

January 26, 2011

[www.hspd12jpl.org](http://www.hspd12jpl.org)

JPL/Caltech Colleagues for

- Civil Liberties
- The Fourth Amendment
- Privacy Rights
- Open Scientific Research



Dear JPL Colleagues:

Over three years ago, we received notice that we were compelled, at the risk of losing our jobs, to participate in a new badging process. There are many aspects of the process that alarm us: how our personal information will be protected; specific questions that are unconstitutional; a requirement that we authorize open-ended background investigations into the most intimate details of our private lives; a requirement that we authorize anyone with information or records about us to turn it over to the government, overriding any prior confidentiality agreement; and a set of criteria (the so-called “suitability matrix”) that NASA intended to use to evaluate our suitability for continued employment. The suitability matrix covers nearly every possible category of human behavior, including financial stability, sexual experience, and other morality judgments.

When employees discussed their concerns with NASA Administrator Michael Griffin, he told us that our only recourse was to go to court. Twenty-eight of us accepted the challenge and filed a lawsuit. As a result, the Ninth Circuit Court of Appeals ruled three years ago that we are entitled to an injunction preventing NASA from implementing the process at JPL. The government appealed the ruling, and that appeal went all the way to the Supreme Court, which recently issued its decision. The Court ruled, on two very narrow points, in favor of the government.

The lower courts must now implement the Supreme Court's decision. When the case gets back to the District Court, it is likely (but not certain) that the injunction will be lifted and our lawsuit will be dismissed. The ball will then be in NASA's court. In the meantime, as Deputy Director Tattini pointed out in his lab-wide e-mail, JPL “will need to work with NASA to determine how the ruling affects the issuance of badges and its impact on badging applications currently in the system. ... For now, JPL employees and resident affiliates may continue to use their existing badges to access the laboratory.” We would like to share additional information with you about this case. All the documents and detailed information can be found at the website [HSPD12JPL.org](http://HSPD12JPL.org).

The open-ended investigations were an outgrowth of Homeland Security Presidential Directive #12, signed by President Bush in 2004. HSPD12 is on its surface innocuous. It merely establishes that there be a standard, tamper-proof identification badge for all employees who have access to federal facilities. However, the Department of Commerce, in developing HSPD12 implementation standards, imposed a requirement that each employee, in order to be eligible for a badge, must consent to a background investigation. NASA then decided to require an investigation that is *unlimited* as to the nature and scope. Investigators can ask any questions they want, and they can ask any source they want (including neighbors, ex-spouses, landlords, former employers—anyone). In addition, the NASA desktop security guide outlined the criteria they would use to determine each employee’s suitability for continued employment—the suitability matrix mentioned above.

The government brought only one issue before the Supreme Court in its appeal; namely, the legitimacy of the two specific questions on investigative forms (related to drug counseling and

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treatment, and an open-ended question soliciting derogatory information). We lost on that issue, and the Supreme Court ruled that the government is entitled to ask those questions. The Court was silent on other egregious issues, including the demand that we authorize the government to conduct open-ended background investigations.

Along the way we have had some significant victories. For instance, the suitability matrix has been jettisoned: the government, three days prior to filing their brief in the Supreme Court, ended its use and disavowed the specific criteria that included medical history, personal opinions, political beliefs, participation in advocacy, and a host of issues protected by the First Amendment. It is no small accomplishment that we were successful in getting the original suitability matrix removed from NASA's procedures. In addition, six of the eight justices were willing to assume that the Constitution does provide a right to informational privacy. This is important well beyond the JPL case, even though they found that the right is not violated by asking those two questions.

There are reasons to be hopeful. While the Supreme Court has ruled that it is legal for NASA to ask the challenged questions, it does not require NASA to do so. NASA can still determine the nature and scope of the investigators' questions and the methods to evaluate the results. Since JPL is a federally funded research and development center (not civil service), NASA can follow the lead of federal agencies (such as the Department of Energy and National Science Foundation) that do not require extensive background investigations for employees in similar low-risk job categories at their FFRDCs.

However, NASA could instead choose to move forward with the original process, in which case you may be asked to submit to what the 9th circuit described as an "unbounded and standardless inquiry." If NASA decides to impose these procedures and you are uncomfortable with them, it may be that your only recourse is to discuss your concerns with your personal attorney and sympathetic coworkers. Please keep in mind that the Caltech/JPL lawyers are obligated to represent the interests of Caltech and that their advice will be in the interest of the Institute, not the individual employee.

We will continue to work for a less odious process, and we will urge NASA to adopt policies like those of DoE and NSF. These procedures would be compliant with regulations and would not entail intrusive background investigations.

We have no regrets about initiating this lawsuit, and we are proud of what we have accomplished. We very much appreciate the support and encouragement we have received from the JPL community and throughout the country.

Robert Nelson, Dennis Byrnes, and Susan Foster

*On behalf of the JPL plaintiffs in the HSPD12 case, Nelson et al. vs. NASA et al.*

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