

2015

Department of Homeland Security v. MacLean: What Law is and Who Makes It

Kristine A. Bergman

Joseph Weishampel

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [Transportation Law Commons](#)

Recommended Citation

Kristine A. Bergman, & Joseph Weishampel, *Department of Homeland Security v. MacLean: What Law is and Who Makes It*, 46 Loy. U. Chi. L. J. 1067 (2015).

Available at: <http://lawcommons.luc.edu/lucj/vol46/iss4/9>

Recent Development

Department of Homeland Security v. MacLean: What Law is and Who Makes It

*Kristine A. Bergman** and *Joseph Weishampel***

On January 21, 2015, the Supreme Court decided *Department of Homeland Security v. MacLean*.¹ In a 7–2 decision written by Chief Justice Roberts, the Court held that to satisfy the Whistleblower Protection Act (“WPA”), 5 U.S.C. § 2302(b)(8)(A), limitations on whistleblower protections must be established specifically by statute, not by administrative rules or regulations.² The Court further held that the Transportation Security Administration’s (“TSA”) power to “prescribe regulations prohibiting the disclosure of information . . . detrimental to the security of transportation” did not give those regulations the force of law,³ and that the TSA could not prevent disclosure of that information by promulgating regulations.⁴ Justice Sotomayor, joined by Justice Kennedy, dissented, arguing that Congress had only given the TSA a mandate to identify the information not to be disclosed.⁵ Therefore, the dissent contended, the limitations on disclosures still came from congressional statutes, and were valid rules

* Kristine Bergman is a Juris Doctor Candidate, expected to graduate in May 2015 from Loyola University Chicago School of Law. She would like to thank Professor Barry Sullivan for helping her understand everything about the Supreme Court; Griffen Thorne for his great EIC work and this opportunity; and Joseph Weishampel for his hard work and patience.

** Joseph Weishampel is a Juris Doctor Candidate, expected to graduate in May 2015 from Loyola University Chicago School of Law. During his time at Loyola, Mr. Weishampel competed as a brief writer on Loyola’s National Moot Court team and served as an academic tutor. He would like to thank Griffen for this opportunity, and Kristine for her expertise and adaptability.

1. Dep’t of Homeland Sec. v. MacLean, 135 S. Ct. 913 (2015).

2. *Id.* at 924; see 5 U.S.C. § 2302(b)(8)(A) (2012) (stating that a whistleblower may report any violation of any law, rule, or regulation if “such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs”). Neither party in *MacLean* contended that an executive order was at issue in this case.

3. 49 U.S.C. § 114(r)(1)(C) (2012).

4. *MacLean*, 135 S. Ct. at 924.

5. 49 U.S.C. § 114(r); *MacLean*, 135 S. Ct. at 925 (Sotomayor, J., dissenting).

of law.⁶

Both the majority and the dissent in *MacLean* resolved the case on the basis of statutory construction.⁷ Perhaps that explains why this case defied the Court’s recent trend, which disfavors government-employee whistleblowers. For example, in the 2006 case *Garcetti v. Ceballos*, the Court held that the First Amendment did not protect a deputy district attorney who was reassigned and transferred after he made meritorious complaints about the validity of an affidavit.⁸ Government-employee whistleblowers—such as Robert MacLean—had little recent precedent to support their arguments.

The WPA protects a federal employee from any “personnel action”⁹ against him or her for the disclosure of any information that the employee “reasonably believes evidences—(i) any violation of any law, rule, or regulation, (ii) or . . . a substantial and specific danger to public health or safety.”¹⁰ The same provision, however, also includes an exception: an employee is not shielded from a personnel action if disclosure of the information is “specifically prohibited by law.”¹¹

In late 2001, Congress enacted the Aviation and Transportation Security Act (“ATSA”),¹² which established a new federal agency—the

6. *MacLean*, 135 S. Ct. at 926.

7. *Id.* at 919 (majority opinion) (“The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force here”); *id.* at 924 (Sotomayor, J., dissenting) (“[T]he Transportation Security Administration (TSA) ‘shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security’” (emphasis added) (citing 49 U.S.C. § 114(r)(1)).

8. *Garcetti v. Ceballos*, 547 U.S. 410, 425–26; see *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (holding that when the government acts as an employer, its powers to abrogate the First Amendment are much stronger than in other circumstances). The Court did hold, in 2014, that the Sarbanes-Oxley Act contained whistleblower protections, but these applied specifically to private-sector whistleblowers. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014). *Lawson* did not address public employee whistleblowers.

9. A personnel action is defined as:

[A]n appointment; a promotion; . . . [a] disciplinary or corrective action; a detail, transfer, or reassignment; a reinstatement; a restoration; a reemployment; a performance evaluation under chapter 43 of this title; a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; a decision to order psychiatric testing or examination; the implementation or enforcement of any nondisclosure policy, form, or agreement; and any other significant change in duties, responsibilities, or working conditions.

5 U.S.C. § 2302(a)(2) (2012).

10. *Id.* § 2302(b)(8)(A).

11. *Id.*

12. 49 U.S.C. § 114.

TSA—to “address the security of the nation’s transportation system.”¹³ The ATSA allowed the TSA to promulgate regulations to define the scope of, and restrict the release of, “sensitive security information” (“SSI”).¹⁴

Respondent Robert MacLean worked for the Federal Air Marshals Service,¹⁵ a subsection of the TSA that employed trained individuals to “detect, deter, and defeat hostile acts targeting U.S. air carriers, airports, passengers, and crews.”¹⁶ Air marshals like MacLean were trained on SSI regulations, such as the prohibition against disclosing a marshal’s flight number and flight times when on a mission.¹⁷

In 2003, MacLean and other air marshals were briefed on a potential terrorist threat targeted at long-distance flights, both domestic and international.¹⁸ Approximately forty-eight hours later, MacLean received a text message from a TSA superior stating that until further notice, federal air marshals would not be deployed on overnight missions from Las Vegas.¹⁹ MacLean, concerned about the decision to cancel these missions in light of the recent warning, questioned his superior about this decision.²⁰ His superior responded that overnight missions had been eliminated to save money on hotels, overtime, and travel allowances.²¹

MacLean, firmly believing these cancellations significantly threatened public security, “blew the whistle.”²² He contacted a reporter for MSNBC, who subsequently reported on and criticized the TSA deployment procedures.²³ Thus, TSA was compelled to change its plans and not cancel all overnight missions as intended.²⁴

13. Brief for Petitioner at 2, *Dep’t of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015) (No. 13-894) (quoting H.R. CONF. REP. No. 296, 107th Cong., 1st Sess. 54 (2001)).

14. *Id.* at 2–3; see 49 U.S.C. § 114(r)(1)(C) (stating in relevant part, “the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the [ATSA]. . . . [I]f the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.”).

15. Brief for Respondent at 9, *Dept. of Homeland Sec. v. MacLean*, 135 S. Ct. 913 (2015) (No. 13-894).

16. *Id.* (citing *Federal Air Marshals*, TSA, <http://www.tsa.gov/about-tsa/federal-air-marshals> (last updated Feb. 26, 2013)).

17. Brief for Petitioner, *supra* note 13, at 6–7.

18. *Id.* at 7.

19. Brief for Respondent, *supra* note 15, at 10.

20. *Id.*

21. *Id.* at 10–11.

22. *Id.* at 11. MacLean did attempt to report and question the decision to cancel flights to higher authorities within the TSA and was warned not to question his superiors and to consider his career’s future. *Id.* at 10–11.

23. Brief for Petitioner, *supra* note 13, at 8.

24. *Id.*

At the time, MacLean was not identified as the whistleblower in this matter.²⁵ MacLean continued to work as an air marshal for the TSA until 2005,²⁶ when he anonymously appeared on television to criticize the agency's dress-code policies.²⁷ Despite digital voice alteration, MacLean was identified by TSA employees and was formally investigated by the Department of Homeland Security ("DHS") in May 2005.²⁸ During the investigation, MacLean admitted to his involvement with the 2003 leak. In September 2005, MacLean was fired from his position as air marshal for disclosing SSI without authorization.²⁹

MacLean challenged his removal to the Merit Systems Protection Board ("MSPB"), arguing, in part, that the message received in the text message did not qualify as SSI, and, even if it did, that his disclosure was protected by the WPA.³⁰ When the TSA responded to the proceeding by issuing an *ex parte* order declaring the information to be SSI, MacLean appealed the order to the Court of Appeals for the Ninth Circuit; however, that court, deferring to internal regulations, sided with the TSA.³¹

When MacLean's case returned to the MSPB, the Board affirmed the agency's decision.³² The MSPB relied on the Ninth Circuit's opinion to reason that the text message was properly characterized as SSI.³³ Further, because MacLean had disclosed information that was specifically prohibited from release by a promulgated rule, the disclosure was "specifically prohibited by law" and thus not subject to WPA whistleblower protections.³⁴

The Court of Appeals for the Federal Circuit reversed.³⁵ The court reasoned that the ATSA did not specifically prohibit the disclosure of the relevant SSI because these SSI disclosures were only prohibited by a

25. Brief for Respondent, *supra* note 15, at 12.

26. *Id.* at 13.

27. *Id.* at 12.

28. *Id.* at 12–13.

29. *Id.* at 13.

30. *Id.*

31. MacLean v. Dep't of Homeland Sec., 543 F.3d 1145, 1150 (9th Cir. 2008).

32. MacLean v. Dep't of Homeland Sec., No. SF-0752-06-0611-I-2, 2009 WL 1759557, at *12 (M.S.P.B. June 22, 2009).

33. Brief for Petitioner, *supra* note 13, at 10.

34. *Id.*

35. MacLean v. Dep't of Homeland Sec., 714 F.3d 1301, 1310 (Fed. Cir. 2013). The Court of Appeals for the Federal Circuit has exclusive jurisdiction to review decisions from the MSPB pursuant to 28 U.S.C. § 1295(a)(9) (2012), whereas other courts of appeal have exclusive review of final agency orders issued within lower courts of their jurisdiction pursuant to 49 U.S.C. § 46110(c) (2012).

TSA-promulgated regulation.³⁶ Thus the court emphasized that “prohibited by law” meant only law as enunciated in a statute.³⁷ The DHS petitioned the Supreme Court for a writ of certiorari, which the Court granted.³⁸

The primary issue argued to the Court was whether “law,” within the context of the WPA, was limited to legislative law, or included law created by an administrative agency, such as through a regulation or promulgated rule.

Petitioner DHS argued that the SSI-disclosure prohibitions satisfied the “prohibited by law” requirement no matter whether they appeared in a statute or in an administrative regulation.³⁹ The DHS relied on *Chrysler Corp. v. Brown*⁴⁰ for the assertion that “properly promulgated, substantive agency regulations have the ‘force and effect of law.’”⁴¹ Further, because this *Chrysler* doctrine was so well established in American jurisprudence, “[i]t would therefore take a clear showing of contrary legislative intent”⁴² for a court to define “law” so narrowly as to exclude administrative rules and regulations.⁴³ Thus, as the DHS argued, because nothing in the WPA provides a clear showing that “by law” was intended to exclude SSI disclosure regulations,⁴⁴ a court should follow *Chrysler* and assume “by law” includes those regulations.⁴⁵

The DHS also pointed to the legislative history of the WPA to support its broader interpretation of “by law.” Originally the Senate proposed to limit the exception to disclosures to those “prohibited by statute,” but later adopted the broader “prohibited by law” language.⁴⁶ Although the DHS acknowledged that clearly Congress intended that some agency regulations be excluded in the “by law” meaning, this did not mean that all regulations were excluded from the “by law” scope.⁴⁷

Finally, the DHS argued that a decision in MacLean’s favor would contravene public policy, and specifically would threaten public safety. For example, an employee who wrongfully disclosed SSI to avoid

36. *MacLean*, 714 F.3d at 1309.

37. *Id.*

38. Dep’t of Homeland Sec. v. MacLean, 134 S. Ct. 2290 (2014) (mem.).

39. 5 U.S.C. § 2302(b)(8)(A) (2012); Brief for Petitioner, *supra* note 13, at 19.

40. 441 U.S. 281 (1979).

41. *Id.* at 295, n.18, cited in Brief for Petitioner, *supra* note 13, at 19.

42. *Id.* at 296, cited in Brief for Petitioner, *supra* note 13, at 20.

43. *Id.*, cited in Brief for Petitioner, *supra* note 13, at 20.

44. Brief for Petitioner, *supra* note 13, at 21.

45. *Id.*

46. *Id.* at 25–26.

47. *Id.* at 26.

disciplinary action could use the WPA as a shield against employment termination.⁴⁸

Respondent MacLean's argument focused on the fact that "by law" cannot include an administrative "rule or regulation" in this specific statute when the statute earlier uses the specific "law, rule, or regulation" language within the same provision.⁴⁹ Further, MacLean relied on the purported purpose of the WPA, arguing that if an agency could promulgate rules preventing disclosures of information supported by reasonable cause, this would "close off the very openness the WPA seeks to create."⁵⁰

The Court relied heavily on the text of 5 U.S.C. § 2302 to hold that MacLean's disclosures were protected.⁵¹ Specifically, the Court held that the many references to "law, rule, or regulation" in § 2302 indicated that a reference only to "law" should be read to exclude "rule" or "regulation."⁵² The Court also noted that 49 U.S.C. § 114(r)(1)(C) vests discretion in the TSA, which supported the Court's interpretation.⁵³ Finally, the Court declared that it was unmoved by the government's public policy argument; even if there existed an urgent need to prevent disclosure, that was a matter for Congress or the President.⁵⁴

As noted, the Court relied primarily on the text of 5 U.S.C. § 2302 to determine that statutes, not rules or regulations, must set forth the disclosures that are not protected whistleblower disclosures. It noted that Congress used the phrase "law, rule, or regulation" on numerous occasions throughout § 2302.⁵⁵ Conversely, the text at issue in *MacLean* referred only to "law."⁵⁶ The Court then cited the well-known interpretive principle that when Congress includes certain

48. *Id.* at 36. Specifically, the WPA protections could "embolden federal employees to disclose SSI and gravely endanger public safety." *Id.* at 38.

49. Brief for Respondent, *supra* note 15, at 19.

50. Brief for Petitioner, *supra* note 13, at 22.

51. *Dept. of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015).

52. *Id.*

53. 49 U.S.C. § 114(r)(1)(C) (2012); *MacLean*, 135 S. Ct. at 921.

54. *MacLean*, 135 S. Ct. at 923–24.

55. *Id.* at 919. For example, 5 U.S.C. § 2302(b)(1)(E) (2012) (regarding marital status discrimination), § 2302(b)(6) (regarding preferences or advantages), and § 2302(b)(9)(A) (regarding the exercise of appeals) all refer to "law, rule, or regulation."

56. See text accompanying *supra* note 2. In fact, in the text at issue in *MacLean*, Congress used the full phrase "law, rule, or regulation" in the same sentence as the shorter phrase "otherwise prohibited by law"; it also used the broader phrase "law, rule, or regulation" nine times in § 2302. 5 U.S.C. §§ 2302(a)(2)(D)(i), 2302(b)(1)(E), 2302(b)(6), 2302(b)(8)(A), 2302(b)(8)(A)(i), 2302(b)(8)(B)(i), 2302(b)(9)(A), 2302(b)(12), 2302(b)(13), 2302(d)(5); *MacLean*, 135 S. Ct. at 919.

language in one part of a statute, but omits it in another, it is presumed to have acted intentionally.⁵⁷ The Court held that the textual difference between § 2302(b)(8)(A) and the rest of § 2302 indicated that Congress intended that congressional statutes, but not rules or regulations, would establish exceptions to general whistleblower protection.⁵⁸

Next, the Court rejected the government’s argument that, because they had the force of law, some regulations—such as those considered here—could properly be considered law under 5 U.S.C. § 2302(b)(8)(A).⁵⁹ The Court noted that Congress’s choice of text “provides the necessary ‘clear showing’ that ‘law’ does not include regulations” in this case, thus overcoming the *Chrysler* presumption.⁶⁰ For this reason, the Court concluded that the regulations promulgated by the TSA could not be considered law for the purposes of 5 U.S.C. § 2302(b)(8)(A).⁶¹

The final section of the Court’s textual analysis considered, and rejected, the government’s claim that MacLean’s disclosures were “specifically prohibited” by 49 U.S.C. § 114(r)(1).⁶² As the Court pointed out, 49 U.S.C. § 114(r)(1) does not prohibit anything; instead, it authorizes the Under Secretary to prohibit certain disclosures at a future time.⁶³ The Court also rejected DHS’s argument that 49 U.S.C. § 114(r)(1) imposes a legislative mandate on the TSA to prohibit certain disclosures,⁶⁴ noting that the statute “says that the TSA shall prohibit disclosures only ‘if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation.’”⁶⁵ From this text, the Court reasoned that 49 U.S.C. § 114(r)(1) did not specifically prohibit MacLean’s disclosure, and

57. *MacLean*, 135 S. Ct. at 919; *Dep’t of Treasury, IRS v. FLRA*, 494 U.S. 922, 931 (1990); *Russello v. United States*, 464 U.S. 16, 23 (1983).

58. *MacLean*, 135 S. Ct. at 920.

59. *Id.*

60. *Id.*; *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

61. *MacLean*, 135 S. Ct. at 921.

62. *Id.* The relevant portion of the statute reads:

Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act (Public Law 107-71) or under chapter 449 of this title if the Under Secretary decides that disclosing the information would—(A) be an unwarranted invasion of personal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation.

49 U.S.C. § 114(r)(1) (2012).

63. 49 U.S.C. § 114(r)(1); *MacLean*, 135 S. Ct. at 921.

64. 49 U.S.C. § 114(r)(1); *MacLean*, 135 S. Ct. at 921.

65. 49 U.S.C. § 114(r)(1); *MacLean*, 135 S. Ct. at 922.

because the Under Secretary exercised discretion to make decisions not attributable to Congress, TSA regulations did not have the status of law for the purposes of 5 U.S.C. § 2302.⁶⁶

The Court also considered public policy arguments. It noted that reading “law” broadly to include rules and regulations could permit any agency to issue a blanket regulation against whistleblowing, thus defeating the purpose of whistleblower statutes.⁶⁷ However, the Court did acknowledge the potential public safety issue if all of the TSA’s employees were permitted to voice their concerns publicly over sensitive safety matters.⁶⁸ Ultimately, the Court decided that Congress or the President would have to act⁶⁹ to prohibit disclosures such as those Robert MacLean made.⁷⁰

Thus, relying heavily on statutory text, and also considering balance-of-power issues, the Court held that the TSA’s regulations were not law for the purpose of § 2302(b)(8)(A). Therefore, Robert MacLean’s disclosures were protected.

In a dissent joined by Justice Kennedy, Justice Sotomayor also focused on the text of the statutes in question, but concluded that Robert MacLean’s disclosures were “prohibited by law” within the meaning of 5 U.S.C. § 2302(b)(8)(A).⁷¹ The dissent agreed that regulations could not establish prohibited disclosures, and that prohibiting disclosures was analytically distinct from exempting information from disclosure requirements.⁷² However, the dissent argued that 49 U.S.C. § 114(r)(1) specifically prohibited the disclosure at issue in *MacLean*.⁷³ That statute provides that the TSA “shall prescribe regulations prohibiting the disclosure of information.”⁷⁴ The dissent read “shall” to mean “must,”⁷⁵ which it considered a direction with limited discretion, not an authorization.⁷⁶ The dissent further asserted that the TSA’s role is

66. *MacLean*, 135 S. Ct. at 923.

67. *Id.* at 920.

68. *Id.* at 923.

69. *Id.* at 923–24. The Court listed a number of actions that Congress could take, including exempting sensitive information from whistleblower laws, overriding § 2302(b)(8)(A)’s whistleblower protections, or exempting the entire TSA from § 2302(b)(8)(A)’s coverage. *Id.*

70. *Id.* at 924 (“Although Congress and the President each has the power to address the Government’s concerns, neither has done so. It is not our role to do so for them.”).

71. 5 U.S.C. § 2302(b)(8)(A) (2012); *MacLean*, 135 S. Ct. at 924 (Sotomayor, J., dissenting).

72. *MacLean*, 135 S. Ct. at 924 (Sotomayor, J., dissenting).

73. *Id.*

74. 49 U.S.C. § 114(r)(1) (2012); *MacLean*, 135 S. Ct. at 924 (Sotomayor, J., dissenting).

75. *MacLean*, 135 S. Ct. at 924 (Sotomayor, J., dissenting) (citing Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432 n.9 (1995)).

76. *Id.* at 924.

limited to identifying information prohibited from disclosure; this limited, near-ministerial role indicated to the dissent that the prohibitions had the status of law.⁷⁷ The dissent also claimed that it would respect what it saw as the clearly expressed intent of Congress to prohibit disclosures such as those made by MacLean and would read 49 U.S.C. § 114(r)(1) as prohibiting *MacLean*'s disclosures.⁷⁸ Therefore, the dissent cited statutory text and congressional intent to support its argument that the TSA prohibitions enacted pursuant to 49 U.S.C. § 114(r)(1) qualified as law under 5 U.S.C. § 2302(b)(8)(A).

Because *MacLean* involved a whistleblower and a whistleblowing statute, some commentators have emphasized the effect the case may have on substantive whistleblower law. Others, however, have viewed the case only through the lens of textual analysis. Regarding the former, *Washington Post* commentator Joe Davidson asserted that a decision for the government would mean that "Uncle Sam will have greater power to bully whistleblowers," and that the American people would lose if MacLean lost.⁷⁹ Conversely, at SCOTUSblog, Steve Vladeck noted the Justices' discomfort during oral argument with the government's textual arguments:

Justices Elena Kagan and [Antonin] Scalia both appeared underwhelmed by [the government's argument that some regulations are "law" for the purposes of 5 U.S.C. § 2302(b)(8)(A)], with the latter suggesting . . . that such a distinction was too "subtle," and that any argument that Congress intended such a distinction when it enacted the whistleblower statute is "hard to believe."⁸⁰

Writing after the Court announced the decision, Vladeck cast the case as both a statutory construction case and a national security case.⁸¹ According to Vladeck, Justice Sotomayor's dissent drove home national security concerns, and even Chief Justice Roberts acknowledged the issue by stating that Congress could alter the laws as necessary.⁸²

Lower courts that have applied *MacLean* have generally cited it for

77. *Id.* at 924–25.

78. *Id.*

79. Joe Davidson, *Federals Whistleblower Have a Lot at Stake in First Supreme Court Case Directly Affecting Them*, WASH. POST, Oct. 10, 2014, at A17.

80. Steve Vladeck, *Argument Analysis: Government's Position in Air Marshal Whistleblower Case too "Subtle" for Justices*, SCOTUSBLOG (Nov. 6, 2014, 9:42 AM), <http://www.scotusblog.com/2014/11/argument-analysis-governments-position-in-air-marshal-whistleblower-case-too-subtle-for-justices/>.

81. Steve Vladeck, *Opinion Analysis: Justices Adopt Broad View of Whistleblower Protections in Air Marshal Dispute*, SCOTUSBLOG (Jan. 21, 2015, 2:45 PM), <http://www.scotusblog.com/2015/01/opinion-analysis-justices-adopt-broad-view-of-whistleblower-protections-in-air-marshal-dispute/>.

82. *Id.*

its rules of statutory construction. Only one case, *Losada v. Department of Defense*, has cited *MacLean* for its substantive rule that statutes, but not rules or regulations, can define those disclosures that lie beyond the protection of whistleblower statutes.⁸³ Three cases have cited *MacLean* for the principle that a legislative body acts intentionally when it includes language in one clause but omits the same language in a nearby clause.⁸⁴ It remains to be seen if *MacLean*'s substantive implications for whistleblower protections will affect future cases, or if lower courts will resolve these questions on the basis of statutory interpretation.

Some may see *MacLean* as heralding greater whistleblower protections.⁸⁵ While this is possible, *MacLean*'s reasoning was tied specifically to the statutory text in question, making it easy to limit if the Court so chooses. On the other hand, the Court confirmed that governmental agencies may not insulate themselves against employee whistleblowers such as Robert MacLean. In other whistleblowing contexts, *MacLean*'s implications are unclear.

83. *Losada v. Dep't of Defense*, No. 2014-3047, 2015 WL 452017, at *2 (Fed. Cir. Feb. 4, 2015).

84. *Pilgrim's Pride Corp. v. Comm'r of Internal Revenue*, No. 14-60295, 2015 WL 791418, at *3 (5th Cir. Feb. 25, 2015); *Fed. Housing Fin. Agency v. Nomura Holding Am., Inc.*, No. 11-cv-6201, 2015 WL 640875, at *2 (S.D.N.Y. Feb. 16, 2015); *Nat'l Fed'n of Blind v. U.S. Dep't of Transp.*, No. 14-cv-85, 2015 WL 349156, at *5 n.3 (D.D.C. Jan. 28, 2015). One other case has cited *MacLean* for statutory construction purposes, specifically its reading of "shall" as mandatory. *Ruiz v. Flores*, No. 1:14-cv-00179, 2015 WL 966148 (E.D. Cal. Mar. 4, 2015).

85. See text accompanying *supra* notes 79–82.