EXPECTATIONS OF SILENCE IN THE TRANSPORTATION SECURITY AGENCY, WHISTLEBLOWER PROTECTION VERSUS NATIONAL SECURITY: *THE DEPARTMENT OF HOMELAND SECURITY V. MACLEAN*

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I. INTRODUCTION

Less than two years pass since the tragic events of September 11, 2001 when a federal air marshal, Robert MacLean, set in motion a conflict between rights of employees to report illegal or dangerous activities, and the needs of a nation's security to protect from terrorist threat when he disclosed information about Transportation Security Agency (TSA) flight protection to an MSNBC reporter.[1] Twelve years later in 2014, the Supreme Court heard the case that addressed the limits of the Whistleblower Protection Act, specifically the definition of the exception that prohibits disclosures that have been prohibited by law.[2] The Homeland Security Act of 2002 defined regulations for the TSA including prohibiting disclosures of information used to maintain air security.[3] The MacLean court settled what is meant by the language "prohibited by law" versus "prohibited by regulation", holding that the actions of the air marshal were not prohibited by law, thereby not triggering the Whistleblower Act exception that would nullify his protections from disclosing what he perceived as a failure in national security.[4]

This note will analyze the intent of the Whistleblower Protection Act of 1989,[5] define the intent of the Homeland Security Act in reference to the Transportation Security Agency's handling of

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[1] Department of Homeland Security v. MacLean 135 S. Ct. 913 (2015).
[2] *Id.*
[3] 49 U.S.C. § 114(r)(1)(C) ("[T]he 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").
[4] 135 S. Ct. at 918-24.
[5] *See Infra* Part II.

sensitive information, [6] identify the procedural history and facts of the Maclean case,[7] and then analyze the Court's opinion whether the disclosure by MacLean was illegal by addressing two arguments proffered by the government; that such a disclosure was contrary to TSA regulation, and in direct violation of codified law.[8] Analysis is then given in reference to the exception or the Whistleblowers Protection Act and a determination if the air marshal's disclosure of flight protection information put the public at risk.[9] The dissent by Justice Sotomayor and Justice Kennedy will then be discussed specifically referencing the perceived danger in making public air marshal schedules and flight plans known to the open public.[10]

II. BACKGROUND

Robert MacLean began work for the TSA in 2001 to protect passengers from potential hijackings.[11] In July of 2003, the Department of Homeland Security (DSA) issued a warning about a suspected hijack plot.[12] MacLean attended a briefing about that plot, and within days received a TSA text message informing him that all overnight missions from Las Vegas were cancelled.[13] MacLean was concerned about this decision in light of the recent warnings by the DHS.[14] MacLean contacted his supervisor for details on the cancelled missions and was informed it was a budget constraint issue.[15] MacLean contacted the Inspector General's office for the DHS and was told that nothing could be done about the cancelations.[16] Left with what appeared to be no choice, the air marshal contacted an MSNBC reporter and provided the information about the TSA

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[6] *See Infra* Part II.
[7] *See Infra* Part II.
[8] *See Infra* Part III.A.
[9] *See Infra* Part III.B.
[10] *See Infra* Part III.C.
[11] *MacLean*, 135 S. Ct. at 917.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

cancelations of protection on flights leaving Las Vegas, Nevada, because he believed he was correcting a failure in national security and the resulting press coverage may correct the security oversight.[17] The story was published, members of congress objected to the decision and protection of those flights resumed. The TSA did not know Maclean was the informant on this report. Another employee of the TSA recognized MacLean in a later interview that the air marshal gave while in disguise in which the agent criticized the dress code because he felt the policy gave away agent's identity onboard aircraft. During an investigation of that incident, MacLean admitted disclosing the flight information to the MSNBC reporter in 2003. The TSA fired MacLean for disclosing sensitive security information. MacLean challenged that firing claiming that the Whistleblower Protection Act relieved him of liability for those activities. The review board disagreed with that argument claiming that his actions were "prohibited by law". The Court of Appeals reversed and remanded this finding.[18] The Department of Homeland Security filed for, and the Supreme Court of the United States granted certiorari.[19]

In 2002, when the congress created the Homeland Security Act, the TSA also enacted regulations concerning the manner in which "sensitive security information" (SSI) was to be handled.[20] That information included many categories of information including numbers of air marshals, mission information, and details of how these missions were carried out.[21] This SSI was not considered confidential information and the marshals were allowed to share it with airline and airport personnel.[22]

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[17] *Id.*
[18] MacLean v. Dep't of Homeland Security 714 F.3d at 1311(Fed. Cir. 2013) ("Because Mr. MacLean's disclosure is not "specifically prohibited by law" within the meaning of the WPA, we *vacate* the Board's decision and *remand* for a determination whether Mr. MacLean's disclosure qualifies for WPA protection").
[19] 135 S. Ct. at 918.
[20] *Id.* at 916.
[21] *Id.*
[22] *Id.*

The Whistleblower Protection Act of 1989 were designed to protect employees who disclose information revealing any violation of law or regulation that could endanger public safety or health.[23] The specific exception written into that language was the prevention of disclosing information that was "prohibited by law".[24]

III. ANALYSIS

Justice Roberts delivered the opinion of the court.[25] The first issue to address was if the disclosure by MacLean was specifically prohibited by the TSA's regulations on how sensitive security information was to be handled and if the disclosure was prohibited by codified law.[26] The court addressed these issues separately.[27]

A. Prohibitive Language

1. Prohibited by Regulation

The 2003 enactment of TSA regulations on the governing of SSI which contained language prohibiting the disclosure of the numbers and deployment of air marshals.[28] The subsequent failure to abide by these regulations was not disputed by MacLean.[29] The court then addresses whether the disclosure was specifically prohibited by law.[30] In the codified law the details prohibited personnel practices, the congress used three phrases almost interchangeably; law, rule, and regulation.[31] Unlike the personnel practices statute, the Whistleblower Protection Act uses the word "law" alone.[32] The court determined that this difference is deliberate and intentional, that is

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[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 919.
[27] *Id.*
[28] 49 C.F.R. § 1520.7 ("Each person participating in a national or area security").
[29] *MacLean,* 135 S. Ct. at 919.
[30] *Id.*
[31] 5 U.S.C.A. § 2302(D)(i) ("any violation of any law, rule, or regulation.").
[32] *MacLean,* 135 S. Ct. at 919.

to add the other terms would broaden the scope of the exception beyond the intended requirement.[33] Congress meant to exclude "rules and regulations" as exceptions to the WPA, and thereby only designed the exception to be triggered when an act is prohibited by "law" only.[34] The court had wrestled with this exact language in 1990 when analyzing the Civil Reform Act of 1978 that contained the same three synonyms: law, rule, and regulation.[35] In The Department of the Treasury case, all three terms has the same meaning and weight.[36] The MacLean court rejects this ideal in this case because the conception of precise communication must be a cornerstone of legal writing.[37] To further this argument the court points out that the "prohibited by law" section is followed by another section that addresses information that the President requires, by executive order, to be kept secret, which implies these two sections were meant to be separated with different meanings.[38] This second section of the statute suggest that the congress meant to limit the WPA statute to "prohibited by law" because of the confusion created when a second section involved the President and the first section involves another executive agency.[39]

Another reason the court infers the logic of limiting the word "law" alone is that if a company so desires, it could create enough rules and regulations internally that any disclosure no matter how mild could trigger the exception to the WPA thereby completely nullifying the effect of the WPA.[40] In this statute the Congress meant to exclude prohibited by regulation as a trigger to nullify the protection of the WPA.[41]

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[33] *Id.*
[34] *Id.*
[35] *Id.* at 920.
[36] Dep't of the Treasury v. Fed. Labor Relations 494 U.S. 922 (1990) ("any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment").
[37] *Maclean* 135 S. Ct. at 920.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*

2. Prohibited by Law

The second element the court addresses is whether MacLean's disclosures violated specific law regarding the safeguard of information that was designed to protect the nation's security.[42] The statute spells out that the TSA will prescribe regulations prohibiting disclosures of information that has such an effect on national security.[43] The MacLean court reads this statute literally and concludes that the code does not prohibit anything, it authorizes the TSA to make regulations.[44] At this point the government proffers that the statute does mandate the prohibition of a disclosure like the MacLean statements.[45] The court determines that the statue affords the TSA a broad power in determining what disclosures pass the Under Secretaries test of "detrimental to the security of transportation".[46] The government points to a previous ruling that gave the Federal Aviation Administration a broad discretion in determining what information to hold or not.[47] In the Robertson case the information was not specifically exempted from the statute, whereas the TSA language uses specifically prohibited by statute.[48] The high court rejects these similarities because the "exempted" and "prohibited" words differ.[49] Exempting information from a mandatory disclosure required by the Freedom of Information Act nullifies the strength of the statute requiring the agency to disclose the information in the first place.[50] The Department of Transportation created the statute involving SSI and TSA employees; it did not create a prohibition, it gave the

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[42] *MacLean,* 135 S. Ct. at 919.
[43] 49 U.S.C.A. § 114(r)(1) ("the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security").
[44] *MacLean,* 135 S. Ct. at 921.
[45] *Id.*
[46] *Id.* at 922.
[47] *Id.*
[48] Fed. Aviation Admin. v. Robertson, 422 U.S. 255 (1975) ("congressional intent to replace the broad standard of the former Administrative Procedure Act and its intent to preserve, for air transport regulation, a broad degree of discretion on what information is to be protected in the public interest").
[49] *MacLean,* 135 S. Ct. at 922.
[50] *Id.*

TSA power to create a prohibition.[51] The Court concludes that MacLean's disclosure was not prohibited by law, but stood against a TSA discretionary regulation.[52]

B. The Whistleblowers Protection Act in Relation to National Security

The government then warns that applying the WPA to disclosures about federal security would endanger the public because it puts to the judgement of the entire workforce of the TSA what information would be considered SSI.[53] Most of those employees lack the security clearance to have enough details to make the decision accurately.[54] The court agrees that this concern is legitimate but it must be addressed by Congress or the President, not by the Supreme Court.[55] Congress could modify the language to specifically state disclosures that would be in violation of law, or Congress could exempt the TSA from the requirements of the Prohibited Personnel Practices statute in whole as they did for the FBI and the CIA as well as other similar agencies.[56] The President could do the same work by executive order.[57] The high court concedes that these modifications are the work of Congress or the President and chooses not to perform the work for them.[58]

C. Dissent by Justice Sotomayor and Justice Kennedy

Justice Sotomayor begins the dissent with agreement on the court's conclusion that the phrase "prohibited by law" does not include "prohibited by regulation" in the language of the WPA.[59] She also agrees on the distinction of statutes that prohibit information disclosures from

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[51] *Id.* at 923.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 923-24.
[57] *Id.* at 924.
[58] *Id.*
[59] *Id.*

statutes that exempt information from required disclosures.[60] The divergence at issue is that the disclosure in this case, specifically the absence of federal protection on specific flights, is detrimental to the security of transportation and is properly addressed by the TSA.[61] The disagreement is found fundamental in the conclusion that the TSA statute does not prohibit anything, but authorizes something.[62] Justice Sotomayor points out the use of the word "shall" in the TSA statute as well as other legal writings to be synonymous with "must".[63] The Justice references cases where this specific requirement appears.[64] From this perspective, no longer is the TSA authorized to proffer regulations, it is directed to do so by law and it is given requirements to accomplish with those regulations.[65]

Additionally, the Court overlooks the need for each agency to have directive power over what it must prohibit from being disclosed in the interest of national security.[66] Congress cannot look at every event to determine the depth of danger involved with public knowledge of a piece of information.[67] Congress is the source of the directive on non-disclosure issues as presented here, but the agency must fine-tune these statutes to fulfill the spirit of the statute.[68] The Justice offers facts from the Senate report to the WPA[69] that identified such exceptions as the director of the CIA protecting intelligence sources and methods from discovery by improper disclosures.[70] The Justice concludes by restating agreement with the majority that statutory language prescribing regulations

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] Fed. Express Corp. v. Holowecki 552 U.S. 389 at 400 (2008) ("noting that Congress' use of the term "'shall'" indicates an intent to "impose discretionless obligations.")
[65] *MacLean,* 135 S. Ct. at 924.
[66] *Id.* at 925
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] S.Rep. No. 95–969, pp. 21–22 (1978) ("EXCLUDES FROM THE COVERAGE OF THE CHAPTER A GOVERNMENT CORPORATION, THE GENERAL ACCOUNTING OFFICE, THE CENTRAL INTELLIGENCE AGENCY").

and determining what information to prohibit from disclosure should be very clear in the written code.[71] The remaining concern is whether important information with potentially widespread implications are being left to the decisions of individual employees of an agency as detrimental to security as the TSA.[72]

IV. CONCLUSION

Robert MacLean took the law into his own hands in the summer of 2003. Looking through the crystal-clear lens of hindsight, Mr. MacLean most likely did not use all of the options available to him to address what he considered a lapse in security. Furthermore, Mr. MacLean was not privy to all the details of budgets, cost, risk analysis, and other detailed information that an individual agent would not have, that a superior, manager, or supervisor would have access to.[73] Instead, the air marshal disclosed sensitive information to a news reporter that put the story out to the public.[74] From an air travelers perspective this act was at least negligent, and possibly criminal in nature. The court infers that the word "law" does not mean "regulation", it means "statute". Congress had purpose in defining the exception to the WPA to include the term "prohibited by law".[75] The court affirms the decision of the Federal Appellate Court finding MacLean's disclosures were not prohibited by law. The Court was correct to point out the deficiency of specific language that is the exception, not the norm, to most legal writing. If the statute should have more detail, it is the elected Congress or the elected President who have authority to make changes to address such deficiencies.[76] The Supreme Court does not write statutes, it interprets them and proffers case law as a result. Systematically, they allow each piece of the government to do its job. The Court was

[71] *MacLean,* 135 S. Ct. at 926.
[72] *Id.*
[73] *MacLean,* 135 S. Ct. at 917.
[74] *Id.*
[75] *Id.* at 919.
[76] Id. at 924.

correct to not limit the power of the Whistleblowers Protection Act so that companies or government entities could simply regulate themselves into immunity from the penalties of improper actions. The WPA exist to protect the public's health and welfare, and the Court has allowed the Act to continue servicing the American people.

However, the words of the dissent must not fall on deaf ears. The real danger created that day by Mr. MacLean cannot be underscored. A man whose salary is paid with American taxpayer funds put those same American taxpayers in harm's way. A federal air marshal put American lives at risk. It is not beyond the scope of common sense that his employer terminated his contract for doing just that. Such terminations must be done with fairness and consistency, and relying on improper language to reach a desired outcome is not what the spirit of codified law is meant to do.