

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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ROBERT M. NELSON, et al.		)	
		)	
Plaintiffs-Appellants,		)	
		)	
v.		)	No. 07-56424
		)	
NATIONAL AERONAUTICS AND		)	
SPACE ADMINISTRATION, et al.		)	
		)	
Defendants-Appellees.		)	
<hr/>		)	

**MOTION TO FURTHER EXTEND STAY OF MANDATE PENDING  
FILING AND DISPOSITION OF PETITION FOR CERTIORARI**

Pursuant to Fed. R. App. P. 41(d)(2), appellees National Aeronautics and Space Administration (NASA), et al., hereby request a further extension of this Court’s stay of mandate in the above-captioned case, for a period of 30 days, to and including November 9, 2009.

This Court denied the government’s petition for rehearing and rehearing en banc on June 4, 2009, and granted the government’s motion to stay issuance of the mandate on June 10, 2009, up to and including September 8, 2009. As the Court is aware, the decision to seek certiorari on behalf of the United States must be made by the Solicitor General, see 28 C.F.R. § 0.20(a), and can be made only after extensive consultations and deliberations within the federal government. On

August 21, 2009, the Solicitor General applied for a 30-day extension of the time in which to file a petition for a writ of certiorari; by order dated August 25, 2009, Justice Kennedy extended the time to so file to and including October 2, 2009. On September 22, 2009, the Solicitor General sought a further 30-day extension for good cause under Supreme Court Rule 13(5). See Attachment A. On September 23, 2009, Justice Kennedy granted an extension to and including November 1, 2009. See Attachment B. Thus, a further stay of this Court's mandate is necessary to allow the Solicitor General to determine whether to file a petition for certiorari and, if a determination is made to file, to prepare the petition within the extended time granted by the Supreme Court.

1. A party who seeks a stay of the mandate pending the filing of a petition for a writ of certiorari "must show that a petition for certiorari would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); see also Circuit Advisory Committee Note to Rule 41-1 ("The motion will not be routinely granted; it will be denied if the Court determines that the application for certiorari would be frivolous or is made merely for delay."). As this Court previously recognized in granting the government's motion for a stay of mandate for 90 days, and an extension of the stay for 30 days, Rule 41's requirements for a stay of mandate are satisfied here.

2. To extend the stay of mandate past 90 days, a party must show “good cause.” Fed. R. App. P. 41(d)(2)(B). The Solicitor General asked for, and the Supreme Court has granted, a further 30-day extension of the time for the government to file a petition for certiorari. Supreme Court Rule 13(5) permits such extensions for 60 days when “good cause” exists. In the Solicitor General’s filing, she explained that a further extension of the time to file a petition for certiorari is justified because: (1) this Court’s “decision raises important questions about the constitutionality of the background check process applicable to federal contractors – an issue with implications in many different contexts of government operations”; (2) she “is examining the legal and practical significance of the court of appeals’ decision”; and (3) that “[a]lthough the Solicitor General’s Office has been diligently consulting with other components of the Department of Justice and with the significant number of federal agencies interested in the matter, additional time is required to complete that consultation process, and if certiorari is authorized, to prepare and print the petition.” See Attachment A at 6. For the same reasons, good cause exists for this Court to extend the stay of mandate.

3. Extending the stay of mandate can result in no harm to plaintiffs. This Court issued an injunction pending appeal shortly after plaintiffs’ request for relief was denied by the district court. For that reason, plaintiffs incurred no injury

during the pendency of the government's petitions for rehearing, the second of which was filed in August 2008. It is appropriate that the Solicitor General be given the opportunity to exercise her responsibilities in determining whether to seek further review within the extended time granted by the Supreme Court and, if she determines to do so, it is appropriate that the Supreme Court be permitted to determine whether to review this Court's decision.

#### CONCLUSION

For the foregoing reasons, the Court should extend its stay of issuance of the mandate for a period of 30 days, to and including November 9, 2009 with the stay to be extended if the Solicitor General files a petition for certiorari within this period.

Respectfully submitted,

s/ Mark B. Stern  
MARK B. STERN  
(202) 514-5089

s/ Melissa N. Patterson  
MELISSA N. PATTERSON  
(202) 514-1201  
Attorneys, Appellate Staff  
Civil Division, Room 7230  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

September 2009

## **CERTIFICATE OF SERVICE**

I hereby certify that on September 23, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Melissa N. Patterson

Melissa N. Patterson

## Attachment A

IN THE SUPREME COURT OF THE UNITED STATES

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No. 09A198

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., APPLICANTS

v.

ROBERT M. NELSON, ET AL.

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APPLICATION FOR A FURTHER EXTENSION OF TIME WITHIN  
WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the National Aeronautics and Space Administration (NASA); Charles F. Bolden, Jr., Administrator of NASA, in his official capacity; the United States Department of Commerce; and Gary Locke, Secretary of Commerce, in his official capacity, respectfully requests a further 30-day extension of time, to and including November 1, 2009, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The judgment of the court of appeals was entered on June 20, 2008. A petition for rehearing was denied on June 4, 2009. By order dated August 25, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 2, 2009. The jurisdiction of this Court would be

invoked under 28 U.S.C. 1254(1). Copies of the opinion of the court of appeals and the order of the court of appeals denying rehearing en banc are attached.

1. a. This case involves a challenge to the government's background investigation process for federal contract employees. Since 1953, the government has required a minimum level of background investigation for federal employees in the competitive civil service. See Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953), reprinted as amended in 5 U.S.C. 7311 note. As relevant here, the background check process involves the completion of two forms: Standard Form 85 (SF-85), Questionnaire for Non-Sensitive Positions, which is completed by the applicant; and Form 42, Investigative Request for Personal Information, which is completed by the applicant's references. SF-85 asks, among other things, whether the applicant has used illegal drugs in the past year. If the answer is yes, the form asks the applicant to provide further details, including whether he received any treatment or counseling. Form 42 is sent to the applicant's references, and a similar form is sent to his educational institutions and former employers. Form 42, which seeks information regarding the applicant's suitability for federal employment, solicits, inter alia, any adverse information concerning the applicant's financial integrity, mental and emotional stability, and drug or alcohol abuse.

b. In 2004, the President issued a directive to the Department of Commerce to develop a federal standard for "secure and reliable forms of identification" that would be used to control access to federally controlled facilities and information systems. Homeland Security Presidential Directive / HSPD 12 -- Policy for a Common Identification Standard for Federal Employees and Contractors Pub. Papers 1765-1766 (2004). The Commerce Department then put in place minimum requirements for the issuance of identity credentials, which include the background check process described above.

c. The Jet Propulsion Laboratory (JPL) is a federal facility operated by the California Institute of Technology (Caltech) pursuant to a contract with NASA. All employees at JPL are Caltech employees who are contract employees of NASA. In 2007, in accordance with the Commerce Department's guidance and under NASA's own authority under the Space Act, 42 U.S.C. 2455, NASA modified its contract with Caltech to require that Caltech employees working at JPL undergo background checks as described above.

2. Respondents are 28 Caltech employees working at JPL who sought a preliminary injunction to enjoin implementation of the background check process at JPL. As relevant here, they argued that the background checks violated the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., because NASA lacked the statutory authority to require background investigations as part of the

security screening of contractors, and that the checks violated a constitutional right to informational privacy. The district court disagreed on both counts and denied respondents' motion for a preliminary injunction.

3. The court of appeals granted respondents an injunction pending appeal. See Nelson v. NASA, 506 F.3d 713 (9th Cir. 2007). It then issued an opinion reversing the district court's denial of a preliminary injunction. See Nelson v. NASA, 512 F.3d 1134 (9th Cir. 2008). As relevant here, the court held that respondents were likely to succeed on their APA claim because NASA lacked the authority to perform the background investigations of JPL employees, see id. at 1143-1144, and were likely to succeed on their informational privacy claim because SF-85's request for information regarding illegal drug use implicates a constitutional right to informational privacy and what the court characterized as Form 42's "open-ended and highly private questions \* \* \* do not appear narrowly tailored to any legitimate government interest," id. at 1144-1145.

In response to the government's petition for rehearing, the court of appeals withdrew its first opinion and issued a second opinion. See Nelson v. NASA, 530 F.3d 865 (9th Cir. 2008). The court reversed its previous holding that NASA did not have the authority to conduct background investigations of federal contractors, id. at 874-875, but continued to adhere to the view

that respondents demonstrated a likelihood of success on their informational privacy claim, id. at 877-881. The court determined that SF-85's requirement that contractor employees disclose treatment or counseling for drug problems was not supported by a legitimate government interest, id. at 879, and that Form 42 is not narrowly tailored to the government's legitimate interests in verifying its contractors' identities and ensuring the security of the JPL facility, id. at 880-881.

The government filed a second petition for rehearing en banc. The court of appeals denied the petition over three published dissents joined by a total of five judges. See Nelson v. NASA, 568 F.3d 1028 (9th Cir. 2009). Judge Callahan's dissent explained that "the panel's opinion constitutes an unprecedented expansion of the constitutional right to informational privacy" that "reaches well beyond this case and may undermine personnel background investigations performed daily by federal, state, and local governments." Id. at 1039 (Callahan, J., joined by Kleinfeld, Tallman, and Bea, JJ.). Judge Kleinfeld's dissent focused on Form 42, explaining that the panel's opinion calls into question the most basic investigation of an applicant by a prospective employer, such as when a federal judge about to "hire law clerks and secretaries \* \* \* talk[s] to professors and past employers and ask[s] some general questions about what they are like." Id. at 1051-1052 (Kleinfeld, J., joined by Callahan and Bea, JJ.). And

Chief Judge Kozinski's dissent questioned whether a constitutional right to informational privacy even exists, particularly a right to prevent collection of information, as opposed to disclosure of information. See id. at 1052-1054 (Kozinski, C.J., joined by Kleinfeld and Bea, JJ.) (observing that this Court "hinted" at a constitutional right to informational privacy in two cases in the 1970s and then "never said another word about it").

4. The court of appeals' decision raises important questions about the constitutionality of the background check process applicable to federal contractors -- an issue with implications in many different contexts of government operations. The Solicitor General is examining the legal and practical significance of the court of appeals' decision. Although the Solicitor General's Office has been diligently consulting with other components of the Department of Justice and with the significant number of federal agencies interested in the matter, additional time is required to complete that consultation process, and if certiorari is authorized, to prepare and print the petition.

Respectfully submitted.

ELENA KAGAN  
Solicitor General  
Counsel of Record

SEPTEMBER 2009

## Attachment B

Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001

William K. Suter  
Clerk of the Court  
(202) 479-3011

September 23, 2009

Ms. Elena Kagan  
Solicitor General  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Re: National Aeronautics and Space Administration, et al.  
v. Robert M. Nelson, et al.  
Application No. 09A198

Dear Ms. Kagan:

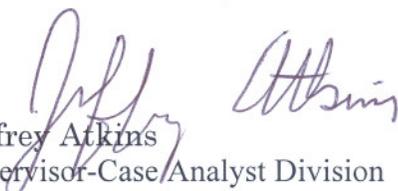
The application for a further extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on September 23, 2009 extended the time to and including November 1, 2009.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by

  
Jeffrey Atkins  
Supervisor-Case/Analyst Division

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SOLICITOR GENERAL

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**Supreme Court of the United States  
Office of the Clerk  
Washington, DC 20543-0001**

**William K. Suter**  
Clerk of the Court  
(202) 479-3011

NOTIFICATION LIST

Ms. Elena Kagan  
Solicitor General  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Clerk  
United States Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103-1526