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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-75112

ROBERT J. MACLEAN,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE TRANSPORTATION SECURITY ADMINISTRATION

BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

The Transportation Security Administration issued its final order on Sensitive Security Information under 49 U.S.C. § 114(s) on August 31, 2006. Excerpts of Record ("ER") 1-2. Petitioner Robert MacLean filed a timely petition for review in this Court on October 27, 2006. This Court has jurisdiction pursuant to 49 U.S.C. § 46110(a).

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Transportation Security Administration's order that a text message sent to Las Vegas Federal Air Marshals, stating that all "remain overnight" missions would be cancelled from late July to early August 2003,

constituted Sensitive Security Information when that information was disclosed on July 29, 2003.

STATEMENT OF THE CASE

In proceedings before the Merit Systems Protection Board, Robert MacLean, a former Federal Air Marshal, alleged that information he had received about certain Air Marshal missions did not constitute "Sensitive Security Information" as that term was defined in pertinent regulations. ER 1 (citing MacLean v. DHS, No. SF-0752-06-0611-I-1 (M.S.P.B.)). Specifically, MacLean claimed that a text message sent to Las Vegas Air Marshals' government-issued mobile phones in July 2003, stating that "all RON (Remain Overnight) missions . . . up to August 9th would be cancelled," did not qualify as Sensitive Security Information under the agency's regulations in effect at that time. Id.

The Transportation Security Administration addressed the issue in a final order of August 31, 2006. The order determined that the information in question "concerned specific [Air Marshal] deployments or missions on long-distance flights," and therefore qualified as Sensitive Security Information under the regulations in effect when the message was disseminated. ER 1.

MacLean now petitions for review of that decision.

STATEMENT OF THE FACTS

I. Statutory and Regulatory Background

Since 1974, Congress has required the federal agency responsible for civil aviation security to issue regulations prohibiting the disclosure of certain information in the interest of protecting air transportation. See Pub. L. No. 93-366, sec. 202, § 316(d), 88 Stat. 409, 417 (1974) (formerly codified at 49 U.S.C. App. § 1357(d)). For many years, the Federal Aviation Administration enforced this statutory directive; following the events of September 11, 2001, Congress extended this authority to the newly created Transportation Security Administration ("TSA"). See Pub. L. No. 107-71, § 101(e), 115 Stat. 597, 603 (2001); see also Pub. L. No. 107-296, § 1601, 116 Stat. 2135, 2312 (2002).

As part of this obligation, the Under Secretary of TSA is required to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C); see also 49 U.S.C. § 40119(b)(1)(C) (according similar authority to Secretary of Transportation).[1]

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[1]The Under Secretary--along with TSA itself--was originally a part of the Department of Transportation. 49 U.S.C. § 114(a), (b)(1). TSA's functions, as well as the Under Secretary's, were transferred to the Department of Homeland Security pursuant to (continued...)

Pursuant to this mandate, the Under Secretary has defined certain types of information to be "Sensitive Security Information,"--or "SSI"--and has limited the disclosure of that information to a narrow set of circumstances. See generally 49 C.F.R. Pt. 1520.[2]

The definition of "Sensitive Security Information" is set forth in TSA's regulations. Among the covered categories of information are "[a]ny approved, accepted, or standard security program . . . and any comments, instructions, or implementing guidance pertaining thereto"; "[a]ny selection criteria used in any security screening process, including for persons, baggage, or cargo"; and "[a]ny security contingency plan or information and any comments, instructions, or implementing guidance pertaining thereto." 49 C.F.R. § 1520.7(a), (c), (d). As relevant here, the regulations also define as SSI

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[1](...continued)
section 403(2) of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. at 2178 (codified at 6 U.S.C. § 203(2)). The Under Secretary is now known as the Administrator of TSA. See 49 C.F.R. § 1500.3. Because federal statutes continue to refer to the head of TSA as the "Under Secretary," this brief follows that convention.

[2]MacLean's challenge before the Merit Systems Protection Board concerned the status of information when it was disclosed on July 29, 2003. ER 1. TSA accordingly based its final order on the SSI regulations in effect at that time, and this brief cites to those same regulations. Except as noted, the current regulations are identical to the 2003 regulations in all respects relevant to this petition--although they have been renumbered within Part 1500. See 69 Fed. Reg. 28066-86 (May 18, 2004).

> [s]pecific details of aviation security measures . . . includ[ing], but [] not limited to, information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.

49 C.F.R. § 1520.7(j). Such information--and any records containing such information--qualify as SSI unless the Under Secretary provides in writing to the contrary. 49 C.F.R. § 1520.7.

In addition to defining Sensitive Security Information, the regulations also prescribe the instances in which SSI may be permissibly disclosed. In particular, the regulations create a duty upon certain individuals to protect SSI; those individuals are prohibited from disseminating SSI except to "persons with a need to know," and are required to report any unauthorized release. 49 C.F.R. § 1520.5(a)-(c). Disclosure by covered persons in violation of the regulations is punishable by civil penalties or enforcement proceedings. 49 C.F.R. § 1520.5(d).

When the Under Secretary determines by final order whether particular material qualifies as SSI--or, if so, to what extent it can be disclosed--that determination constitutes final agency action subject to judicial review. See 49 U.S.C. §§ 114(s); 46110(a). The statute vests exclusive review of such orders in the D.C. Circuit or the court of appeals for the circuit in which a complaining party resides or has its principal place of business. 49 U.S.C. § 46110(a), (c); see also Gilmore v.

Gonzales, 435 F.3d 1125, 1132-34 (9th Cir. 2006), cert. denied, 127 S. Ct. 929 (2007). Those courts may review objections to a final order under section 46110 only if the petitioner has raised the objections previously in the agency proceeding or "if there was a reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 46110(d).

II. Factual Background and Prior Proceedings

In 2005, the Department of Homeland Security initiated proceedings to remove Robert MacLean from his position as a Federal Air Marshal. The agency ultimately found that MacLean had engaged in unauthorized disclosure of Sensitive Security Information concerning specific Air Marshal missions in July to August 2003, and MacLean was removed from his position in April 2006.

MacLean appealed the agency's determination to the Merit Systems Protection Board ("MSPB"). See ER 1 (citing MacLean v. DHS, No. SF-0752-06-0611-I-1 (M.S.P.B.)). In the course of his appeal before the MSPB, MacLean alleged that the information he had disclosed did not constitute "Sensitive Security Information" as that term was defined by TSA regulations. Id. Specifically, MacLean claimed that a text message sent to Las Vegas Air Marshals' government-issued mobile phones, stating that "all RON (Remain Overnight) missions . . . up to August 9th would be cancelled," did not qualify as Sensitive Security

Information under the regulations in effect when the message was disclosed in July 2003. Id.

TSA addressed the matter in a final order on August 31, 2006. ER 1-2. Applying the regulations in effect at the time of the disclosure, the agency confirmed that the information "concerned specific [Air Marshal] deployments or missions on long-distance flights," and therefore qualified as Sensitive Security Information under 49 C.F.R. § 1520.7(j). ER 1. MacLean filed a timely petition for review in this Court on October 27, 2006. His proceeding before the MSPB has been dismissed without prejudice pending the outcome of that petition.

STANDARD OF REVIEW

This Court must sustain a final order on Sensitive Security Information unless contrary to law or an abuse of discretion. See 5 U.S.C. § 706(2)(A). Where, as here, the Court considers an agency's interpretation of its own regulations, review is "extremely deferential": the agency's interpretation "'must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1074 (9th Cir. 2001) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). The agency's factual findings are reviewed for substantial evidence. 49 U.S.C. § 46110(c).

SUMMARY OF THE ARGUMENT

The only issue properly before this Court is whether the Transportation Security Administration correctly determined that a message ordering the cancellation of particular Federal Air Marshal missions from July to August 2003 qualified as Sensitive Security Information at that time. There cannot be any serious dispute on this point. Under TSA's regulations, SSI includes any information "concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. § 1520.7(j). A message stating that a particular category of Air Marshal missions in a specific part of the country would be cancelled for a defined period fits precisely within the category of information that the regulation contemplates. That reading is supported not only by the regulation's plain language, but also by its purpose, which is to protect information whose disclosure might pose a threat to civil aviation security. TSA's interpretation of the word "specific" to encompass the type of information at issue here is a reasonable reading--and, as an interpretation of the agency's own regulations, must be sustained unless a contrary conclusion is "compelled by the regulation's plain language." Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1074 (9th Cir. 2001).

No alternative interpretation is compelled here. MacLean's arguments to the contrary are meritless, and in some instances wholly irrelevant.

MacLean erroneously suggests that an alleged failure to mark or distribute the July 2003 message in a manner appropriate to SSI somehow exempts it from valid designation as Sensitive Security Information. The regulations support no such conclusion--indeed, they contain no marking or distribution requirements whatsoever. The agency's interim SSI policy, cited by MacLean, likewise contains no suggestion that a failure to mark or distribute data as SSI provides any license to disclose such information; and TSA's new regulations adopting an SSI marking policy specifically state to the contrary. MacLean is free to argue before the MSPB that he did not realize that the 2003 message was SSI because of how it was marked or distributed. But that issue is relevant, if at all, only to the propriety of MacLean's termination--not to the validity of the SSI order before this Court.

Nor is there any purchase to MacLean's procedural critique of TSA's order. MacLean claims that because a court of appeals may review an objection to a final order "only if the objection was made" in the agency proceeding or "if there was a reasonable ground for not making the objection in the proceeding," 49 U.S.C. § 46110(d), he was entitled to object to the SSI order

before it was issued. But this language does not create an independent right to lodge objections with an agency; it merely prohibits challenges in the courts of appeals that could have been raised before the agency in the first instance but were not. Where, as here, agency proceedings afford no opportunity to raise objections, the courts of appeals have held that section 46110's exhaustion requirement is excused, and a petitioner may present his arguments to the court in the first instance. This outcome--which is explicitly contemplated by section 46110--affords ample opportunity for MacLean to be heard on his claims, and is fully in accord with the statute.

Similarly mistaken is MacLean's claim that TSA's order is either "impermissibly retroactive" or "forum shopping." The agency's final order does no more than apply the SSI regulations to a specific piece of information on a specific date, using the law in effect at the time of the act in question. This is a classic instance of informal agency adjudication that is neither impermissible nor retroactive, and which follows the exclusive method for review under 49 U.S.C. § 46110 in the courts of appeals. MacLean may be displeased that this is the avenue that Congress has provided for a legal challenge to an SSI order, but the law is clear: review must be in the courts of appeals or not at all.

The remainder of the legal theories on which MacLean relies are not only meritless, but improperly conflate the question before this Court--whether the July 2003 text message was SSI--with the propriety of MacLean's subsequent removal based upon the disclosure of that information. MacLean's arguments under the Whistleblower Protection Act and "Anti-Gag Statute" bear solely on the latter question, and as both a statutory and practical matter can be raised only before the Merit Systems Protection Board. Furthermore, even if such claims were reviewable in this Court, they would fail on their merits. Because both statutes properly address only personnel actions and policies, they have no application to an order such as the one at issue here, which is not a personnel matter at all. In short, MacLean is free to raise a challenge his termination--which <u>is</u> a personnel action--before the MSPB, but such claims have no place in the petition for review before this Court.

ARGUMENT

I. TSA'S READING OF ITS REGULATIONS--A READING ENTITLED TO "EXTREME DEFERENCE"--CORRECTLY DETERMINED THAT THE TEXT MESSAGE QUALIFIED AS SENSITIVE SECURITY INFORMATION UNDER 49 C.F.R. § 1520.7(j) IN JULY 2003.

Where, as here, this Court is asked to review an agency's interpretation of its own regulations, deference to the agency is at its zenith. Such review is "extremely deferential," and the agency's interpretation must control "'unless it is plainly

erroneous or inconsistent with the regulation.'" Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1074 (9th Cir. 2001) (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)). Even without that heavy thumb on the scale, TSA's final order evinces a proper interpretation of section 1520.7(j)'s language and purpose. When viewed in the extremely deferential light that must be afforded to TSA's reading of its own regulations, the validity of the agency's order is unquestionable.

1. As part of its statutory duty to ensure the safety of civil aviation, TSA has issued regulations restricting the disclosure of Sensitive Security Information--i.e., information "developed in carrying out security" whose release would be "detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C); see also 49 C.F.R. § 1520.3(b)(3).[3] Among other items, SSI includes "[s]pecific details of aviation security measures"--which in turn includes any information "concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations." 49 C.F.R. § 1520.7(j). Such data is SSI unless the Under Secretary certifies to the contrary in writing. 49 C.F.R. § 1520.7.

In late July 2003, Federal Air Marshal management sent a text message to the government-issued mobile phones of Las Vegas

[3]SSI also includes certain other information not relevant here. 49 U.S.C. § 114(s)(1)(A)-(B); 49 C.F.R. § 1520.3(b)(1)-(2).

Air Marshals, cancelling future remain overnight missions--i.e., missions for which an Air Marshal would be required to remain at a remote location until the following morning, either because of the length of the protected flight or its hour of departure. Specifically, the text message stated that "all RON (Remain Overnight) missions . . . up to August 9th would be cancelled." ER 1. In a final order of August 2006, pursuant to 49 U.S.C. § 114(s), the Transportation Security Administration confirmed that this information constituted Sensitive Security Information under the regulations in effect at the time the message was disclosed. In particular, the Administration held that the information "concerned specific [Air Marshal] deployments or missions on long-distance flights," and therefore qualified as Sensitive Security Information under 49 C.F.R. § 1520.7(j). Id.

2. That determination is plainly correct. The information at issue falls squarely within section 1520.7(j)'s "[s]pecific details of aviation security measures"--and, more narrowly, information "concerning specific . . . deployments or missions" of Federal Air Marshals. The message reveals information about a specific type of assignment (remain overnight); it concerns a specific period (July 29 through August 9, 2003); and it applies to Marshals in a specific location (Las Vegas). The disclosure here is specific three times over--in time, location, and type--

and thus falls well within a reasonable reading of the categories of information covered by section 1520.7(j).

This conclusion is underscored by the required purposes of the SSI statute and regulations. The Under Secretary must prohibit the disclosure of Sensitive Security Information because its release would be "detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). A message to Las Vegas Air Marshals stating that there would be no remain overnight missions between July 29 and August 9, 2003 is precisely such data, susceptible to exploitation and dangerous in the hands of those intending to compromise aviation security. MacLean erroneously claims that this danger is diluted by the obscurity of the phrase "remain overnight missions." Petr's Br. 38-39. But the definition of remain overnight missions is obvious on its face--namely, that an assigned Marshal must remain overnight at a remote location. Even if an individual intending harm to aviation security were unable to deduce that a remain overnight mission means what it says, a modicum of research or common sense would lead a determined individual to conclude that long-distance and evening flights would be more susceptible targets. Intelligence that Federal Air Marshals would not be staffed out of Las Vegas on remain overnight missions for July 29 to August 9, 2003 poses precisely the heightened risk to aviation security that the SSI regulations

seek to prevent.[4] That conclusion further bolsters the agency's interpretation of the regulations in this instance.

3. Contrary to MacLean's suggestion (Petr's Br. 37-38), a message need not identify a particular Federal Air Marshal or an individual flight in order to qualify as SSI. While such information would certainly fall within the coverage of section 1520.7(j), the regulation contains no language that compels so narrow a limit to its scope. Indeed, such an interpretation would yield the perverse result that the broader a security measure--and thus the more dangerous its disclosure--the less likely such information would be protected as SSI. The word "specific" does not support such a reading, which would undercut the very purpose of the SSI regulations.

More to the point, even if the scope of section 1520.7(j) could sustain the interpretation MacLean suggests, TSA's reading to the contrary is a reasonable one--and accordingly must prevail.[5] Indeed, MacLean's claim that section 1520.7(j) is an

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[4]Nor is this result altered by the fact that TSA ultimately reinstated remain overnight missions for much of the period in question. See Petr's Br. 39-40. It requires no explanation to understand that releasing an aviation security plan--even if that plan is ultimately implemented in a revised form--still exposes civil air transportation to significant vulnerability.

[5]The language of MacLean's 2006 notice of removal and the deposition testimony of Andrew E. Colsky--neither of which is even part of the administrative record or properly before this Court--do not call the agency's interpretation into question. Contra Petr's Br. 35-38, 40-41. Neither source (unlike the final
(continued...)

ambiguous regulation that must be construed against its drafter, Petr's Br. 40-43, displays the flaw of his argument. Whatever purchase that rule might have in contract law, it is wholly inappropriate in the administrative realm, which dictates precisely the opposite outcome. The language of section 1520.7(j) may well be susceptible of both a broad and narrow interpretation--but MacLean bears the heavy burden of demonstrating that the regulation requires a reading contrary to TSA's final order. This Court must defer to TSA's understanding of its own regulation "unless an alternate reading is compelled by the regulation's plain language." Alhambra Hosp., 259 F.3d at 1074 (quotation marks omitted). MacLean's arguments, to the extent they even bear upon the question, support no such radical conclusion.

4. MacLean's contention that the 2003 message may not have been marked or distributed in a manner appropriate for SSI, Petr's Br. 32-35, does not alter this analysis. The regulations in effect at the time of the message's disclosure make no provision for marking or handling SSI--and certainly do not state that a failure to adequately safeguard SSI is license for its disclosure. Nor do TSA's Interim SSI Policies and

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[5](....continued) order in this case) is a formal statement of the agency's reading of the regulation; and in any event neither source contradicts the understanding of the term "specific" as elaborated in the August 2006 order.

Procedures for Safeguarding and Control (Nov. 13, 2002), which elaborate certain marking and distribution protocols for SSI, suggest the contrary. Unlike the SSI regulations, TSA's internal policy manual is not entitled to the force of law, and cannot nullify a legitimate SSI order that reflects the agency's interpretation of its own regulations. See Schweiker v. Hansen, 450 U.S. 785, 789-790 (1981) (per curiam); Anderson v. United States, 44 F.3d 795, 799 (9th Cir. 1995). In any event, the regulations and the policy manual speak with one voice in this instance: the Interim Policies, like the regulations, do not suggest that potentially inappropriate handling of SSI materials can revoke an otherwise valid SSI designation.

To conclude to the contrary would yield the absurd result that an inadvertent error in marking or distributing protected SSI materials would render them freely distributable. Cf. Lesar v. U.S. Dep't of Justice, 636 F.2d 472, 483-85 (D.C. Cir. 1980) (failure to mark classified material in accord with Executive Order does not require the "absurd result" of release under FOIA). In accord with this view, the new regulations--which specifically incorporate provisions for marking SSI--clarify that the agency's regulations have never exempted inadequately marked materials from SSI coverage. See 69 Fed. Reg. 28066, 28074 (May 18, 2004) ("As is the case under the current SSI regulation . . . records containing SSI that are not so marked

are nonetheless subject to the requirements of the SSI regulation.").

Furthermore, precisely because markings and distribution methods do not affect an otherwise appropriate SSI designation, neither the administrative record nor TSA's final order contains any mention of the facts alleged by MacLean in pursuing this claim. The absence of any support in the administrative record is itself enough to doom MacLean's argument on this score. See San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966, 969 (9th Cir. 1989). The alleged failure to mark or distribute the July 2003 message as SSI may bear upon whether MacLean realized that its contents were protected--and thus raise a question before the MSPB as to whether MacLean was appropriately disciplined. But such a failure is of no import to whether the message was properly SSI under section 1520.7(j), which is the only question before this Court.

* * *

In short, TSA correctly determined that the 2003 message constituted Sensitive Security Information under 49 C.F.R. § 1520.7(j). Even assuming that the regulation could be read more narrowly to exclude all but the most particular information about individual Air Marshals or flights, as MacLean argues, that would not be the best reading of the regulation in light of the statutory purpose it is intended to serve. More to the

point, that is not the interpretation that the agency has adopted and that this Court must accordingly follow unless a contrary reading is compelled. Whatever the outer bounds of section 1520.7(j) may be, the information at issue here--which concerns a narrow type of Air Marshal mission over a limited time in a particular location--falls well within the scope of information "concerning specific . . . deployments or missions" as the agency has interpreted that phrase. MacLean's arguments to the contrary do not compel an opposite conclusion, and this Court need go no further to deny his petition for review.

II. MACLEAN'S REMAINING ATTACKS ON TSA'S FINAL ORDER, TO THE EXTENT THEY ARE WITHIN THIS COURT'S JURISDICTION, ARE WITHOUT MERIT.

In addition to contesting TSA's interpretation of its own regulations, MacLean mounts a handful of other attacks on the agency's final order. At best, these challenges fail on their merits. At worst, MacLean's claims invoking the Civil Service Reform Act and related federal personnel statutes have no relevance to this petition for review--and must be brought, if at all, before the MSPB.

1. MacLean briefly contends that 49 U.S.C. § 46110(d) guarantees him an opportunity to raise objections to an SSI determination before the agency. Petr's Br. 26-27. But the text of the statute creates no such right. To the contrary, section 46110(d) simply limits the issues that can be raised in

a petition for review: "In reviewing an order under this section, the court may consider an objection to an [agency order] only if the objection was made in the [agency] proceeding . . . or if there was a reasonable ground for not making the objection in the proceeding." The provision creates no independent procedural rights, but is rather a "codification of the administrative exhaustion doctrine." USAir v. Dep't of Transp., 969 F.2d 1256, 1259 (D.C. Cir. 1992). As MacLean notes, Petr's Br. 26 n.7, the statute permits him to present his claims for the first time in the court of appeals where, as here, the agency proceeding did not afford an opportunity for contemporaneous objections. See, e.g., Communities Against Runway Expansion, Inc. v. FAA, 355 F.3d 678, 686 (D.C. Cir. 2004); City of New York v. Minetta, 262 F.3d 169, 177 (2nd Cir. 2001). But the statute does not require TSA to allow objections to SSI designations before the agency as well.

2. MacLean's characterization of the agency's final order as "forum shopping" or "impermissibly retroactive," Petr's Br. 27-28, 43-45, is likewise misplaced. As to the former claim, Congress has provided an exclusive avenue by which TSA's designation of Sensitive Security Information may be challenged: a petition for review of a final agency order in the courts of appeals. 49 U.S.C. § 46110(a); see also Gilmore v. Gonzales, 435 F.3d 1125, 1132-34 (9th Cir. 2006), cert denied, 127 S. Ct.

929 (2007). TSA issued a final order in this case, as it does for all challenged SSI designations, to permit review of the agency's reasoned decision before the appropriate tribunal--this Court. That is not "forum shopping": it is the process that Congress has required for challenging SSI determinations.[6]

Nor is the agency's decision retroactive--let alone impermissibly so. As with many agency orders, TSA's decision here simply applies the law at the time of the incident at issue to determine the legal status of a particular act in the past.[7] Far from being impermissibly retroactive, this is the essence of agency adjudication. Perhaps if TSA had rendered its decision under current law--rather than the law at the time of the event at issue--such an order would be "retroactive." See Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). But TSA did no such thing; its SSI determination is no more than an unremarkable example of traditional agency adjudication.[8]

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[6]MacLean is of course correct that deferential standards of review apply under such proceedings; but that, too, was what Congress provided when enacting section 46110.

[7]Needless to say, the inability of an agency official to recall another SSI order that applied to information already disclosed does not suggest that the agency has "violated its own past practice," as MacLean claims. Petr's Br. 28. Certainly, MacLean points to nothing in the statute or regulations that would limit the Under Secretary's authority in such a manner.

[8]MacLean suggests that the 2003 message might not qualify as SSI today because more than three years have elapsed since its issue. Petr's Br. 28. But that contention has no relevance to (continued...)

In sum, MacLean's suggestion that TSA's order "deprives [him] of his right to appeal his removal to the MSPB," Petr's Br. 43, is simply mistaken. With the exception of challenging the final order in this case--which Congress has required to be litigated in the courts of appeals--MacLean remains free to press whatever claims he wishes before the MSPB to contest his termination. Indeed, as discussed below, those of his arguments that rely on federal personnel statutes must be litigated in that forum, or not at all. What MacLean cannot do, however, is litigate an SSI designation before any court other than one provided for in 49 U.S.C. § 46110(a).[9] Compliance with this statutory command is the purpose of TSA's final order, and that result is neither impermissibly retroactive nor an exercise in forum shopping.

3. MacLean's contention that TSA's final order violates either the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8), or the "Anti-Gag Statute," Pub. L. No. 109-115, § 820, 119 Stat. 2396, 2500-2501 (2005), is wholly misplaced. It is an open question whether MacLean's removal may contravene either of

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[8](...continued)
the agency's decision here, which concerns only whether the message was SSI when it was disclosed in July 2003.

[9]MacLean is free to argue to the MSPB, as he has to this Court, that TSA's final order is not sufficient to justify his removal. But that question is separate from whether TSA has properly designated the 2003 message as SSI. That issue must be litigated in this Court pursuant to section 46110(a).

those statutes; that is a matter that the MSPB must ultimately decide. But it is abundantly clear that those statutes--which apply only to "personnel actions" and "nondisclosure policies, forms, or agreements" respectively--have no application to a final agency order determining certain information to be SSI. Moreover, even if a cause of action did exist under either statute to challenge TSA's order here, that action would properly lie before the MSPB. That result is compelled not merely by statute, but also by common sense: neither the administrative record in this case nor the courts of appeals in general are suited to adjudicating the fact-intensive inquiries that such personnel claims entail.

First and foremost, neither the Whistleblower Protection Act nor the "Anti-Gag Statute" apply to TSA's final order. The Whistleblower Protection Act is limited in its scope to "personnel actions" taken on account of permissible disclosures. 5 U.S.C. § 2302(b)(8). As defined by the Civil Service Reform Act, the term "personnel action" means

> any appointment, promotion, disciplinary or corrective action, detail, transfer, or reassignment, reinstatement, restoration, reemployment, performance evaluation, decision concerning pay or benefits and the like, decision to order psychiatric examination, and any other significant change in duties, responsibilities, or working conditions.

Orsay v. U.S. Dep't of Justice, 289 F.3d 1125, 1131 (9th Cir. 2002) (citing 5 U.S.C. § 2302(a)(2)(A)). A final order that

designates particular information as SSI falls under none of these enumerated categories. As MacLean suggests, TSA's final order may have subsequent legal implications for his action before the MSPB.[10] But this does not alter the conclusion that an SSI order does not itself qualify as a "personnel action" as the Civil Service Reform Act defines the term. MacLean may challenge his removal under that Act, but not TSA's final order on SSI.

MacLean's argument under the annual appropriations bill that he dubs the "Anti-Gag Statute" is equally tenuous.[11] Like the Whistleblower Protection Act, the "Anti-Gag Statute" is aimed at conditions of federal employment: its limitations apply only to a "nondisclosure policy, form, or agreement." 119 Stat. 2500. TSA's final order, which determines a specific piece of information to be SSI, is none of these--it is an agency adjudication, authorized by statute and with attendant force of law. This same conclusion holds for the agency's SSI regulations, which are required by federal statute and bear no resemblance to any common understanding of a "policy, form, or agreement." Indeed, the notion that Congress would require agencies to append the disclosure provisos of section 820 to the

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[10]But see supra note 9.

[11]It should be noted that the Act's appropriations primarily concern the year ending September 30, 2006. 119 Stat. 2396.

end of their regulations or final orders--as opposed to simply their internal forms and agreements with employees--is a strained reading of the statutory text at best. MacLean offers no reason to conclude that the "Anti-Gag Statute" encompasses the agency order or regulations in this case, and both the text of the statute and its purpose suggest the opposite.[12]

Even if TSA's final order did fall under the Whistleblower Protection Act or the "Anti-Gag Statute," such claims would be properly brought before the MSPB. It is beyond question that exclusive jurisdiction over Whistleblower Protection Act claims lies in the MSPB. See, e.g., Richards v. Kiernan, 461 F.3d 880, 885-86 (7th Cir. 2006) (citing cases); Stella v. Mineta, 284 F.3d 135, 142 (D.C. Cir. 2002) ("[u]nder no circumstances does the WPA grant the District Court jurisdiction to entertain a whistleblower cause of action brought directly before it in the first instance"). The same is true of the "Anti-Gag Statute," which creates no cause of action but finds expression, if at all, only in the catch-all provision of 5 U.S.C. § 2302(b)(12)

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[12]A contextual reading of the statute's terms makes clear that section 820 is aimed at agreements between the government and its employees--namely, documents akin to "forms" or "agreements" such as the Government Standard Forms 312 and 4414 also enumerated in the same provision. See Massachusetts v. Morash, 490 U.S. 107, 114-15 (1989) (explaining the "familiar principle[] that 'words grouped in a list should be given related meaning'"); see also Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995) (using noscitur a sociis "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words").

prohibiting personnel actions that "violate[] any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in [5 U.S.C. § 2301]." Thus, even assuming arguendo that the "Anti-Gag Statute" generates any enforceable rights, they would also lie within the exclusive jurisdiction of the MSPB. See generally United States v. Fausto, 484 U.S. 439 (1988). As a precursor to MSPB review, MacLean must also follow a detailed process of administrative exhaustion before pursuing either of his personnel claims. See, e.g., Stella, 284 F.3d at 142 (citing relevant provisions). MacLean cannot avoid this comprehensive system of adjudication by simply pressing his arguments before this Court in a petition for review.

Nor would it make any practical sense for this Court to adjudicate such claims in the first instance--particularly in the case of the Whistleblower Protection Act, where resolution turns upon factual matters such as the reasonable beliefs of an employee and the nexus between an employee's disclosure and an agency's allegedly retaliatory action. The unique institutional capacities of this Court make such an inquiry entirely infeasible. The lack of any germane facts in the administrative record only reinforces this conclusion. See, e.g., San Diego Air Sports Ctr., 887 F.2d at 969 (noting that, even when the

administrative record consists of no more than a letter, "[t]he limits of the record limit our jurisdiction").

In sum, MacLean is free to challenge his termination before the MSPB, where his arguments will be appropriately directed at personnel actions and where federal law provides that such challenges must be heard. But MacLean cannot invoke the authority of the Whistleblower Protection Act or the "Anti-Gag Statute" to challenge a non-personnel decision before this Court in the first instance. The record before this Court does not permit the resolution of such claims, nor do the statutes on which those claims rely. The only issue to be resolved by this Court is whether TSA correctly determined that a message disclosing the cancellation of particular Air Marshal missions in July 2003 was SSI. For the reasons discussed above, that decision was correct. This Court should accordingly deny the petition for review in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

Respectfully submitted,

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STATEMENT OF RELATED CASES

MacLean appealed his removal from his position as a Federal Air Marshal in MacLean v. DHS, No. SF-0752-06-0611-I-1 (M.S.P.B.). Upon MacLean's request, that action has been dismissed without prejudice pending the resolution of this petition for review.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in monospaced Courier New font of no more than 10.5 characters per inch. The brief from Statement of Jurisdiction to Conclusion contains 6026 words according to the count of this office's word processing system.

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2007, I filed and served the foregoing Brief by causing the original and 15 copies to be sent to this Court by Federal Express overnight, and by causing two copies to be sent Federal Express overnight to:

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