

*Kidd* did not lend themselves to such a disposition. In fact, not only did the Court fail to provide a remedy, but also it foreclosed one of the few remedies that would have closed the Fourth Amendment loophole. As Professor Daryl Levinson and others have argued, the failure to impose a remedy can effectively neuter an otherwise powerful check on the behavior of law enforcement officials in criminal procedure contexts.<sup>91</sup> In the wake of *al-Kidd*, officials will likely continue to pursue questionable, possibly unconstitutional, detainment policies with the belief that the Court tacitly endorsed their methods. When the Court could have simply granted Ashcroft immunity, it instead sent the contradictory signal that there may be a right at stake, but officials need not be worried about encroaching upon it — at least until the Court has an opportunity to someday fashion a remedy.<sup>92</sup>

As a consequence of the Court's overreach, *al-Kidd* constitutes an example of judicial acquiescence to post-9/11 Fourth Amendment creep, which is all the more significant given the importance of safeguarding citizens' constitutional protections in times of exigency.<sup>93</sup> Instead of establishing such safeguards, the Court has signaled that, so long as law enforcement officials adhere to the permissive material witness warrant process, they may use the Material Witness Statute to detain citizens, whatever true motivation lies behind the material witness designation. Sending this message was both unnecessary and unwise, and ultimately only widens an existing loophole that has allowed officials to detain citizens without legitimate justifications.

3. *Right to Informational Privacy*. — In two opinions issued over thirty years ago, the Supreme Court suggested, but did not conclusively hold, that the Constitution provides a right against the forced disclosure of private information.<sup>1</sup> While circuit courts have adopted different interpretations of this suggested right to “informational privacy,” the Supreme Court has provided no further guidance. Last Term, in *NASA v. Nelson*,<sup>2</sup> the Court finally revisited the issue of informational privacy, but again refrained from deciding that such a right exists. *Nelson*'s narrow holding leaves unresolved

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<sup>91</sup> E.g., Levinson, *supra* note 87, at 887 (“[R]ights can be effectively enlarged, abridged, or eviscerated by expanding, contracting, or eliminating remedies.”). See generally William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

<sup>92</sup> Cf. John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89 (1999) (“Unredressed constitutional violations may have to be tolerated, but they should not be embraced, approved, or allowed to proliferate.”).

<sup>93</sup> Cf. *United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”).

<sup>1</sup> See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977); *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

<sup>2</sup> 131 S. Ct. 746 (2011).

several circuit splits on the nature of the right to informational privacy. Still, its minimalist approach was appropriate for an issue that recent advances in technology has made increasingly important and volatile. 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.

Located in Pasadena, California, the Jet Propulsion Laboratory (JPL) is “the lead U.S. center for robotic exploration of the solar system.”<sup>3</sup> Although NASA, an executive agency, formally owns JPL,<sup>4</sup> the federal government grants the California Institute of Technology (Cal Tech), a private institution, the authority to govern the operation of the facility.<sup>5</sup> JPL employees are not civil servants, are not on the federal payroll, and were not historically required to pass a federal background check.<sup>6</sup> Following a recommendation by the 9/11 Commission in 2004,<sup>7</sup> however, President George W. Bush announced new uniform federal employee identification standards,<sup>8</sup> which the Department of Commerce interpreted to mandate a standard federal background check for private contract workers.<sup>9</sup> NASA modified its contract with Cal Tech to include the requirement, and Cal Tech in turn informed JPL employees that they must complete the check by October 2007 or have their employment terminated.<sup>10</sup>

The background check consisted of two principal forms. The first form, Standard Form 85 (SF-85), which is required for all federal employees in “non-sensitive” positions, asks for “basic biographical information . . . [such as] employment history, and personal and professional references.”<sup>11</sup> It also asks applicants if they have used or possessed drugs in the past year, and if so, whether they have sought any drug treatment or counseling.<sup>12</sup> The second form, Form 42, is a two-page

<sup>3</sup> *Credits*, NEAR EARTH OBJECT PROGRAM, <http://neo.jpl.nasa.gov/credits.html> (last updated Apr. 18, 2008).

<sup>4</sup> *Nelson*, 131 S. Ct. at 752.

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See* Homeland Security Presidential Directive/HSPD-12 — Policy for a Common Identification Standard for Federal Employees and Contractors, 2 PUB. PAPERS 1765 (Aug. 27, 2004) [hereinafter HSPD-12].

<sup>9</sup> *See* NAT'L INST. OF STANDARDS & TECH., U.S. DEP'T OF COMMERCE, FIPS PUB. 201-1, PERSONAL IDENTITY VERIFICATION (PIV) OF FEDERAL EMPLOYEES AND CONTRACTORS iii–vi, 1–8 (2006), available at <http://csrc.nist.gov/publications/fips/fips201-1/FIPS-201-1-chng1.pdf>.

<sup>10</sup> *Nelson*, 131 S. Ct. at 752.

<sup>11</sup> *Id.* at 752–53.

<sup>12</sup> U.S. OFFICE OF PERS. MGMT., STANDARD FORM 85 — QUESTIONNAIRE FOR NON-SENSITIVE POSITIONS 5 (1995).

document given to applicants' listed personal references. Form 42 includes open-ended questions about applicants' "honesty or trustworthiness" and any negative "general behavior or conduct."<sup>13</sup>

About two months before the October 2007 deadline, twenty-eight JPL employees moved for injunctive relief.<sup>14</sup> The employees challenged the background checks on three grounds: (1) NASA and the Department of Commerce lacked the statutory authority to impose the background checks on contract employees, (2) the investigations were unreasonable searches that violated the Fourth Amendment, and (3) the investigations violated the employees' constitutional right to informational privacy.<sup>15</sup> The district court denied the employees' motions. According to the court, the background checks were within NASA's statutory authority and did not violate the Fourth Amendment.<sup>16</sup> And while they implicated a constitutional right to informational privacy, the checks were narrowly tailored to serve a legitimate government interest in national security.<sup>17</sup>

The Ninth Circuit reversed and remanded.<sup>18</sup> Writing for the panel, Judge Wardlaw held that while the district court was correct to dismiss the employees' statutory and Fourth Amendment claims,<sup>19</sup> it had misjudged the likelihood of success of their informational privacy claims.<sup>20</sup> Following the Supreme Court's suggestion in *Whalen v. Roe*,<sup>21</sup> the Ninth Circuit had previously recognized a constitutional interest "in avoiding disclosure of personal matters."<sup>22</sup> In the panel's view, SF-85's questions on drug use and treatment implicated this right.<sup>23</sup> As such, the government had "the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest."<sup>24</sup> While the panel determined that the question on drug *use* was narrowly tailored to the government's interest in security, it held that the question on drug *treatment* was not, as the government had "not suggested any legitimate interest in requiring the disclosure of such infor-

<sup>13</sup> *Nelson*, 131 S. Ct. at 753.

<sup>14</sup> *Id.* at 752, 754.

<sup>15</sup> *Nelson v. NASA*, 530 F.3d 865, 872 (9th Cir. 2008). This opinion was issued after the Ninth Circuit released a first opinion granting the employees injunctive relief. See *Nelson v. NASA*, 512 F.3d 1134 (9th Cir. 2008), *vacated*, 530 F.3d 865, 870 (9th Cir. 2008).

<sup>16</sup> *Nelson*, 530 F.3d at 872.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 870.

<sup>19</sup> *Id.* at 875, 877.

<sup>20</sup> *Id.* at 881.

<sup>21</sup> 429 U.S. 589 (1977).

<sup>22</sup> *Nelson*, 530 F.3d at 877 (quoting *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999)) (internal quotation marks omitted).

<sup>23</sup> *Id.* at 878–79.

<sup>24</sup> *Id.* (quoting *Crawford*, 194 F.3d at 959) (internal quotation marks omitted).

mation.”<sup>25</sup> The open-ended inquiries of Form 42 were similarly overbroad, as the government failed “to provide any standards narrowly tailoring the investigations” to its interest in security.<sup>26</sup> The Ninth Circuit denied a petition for a rehearing en banc.<sup>27</sup>

The Supreme Court reversed.<sup>28</sup> Writing for the Court, Justice Alito<sup>29</sup> declined to resolve whether a constitutional right to informational privacy actually existed but held that even if such a right did exist, it did not bar the questions on SF-85 or Form 42. Critical for Justice Alito was that the government sought information through SF-85 and Form 42 not as a sovereign but as an employer.<sup>30</sup> The government has more freedom when acting as an employer, Justice Alito explained, because it could not operate effectively “if every ‘employment decision became a constitutional matter.’”<sup>31</sup> Justice Alito further determined that compelling JPL employees to complete the two forms fell within the realm of appropriate employer action. Both drug use and treatment were relevant factors for job performance,<sup>32</sup> and even though the questions on the forms were open-ended, Justice Alito denied that the Constitution required the government to prove that its employment background checks were the least restrictive means to achieve its interest in national security.<sup>33</sup>

Justice Alito further emphasized that the information collected by SF-85 and Form 42 was “subject to substantial protections against disclosure to the public.”<sup>34</sup> The Privacy Act of 1974’s<sup>35</sup> requirement of written consent before disclosing private information and imposition of criminal penalties for unwarranted disclosure provided adequate privacy protection.<sup>36</sup> Justice Alito noted that the Court’s previous decisions in *Whalen* and *Nixon v. Administrator of General Services*<sup>37</sup> did not require “an ironclad disclosure bar,”<sup>38</sup> but only “statutory or regulatory dut[ies] to avoid unwarranted disclosures.”<sup>39</sup> Threat of a sec-

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<sup>25</sup> *Id.* at 879.

<sup>26</sup> *Id.* at 881.

<sup>27</sup> See *Nelson v. NASA*, 568 F.3d 1028, 1029 (9th Cir. 2009).

<sup>28</sup> *Nelson*, 131 S. Ct. at 764.

<sup>29</sup> Justice Alito was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Justice Kagan took no part in the decision.

<sup>30</sup> See *Nelson*, 131 S. Ct. at 757–58.

<sup>31</sup> *Id.* at 758 (quoting *Connick v. Myers*, 461 U.S. 138, 143 (1983)).

<sup>32</sup> *Id.* at 759–60.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 761.

<sup>35</sup> Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (2006)).

<sup>36</sup> *Nelson*, 131 S. Ct. at 762 (citing 5 U.S.C. §§ 552a(b), 552a(i)(1)).

<sup>37</sup> 433 U.S. 425 (1977).

<sup>38</sup> *Nelson*, 131 S. Ct. at 762.

<sup>39</sup> *Id.* at 761 (quoting *Whalen v. Roe*, 429 U.S. 589, 605 (1977)).

urity breach alone was not grounds for finding a constitutional violation.<sup>40</sup>

Justice Scalia concurred in the judgment,<sup>41</sup> agreeing that the employees were not entitled to injunctive relief, but on the ground that the Constitution provides no right to informational privacy. While expressing skepticism about substantive due process generally,<sup>42</sup> Justice Scalia argued that even under the Court's conventional jurisprudence, an interest in preventing disclosure of personal information was not the sort of "deeply rooted" right that triggered constitutional protection,<sup>43</sup> and prior cases precluded the Court from finding otherwise.<sup>44</sup> Moreover, the Fourth Amendment already governed the collection of information by the government.<sup>45</sup> Justice Scalia criticized the majority's failure to rule definitively on the existence of an informational privacy right. This approach, he contended, would lead to a number of negative outcomes, including increased court involvement in policy judgments<sup>46</sup> and more litigation in lower courts.<sup>47</sup> Even more fundamentally, Justice Scalia found the approach logically incoherent, characterizing it as applying a hypothetical and undefined constitutional standard.<sup>48</sup>

Justice Thomas concurred in the judgment.<sup>49</sup> Confining his opinion to a single paragraph, Justice Thomas would have also resolved the case by holding that the Constitution does not include a right to informational privacy.<sup>50</sup>

The ultimate outcome of *Nelson* is unsurprising. By holding that the government is not constitutionally barred from inquiring into the past drug use of its employees, *Nelson* corrected an expansion of the right to informational privacy that had serious implications for national security. What makes *Nelson* controversial is the minimalist reasoning the Court used to reach that outcome. Critics of that reasoning — Justice Scalia included — perceive it as another wasted opportunity by

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<sup>40</sup> *Id.* at 763.

<sup>41</sup> *Id.* at 764 (Scalia, J., concurring in the judgment).

<sup>42</sup> *Id.* at 764–65.

<sup>43</sup> *Id.* at 765 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)) (internal quotation marks omitted).

<sup>44</sup> *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 709 (1976) (finding that government defamation does not deprive an individual of his constitutionally protected liberty interest)).

<sup>45</sup> *Id.* (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998)).

<sup>46</sup> *Id.* at 767.

<sup>47</sup> *Id.* at 769.

<sup>48</sup> *Id.* at 767. Justice Alito responded to these criticisms with a lengthy footnote, *see id.* at 756 n.10 (majority opinion), noting that no parties had challenged the existence of the right in their briefs, and that "the Court has repeatedly recognized the benefits of proceeding with caution" in cases involving substantive due process, *id.* at 757 n.10.

<sup>49</sup> *Id.* at 769 (Thomas, J., concurring in the judgment).

<sup>50</sup> *Id.*

the Court to provide needed guidance to lower courts on a murky legal doctrine. But this critique ignores the risks of arriving at a broad holding on a privacy issue that is closely tied to developing technology. Indeed, to provide clarification through *Nelson* would have required the Court to reach outside the facts and issues before it and decide the kind of developing constitutional issue that it has previously recognized most warrants caution. While underwhelming, the Court's minimalist approach in *Nelson* prudently accepted the costs of a narrow holding over the much larger potential costs of a broad one.

The disagreement between Justice Scalia and the majority in *Nelson* is just one manifestation of an ongoing debate about the role of minimalism — the idea that judges should “say[] no more than necessary to justify an outcome”<sup>51</sup> — in Supreme Court decisionmaking. Advocates of minimalism contend that the approach both curtails the damage of poorly thought-out changes to the law and reserves potentially divisive social issues for more democratic decisionmakers.<sup>52</sup> These benefits make minimalist holdings particularly desirable where “the Court lacks the information that would permit it to produce sensible rules.”<sup>53</sup> Minimalism's critics, meanwhile, argue that such an approach provides no guidance to lower courts and allows judges to follow their own policy preferences through narrow and inconsistent reasoning.<sup>54</sup>

That *Nelson* retrIGGERED this debate should be no surprise, given that the two decisions to first mention an “informational privacy” right — both from the Court's 1976–77 Term — did not themselves find any actual constitutional violation. The first, *Whalen*, involved a challenge to a New York state law that required the collection of prescription records for certain legal but potentially abusable medications.<sup>55</sup> The Court in *Whalen* described the constitutional right to privacy as involving “at least two different kinds of interests”: (1) an “interest in independence in making certain kinds of important decisions” and (2) an “interest in avoiding disclosure of personal matters.”<sup>56</sup> The Court concluded, however, that the type of information involved, and New York's protection of that information once it was collected, did not amount to a violation of either interest.<sup>57</sup> The second, *Nixon*, involved a challenge by former President Richard Nixon to the compelled dis-

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<sup>51</sup> CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3 (1999).

<sup>52</sup> See Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 359–62 (2010).

<sup>53</sup> Cass R. Sunstein, *Problems With Minimalism*, 58 STAN. L. REV. 1899, 1909 (2006).

<sup>54</sup> See, e.g., Smith, *supra* note 52, at 363–65.

<sup>55</sup> 429 U.S. 589, 591 (1977).

<sup>56</sup> *Id.* at 599–600.

<sup>57</sup> See *id.* at 600.

closure of his papers and tape recordings to executive branch archivists.<sup>58</sup> The Court referenced the interests described in *Whalen*,<sup>59</sup> but again declined to find a constitutional violation.<sup>60</sup>

*Whalen* and *Nixon* thus suggested that a right to informational privacy could exist — but they said little else. Neither opinion clearly articulated the source of a right to informational privacy. *Whalen* began its legal discussion with a digression about *Lochner v. New York*<sup>61</sup> and substantive due process<sup>62</sup> and, when discussing the right specifically, referenced the “penumbra” language of *Griswold v. Connecticut*<sup>63</sup> and two Fourth Amendment cases.<sup>64</sup> *Nixon*, meanwhile, cited *Whalen*.<sup>65</sup> The two cases also never defined a level of scrutiny. *Whalen* appears to have used a balancing test, weighing New York’s interest in regulating legal narcotics against the patients’ interest in protecting the confidentiality of their medical information.<sup>66</sup> *Nixon* hewed closely to a traditional Fourth Amendment analysis, assuming President Nixon’s “legitimate expectation of privacy” in certain materials.<sup>67</sup>

In the years since, all circuits — with the arguable exception of the D.C. Circuit<sup>68</sup> — have recognized a constitutional right to informational privacy.<sup>69</sup> But, unsurprisingly, they have fractured in their approach.<sup>70</sup> Two major splits now exist. First, courts differ on the appropriate level of scrutiny for such claims: most require satisfaction of

<sup>58</sup> 433 U.S. 425, 429–30 (1977).

<sup>59</sup> *Id.* at 457.

<sup>60</sup> *Id.* at 484.

<sup>61</sup> 198 U.S. 45 (1905).

<sup>62</sup> *Whalen*, 429 U.S. at 596–98.

<sup>63</sup> 381 U.S. 479 (1965).

<sup>64</sup> *Whalen*, 429 U.S. at 599 n.25 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold*, 381 U.S. at 483; *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

<sup>65</sup> *Nixon*, 433 U.S. at 457.

<sup>66</sup> See *Whalen*, 429 U.S. at 600–03.

<sup>67</sup> *Nixon*, 433 U.S. at 458 (citing *Katz v. United States*, 389 U.S. 347, 351–53 (1967)); see also *Nelson*, 131 S. Ct. at 766 (Scalia, J., concurring in the judgment) (describing *Nixon* as “conduct[ing] a straightforward *Fourth Amendment* analysis”).

<sup>68</sup> See *Am. Fed’n of Gov’t Emps., AFL-CIO v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 788 (D.C. Cir. 1997) (expressing “grave doubts” that a right to informational privacy exists).

<sup>69</sup> See *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 182–83 (1st Cir. 1997); *Doe v. City of N.Y.*, 15 F.3d 264, 267 (2d Cir. 1994); *Sterling v. Borough of Minersville*, 232 F.3d 190, 195 (3d Cir. 2000); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *Zaffuto v. City of Hammond*, 308 F.3d 485, 489 (5th Cir. 2002); *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 945 (6th Cir. 2004); *Denius v. Dunlap*, 209 F.3d 944, 955 (7th Cir. 2000); *Cooksey v. Boyer*, 289 F.3d 513, 515–16 (8th Cir. 2002); *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004); *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006); *James v. City of Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991).

<sup>70</sup> For an overview of informational privacy doctrine in circuit courts, see Helen L. Gilbert, Comment, *Minors’ Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1375, 1381–88 (2007).

some level of intermediate scrutiny,<sup>71</sup> a minority require narrow tailoring to a compelling government interest,<sup>72</sup> and at least one varies the level of scrutiny depending on the nature of the information implicated.<sup>73</sup> Second, courts disagree on what type of information even triggers a constitutional right to informational privacy: some require information implicating another constitutional right or fundamental liberty interest,<sup>74</sup> while others extend the right to any information in which an individual has a reasonable expectation of privacy.<sup>75</sup>

*Nelson* does not resolve these splits. The Court's ad hoc balancing of the government's and plaintiffs' relative interests does not allow for easy extrapolation.<sup>76</sup> Indeed, *Nelson* makes only two statements about informational privacy that are easily applicable to other cases. First, the Court made clear that when the government collects information as an employer, it need not "demonstrate that its questions are 'necessary' or the least restrictive means of furthering its interests."<sup>77</sup> While this may overrule the dicta of some circuits,<sup>78</sup> no lower court has actually required narrow tailoring in a government employment context. Second, the Court held that "statutory or regulatory dut[ies]" provide sufficient protection against the unwarranted disclosure of information.<sup>79</sup> While this threshold may seem low, no circuit court has required a higher one.<sup>80</sup> Viewed in light of its potential to clarify the law on informational privacy, *Nelson* may be a disappointment.<sup>81</sup>

But *Nelson* also provided classic reasons for caution from the Court, as informational privacy both implicates a changing technology and has potentially far-reaching effects for all Americans. Federal and state governments have to collect at least some personal information about their citizens.<sup>82</sup> While electronic storage of that information has

<sup>71</sup> See, e.g., *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (requiring narrow tailoring to a "legitimate state interest"); *Doe*, 15 F.3d at 269 (requiring satisfaction of a balancing test and a "substantial" state interest).

<sup>72</sup> See, e.g., *Anderson*, 469 F.3d at 915; *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998).

<sup>73</sup> See *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 580-82 (3d Cir. 1980).

<sup>74</sup> See, e.g., *Bloch*, 156 F.3d at 683-84.

<sup>75</sup> See, e.g., *Doe v. Se. Pa. Transp. Auth.*, 72 F.3d 1133, 1138 (3d Cir. 1995).

<sup>76</sup> See *Nelson*, 131 S. Ct. at 768 (Scalia, J., concurring in the judgment) (noting the "multiplicity . . . of factors" at play in the case).

<sup>77</sup> *Id.* at 760 (majority opinion).

<sup>78</sup> See, e.g., *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006) (stating that disclosure of protected information "must be accomplished in the least intrusive manner" (quoting *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986)) (internal quotation marks omitted)).

<sup>79</sup> *Nelson*, 131 S. Ct. at 761 (quoting *Whalen v. Roe*, 429 U.S. 589, 605 (1977)).

<sup>80</sup> See, e.g., *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 118 (3d Cir. 1987) (stating that safeguards against disclosure are sufficient "when there exists a statutory penalty for unauthorized disclosures") (citing *Whalen*, 429 U.S. at 605-06).

<sup>81</sup> See Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2041 (2010) (describing *Nelson* as "a golden opportunity").

<sup>82</sup> See, e.g., U.S. CONST. art. I, § 2, cl. 3.



been around for some time,<sup>83</sup> the increased size<sup>84</sup> and accessibility<sup>85</sup> of electronic databases has raised new issues. In other legal contexts such as in cases involving the Fourth Amendment, the Court has counseled for additional caution when confronting new technologies.<sup>86</sup> It makes sense that in an area with murkier law,<sup>87</sup> and with a right that has more widely felt practical implications,<sup>88</sup> the Court would continue to be wary of a broad ruling's likelihood "to go wrong."<sup>89</sup>

Government data breaches are a prime example of why a broad ruling would likely have undesirable consequences. The protections afforded to collected information are part of every court's informational privacy analysis.<sup>90</sup> But the question of whether data security and encryption technology can keep pace with the risks created by massive electronic storage of information is unsettled<sup>91</sup> — individuals may eventually have to resign themselves to a built-in risk of public disclosure when they share any sort of electronically stored information.<sup>92</sup> If this is so, a more rigorous review of the government's need for certain sensitive information may appropriately reflect a permanent heightened risk of disclosure. But if it is not, such a standard may be needlessly burdensome. The scope of interests covered by a right to informational privacy would also have important ramifications. A rigorous

<sup>83</sup> *Whalen*, for example, involved data stored on computer tapes. See 429 U.S. at 591.

<sup>84</sup> See Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1422 (2001) ("The problem with databases emerges from subjecting personal information to the bureaucratic process with little intelligent control or limitation, resulting in a lack of meaningful participation in decisions about our information.")

<sup>85</sup> See Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 248 (2008) ("[W]ith digitization, not only can recorded information be retained indefinitely at little cost, but [it can] also . . . readily be pooled, opening the way to assembling all the recorded information concerning an individual in a single digital file that can easily be retrieved and searched.")

<sup>86</sup> See, e.g., *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010) ("The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.")

<sup>87</sup> See *Nelson*, 131 S. Ct. at 757 n.10 (citing *Herrera v. Collins*, 506 U.S. 390, 417 (1993)) (noting that the Court should proceed with caution when interpreting substantive due process rights).

<sup>88</sup> Presumably, more people will have voluntarily shared personal information with the government than will have their possessions searched by police.

<sup>89</sup> Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 18 (1996).

<sup>90</sup> See, e.g., *Nelson*, 131 S. Ct. at 761–63 (reviewing NASA's protections against unauthorized disclosures of personal data to the public).

<sup>91</sup> See, e.g., Phil Stewart et al., *Special Report: Government in Cyber Fight but Can't Keep Up*, REUTERS, June 17, 2011, available at <http://www.reuters.com/article/2011/06/17/us-usa-cybersecurity-idUSTRE75F4YG20110617>.

<sup>92</sup> Cf. Solove, *supra* note 84, at 1399 (equating the placement of personal information in a database with the loss of control over that information); Richard Warner, *Undermined Norms: The Corrosive Effect of Information Processing Technology on Informational Privacy* 6 (Chi.-Kent Coll. of Law Intellectual Prop., Sci. & Tech. Research Paper Series, Research Paper No. 10-028, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1579094](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579094) (arguing that no norms currently exist for collection and dissemination of personal information by third parties).

standard for only a small subset of interests, for example, could reflect a determination of not only inadequate protection against disclosure, but also an increased need for government flexibility in collecting all but the most sensitive personal information.

In contrast to the high potential costs of a broad holding in *Nelson*, the actual costs of its narrow holding are likely overstated. Informational privacy may remain hypothetical in the Supreme Court, but it is a reality for most Americans — almost all circuits have recognized the right and created frameworks for evaluating claims.<sup>93</sup> *Nelson* thus does not present a situation where the Court, by reaching a narrow holding, simply passes down decision costs to lower courts.<sup>94</sup> Nor should *Nelson* lead to a surge in litigation.<sup>95</sup> While *Nelson* may be an easy case to distinguish factually,<sup>96</sup> it will not be *useful* to distinguish it if more pertinent circuit precedent exists. Considering both *Nelson*'s unique facts and the developed, if fractured, status of informational privacy doctrine, this should be so for most litigants.<sup>97</sup>

The costs for lower courts should remain low notwithstanding *Nelson*'s failure to rule on the existence of an informational privacy right. Declaring a constitutional right to informational privacy without any articulation of its scope or application would be novel,<sup>98</sup> and of little benefit: had *Nelson* done so, the effect would likely be little more than to make it easier in some jurisdictions to prove that the right is “clearly established” for qualified immunity.<sup>99</sup> While *Nelson*'s “assumption” of an informational privacy right could arguably cast doubt on circuit courts' previous use of *Whalen*, the two decisions' vague treatments of the right make it difficult to argue that they are in direct conflict.<sup>100</sup>

<sup>93</sup> See cases cited *supra* note 69.

<sup>94</sup> See Sunstein, *supra* note 89, at 28–29 (noting the “exporting” of decision costs as a drawback of minimalism).

<sup>95</sup> But see *Nelson*, 131 S. Ct. at 769 (Scalia, J., concurring in the judgment) (arguing that the majority opinion will “dramatically increase the number of lawsuits claiming violations of the right to informational privacy”).

<sup>96</sup> *Id.* at 768 (noting the variety of factors deemed relevant in the majority's opinion).

<sup>97</sup> Importantly, *Nelson* is about the *collection* of personal information by the government. See *id.* at 762 (majority opinion). Many, if not most, informational privacy cases involve the reckless or intentional disclosure of information by a public official. See, e.g., *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998) (noting that a sheriff's public disclosure of details of the plaintiff's sexual assault gave rise to a cognizable privacy claim).

<sup>98</sup> While Justice Scalia has noted before that the Court has established the existence of constitutional rights without finding corresponding violations, all of the relevant opinions provided some sort of standard for evaluating potential violations. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2603 (2010) (collecting cases).

<sup>99</sup> Cf. *Doe v. Saftig*, No. 09–C–1176, 2011 WL 1792967, at \*10 (E.D. Wis. 2011) (“[*Nelson*] demonstrates that a right to informational privacy is not clearly established.”).

<sup>100</sup> One could argue that *Whalen* never “assumes” a right to informational privacy, but rather states that one exists, see 429 U.S. 589, 599–600 (1977), and regards only a right against negligent government data breaches to be “arguabl[e],” *id.* at 605. But such an analysis would still be dic-

Indeed, the Sixth Circuit has already concluded that *Nelson* “has not provided . . . any reason . . . to revisit our past precedents.”<sup>101</sup>

Finally, the lack of an established right to informational privacy does not make *Nelson*’s reasoning incoherent. *Nelson*’s holding hinges on the Court’s conclusion that narrow tailoring was not appropriate for evaluating information collection from government employees.<sup>102</sup> This approach differs from that in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>103</sup> cited by Justice Scalia in his concurrence,<sup>104</sup> where the Court, without defining a precise standard for when a judicial decision can constitute a taking under the Fifth Amendment, held that the plaintiffs failed to state such a claim.<sup>105</sup> *Stop the Beach* makes factual distinctions within a loosely defined standard; *Nelson* makes a legal distinction *between* standards. While the two approaches may use similar logic, the latter deals with legal frameworks that exist outside the specific right at issue and at a more useful level of generality.<sup>106</sup>

*Nelson*’s primary attribute is its limited impact, and that should also be its legacy. The majority’s reluctance to definitively establish an informational privacy right should not represent new doubts about informational privacy, but rather a tacit acceptance of the right’s continued existence in lower courts, at least while the ways we share and safeguard sensitive information continue to evolve.

### C. Fifth Amendment

*Self-Incrimination Clause.* — The Self-Incrimination Clause of the Fifth Amendment provides simply that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>1</sup> In *Miranda v. Arizona*,<sup>2</sup> however, the Supreme Court created a set of familiar cautionary measures designed to protect this right: if a person is in custody, “the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against

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tum. *Nelson*’s failure to reaffirm it should not deprive *Whalen* of persuasive authority even to the extent that *Nelson* abrogates previous circuit interpretations of *Whalen*’s privacy language.

<sup>101</sup> *Lee v. City of Columbus*, 636 F.3d 245, 260 n.8 (6th Cir. 2011).

<sup>102</sup> See *Nelson*, 131 S. Ct. at 758 (majority opinion) (citing *Connick v. Myers*, 461 U.S. 138 (1983)).

<sup>103</sup> 130 S. Ct. 2592 (2010).

<sup>104</sup> *Nelson*, 131 S. Ct. at 767 (Scalia, J., concurring in the judgment).

<sup>105</sup> *Stop the Beach*, 130 S. Ct. at 2613 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>106</sup> Both Justice Scalia and Justice Alito recognized the distinction as a relevant one. Justice Alito joined Justice Scalia’s opinion in *Stop the Beach*, which distinguished the case from others where there had been “competing standards.” *Id.* at 2604 (plurality opinion).

<sup>1</sup> U.S. CONST. amend. V. The Supreme Court incorporated the Self-Incrimination Clause against the states in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

<sup>2</sup> 384 U.S. 436 (1966).