

# Supreme Court Hears Oral Argument in Federal Whistleblower Case

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On November 4, the Supreme Court heard [oral argument](#) in [DHS v. MacLean](#), where the government is appealing a Federal Circuit decision finding a former Transportation Security Administration (TSA) employee who disclosed sensitive information to the media protected by the Whistleblower Protection Act (WPA). The Court's decision could have significant implications for federal whistleblowers moving forward.

MacLean is a former federal air marshal with TSA who attended a TSA briefing on a potential terrorist plot to hijack U.S. airplanes in July 2003. Soon after, TSA sent air marshals, including MacLean, a text message informing them that certain overnight missions were canceled, meaning some flights would not have air marshals onboard. At the time, [TSA regulations](#) generally prohibited public disclosure of Sensitive Security Information (SSI). SSI included, among other things, information on "specific details of aviation security measures" such as "information concerning specific numbers of Federal Air Marshals, deployments, or missions..." Therefore, TSA's text message to MacLean appeared to be SSI which could not be disclosed to the public under TSA regulations, though it was not labeled as such when sent to MacLean. Maclean believed that pulling air marshals from certain flights during an ongoing threat of terrorist airplane hijackings endangered the public, and brought his concerns to both his supervisor and the agency's Inspector General. Unhappy with their responses, he then disclosed the text message contents to media sources, which later led to his termination. MacLean challenged his termination under the WPA.

[In relevant part](#), the WPA protects covered federal employees against prohibited personnel action taken because of protected disclosures. Generally speaking, such protected disclosures include, for example, disclosures of information evidencing violations of law, rule, or regulation, or dangers to public safety. However, the WPA does not protect disclosures that are "specifically prohibited by law." MacLean's challenge to his termination came before the Federal Circuit, which [held](#) that his disclosure was protected under the WPA, and thus that his termination was improper. The government appealed the Federal Circuit decision to the Supreme Court.

On appeal, the government argues that MacLean's disclosures were not protected under the WPA as they were "specifically prohibited by law" in the form of TSA's SSI regulation. In response, MacLean argues that the WPA's "specifically prohibited by law" language denies whistleblower protections only to disclosures prohibited by *statutes*, not those prohibited by *agency regulations*. In the alternative, the government argues that even if the WPA's "specifically prohibited by law" language encompasses only statutory prohibitions, MacLean's disclosure was prohibited by the [Aviation and Transportation Security Act](#) (ATSA), which provided the statutory authorization for TSA's SSI regulation. According to MacLean, however, the ATSA merely authorizes TSA to implement regulations prohibiting disclosures, but does not actually prohibit anything. Therefore, MacLean argues, the ATSA did not "specifically prohibit" his disclosure. [Multiple commentators observed](#) that the Justices of the Supreme Court appeared to favor MacLean's position at oral argument.

The Supreme Court's decision in *MacLean* could have far-reaching implications for federal whistleblowers. If the Court decides that the WPA does not protect disclosures prohibited by agency regulations, agencies would have wider latitude in preventing the dissemination of agency information. On the one hand, this could help to prevent sensitive agency security information from falling into the possession of the wrong people. On the other hand, agencies could potentially use regulations to block legitimate whistleblowers from bringing to light information on agency fraud, waste, and abuse. Additionally, the Court's decision may help clarify just how precise a statute's prohibition on public disclosure has to be for the disclosure to be

“specifically prohibited by law,” and thus unauthorized under the WPA.

The Supreme Court is expected to issue a decision in *DHS v. MacLean* by the end of June.