

UP IN THE AIR: *DEPARTMENT OF HOMELAND SECURITY V. MACLEAN* AND THE WHISTLEBLOWER PROTECTION ACT

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INTRODUCTION

Following the terrorist attacks of September 11, 2001, the Department of Homeland Security (DHS) sprang into existence almost overnight,¹ growing into the third-largest federal government agency in the United States.² Its mission—“to patrol borders, protect travelers and [] transportation infrastructure, enforce immigration laws, and respond to disasters and emergencies”—is carried out daily by over 216,000 employees.³ Despite the gravity of this charge, DHS employees nonetheless remain subject to the same labor and employment disputes of any ordinary office or agency. Resolution of such disputes is messy in the best of environments, and becomes all the more complicated when national security is at stake. An employee may have an honest disagreement with management, but what happens when that disagreement implicates Sensitive Security Information (SSI) and the potential safety of American civilians?

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1. *Creation of the Department of Homeland Security*, DEPT. OF HOMELAND SEC. (Oct. 21, 2014), <http://www.dhs.gov/creation-department-homeland-security>.

2. *The Executive Branch*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Oct. 30, 2014).

3. *Id.*

In *Department of Homeland Security v. MacLean*,⁴ the Court will address whether a federal employee is protected under the Whistleblower Protection Act⁵ when that employee speaks out on an issue of national security.⁶ The Court’s focus will rest on whether or not disclosure of SSI is “specifically prohibited by law,” which crucially hinges on whether agency regulations authorized by Congressional mandate are themselves “law,” or are merely administrative rules unenforceable for purposes of the Whistleblower Protection Act.⁷

The Court will address two questions. First, may the phrase “specifically prohibited by law” be interpreted to include agency rules and regulations, as in *Chrysler Corp. v. Brown*,⁸ or is “law” strictly limited to Congressional statutes? Second, is the language of the Air Transportation and Security Act (ATSA) sufficiently specific that an employee’s disclosure is prohibited by virtue of the statute itself, where Congress gives express authority to the agency to create regulations promulgating the statute?⁹ This commentary will cover the factual and legal background of the case, and provide analysis of how the Court may consider the primary arguments of both sides.

I. FACTUAL BACKGROUND

A. Underlying Facts

Less than two years after the terrorist attacks of September 11, 2001, the Transportation Security Administration (TSA) learned of a possible plot to hijack United States planes.¹⁰ TSA briefed the Federal Air Marshal Service (FAMS) about this threat in July 2003.¹¹

4. Dep’t of Homeland Sec. v. MacLean, No. 13-894 (U.S. argued Nov. 4, 2014).

5. 5 U.S.C.A. § 2302(b)(8) (West 2014).

6. Brief for Petitioner at I, Dep’t of Homeland Sec. v. MacLean, No. 13-894 (U.S. July 25, 2014).

7. See Dep’t of Homeland Sec. v. MacLean, 714 F.3d 1301, 1310 (Fed. Cir. 2013), *cert. granted*, 134 S. Ct. 2290 (2014) [hereinafter *MacLean IV*] (finding “MacLean’s disclosure is not ‘specifically prohibited by law’ within the meaning of the WPA”).

8. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

9. See *MacLean IV*, 714 F.3d at 1308–10.

10. *MacLean v. Dep’t of Homeland Sec.*, 116 M.S.P.R. 562, 564 (2011) [hereinafter *MacLean III*].

11. *Id.*

Later that month, Federal Air Marshal (FAM) Robert J. MacLean¹² received an order stating all long-distance and international flights (or “remain overnight” missions) out of Las Vegas were to be cancelled until August 9.¹³ Concerned, MacLean approached his supervisor to confirm the directive.¹⁴ It had been sent via unencrypted text message to his unsecured cell phone, rather than as an encrypted message to his government-issued personal digital assistant, and it was not specifically labeled SSI.¹⁵ Moreover, the directive had significant security implications—MacLean believed cancelling these “remain overnight” missions would put the flying public in danger, especially in light of the recently discovered hijacking threat.¹⁶ His supervisor confirmed the order, explaining the agency did not have the budget to conduct such missions at that time and were temporarily pulling all FAMs from international and long-distance flights.¹⁷ MacLean, unsatisfied, approached an employee in the DHS Office of the Inspector General, but his concerns were again rebuffed.¹⁸

Having failed to effect change from within the organization, MacLean contacted MSNBC reporter Brock Meeks and revealed the TSA deployment plan in order to “create a controversy resulting in rescission of the directive.”¹⁹ On July 29, 2003, MSNBC.com published an article entitled *Air Marshals Pulled from Key Flights*, which made public that “[d]espite renewed warnings about possible airline hijackings, the Transportation Security Administration has alerted federal air marshals that as of Friday they will no longer be covering cross-country or international flights.”²⁰ Members of Congress caught wind of the news story and criticized the TSA deployment plan, ensuring the directive was withdrawn before it ever went into effect.²¹

12. MacLean joined the FAMS in 2001, and at the time of the incident which led to his removal, he was a federal employee pursuant to 5 U.S.C.A. § 7511(a)(1)(West 2014). *Id.* (citing Aviation and Transportation Security Act, Pub. L. No. 107-71, §101, 115 Stat. 597 (2001)).

13. *MacLean III*, 116 M.S.P.R. at 564, 568.

14. *Id.* at 565.

15. *Id.* at 564.

16. *Id.* at 564–65.

17. See Petition for a Writ of Certiorari at 59a, *Dep’t of Homeland Sec. v. MacLean*, No. 13-894 (U.S. Mar. 28, 2014) (“My supervisor told me that the Service ran out of funds for overtime, per diem, mileage and lodging.”).

18. *MacLean III*, 116 M.S.P.R. at 56.

19. *Id.* at 565.

20. *Id.* (citing Brock N. Meeks, *Air Marshals Pulled from Key Flights*, MSNBC (July 29, 2003), <http://uslaboragainstar.org/article.php?id=1429>).

21. *MacLean III*, 116 M.S.P.R. at 565.

MacLean was not mentioned in the MSNBC article, and continued serving in the FAMS without notifying anyone of the unauthorized disclosure.²² Following the incident, MacLean determined the FAMS should speak with “a collective voice,” and became active in the Federal Law Enforcement Officers Association (FLEOA).²³

In 2004, about a year after his initial unauthorized disclosure, MacLean appeared on NBC Nightly News to criticize the FAMS dress code, which he believed made air marshals too easily identifiable.²⁴ Despite appearing on the program disguised as “Air Marshal Mike,” someone from the TSA recognized MacLean’s voice and reported him.²⁵ In the ensuing investigation, MacLean admitted to agents from the Immigration and Customs Enforcement (ICE) Office of Professional Responsibility that he was the one who had disclosed the 2003 directive to MSNBC without authorization.²⁶

The TSA proposed MacLean’s removal on three grounds: first, his unauthorized media appearance; second, his unauthorized release of information to the media; and third, his unauthorized disclosure of SSI.²⁷ The agency sustained only the third charge and fired MacLean on April 11, 2006.²⁸ The TSA issued a subsequent order classifying the 2003 directive as SSI on August 31, 2006²⁹—over three years after MacLean made the disclosure, and four months after he was removed.

MacLean appealed his removal through two main avenues. First, he sought an order that his disclosure did not actually include SSI because the information was not classified as SSI in 2003.³⁰ Second, he sought an order that his disclosure was protected under the Whistleblower Protection Act.³¹

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Petition for a Writ of Certiorari, *supra* note 17, at 86a.

27. *MacLean III*, 116 M.S.P.R. at 565.

28. *MacLean v. Dep’t of Homeland Sec.*, 112 M.S.P.R. 4, 6 (2009) [hereinafter *MacLean II*].

29. *Id.*

30. See *MacLean v. Dep’t of Homeland Sec.*, 543 F.3d 1145, 1152 (9th Cir. 2008) [hereinafter *MacLean I*] (finding the order classifying the 2003 text message as SSI was not a retroactive agency adjudication).

31. See *id.* at 1150 (finding the Whistleblower Protection Act did not apply to the order at issue).

B. Ninth Circuit Decision

MacLean sought a court order that the TSA could not retroactively classify the 2003 directive as SSI.³² He petitioned the Ninth Circuit for review of the TSA's order.³³

On September 16, 2008, the Ninth Circuit upheld the TSA's classification and determined that MacLean had indeed leaked SSI.³⁴ Under the definition in effect at the time of the directive, SSI consisted of "specific details of aviation security measures," including but not limited to "information concerning specific numbers of Federal Air Marshals, deployments, or missions, and the methods involved in such operations."³⁵ The court found the retroactive classification by the TSA made no difference, as "information falling within this designation is automatically considered 'sensitive security information' without further action from the TSA."³⁶ In other words, the information in the 2003 directive qualified as SSI whether or not the TSA explicitly labeled it as such at the time, because it contained the kind of information automatically understood in the TSA's regulatory scheme to be SSI.³⁷ Additionally, the TSA's classification did not violate the Whistleblower Protection Act, because it was not a "personnel action" within the meaning of the Act, but merely an official determination that the 2003 text message contained SSI.³⁸

MacLean claimed he did not know the text message was SSI at the time of his disclosure.³⁹ It was sent as an unencrypted text message to his cell phone rather than to his secure, government-issued PDA, and

32. *See id.* at 1152 (discussing the potential retroactivity of the classification as SSI).

33. *Id.* at 1148.

34. *Id.* at 1150.

35. Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8352 (Feb. 22, 2002) (codified at 49 C.F.R. pt. 1500 *et seq.*).

36. *See MacLean I*, 543 F.3d at 1150 (citing 49 C.F.R. § 1520.7 (2003)).

37. The TSA regulations prohibited unauthorized disclosure of "information concerning the deployments, numbers, and operations of Coast Guard personnel engaged in maritime security duties and Federal Air Marshals, to the extent it is not classified national security information." 49 C.F.R. § 1520.5(b)(8)(ii) (2003). This "includes, but is not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions and the methods involved in such operations." 49 C.F.R. § 1520.7(j) (2003). In addition, a "covered person must disclose, or otherwise provide access to, SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA." 49 C.F.R. § 1520.9(a)(2) (2003). Finally, "[v]iolation of this part is grounds for a civil penalty and other enforcement or corrective action by DHS, and appropriate personnel actions for Federal employees." 49 C.F.R. § 1520.17 (2003).

38. *MacLean I*, 543 F.3d at 1150–51.

39. *MacLean IV*, 714 F.3d 1301, 1305 (Fed. Cir. 2013).

was not labeled SSI.⁴⁰ However, the court determined MacLean’s plea of ignorance was not credible in light of his testimony that he attended an air marshal training in November 2001, during which the term “sensitive information” was used to describe flight times, flight numbers, and airline information.⁴¹ He confessed that “[i]f I told somebody that a particular flight was not going to have any protection on it, that endangered that specific flight.”⁴² Moreover, he “admit[ted] that he signed a nondisclosure agreement as a condition of his employment, which state[d] that Marshals ‘may be removed’ for ‘[u]nauthorized release of security-sensitive or classified information.’”⁴³ Consequently, the court found MacLean should reasonably have understood the 2003 directive to be SSI regardless of whether it was officially classified as such at the time.

Later, the Court of Appeals for the Federal Circuit held that whether or not MacLean knew he was disclosing SSI, the regulation prohibiting disclosure contains no intent element, meaning that MacLean’s subjective belief that the 2003 directive was not SSI makes no difference in evaluating his culpability.⁴⁴ In fact, if his intentions mattered, it would have made the case against him even stronger: during the investigation, MacLean admitted:

“[d]ue to the fact my chain of command, the DHS [Inspector General] and my Congressmen all ignored my complaints and would not follow up with investigations, I have NO REGRETS or feel NO REMORSE for going to a credible and responsible media representative, Brock Meeks. Brock Meeks reporting these gross mismanagement issues has resulted in immediate and positive change in deadly FAMS policies.”⁴⁵

He further claimed it did not matter to him whether the information was SSI, and that he would have revealed the information however it was classified.⁴⁶ As a result, management lost “all . . . confidence in his ability at that point.”⁴⁷

40. *MacLean III*, 116 M.S.P.R. 562, 564 (2011).

41. Petition for a Writ of Certiorari, *supra* note 17, at 72a.

42. *Id.* at 74a.

43. *MacLean III*, 116 M.S.P.R. at 580.

44. *Maclean IV*, 714 F.3d at 1306 (finding that “because the regulation prohibiting disclosure of SSI does not include an intent element, Mr. MacLean cannot be exonerated by his subjective belief that the content of the text message was not SSI”).

45. Petition for a Writ of Certiorari, *supra* note 17, at 45a (emphasis in original).

46. *Id.* at 44a–45a.

47. *Id.* at 108a.

C. Merit Systems Protection Board Decision

After failing to demonstrate his disclosure did not contain SSI, MacLean next challenged his removal on the ground that the Whistleblower Protection Act (WPA) protected his disclosure.⁴⁸ Before the Merit Systems Protection Board (MSPB), MacLean claimed the agency could not “take a personnel action” against an employee for disclosing certain types of information when the employee “reasonably believe[d]” that the information showed a “violation of any law, rule or regulation” or “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”⁴⁹

The Board never reached the question of whether MacLean reasonably believed the 2003 directive presented a “substantial and specific danger” to public safety, because the WPA does not apply if the disclosure is “specifically prohibited by law.”⁵⁰ The Board found his disclosure was indeed “specifically prohibited by law,” as the TSA had been given express authority by Congress to create regulations prohibiting the release of SSI.⁵¹ As a consequence, the Board rejected MacLean’s argument, finding his disclosure was not protected under the WPA, and sustained the Agency’s decision to remove him.⁵² MacLean appealed the decision to the United States Court of Appeals for the Federal Circuit.⁵³

48. *MacLean III*, 116 M.S.P.R. at 569.

49. The relevant provision of the Act reads in full:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, *if such disclosure is not specifically prohibited by law* and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

5 U.S.C.A. § 2302(b)(8)(A)(i)–(ii) (West 2014) (emphasis added).

50. *MacLean III*, 116 M.S.P.R. at 581; *see also* 5 U.S.C.A. § 2302(b)(8)(A)(ii) (West 2014) (disallowing personnel action for the disclosure of information that evidences a “substantial and specific danger” to public safety).

51. *MacLean III*, 116 M.S.P.R. at 581; *see* 49 U.S.C.A. § 40119(b) (West 2014) (setting out TSA’s authority to create regulations prohibiting disclosures of security information).

52. *MacLean III*, 116 M.S.P.R. at 581.

53. *MacLean IV*, 714 F.3d 1301, 1310–11 (Fed. Cir. 2013).

D. Federal Circuit Decision

Reviewing *de novo*, the Federal Circuit vacated the Board's decision and found MacLean's disclosure protected under the WPA because it was *not* "specifically prohibited by law," but rather only prohibited by regulation.⁵⁴ The Federal Circuit found "[i]n order to fall under the 'specifically prohibited by law' proviso, a 'disclosure must be prohibited by a statute rather than by a regulation.'" ⁵⁵ Discarding the TSA regulations that prohibited disclosure of SSI, the Federal Circuit focused exclusively on the statutory language of ATSA,⁵⁶ ultimately determining the Act was not specific enough to prohibit MacLean's disclosure of SSI.⁵⁷ The Federal Circuit reversed and remanded for consideration of whether MacLean reasonably believed the 2003 directive presented a "substantial and specific danger" to public safety, in which case the WPA would apply, protecting MacLean's conduct and blocking DHS from taking personnel action against him.⁵⁸

II. LEGAL BACKGROUND

A. History of SSI Disclosure Prohibitions

Beginning in 1974, Congress required the Federal Aviation Administration (FAA) to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security or research and development activities" if "disclosing the information would be an unwarranted invasion of personal privacy," "reveal a trade secret or privileged or confidential commercial or financial information," or "be detrimental to the safety of passengers in air transportation."⁵⁹ Pursuant to that mandate, the FAA promulgated detailed regulations classifying certain information as SSI and restricting disclosure of SSI.⁶⁰

54. *Id.* at 1310.

55. *Id.* at 1308.

56. *Id.*; *see also* 49 U.S.C.A. § 114(r)(C) (West 2014) ("Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.")

57. *MacLean IV*, 714 F.3d at 1310.

58. *Id.*

59. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745, 1117; Air Transportation Security Act of 1974 § 316, Pub. L. No. 93-366, 88 Stat. 409, 417.

60. 14 C.F.R. § 191.5 (2000); 14 C.F.R. § 191 (1977).

The Air Transportation Security Act (ATSA) reassigned that duty to the TSA, and transferred the SSI regulations to TSA's authority.⁶¹ Subsequently, the Homeland Security Act of 2002 moved the TSA into the newly created DHS.⁶² A separate provision of the Homeland Security Act expanded on TSA's statutory mandate to prohibit disclosure of SSI.⁶³

B. The Chrysler Default Rule and the Legislative History of the WPA

This case hinges on whether the TSA regulations promulgating ATSA, 49 U.S.C. § 114(r), can be considered “law” for purposes of the WPA.⁶⁴ If they are not, MacLean will be protected from adverse personnel action because of his unauthorized disclosure.⁶⁵ To determine whether Congress intended TSA regulations to function as laws, it is helpful to examine the legislative history.⁶⁶ Looking to the origins of the Act, Congress changed the language in the original draft from ‘specifically prohibited by law, rule, or regulation’ to just ‘specifically prohibited by law’ in the final version. At first blush, the removal of “rule, or regulation” appears clearly targeted at excluding these terms from consideration.⁶⁷

61. Aviation and Transportation Security Act § 101(e), Pub. L. No. 107-71, 115 Stat. 597, 603 (2001) (codified at scattered sections of 49 U.S.C.A.); *see also* Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8352 (Feb. 22, 2002).

62. Homeland Security Act of 2002 § 403(2), Pub. L. No. 107-296, 116 Stat. 2178.

63. The Homeland Security Act of 2002 § 1601(b), 49 U.S.C.A. § 114 (West 2014), reads as follows:

Notwithstanding section 552 of title 5 [the FOIA], the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to the security of transportation.

64. Steve Vladek, *Argument Preview: How Much Control do Agencies Have over What Whistleblowers May Disclose*, SCOTUSBLOG, (Oct. 31, 2014 12:00 PM), <http://www.scotusblog.com/2014/10/argument-preview-how-much-control-do-agencies-have-over-what-whistleblowers-may-disclose/>.

65. *See* 5 U.S.C.A. § 2302(b)(8) (West 2014) (prohibiting personnel action for disclosing information that is reasonably believed to, amongst other things, violate law).

66. *See* FAA v. Robertson, 422 U.S. 255, 263 (1975) (stating that where the law is “unclear and ambiguous” analysis “compel[s] resort to the legislative history”); *cf.* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (comparing use of legislative history in statutory interpretation to “looking over a crowd and picking out your friends”).

67. *See* Russello v. United States, 464 U.S. 16, 23 (1983).

In *Chrysler Corp. v. Brown*, however, the Court created a default rule for interpretation of the phrase “by law.”⁶⁸ *Chrysler* interpreted the phrase “authorized by law” to include not just authorization conferred directly by statute, but also by “properly promulgated, substantive agency regulations.”⁶⁹ Absent a clear showing of contrary Congressional intent—that is some indication that “by law” includes only statutes—the phrase “by law” must be read to include both statutes and regulations. Given the decision in *Chrysler* predates the WPA by a decade, had Congress meant to limit the “specifically prohibited by law” proviso to operate only with statutes and not with regulations, it would have to make “a clear showing of contrary legislative intent.”⁷⁰

III. ARGUMENTS

A. *Petitioner’s Arguments*

DHS chiefly contends “the Federal Circuit’s decision seriously undermines the effectiveness of the congressionally mandated SSI regime, invites individual federal employees to make disclosures that will threaten public safety, and warrants [the Supreme] Court’s immediate review.”⁷¹

DHS first challenges the Federal Circuit’s finding that TSA regulations are not “law” for purposes of the WPA proviso, contending that law within the congressionally created SSI nondisclosure scheme specifically prohibits disclosure of SSI.⁷² Citing the *Chrysler* default rule for the proposition that “by law” includes not only statutes, but also “properly promulgated, substantive agency regulations,” DHS insists Congress meant to include agency regulations within the scope of the WPA proviso.⁷³ If Congress did not

68. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979).

69. *Id.* at 295 (propounding a presumption in favor of reading “specifically prohibited by law” to include both statutes and regulations, absent a contrary indication of Congressional intent).

70. *See id.* at 295–96 (“It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law.’ This doctrine is so well established that agency regulations implementing federal statutes have been held to preempt state law under the Supremacy Clause. It would therefore take a clear showing of contrary legislative intent before the phrase ‘authorized by law’ in § 1905 could be held to have a narrower ambit than the traditional understanding.”).

71. Petition for Writ of Certiorari, *supra* note 17, at 11.

72. Brief for Petitioner, *supra* note 6, at 18.

73. *Id.* at 19–20.

desire such a reading of the WPA proviso, DHS argues they should have made this explicit, and in the absence of contrary legislative intent the default rule in *Chrysler* applies.⁷⁴

DHS acknowledges the legislative history of the WPA, including the Senate and House Conference reports that describe the Congressional intent in changing the language of the proviso.⁷⁵ DHS focuses on the fact that Congress ultimately chose the House version, “by law,” over the more specific Senate version, “by statute,” arguing this was a deliberate choice evincing Congress’s intent that the proviso be read generally, in keeping with *Chrysler*, to include statutes, rules, and regulations.⁷⁶

Furthermore, DHS points out the nondisclosure regulations have the force and effect of law because they were affirmatively required by Congressional statute.⁷⁷ Congress explicitly delegated legislative authority to TSA to create regulations prohibiting SSI disclosure on the basis of three distinct criteria: if the information was (1) “an unwarranted invasion of personal privacy”; (2) “reveal[ed] a trade secret or privileged or confidential commercial or financial information”; or (3) was “detrimental to the safety of passengers in air transportation.”⁷⁸ In addition, DHS relies on the fact that Congress was already aware of the content of TSA’s nondisclosure regulations when it enacted § 114(r)(1).⁷⁹ Because Congress passed a law affirming and expanding TSA’s regulatory authority *after* TSA’s regulatory scheme was already in place, DHS contends that Congress not only acknowledged the legitimacy of TSA’s existing regulations but also affirmatively endowed them with the force of law.⁸⁰

Alternatively, DHS argues that even without counting the TSA regulations within the scope of “law,” § 114(r)(1) itself specifically prohibits MacLean’s disclosure.⁸¹ For support, they cite *Administrator, FAA v. Robertson*,⁸² where the Court interpreted the phrase

74. *Id.* at 13.

75. *Id.* at 26–27.

76. *Id.*

77. *Id.* at 21–22.

78. Air Transportation Security Act of 1974 § 316, Pub. L. No. 93-366, 88 Stat. 417.

79. See Homeland Security Act § 1601, 116 Stat. 2312; 67 Fed. Reg. 8340, 8352 (demonstrating Congress’s awareness of the TSA’s nondisclosure regulations).

80. See *Ablemarle Paper Co. v. Moody*, 422 U.S. 404, 414 n.8 (1975) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”).

81. Brief for Petitioner, *supra* note 6, at 28.

82. 422 U.S. 255 (1975).

“specifically exempted from disclosure by statute”⁸³ to include a statute authorizing the FAA to exercise broad interest-balancing discretion in determining whether certain information should be disclosed.⁸⁴ DHS argues the phrase “specifically exempted from disclosure by statute” is even narrower than “specifically prohibited by law,” but still, the *Robertson* Court found that the phrase encompassed an SSI disclosure regulatory scheme that gave broad discretion to the agency.⁸⁵ In *Robertson*, the statute allowed the agency to classify certain information using a general and untethered interest-balancing approach;⁸⁶ here, the statute predicated the agency’s creation of regulations on three enumerated criteria.⁸⁷ DHS argues that if the Court upheld a regulatory scheme in *Robertson* broader than the one at issue here, a fortiori the Court must uphold the regulatory scheme here.⁸⁸

Finally, from a policy perspective, DHS warns that allowing federal employees to publicly disclose SSI would subvert Congress’s intent and create serious risks to public safety.⁸⁹ The WPA, DHS claims, does not allow employees to go to the media *whenever* they have a reasonable belief that particular information shows government wrongdoing.⁹⁰ Rather, the statutory protection only applies when the employee raises his or her concerns through appropriate channels, such as to the Office of the Inspector General or Office of Special Counsel, thereby allowing the appropriate officials to inspect an employee’s claims while keeping the SSI secure.⁹¹ DHS argues that if an employee could run to the media any time he or she had a plausible objection to a directive involving SSI, the resulting public disclosure would sink Congress’s system for

83. See 5 U.S.C.A. § 552(b)(3) (West 2014).

84. Brief for Petitioner, *supra* note 6, at 28–31 (citing *Robertson*, 422 U.S. at 256–58).

85. *Id.*

86. The statute at issue in *Robertson* allowed the agency to withhold information whenever the agency adjudged disclosure was “not required in the interest of the public” and “would adversely affect the interests” of someone objecting to the disclosure. 422 U.S. at 258 n.4 (quoting 49 U.S.C.A. § 1504 (West 2014)). See also *id.* at 261–67.

87. See 49 U.S.C.A. § 114(r)(1)(A)–(C) (West 2014); see *supra* note 78 and accompanying text.

88. Brief for Petitioner, *supra* note 6, at 30 (“The combination of a broader proviso and a more specific nondisclosure statute makes this an even easier case for proviso coverage than *Robertson* itself.”).

89. *Id.* at 38–39.

90. *Id.* at 36 (citing 5 U.S.C.A. § 2302(b)(8)(B) (West 2014)).

91. *Id.*

keeping classified information out of the wrong hands.⁹² In effect, this reading of the WPA would allow each of the TSA's more than 60,000 employees to disclose any information to the media that they personally determined necessary for the public to know, regardless of the broader implications.⁹³ Such a result, DHS argues, would not only contravene Congress's purpose in creating the regulatory scheme, but would impermissibly compromise national security.⁹⁴

B. Respondent's Arguments

Respondent MacLean counters that even if TSA regulations specifically prohibited his disclosure of SSI, they are not "law" and therefore do not apply under the WPA proviso.⁹⁵ He insists the agency cannot rely on its own regulations to remove him for disclosing SSI because the key sentence of the WPA authorizes whistleblowers to disclose "any violation of any *law, rule, or regulation*," but allows punishment of such disclosures only if they are "specifically prohibited by *law*."⁹⁶ The Court has previously held "[a] statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places."⁹⁷ As a result, MacLean claims the plain language of the WPA proviso clearly excludes regulations.⁹⁸

DHS warns MacLean's argument threatens the integrity of the SSI nondisclosure statutory scheme, and MacLean counters that DHS's argument threatens the integrity of the WPA.⁹⁹ MacLean argues that allowing agencies to use their own regulations to block disclosure of dangerous or illegal agency practices counteracts the purpose of the WPA.¹⁰⁰ Congress changed the language in an earlier draft of the statute—"specifically prohibited by law, rule, or regulation"—to the present version, "specifically prohibited by law"—because it feared exactly this "adoption of internal procedural regulations against disclosure, [] thereby enabl[ing] an agency to

92. *Id.* at 37.

93. *Id.*

94. *Id.* at 38–40.

95. Brief for Respondent at 19, *Dep't of Homeland Sec. v. MacLean*, No. 13-894 (U.S. Mar. 28, 2014).

96. *See id.* at 19 (emphasis added).

97. *Dep't of Treasury, I.R.S. v. Fed. Labor Relations Auth.*, 494 U.S. 922, 932 (1990).

98. Brief for Respondent, *supra* note 95, at 16.

99. *Id.*

100. *Id.* at 22.

discourage an employee from coming forward with allegations of wrongdoing.”¹⁰¹

In addition, MacLean asserts ATSA makes it clear that “nothing in [§ 114(r)], or any other provision of law, shall be construed to authorize the designation of information as sensitive security information” in order to “conceal a violation of law, inefficiency, or administrative error” or “prevent embarrassment to a person, organization, or agency.”¹⁰² The concern at the forefront of Congress’s mind was that by allowing the agency to decide for itself what information was SSI, the agency might classify information to cover up wrongdoing.¹⁰³ MacLean contends this is exactly what happened in his case, and exactly the reason the WPA exists—to allow employees to come forward with legitimate claims of misfeasance without fear of reprisal, even when those claims involve disclosure of SSI.¹⁰⁴

Thus, from a policy standpoint, MacLean warns that including regulations to be within the ambit of “specifically prohibited by law” runs the risk of stifling whistleblowers and perpetuating undesirable internal conduct, including “violation[s] of law, inefficienc[ies], or administrative error[s].”¹⁰⁵ MacLean argues this result could not have been the intent of Congress in passing the statute.¹⁰⁶

MacLean next turns to DHS’s argument that even without TSA’s regulatory prohibitions, the statute itself specifically prohibits his disclosure. MacLean counters that § 114(r) does not prohibit anything at all—it merely “allows DHS ‘to prescribe regulations prohibiting the disclosure of information.’”¹⁰⁷

Even if it were a prohibition, MacLean argues, ATSA’s broad authorization for the TSA to shield information is not specific enough to meet the demands of the WPA proviso.¹⁰⁸ He compares § 114(r) to a provision of the Trade Secrets Act, which in great detail prohibits

101. S. REP. NO. 95-969, at 19 (1978), *reprinted in* 1978 U.S.S.C.A.N. 2723, 2743.

102. 49 U.S.C.A. § 114(r)(4)(A)–(D) (West 2014); *see* American Communities’ Right to Public Information Act § 561(c)(1), Pub. L. No. 111-83, 123 Stat. 2182 (2009); *see also* 49 U.S.C.A. § 40119(b) (West 2014) (illustrating similar limitations on the Department of Transportation’s authority).

103. Brief for Respondent, *supra* note 95, at 22.

104. *Id.* (“The ‘purpose of the WPA’ is to allow employees to make [] disclosures ‘without fearing retaliatory action by their supervisors or those who might be harmed by the disclosures.’”) (citing *Willis v. Dep’t of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998)).

105. 49 U.S.C.A. § 114(r)(4)(A).

106. Brief for Respondent, *supra* note 95, at 7–8.

107. *Id.* at 17.

108. *Id.*

disclosure of “information concern[ing] or related to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association”¹⁰⁹ By contrast, § 114(r) lists no such categories, but prohibits only generally the disclosure of information that may “be detrimental to the security of transportation.”¹¹⁰

MacLean asserts the WPA strikes a balance between the benefit of allowing whistleblowers to reveal agency wrongdoing on the one hand, and the need to keep certain information secret for national security purposes on the other.¹¹¹ But MacLean contends DHS may not decide where this balance lies; only Congress can, because in the plain language of the WPA, Congress chose not to delegate that power to the agency.¹¹² As a result, he argues, DHS may not prohibit his disclosure and consequently has no grounds to take personnel action against him for blowing the whistle.

IV. ANALYSIS

Assuming MacLean “reasonably believe[d]” he was revealing an FAMS deployment plan which would cause a “substantial and specific danger to public safety,” he will be protected under the WPA unless his disclosure was “specifically prohibited by law.”¹¹³ His disclosure was indeed “specifically prohibited,” but not by statute—only by the agency regulation promulgating the statute.¹¹⁴ If the Court determines these regulations are “law” then MacLean’s removal will be sustained. If, however, the Court determines only “statutory law and court interpretations of those statutes”¹¹⁵ may be considered law for purposes of the WPA, MacLean’s disclosure will be protected. In light of the clear showing of Congressional intent evident from the statutory history, the latter ruling appears the more probable.

109. 18 U.S.C.A. § 1905 (West 2014).

110. 49 U.S.C.A. § 114(r)(1)(C) (West 2014).

111. Brief for Respondent, *supra* note 95, at 47.

112. *Id.* at 18.

113. See 5 U.S.C.A. § 2302(b)(8)(A) (West 2014); see also *MacLean IV*, 714 F.3d 1301, 1311 (Fed. Cir. 2013) (Wallach, J., concurring) (“[T]he facts alleged, if proven, allege conduct at the core of the Whistleblower Protection Act.”).

114. See *MacLean IV*, 714 F.3d at 1309 (“[T]he ultimate source of prohibition of Mr. MacLean’s disclosure is not a statute but a regulation, which the parties agree cannot be ‘law under the WPA.’”).

115. 56 M.S.P.R. 536, 542–43 (M.S.P.B. 1993) (citing H.R. CONF. REP. NO. 95-1717, at 4 (1978), reprinted in 1978 U.S.C.A.N. 2860, 2864).

It bears noting that at the time of his disclosure, MacLean was a first-time offender with a spotless record, and appears to have acted out of genuine concern for the public safety.¹¹⁶ He stood to gain nothing from his disclosure, and in this sense his circumstances are quite different from other FAMs who have been disciplined by TSA for disclosing SSI.¹¹⁷ His case falls squarely under the scenario envisioned by the WPA.¹¹⁸

Nevertheless, DHS's policy arguments are compelling. National security interests, which involve the safety of society at large, will generally outweigh the interest of the individual no matter how well-intentioned.¹¹⁹ MacLean acted unilaterally and contrary to explicit agency regulations in approaching the media, and according to TSA Officer in Charge Frank Donzanti, he did so without "all the information. He's not in a position to make that kind of decision. There [were] other factors that [went] into [the 2003 directive] he [was] unaware of."¹²⁰ His decision thus created an immediate vulnerability in the security network managed by the TSA, forcing the agency to reallocate scarce resources to cover a security gap.¹²¹ From an interest-balancing standpoint, the benefit of MacLean's disclosure is almost certainly outweighed by the agency's interest in maintaining effective national security policies.¹²²

Powerful as the policy arguments are, however, the question is ultimately one of statutory interpretation. Congress's intent in passing the WPA will control the outcome of the case. In the process of going from "by law, rule, or regulation" to simply "by law," each chamber of Congress approved a different version of the statute: the House passed a version that read, "specifically prohibited by law,"¹²³ while the Senate passed a version that read, "specifically prohibited by statute."¹²⁴ The House version, "by law," was ultimately chosen and

116. *MacLean IV*, 714 F.3d at 1306.

117. Petition for a Writ of Certiorari, *supra* note 17, at 106a–08a.

118. *MacLean IV*, 714 F.3d at 1311 (Wallach, J., concurring) ("[T]he facts alleged, if proven, allege conduct at the core of the Whistleblower Protection Act.>").

119. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("Pressing public necessity may sometimes justify the existence of such restrictions.")

120. Petition for a Writ of Certiorari, *supra* note 17, at 104a.

121. *See MacLean IV*, 714 F.3d at 1306 ("[B]ecause even a possibility that a Marshal may be onboard is an important deterrent to terrorist activity, Mr. MacLean's disclosure compromised flight safety and forced the Agency to reallocate resources to address this new vulnerability.").

122. *See, e.g.*, *National Security: Overview*, RIGHT2INFO.ORG, <http://www.right2info.org/exceptions-to-access/national-security> (last visited Nov. 15, 2014).

123. H.R. CONF. REP. NO. 95-1717, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864.

124. S. REP. NO. 95-969, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743.

remains on the books today.¹²⁵

This legislative history suggests two mutually exclusive possibilities. First, by choosing the House version over the Senate version and substituting the more general term “law” for the more precise term “statute,” Congress meant to include rules and regulations as “laws” within the meaning of the WPA proviso. Or, second, by reducing the original language from “by law, rule, or regulation” to simply “by law,” Congress intended to limit the proviso to include only statutory law.

If Congress meant to include rules and regulations in the WPA proviso, it could have left the statutory language of the original draft intact.¹²⁶ The phrase “law, rule, or regulation” appears more than twenty times elsewhere in the WPA, seven times in § 2302(b) alone,¹²⁷ and even in the same sentence as the proviso in question.¹²⁸ It would not make sense for Congress to use the phrase “by law, rule or regulation” throughout if it understood “by law” to have the same meaning. After all, “[a] statute that in one section refers to ‘law, rule or regulation,’ and in another section to only ‘laws’ cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.”¹²⁹

Chrysler created a presumption that the phrase “by law” includes rules and regulations, but “a clear showing of contrary legislative intent” may rebut this presumption.¹³⁰ Here, the Senate and House Conference reports provide the “clear showing” needed. The Senate report reveals Congress’s concern that the original “by law, rule, or regulation” language “would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing.”¹³¹ The Senate chose the statutory language it did to eliminate the exact kind of conduct at play in *MacLean*—the removal of an employee for whistle-blowing despite adverse agency

125. 49 U.S.C.A. § 114(r) (West 2014).

126. See S. REP. NO. 95-969, at 21 (1978); H.R. REP. NO. 95-1403, 95th Cong., 2d Sess. (1978).

127. See 5 U.S.C.A. §§ 2302(b)(1)(E), (6), (8)(A)(i), (8)(B)(i), (9)(A), (12), (13) (West 2014).

128. The WPA protects a disclosure “of any violation of any law, rule or regulation . . . if such disclosure is not specifically prohibited by law.” 5 U.S.C.A. § 2302(b)(8)(A) (West 2014).

129. Dep’t of Treasury, *I.R.S. v. Fed. Labor Relations Auth.*, 494 U.S. 922, 932 (1990).

130. *Chrysler Corp. v. Brown*, 441 U.S. 281, 296 (1979).

131. S. REP. NO. 95-969, at 19 (1978).

regulations designed to keep him quiet.¹³² The Senate Report thereby satisfies the exception to the default rule of *Chrysler*.

However, Congress ultimately chose to enact the House version and not the Senate version of the bill, limiting the value of the Senate report. Thankfully, the House Conference report provides an equally “clear showing of contrary legislative intent,” stating flatly that “prohibited by law” refers to “statutory law and court interpretations of those statutes . . . not . . . to agency rules and regulations.”¹³³ From this, it seems obvious that Congress did not intend “by law” to include regulations for purposes of the WPA, but only statutory law.¹³⁴

Thus, the regulations prohibiting disclosure of SSI are irrelevant for purposes of determining whether the WPA protects MacLean’s conduct, and only the statutory language of ATSA itself may specifically prohibit the disclosure in such a way that the WPA will not apply.¹³⁵

In *Kent v. General Services Administration*,¹³⁶ the Merit Systems Protection Board addressed the WPA proviso at issue here in the context of the Trade Secrets Act.¹³⁷ The Board held that the Act specifically prohibited disclosure by law and *not* by regulation, because the Act used extremely detailed and comprehensive descriptions of the prohibitions and penalties for public disclosure of information.¹³⁸ For example, the Act prohibits disclosure of “information concern[ing] or related to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association”¹³⁹

ATSA, by contrast, broadly prohibits disclosure of information “detrimental to security of transportation.”¹⁴⁰ It lists no specific categories, only general criteria, and it “gives some discretion to the Agency to fashion regulations for prohibiting disclosure.”¹⁴¹ ATSA

132. *See id.*

133. H.R. CONF. REP. NO. 95-1717, at 4 (1978).

134. *See id.*

135. *MacLean IV*, 714 F.3d 1301, 1309 (Fed. Cir. 2013).

136. 56 M.S.P.R. 536 (M.S.P.B. 1993).

137. 18 U.S.C.A. § 1905 (West 2014).

138. 56 M.S.P.R. at 543–46.

139. 18 U.S.C.A. § 1905 (West 2014).

140. 49 U.S.C.A. § 114(r) (West 2014).

141. *MacLean IV*, 714 F.3d 1301, 1309 (Fed. Cir. 2013).

therefore seems too general to “specifically prohibit” the conduct in question on its own, particularly compared against the specificity of the Trade Secrets Act.

Still, ATSA specifically charges the Secretary of Transportation with prescribing regulations pursuant to certain criteria.¹⁴² The distinction is a fine one. ATSA does not fall squarely under the WPA proviso, but also does not delegate authority to the agency without circumscribing agency discretion in any way.¹⁴³ The statute falls in a gray area. It does not specifically prohibit disclosure by law, but it does prescribe criteria that the agency is obligated to use in creating regulations specifically prohibiting disclosure.¹⁴⁴

Difficult as it is to nail down ATSA’s specificity for purposes of the WPA, analysis of the motivation behind ATSA’s enactment may prove helpful. ATSA was not primarily intended to prevent employee disclosure of sensitive information; rather, it was meant to empower DHS to reject the public’s requests for confidential intelligence, notwithstanding the Freedom of Information Act (FOIA).¹⁴⁵ In the hands of the general public, sensitive security information could be used towards any variety of undesirable ends contrary to national security objectives.¹⁴⁶ ATSA was designed as a privacy shield to limit the potential impact of the FOIA on national security by forbidding private citizens from asking for certain information—not by forbidding public employees from disclosing it in the right circumstances.¹⁴⁷

Section 114(r) does not specifically prohibit the disclosure of SSI.¹⁴⁸ Compared side-by-side with a statute like the Trade Secrets Act, which *does* prohibit disclosure of SSI, § 114(r) falls short of the mark set by the WPA and *Kent*.¹⁴⁹ “[W]hen Congress seeks to prohibit

142. 49 U.S.C.A. § 114(r) (West 2014).

143. *Maclean IV*, 714 F.3d at 1309.

144. See Air Transportation Security Act of 1974, *supra* note 76.

145. See *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993) (rejecting the argument that by expressly including the phrase “[n]otwithstanding section 552 of Title 5 relating to freedom of information,” Congress intended the statute “not to shield information from disclosure under any statute other than FOIA”).

146. See generally Dallas Boyd, *Protecting Sensitive Information: The Virtue of Self-Restraint*, 7 *HOMELAND SEC. AFF. J.*, MAY 2011, available at <http://www.hsaj.org/download&mode=dl&h&w&drm=resources%2Fvolume7%2Fissue1%2Fpdfs%2F&f=7.1.10.pdf&altf=7.1.10.pdf>.

147. *Id.*

148. *Id.*

149. See 56 M.S.P.R. 536, 543–46 (M.S.P.D. 1993).

disclosure of specific types of information, it has the ability to draft the statute accordingly.”¹⁵⁰ Congress did not do so here. Instead, Congress made an intentional choice in drafting ATSA the way it did: rather than codify prohibitions on disclosure of SSI in a statute, it gave the TSA broad discretion to create regulations that prohibit disclosure of SSI.¹⁵¹ The distinction is a crucial one, precisely because of provisos like the one at issue in the WPA.

In conjunction with the language of the WPA proviso, § 114(r) may be read as a deliberate choice by Congress to leave the door open for whistleblowers to disclose SSI exactly as MacLean did. In fact, when Congress discovered the deployment plan then being used by TSA, multiple members objected to the plan and created a national controversy that resulted in the withdrawal of the 2003 directive.¹⁵² Under this reading, the statutory scheme functioned exactly as designed, stopping the agency from using self-serving regulations to hide information from Congress and prevent exposure of an embarrassing internal agency mistake.¹⁵³

Because ATSA does not meet the “specifically prohibited by law” standard demanded by the WPA, no “law” specifically prohibited MacLean’s disclosure.¹⁵⁴ Consequently, the Court will likely uphold the decision of the Federal Circuit in favor of MacLean.

CONCLUSION

The Court’s decision will hinge on the statutory language of the WPA proviso itself and the legislative intent behind the textual changes to the WPA revealed in the Senate and House Conference reports. Both of these point to the conclusion that Congress meant to exclude rules and regulations from the “specifically prohibited by law” proviso. Thus, despite the strong national security interest in placing the confidentiality of SSI above the determination by an employee that he or she should disclose potentially dangerous information, the Court will likely affirm the Federal Circuit’s finding that MacLean’s disclosure was not prohibited by law, and remand for a determination of whether he reasonably believed there was a substantial and specific danger to public health or safety. As MacLean

150. *MacLean IV*, 714 F.3d 1301, 1310 (Fed. Cir. 2013).

151. 49 U.S.C.A. § 114(r) (West 2014).

152. *MacLean IV*, 714 F.3d at 1304.

153. Brief for Respondent, *supra* note 95, at 19.

154. *MacLean IV*, 714 F.3d at 1310.

was a first-time offender with a clean record, who acted out of public concern, and gained no individual benefit from his disclosure, it seems probable that on remand the court will find him protected by the WPA.