

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

ROBERT J. MACLEAN,

Appellant,

**DOCKET NUMBER
SF-0752-06-0611-I-2**

v.

**DEPARTMENT OF HOMELAND
SECURITY,**

Agency.

**MOTION FOR LEAVE FOR THE FEDERAL LAW
ENFORCEMENT OFFICERS ASSOCIATION (FLEOA)
TO JOIN AS AMICUS CURIAE
THE BRIEF FILED BY THE GOVERNMENT
ACCOUNTABILITY PROJECT (GAP)**

The Federal Law Enforcement Officers Association (FLEOA) respectfully moves for a leave to join as *amicus curiae* the brief filed by the Government Accountability Project (GAP) supporting the appellee in this matter.

FLEOA is the largest nonpartisan, professional association, representing exclusively federal law enforcement officers. Currently, FLEOA represents more than 25,000 federal agents from over 65 different federal law enforcement agencies. Founded in 1977 by a group of concerned agents from Customs, IRS-CI, TIGTA, FBI, and IS, FLEOA's primary tenant was, and still is, that legal assistance and representation are only a phone call away. FLEOA also provides a legislative voice for the federal law enforcement community, monitoring issues that may impact law enforcement and encouraging its membership to lobby their elected officials. In the past, FLEOA has fought for issues such as death benefits for federal law enforcement officers and the Federal LEO Good Samaritan Act, and currently FLEOA is working for a fair

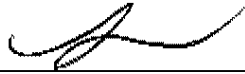
implementation of the Law Enforcement Officers Safety Act. Our primary mission is to ensure that federal law enforcement officers can do their job as safely and effectively as possible, as evidenced by our motto: "Protecting Those Who Protect And Serve."

In the case currently before the Board, Robert MacLean, a Federal Air Marshal who has worked tirelessly to protect Americans, was terminated for disclosing a substantial and immediate public danger. As active federal law enforcement officers, our organization is concerned about the precedent this action would set. When those individuals charged with protecting and serving the public are silenced, fewer threats to public safety are likely to be corrected. If the authority of agencies to pass regulations is interpreted so broadly as to supersede Congressionally-passed federal law, it becomes easier to restrict the ability of FLEOA members to do their jobs and puts the public at greater risk.

Because of the vital importance of this issue and potentially far-reaching effects of this case, the proposed amicus urges careful, reasoned consideration by the Board.

WHEREFORE, the proposed *Amicus Curiae* respectfully requests that the Merit Systems Protection Board grant its motion for leave to join the brief filed by the Government Accountability Project on March 9, 2009.

RESPECTFULLY SUBMITTED this 27th day of April, 2009.



Lawrence Berger, Esq.
General Counsel
Federal Law Enforcement Officers
Association
21 Glen Street, Suite D
Glen Cove, New York 11542
516-671-2688

CERTIFICATE OF SERVICE

I, Gabriella Cerasi, hereby certify that on this date, April 27, 2009, I served a true and correct copies of the foregoing Motion for Leave to Join Brief as Amicus Curiae by depositing the same in United States Mail, postage prepaid, addressed to the following persons:

Appellant Representative
Peter H. Noone, Esq.
Avery, Dooley, Post and Avery LLP
Attys at Law
90 Concord Avenue
Belmont, MA 02478

Agency Representative
Eileen Dizon Calaguas, Esq.
Dept of Homeland Security
Attorney-Advisor
TSO Office of Chief Counsel
450 Golden Gate Avenue
PO Box 36018
San Francisco, CA 94102

Dated: April 27, 2009



GABRIELLA CERASI

Exhibit 5

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BRIEF OF THE GOVERNMENT ACCOUNTABILITY PROJECT (GAP)
AS AMICUS CURIAE

THOMAS M. DEVINE
Legal Director,
Government Accountability Project

KASEY M. DUNTON
Legal Associate,
Government Accountability Project

Counsel of Record for the Amicus
1612 K Street NW, Suite 1100
Washington, DC 20006
(202) 408-0034 X136

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INTEREST OF THE AMICUS

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of “whistleblowers” – government and corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific dangers to public health and safety; or other institutional misconduct undermining the public interest.

GAP’s efforts on behalf of federal whistleblowers are based on the belief that a professional and dedicated civil service is essential to an effective democracy. The link between the government and the public it serves, civil servants are the foundation of a responsible, law-abiding political and corporate system. However, when whistleblowers encounter retaliation, poor performance reviews, and even discharge for speaking truth to power, that link is severed. While laws written to protect federal employees from Prohibited Personnel Practices (PPPs), particularly whistleblower reprisals, are an important first step, those laws cannot fulfill their intended purpose if they remain unenforced. It is GAP’s firm belief that, in order to protect both the independence of the civil service and the responsiveness of federal institutions to the citizenry, the government must operate in an open environment where truth and accountability are not only encouraged, but respected. The dedicated members of the federal civil service must not be forced to choose between their jobs and their integrity.

GAP has substantial expertise on protecting government employees’ rights against the Office of Special Counsel. GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous amicus curiae briefs on constitutional and statutory issues relevant to whistleblowers, co-authored the

model whistleblower protection laws to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (April 10, 1989) (WPA) and subsequent 1994 amendments, as well as the employee rights provisions in the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A.

BACKGROUND AND PROCEEDINGS BELOW

On February 10, 2009 Merit Systems Protection Board (“MSPB” or “Board”) Administrative Judge (“AJ”) Craig Berg certified an interlocutory appeal to the full Board in *MacLean v. Department of Homeland Security*, MSPB No. SF-0752-06-0611—I-2 (February 10, 2009). (“MacLean interlocutory certification”) While defendant Transportation Security Administration (“TSA”) sought review of several alleged errors not addressed by *amici*, the AJ *sua sponte* added a third issue: “Whether a disclosure of information that is SSI can also be a disclosure protected by the Whistleblower Protection Act under 5 U.S.C. section 2302(b)(8)(A). *Amici* urge the Board to reverse the AJ’s initial ruling on that issue and unequivocally reaffirm a constant premise of the law for over 30 years: agency rules or regulations may not cancel protection for public disclosures that otherwise satisfy the Whistleblower Protection Act’s (“WPA”) requirements.

The relevant factual context is straightforward and not at issue for concerns raised by *amicus*. In July 2003 TSA Federal Air Marshal Robert MacLean received an order from the Federal Air Marshals Service (“FAMS”) canceling air marshal coverage on all overnight flights, from August 2 through September 30, the end of the fiscal year. FAMS sent its employees the

order at the same time TSA's parent agency, the Department of Homeland Security (DHS), had issued a terrorist alert of a planned airlines hijacking. The order did not have any marking that it was classified, or otherwise provide prior notice for any restriction on its distribution.

Mr. MacLean believed the order was illegal and dangerous. When his internal protests were rebuffed, he shared the order with a media representative as part of a whistleblowing disclosure. The story quickly spread, sparking protests from Congress. FAMS then rescinded the order, claiming that it had been a mistake. Air Marshal coverage was not interrupted. Two and a half years later, however, FAMS terminated Mr. MacLean, charging that he had publicly disclosed Sensitive Security Information (SSI) prohibited by agency regulation.²⁴

Mr. MacLean subsequently filed suit under the Whistleblower Protection Act, contending, *inter alia*, that agency regulations may not cancel his statutory free speech rights. TSA responded that in the Aviation Transportation and Security Act (ATSA) Congress had directed the agency to issue regulations "prohibiting the disclosure of information ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation." 49 USC 114(s)(1). TSA contended that because it issued SSI regulations pursuant to that authority, terminating Mr. MacLean for violating SSI *rules* complied with 5 USC 2302(b)(8). That provision, the statement of WPA free speech rights, protects public disclosures meeting other statutory requirements unless the information disclosed is classified²⁵ or its release is "specifically prohibited by law."²⁶ The AJ agreed with the agency.

²⁴ Mr. MacLean hotly contests the imposition of ex post facto liability, as well as the timing and applicability of SSI regulations. While *amici* are sympathetic, this submission is limited to the ruling's destructive impact on the WPA if upheld.

²⁵ There is no contention that Mr. MacLean disclosed classified information.

²⁶ Section 2302(b)(8) provides as follows: Any employee who has authority to take, direct others to take,

In a Request for Reconsideration, Mr. MacLean protested that only statutes qualify as “law” under the WPA, not agency regulations. He added that the statutory provisions were not specific, another prerequisite to interfere with WPA public free speech rights. The AJ rejected Mr. MacLean’s protest, reasoning as follows:

I agree with the agency that it would be an absurd result for Congress to direct TSA to issue regulations prohibiting the disclosure of information that is a threat to transportation security, and at the same time to intend that a TSA employee be shielded from discipline by the WPA for violating the regulations by
Disclosing such information.

(MacLean interlocutory certification, at 9) He affirmed his original resolution of the issue and certified it for the Board’s interlocutory review. *Id.*, at 10.

ARGUMENT

Since Congress enacted whistleblower rights in section 2302(b)(8) with passage of the Civil Service Reform Act of 1978, only one MSPB case has carefully considered this issue. *Kent v. General Services Administration*, 50 MSPR 536 (1993). The Board rejected GSA’s contention that the WPA did not apply to an employee’s public disclosure, despite a nondisclosure rule in Federal Acquisition Regulations that Congress by statute had authorized

recommend, or approve any personnel action, shall not, with respect to such authority--

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-- (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-- (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, 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; or (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences-- (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

the Administrator to issue. The Board reasoned that a statutory delegation to issue regulations was not the same as a specific, statutory disclosure prohibition that could override WPA free speech rights.

There has been almost no case law developing a doctrine to interpret this issue, because there are no grounds for confusion. Congress made a clear, unequivocally expressed decision in 1978 that agency regulations are not relevant for non-classified disclosures otherwise protected by section 2302(b)(8). Only Congress can cancel WPA public free speech rights, and even then only through specific restrictions. In three decades there only has been one unsuccessful challenge to that premise, over 15 years ago.

The AJ reasoned that it would be “absurd” to deny TSA’s Under Secretary the authority to issue whatever secrecy regulations he deemed necessary, since Congress ordered him to issue them. As discussed below, that judgment amounts to ending the long-standing WPA cornerstone that agencies have no discretion to override the protections afforded to employees under the WPA for non-classified disclosures of information that the employee reasonably believes evidence waste, fraud, abuse, illegality, or dangers to the public.

I. THE AJ’S DECISION CANNOT CO-EXIST WITH CONGRESSIONAL INTENT OR PUBLIC POLICY UNDERLYING THE WHISTLEBLOWER PROTECTION ACT.

Since 1978, when Congress initially created whistleblower protection in 5 USC 2302(b)(8), it has unequivocally stated its intention to create a safe channel for employees to disclose evidence of agency illegality or other misconduct. In an August 24, 1978 Dear Colleague letter, a bi-partisan coalition of seventeen Senators representing both the Senate’s

conservative and liberal wings succinctly summarized the purpose of the final legislative package,

[to] vindicate the Code of Ethics for Government Service, established by Congress twenty years ago, which demands that all federal employees “Uphold the Constitution, laws and legal regulations of the United States and all governments therein, and never be a party to their evasion” and “Expose corruption wherever discovered.” Under our amendment, an Employee can fulfill those obligations without putting his or her job on the line.

(Reprinted in 124 Cong. Rec. S14302-03 [daily ed. Aug. 24, 1978]) As the Senate Committee Report, S. Rep. No. 969, 95th Cong., 2d Sess. at 8, reprinted in 1978 USCCAN 2725, 2733, emphasized,

Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy, it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth.

Senator Charles Grassley (R.-IA.), an original sponsor of the Whistleblower Protection Act, applied that purpose directly to congressional oversight:

As a Senator, I have conducted extensive oversight into virtually all aspects of the Federal bureaucracy. Despite the differences in cases from agency to agency and from department to department, one constant remains: the need for information and the need for insight from whistleblowers. This information is vital to effective congressional oversight, the constitutional responsibility of Congress, in addition to legislating.

Documents alone are insufficient when it comes to understanding a dysfunctional bureaucracy. Only whistleblowers can explain why something is wrong and provide the best evidence to prove it. Moreover, only whistleblowers can help us truly understand problems with the culture of Government agencies, because without changing the culture, business as usual is the rule.

153 Cong. Rec. S6034 (daily ed., May 14, 2007).

To defend this policy against hostile activism by administrative and judicial institutions responsible to enforce the Whistleblower Protection Act, Congress has worked since 1999 to restore its original mandate. The 2007 Senate Committee Report on S. 274 applied the effort to national security whistleblowers such as Mr. MacLean.

The Federal Employee Protection of Disclosures Act is designed to strengthen the rights and protections of federal whistleblowers and to help root out waste, fraud, and abuse. Although the events of September 11, 2001, have brought renewed attention to those who disclose information regarding security lapses at our nation's airports, borders, law enforcement agencies, and nuclear facilities, the right of federal employees to be free from workplace retaliation has been diminished as a result of a series of decisions of the Federal Circuit Court of Appeals that have narrowly defined who qualifies as a whistleblower under the WPA and what statements are considered protected disclosures. S. Rep. No. 110-32 (110th Cong., 2d. Sess.) at 2.

The AJ in this proceeding proposes to go far beyond “diminishing” WPA rights. It would make them discretionary for any agency whenever Congress requires secrecy regulations to achieve its mission. There is no basis in legislative intent or public policy for a doctrine that an agency’s mission lawfully can include canceling the Whistleblower Protection Act. Congress carefully drafted this law, with stated modifications and limitations to protect legitimate exercises of government secrecy. It is Congress’ role to draw those boundaries for responsible disclosure.

II. THE AJ’S RULING CANNOT CO-EXIST WITH STATUTORY LANGUAGE.

The ruling below is incompatible with the “plain meaning doctrine,” the most basic canon of statutory construction. As the Supreme Court has explained: “[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that

a legislature says in a statute what it means and means in a statute what it says there."

Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146, 1149 (1992). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: `judicial inquiry is complete.'

"*Id.* The Board long has recognized this premise for statutory construction, in *Kent* reaffirming that "the plain language of a statute controls absent a clearly expressed legislative intent to the contrary." *Kent, supra*, at 542n.8, quoting *Benedetto v. Office of Personnel Management*, 32 MSPR 530, 533034 (1987).

As discussed below, the AJ's ruling cannot withstand scrutiny under either the plain meaning doctrine or of any relevant, specific standards for statutory construction.

A. The AJ's ruling would restore specific agency authority rejected by Congress.

Another basic statutory construction principle is that when Congress removes proposed language from legislation it enacts, that means Congress has rejected the associated policy. *Russello v. United States*, 464 U.S. 16, 23-24 (1983) Congress definitively decided this issue in 1978, rejecting and removing language that would have provided a statutory basis for the AJ's ruling.

When initially proposed, language for section 2302(b)(8) would have canceled protection for public disclosures that violated "law, rule or regulation." After spirited debate, the exception was narrowed to violations of law. The 1978 Senate Report noted the language was deleted. S. Rep. No. 95-969, *supra*, at 12 (1978). As the Conference Report clearly defined, "[P]rohibited

by law refers to statutory law and court interpretations of those statutes.” HR Conf. Rep. No. 95-717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 USCCAN 2860, 2864. Congress acted, because it was concerned that otherwise agency rules and regulations could impede the disclosure of government wrongdoing. *Id.*

Noted authority Professor Robert Vaughn provided context for the change in the most detailed commentary published on section 2302(b)(8):

Both the House and Senate committees rejected this [administration] proposal [to remove protection for disclosures barred by agency rule or regulation] and restricted the limitations only to those situations where release was prohibited by statute. These committees believed that the original proposal gave an agency too much discretion to prohibit disclosure of information, and reduce the scope and therefore the effectiveness of protection.

Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. Ill. L.R. 615, 629.

In *Kent*, *supra* at 542-43, the Board recognized and analyzed the law in deference to this basic policy choice. While referencing *Kent*, the AJ’s analysis below contains no mention of the watershed choice.

B. The AJ’s ruling below fails to recognize that Congress used different language when referring to statutory versus regulatory authority.

A second, directly relevant canon is that "when Congress includes a specific term in one section of a statute but omits it in another section of the same Act, it should not be implied where it is excluded. *Ariz. Elec. Power Co-op. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987); *see also West Coast Truck Lines, Inc. v. Arcata Community Recycling Ctr.*, 846 F.2d 1239, 1244 (9th Cir. 1988), *cert. denied*, 488 U.S. 856 (1988).

In this instance, the AJ went further than disregarding different terms for different concepts in the same statute. He disregarded different language in the same statutory subsection. In 5 USC 2302(b)(8)(A) protects disclosures of alleged “violation of law, rule or regulation,” creating a right to disclosure violations of agency rules and regulations. The same subsection bars public disclosure rights for information whose release is “specifically prohibited by law,” conspicuously excluding references to rules or regulations.

C. The AJ’s ruling would add loopholes to whistleblower protection not included in statutory language.

A statutory construction rule whose violation has been particularly painful for the WPA is that only Congress can create exceptions to provisions it enacts. When Congress enumerates an exception or exceptions to a rule, no other exceptions may apply. *Horner v. Adnrzjewski*, 811 F.2d 571, 574-75 (Fed. Cir.), *cert. denied*, 484 U.S. 912 (1987); *Koniag v. Koncor Forest Resource*, 39 F.3d 991, 998 (9th Cir. 1994); 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* S 47.23 (5th Ed. 1992).

The AJ’s ruling does not accept this canon. His ultimate conclusion is that, although Congress did not include any exceptions for agency regulations, he remained unconvinced that non-disclosure regulations directed by Congress “can never be considered law for purposes of the WPA.” MacLean Interlocutory Certification, at 10 n.8.

Congress chose to include exceptions to public disclosure rights for whistleblowers -- classified information, or information whose release is specifically prohibited by law. As noted

above, Congress clearly explained that the term “law” is meant only to include specific statutory provisions or court interpretation of such statutes. It created a whole separate, restricted channel to disclose that information. 5 USC 2302(b)(8)(B).

But it included no exceptions for agency regulations. As discussed above, it cleanly removed their relevance for disclosures that otherwise comply with the “reasonable belief” requirements of the WPA. The AJ simply had no authority to substitute his judgment for that of Congress either by creating, or restoring an exception that includes agency regulations.

The AJ reasoned, however, that in this instance Congress required the agency to issue secrecy regulations necessary to protect air security, including to prohibit release of information that the Under Secretary...determines to be detrimental to aviation security.

He contrasted that scenario with *Kent*, in which the statute merely authorized issuance of regulations.

I conclude that the fact that congress specifically mandated the SSI regulations, unlike in *Kent*, brings the regulations within the definition of “law” in 5 USC 2302(b)(8)(A), and that disclosure of information falling within the meaning of the SSI regulations is therefore “specifically prohibited by law,” and cannot be a “protected disclosure” under the WPA.

MacLean Interlocutory Certification, at 10.

This distinction has never existed before and is irrelevant, because it was not the AJ’s to make. Congress could have added another exception to section 2302(b)(8), restricting public speech when a statute requires issuance of regulations that prohibit the release of general categories of information. It didn’t.

In reality, the distinction created by the AJ is not meaningful. For purposes of transparency rights to promote government accountability, it is immaterial whether Congress

orders or permits an agency to issue secrecy regulations. ***This is an inherent management function for any law enforcement or security agency covered by the merit system, as well as every government agency entrusted with government resources and authority.***

Congress has expended enormous energy to close loopholes created by the Federal Circuit Court of Appeals on the scope of protected speech. *Horton v. Dep't Navy*, 66 F.3d 279 (Fed. Cir. 1995) (excluding disclosures to co-workers and supervisors from the definition of “any”), *Willis v. Dep't Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998) (excluding disclosures made in the course of job duties from the definition of “any”); *Lachance v. White*, 174 F.3d 1378 (Fed. Cir. 1999) (excluding disclosures challenging illegal or otherwise improper policies from the definition of “any”; and defining “reasonably believes evidences” to mean “irrefragable proof”); *Meeuwissen v. Dep't of Interior*, 234 F.3d 9 (Fed. Cir. 2000)(defining disclosure to exclude any issue raised previously by another employee). None, however, would be as destructive as that the AJ proposes. This loophole would render the entire statute discretionary whenever Congress requires issuance of regulations to achieve an agency’s mission.

Stripped to its core, the AJ’s reasoning seems to conclude that the information disclosed by Mr. MacLean *was* prohibited by statute, because of the existence of 49 U.S.C. s. 114(s)(1). In fact, the statutory provision contains no prohibition for the disclosure of any information whatsoever. It merely directs the TSA Under Secretary to determine what information would be detrimental to aviation security, with open-ended discretion to decide whatever that is, and then issue corresponding regulations. Therefore, the information Mr. MacLean disclosed could not have been prohibited by statute, the threshold requirement for an exception to WPA protection.

D. The AJ's ruling disregards the critical criteria of specificity even for statutory restrictions on whistleblowing disclosures.

Most fundamentally, the AJ's ruling ignores that the statutory basis he relied on cannot pass muster as sufficiently "specific" to establish any restriction on WPA rights, even on its own terms. Still another basic statutory construction canon is the prohibition against construing statutes so as to render any of their provisions superfluous. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). That is precisely what happened below.

In his initial decision the AJ did not deny that the statute was insufficiently precise to restrict WPA disclosures. He conceded that regulations "set the exact parameters, rather than the statute itself." *MacClean, supra*, Order (December 23, 2008), at 6. After Mr. MacLean sought reconsideration on grounds, *inter alia*, that the underlying statute had to be specific, the AJ recognized but declined to address the specificity issue. The entirety of his relevant reasoning on specific statutory prohibitions was as follows:

I have afforded specific consideration to the appellant's argument that the use of the word 'specifically' in the statute, which I left out in some of my discussion in my prior order, undermines my analysis. I am nonetheless unconvinced that inclusion of the word means that regulations to prohibit disclosure of certain information, promulgated at the direction of Congress, can never be considered 'law' for purposes of the WPA.

MacLean Interlocutory Certification, at 10 n.8. In other words, the AJ declined to fill the analytical vacuum.

The AJ's silence was understandable. His ruling is incompatible with statutory language, rendering superfluous the requirement for specificity. In 1978 Congress gave clear guidance on the requirements to be a "specific statutory prohibition" on public disclosure. The Senate Report

explained that in order to qualify a statutory restriction either must “leave no discretion on the issue, or [be] a statute which establishes particular criteria.” Sen. Rep., *supra*, at 2743. As the AJ conceded, the statute does not have precise nondisclosure criteria.

The *Kent* decision, *supra* at 542-48, carefully analyzed the standards for a specific statutory prohibition, analysis which the AJ disregarded as not “relevant for “analysis in this order whether the can be considered ‘law’ in 5 USC 2302(b)(8)...” MacLean Interlocutory Certification, at 9 n.7. The analysis he dismissed carefully explains the type of statutory prohibition that is sufficient. In 18 USC 1905, the Trade Secrets Act prohibits disclosure of “processes, operations, style of work or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, loss or expenditures of any person, firm, partnership, corporation or association.” By only requiring secrecy regulations for a category as broad as “aviation security,” Congress did not attempt to issue specific criteria.

That is why the ruling below, if not clearly rejected, would permit agencies to issue gag orders that eliminate all public whistleblowing. An agency official can judge virtually any information’s release as “detrimental to aviation security,” based on that official’s unchecked judgment as permitted by the ATSA. On balance, while 49 USC 114(s)(1) is statutory, it is neither specific nor a prohibition – the two requirements for a statute to restrict WPA rights.

CONCLUSION

While the AJ found it “absurd” that the WPA could tie a TSA official’s hands, a final, relevant statutory construction principle is that courts must interpret the law to avoid an “absurd” result the legislature did not intend. (*Bruce v. Gregory*, 65 Cal.2d 666, 673 (1967).)

There is no basis in law, legislative intent, or public policy that whenever Congress requires agencies to create secrecy regulations, that is a blank check to cancel Whistleblower Protection Act rights for non-classified public disclosures. The Board must reject the ruling below for the WPA to remain a viable statute. This decision also is an opportunity for Board leadership to require that AJ's enforce the WPA consistent with basic canons of statutory construction.

RESPECTFULLY SUBMITTED this 9th day of March, 2009.

Thomas M. Devine
Legal Director,
Government Accountability Project

Kasey M. Dunton
Legal Associate,
Government Accountability Project

Counsel of Record for the Amicus
1612 K Street NW, Suite 1100
Washington, DC 20006
(202) 408-0034 X136

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2009, I served two true and correct copies of the foregoing FILE BRIEF OF AMICUS CURIAE by depositing the same in United States Mail, postage prepaid, addressed to the following persons:

Appellant Representative

Peter H. Noone, Esq.
Avery, Dooley, Post, and Avery, LLP
Attorneys at Law
90 Concord Ave
Belmont, MA 02478

Agency Representative

Eileen Dizon Calaguas, Esq.
Department of Homeland Security
Attorney-Advisor
TSO Office of Chief Counsel
450 Golden Gate Ave
P.O. Box 36018
San Francisco, CA 94102

Kasey M. Dunton
Legal Associate
Government Accountability Project
1612 K Street NW, Suite 1100
Washington, DC 20006
202-408-0034 X136