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# NASA v. Nelson: The High Court Flying High Above the Right to Informational Privacy

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**NASA V. NELSON:  
THE HIGH COURT FLYING HIGH  
ABOVE THE RIGHT TO  
INFORMATIONAL PRIVACY**

*Blythe Golay\**

*In 1977, the U.S. Supreme Court first acknowledged a potential constitutional privacy “interest in avoiding disclosure of personal matters.” Since then, the Court has remained silent on whether there is a right to informational privacy. In the October 2010 term, the Court had another chance to revisit the contours of this potential privacy interest in NASA v. Nelson. But it again refused to define those contours and instead assumed, without deciding, that a constitutional right to informational privacy exists. The Court held that although information that was collected from an employee background-check questionnaire implicated the employees’ putative right to informational privacy, the Privacy Act of 1974 alleviated that privacy concern by providing sufficient protection that prevents the nonconsensual dissemination of information. This Comment argues that, in its reliance on the Privacy Act, the Court improperly ignored the distinction between compelled collection of information and dissemination of information—and how both threaten a right to informational privacy.*

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## I. INTRODUCTION

The U.S. Constitution does not expressly mention a right of privacy.<sup>1</sup> But the U.S. Supreme Court has recognized that the Constitution creates certain “zones of privacy.”<sup>2</sup> With respect to a right to informational privacy, in 1977 the Court first acknowledged a potential constitutional privacy “interest in avoiding disclosure of personal matters.”<sup>3</sup> In two cases—*Whalen v. Roe*<sup>4</sup> and *Nixon v. Administrator of General Services*<sup>5</sup>—the Court assumed, without deciding, that the Constitution protects an informational privacy interest.<sup>6</sup> In both *Whalen* and *Nixon*, it held that whatever the limits of that interest were, the statutes at issue did not unconstitutionally invade the interest.<sup>7</sup> More than thirty years later, the Court in *National Aeronautics & Space Administration v. Nelson*<sup>8</sup> (“*Nelson*”) took the same approach and assumed, without deciding,<sup>9</sup> that a constitutional right to informational privacy exists—only to then hold that a public employer who conducted an employee background check did not violate that right.<sup>10</sup> In so holding, the Court reasoned that the Privacy Act of 1974<sup>11</sup> (the “Privacy Act”) afforded sufficient protections against public dissemination, such that the challenged background check did not violate contract employees’ (the “Employees”) informational privacy interest.<sup>12</sup>

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1. *Paul v. Davis*, 424 U.S. 693, 712 (1976).

2. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 152–53 (1973)).

3. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977); *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

4. 429 U.S. 589 (1977).

5. 433 U.S. 425 (1977).

6. *Id.* at 457–58; *Whalen*, 429 U.S. at 598–600.

7. *Nixon*, 433 U.S. at 457 (holding that a statute that required former President Nixon to submit papers and recordings was constitutional); *Whalen*, 429 U.S. at 603–04 (holding that a statute that required collection of drug-prescription information was constitutional).

8. 131 S. Ct. 746 (2011).

9. *Id.* at 751 (“We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.”).

10. *Id.*

11. 5 U.S.C. § 552a (2006).

12. *Nelson*, 131 S. Ct. at 751 (“The Government’s interest as employer . . . , combined with the protections against public dissemination provided by the Privacy Act . . . satisfy any ‘interest in avoiding disclosure’ that may ‘arguably ha[ve] its roots in the Constitution.’” (alteration in original) (citation omitted) (quoting *Whalen*, 429 U.S. at 599, 605)).

This Comment explores *Nelson* and argues that the Court should not have held that the Privacy Act sufficiently protected the Employees' informational privacy interest. Part II discusses the procedural history and facts of *Nelson*. Part III describes the Court's reasoning in holding that the background check, in light of the Privacy Act's protections, did not violate a putative right to informational privacy.<sup>13</sup> Part IV argues that the "interest in avoiding disclosure of personal matters," that was first articulated in *Whalen*,<sup>14</sup> encompasses both the Employees' disclosure to NASA (the "Government")—*collection* of information—and the Government's disclosure to the public—*dissemination* of information.<sup>15</sup> While the Court chose to focus only on the latter,<sup>16</sup> both disclosures threaten an informational privacy interest, and the Privacy Act is inadequate to protect either.

## II. STATEMENT OF THE CASE

The background check at issue in *Nelson* consisted of two form questionnaires: Standard Form 85 ("SF-85") and the Investigative Request for Personal Information, Form 42 ("Form 42").<sup>17</sup> SF-85 seeks, in addition to basic biographical information,<sup>18</sup> information on whether the individual "used, possessed, supplied, or manufactured illegal drugs" in the last year.<sup>19</sup> If the individual answers affirmatively, he or she *must* provide information about "any treatment or counseling received."<sup>20</sup> Upon completion of SF-85, the Government sends Form 42 to the individual's current and former landlords and references listed in SF-85.<sup>21</sup> Form 42 then asks the

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13. *Id.*

14. *Whalen*, 429 U.S. at 599.

15. See Brief of Amicus Curiae Electronic Frontier Foundation in Support of Respondents at 21–22, *Nelson*, 131 S. Ct. 746 (No. 09-530), 2010 WL 3183846, at \*21–22 [hereinafter EFF Brief].

16. *Nelson*, 131 S. Ct. at 761–63.

17. *Id.* at 752–53; *Form 42*, EDITTHIS.INFO, [http://editthis.info/images/jpl\\_rebadging/ec/Opm\\_form\\_inv\\_42.pdf](http://editthis.info/images/jpl_rebadging/ec/Opm_form_inv_42.pdf) (last visited Sept. 30, 2011); *Standard Form 85, Questionnaire for Non-Sensitive Positions*, U.S. OFFICE OF PERS. MGMT. (Sept. 1995), [http://www.opm.gov/forms/pdf\\_fill/SF85.pdf](http://www.opm.gov/forms/pdf_fill/SF85.pdf).

18. *Nelson*, 131 S. Ct. at 753.

19. *Standard Form 85, Questionnaire for Non-Sensitive Positions*, *supra* note 17, at 5 (question fourteen).

20. *Id.*; see *Nelson*, 131 S. Ct. at 753.

21. *Nelson*, 131 S. Ct. at 753.

references open-ended questions bearing on the individual's "honesty and trustworthiness."<sup>22</sup> It also asks whether the references know of any "adverse information" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters."<sup>23</sup> If the references answer affirmatively, Form 42 calls for an explanation.<sup>24</sup>

Following an initiative by the 9/11 Commission,<sup>25</sup> the Government informed the Employees that they had to complete the background-check process.<sup>26</sup> Any employee who failed to complete the process before the deadline faced termination of employment.<sup>27</sup> The Employees subsequently filed suit, alleging that the background check violated their constitutional right to informational privacy.<sup>28</sup> The Employees then moved for a preliminary injunction, less than two weeks before the background-check deadline, on the basis that the Government would fire them if they refused to submit to the background check.<sup>29</sup> The district court denied the request,<sup>30</sup> but the Ninth Circuit subsequently granted a temporary injunction pending appeal.<sup>31</sup>

The Ninth Circuit acknowledged, and the Employees conceded, that most of the background check questions were "unproblematic and [did] not implicate the constitutional right to informational privacy."<sup>32</sup> The court went on, however, to conclude that the district court erred in holding that the Employees were not likely to succeed

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22. *Form 42*, *supra* note 17.

23. *Id.*; see *Nelson*, 131 S. Ct. at 753.

24. *Form 42*, *supra* note 17.

25. Since its creation, NASA has used a background-check process for federal, but not contract, employees. *Nelson*, 131 S. Ct. at 752. This distinction changed in 2004, when the 9/11 Commission prompted President George W. Bush "to order new, uniform identification standards for '[f]ederal employees,' including 'contractor employees.'" *Id.* (citing George W. Bush, *Homeland Security Presidential Directive/HSPD-12—Policy for a Common Identification Standard for Federal Employees and Contractors*, THE AM. PRESIDENCY PROJECT (Aug. 27, 2004), <http://www.presidency.ucsb.edu/ws/?pid=64578#axzz1ZZODTHD7>). Thereafter, the Department of Commerce implemented that initiative by "mandating that contract employees with long-term access to federal facilities complete a standard background check . . ." *Id.*

26. *Nelson*, 131 S. Ct. at 752.

27. *Id.*

28. *Nelson v. Nat'l Aeronautics & Space Admin.*, 512 F.3d 1134, 1141 (9th Cir.), *vacated*, 530 F.3d 865 (9th Cir. 2008), *rev'd*, 131 S. Ct. 746 (2011).

29. *Id.*

30. *Id.*

31. *Nelson v. Nat'l Aeronautics & Space Admin.*, 506 F.3d 713, 715–16 (9th Cir. 2007).

32. *Nelson*, 530 F.3d at 878.

on their privacy claim.<sup>33</sup> As to SF-85, the Ninth Circuit held that the compelled disclosure of information about treatment or counseling for drug problems did not further the Government's interest in "uncovering and addressing illegal substance abuse" among the Employees.<sup>34</sup> To the contrary, the court noted, any treatment or counseling that the Employees received for illegal drug use arguably weakened the Government's interest regarding drug problems.<sup>35</sup> The Ninth Circuit further held that the open-ended questions on Form 42 were not narrowly tailored to meet the Government's interests in verifying the Employees' identities and ensuring security at the Government's facilities.<sup>36</sup> Although the open-ended questions might have solicited some information that was relevant to the Government's interests, because they were not narrowly tailored, they likely violated the Employees' informational privacy interest.<sup>37</sup>

The Supreme Court reversed.<sup>38</sup> Relying heavily on the Privacy Act's nondisclosure requirement<sup>39</sup> and the reasoning of *Whalen* and *Nixon*, the Court held that the Government's inquiries in SF-85 and Form 42 did not violate a constitutional right to informational privacy.<sup>40</sup>

### III. REASONING OF THE COURT

The issue in *Nelson* was twofold. First, assuming that an individual admits to having "used, possessed, supplied, or

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33. *Id.* at 879 ("Because SF 85 appears to *compel* disclosure of personal medical information for which the government has failed to demonstrate a legitimate state interest, [the Employees] are likely to succeed on this—albeit narrow—portion of their informational privacy challenge to SF 85."). First, a merits panel reversed the denial of the preliminary injunction; then, the panel vacated its opinion to file a superseding opinion. *Nelson*, 512 F.3d 1134.

34. *Nelson*, 530 F.3d at 878–79.

35. *Id.* at 879.

36. *Id.* at 880. While the Government's interests were legitimate, the questions were not narrowly tailored:

[T]he form invites the recipient to reveal *any* negative information of which he or she is aware. It is difficult to see how the vague solicitation of derogatory information concerning the applicant's "general behavior or conduct" and "other matters" could be narrowly tailored to meet *any* legitimate need, much less the specific interests that [the Government] ha[s] offered to justify the new requirement.

*Id.* at 881.

37. *Id.* at 881.

38. *Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 764 (2011).

39. 5 U.S.C. § 552a(b) (2006).

40. *Nelson*, 131 S. Ct. at 763–64.

manufactured illegal drugs” in the last year, does the Government’s requirement<sup>41</sup> that the individual then provide information on treatment or counseling violate a putative right to informational privacy, despite the Privacy Act’s protections?<sup>42</sup> Second, if that forced inquiry does not violate a putative right, does a follow-up, open-ended question—concerning the honesty and truthfulness of, or adverse information about, the individual<sup>43</sup>—violate a putative right, despite the Privacy Act’s protections?

Justice Alito, writing for the unanimous Court,<sup>44</sup> held no on both. The questions that were included in the background check, in conjunction with the Privacy Act’s safeguards against nonconsensual disclosure, did not violate the Employees’ putative right to informational privacy.<sup>45</sup> In arriving at its decision, the Court began by reviewing *Whalen* and *Nixon*.<sup>46</sup> *Whalen* held that a New York statute, which permitted the recording of names and addresses of individuals who obtained certain drugs with a doctor’s prescription, did not violate physicians’ and patients’ putative right to informational privacy.<sup>47</sup> Similarly, *Nixon* held that a statute, which permitted the custody and screening of the former president’s materials, did not unconstitutionally invade his putative right to informational privacy.<sup>48</sup>

Adhering to the approach of those cases, the Court in *Nelson* “assume[d] for present purposes that the Government’s challenged inquiries implicate[d] a privacy interest of constitutional

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41. The Employees had no meaningful choice of whether to refuse to submit to collection. The background-check requirement left the Employees with a choice to surrender either their privacy rights or their jobs. Brief for the Respondents at 56, *Nelson*, 131 S. Ct. 746 (No. 09-530), 2010 WL 3048324, at \*56 (“Respondents ‘are entitled, like all other persons, to the benefit of the Constitution,’ and the government may not force them to choose ‘between surrendering their constitutional rights or their jobs.’” (quoting *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation of N.Y.*, 392 U.S. 280, 284–85 (1968))).

42. Brief for the Petitioners at I, *Nelson*, 131 S. Ct. 746 (No. 09-530), 2010 WL 2031410, at \*I.

43. See *supra* text accompanying notes 22–23.

44. The vote was 8–0, but the Justices differed on the reasoning. Justice Scalia and Justice Thomas wrote concurring opinions. *Nelson*, 131 S. Ct. at 764 (Scalia, J., concurring); *id.* at 769 (Thomas, J., concurring). Justice Kagan took no part in the consideration or decision of the case because of her prior work on it as President Obama’s solicitor general. Bob Egelko, *Court: Feds Can Pry into NASA Scientists’ Lives*, S.F. CHRONICLE, Jan. 21, 2011, at C-2.

45. *Nelson*, 131 S. Ct. at 756–57.

46. *Id.* at 751.

47. *Whalen v. Roe*, 429 U.S. 589, 591 (1977).

48. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 465 (1977).

significance.”<sup>49</sup> Although Justices Scalia and Thomas—who wrote separate concurrences—urged the majority to hold that a constitutional right to informational privacy does not exist, the Court declined to provide a definitive answer.<sup>50</sup> Instead, the Court evaluated the Government’s interest in collecting the information and determined that the Privacy Act’s protections shielded any privacy interest at stake.<sup>51</sup> Although the Court assumed that an informational privacy right exists, it nevertheless found that the Government had a strong interest in conducting the background check because investigations of the Employees aided the Government in “employing a competent, reliable workforce.”<sup>52</sup> Thus, the Court declined to interfere with the Government’s workplace decisions because the Government—as an employer—had a strong interest in managing its internal operations by conducting background checks.<sup>53</sup>

Next, the Court examined whether SF-85 and Form 42 furthered the Government’s interest in managing its internal operations.<sup>54</sup> The Court held that SF-85’s inquiry into drug treatment and counseling was a permissible follow-up question that furthered the Government’s interest, because “[l]ike any employer, the Government is entitled to have its projects staffed by reliable, law-abiding persons who will ‘efficiently and effectively’ discharge their duties.”<sup>55</sup> Regarding Form 42, the Court held that the open-ended questions were “reasonably aimed at identifying capable employees who will faithfully conduct the Government’s business.”<sup>56</sup> Therefore, the questions furthered the Government’s interest<sup>57</sup>—especially in light of employers’ pervasive use of Form 42.<sup>58</sup>

Finally, the Court examined the protections that the Privacy Act established and the extent to which those protections safeguarded the Employees’ putative right to informational privacy.<sup>59</sup> The Court held that although the Privacy Act provides for exceptions to the

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49. *Nelson*, 131 S. Ct. at 756.

50. *Id.* at 756 n.10.

51. *Id.* at 759, 761.

52. *Id.* at 758.

53. *Id.*

54. *Id.* at 759.

55. *Id.* at 759–60.

56. *Id.* at 761.

57. *Id.*

58. *Id.* (“Form 42 alone is sent out by the Government over 1.8 million times annually.”).

59. *Id.* at 762.



nondisclosure requirement, this was insufficient to show that the Privacy Act failed to protect the Employees' privacy interest.<sup>60</sup> In particular, the routine-use exception<sup>61</sup>—which allows for the disclosure of information to the Employees' references and to authorized NASA employees who review the form for completion—did not create “any undue risk of public dissemination.”<sup>62</sup>

Because the background check's inquiries were reasonable and employment-related in light of the Government's interest in managing its internal operations, and because the Privacy Act's nondisclosure requirement provided sufficient protection to the Employees' informational privacy interest, the Court held that the Government's background check did not violate a putative constitutional right to informational privacy.<sup>63</sup>

#### IV. THE COURT SHOULD NOT HAVE HELD THAT THE PRIVACY ACT SUFFICIENTLY PROTECTS THE EMPLOYEES' RIGHT TO INFORMATIONAL PRIVACY

The Privacy Act of 1974<sup>64</sup> was a determining factor in the Court's decision to uphold the constitutionality of the background check. The Privacy Act applied to all of the information that the Government collected during its background-check process.<sup>65</sup> The Court relied on the Privacy Act in reasoning that “the information collected is shielded by statute from ‘unwarranted disclosur[e].’”<sup>66</sup> Thus, although the information that the background check collected implicated the Employees' right to informational privacy, the Court reasoned that the Privacy Act alleviated that privacy concern by providing sufficient protection that prevented the nonconsensual dissemination of the Employees' personal information.<sup>67</sup>

The Court's reliance on the Privacy Act was flawed because it glossed over an important, yet subtle, distinction: the right to privacy is threatened by both the collection of information and the

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60. *Id.*

61. 5 U.S.C. § 552a(b)(3) (2006).

62. *Nelson*, 131 S. Ct. at 763.

63. *Id.* at 763–64.

64. 5 U.S.C. § 552a.

65. *Nelson*, 131 S. Ct. at 753 (“All responses to SF-85 and Form 42 are subject to the protections of the Privacy Act.”).

66. *Id.* at 762 (alteration in original) (quoting *Whalen v. Roe*, 429 U.S. 589, 605 (1977)).

67. *Id.* at 763.

dissemination of that information.<sup>68</sup> But the Court in *Nelson* was prepared to address only the privacy interest that was implicated by the dissemination of information.<sup>69</sup> That raises the question: did the Privacy Act sufficiently protect the Employees' privacy interest that was implicated by the *collection* of information?

*A. Overview of the Privacy Act of 1974  
and Its Routine-Use Exception*

The Privacy Act regulates the federal government's use of personal information by placing limitations on the collection, dissemination, and use of personal information in a system of records.<sup>70</sup> The Privacy Act allows an agency to maintain a system of records that contains information about an individual that is "relevant and necessary to accomplish a purpose of the agency" that is authorized by law.<sup>71</sup> The goal of the Privacy Act is "to strike a delicate balance between the government's need to gather and to use personal information and the individual's competing need to maintain control over such personal information."<sup>72</sup> Thus, although the Privacy Act permits an agency to maintain a system of records, it also focuses on protecting individuals and their personal information.<sup>73</sup>

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68. Brief for the Respondents, *supra* note 41, at 36, 38 ("The distinction between government collection and dissemination of private information is not irrelevant to the analysis whether the government's actions are constitutional."); Brief Amici Curiae for the Respondents at 17, *Nelson*, 131 S. Ct. 746 (No. 09-530), 2010 WL 3167310, at \*17 ("The Privacy Act only limits disclosure by the government; it does nothing to mitigate the privacy concerns raised by collection of the information in the first place. Thus, it is not coextensive with the right to informational privacy.").

69. *Nelson*, 131 S. Ct. at 762 ("[The Employees] . . . attack only the Government's collection of information on SF-85 and Form 42. And here, no less than in *Whalen* and *Nixon*, the information collected is shielded by statute from 'unwarranted disclosur[e].'").

70. U.S. GEN. ACCOUNTING OFFICE, PRIVACY ACT: OMB LEADERSHIP NEEDED TO IMPROVE AGENCY COMPLIANCE 5 (2003), available at <http://www.gao.gov/new.items/d03304.pdf>.

71. 5 U.S.C. § 552a(e)(1) (2006); *Nelson*, 131 S. Ct. at 762.

72. Todd Robert Coles, *Does the Privacy Act of 1974 Protect Your Right to Privacy? An Examination of the Routine Use Exemption*, 40 AM. U. L. REV. 957, 965 (1991). For a brief but informative discussion on the history of events that led up to the enactment of the Privacy Act, see HAROLD C. RELYEA, CONG. RESEARCH SERV., THE PRIVACY ACT: EMERGING ISSUES AND RELATED LEGISLATION 1-4 (2002), available at <http://www.au.af.mil/au/awc/awcgate/crs/r130824.pdf>.

73. Indeed, the legislative history indicates that the Privacy Act's "purpose . . . is to provide certain safeguards for an individual against an invasion of personal privacy." Privacy Act of 1974, Pub. L. No. 93-579, § 5, 88 Stat. 1986, 1905-09, amended by Pub. L. No. 95-38, § 5(g), 91 Stat. 179 (1977). Some scholars suggest that the reason behind this dual, competing purpose was

At the heart of the Privacy Act's protection of individuals is its prohibition against the nonconsensual disclosure of personal information.<sup>74</sup> This requires that an individual give written consent before an agency may disclose records that contain information about the individual.<sup>75</sup> This prohibition, however, is subject to many exceptions that permit nonconsensual disclosure.<sup>76</sup> Once an agency determines that a disclosure falls under one of the twelve exceptions to the Privacy Act, the agency only needs to keep a record of the "date, nature, and purpose of each disclosure" and the "name and address of the person or agency to whom the disclosure is made."<sup>77</sup> Thus, the burden on agencies to establish exceptions to the nondisclosure requirement is quite low.<sup>78</sup>

The most contested exception in *Nelson* was the routine-use exception.<sup>79</sup> The routine-use exception allows for the nonconsensual disclosure of information if the agency determines that disclosure is "compatible with the purpose for which [the information] was collected."<sup>80</sup> An agency must publish in the federal register<sup>81</sup>—and

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a struggle between the House of Representatives and the Senate to reach a compromise. Coles, *supra* note 72, at 970. The House wanted to facilitate the transfer of information among federal agencies, while the Senate wanted to protect individuals by encouraging private enforcement and greater remedies. *Id.* at 970–73.

74. "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b); see Coles, *supra* note 72, at 959.

75. 5 U.S.C. § 552a(b); *Nelson*, 131 S. Ct. at 762.

76. 5 U.S.C. § 552a(b)(1)–(12).

77. *Id.* § 552a(e)(1).

78. Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Legal Scholars and Technical Experts in Support of the Respondents at 25, *Nelson*, 131 S. Ct. 746 (No. 09-530), 2010 WL 3167308, at \*25 [hereinafter EPIC Brief].

79. 5 U.S.C. § 552a(b)(3); *Nelson*, 131 S. Ct. at 762; see also Coles, *supra* note 72, at 975–77 (discussing the legislative history of the routine-use exception and the compromise between the House and Senate). The routine-use exception is one of the "most commonly abused provisions of the Privacy Act." *The Privacy Act of 1974*, ELEC. PRIVACY INFO. CTR., <http://epic.org/privacy/1974act/> (last visited Sept. 7, 2011). The Employees in *Nelson* did not seriously contest the other eleven exceptions, although it is interesting to note that in previous, unrelated litigation, other plaintiffs alleged that NASA relied on those exceptions. *E.g.*, *Henson v. Nat'l Aeronautics & Space Admin.*, 14 F.3d 1143, 1145 (6th Cir. 1994) (dealing with the system of records exception, 5 U.S.C. § 552a(b)(1)).

80. 5 U.S.C. § 552a(a)(7); see U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 5 n.6; Coles, *supra* note 72, at 959.

81. 5 U.S.C. § 552a(e)(4)(D).

must inform each individual from whom it collects information<sup>82</sup>—the routine uses for which the information may be disseminated.<sup>83</sup>

The Government's system of records that it filed with the federal registrar indicated multiple routine uses, two of which were critical in *Nelson*: (1) disclosure when it requested information; and (2) disclosure of the information that it collected.<sup>84</sup> Thus, under the routine-use exception, the Government could have disclosed information in the Employees' background checks when either (1) disclosure was necessary to obtain information for a decision that concerned the hiring or retention of the Employees; or (2) disclosure was necessary to provide information to a federal agency, if that agency requested it, regarding the hiring or retention of the Employees.<sup>85</sup> Essentially, this allowed the Government to disclose information to (1) the Employees' former landlords and references who filled out Form 42, to allow them to identify the employee,<sup>86</sup> and (2) other employees who reviewed SF-85, to verify that the Employees provided all of the requested information.<sup>87</sup>

*B. The Privacy Act Does Not Adequately  
Protect the Right to Informational  
Privacy That Is Threatened by the  
Compelled Collection of Information*<sup>88</sup>

The Court repeatedly emphasized that the Privacy Act shielded the Employees' information from unwarranted dissemination.<sup>89</sup> What the Court did not address, however, was whether the Privacy Act protected a right to informational privacy that was threatened by the

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82. SF-85 put the Employees on notice of the Government's routine uses. Brief for the Respondents, *supra* note 41, at 43. The information in SF-85 was different, however, from that which the Government submitted to the Federal Register. EPIC Brief, *supra* note 78, at 26–27. Moreover, Form 42 did not list the routine uses. *Id.*

83. 5 U.S.C. § 552a(e)(3)(C).

84. National Aeronautics and Space Administration (NASA) Notice of Proposed Revisions to an Existing Privacy Act System of Records, 71 Fed. Reg. 45859-02, 45862 (proposed revision Aug. 10, 2006) [hereinafter NASA Notice of Proposed Revisions] (listing the routine uses in Appendix B).

85. *Id.*

86. Nat'l Aeronautics & Space Admin. v. Nelson, 131 S. Ct. 746, 753, 763 (2011).

87. *Id.* at 763.

88. Recall that the Employees essentially had no meaningful choice regarding whether to submit to the background-check process. *See supra* note 41.

89. *Nelson*, 131 S. Ct. at 761–63 (discussing the statutory protection of unwarranted disclosure).

collection of information itself.<sup>90</sup> The Privacy Act does not adequately protect against a threat to the right to informational privacy like the one that was implicated by the background checks' compelled collection of information,<sup>91</sup> and the Court should not have glossed over the distinction between collection and dissemination.<sup>92</sup>

That the collection of personal information implicates a privacy interest has been clear since the Privacy Act's beginnings. Congress was influenced by the Secretary's Advisory Committee on Automated Personal Data Systems and that committee's 1973 report,<sup>93</sup> which set forth a "Code of Fair Information Practices."<sup>94</sup> That code listed five principles, and Congress in turn refined the five principles to eight—each of which exists in the Privacy Act's requirements.<sup>95</sup> One of the eight principles stated, "There shall be limits on the types of information an organization may collect about an individual . . ."<sup>96</sup> This principle was distinct from another: "There shall be limits on the external disclosures of information about an individual a record-keeping organization may make."<sup>97</sup> Thus, Congress intended for the actions—collection and

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90. Brief for the Respondents, *supra* note 41, at 43 ("[T]he Privacy Act—which as relevant here limits only dissemination, and not collection, of personal information . . .").

91. Moreover, while the Privacy Act does provide measures that protect against the nonconsensual dissemination of information, even those measures are inadequate to protect against threats to a right to privacy. *See infra* Part IV.C.

92. Perhaps the lack of discussion of why collection of information implicates a privacy right was one way for the Court to narrow the scope of the putative right to informational privacy—a narrowing that the Court might have preferred given the lack of precedent on the scope of such a right. *See* EPIC Brief, *supra* note 78, at 20; *see also The Supreme Court, 2010 Term—Leading Cases*, 125 HARV. L. REV. 231, 239 (2011) [hereinafter *Leading Cases*] ("It makes sense that in an area with murkier law, and with a right that has more widely felt practical implications, the Court would continue to be wary of a broad ruling's likelihood 'to go wrong.'" (footnotes omitted)).

93. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS: REPORT OF THE SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEM viii (1973), available at <http://aspe.hhs.gov/DATACNCL/1973privacy/tocprefacemembers.htm>.

94. PRIVACY PROT. STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY: THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION 501 (1977), available at <http://epic.org/privacy/ppsc1977report/c13.htm>.

95. *Id.* at 501–02.

96. This is known as the Collection Limitation Principle. *Id.* at 502.

97. This is known as the Disclosure Limitation Principle. *Id.*

dissemination—to be distinct, yet of comparable significance, for the Privacy Act’s requirements.<sup>98</sup>

Moreover, both *Whalen* and *Nixon* drew a distinction between collection and dissemination of information—recognizing that although dissemination is often more intrusive and more likely than collection is to rise to a violation of the right to informational privacy, collection of sensitive information can, by itself, constitute an impermissible invasion of privacy.<sup>99</sup> Although the two cases distinguished between collection and dissemination, neither case expressly limited the right to informational privacy to situations that exclusively involve dissemination.<sup>100</sup>

For example, *Whalen* stated that individuals have an “interest in avoiding disclosure of personal matters.”<sup>101</sup> And *Whalen* acknowledged that someone can protect that interest either by refusing to disclose personal information to the collection agency or by requiring the collection agency to guard the information carefully to prevent disclosure to the public.<sup>102</sup> Indeed, *Whalen* noted that “[r]equir[ed] . . . disclosure[] to representatives of the State”—the collection of information—implicates a privacy interest.<sup>103</sup> *Whalen* then hinted that compelled collection might, but does not automatically, amount to an invasion of privacy.<sup>104</sup> Moreover, in first

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98. See generally Haeji Hong, *Dismantling the Private Enforcement of the Privacy Act of 1974: Doe v. Chao*, 38 AKRON L. REV. 71, 80–83 (2005) (summarizing the principles and history behind the Privacy Act).

99. Brief for the Respondents, *supra* note 41, at 36–37. Other courts have similarly reached the conclusion that the collection of information implicates a right to informational privacy. *Id.* at 39 n.18 (listing cases). For example, the Ninth Circuit reasoned that the right to information 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.” *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789–90 (9th Cir. 2002) (citing *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977)); *accord Shuman v. City of Phila.*, 470 F. Supp. 449, 458 (E.D. Pa. 1979) (“If there is a constitutionally protected ‘zone-of-privacy’, compelled disclosure in and of itself may be an invasion of that zone, and therefore, a violation of protected rights. Absent a strong countervailing state interest, disclosure of private matters should not be compelled.”).

100. Brief for the Respondents, *supra* note 41, at 36.

101. *Whalen*, 429 U.S. at 599.

102. See *id.* at 605–06 (“We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information . . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.”); EFF Brief, *supra* note 15, at 21–22 (citing cases including *Whalen*).

103. *Whalen*, 429 U.S. at 602; Brief for the Respondents, *supra* note 41, at 36–37.

104. *Whalen*, 429 U.S. at 602; Brief for the Respondents, *supra* note 41, at 36–37.

crafting the putative right to informational privacy,<sup>105</sup> *Whalen* cited Professor Kurland for the assertion that there are three facets of the right to privacy, one of which is the “right of the individual to be free in action, thought, experience, and belief from governmental compulsion.”<sup>106</sup> Professor Kurland distinguished this right from “the right of an individual not to have his private affairs made public.”<sup>107</sup> Thus, *Whalen*, by relying on Professor Kurland for guidance, distinguished between freedom of action, which includes the compelled collection of information, and improper dissemination—both of which implicate a putative right to informational privacy.<sup>108</sup>

Similarly, *Nixon* concluded that the former president’s privacy rights were threatened the moment that he was forced to submit to collection of his personal papers.<sup>109</sup> *Nixon* recognized that the collection threatened a privacy right simply by the submission of the papers to government employees<sup>110</sup> who sorted the private documents from the public documents.<sup>111</sup> Thus, even though there was no disclosure to the public because a statute required the former president’s private papers to be returned to him,<sup>112</sup> *Nixon* nonetheless recognized that the short-term collection of personal papers threatened the former president’s privacy right.<sup>113</sup>

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105. The Court crafted the putative right from its previous decisions of *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and others that delineated the right to privacy. *Whalen*, 429 U.S. at 598 n.23.

106. *Whalen*, 429 U.S. at 599 n.24 (quoting Phillip Kurland, *The Private I*, UNIVERSITY OF CHICAGO MAGAZINE (Autumn 1976)).

107. *Id.* (quoting Kurland, *supra* note 106).

108. *Id.* at 599 & n.24, 600.

109. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457–58, 465 (1977) (“We may assume . . . that this pattern of *de facto* Presidential control and congressional acquiescence gives rise to appellant’s legitimate expectation of privacy in such materials.”). But the *Nixon* Court ultimately held that the public interest outweighed his privacy interest. *Id.* at 465.

110. It is interesting to note that those employees had an “unblemished record . . . for discretion.” *Id.* at 465.

111. *Id.* at 457–58 (discussing the problem of mingling personal documents with public documents and how this gives rise to a legitimate expectation of privacy); EFF Brief, *supra* note 15, at 22.

112. The statute at issue in *Nixon* was the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (2006).

113. *Nixon*, 433 U.S. at 458–59. “The very fact that the Court considered whether Nixon’s informational privacy rights had been violated, when public dissemination was not an issue, lends strong support to the notion that informational privacy concerns may be triggered by the mere collection of information.” Russell T. Gorkin, Comment, *The Constitutional Right to Informational Privacy: NASA v. Nelson*, 6 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 1, 7 (2010). *Nixon*, which focused on a Fourth Amendment claim, never went on to analyze the former president’s claim that his privacy interest was threatened by the collection of information,



Interestingly, the Court in *Nelson* did acknowledge that *Whalen* and *Nixon* each conceded that collection of information might threaten a putative privacy interest.<sup>114</sup> The Court stated, “Both *Whalen* and *Nixon* recognized that government ‘accumulation’ of ‘personal information’ for ‘public purposes’ may pose a threat to privacy.”<sup>115</sup> But the Court did not apply that precedent to determine whether the Privacy Act sufficiently protected the privacy interest that was threatened by the compelled collection of the Employees’ information.<sup>116</sup> Instead, the Court jumped to its determination of whether the Privacy Act’s statutory protections alleviated the entirety of the Employees’ privacy claims because the Privacy Act sufficiently protected against unwarranted dissemination.<sup>117</sup>

Had the Court acknowledged that the compelled collection of information threatened the Employees’ informational privacy interest, the Court would have been faced with the question of whether the Privacy Act sufficiently protects that interest.<sup>118</sup> Simply put, the Privacy Act does not. Its requirements for collection are too broad for it to protect against the threats to privacy that are created by the compelled collection of personal information.<sup>119</sup> The Privacy Act’s two main requirements for collection are: (1) the information collected must be “relevant and necessary” to accomplish a purpose of the agency that is required by law; and (2) the agency, “to the greatest extent practicable[,]” should attempt to collect information directly from the individual.<sup>120</sup>

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and therefore never answered the question of “what information an individual can prohibit the government from collecting, and when, if it all, this prohibition can be overcome.” *Id.*; see *Nixon*, 433 U.S. at 460.

114. *Nat’l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 761 (2011).

115. *Id.* (citing *Nixon*, 433 U.S. at 457–58; *Whalen v. Roe*, 429 U.S. 589, 605 (1977)).

116. See *Nelson*, 131 S. Ct. at 762 (“[H]ere, no less than in *Whalen* and *Nixon*, the information collected is shielded by statute from ‘unwarranted disclosur[e].’ The Privacy Act, which covers all information collected during the background-check process, allows the Government to maintain records ‘about an individual’ only to the extent the records are ‘relevant and necessary to accomplish’ a purpose authorized by law.” (citations omitted)).

117. *Id.* at 761 (“Both *Whalen* and *Nixon* recognized that government ‘accumulation’ of ‘personal information’ for ‘public purposes’ may pose a threat to privacy. But both decisions also stated that a ‘statutory or regulatory duty to avoid unwarranted disclosures’ generally allays these privacy concerns.” (emphasis added) (citations omitted)).

118. See *id.* (reasoning that statutes may shield threats to privacy).

119. See 5 U.S.C. § 552a(e) (2006) (regulating the maintenance, manner of collection, and disclosure of personal information, but limiting the type of information that can be collected to that which is “relevant and necessary” to accomplish a purpose of the agency that is required by law).

120. 5 U.S.C. § 552a(e)(1)–(2).



The Court did not address either requirement.<sup>121</sup> As to the first, the Court repeatedly asserted that the questions were reasonable and related to employment,<sup>122</sup> but it never deemed the collection to be relevant and necessary to an end that was required by law.<sup>123</sup> As to the second requirement, the Government collected information from the Employees' former landlords and references—information that it did not collect directly from the individuals.<sup>124</sup> Still, given the Privacy Act's vague language,<sup>125</sup> in conjunction with the Court's ultimate finding that the questions were reasonable,<sup>126</sup> the Court might have held that the Government's collection of information met the Privacy Act's two requirements.

But just because the Government satisfied the Privacy Act's requirements did not guarantee that the Privacy Act did an adequate job of protecting the Employees' privacy interest. Indeed, a recent study demonstrates that, despite the Privacy Act's requirements, many agencies overcollect information because they do not assess the relevance of or need for such information.<sup>127</sup> And the current degree of agency and congressional oversight is inadequate for agencies to determine what is actually relevant and necessary for them to prevent or remedy overcollection.<sup>128</sup> Until Congress takes action and mandates more specific requirements for collection under

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121. See *Nelson*, 131 S. Ct. at 762–63 (noting that the safeguards in the Privacy Act “evidence a proper concern’ for individual privacy” with respect to disclosure, without discussing whether or not such safeguards properly protect the individual’s privacy interest against compelled collection).

122. *Id.* at 759–61 (repeating “reasonable”).

123. 5 U.S.C. § 552a(e)(1). The Court denied that it had to determine whether the *questions* were necessary: “We reject the argument that the Government . . . has a constitutional burden to demonstrate that its questions are ‘necessary’ . . .” *Nelson*, 131 S. Ct. at 760. While there is a distinction between determining whether specific questions themselves were necessary and determining whether the collection of information was necessary, under the Court’s reasoning—that proving that the questions were necessary was too great a burden—perhaps the Court would have found that collection was also not necessary and therefore did not meet the Privacy Act’s first requirement, 5 U.S.C. § 552a(e)(1).

124. *Nelson*, 131 S. Ct. at 753.

125. See 5 U.S.C. § 552a(e)(1)–(2) (using such terms as “relevant,” “necessary,” and “to the greatest extent practicable” without defining them or explaining what they mean).

126. *Nelson*, 131 S. Ct. at 759–61.

127. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 14–15. This is even more problematic for electronic records, which are easier to collect. *Id.* at 43; *Leading Cases*, *supra* note 92, at 238–39.

128. Coles, *supra* note 72, at 990 (“Current oversight and enforcement efforts have been unsuccessful in preventing widespread abuse of the Privacy Act. Federal agencies have been unwilling to police themselves.”).

the Privacy Act,<sup>129</sup> the only adequate protection is to not collect information in the first place because “information not collected about an individual cannot be misused.”<sup>130</sup>

In sum, although the dissemination of personal information is often more intrusive than the collection of that information, “[w]hen the government compels individuals to relinquish control of sensitive personal information, the harm to personal dignity can be profound, regardless of how widely and to whom the information is later disseminated.”<sup>131</sup> The Employees’ informational privacy right involved more than just an interest in limiting the dissemination of their personal information; their privacy right also included an interest in curtailing the collection of that information.<sup>132</sup> The Privacy Act, however, does not adequately protect against threats to a putative right to information privacy that is implicated by the compelled collection of information.

*C. The Privacy Act Does Not Adequately Protect  
a Right to Informational Privacy That Is Threatened  
by the Improper Dissemination of Information*

The Privacy Act is also inadequate to protect the privacy interest that is threatened by improper, nonconsensual dissemination.<sup>133</sup> The Privacy Act has twelve exceptions that swallow the rule against the nonconsensual dissemination of information.<sup>134</sup> In particular, the

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129. *Id.* (“[T]he efforts of Congress . . . to provide guidance and to ensure compliance have met with limited success. . . . Ultimately, it is the flawed statutory enforcement and oversight scheme that is responsible for the failings of the Privacy Act.”).

130. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 14 (quoting Notice of Privacy Act Guidelines, 40 Fed. Reg. 28949, 28960 (July 9, 1975)).

131. Brief for the Respondents, *supra* note 41, at 40.

132. EPIC Brief, *supra* note 78, at 11 (“[P]rivacy is not simply the limit on the disclosure of personal information.”).

133. Another inadequacy—which should be noted but is not discussed at length in this Comment—is the lack of proper remedies for violations of the Privacy Act: individuals may only obtain monetary relief for intentional and willful violations. 5 U.S.C. § 552a(g)(4) (2006); *Nat’l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 763 n.15 (2011); *Coles*, *supra* note 72, at 992–94 & n.236; Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1168 (2002); *see also Doe v. Chao*, 540 U.S. 614, 616, 627 (2004) (holding that plaintiffs must prove that some actual damages resulted from a federal agency’s intentional or willful violation of the Privacy Act of 1974 in order to qualify for the minimum award of \$1,000 that the statute provides as compensation for such a violation).

134. 5 U.S.C. § 552a(b)(1)–(12); *see also* Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 479–80 (1995) (“[T]he Privacy Act is a paper tiger. . . . [T]he Act’s substantive provisions are riddled with loopholes and laced with exceptions.”).

routine-use exception that was at issue in *Nelson* “has threatened to emasculate the Privacy Act’s protection of individual privacy.”<sup>135</sup>

The Court, in concluding that the Government’s established routine uses were not too broad, reasoned that those routine uses did not specifically authorize a release of the information to the public; instead, the Government released the information only to other employees and to the Employees’ references and landlords.<sup>136</sup> Although the Government’s routine uses did not facially permit a disclosure to the public, the Court’s conclusion—that there was necessarily only a remote possibility that the information could be disclosed to the public<sup>137</sup>—was flawed because it did not take into consideration the modern reality of the abuse of the exception.<sup>138</sup>

In *Nelson*, the Government, in attempting to comply with the Privacy Act’s provisions,<sup>139</sup> gave notice to the federal register and the Employees that its routine uses included disclosure for collection and disclosure for dissemination.<sup>140</sup> The Court reasoned that these routine uses were “limited, reasonable steps designed to complete the background-check process in an efficient and orderly manner.”<sup>141</sup> Moreover, because only references and other employees could review the information, the Court concluded that “[t]he ‘remote possibility’ of public disclosure created by these narrow ‘routine use[s]’ does not undermine the Privacy Act’s substantial protections.”<sup>142</sup>

As the Court noted, an “ironclad disclosure bar” is unnecessary to protect an informational privacy interest.<sup>143</sup> The routine-use exception, however, is far from ironclad. And the Court’s reliance on *Whalen* and *Nixon*—for the assertion that protections do not need to be ironclad<sup>144</sup>—is undermined by several distinctions between those cases and *Nelson*. First, neither of the earlier cases dealt with the

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135. Coles, *supra* note 72, at 959.

136. *Nelson*, 131 S. Ct. at 763.

137. *Id.*

138. The routine-use exception has long been criticized as the exception that swallows the rule. *E.g.*, Solove, *supra* note 133, at 1167–68.

139. *See supra* note 82.

140. NASA Notice of Proposed Revisions, *supra* note 84 (listing routine uses in Appendix B).

141. *Nelson*, 131 S. Ct. at 763.

142. *Id.* (alteration in original) (citing *Whalen v. Roe*, 429 U.S. 589, 601–02 (1977)).

143. *Id.* at 762.

144. *Id.*

Privacy Act or its exceptions. The statutes in *Whalen* and *Nixon* had their own distinct exceptions to nondisclosure.<sup>145</sup> The statutory exceptions that permitted disclosure in *Whalen* and *Nixon*, therefore, had no bearing on whether the routine-use exception at issue in *Nelson* was too porous to protect a privacy interest.<sup>146</sup> Second, neither *Whalen* nor *Nixon* dealt with dissemination to persons outside of the agency; rather, the exception in each case was for dissemination to other employees.<sup>147</sup> But in *Nelson*, one of the Government's routine-use exceptions permitted disclosure to nonemployees such as references and former landlords.<sup>148</sup> Finally, there was no evidence that the other NASA employees, unlike the employees in *Nixon*, had spotless records.<sup>149</sup> Thus, while there may have been only a remote possibility of public disclosure given the narrow exceptions in *Whalen* and *Nixon*, those exceptions are distinct from the Privacy Act's routine-use exception. Therefore, it does not necessarily follow that there was only a remote possibility of public disclosure in *Nelson*.

Moreover, criticism of the routine-use exception is widespread.<sup>150</sup> Essentially, the exception only requires agencies to plan in advance for disclosure and to comply with minimal procedural requirements.<sup>151</sup> Thus, it threatens to eliminate one of the Privacy Act's central purposes: to protect individual privacy rights.<sup>152</sup> As noted, agencies must meet minimal requirements, including reviewing routine-use disclosures by keeping a record.<sup>153</sup>

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145. The statute in *Whalen* was N.Y. PUB. HEALTH LAW § 3371 (McKinney 1973). *Whalen*, 429 U.S. at 594 & n.12 (listing nondisclosure exceptions, including disclosure to employees). The statute in *Nixon* was the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 (1970). *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 429, 431 (1977).

146. *Nelson*, 131 S. Ct. at 762 (“[T]oo porous to supply a meaningful check against ‘unwarranted disclosures.’” (citing *Whalen*, 429 U.S. at 605)).

147. *Nixon*, 433 U.S. at 462 (describing the archivists' screening and collection procedures pursuant to their authority under 44 U.S.C. § 2107); *Whalen*, 429 U.S. at 594 & n.12 (citing N.Y. PUB. HEALTH LAW § 3371).

148. *Nelson*, 131 S. Ct. at 753.

149. *Nixon*, 433 U.S. at 462 (“[U]nblemished record for discretion.” (quoting *Nixon v. Adm'r of Gen. Servs.*, 408 F. Supp. 321, 365 (D.D.C. 1976))).

150. E.g., Paul M. Schwartz, *Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 584–86 (1995) (“Not only is the ‘routine use’ exemption applied in a fashion that ignores relevant statutory language, such agency practice continues despite prolonged and well-placed criticism of it.”).

151. Major John F. Joyce, *The Privacy Act: A Sword and a Shield but Sometimes Neither*, 99 MIL. L. REV. 113, 157 (1983).

152. Coles, *supra* note 72, at 979–80.

153. 5 U.S.C. § 552a(c)(1) (2006).

Some agencies fail to adhere to this requirement.<sup>154</sup> For example, one report found that, in 2,400 different systems of records, 18 percent of agencies did not review routine-use disclosures to ensure that the disclosures continued to comply with the purposes for which the information had been collected.<sup>155</sup> Given this abuse of the exception, “agencies cannot assure the public that the potential uses of their personal information remains appropriate.”<sup>156</sup> Moreover, although an agency must give notice of routine uses,<sup>157</sup> it has become common for agencies to eliminate the effectiveness of this requirement by broadly wording their routine-use notices.<sup>158</sup> As agencies craft their own routine uses, which are subject only to the vague requirement that the uses be compatible with the purpose for which the records had been originally collected,<sup>159</sup> they can essentially create their own exceptions to the Privacy Act’s prohibition against nonconsensual disclosure.<sup>160</sup> Thus, even though the Government’s routine uses did not explicitly permit disclosure to the public, the Court should not have ignored the reality of the abuse of the routine-use exception and the potential for disclosure to the public.

## V. CONCLUSION

Perhaps the Court should not have even continued *Whalen* and *Nixon*’s tradition of assuming, without deciding, that a constitutional right to informational privacy exists.<sup>161</sup> But because the Court in *Nelson* did just that, it had to ascertain whether any statutory requirements shielded the Employees’ putative right to informational privacy. *Nelson*’s holding hinged on the assertion that, like the statutory protections in *Whalen* and *Nixon*, the Privacy Act’s

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154. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 17, 50.

155. *Id.*

156. *Id.* at 17.

157. The agency must give notice to the federal register, 5 U.S.C. § 552a(e)(4)(D), and to individuals who provide information, *id.* § 552a(e)(3)(C).

158. U.S. GEN. ACCOUNTING OFFICE, *supra* note 70, at 50.

159. 5 U.S.C. § 552a(b)(3).

160. EPIC Brief, *supra* note 78, at 25–26.

161. “Thirty-three years have passed since the Court first suggested that the right may, or may not, exist. It is past time for the Court to abandon this Alfred Hitchcock line of our jurisprudence.” *Nat’l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 767 (2011) (Scalia, J., concurring). *But see Leading Cases*, *supra* note 92, at 232 (“Although *Nelson* may not answer many of the questions that persist about informational privacy, the Court correctly declined to dictate the contours of that right at a time when its practical and legal implications remain difficult to anticipate.”).

requirement against nonconsensual public disclosure was adequate to protect the Employees' informational privacy interest. But the Court did not address how the Privacy Act warded off the privacy threat that was created by the background check's collection of personal information. Moreover, the Court failed to acknowledge the reality that the Privacy Act's routine-use exception swallows the rule against nonconsensual public disclosure, thereby causing dissemination of more personal information than the Privacy Act actually intended to allow. Consequently, the Court should not have held that the Privacy Act sufficiently protected the Employees' putative constitutional right to informational privacy that was implicated by the Government's background checks. If, as will likely happen, background checks and compelled collection of information become more widespread,<sup>162</sup> then *Nelson* will be even more meaningful to citizens and their "interest in avoiding disclosure of personal matters."<sup>163</sup>

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162. *Nelson*, 131 S. Ct. at 758 ("[M]ore than 88% of U.S. companies . . . perform background checks on their employees." (alteration in original) (quoting Brief Amicus Curiae of Consumer Data Industry Ass'n et al. in Support of Petitioners at 2, *Nelson*, 131 S. Ct. 746 (09-530), 2010 WL 2185134, at \*2)); John E. Matejkovic & Margaret E. Matejkovic, *Whom to Hire: Rampart Misrepresentations of Credentials Mandate the Prudent Employer Make Informed Hiring Decisions*, 39 CREIGHTON L. REV. 827, 829 (2006) ("82% of employers surveyed in 2003 conducted applicant background investigations, up from 66% in 1996." (citing *How to Do Background Checks Properly*, HRFOCUS, Aug. 1, 2004, at 11)).

163. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977); *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

