

2014

The Aviation and Transportation Safety Act and Whistleblowers - How MacLean and the Federal Circuit Sent National Security into a Nose Dive

Cassie Suttle

Recommended Citation

Cassie Suttle, *The Aviation and Transportation Safety Act and Whistleblowers - How MacLean and the Federal Circuit Sent National Security into a Nose Dive*, 79 J. AIR L. & COM. 183 (2014)
<https://scholar.smu.edu/jalc/vol79/iss1/7>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

**THE AVIATION AND TRANSPORTATION SAFETY ACT
AND WHISTLEBLOWERS—HOW MACLEAN AND THE
FEDERAL CIRCUIT SENT NATIONAL SECURITY
INTO A NOSE DIVE**

CASSIE SUTTLE*

YET AGAIN, a federal court chips away at already eroding national security protections in the name of an individual. The Federal Circuit's decision in *MacLean v. Department of Homeland Security*¹ exemplifies the current attitude toward measures taken to ensure national safety: aloof at its slightest and combative at its worst. As the United States drifts further from the overcautious approach that swept the nation after September 11, 2001, it is essential that the country does not fall back into the lackadaisical attitude of the twentieth century. Unfortunately, the Federal Circuit's decision in *MacLean* is a step in the wrong direction.

MacLean involves the all-too-familiar story of a citizen leaking classified information under the guise of benevolence.² However, in a unique twist, the rogue American involved in the case was a federal air marshal,³ and the impact of his disclosures on public safety could be catastrophic.⁴ In July 2003, Robert J. MacLean and his fellow air marshals “received a briefing from the [Transportation Security Administration (TSA)] that there was a ‘potential plot’ to hijack U.S. [a]irliners.”⁵ Following the briefing, the TSA informed the marshals via text message that it was “cancelling all missions on flights from Las Vegas[, Nevada,]

* Cassie Suttle is a candidate for Juris Doctor, May 2015, at SMU Dedman School of Law. She received her B.A. in Psychology and Government from The University of Texas at Austin. Cassie would like to thank her amazing parents, sisters, and Corey Russell for their unwavering love and support.

¹ 714 F.3d 1301 (Fed. Cir. 2013).

² *See id.* at 1304–05.

³ *Id.* at 1304.

⁴ *See id.* at 1306–07.

⁵ *Id.* at 1304.

until early August.”⁶ Although the text message was not initially labeled as “sensitive security information” (SSI), the TSA later issued an order stating that the content was in fact SSI.⁷

MacLean allegedly became wary that the “suspension of overnight missions during a hijacking alert created a danger to the flying public.”⁸ He protested to both his supervisor and the Office of Inspector General to no avail.⁹ MacLean’s next step was to contact MSNBC, which published a detailed article condemning the directive.¹⁰ Through the article, congressional members became informed of the TSA’s directive.¹¹ Under substantial pressure by these congressional members, the TSA was forced to withdraw its decree.¹² In 2004, the TSA uncovered MacLean’s disclosure after he appeared in disguise on NBC Nightly News to criticize air marshal dress code.¹³ The TSA terminated MacLean shortly thereafter, reasoning that his actions “constituted an unauthorized disclosure of . . . SSI.”¹⁴

The legal battle that ensued is almost as convoluted as the FAA regulations themselves. MacLean first challenged the SSI order in front of the Ninth Circuit, arguing that it was a violation of TSA regulations and an “impermissible retroactive agency action.”¹⁵ The court held that there was sufficient evidence that the text message was SSI under applicable regulations and that the TSA’s actions were not retroactive.¹⁶ Next, MacLean challenged his removal by the Merit Systems Protection Board (Board), arguing that his actions constituted protected whistleblowing pursuant to the Whistleblower Protection Act (WPA).¹⁷ The Board disagreed, holding that the TSA regula-

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*; see Ono, *Budget Cuts in Air Marshal Program: MSNBC*, COLLAPSING TEMPORAL PLATES—A WEB OF DELUSION (July 30, 2003, 7:43 AM), <http://onoekah.blogspot.com/2003/07/budget-cuts-in-air-marshall.html>.

¹¹ See *MacLean*, 714 F.3d at 1304.

¹² See *id.*; James Gordon Meek, *Team Bush Scrubs Plan to Cut Air Marshal Force*, N.Y. DAILY NEWS (July 31, 2013, 12:00 AM), <http://www.nydailynews.com/archives/news/team-bush-scrubs-plan-cut-air-marshall-force-article-1.516198>.

¹³ *MacLean*, 714 F.3d at 1304.

¹⁴ *Id.*

¹⁵ *MacLean v. Dep’t of Homeland Sec.*, 543 F.3d 1145, 1150, 1152 (9th Cir. 2008).

¹⁶ *Id.*

¹⁷ See *MacLean v. Dep’t of Homeland Sec.*, 112 M.S.P.R. 4, ¶¶ 20, 21 (2009).

tions specifically prohibited MacLean's disclosure.¹⁸ On appeal, the Board again rejected MacLean's arguments, this time asserting that the Aviation and Transportation Security Act (ATSA) directly prohibited his disclosure.¹⁹

The Federal Circuit subsequently took up the case. In *MacLean*, the court easily found that (1) the TSA was authorized to remove MacLean as a result of his disclosure,²⁰ (2) the removal was not a disparate penalty,²¹ and (3) MacLean was not discriminated against.²² Nevertheless, the court reversed the decision on a technicality.²³ The dispositive issue turned on the proper interpretation of both the ATSA and the WPA.²⁴ Specifically, the court set out to establish whether MacLean's disclosure was prohibited by law within the meaning of the WPA.²⁵

The WPA prohibits authoritative figures from taking "personnel action" against a government employee "because of . . . any disclosure of information . . . which the employee . . . reasonably believes evidences . . . a substantial and specific danger to public health or safety . . . if such disclosure is *not specifically prohibited by law*."²⁶ Two judges of the court held that because a TSA *regulation* barred MacLean's disclosure, his "whistleblowing" activity was not "specifically prohibited by law."²⁷ According to the judges, regulations were not the type of law that could prohibit whistleblower protection under the WPA.²⁸ A third judge concurred, agreeing with the overall outcome but taking the opinion one step further by stating that MacLean's disclosure was reasonable.²⁹

The court found it inconsequential that an express legislative directive, the ATSA, called for TSA regulations barring disclo-

¹⁸ *Id.* ¶¶ 22–33.

¹⁹ *MacLean v. Dep't of Homeland Sec.*, 116 M.S.P.R. 562, ¶17 (2011); Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597, 603 (2001) (codified as amended in scattered sections of 49 U.S.C.).

²⁰ *See MacLean v. Dep't of Homeland Sec.*, 714 F.3d 1301, 1306 (Fed. Cir. 2013).

²¹ *See id.* at 1307.

²² *Id.*

²³ *See id.* at 1310.

²⁴ *See id.* at 1308–11.

²⁵ *See id.* at 1308.

²⁶ 5 U.S.C. § 2302(b)(8) (2012) (emphasis added).

²⁷ *See MacLean*, 714 F.3d at 1310.

²⁸ *Id.* at 1309.

²⁹ *See id.* at 1311 (Wallach, J., concurring) (noting that "the facts alleged, if proven, allege conduct at the core of the Whistleblower Protection Act").

sure of SSI.³⁰ The ATSA states, in part, “[T]he Secretary of Transportation shall prescribe regulations prohibiting disclosure of information . . . if the Secretary of Transportation decides [that] disclosing the information would . . . be detrimental to transportation safety.”³¹ Even though the case was a “very close” one, the justices held that the ATSA’s express legislative directive was insufficiently specific and therefore “not enough to push the [statute] over th[e WPA’s specificity] threshold.”³²

The Federal Circuit erred in concluding that the ATSA does not specifically prohibit SSI disclosure for two reasons: (1) regulations stemming from express legislative directives have the same force of law as general statutes, and (2) the court’s rationale strips the TSA regulation of its enforcement power and thereby thwarts the underlying purpose of the ATSA. The Federal Circuit’s whimsical response to a potentially serious national security breach demands congressional action to close gaps in the WPA.

First, the court’s differentiation between regulations arising from express legislative directives and statutes for WPA purposes was erroneous.³³ Admittedly, the WPA provides a defense to federal employees who disclose information so long as the disclosure is reasonable and a statute does not specifically prohibit the disclosure.³⁴ Here, however, a statute specifically prohibited disclosure.³⁵ Congress, through the ATSA, directed the TSA to promulgate rules prohibiting disclosure,³⁶ and the TSA comported with the express directive.³⁷ When Congress directs an agency to make law on its behalf, it should have the same force of law as statutes themselves.³⁸ Administrative law is not an agency rulemaking free-for-all.³⁹ While agencies do enjoy a certain amount of discretionary power, legislative directives severely

³⁰ See *id.* at 1310 (majority opinion).

³¹ 49 U.S.C. § 40119(b)(1) (2006).

³² *MacLean*, 714 F.3d at 1310.

³³ See *id.*

³⁴ 5 U.S.C. § 2302(b)(8) (2012).

³⁵ See 49 U.S.C. § 40119(b)(1); 49 C.F.R. § 1520.9 (2008) (“A covered person must . . . [d]isclose, or otherwise provide access to, SSI only to covered persons who have a need to know, unless otherwise authorized . . .”).

³⁶ See 49 U.S.C. § 40119(b)(1).

³⁷ See 49 C.F.R. § 15209.

³⁸ See 2 AM. JUR. 2D *Administrative* § 133 (2013).

³⁹ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975).

constrain administrative action.⁴⁰ Traditionally, agencies are required to act only within boundaries specified by a legislative directive.⁴¹ These legislative directives are essentially a call for backup when Congress lacks sufficient resources and knowledge to draft a statute.⁴² Indeed, the whole purpose of administrative agencies' rulemaking authority is to add an extra layer of expertise that Congress is unable to provide.⁴³

That being said, it makes sense for Congress to delegate rulemaking authority to the Department of Homeland Security (DHS); Congress created the agency just eleven days after the September 11th terrorist attacks for the chief purpose of shielding the United States from threats.⁴⁴ The DHS has boundless expertise on arguably the United States' most important priority—national security.⁴⁵ A Congress that lacked the expertise, knowledge, and foresight to determine what kind of sensitive information required utmost security directed the TSA, a sub-agency of the DHS, to promulgate the laws in question.⁴⁶ The Federal Circuit's failure to acknowledge that these TSA regulations in essence supplant the ATSA's directive is scary precedent.

⁴⁰ See *id.* at 1669–70; *Administrative*, *supra* note 38, § 132.

⁴¹ See Stewart, *supra* note 39, at 1670.

⁴² See *id.* at 1678; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (“[A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, . . . rely upon the incumbent administration’s views of wise policy to inform its judgments.”). *Types of Administrative Agency Action: Rulemaking, Adjudication, Investigation*, USLEGAL, INC., <http://administrativelaw.uslegal.com/three-types-of-administrative-agency-action-rulemaking-adjudication-investigation/> (last visited May 22, 2014) (“[L]egislatures frequently find areas where it is impractical . . . to apply a level of detail or expertise required to constitute complete standards.”) [hereinafter *Types of Administrative Agency Action*].

⁴³ See *Chevron, U.S.A., Inc.*, 467 U.S. at 865 (stating that agencies are entitled to deference because regulatory schemes are often “technical and complex,” and agencies boast a more tailored expertise); *Types of Administrative Agency Action*, *supra* note 42.

⁴⁴ *Creation of the Department of Homeland Security*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/creation-department-homeland-security> (last visited May 22, 2014) (The DHS “coordinate[s] a comprehensive national strategy to safeguard the country against terrorism and respond to any future attacks.”).

⁴⁵ See *Prevent Terrorism and Enhance Security*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/prevent-terrorism-and-enhance-security> (last visited May 22, 2014) (“Protecting the American people from terrorist threats is our founding principle and our highest priority.”).

⁴⁶ See 49 U.S.C. § 40119(b)(1) (2006); *Who Joined DHS*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/who-joined-dhs> (last visited May 22, 2014).

Based on the Federal Circuit rationale, it follows that Congress had two alternatives if it wanted to avoid the WPA thwarting the entire purpose of its ATSA disclosure directive: (1) adopt its own statute prohibiting federal air marshals' disclosure of SSI, or (2) adopt the TSA's regulations regarding disclosure of SSI as law.⁴⁷ Not only are these alternatives incredibly inefficient, but they are also nonsensical. Such alternatives would require Congress to either draft a resolution adopting the TSA regulations or craft a statute on its own, both of which would unreasonably cost time and resources. Inefficiency with respect to national security is inexcusable.⁴⁸ Moreover, as aforementioned, the purpose of agencies like the DHS is to add expertise lacking in Congress.⁴⁹ The Federal Circuit's precedent eviscerates Congress's attempt to craft more comprehensive national security measures. This is hardly the type of action Americans should want to encourage.

Not only does the Federal Circuit's rationale offend administrative law theory, but it also takes the teeth out of the ATSA and impedes its underlying purpose. The court's rationale effectively renders the TSA's disclosure regulations moot by providing a defense under the WPA to defecting federal air marshals.⁵⁰ By these standards, one would be hard pressed to formulate a scenario under which a federal air marshal would not be saved by the protections of the WPA after disclosing SSI.⁵¹ Sure, a jury would still have to decide whether said air marshal "reasonably believed" that the SSI evidenced a specific and significant danger to public safety.⁵² But a rogue air marshal may be willing to take that gamble if there is a chance that he will keep his job.

The Federal Circuit's interpretation completely frustrates the underlying purpose of the ATSA. Congress promulgated the ATSA in the wake of the September 11, 2001, terrorist attacks exclusively to strengthen the security of the United States' trans-

⁴⁷ See *MacLean v. Dep't of Homeland Sec.*, 714 F.3d 1301, 1308–10 (Fed. Cir. 2013).

⁴⁸ See *Prevent Terrorism and Enhance Security*, *supra* note 45.

⁴⁹ See *Types of Administrative Agency Action*, *supra* note 42; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984) (An agency may "resolv[e] the competing interests which Congress . . . inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.").

⁵⁰ See *MacLean*, 714 F.3d at 1310.

⁵¹ See *id.* at 1308–10.

⁵² See *id.* at 1311; 5 U.S.C. § 2302(b)(8) (2012).

portation infrastructure.⁵³ Hence, Congress must forbid the disclosure of this extremely sensitive information in order to implement this policy. Punishment for rogue offenders must be swift, not nonexistent.⁵⁴ It is essential that federal air marshals keep classified information in confidence, regardless of the information provided. As the United States has painfully learned, sensitive information in the wrong hands can lead to devastating and deadly consequences.⁵⁵ Even if MacLean innocently assumed that the directive could negatively affect the public, he did not have the information to know with certainty. Air marshals are not always given background information for measures they are asked to implement.⁵⁶ In fact, agency heads, including the head of the TSA, are responsible for designating which subordinate government employees have access to sensitive national security information.⁵⁷ As a result, the reasons underlying the implementation of certain directives are often kept confidential from subordinates.⁵⁸

Disclosure of SSI, regardless of an official's subjective beliefs, should be strictly forbidden pursuant to the ATSA. In holding otherwise, the Federal Circuit effectively prioritized the WPA over the ATSA, which is chilling precedent. The WPA is meant to protect a government employee who blows the whistle on agency misconduct,⁵⁹ not to protect one who disagrees with a

⁵³ Marcia B. Dinneen, *Aviation and Transportation Security Act of 2001*, IMMIGR. AM. (June 24, 2011), <http://immigrationinamerica.org/371-aviation-and-transportation-security-act-of-2001.html>.

⁵⁴ Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 No. 2 J. PERSONALITY & SOC. PSYCHOL. 285–86 (2002) (discussing the retributive and deterrent effects of punishing wrongdoers).

⁵⁵ See Press Release, Louis J. Freeh, FBI Dir., Robert Philip Hanssen Espionage Case (Feb. 20, 2001), available at <http://www.fbi.gov/about-us/history/famous-cases/robert-hanssen> (Robert Phillip Hanssen was an FBI agent who intentionally exposed two American spies to the Soviet Union, resulting in their execution); Raphael G. Satter, *WikiLeaks: Breach Has Exposed Unredacted U.S. Cables*, HUFFINGTON POST (Sept. 1, 2011, 12:01 AM), http://www.huffingtonpost.com/2011/08/31/wikileaks-breach-has-expo_n_944299.html (anti-secrecy group Wikileaks released sensitive, unredacted documents which “contain[ed] the names of individuals whose lives are at risk because they are named”).

⁵⁶ See Blake Morrison, *Air Marshals Charge New Policies Could Endanger Passengers*, USA TODAY (Dec. 18, 2002, 11:17 PM), http://usatoday30.usatoday.com/news/nation/2002-12-18-air-marshal-cover_x.htm (suggesting that it is common for superiors to “lie[] to” subordinate air marshals).

⁵⁷ Exec. Order No. 13526, 75 Fed. Reg. 707, 708 (Dec. 29, 2009).

⁵⁸ See Morrison, *supra* note 56.

⁵⁹ L. PAIGE WHITAKER, CONG. RESEARCH SERV., RL33918, *THE WHISTLEBLOWER PROTECTION ACT: AN OVERVIEW 1* (2007).

national security directive. Congress ordered its top transportation security agency to create nondisclosure regulations,⁶⁰ and the court practically prohibited the agency from enforcing these regulations by giving scallywag employees an out under the WPA.⁶¹ The ATSA's policy to uphold the safety and security of the United States should be treated as just as important as, if not more important than, an air marshal's right to protest a directive. To hold otherwise would invite further disclosures under the pretense of altruism and would force the agency to lose faith in its employees. Should we really be willing to take that gamble with national security?

In sum, the Federal Circuit's misguided opinion calls for congressional action. *MacLean* flies in the face of an agency's rulemaking authority and thwarts the policy behind an act specifically crafted to secure our nation from potential future threats. Congress must take the necessary steps to restore the TSA's authority to punish an individual who discloses sensitive security information and thereby breaches national security. Moreover, an agency dedicated to protecting our country from threats must have full faith in its employees. We cannot expect the TSA to have faith in its employees if it is forced to keep rogue employees on its payroll. *MacLean* had several alternatives to voice his displeasure with the directive he assumed was a public safety hazard rather than going to the media. The Federal Circuit should not have excused *MacLean*'s failure to take advantage of all options due to a technicality in the law. National security is of utmost importance to the public, the DHS, and the TSA—the Federal Circuit should take note.

⁶⁰ See 49 U.S.C. § 40119(b)(1) (2006).

⁶¹ See *MacLean v. Dep't of Homeland Sec.*, 714 F.3d 1301 (Fed. Cir. 2013).