back to
12 Justice Sotomayor's earlier question. You said if there
13 is a rational basis, so is that the test?

14 MR. STORMER: The test --

15 CHIEF JUSTICE ROBERTS: No matter what type
16 of information? I suppose it's harder to show a
17 rational basis when you get into certain areas that --
18 that concern you, but is it a rational basis test?

19 MR. STORMER: In this case, I think it is a
20 legitimate State interest, narrowly tailored to meet
21 that interest, Your Honor.

22 CHIEF JUSTICE ROBERTS: But in the case of a
23 date of birth for a driver's license, you say it's
24 rational basis?

25 MR. STORMER: Yes.

1 JUSTICE BREYER: So how do we decide? I am
2 a little interested, if you could spend two or three
3 minutes elaborating this.

4 A number of laws, Federal laws, I imagine
5 the regulations fill this room, and I think many --
6 maybe more, maybe several rooms. And many of them
7 involve asking people for information. And the number
8 of forms that ask people for information, I guess, about
9 themselves, might fill several rooms. And I can imagine
10 in a country of 300 million people, you would find
11 someone objecting to many of the questions.

12 And so how is the system supposed to work,
13 in your view, where judges will decide whether a
14 particular question -- I'm not saying you are wrong. I
15 just wanted to get an idea from you as to how this legal
16 system works, where any question asked by the Government
17 about a person is potentially subject to challenge as
18 unconstitutional. You and I will agree that many are
19 fine. But you are worried about some that aren't fine.

20 How does it work, the system, distinguishing
21 the ones from the other?

22 MR. STORMER: Well, this Court has done much
23 of that already in a whole history of cases:
24 Contraception, procreation, marriage, sexual relations,
25 family relations.

1 JUSTICE SOTOMAYOR: The fundamental rights
2 issue that the Sixth Amendment identified, are those the
3 questions that are subject to that greater scrutiny?

4 MR. STORMER: The -- the rights that go --
5 the questions that go to those types of -- which could
6 elicit that type of information.

7 For instance, on Form 42, if they said, tell
8 us any adverse information you have about this person,
9 which includes any other matters. This could be -- they
10 could respond with saying, "Well, I don't like the way
11 he -- how many kids he has. I don't like his religion.
12 I don't like his sexual practices."

13 JUSTICE GINSBURG: But isn't that question,
14 that kind of open-ended question, routinely used in
15 employment situations? That is, the employer wants to
16 know: Is there any adverse information about this
17 person? Doesn't know which question to ask, because
18 there's a whole -- many things that could be relevant.

19 So are you suggesting that that kind of
20 question is off-limits to the Government, although it is
21 routinely used in other employment sectors?

22 MR. STORMER: It is not routinely used in
23 employment sectors where there is allowed to inquiry --
24 inquiry into non-employment-related --

25 JUSTICE GINSBURG: Well, it has a legend on

1 the top. Everything that we are asking you is meant
2 to -- to determine suitability for employment. So they
3 want to find out information relevant to suitability for
4 employment.

5 MR. STORMER: And for security clearances.
6 Those are the two issues.

7 JUSTICE KENNEDY: Well, I -- I have to agree
8 with the implication of Justice Ginsburg's remark, at
9 least what I imply from it.

10 Look at the private employment sphere. It
11 seems to me that for a sensitive position, a bank who
12 has people taking care of -- its employees taking care
13 of other people's money, or the medical profession, that
14 the employer could be sued and would be remiss if it did
15 not ask this question.

16 Do you know anything adverse about this
17 person whom we are going to hire for a very sensitive
18 position? This is done all the time, and we do it with
19 the -- a judge said below, with our law clerk.

20 MR. STORMER: That would be exactly my
21 point, Your Honor. It is in those situations where
22 there's sensitive issues, you are allowed to inquire
23 based on the need.

24 But here, they are inquiring the snack bar
25 worker, the -- the bus driver, the gift shop operator,

1 are -- are required to respond to these questions. The
2 GS-4 interior department clerk. The Government's
3 position is all of those are subject to this same type
4 of inquiry.

5 JUSTICE ALITO: I don't see what the
6 alternative, as a practical matter, is to asking this
7 sort of open-ended question. The -- the alternative
8 would seem to be to try to compile a list of every
9 possible thing that the -- the person might do that
10 would raise serious questions about suitability for
11 employment or would be disqualifying for employment.
12 And that seems to be impractical.

13 There's almost no limit to the sorts of
14 things that might be relevant in that respect; isn't
15 that right?

16 MR. STORMER: This goes to the very basic
17 question of: Why does the Government need to know this
18 information for these individuals, most of whom have
19 been there for 20 to 30 years? The Government can't
20 show a single instance of any of these individuals doing
21 anything that would require any of the type of
22 scrutiny --

23 JUSTICE GINSBURG: Are you then saying that
24 these people have to be grandfathered or grandparented
25 because they worked for 20 years --

1 (Laughter.)

2 JUSTICE GINSBURG: -- without --

3 MR. STORMER: I am not, Your Honor. But the
4 Government has some burden to show that -- a need to
5 inquire into these privacy areas. It needs to know if
6 you have gone to the Betty Ford --

7 JUSTICE GINSBURG: But you are making a --
8 you said that these people have worked there for
9 20 years. Are they different from the new employee?
10 Are you suggesting it's okay for the new employee, but
11 not okay --

12 MR. STORMER: I am not.

13 JUSTICE GINSBURG: -- for the person who is
14 already in the job?

15 MR. STORMER: I -- I am not. The -- the
16 difference between this case and, ultimately, what was
17 allowed in both Whalen and Nixon -- excuse me,
18 particularly in Whalen -- is that there was some
19 overarching societal need to have this information.

20 JUSTICE ALITO: Well, suppose the person who
21 works at the -- at the gift shop, or the snack bar -- I
22 think that's what you mentioned -- has a big sign on his
23 front lawn that says, "I hope the space shuttle blows
24 up."

25 Is that information the Government has a

1 legitimate reason to get?

2 MR. STORMER: I would agree that -- that in
3 that instance, "I hope the space shuttle blows up,"
4 would certainly implicate some First Amendment issues,
5 but the Government should know that information.

6 JUSTICE ALITO: And now, what's the
7 alternative to acquiring that information through an
8 open-ended question? Do you have to have a specific
9 question on the form? Does this individual have a big
10 sign on his front lawn that says --

11 (Laughter.)

12 JUSTICE ALITO: -- "I hope the space shuttle
13 blows up"?

14 MR. STORMER: I wouldn't think that that
15 would be needed. I think that --

16 JUSTICE ALITO: Do you see what I am getting
17 at? I don't see how you are going to do this, other
18 than by asking an open-ended question.

19 MR. STORMER: Only if you need to know the
20 answers. And for the snack bar worker or the GS
21 clerk-typist, for those types of people who have no
22 access to sensitive information, do not -- it can -- the
23 definition here is that these are no- or low-risk --
24 they are low-risk employees, which is defined as, if
25 they misuse their position, they will have little or no

1 impact on the agency mission.

2 So we know that these questions are being
3 asked of people who, if they completely misused their
4 position, there will be no impact.

5 CHIEF JUSTICE ROBERTS: So -- just to -- I
6 would like to get back to Justice Breyer's question.

7 So now you not only have to decide which
8 questions -- they can challenge any question they want
9 and say, this isn't pertinent, but you also have to
10 categorize which employees are being asked that
11 question.

12 This is a -- SF means "standard form,"
13 right?

14 MR. STORMER: It does.

15 CHIEF JUSTICE ROBERTS: Well, that -- you
16 know, it's a big government, and they can't tailor every
17 inquiry, every form, to the individual applicant.

18 MR. STORMER: It -- it can to the positions.
19 This -- this -- what is being done now, if they have
20 done 70,000 inquiries, that means -- and 128 issues
21 arose, that means a whole host of people, over 69,000
22 people, have had to give up information that otherwise
23 they would not have to give up.

24 JUSTICE GINSBURG: Are you suggesting
25 that this is no good for government employment? You

1 were dealing with a contractor here, but this form, as I
2 understand it, has been used for -- for many years for
3 standard government employment.

4 Is it -- are they okay? And for
5 nonsensitive positions, are you -- are you arguing just
6 government contractor or are you saying even for the
7 government employee, the person who's hired to work at
8 the snack bar in the Senate, let's say, the Government
9 can't ask these questions?

10 MR. STORMER: If I understand Your Honor's
11 question, and I apologize, I -- I think this cannot be
12 asked of -- these questions cannot be asked of people
13 for whom the Government does not have a justifiable need
14 to know that information.

15 JUSTICE SCALIA: We can handle those
16 details. My goodness, it's all right there in the
17 Constitution. And we can decide what -- what employees
18 have to know what, and what questions you can ask them,
19 and how much privacy is too much privacy, right?

20 MR. STORMER: Well --

21 JUSTICE SCALIA: It's a piece of cake.

22 MR. STORMER: The Government is -- claims to
23 be acting as the employer here. In fact, it is not. It
24 is -- it's once or twice removed. But assuming that the
25 Government is the employer, there is a massive amount of

1 waste that is generated by this form.

2 JUSTICE GINSBURG: You are -- you are
3 attacking these forms for all Government employment, not
4 just the contractors?

5 MR. STORMER: I -- I don't -- it -- I think
6 it would apply to all of those people who are in
7 nonsensitive positions. This is the Government's
8 definition, it's not our definition. We chose the
9 Government's definition.

10 And if it is a low-risk or a no-risk
11 employee, then the Government doesn't have a need to
12 know. A private employer could not --

13 CHIEF JUSTICE ROBERTS: But you don't
14 know -- you don't know if it's a low-risk employee until
15 you find out what he -- he or she is like or what the
16 neighbor thinks. Well, you know, he keeps practicing
17 planting bombs or something. I mean, then he becomes a
18 high-risk employee. You don't know until you get the
19 information. That's the reason you ask for it.

20 MR. STORMER: In the context of these
21 employees for this particular case, we absolutely know,
22 because the Government went through and of the 7,500
23 employees there, it categorized 97 percent as low- or
24 no-risk employees. So, we know in this context where
25 they are already employed and it's just a badging

1 procedure. What the Government did here --

2 JUSTICE SCALIA: Excuse me. I thought -- I
3 thought that your friend said that the badge enables you
4 to get within 10 feet of the shuttle?

5 MR. STORMER: I don't know that for a fact.
6 I do know that --

7 JUSTICE SCALIA: Well, do you contradict
8 that? And if it's so, how can you say that these people
9 are low-risk employees?

10 MR. STORMER: Because the Government says
11 they are low- or no-risk employees.

12 This is a campus atmosphere. I have been
13 there. I have seen it. If you want -- if I want to go
14 on, I just call up Dr. Nelson and say, can you get me
15 on? If I'm on there, and my car breaks down and I call
16 up and say can the AAA auto come on, I just call the
17 gate and the AAA auto person, they say, yeah, just let
18 him in? The -- the people who have -- bring supplies on
19 they just come on. This is a campus where they don't
20 have --

21 JUSTICE SCALIA: Does al-Qaeda know all this
22 stuff?

23 MR. STORMER: I'm sorry.

24 JUSTICE SCALIA: Does al-Qaeda know this?

25 (Laughter .)

1 MR. STORMER: Well, the interesting response
2 to that, Your Honor, is that it wouldn't matter if they
3 knew this, because it's open transparent science by a
4 civilian agency in a campus atmosphere. This is not
5 a -- weapons, national security --

6 CHIEF JUSTICE ROBERTS: What you are
7 saying -- what you are saying is it may not make much
8 sense to have the people here fill out Standard Form 85,
9 but the Government can't tailor its open -- opening
10 security form to people that -- you know, maybe down the
11 road at a different NASA laboratory, they do work on
12 more sensitive information. It's a standard form. The
13 Government has to do things in a standard way.

14 MR. STORMER: And the Government has a form
15 for those people who work in classified information.
16 That's SF-85P, SF-85S and SF-86. The Government can
17 standardize and when it acts as the employer, it has an
18 obligation, because it can't take both it's ability and
19 authority as the Government and -- and overreach into
20 the private lives of its citizens. The questions that
21 are being asked here would not be allowed for private
22 employers --

23 JUSTICE GINSBURG: I'm -- I'm very surprised
24 to hear that. I thought that -- that if there were
25 in -- in the private sector similar questions?

1 MR. STORMER: Similar but not questions that
2 would go -- you couldn't, as a private employer, say you
3 have to turn over your medical records, you have to turn
4 over --

5 JUSTICE GINSBURG: Where does it say you
6 have to turn over your medical records?

7 MR. STORMER: That's in SF -- SF-85 page 6,
8 which is the release. And all of this has to be
9 inquired into --

10 CHIEF JUSTICE ROBERTS: Under what -- under
11 what law could you -- a private employer not ask for
12 those records?

13 MR. STORMER: In the State of California in
14 the right to privacy.

15 CHIEF JUSTICE ROBERTS: I know we are
16 talking about under general federal law.

17 MR. STORMER: Most -- general federal law, I
18 cannot answer that.

19 CHIEF JUSTICE ROBERTS: But it's a matter of
20 statutory law?

21 MR. STORMER: Yes -- well, in some States
22 there's a -- where there's a privacy right.

23 JUSTICE KENNEDY: Question 42, do you
24 have -- pardon me, question 7 on Form 42, the -- the
25 standard one, do you have any adverse information about

1 this person's employment, residence or activities
2 concerning, and so forth, violation of the law? Are you
3 saying that private employers cannot ask that question?

4 MR. STORMER: They can't ask the question --

5 JUSTICE KENNEDY: The prospective private
6 employer?

7 MR. STORMER: -- in the context of the
8 release which is SF-85 page 6, which requires that you
9 release your private records, extensive records,
10 residential, retail businesses, where you shop, your
11 educational, your --

12 JUSTICE KENNEDY: I -- I'm asking whether or
13 not a private employer can ask third persons the
14 question that's at Form 42 question 7. I thought your
15 representation to me was that private employers cannot
16 ask that question?

17 MR. STORMER: I -- I -- if I said that, Your
18 Honor, I misspoke. The question goes --

19 JUSTICE KENNEDY: But that was enjoined by
20 the court below, was it not?

21 MR. STORMER: It was.

22 JUSTICE KENNEDY: All right.

23 MR. STORMER: Question 7 talks about
24 financial integrity, mental and emotional stability,
25 general -- general behavior or conduct or other matters.

1 If a private employer, in many States, goes into
2 non-employment-related issues, it's -- it's contrary
3 to --

4 JUSTICE BREYER: What is your view on that
5 question? There is a famous, funny example that
6 supposedly may be untrue. Senator Hruska used to ask
7 and say in giving a reference he would write about
8 someone, you'll be lucky if you can get Smith to work
9 for you. That's the kind of thing that you might want
10 to know. And despite the ambiguity there and it seemed
11 to me that question 7 sort of drove at that. And so,
12 but they did enjoin it, so in your view, is that aspect
13 of the injunction wrong.

14 MR. STORMER: No.

15 JUSTICE BREYER: All right then. Well,
16 then, if it's right, why is it right? Because it seems
17 to me the basic thing any employer would want to know is
18 whether I'm lucky to get this person to work for me,
19 that kind of thing.

20 MR. STORMER: Any employer can ask issues
21 that are employment related and based upon the nature of
22 the job. You can ask those questions, but any employer
23 can't require as a condition of employment that you sign
24 a release that gives them all manner of information as
25 to where you shop, how you shop --

1 JUSTICE BREYER: What is the specific thing
2 about question 7 that you think is unlawful or should be
3 changed? What words do you object to in that question?

4 MR. STORMER: Well, other matters, general
5 behavior or conduct, certainly.

6 JUSTICE BREYER: So they cannot ask, do you
7 have any information about this person's employment,
8 residence, or activities concerning general behavior or
9 conduct or other matters? Now, I am an employer and I
10 would like to find out if he's going to do a good job.
11 So what am I supposed to say, there doesn't seem to be a
12 place here other than that to get into that question.

13 MR. STORMER: That's because this question
14 for the types of situations is not needed. The question
15 that is needed is, what are the characteristics that you
16 feel he has for this job.

17 JUSTICE BREYER: I see, I see.

18 JUSTICE SCALIA: Why do you say a private
19 employer could not ask a question of such detail?

20 MR. STORMER: Primarily because of the
21 release. That's the sixth stage of Standard Form 85.
22 That release just allows --

23 JUSTICE SCALIA: Why could a private
24 employer not do it?

25 MR. STORMER: Because in virtually every

1 state there are laws requiring the disclosure of private
2 information.

3 JUSTICE SCALIA: Well, you mean that
4 legislatures take care of these matters? I find it
5 curious that in order to establish a Federal
6 Constitutional right, which turns this area over to this
7 Court, you invoke laws that have been democratically
8 enacted by State legislatures. If indeed that's the
9 criterion, maybe you don't need us.

10 MR. STORMER: I -- the reason I invoke that
11 is because the Government has stated that any private
12 attorney can ask these questions, and that's a
13 misstatement of the law in most states.

14 JUSTICE ALITO: Can I ask you this question
15 about the question on drug treatment.

16 Would it be unconstitutional for the
17 Government to take the position that to require an
18 employee or applicant for employment to disclose whether
19 this individual had violated Federal or State drug laws,
20 and take the position that if the person gave an
21 affirmative answer that was disqualifying, would that be
22 unconstitutional?

23 MR. STORMER: If they've said I violated
24 State or Federal laws, not on its face so long as if it
25 said voluntarily, you may show mitigation that -- that

1 would show that this is not a problem, it would make you
2 unfit for the job.

3 JUSTICE ALITO: So they could say, have you
4 bought, sold, used drugs in violation of Federal or
5 State law? If so, you are disqualified. Unless you can
6 show that you have had treatment, and then it's up to
7 you to disclose whether or not you had treatment.

8 MR. STORMER: That's correct.

9 JUSTICE ALITO: What's really the difference
10 between that regime and what you have here?

11 MR. STORMER: The difference is here is
12 because it is compelled. It's a compelled disclosure
13 and not offering you the opportunity to make a showing.
14 And in this concept the appeal right that you have from
15 this is not a robust appeal right that was described.
16 It's a very limited appeal that is internal to the
17 department, that does not have a right to confront or
18 cross examine.

19 JUSTICE GINSBURG: Can I ask you to clarify
20 your understanding of what has been enjoined? We know
21 Form 85, but Form 42, you mentioned the releases. I
22 thought that the Ninth Circuit's order covers lots of
23 question 7 and perhaps question 8, I didn't see, is
24 there something, maybe I missed it, that says they can
25 ask for release of the records?

1 MR. STORMER: There was in the emergency
2 order specific reference to the release. There was not
3 in the final order, but the question can't -- has to be
4 read in the context of the release, because that's how
5 they get to -- if you go to the Betty Ford Clinic.

6 JUSTICE GINSBURG: They didn't say,
7 Government, you can't ask for the release?

8 MR. STORMER: They did not.

9 JUSTICE GINSBURG: They say you can't ask
10 open-ended questions?

11 MR. STORMER: That's correct. They did not
12 say that. But it has to be implicit in their ruling
13 because in many of the case --

14 JUSTICE GINSBURG: If somebody is going to
15 be enjoined, I mean, it can't be implicit in the ruling
16 if you were enjoined. Because it has been stayed you
17 don't have a formal order, but you can't say, well, it
18 is implicit in the how many page opinion.

19 MR. STORMER: The -- well, in the Court
20 below, for instance, the argument that the Government
21 made was that they needed to have the medical records,
22 not that they just needed this information, that they
23 needed to have the medical records.

24 The question that logically flows is what
25 can they do with this information once they learn that

1 you had counseling? Then I guess they can ask you who
2 the counsellor was, what you told the counsellor. What
3 was the purpose of --

4 JUSTICE GINSBURG: As I understand this
5 process, this is not an oral interview. You fill out a
6 form, you meet somebody and they ask follow-up
7 questions. This is -- this handles on the papers,
8 right?

9 MR. STORMER: It's handled. First you
10 reveal the information and then there are 22 approvers
11 at JPL, civilians who are not employed by NASA. They
12 review it and then it goes to NASA and then there is a
13 whole series --

14 JUSTICE GINSBURG: Yes. But is there an
15 oral interview in this process?

16 MR. STORMER: There is not.

17 JUSTICE GINSBURG: So then they wouldn't
18 say -- it says here, so I'm going to ask this, that and
19 the other thing. It's a written --

20 MR. STORMER: I may have misspoken. It
21 doesn't preclude an oral interview. I am not aware of
22 oral interviews having been made or taken.

23 JUSTICE KENNEDY: You say there are 22
24 people in JPL that are involved in the employment?

25 MR. STORMER: There are 22, the Government

1 has approved 22 so-called approvers who are at JPL who
2 look over -- who are eligible to look over these forms
3 and the responses to the forms.

4 CHIEF JUSTICE ROBERTS: What do you
5 understand the scope of the preliminary injunction to
6 be? Does it bar the solicitation of this information
7 throughout the Ninth Circuit or only with respect to
8 JPL?

9 MR. STORMER: At this point it only applies
10 to -- well -- this is not before the -- part of the
11 record, but when it went back to the district court, the
12 district court and all parties agreed that it would only
13 apply -- that HSPD-12 would be limited to these 28
14 individuals, that investigation.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 General Katyal, you have four minutes.

18 REBUTTAL ARGUMENT OF NEAL K. KATYAL

19 ON BEHALF OF THE PETITIONERS

20 GENERAL KATYAL: Justice Ginsburg, you had
21 asked earlier whether this was narrow decision on just a
22 couple of questions and I think that the argument that
23 you just heard from my friend illustrates that it is
24 not. He asks for a "free standing right to control."

25 JUSTICE GINSBURG: Whatever he asks, we were

1 reviewing a judgment.

2 GENERAL KATYAL: And the judgment --

3 JUSTICE GINSBURG: And the judgment is not
4 the universe, it's certain questions can be.

5 GENERAL KATYAL: And the judgment is based
6 on the following rationale, this is from the petition
7 appendix on page 18A from the Ninth Circuit. "If the
8 Government's actions compel disclosure of private
9 information, has the burden of showing that its use of
10 the information would advance a legitimate State
11 interest and that its actions are narrowly tailored to
12 meet the legitimate interest." Now, that reasoning was
13 used to invalidate a question, as Justice Kennedy said
14 on Form 42, that employers ask all the time, banks ask
15 it and the like. And it's a -- it's used to invalidate
16 parts of a standard form that the Government uses day in
17 and day out and that employers generally use in order to
18 make employment decisions.

19 JUSTICE SOTOMAYOR: Are you conceding you
20 can't meet that standard or are you saying that the
21 Ninth Circuit misapplied that standard?

22 GENERAL KATYAL: No, we are not conceding
23 that at all. I do think we would meet the standard, but
24 our point is it's the same point as in Engquist, in the
25 Chief Justices's opinion in Engquist v. Oregon. Forcing

1 the Government to have to march into court every time to
2 justify a question here or an employee there or soup
3 clerk here or whatever, all of those different inquiries
4 pose practical burdens on the ability of the Government
5 to operate. And so --

6 JUSTICE SOTOMAYOR: Do you think there is
7 something wrong with the Government having to explain
8 why it seeks information? I mean, I would think that
9 would be fairly simple in virtually every situation. I
10 ask that question because that begs the question of can
11 you ask anything you want regardless of why?

12 GENERAL KATYAL: I think that political
13 process ensures that the Government generally has to
14 answer that question at large, but in order for the
15 Ninth Circuit's reasoning to apply it would permit any
16 individual person here or there to ask the question.

17 JUSTICE GINSBURG: I don't see how that's so
18 because at least if you are in the Ninth Circuit, you
19 know that the Ninth Circuit has blessed all the
20 questions on that form but one.

21 GENERAL KATYAL: That's only because --

22 JUSTICE GINSBURG: You could raise the
23 question, but you would be out of court in a minute.

24 GENERAL KATYAL: Justice Ginsburg, I think
25 that's only because the Petitioners here only challenged

1 certain questions. I could imagine other Petitioners
2 challenging other questions.

3 JUSTICE GINSBURG: I thought they did in the
4 lower court, but then it came here challenging the
5 question about the drug use?

6 GENERAL KATYAL: The drug use piece, but I
7 could imagine all sorts of inquires about other aspects
8 of the form and indeed the rationale, the language that
9 I just read to you is a road map for anyone to be able
10 to come in and say, well, this question isn't necessary
11 for me because I got a background clearance before and
12 I'm rehired or whatever. And it would be a huge
13 practical burden in the same way as recognizing the
14 cause of action in Engquist was a practical burden.
15 Instead we think what the Court should do here is what
16 it did in Whalen, which is recognize governments collect
17 information all the time.

18 JUSTICE ALITO: How much of the information
19 that's at issue here can be released and to whom?

20 GENERAL KATYAL: The information which can
21 be collected that is released here is governed by the
22 Privacy Act. And so there are, the appendix to our
23 brief lists out precisely to who they could be released
24 to, and that has been around since 1975. We have seen
25 virtually no complaints about the Government disclosing

1 this type of background information on SF-85.

2 JUSTICE GINSBURG: Is that also within the
3 Government itself? I know the Privacy Act is the
4 Government can't disclose, but how about checks and when
5 you have a back Government or checks about circulating
6 the information within the Government?

7 GENERAL KATYAL: If it is for, if it is to
8 further the Government purpose for which the information
9 is collected it can be distributed to other folks in the
10 Government. There are restrictions on that and they are
11 specified in the Privacy Act and they are quite
12 extensive. To the extent that the Court is concerned
13 that there is something that isn't robust enough in the
14 Privacy Act, we suggest that can wait for an as-applied
15 challenge down the road when information is disclosed.

16 We don't think it will, but if heaven forbid
17 that happens, that's a basis for the as-applied
18 challenge down the road. But here what they are asking
19 you to do is invalidate questions and forms that the
20 Government asks all of it's employees and now just wants
21 to ask contractors.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, General.

24 The case is submitted.

25 (Whereupon, at 11:03 a.m., the case in the

1 above-titled matter was submitted.)
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