Nelson v. NASA, No. 07-56424.

Chief Judge **KOZINSKI**, with whom Judges **KLEINFELD** and **BEA** join, dissenting from the denial of rehearing en banc.

Is there a constitutional right to informational privacy? Thirty-two Terms ago, the Supreme Court hinted that there might be and has never said another word about it. See Whalen v. Roe, 429 U.S. 589, 599 (1977) (alluding to "the individual interest in avoiding disclosure of personal matters"), and Nixon v. Administrator of General Services, 433 U.S. 425, 457 (1977) (quoting the above phrase from Whalen). With no Supreme Court guidance except this opaque fragment, the courts of appeals have been left to develop the contours of this free-floating privacy guarantee on their own. It's a bit like building a dinosaur from a jawbone or a skull fragment, and the result looks more like a turducken. We have a grab-bag of cases on specific issues, but no theory as to what this right (if it exists) is all about. The result in each case seems to turn more on instinct than on any overarching principle.

One important function of the en banc process is to synthesize the accumulated experience of panels into firmer guideposts. We ought to have taken this case en banc for precisely that reason. Unless and until the Supreme Court again weighs in on this topic, only an en banc court can trim the hedges, correct what now appear to be missteps and give the force of law to those distinctions that

experience has revealed to be important.

**1.** One such distinction is between mere government collection of information and the government's disclosure of private information to the public. Whalen involved the latter: patients who feared public disclosure of their prescription records. Many of the cases in our circuit fall into this mold. In Tucson Woman's Clinic v. Eden, we held that women had a right not to have the government disclose their pregnancy records to a third-party contractor. 379 F.3d 531, 553 (9th Cir. 2004). In re Crawford featured a bankruptcy preparer who didn't want his Social Security number published. 194 F.3d 954 (9th Cir. 1999). But in other cases, such as the one now before us, we have sustained informational privacy claims without any allegations that the government might publish what it learned. See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260 (9th Cir. 1998).

The distinction matters. Government acquisition of information is already regulated by express constitutional provisions, particularly those in the Fourth, Fifth and Sixth Amendments. How can the creation of new constitutional constraints be squared with the teachings of Medina v. California, which cautioned against discovering protections in the Due Process Clause in areas where the "Bill

of Rights speaks in explicit terms?" 505 U.S. 437, 443 (1992). Our cases, including this one, neither address nor acknowledge this problem. Yet limiting the government's ability to gather information has very serious implications, as Judge Callahan's dissent illustrates.

**2.** There's also an important distinction between disclosures that the target may refuse and those imposed regardless of his consent. The latter is inherently more invasive. Nixon is instructive: There, the former president was required by law to submit his papers for screening by the National Archives. This requirement wasn't imposed as a condition on some benefit or job opportunity; rather, it was imposed outright under penalty of law. 433 U.S. at 429. Though Nixon was unsuccessful, it wasn't because his claim wasn't found to be cognizable; the public interest was held to outweigh his privacy. In Whalen, the only way for the patients to avoid having their prescription records turned over was to give up needed pharmaceuticals. Our cases sometimes fit comfortably in this mold: What was so creepy about the medical tests in Norman-Bloodsaw, for example, was the sneaky way they were done without the subjects' knowledge or consent. 135 F.3d at 1269.

It strikes me as quite a different case when the government seeks to collect information directly from persons who are free to say no. The plaintiffs here had a

simple way to keep their private dealings private: They could have declined to fill out the forms, provided no references and sought other employment. Does being asked to disclose information one would prefer to keep private, in order to keep a government job to which one has no particular entitlement, amount to a constitutional violation? If the answer is yes, then the government commits all manner of constitutional violations on tax returns, government contract bids, loan qualification forms, and thousands of job applications that are routinely filled out every day.

**3.** There is also a distinction, recognized by some of our sister circuits, between information that pertains to a fundamental right, such as the right to an abortion or contraception, see, e.g., Bloch v. Ribar, 156 F.3d 673, 684 (6th Cir. 1998), and a free-standing right not to have the world know bad things about you. The former kind of right seems to stand on far sounder constitutional footing than the latter.

**4.** Consider also the contrast between investigating a subject by digging through his bank records or medical files, and contacting third parties to find out what they know about him. One's pregnancy status (perhaps known to no one), as in Norman-Bloodsaw, or the need for certain pharmaceuticals, as in Whalen, is

private precisely because one has been careful not to disclose it. But one's privacy interest ought to wane the more widely the information is known. The Supreme Court has made a related point about the Fourth Amendment: Individuals lack a reasonable expectation of privacy in information that they share voluntarily with others. See United States v. Miller, 425 U.S. 435, 443 (1976).

Does one really have a free-standing constitutional right to withhold from the government information that others in the community are aware of? I don't think so. How then can it be constitutionally impermissible for the government to ask a subject's friends, family and neighbors what they know about him? Surely there's no constitutional right to have the state be the last to know.

**5.** A final distinction that emerges from the cases is between the government's different functions as enforcer of the laws and as employer. In Whalen, the government was acting as the former, collecting prescription records to aid later investigation of unlawful distribution. 589 U.S. at 591–92. Similarly, in Tucson Woman's Clinic, the government was ostensibly scooping up patient information to protect the public health. 379 F.3d at 536–37. Here, as Judge Kleinfeld illustrates in his dissent, the government is simply acting as any other employer might: collecting information for its own purposes to make employment

decisions.

If a right to informational privacy exists at all, but see AFL-CIO v. Department of Housing and Urban Development, 118 F.3d 786, 791, 793 (D.C. Cir. 1997), it would be far more likely to apply when the government is exercising its sovereign authority than when it is monitoring its own employees. While I can think of many reasons to worry when the government seeks to uncover private information using the special powers that private entities lack, it's far less obvious why it should be hamstrung in ensuring the security and integrity of its operations in ways that private employers are not. The delicate knowledge handled by thousands of federal employees seems as worthy of protection as the formula for Coca-Cola.

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As we have recognized elsewhere, there are circumstances when a well-worn doctrine can grow into "a vexing thicket of precedent" that then becomes "difficult for litigants to follow and for district courts—and ourselves—to apply with consistency." United States v. Heredia, 483 F.3d 913, 919 (9th Cir. 2007) (en banc). The back-and-forth between the panel and my dissenting colleagues illustrates that we have reached this point with the doctrine of informational

privacy. Though I am sympathetic to the arguments of my dissenting colleagues, it's not clear that the panel has misapplied circuit law; when the law is so subjective and amorphous, it's difficult to know exactly what a misapplication might look like.

It's time to clear the brush. An en banc court is the only practical way we have to do it. We didn't undertake that chore today, but we'll have to sooner or later, unless the Supreme Court should intervene.