Nelson v. NASA, No. 07-56424, 512 F.3d 1134 (9th Cir. 2008), withdrawn and superseded, 530 F.3d 865 (9th Cir. 2008).

KLEINFELD, Circuit Judge, with whom CALLAHAN and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I join in Judge Callahan's dissent from denial of rehearing en banc. Judge Callahan focuses on the drug treatment question and other inquiries to the applicant. I write to supplement her discussion of the other government conduct the panel held likely to be unconstitutional – the inquiries to references, past employers, landlords, and schools.

The panel characterizes as "the most problematic aspect of the government's investigation – the open-ended Form 42 inquiries."[1] Almost 1,000,000 of these inquiries are sent out every year, not just for people applying for jobs at the Jet Propulsion Lab managing space missions and protecting national security on secret space matters, but also for most other government jobs.[2] The panel opinion is

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[1] Nelson v. NASA, 530 F.3d 865, 877 (9th Cir. 2008).

[2] See Exec. Order No. 10,450 § 3(a), 18 Fed. Reg. 2489 (Apr. 29, 1953), reprinted as amended in 5 U.S.C. § 7311 app. at 78 (2006) ("The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. . . . [I]n no event shall the investigation

likely to impair national security by enjoining reasonable reference checks on applicants for federal government functions. The panel's injunction failed to consider this public interest factor, contrary to the Supreme Court's recent admonition that "consideration of the public interest" is mandatory "in assessing the propriety of any injunctive relief."[3]

The panel forbids the government from making the inquiries it has been making for decades, and from doing what any sensible private employer would do.[4] The panel's concern is that the "open-ended questions" – any adverse information regarding financial integrity, drug and alcohol abuse, mental and emotional stability, general behavior and conduct, and other matters – go beyond the government's legitimate security needs. The panel says that "highly personal information" is likely to come back when this form is sent to references, former

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include less than . . . written inquiries to . . . former employers and supervisors, references, and schools attended by the person under investigation.") (emphasis added); Submission for OMB Review, 70 Fed. Reg. 61,320, 61,320 (Oct. 21, 2005) ("Approximately 980,000 INV 42 inquiries are sent to individuals annually. The INV 42 takes approximately five minutes to complete.").

[3] Winter v. NRDC, 129 S. Ct. 365, 381 (2008), rev'g 518 F.3d 658 (9th Cir.) (emphasis added).

[4] Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953), reprinted as amended in 5 U.S.C. § 7311 app. at 77-80 (2006).

employers, and landlords.[5] I disagree. What these categories of people know ought to be subject to inquiry.

First, what would references, past employers, and landlords know that is too "highly personal" for the government to know when it is hiring someone?[6] There is no citation for the panel's claim that "[t]he highly personal information that the government seeks to uncover through the Form 42 inquiries is protected by the right to privacy, whether it is obtained from third parties or from the applicant directly."[7] A landlord, unlike a doctor or lawyer, does not obtain genuinely private medical or legal confidences, after all. That is why past employers, unlike doctors or lawyers, have a privilege in defamation and invasion of privacy law.[8] A past employer can (and should) tell a prospective employer if the applicant stole money, came in late and hungover on Mondays, or wound up in jail after a drug bust, yet

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[5] Nelson, 530 F.3d at 879-82.

[6] See United States v. Jacobsen, 466 U.S. 109, 117 (1984) ("[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information . . . .").

[7] Nelson, 530 F.3d at 880 n.5.

[8] See Restatement (Second) of Torts, § 652G (1977); id. § 595 cmt. i (noting conditional privilege to make a defamatory statement regarding former employee, despite any putative invasion of privacy).

the majority would treat this as a secret not to be disclosed to the Jet Propulsion Lab or any government agency hiring for a civil service position.

Other circuits have rejected the panel's position. The District of Columbia Circuit held that collection of information does not raise the concerns that dissemination would, noting that "the employees could cite no case in which a court has found a violation of the constitutional right to privacy where the government has collected, but not disseminated, the information."[9] Likewise the Fifth Circuit.[10] This case concerns only collection of information, not dissemination.

The panel appears to be especially concerned with the "open-ended" inquiry into "any other adverse matters." The panel cites no authority, and gives no good reason, for rejecting these inquiries. When a prospective employer calls a past

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[9] Am. Fed. of Gov't Employees v. HUD, 118 F.3d 786, 793 (D.C. Cir. 1997) (emphasis added).

[10] Nat'l Treasury Employees Union v. U.S. Dep't of Treasury, 25 F.3d 237, 244 (5th Cir. 1994) ("[G]iven that the information collected by the questionnaire will not be publically disclosed, we hold that the individual employees represented in the present case have no reasonable expectation that they can keep confidential from their government employer the information requested . . . .") (emphasis added).

employer, it is exceedingly difficult to find out bad things, because people usually do not like to allege them without absolute proof (and because of potential liability and retaliation). The prospective employer does not know what bad things to ask about until something comes up in response to the open-ended questions. The prospective employer must smoke out negative information with open-ended broad questions and is lucky to get a glimmer. The answers to open-ended questions are not infrequently revelatory and surprising.[11]

Most of us do not hire law clerks and secretaries without talking to professors and past employers and asking some general questions about what they are like. It is hard to imagine an espresso stand hiring a barista without some open-ended questions to throw light on his reliability, honesty with cash, customer service, and ability to get along with coworkers and supervisors. I doubt if a

[11] None more so than People v. Hill, 452 P.2d 329, 337 (Cal. 1969), where an interviewee answered the question "is there anything else you want to tell us" by admitting a previous burglary, which made him a suspect, later convicted, in a home-invasion murder. See also Shannon Dininny, Washington Prepares for First Execution since 2001, Associated Press, Mar. 9, 2009 (suspect in a California attempted murder answers the same question by admitting a murder in Washington, for which he was later convicted and currently faces the death penalty); cf. United States v. King, 34 C.M.R. 7, 9 (C.M.A. 1963) ("The Air Policeman 'more or less' found out 'what the story was' when he asked King if there was 'anything you want to tell me.'").

person cleaning homes for a living hires an assistant without first finding out something about the assistant. Without open-ended questions, it is hard to know what potential problems might need an explanation. Of course some answers will be irrelevant or silly. But without the open-ended questions, any employer gets stuck with people who should not have been hired, and even, occasionally, people who are dangerous.

Under the panel opinion, our federal government cannot exercise the reasonable care an espresso stand or clothing store exercises when hiring. No revival of McCarthyism is threatened by allowing as much inquiry for hiring a Jet Propulsion Lab engineer as a barista.