

2011-3231

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT J. MACLEAN,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

**Petition for Review of the Merit Systems Protection Board decision in
Case No. SF-0752-06-0611-I-2.**

**RESPONDENT, DEPARTMENT OF HOMELAND SECURITY'S COMBINED
PETITION FOR PANEL REHEARING AND REHEARING *EN BANC***

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STATEMENT OF COUNSEL

Based upon my professional judgment, I believe this appeal requires an answer to the following precedent-setting questions of exceptional importance:

(1) Does the exception to the Whistleblower Protection Act (WPA) for disclosures “specifically prohibited by law” include situations in which Congress specifically ordered an agency to pass regulations prohibiting disclosure of a particular category of information?

(2) Is the unauthorized disclosure of Sensitive Security Information (SSI) “specifically prohibited” by the SSI authorizing statutes, including the Aviation and Transportation Security Act (ATSA), such that someone who has improperly publicized SSI may not claim whistleblower status pursuant to the WPA to avoid discipline?

/s/Michael P. Goodman
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BASIS FOR SEEKING REHEARING EN BANC

The Panel held that under the WPA an individual employee's decision to disclose SSI outweighs the Government's expert judgment that revealing such information would be detrimental to the security of transportation. As a result, the Panel's decision directly undermines the Executive's ability to carry out Congress' mandate to prohibit the disclosure of SSI. The decision also conflicts with numerous other courts' decisions holding that there is no exception for SSI disclosure under Exemption 3 of the Freedom of Information Act, 5 U.S.C. 552 (FOIA), which Congress intended to be coextensive with the WPA exception.

POINTS OF LAW OVERLOOKED OR MISAPPREHENDED BY THE PANEL'S DECISION

The Panel held that revealing SSI is not "specifically prohibited by law" within the meaning of the WPA. In reaching that conclusion, the Panel committed three fundamental errors.

First, the Panel erred when describing the framework for assessing whether a statute prohibiting disclosure fits within the WPA's exception. The Panel understood that exception's applicability to depend upon whether Congress has itself delineated which specific information's disclosure Congress intends to prohibit. That conclusion was based upon the Panel's view that a Senate Report accompanying the WPA reveals the "specifically

prohibited by law” exception to be inapplicable when Congress delegates discretion to an agency to describe prohibited disclosures. In fact, however, whether Congress chooses to delegate the task of effectuating its intent is immaterial to the inquiry; what matters is whether Congress has expressed the intent to prevent the disclosure of information.

Second, the Panel misapprehended the WPA’s legislative history. The same Senate Report relied upon by the Panel reveals that Congress did not intend to exclude statutes that delegate the task of describing prohibited disclosures to agencies from the WPA’s exception. Rather, that history compels the opposite conclusion, as it reveals that Congress explicitly intended the National Security Act’s delegation of broad discretion to the Director of Central Intelligence to describe prohibited disclosures to fall within the WPA’s “specifically prohibited by law” exception.

Finally, the Panel overlooked that Congress intends the WPA’s “specifically prohibited by law” exception to be coextensive with matters not required to be disclosed under FOIA. In contrast to the Panel’s conclusion that the SSI statutes are not “specifically prohibited by law” for purposes of the WPA, every court that has addressed the question has determined that the SSI statutes describe information that need not be revealed under FOIA.

STATEMENT

This case involves TSA's removal of a federal air marshal, Robert MacLean, for improperly disclosing SSI to a reporter. Mr. MacLean first appealed his removal to the Merit Systems Protection Board (MSPB), but obtained dismissal of that proceeding pending his related challenge then proceeding before the Ninth Circuit Court of Appeals, wherein Mr. MacLean challenged TSA's determination that the information he had disclosed was, in fact, SSI. The Ninth Circuit found that the disclosed information was SSI, as it contained specific details of aviation security measures regarding deployment and missions of federal air marshals.

After his appeal was re-filed at the MSPB, the administrative judge found that Mr. MacLean committed the act for which he was charged, disclosing SSI to a reporter, and the full board concluded that a disclosure of SSI cannot give rise to whistleblower protection, explaining, "we find that the appellant's disclosure of SSI was 'specifically prohibited by law' because the regulation that he violated when he disclosed information about [Federal Air Marshal] deployments was promulgated pursuant to an explicit Congressional mandate that required TSA to prohibit such disclosures."

Upon appeal, the Panel reversed the MSPB's legal holding that disclosures of SSI are exempt from the WPA, holding, instead, that "the

ATSA does not ‘specifically prohibit’ the disclosure at issue in this case.”

Slip. Op. at 11. The Panel reached that conclusion based upon an understanding of the phrase “specifically prohibited by law” in the WPA as referring only to statutes that afford an agency little to no discretion in describing the information that would be exempt from the WPA’s protection. In other words, the Panel concluded that the specificity requirement must be accomplished by a statute itself, rather than through delegation to an agency.

To reach the conclusion that the ATSA does not contain the requisite specificity, the Panel noted that “[t]he ATSA’s plain language does not expressly prohibit employee disclosures, and only empowers the Agency to prescribe regulations prohibiting disclosure of SSI ‘*if the Secretary decides disclosing the information would . . . be detrimental to public safety.*’” Slip. Op. at 11-12 (emphasis in original)). The Panel then looked to the legislative history of the WPA, specifically referring to a Senate Report that accompanied passage of the WPA. Slip. Op. at 12. The Panel stated that in contrast to the Senate Report’s description:

[T]he ATSA does not describe specific matters to be withheld. It provides only general criteria for withholding information and gives some discretion to the Agency to fashion regulations for prohibiting disclosure. Thus, the ATSA does not ‘specifically prohibit’ employee conduct within the meaning of the WPA.

Slip. Op. at 12. The Panel concluded that while the ATSA presents “a very close case”:

the ATSA appears to fall in the middle of the spectrum of statutes flanked at opposite ends by (a) those that fall squarely under the WPA’s ‘specifically prohibited by law’ proviso, such as the Trade Secrets Act and § 6013 of the Internal Revenue Code, and (b) those in which Congress delegates legislative authority to an administrative agency without circumscribing the agency’s discretion.

Slip. Op. at 13.

ARGUMENT IN SUPPORT OF REHEARING

For nearly forty years, Congress has directed the Executive to prevent the disclosure of information that when revealed would “be detrimental to the security of transportation.” *See* 49 U.S.C. §§ 114(r) (granting authority to the TSA Administrator); 40119(b) (granting the same authority to the Secretary of Transportation); *See* Pub. L. No. 93-366 § 316, 88 Stat. 409, 415-17 (1974). This information, known as SSI, includes aircraft operator security plans, security incident response plans, vulnerability assessments and security measure information about deployments, numbers and operations of Federal Air Marshals. In passing the SSI authorizing statutes, Congress recognized that there are certain types of unclassified information that could impose a danger to public safety if publicly disclosed and ordered the agencies to set up rules to prohibit such disclosure. The Panel’s

decision, providing an exception for individual employees who choose to publicly disclose SSI in the context of whistleblowing activities, eviscerates the Executive's ability to carry out that mandate and creates a public safety risk. This is because individual employees who have access to SSI may not understand why it is sensitive, how it implicates other information to which they do not have access, or how it exposes certain vulnerabilities about which the employee is unaware. By holding that the disclosure of SSI is not "specifically prohibited by law" within the meaning of that exception to the WPA, the Panel adopted an overly formalistic approach that ignores congressional intent.

A. The Panel Misinterpreted the Exception to the WPA

The WPA generally protects federal employees from discipline who disclose certain information, but an exception permits the federal government to discipline an employee for making a disclosure if the employee's disclosure of information is "specifically prohibited by law" or the information disclosed is "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. § 2302(b)(8).

The Panel interpreted that exception as applicable only when a statute curtails agency discretion by providing "express instructions" of the

“parameters” of information for which the agency is to prevent disclosure. *See Slip. Op.* at 13-14. In the Panel’s view, the degree of discretion any particular statute has delegated to an agency provides the touchstone of whether the WPA’s exception is applicable to that statute’s prohibition upon disclosure. *See Slip. Op.* at 13 (describing as statutes that do not fall within the “specifically prohibited by law” exception those statutes “in which Congress delegates legislative authority to an administrative agency without circumscribing the agency’s discretion”).

Based upon that interpretation, the Panel focused upon the specificity of Congress’ description of the protected disclosures themselves, compared the SSI authorizing statutes to other mandates prohibiting the disclosure of information, and found that, in comparison, the SSI authorizing statutes contain “insufficient specificity.” *Slip. Op.* at 12. The Panel therefore concluded that the congressional mandate in the SSI authorizing statutes is not an adequately specific command.

The Panel applied an overly formalistic framework. By focusing upon the specificity of Congress’ description of protected disclosures, the Panel misapprehended the meaning of the WPA exception. As the Panel recognized, when Congress passed the WPA, Congress changed the language “specifically prohibited by law, rule, or regulation” to simply

“prohibited by law.” Slip. Op. at 12. In doing so, Congress made clear that it did not intend to permit agencies to bypass the WPA by simply passing internal procedural regulations that prohibit disclosures. The Panel went too far in concluding that the agencies could play no part in prohibiting disclosures, however. Congress’s effort to ensure that agencies could not bypass the WPA by unilaterally passing internal procedural regulations does not mean that Congress intended to eliminate its own ability to delegate to agencies the task of determining what information should be prohibited from disclosure pursuant to Congressional direction.

Indeed, the second portion of the exception, encompassing information “specifically required by Executive order to be kept secret” operates through passage of Executive Order 13,526 governing classified information. Like the SSI authorizing statutes, that Order does not define the information that is classified and prohibited from public disclosure, but instead empowers certain agencies to determine whether “the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security.” Thus, when the WPA exception refers to information the disclosure of which is “specifically” prohibited by either law or Executive Order, Congress was including prohibitions achieved through delegation to agencies.

B. The Panel Misapprehended The WPA's Legislative History

The Panel concluded that its reading of the WPA was confirmed by that Act's legislative history, specifically referencing a Senate Report accompanying the Act's passage. Slip. Op. at 12. In fact, contrary to the Panel's conclusion, a more complete reading of that Senate Report reveals that Congress intended the "specifically prohibited by law" exception to apply to disclosures of information that Congress broadly describes and directs an agency to further delineate. A longer quotation from the Senate Report than that cited by the Panel explains:

Those disclosures which are specifically exempted from disclosure by a statute which requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, **or by a statute which establishes particular criteria for withholding or refers to particular types of matters to be withheld**, are not subject to the protections of this section. It is the Committee's understanding that Section 102(D)(3) of the National Security Act of 1947 [NSA], which authorizes protection of national intelligence sources and methods, has been held to be such a statute.

S. Rep. No. 969, 95th Cong., 2d. Sess. (1978), reprinted in 1978

U.S.C.C.A.N. 2723, 2743-44 (Senate Report).

Within that language, the Senate Report describes three types of statutes that Congress intended to qualify as statutes whose prohibition upon disclosure are "specifically prohibited by law." One of those types is a

statute “which requires that matters be withheld from the public in such a manner as to leave no discretion on the issue.” *Id.* The second and third type is a statute that “establishes particular criteria for withholding,” or “refers to particular types of matters to be withheld.” *Id.* When citing the Senate Report, the Panel appears to have conflated the three different types of statutes into a single category, thereby incorrectly concluding that discretion, or more specifically the lack of discretion, was a critical feature for each statute Congress meant to exclude from the WPA. In fact, however, discretion is a component only of the first of the three types of statutes.

In addition, that section of the NSA that the Senate Report refers to provided that “the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure.” 50 U.S.C. § 403(d)(3) (now codified at 50 U.S.C. § 403-1(i)(1)). As the Supreme Court noted, by passing that provision, “Congress chose to vest the Director of Central Intelligence with the broad discretion to safeguard the Agency’s sources and methods of operation.” *C.I.A. v. Sims*, 471 U.S. 159, 174-75 (1985). Thus, in the Senate Report accompanying passage of the WPA, Congress specifically referred to a statute granting “broad discretion” to an agency to prevent disclosure as an example of the type of statute Congress intended to be included within the WPA’s “specifically prohibited

by law” exception. The Panel overlooked the Senate Report’s reference to the NSA, and the consequence that follows: that “broad discretion” being afforded to an agency does not exclude a statute from qualifying as a prohibition upon disclosure that is “specifically prohibited by law.”

The SSI authorizing statutes’ grant of authority to prevent the disclosure of air security information is a grant of discretion similar in all respects to Congress’ grant of “broad discretion” to the CIA director in the NSA. Both statutes relate to national security concerns and grant the agencies’ principals broad discretion in determining what information must be protected to effectuate their missions. Accordingly, the legislative history confirms the plain language reading of the statutes, that Congress’ direction to the agencies to prevent the disclosure of SSI results in SSI’s disclosure being “specifically prohibited by law” within the meaning of the WPA.

C. The Panel Overlooked That Congress Intends The “Specifically Prohibited By Law” Exception To Be Coextensive With Exemption 3 Of The Freedom Of Information Act

The legislative history relied upon by the Panel demonstrates that Congress intended the “specifically prohibited by law” exception to be coextensive with Exemption 3 of FOIA, which Congress had then recently amended. Exemption 3 provides that information may be withheld from a FOIA release if it is “specifically exempted from disclosure by statute.” 5

U.S.C. § 552(b)(3). A statute falls within the Exemption 3 category if it: (1) “requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue,” (2) “establishes particular criteria for withholding,” or (3) “refers to particular types of matters to be withheld.” 5 U.S.C. § 552(b)(3)(A). That language is identical to the legislative history underlying the WPA exemption, in which Congress explained that a covered statute is one that: (1) “requires that matters be withheld from the public as to leave no discretion on the issue,” (2) “establishes particular criteria for withholding,” or (3) “refers to particular types of matters to be withheld.” Senate Report at 2743-44.

In addition to using the identical Exemption 3 language when describing WPA’s “specifically prohibited by law” exception, the Senate Report explicitly described cases holding that the National Security Act was a nondisclosure statute within Exemption 3 of FOIA because it refers to particular types of matters to be withheld. In that statement, the Committee was referring to those cases that had held that Section 102(D)(3) of the National Security Act of 1947 fell within that FOIA Exemption 3. *See, e.g. Nat’l Com’n on Law Enforcement and Social Justice v. C.I.A.*, 576 F.2d 1373, 1376 (9th Cir. 1978) (“Exemption Three authorizes nondisclosure of materials specifically exempted by statutes which refer to ‘particular types

of matter to be withheld.’ We conclude that the statutes under which the CIA justifies its nondisclosure describe with sufficient particularity the types of information to be withheld.”). Thus, the Senate Report explicitly described cases holding that the NSA fell within FOIA Exemption 3 as cases holding that the NSA was a statute that created nondisclosures “specifically prohibited by law.”

Every court to have addressed the parallel question about whether the SSI authorizing statutes fall within Exemption 3 has concluded that they do. In other words, those courts have all found these same statutes to be sufficiently specific under the same criteria the Panel applied in this case when the Panel found the statutes to be insufficiently specific for the WPA exemption. For example, the District Court of the District of Columbia recently held that information pertaining to radiation emissions produced by full-body scanning machines used at security checkpoints is exempt from FOIA because that information is SSI, and 49 U.S.C. § 114(r) specifically exempts SSI from disclosure. *See Elec. Privacy Info. Ctr. (EPIC) v. Dep’t of Homeland Sec.*, No. 10-1992, 2013 WL 829483, at *4 (D.D.C. Mar. 7, 2013) citing *Tooley v. Bush*, No. 06-306, 2006 WL 3783142, at *20 (D.D.C. Dec. 21, 2006) (holding that 49 U.S.C. § 114(r) specifically exempts SSI from FOIA disclosure), *rev’d & remanded in part on other grounds sub*

nom., *Tooley v. Napolitano*, 556 F.3d 836 (D.C. Cir. 2009). Similarly, the Northern District of California concluded that “there is no dispute that these statutes fall within Exemption 3.” *Gordon v. F.B.I.*, 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004). There is no reason why those findings should not apply in the context of the WPA. The Panel’s decision in this case, concluding that the same statutes fail to meet these same criteria when viewed under the WPA exemption, is thus in conflict with these holdings.

ARGUMENT IN SUPPORT OF REHEARING *EN BANC*

The Panel decision attempted to craft a compromise position, wherein the Panel assumed that the Executive could continue to prevent the disclosure of information through FOIA, but must permit an employee to disclose that same information if the employee is a whistleblower. But as explained above, the same standard applies to both the question whether information must be released under FOIA and the question whether the WPA exception applies. The decision therefore creates a split of authority about whether the SSI statutes are sufficiently specific to enable the Executive to prevent SSI’s disclosure.

In addition, even if the information could be protected from disclosure through FOIA but not under the WPA, that result would undermine the Executive’s ability to carry out Congress’ mandate to prohibit SSI’s

disclosure. Under the Panel's decision, an employee can disclose that SSI whenever he believes the revealed SSI evidences "a substantial and specific danger to public health or safety." Slip. Op. at 15.

The problem with that outcome is that SSI is, by definition, that information that the Executive has determined would be "detrimental to the security of transportation" when disclosed. In practice, that means that when whistleblowers reveal SSI, their disclosures have a negative impact upon the nation's security. The Panel decision therefore gives individual employees the authority to rely upon their own judgment to weigh the balance between the harm they hope to reveal through whistleblowing and the harm their SSI revelations will cause to national security, whereas Congress explicitly provided that authority to the heads of the transportation security agencies.

Finally, even if this Court were to agree with the Panel that the discretion afforded to the agency is the appropriate gauge of whether a statute fits within the WPA exception, the Court should still consider, *en banc*, whether the SSI authorizing statutes qualify under the WPA exception. Even within that framework, the Panel recognized that whether those statutes are sufficiently specific presents "a very close case." Slip. Op. at 13. Due to the importance of the question whether the Executive may prohibit SSI's disclosure, we respectfully ask that the Court reassess that conclusion.

CONCLUSION

For the foregoing reasons, we respectfully request that the Panel reconsider its decision or the full Court reconsider the decision *en banc*.

Respectfully submitted,

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July 10, 2013

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APPENDUM

**United States Court of Appeals
for the Federal Circuit**

ROBERT J. MACLEAN,
Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent.

2011-3231

Petition for review of the Merit Systems Protection Board in No. SF0752060611-I-2.

Decided: April 26, 2013

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Before PROST, MOORE, and WALLACH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MOORE.

Concurring opinion filed by *Circuit Judge* WALLACH.

MOORE, *Circuit Judge*.

Robert J. MacLean petitions for review of a final decision of the Merit Systems Protection Board (Board), which sustained the Transportation Security Administration's (Agency's) removal of Mr. MacLean from the position of Federal Air Marshal (Marshal). *See MacLean v. Dep't of Homeland Sec.*, 116 M.S.P.R. 562 (2011) (*MacLean II*). Because the Board incorrectly interpreted the Whistleblower Protection Act (WPA), we *vacate* and *remand*.

BACKGROUND

Mr. MacLean became a Marshal in 2001. In July 2003, all Marshals received a briefing from the Agency that there was a "potential plot' to hijack U.S. Airliners." *MacLean II*, 116 M.S.P.R. at 564. Soon after that briefing, however, the Agency sent an unencrypted text message to the Marshals' cell phones cancelling all missions on flights from Las Vegas until early August. After receiving this directive, Mr. MacLean became concerned that "suspension of overnight missions during a hijacking alert created a danger to the flying public." *Id.* He complained to his supervisor and to the Office of Inspector

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General, but they responded that nothing could be done. J.A. 212–13. Dissatisfied, Mr. MacLean told an MSNBC reporter about the directive so as to “create a controversy resulting in [its] rescission.” *MacLean II*, 116 M.S.P.R. at 565. MSNBC published an article criticizing the directive, and the Agency withdrew it after several members of Congress joined in the criticism.

In 2004, Mr. MacLean appeared on NBC Nightly News in disguise to criticize the Agency dress code, which he believed allowed Marshals to be easily identified. However, someone from the Agency recognized his voice. During the Agency’s subsequent investigation, Mr. MacLean admitted that he revealed the cancellation directive to an MSNBC reporter in 2003. Eventually, Mr. MacLean was removed from his position because his contact with the MSNBC reporter constituted an unauthorized disclosure of sensitive security information (SSI). Although the Agency had not initially labeled the text message as SSI when it was sent, it subsequently issued an order stating that its content was SSI.

Mr. MacLean challenged the SSI order in the Ninth Circuit as a violation of the Agency’s own regulations and as an impermissible retroactive action, but the court rejected Mr. MacLean’s challenges. *MacLean v. Dep’t of Homeland Sec.*, 543 F.3d 1145, 1150–52 (9th Cir. 2008). It held that substantial evidence supported designating the text message as SSI under the applicable regulations, *id.* at 1150, and that the Agency did not engage in retroactive action because it “applied regulations . . . in force in 2003” to determine that the text message was SSI, *id.* at 1152.

Mr. MacLean challenged his removal before the Board, arguing that his disclosure of the text message was protected whistleblowing activity. After an interlocutory appeal from the Administrative Judge (AJ), the full Board determined that Mr. MacLean’s disclosure fell

outside the WPA because it was “specifically prohibited by law.” 5 U.S.C. § 2302(b)(8)(A) (2008). The Board reasoned that the regulation prohibiting disclosure of SSI, upon which the Agency relied when it removed Mr. MacLean, had the force of law. *MacLean v. Dep’t of Homeland Sec.*, 112 M.S.P.R. 4, 12–18 (2009) (*MacLean I*).

The AJ then upheld Mr. MacLean’s removal and the Board affirmed in *MacLean II*, the decision now on appeal. Reconsidering *MacLean I*, the Board explained that a regulation is not a “law” within the meaning of the WPA. Instead, the Board held that the disclosure of the text message could not qualify for WPA protection because it was directly prohibited by a *statute*, the Aviation and Transportation Security Act (ATSA). *MacLean II*, 116 M.S.P.R. at 570–71.

The Board also determined that the AJ applied the correct regulation in upholding the Agency’s removal of Mr. MacLean, and that the penalty of removal was reasonable. Moreover, the Board upheld the AJ’s finding that the Agency did not terminate Mr. MacLean in retaliation for his activities on behalf of the Federal Law Enforcement Officers Association (FLEOA) because the unauthorized disclosure of SSI was a non-retaliatory reason for removal. Therefore, the Board sustained the removal.

This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(9).

DISCUSSION

We must affirm the Board’s decision unless it is “(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.” 5 U.S.C. § 7703(c) (2012). We review the Board’s legal

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determinations *de novo*. *Welshans v. U.S. Postal Serv.*, 550 F.3d 1100, 1102 (Fed. Cir. 2008).

I. Application of Agency Regulations to Mr. MacLean's Removal

The Board explained that, “[u]nder the regulations in effect in July 2003, information relating to the deployment of [Marshals] was included within the definition of SSI,” and concluded that, as a result, Mr. MacLean’s communication with a reporter constituted an unauthorized disclosure. *MacLean II*, 116 M.S.P.R. at 569. Mr. MacLean argues, however, that the Board erred by upholding his removal because he was not charged under the right regulation. He explains that the regulation quoted in the initial charge, 49 C.F.R. § 1520.5(b)(8)(ii), was not in force in 2003 and only became codified in 2005. Mr. MacLean contends that the Board wrongly concluded that the regulation it ultimately relied on to uphold his removal, 49 C.F.R. § 1520.7(j), which *was* in force in 2003, is the same as the 2005 regulation. Mr. MacLean argues that the Board violated the rule of *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), because the Board affirmed his removal on grounds different from those under which he was initially charged by the deciding official.

Mr. MacLean also maintains that, although the Ninth Circuit upheld the Agency’s eventual designation of the text message as SSI, his removal violated his due process rights because the message was not labeled SSI when it was sent. He argues that the termination was improper because he did not know that he was violating any Agency rules by revealing the content of the text message. Mr. MacLean admits that he signed a nondisclosure agreement as a condition of his employment, which states that Marshals “may be removed” for “[u]nauthorized release of security-sensitive or classified information.” *MacLean II*, 116 M.S.P.R. at 580. He argues, however, that he believed that the message was not SSI and that, in any

event, he was protected as a whistleblower. Repeating the argument rejected by the Board, Mr. MacLean thus insists that he tried in good faith to proceed within the law.

We do not find Mr. MacLean's arguments challenging the Agency's charge to be persuasive. The regulation that the Board ultimately relied upon to uphold Mr. MacLean's removal, 49 C.F.R. § 1520.7(j) (2002), is no different from the regulation under which he was initially charged, 49 C.F.R. § 1520.5(b)(8)(ii) (2005). The earlier regulation bars disclosing "[s]pecific details of aviation security measures," including "information concerning specific numbers of [Marshals], deployments or missions," while the latter prohibits revealing "specific details of aviation . . . security measures" and "[i]nformation concerning deployments." In fact, the regulation's history shows that § 1520.5(b)(8)(ii) is simply a recodified version § 1520.7(j). *See* J.A. 36. Because the Agency removed Mr. MacLean for revealing SSI, and the Board affirmed the termination for that same reason, the Board did not violate the *Chenery* doctrine.

We likewise reject Mr. MacLean's due process and "good faith" arguments. Both the applicable regulation and the nondisclosure agreement that Mr. MacLean signed put him on notice that revealing information concerning coverage of flights by Marshals could lead to termination. Thus, the Agency did not violate due process even though it formally designated the text message as SSI only after it was sent. Furthermore, we agree with the government 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 or that he was protected as a whistleblower.

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II. Reasonableness of Mr. MacLean's Removal

Mr. MacLean argues that the Board failed to adequately analyze the factors listed in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305–06 (1981), for possible mitigation of the penalty of removal. Mr. MacLean contends that the Board did not take into account the fact that he was a one-time offender and otherwise had an unblemished record. Mr. MacLean also argues that *Douglas's* “comparative discipline” factor did not weigh in favor of removal because other Marshals were not terminated even though they disclosed SSI regarding specific flights. Mr. MacLean contends that the Board ignored the fact that other Marshals' disclosures were for personal gain, while his disclosure exposed and led to correcting an Agency mistake. He thus argues that revealing the text message to a reporter served the public interest, and that his termination undermined the efficiency of the service.

The government counters that the Board did not abuse its discretion when it determined that Mr. MacLean's termination promoted the efficiency of the service. The government argues that there is no evidence that Mr. MacLean's actions made the flying public safer. The government contends that, because 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 scarce resources to address this new vulnerability. The government explains that, although Mr. MacLean was a first-time offender with a clean record, he was properly removed because his disclosure could have had catastrophic consequences. The government argues that Mr. MacLean differs from the Marshals who kept their jobs in spite of SSI breaches because those Marshals compromised only individual flights and showed remorse.

We agree with the government. The Board analyzed the relevant *Douglas* factors and did not abuse its discre-

tion in concluding that Mr. MacLean's removal was not a disparate penalty. *MacLean II*, 116 M.S.P.R. at 576, 580–81. Unlike other Marshals, Mr. MacLean revealed that multiple flights would be unprotected, and we cannot say that it was unreasonable for the Board to find that Mr. MacLean's belief that he was doing the right thing was outweighed by the resulting threat to public safety. Moreover, it was not unreasonable for the Board to determine that Mr. MacLean's conduct "caused the [A]gency to lose trust in him," *id.* at 579, because Mr. MacLean admitted that he has "no regrets" and "feel[s] no remorse for going to a credible and responsible media representative," *id.* at 576. Given these circumstances, the Board did not abuse its discretion by upholding Mr. MacLean's removal.

III. Mr. MacLean's Prohibited Personnel Practice Claim

The Board rejected Mr. MacLean's argument that the Agency violated the Civil Service Reform Act by investigating him in retaliation for his FLEOA activities.¹ The statute at issue prohibits individuals in positions of authority from discriminating against a government employee "on the basis of conduct which does not adversely affect the performance of the employee . . . or the per-

¹ The government submitted a letter arguing that the Board lacked jurisdiction over Mr. MacLean's prohibited personnel practice claim. The government's argument is unsupported by the applicable statutes. The Board has jurisdiction to entertain prohibited personnel practice claims under 5 U.S.C. § 7701(c)(2), which states that "the agency's decision may not be sustained . . . if the employee . . . shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title." Section 7701 applies to Agency employees by virtue of 49 U.S.C. § 40122(g)(2)(H).

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formance of others.” 5 U.S.C. § 2302(b)(10)(A). The Board concluded that Mr. MacLean’s prohibited personnel practice challenge failed because he did not “meet his burden to establish that the reason articulated by the [A]gency was pretextual and that the real reason underlying that decision was his FLEOA activities.” *MacLean II*, 116 M.S.P.R. at 575. Mr. MacLean reasserts his discrimination argument on appeal. He contends that the Agency investigated him because of his 2004 appearance on NBC Nightly News, which he made as part of his advocacy on behalf of FLEOA.

We agree with the government that substantial evidence supports the Board’s conclusion that the Agency did not discriminate against Mr. MacLean on the basis of his FLEOA activities. Agency Policy Directive ADM 3700 “regulate[s] and prohibit[s] [Marshals’] unauthorized contact with the media,” and record evidence is consistent with the AJ’s determination that Mr. MacLean was initially investigated for his unauthorized media appearance, not for his FLEOA activities. J.A. 27. Indeed, it is undisputed that the Agency began to investigate Mr. MacLean “within days of his unauthorized appearance” on NBC Nightly News, which was “approximately 22 months after he began organizing and leading the [FLEOA] chapter.” J.A. 55 (quotation marks omitted). Although the Agency ultimately did not pursue the media appearance charge and focused on the SSI disclosure charge, the initial investigation does not appear to be frivolous or pretextual because it was justified by Directive ADM 3700.

IV. Mr. MacLean’s Affirmative Defense Under the WPA

The WPA prohibits individuals in positions of authority from taking a “personnel action” against a government employee in certain circumstances, particularly

because of any disclosure of information by an employee . . . 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*²

5 U.S.C. § 2302(b)(8) (emphasis added). The Board rejected Mr. MacLean’s affirmative defense that his disclosure of the text message was protected whistleblowing activity because it determined that the disclosure was “specifically prohibited by law” within the meaning of the WPA. The law that the Board relied upon is the ATSA, which states, in relevant part:

Notwithstanding section 552 of title 5 . . . , the Secretary of Transportation *shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would . . . be detrimental to transportation safety.*

49 U.S.C. § 40119(b)(1) (2009) (emphases added). Because its conclusion that revealing the content of the text message was specifically prohibited by the ATSA made further WPA inquiry unnecessary, the Board did not reach the question of whether Mr. MacLean “reasonably believe[d]” that this information “evidence[d] . . . a substantial and specific danger to public . . . safety.” 5 U.S.C. § 2302(b)(8); *see MacLean II*, 116 M.S.P.R. at 581.

The parties do not dispute that, in order to fall under the WPA’s “specifically prohibited by law” proviso, the disclosure must be prohibited by a statute rather than by a regulation. Thus, the core of the disagreement is whether the ATSA “specifically prohibit[s]” disclosure of information concerning coverage of flights by Marshals within the meaning of the WPA.

² The WPA was recently amended by the Whistleblower Protection Enhancement Act (WPEA). Neither party argues that the WPEA applies to this appeal.

Mr. MacLean and his amici (three members of Congress) argue that the Board erroneously concluded that the ATSA's mandate to the Secretary of Transportation to "prescribe regulations prohibiting disclosure" of certain kinds of information is a specific prohibition under the WPA. They contend that the phrase "specifically prohibited by law" in the WPA can only refer to explicit statutory language that identifies specific classes of information. They argue that the ATSA's "detrimental to transportation safety" language does not establish particular criteria for withholding information and leaves a great deal of discretion to the Agency, which is inconsistent with the WPA's requirement of specificity. They contrast the ATSA with the Trade Secrets Act, which directly authorizes removal of any federal employee who divulges information that falls into particular categories. 18 U.S.C. § 1905 (2008); *see also Kent v. Gen. Servs. Admin.*, 56 M.S.P.R. 536, 540–46 (1993).

The government counters that Mr. MacLean violated a regulation promulgated pursuant to an express legislative directive in the ATSA, which made his disclosure "specifically prohibited" by a statute. It thus argues that Mr. MacLean's disclosure does not qualify for WPA protection. The government contends that Mr. MacLean's reading of the WPA eviscerates laws that provide for any Agency discretion in classifying information as SSI, and thus disables Congress from directing agencies to pass nondisclosure regulations. Lastly, the government argues that it does not make sense for Congress to order an agency to promulgate nondisclosure regulations and at the same time prohibit that agency from disciplining an employee for violating those regulations by providing a defense under the WPA.

We agree with Mr. MacLean that the ATSA does not "specifically prohibit" the disclosure at issue in this case. The ATSA's plain language does not expressly prohibit employee disclosures, and only empowers the Agency to

prescribe regulations prohibiting disclosure of SSI “*if the Secretary decides* disclosing the information would . . . be detrimental to public safety.” 49 U.S.C. § 40119(b) (emphasis added). Thus, the 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.

Notably, Congress changed the language “specifically prohibited by law, rule, or regulation” in the statute’s draft version to simply “specifically prohibited by law.” Congress did so because it was concerned that the broader 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.” S. Rep. No. 969, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743. Congress explained that only “a statute which requires that matters be withheld from the public as to leave no discretion on the issue, or . . . which establishes particular criteria for withholding or refers to particular types of matters to be withheld” could qualify as a sufficiently specific prohibition. *Id.* In contrast, the “detrimental to transportation safety” language of the ATSA does not describe specific matters to be withheld. It provides only general criteria for withholding information and gives some discretion to the Agency to fashion regulations for prohibiting disclosure. Thus, the ATSA does not “specifically prohibit” employee conduct within the meaning of the WPA.

The ATSA’s insufficient specificity becomes even more apparent when it is contrasted with statutes that have been determined to fall under the WPA’s “specifically prohibited by law” proviso. For example, the Trade Secrets Act, which the Board in *Kent* held to qualify as a specific prohibition, is extremely detailed and comprehensive. 56 M.S.P.R. at 543–46. That statute penalizes federal employees who “divulge[] . . . any information

coming to [them] in the course of [their] employment . . . which information concerns or relates 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” 18 U.S.C. § 1905. The same is true of § 6013 of the Internal Revenue Code, which the Ninth Circuit in *Coons v. Secretary of the Treasury*, 383 F.3d 879, 890–91 (9th Cir. 2003), held to fall within the meaning of the WPA’s “specifically prohibited” language. That statute prohibits federal employees from “disclos[ing] any return or return information obtained by him in any manner in connection with his service,” 26 U.S.C. § 6013(a)(1), and then goes on to define “return” and “return information” in explicit detail, mentioning such things as “a taxpayer’s identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, overassessments, or tax payments . . . ,” *id.* § 6013(b)(1), (2). Thus, when Congress seeks to prohibit disclosure of specific types of information, it has the ability to draft the statute accordingly.

Nonetheless, we note that the ATSA’s charge to the Secretary of Transportation to prescribe regulations pursuant to specific criteria (i.e., only information that would be detrimental to transportation safety) makes this a very close case. Indeed, the ATSA appears to fall in the middle of the spectrum of statutes flanked at opposite ends by (a) those that fall squarely under the WPA’s “specifically prohibited by law” proviso, such as the Trade Secrets Act and § 6013 of the Internal Revenue Code, and (b) those in which Congress delegates legislative authority to an administrative agency without circumscribing the agency’s discretion. Regulations promulgated pursuant to Congress’s express instructions would qualify as specific legal prohibitions. In this case, given the clarity of the statutory language and legislative intent behind the

WPA's specificity requirement, the parameters set by Congress are not enough to push the ATSA over that threshold.

We are similarly unpersuaded by the government's argument that a parade of horrors necessarily follows our adoption of Mr. MacLean's interpretation of the WPA. The government argues that, if Mr. MacLean is allowed to pursue his whistleblower defense, the WPA would in effect prohibit later Congresses from directing agencies to pass nondisclosure regulations. The government is concerned that, under Mr. MacLean's reading, the WPA would prohibit agencies from disciplining employees for violating nondisclosure regulations and thereby prevent agencies from enforcing such regulations.

The government is mistaken. In spite of the WPA, Congress remains free to enact statutes empowering agencies to promulgate and enforce nondisclosure regulations, and it has done so in the ATSA. The government ignores the fact that the ATSA covers a wide range of conduct that would not qualify as whistleblowing. For example, no one disputes that the ATSA empowers the Agency to promulgate regulations that enable it to discipline employees who reveal SSI for personal gain or due to negligence, or who disclose information that the employee does not reasonably believe evidences a substantial and specific danger to public health or safety. The WPA also does not prohibit the Agency from following the ATSA's mandate to regulate public access to information that the Agency might otherwise be forced to disclose under the Freedom of Information Act (FOIA). Indeed, it appears that the paramount goal of the ATSA is to empower the Agency to reject the public's requests for Agency intelligence because the statute recites that, "[n]otwithstanding [FOIA] . . . , the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title." 49 U.S.C. § 40119(b)(1); *see also Public*

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Citizen, Inc. v. FAA, 988 F.2d 186, 194–96 (D.C. Cir. 1993) (analyzing the predecessor statute to the ATSA and explaining that Congress’s desire to enable the Agency to bar FOIA requests for information that qualifies as SSI was one of the driving forces behind the passage of that statute). Our interpretation of the WPA does not deprive the ATSA of meaning.

CONCLUSION

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. For example, it remains to be determined whether Mr. MacLean reasonably believed that the content of his disclosure evidenced a substantial and specific danger to public health or safety.

VACATED AND REMANDED

**United States Court of Appeals
for the Federal Circuit**

ROBERT J. MACLEAN,
Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,
Respondent.

2011-3231

Petition for review of the Merit Systems Protection Board in No SF0752060611-I-2.

WALLACH, *Circuit Judge*, concurring.

Mr. MacLean presented substantial evidence that he was not motivated by personal gain but by the desire to protect the public. He averred proof that he sought direction from his supervisors before making allegedly protected disclosures. While I join in the analysis and the result of the majority opinion, I concur to emphasize that the facts alleged, if proven, allege conduct at the core of the Whistleblower Protection Act.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 10th day of
July, 2013, a copy of the foregoing
Combined Petition For Panel Rehearing and Rehearing En Banc
was filed electronically.

This filing was served electronically to all parties by operation of the Court's
electronic filing system.

/s/Michael P. Goodman

I caused a copy of this filing to be served via:

hand delivery

mail

third-party commercial carrier for delivery within 3 days

electronic means, with the written consent of the party being served

To the following address:
