1   IN THE SUPREME COURT OF THE UNITED STATES

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3 DEPARTMENT OF HOMELAND   :

4 SECURITY,   :

5   Petitioner   :

6   v.   : No. 13-894

7 ROBERT J. MACLEAN.   :

8 - - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Tuesday, November 4, 2014

11

12   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 10:06 a.m.

15 APPEARANCES:

16 IAN H. GERSHENGORN, ESQ., Deputy Solicitor General,

17   Department of Justice, Washington, D.C.; on behalf of

18   Petitioner.

19 NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of

20   Respondent.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   first this morning in Case 13-894, the Department of

5   Homeland Security v. Robert MacLean.

6   Mr. Gershengorn.

7   ORAL ARGUMENT OF IAN H. GERSHENGORN

8   ON BEHALF OF THE PETITIONER

9   MR. GERSHENGORN: Mr. Chief Justice, and may

10   it please the Court:

11   In Section 114(r), Congress directed TSA to

12   promulgate regulations prohibiting disclosures that

13   would be detrimental to the security of transportation.

14   The information covered in the TSA regulations ranges

15   from a flight -- flight crew's plans for dealing with a

16   hijacking attempt to vulnerabilities in airport security

17   systems to the kind of de -- flight -- Federal air

18   marshal deployment information at issue in this case.

19   Under the Federal Circuit's construction of

20   the whistleblower statutes, any one of TSA's 60,000

21   employees may override TSA's expert judgment and

22   publicly disclose sensitive security information in that

23   employee's possession based on that employee's

24   reasonable belief about what public safety requires.

25   JUSTICE GINSBURG: At what point was -- was

1   MacLean told that this qualified an -- as SSI? Correct

2   me if I'm wrong about this, but as I understood it, he

3   was fired, and it wasn't until the case was before the

4   MSPB that a determination was made that this information

5   qualified as -- as what you call SSI.

6   MR. GERSHENGORN: Your Honor, I think that's

7   not quite correct, and let me see if I can work it

8   through.

9   The information -- the information about

10   Federal air marshal deployment has been prohibited by

11   regulation for more than a decade. It was prohibited

12   expressly prior to 9/11. It was in regulations that

13   were promulgated by TSA after 9/11.

14   JUSTICE GINSBERG: But when was he first

15   told?

16   MR. GERSHENGORN: He was told that air

17   marshal deployment information was SSI in the training,

18   and it's in the regs. He argued before the

19   administrative judge that he was unaware that this

20   information was SSI, and the administrative judge

21   rejected that contention. That's at Petitioner's

22   Appendix from 100a to 103a.

23   What the administrative judge found was his

24   testimony that he did not know this was SSI was

25   inconsistent, nuanced, and evasive, and the judge

1   rejected that contention.

2   What happens in the TSA final order, which I

3   know Your Honor is referring to, is that TSA creates a

4   final order determining something is SSI precisely so

5   that it can be appealed to the court of appeals under 49

6   U.S.C. 46110, which gives a person aggrieved by a -- a

7   TSA order 60 days to appeal something to the court of

8   appeals.

9   Mr. MacLean did so, and the -- the Ninth

10   Circuit rejected his argument that this was retroactive

11   classification of TS -- of SSI. So I think as the case

12   comes to this Court, there really is no dispute that he

13   understood that this was SSI.

14   CHIEF JUSTICE ROBERTS: But it -- it

15   certainly is -- will, in many cases, be a close

16   question. I was very surprised to see in your reply

17   brief the recognition that the employee can -- just to

18   quote it -- "can tell the media that Federal air

19   marshals will be absent from important flights, but

20   declining to specify which flights."

21   I think it would be very difficult to figure

22   out what's SSI and what's not if -- given that kind of

23   fine line.

24   MR. GERSHENGORN: So, Your Honor --

25   CHIEF JUSTICE ROBERTS: And could he say,

1   there will -- air marshals have been cut 50 percent

2   from, you know, transcontinental flights?

3   MR. GERSHENGORN: So, Your Honor, there may

4   be close cases. Again, the administrative judge heard

5   this contention from Mr. MacLean and rejected it. As

6   the case --

7   CHIEF JUSTICE ROBERTS: Heard what

8   contention?

9   MR. GERSHENGORN: That he did not know that

10   this was SSI, that the Federal air marshal deployment --

11   CHIEF JUSTICE ROBERTS: Okay. Well, what

12   about my question? Could somebody say that the number

13   of air marshals on transcontinental flights has been cut

14   50 percent?

15   MR. GERSHENGORN: Your Honor, I think

16   that -- that without specifying -- I don't know the

17   answer to that. I'm not someone at TSA who has

18   classification --

19   CHIEF JUSTICE ROBERTS: So how was

20   Mr. MacLean supposed to know?

21   MR. GERSHENGORN: Because Mr. MacLean --

22   Mr. MacLean is -- was trained to know, was trained in

23   SSI, received training on that -- on that. And as I

24   say, Your Honor, there is no dispute that he did know

25   that this was SSI. Details of Federal air marshal

1   deployment --

2   JUSTICE SOTOMAYOR: I'm a little confused.

3   Like Justice Ginsburg, I thought from the briefing that

4   that was done generally beforehand, that something would

5   be distributed to people with a confidential notice on

6   it so that people would be --

7   MR. GERSHENGORN: That would be marked SSI.

8   JUSTICE SOTOMAYOR: -- that the -- that this

9   was SSI. But this particular information wasn't so

10   designated before the release.

11   MR. GERSHENGORN: That's correct, Your

12   Honor. But the -- the -- there's no doubt the best

13   practice is, is to mark information SSI. But

14   information is SSI --

15   JUSTICE SOTOMAYOR: You want it before it's

16   going out.

17   MR. GERSHENGORN: Correct. But SSI can --

18   information can be SSI, whether or not it is marked --

19   whether it -- or not it is marked that way. And, again,

20   the regulations are -- are clear on this, that details

21   of Federal air marshal deployment are covered as SSI,

22   and this issue was litigated before the administrative

23   judge. I think --

24   JUSTICE KENNEDY: If there were no

25   regulations, just the statutes on the books, at that

1 point, are there any prohibitions on disclosure? Or

2 there can be no SSI without at least some regulation?

3   MR. GERSHENGORN: That's correct, Your

4 Honor.

5   But -- and so if I could turn to that, what

6 the Federal Circuit held, the Federal Circuit held that

7 the whistleblower protections extended to this

8 information. But properly read, 2302(b)(8)(A) squarely

9 forecloses that result. What that section does is

10 exempt from whistleblower protection information that is

11 specifically -- disclosure of which is specifically

12 prohibited by law. The Federal Circuit found no

13 specific prohibition here, indeed, no law at all.

14   But under the SSI regime, disclosure was

15 prohibited both by the statute that mandated

16 nondisclosure regulations and by the nondisclosure

17 regulations --

18   JUSTICE SCALIA: No, it wasn't prohibited by

19 the statute until there were regulations, right?

20   MR. GERSHENGORN: That's correct, Your

21 Honor. But there were regulations --

22   JUSTICE SCALIA: So it is prohibited by

23 regulations. Let's not play games.

24   MR. GERSHENGORN: So, Your Honor, I don't --

25 I -- I think we would prevail even under that

1   interpretation because it's prohibited by regulations

2   that the statute mandated to be disclosed. But I think

3   under this Court's decisions in Robertson and in Sims,

4   which addressed the question of specifically exempted

5   from disclosure by statute, and this Court said that in

6   Robertson, a regulation that gave to the administrator

7   authority to -- to ex -- to dis -- exempt from

8   disclosure after a public interest weighing, and in Sims

9   where the Court had a statute that just gave to the CIA

10   director an instruction to protect sources and methods,

11   and the Court said in both cases that was specifically

12   exempted by statute.

13   CHIEF JUSTICE ROBERTS: Well, your reasoning

14   is --

15   JUSTICE GINSBURG: What --

16   CHIEF JUSTICE ROBERTS: -- would -- it

17   apparently came as a surprise to the government lawyer

18   in the court of appeals. He said, I'll be as clear as I

19   can. Specifically prohibited by law here means statute.

20   MR. GERSHENGORN: So, Your Honor, I --

21   CHIEF JUSTICE ROBERTS: Again, the MacLean

22   is supposed to know something that the lawyer --

23   government lawyer and the court of appeals doesn't know.

24   MR. GERSHENGORN: So, Your Honor, I think

25   that that statement -- the lawyer did say that. But the

1   lawyer went on to explain that regulations promulgated

2   pursuant to a statutory mandate would control, and

3   that's what the Federal Circuit understood.

4   JUSTICE GINSBURG: But now you think -- you

5   seem to be arguing that it's not simply mandated by

6   statute. You use the two FOIA examples that you gave

7   was authorized or permitted. So what is your position

8   today? Before the Federal Circuit, it seems to have

9   been this is statute, not regulations. Now it's some

10   regulations, but we don't know whether regulations that

11   are mandated or regulations that are merely authorized.

12   What is it?

13   MR. GERSHENGORN: So let me be as clear as I

14   can. We believe that it is specifically prohibited

15   first by a statute, which was the argument that was made

16   clearly below, and by -- and -- and in the briefs here

17   and that this qualifies.

18   Second, we think that it is prohibited by

19   regulations that are prohibited pursuant to a statutory

20   mandate -- that promulgated pursuant to a statutory

21   mandate.

22   And if I could point the Court's attention

23   to page 15a.

24   JUSTICE KENNEDY: Excuse me, I must have

25   misunderstood. I asked you whether or not the employee

1   could be terminated if only the statute were on the

2   books and no regulations yet, and I thought you said no.

3   MR. GERSHENGORN: Because there would be no

4   SSI designated.

5   JUSTICE KENNEDY: All right. So --

6   MR. GERSHENGORN: But once there's -- sorry.

7   JUSTICE KENNEDY: So then -- so then the

8   statute alone does not carry the day.

9   MR. GERSHENGORN: So, Your Honor, I don't

10   think that's the way the Court looked at it in Robertson

11   and the way the Court looked at it in Sims, because in

12   both of those cases, there had been no determination not

13   to disclose until the administrator made the

14   determination, and yet the Court found that those were

15   specifically -- that they were specifically --

16   nondisclosure was specifically authorized by statute.

17   If I could just finish the answer to Justice

18   Ginsburg and to the Chief. At -- to the Chief Justice.

19   At page 15a in the Petitioner's Appendix,

20   what the court -- the Federal Circuit said was,

21   "Regulations promulgated pursuant to Congress's express

22   instructions would qualify as specific legal

23   prohibitions."

24   Both arguments were --

25   CHIEF JUSTICE ROBERTS: I'm sorry, what was

1   that quoted from?

2   MR. GERSHENGORN: That was from the Federal

3   Circuit's decision at 15a. It's at 15a attached to

4   the -- to the petition.

5   So the Federal Circuit understood, just

6   as -- as they said, that regulations promulgated

7   pursuant to Congress's express instructions would

8   qualify as specific legal prohibition.

9   JUSTICE SOTOMAYOR: Counsel, would you

10   qualify, assuming -- because Congress disagreed with

11   Robertson and -- didn't it? And it then amended FOIA.

12   MR. GERSHENGORN: Congress amended FOIA,

13   yes, Your Honor.

14   JUSTICE SOTOMAYOR: All right. Assume that

15   we read statute more or less the way that FOIA does --

16   MR. GERSHENGORN: Okay.

17   JUSTICE SOTOMAYOR: -- the amended FOIA. Do

18   you meet the amended FOIA criteria?

19   MR. GERSHENGORN: We do, Your Honor.

20   JUSTICE SOTOMAYOR: All right. And which

21   prong of it and why?

22   MR. GERSHENGORN: We meet the -- first of

23   all, I would just like to say that the Senate

24   legislative history expressly considered this very

25   question and said that if that -- that we -- I'm sorry.

1   Can I step back one second, Your Honor?

2   We don't think that you need to meet those

3   amended -- so -- the -- the amended FOIA.

4   But taking that as a given, Your Honor, what

5   the Senate report said was --

6   JUSTICE SOTOMAYOR: It seems to be eminently

7   reasonable despite Robertson.

8   MR. GERSHENGORN: It seems -- Your Honor,

9   once this Court --

10   JUSTICE SOTOMAYOR: I mean, but that's

11   basically what you're arguing, is that -- one of the two

12   FOIA exceptions. So tell me which one.

13   MR. GERSHENGORN: So it's the FOIA

14   exception, Your Honor, that -- that establishes

15   particular criteria for withholding or refers to

16   particular types of matters withheld. And we think in

17   the legislative history what the Senate report said was

18   that the Sims statute, the Section 102(d)(3) of the

19   National Security Act of 1947, would qualify and that's

20   a statute that said, "The director of CIA shall be

21   responsible for protecting intelligence sources and

22   methods from unauthorized disclosure," period. That was

23   all it said. That's no different from our statute and

24   we think that even if this -- we think --

25   JUSTICE SOTOMAYOR: Yours is, I think, a

1   little bit more specific than that.

2   MR. GERSHENGORN: Then perhaps more

3   specific. So we think that -- that it follows a

4   fortiori that if the Court relies on statute, that we

5   meet that statute and, of course, that -- that makes

6   perfect sense. If the Chief Justice were --

7   JUSTICE BREYER: Well, my goodness. I'm not

8   sure. I mean, when you have a CIA statute, they say you

9   cannot disclose agents or sources and -- what does it

10   say? Sources?

11   MR. GERSHENGORN: Your Honor, it says, "The

12   director of" --

13   JUSTICE BREYER: Sources and methods,

14   intelligence sources and methods. And there's another

15   one that refers to critical infrastructure information.

16   All right. If I accept those as being sufficiently

17   specific or having sufficient criteria, I look at yours.

18   And yours says, "There shall be regulations prohibiting

19   the disclosure of information obtained or developed in

20   carrying out security" -- and now here's the

21   criterion -- "if the under secretary decides disclosing

22   information would be detrimental to the security of

23   transportation."

24   Now, that it seems to me could include

25   everything from a spark plug that is deficient in the

1   airplane to a terrorist. And -- and I don't -- I mean I

2   don't know how I would judge that. I mean, to the ear

3   telling the CIA you can't disclose sources seems a lot

4   narrower than telling the Department of Transportation

5   or Homeland -- what is it, DOT -- that, everybody in

6   charge of airplanes, you have a regulation, detrimental

7   to the security of transportation. I don't know. How

8   would you decide it? I mean, it sounds to me that

9   that's quite a lot broader and so much can be

10   detrimental to the security of an airplane.

11   MR. GERSHENGORN: So, Your Honor, a couple

12   of points on that. First of all, the -- the Court

13   interpreted the statute in Robertson to be sufficiently

14   specific. And in Robertson, what the Court -- what the

15   statute said was, "An administrator shall order

16   information withheld from public disclosure when, in the

17   judgment of the administrator, the disclosure would

18   adversely affect the interest of the person and is not

19   required in the interest of the public." It's much less

20   specific.

21   JUSTICE BREYER: Now, that's the one before.

22   MR. GERSHENGORN: But that's the one this

23   Court found sufficient.

24   JUSTICE BREYER: That may be what this Court

25   did. But subsequent to that, Congress amended the Act,

1   as was just pointed out, in a way that says you have to

2   have specific criteria.

3   MR. GERSHENGORN: But if I may, Your Honor.

4   It amended FOIA, but strikingly, the Court -- the

5   Congress did not amend and include that language when it

6   passed the CSRA. In fact, what Congress did --

7   JUSTICE BREYER: Okay. I'll look at that.

8   I'll look at that. I'm not -- I can deal with that on

9   my own. But I do have a question that only you can deal

10   with. And the question I have that only you can deal

11   with is this. I mean, obviously, it's a matter of

12   concern that someone could go around and say there are

13   no marshals on this airplane. That is obviously a

14   matter of concern. So if in fact that was a real worry

15   about blowing up airplanes for that reason, could the

16   President then simply use the second prong and say an

17   executive order will require that to be kept secret?

18   MR. GERSHENGORN: Your Honor, the President

19   could do that.

20   JUSTICE BREYER: All right. Now, in doing

21   that, in doing that, does it automatically fall into the

22   400,000 regulations that govern Defense Department

23   security information, or could he say, for the purpose

24   of this statute, what we're talking about now, I

25   determine that it should be kept secret. Therefore,

1 there is no -- no prohibition against people

2 communicating that information with Swedish people,

3 British people, all kinds of airline officials, et

4 cetera? Now, you're saying yes, he could do that under

5 this second prong, yes or no?

6   MR. GERSHENGORN: Yes, because there's an

7 executive order --

8   JUSTICE BREYER: Yes. Okay. Fine. If

9 that -- if he can do that, then there is no worry.

10   MR. GERSHENGORN: Your Honor --

11   JUSTICE BREYER: Because if this -- am I

12 right, there is no worry?

13   MR. GERSHENGORN: No, Your Honor.

14   JUSTICE BREYER: Because if, in fact, this

15 is going to lead to blowing up airplanes, all he has to

16 do is use that second prong. Now, you say I'm not

17 right. Why not?

18   MR. GERSHENGORN: You're not right, Your

19 Honor, because that is fundamentally inconsistent with

20 the judgment that Congress made that the SSI system

21 should coexist with the classified information and with

22 executive orders. What Your Honor is saying is that it

23 doesn't matter that the SSI system that Congress set up

24 doesn't -- wouldn't work and can't function because the

25 President by executive order could fill in the gaps.

1   But what Congress --

2   JUSTICE BREYER: I'm not saying anything

3   like that. I am worried about a practical matter. I am

4   worried about the decision of the Court against you

5   leading to somebody blowing up an airplane. And I

6   suddenly thought, as a practical matter, that is not a

7   serious worry because the President can always use the

8   second prong to keep people from disclosing the

9   information that you don't want disclosed. And so far,

10   you've said I'm right and now you got into a legal

11   argument. I'm not talking about a legal argument.

12   MR. GERSHENGORN: So, Your Honor, I think

13   such a system could be devised, but I think it would be

14   a very odd construction of the statutes the Court has

15   before it to -- to say that we are going to undermine

16   and eviscerate the SSI system that Congress by

17   statute --

18   JUSTICE BREYER: No, no. I am just

19   worried -- look. Let me ask my question. And my

20   question is: If for other reasons I decided you were

21   wrong, would I still have to face the problem of

22   airplanes being blown up? I'm focusing on this because

23   it's very important to me. And you have answered that

24   question, if for other reasons -- and you, of course,

25   think you're right -- but if for other reasons I thought

1   you were wrong, I wouldn't have to worry about that

2   practical problem because there is prong two. And it's

3   important to me that you answer yes or no and I take

4   your answer to be yes, you are right as a practical

5   matter.

6   MR. GERSHENGORN: I think it is possible

7   that the President could entirely duplicate the SSI

8   system that Congress set up to help to prevent that

9   practical problem.

10   JUSTICE ALITO: To follow up on that, if the

11   President proceeded along that path, what would be the

12   consequences with respect to the people, the class of

13   people who would be able to have access to this

14   information? Would this -- this would be classified

15   information and then only people with certain security

16   clearances would be -- no?

17   MR. GERSHENGORN: So the system could not

18   work, Your Honor, if it was a classified information

19   system.

20   JUSTICE ALITO: No. I'm talking about

21   Justice Breyer's alternative.

22   MR. GERSHENGORN: So Justice Breyer's

23   system, the answer is we would be in uncharted

24   territory. I don't know as a fact that the President --

25   the President would have to essentially duplicate the

1   SSI system. And it's precisely because it doesn't work

2   under the classified information system that already

3   exists, because this is information that is very

4   sensitive, yet has to be shared among people who are

5   operating our -- our transit system, so that flight

6   attendants need to know --

7   CHIEF JUSTICE ROBERTS: Yeah. But what's so

8   hard about duplicating the SSI system? He signs an

9   executive order saying duplicate the SSI system and

10   right away the problem we have here of people like

11   Mr. MacLean revealing information is not a problem

12   anymore because it is then protected by executive order.

13   MR. GERSHENGORN: So, Your Honor, I -- I

14   just -- I -- I think that that would work, but I have to

15   say I'm not sure of the ins and outs. But I do think

16   it's critical to say --

17   JUSTICE SCALIA: It would have one good

18   effect and that is, it would make sure that the matter

19   is important enough to occupy the President's attention

20   and is not so insignificant that an agency that just

21   doesn't want any whistleblower, doesn't want any

22   criticism of what it's doing, can pump out these

23   regulations. It would have that -- that salutary

24   effect, wouldn't it?

25   MR. GERSHENGORN: Your Honor, it might have

1   that effect, but I think that that's the judgment that

2   Congress made. What Congress did was set up this SSI

3   system, knowing that the President had authority under

4   the executive order, knowing that the classified

5   information system was set. And what Congress -- and

6   knowing, in fact, what these regulations said, the very

7   regulations in -- in basically the same form that we

8   have today.

9   When Congress created -- moved TSA into

10   the -- into DHS as part of the Homeland Security Act,

11   these regulations were already there and Congress had

12   them before it. And what Congress said was that SSI --

13   JUSTICE KAGAN: Mr. Gershengorn, if I could,

14   before you get away from this, and I understand you have

15   a statutory argument to make, but the way that the

16   President would do this, if he wanted to do it, would be

17   by a new executive order or, in fact, would this old

18   Executive Order 13556, which deals with controlled

19   unclassified information, is that what the President

20   would use?

21   MR. GERSHENGORN: Your Honor, I'm not sure

22   of the ins and outs of what the President would have to

23   do. This is information that is shared outside of the

24   government, which is what makes it a little tricky.

25   These are -- they are shared with -- with flight

1   attendants. They're shared with local --

2   JUSTICE KAGAN: Right. But I thought that

3   that class -- that class of information, controlled

4   unclassified information, as opposed to classified

5   information, could be shared outside the government and

6   Executive Order 13556 deals with that and the President

7   could simply make clear that that executive order

8   applies to this kind of information.

9   MR. GERSHENGORN: So, Your Honor, I just

10   don't know the answer to that, whether that order

11   would -- would satisfy. My sense is that it would take

12   a lot more than that to -- to duplicate the kinds of SSI

13   system that has been in place for over a decade and a

14   half and that Congress signed off on. But it -- it --

15   and so the exact form of the executive order, it's not

16   something that, quite frankly, I think we've

17   contemplated here because there is this regime that

18   Congress had set up.

19   CHIEF JUSTICE ROBERTS: Well, about -- you

20   talked about what Congress meant and set up. But the

21   conference report says the language does not refer to

22   agency rules and regulations. So, whatever staffers

23   prepared that, and I'm not suggesting Congress did, but

24   whatever staffers prepared that, again, MacLean had to

25   know more than they did.

1   MR. GERSHENGORN: So, Your Honor, I don't

2   think that's right. And I think this is a situation --

3   I'm going to make the initial point and then step back

4   if I could and make a series of points on this.

5   I think this is a situation in which the

6   Court has -- would be right to view that legislative

7   history with some skepticism and here's why. What

8   Congress had before it was a bill that said, but from

9   the Senate side, that said "prohibited by statute." Had

10   Congress passed that, we wouldn't be here making our

11   regulatory argument. What Congress adopted was a

12   provision that says "specifically prohibited by law," a

13   phrase that --

14   JUSTICE SCALIA: Yes. But elsewhere in the

15   same legislation, it refers to "prohibited by law, rule

16   or regulation."

17   MR. GERSHENGORN: It does.

18   JUSTICE SCALIA: Here, it just said "by

19   law." Elsewhere in the same statute it says, "by law,

20   rule, or regulation." What am -- what am I supposed to

21   conclude from that?

22   MR. GERSHENGORN: So I think what you need

23   to conclude from that, Your Honor, is that the term "by

24   law" has to exclude at least some rules and regulations,

25   and we think that it does. It excludes those that are

1   internal agency regulations and regulations relating to

2   agency organization, practice or procedures.

3   JUSTICE SCALIA: How do I know that?

4   MR. GERSHENGORN: Because that is the

5   presumption that this Court set up in Chrysler. What

6   Chrysler did was interpret the phrase "authorized by

7   law," and what the Court said that "authorized by law"

8   meant had a well-established meaning and that

9   well-established meaning was that regulations that met

10   the three-part test in Chrysler, that they were

11   substantive regulations of a legislative type, that they

12   were reasonably within the contemplation with Congress,

13   and they were properly promulgated, were regulations

14   that counted as by law.

15   The Court expressly distinguished internal

16   agency interpretive rules and agency rules of

17   organization, order, and practice and said those were

18   different. We think that is the distinction that is in

19   the statute.

20   JUSTICE SCALIA: If -- if that is true and

21   if that is so obvious, Congress would not have -- have

22   to have said "by law, rule, or regulation" in the other

23   provision. It could just have said "by law" and what

24   you said would automatically follow.

25   MR. GERSHENGORN: No, Your Honor. The "law,

1   rule, or regulation" is the formulation that sweeps in

2   agency internal rules and regulations and regulations

3   promulgated pursuant to the housekeeping reg. That is

4   precisely the distinction that the Court drew in

5   Chrysler and it is precisely the distinction that we

6   draw in the statute.

7   When the statute says "by law, rule, or

8   regulation," it includes all lawfully promulgated

9   regulations, including interpretive rules, including

10   agency's rules of procedure and practice. When the

11   statute says "by law," what the Court -- what is meant

12   and what Chrysler said had a well-established meaning

13   that -- that would require a clear showing to overcome

14   is that it includes statutes and it includes regulations

15   that meet the Chrysler three-part test. So that is the

16   precise distinction that this Court -- that this Court

17   drew in Chrysler, and it is embodied in the statute. To

18   read it otherwise is to say that --

19   JUSTICE KAGAN: But the place -- Mr.

20   Gershengorn, Chrysler was -- it just said "law." "Law"

21   was not juxtaposed in the same sentence as another

22   phrase that said "law, rule and regulation." So that

23   would seem, that juxtaposition of the two very different

24   terms, would seem to defeat the Chrysler presumption.

25   MR. GERSHENGORN: So, Your Honor, the reason

1   I don't think it does is because it is equally

2   consistent with precisely the distinction that Chrysler

3   drew between regulation -- rules, regulations with the

4   force and effect of law on the one hand and internal

5   rules and reg -- and rules of agency --

6   JUSTICE SCALIA: Boy, that is subtle. That

7   is so subtle, that Congress is going to draw that

8   distinction between substantive rules and procedural

9   rules by saying "law" here and "law, rule, or

10   regulation" there. You can spin out that argument, but

11   the notion that this is what Congress had in mind when

12   it enacted this thing or that any member of Congress had

13   in mind when he voted for it, I -- I find that hard to

14   believe.

15   MR. GERSHENGORN: So, Your Honor, the reason

16   why I don't think you should find that hard to believe

17   is the following. First of all, by going from "by

18   statute" to "by law," right, Congress went from a

19   narrow -- a narrow structure that would have plainly

20   foreclosed regs and instead moved to a much broader

21   formulation that this Court had given meaning in

22   Chrysler.

23   Second --

24   JUSTICE GINSBURG: One -- there was one view

25   that by going to "law" rather than "statute" what was

1   meant was to include judicial decisions.

2   MR. GERSHENGORN: Your Honor, it does say

3   that in the -- in the legislative history, but that's

4   precisely why I think this Court should view that with

5   some skepticism. It's hard to believe that the term "by

6   statute" would not have included constructions of

7   statutes that this Court made. And so to justify the

8   move from "by statute" to "by law" to say we sweep in

9   the Court's interpretation of statutes, I think, is a

10   little hard to swallow.

11   If I could reserve the balance of my time.

12   CHIEF JUSTICE ROBERTS: Thank you, counsel.

13   Mr. Katyal.

14   ORAL ARGUMENT OF NEAL K. KATYAL

15   ON BEHALF OF THE RESPONDENT

16   MR. KATYAL: Thank you, Mr. Chief Justice,

17   and may it please the Court:

18   Congress enacted the Whistleblower Act to

19   restrain, not to empower, agencies. Now, my friend's

20   answer at the start of his oral argument was the specter

21   of 60,000 people who are going to leak this information.

22   We're not in a Chevron situation in which the agency is

23   getting any sort of deference here. And as Justice

24   Breyer's line of questioning, I think, points out, that

25   is a red herring, because Congress in (b)(8) of the

1   Whistleblower Act dealt with precisely that. They gave

2   a mechanism for the President --

3   JUSTICE SOTOMAYOR: Mr. Katyal, if the

4   statute read, "Disclosure of information detrimental to

5   transportation safety is prohibited and the TSA shall

6   promulgate regulations to that effect," would that be

7   pursuant to law under the statute?

8   MR. KATYAL: I don't think so. I'll explain

9   why in a moment.

10   JUSTICE SOTOMAYOR: And that'shat's what I want

11   to know. How specific does -- are we going to get to a

12   point where Congress has to look at every category of

13   information every agency deals with and make a law

14   prohibiting the disclosure of that individually?

15   MR. KATYAL: Not at all, Your Honor. So

16   with respect to the backup argument of the government,

17   114(r), we have two different views -- two different

18   arguments. One is that 114(r) doesn't prohibit. The

19   other is that it's not specific. And your hypothetical

20   deals with the first and not the second. So you've

21   already -- the Congress is doing the prohibiting, unlike

22   114(r), which, as Justice Kennedy pointed out, doesn't

23   actually do anything. You need the regulation.

24   With respect to specificity, I think

25   Congress has two different options in (b)(8). One is to

1   pass a specific law. The opposite of "specific" is

2   "general," and I think the words "detrimental to

3   transportation security" aren't specific enough. And if

4   you need any illustration of that, just look to my

5   friend's argument in the reply brief that the Chief

6   Justice pointed out, where he said that -- that

7   information -- that you could release information about

8   how important flights weren't covered.

9   The SSI regulations flatly call that SSI

10   material -- this is 49 C.F.R. 1520.5(b)(1) and (2),

11   quote: "Information concerning the deployments and

12   operations of Federal air marshals are covered." That

13   is SSI material. And so he can't even give you --

14   JUSTICE SOTOMAYOR: Do you have any doubt

15   that the -- that -- make the argument that the

16   disclosure of this information didn't potentially harm

17   transportation safety?

18   MR. KATYAL: Certainly. That's

19   Mr. MacLean's whole position, which is that he saved

20   national security. This was a situation unfolding in

21   real time in a 4-day period and he did everything he

22   could from going to the Inspector General and to a

23   supervisor in -- in a quick thing in order to save

24   something that otherwise would have been detrimental to

25   national security.

1   Now, my other point about the specificity --

2   JUSTICE SCALIA: And he was successful.

3   MR. KATYAL: And he was, and the TSA

4   admitted there was a mistake.

5   JUSTICE SCALIA: They called off the

6   cancellations.

7   MR. KATYAL: Exactly. The other point

8   about --

9   JUSTICE ALITO: I'm sorry. Go ahead.

10   MR. KATYAL: The other point about

11   specificity is Congress has a whole other way of dealing

12   with it, as Justice Breyer pointed out, which is the

13   critical information, infrastructure regulation --

14   regulations and the like. Congress can enact a

15   notwithstanding clause --

16   JUSTICE SOTOMAYOR: So are you saying that

17   this statute is not specific enough for a FOIA request?

18   If someone under FOIA had come in and asked for this

19   information, they could have gotten it?

20   MR. KATYAL: Your Honor, 114(r)'s first

21   words are "notwithstanding FOIA," okay. And it only is

22   notwithstanding FOIA. Congress is free to do precisely

23   that with respect to the Whistleblower Act, either

24   notwithstanding all laws or notwithstanding the

25   Whistleblower Protection Act, and pass the most general

1   statute imaginable. It doesn't have to be specific.

2   JUSTICE SOTOMAYOR: So you want us to

3   de-couple FOIA from this. It would be okay under FOIA

4   for the agent to withhold this information?

5   MR. KATYAL: That's exactly what Congress

6   has said.

7   JUSTICE SOTOMAYOR: Because you think it's

8   -- that you think it's -- that particular types of

9   matter to be withheld. You agree with the government

10   that that includes this kind of material.

11   MR. KATYAL: It very well may satisfy FOIA,

12   particularly because of the first clause, which is

13   "notwithstanding FOIA." So you don't have to deal with

14   this. But -- but here, the statute doesn't say anything

15   like that and so for that reason it's not specific.

16   JUSTICE BREYER: No. But the statute -- the

17   statue other than the FOIA exemption 3 language doesn't

18   talk about when a matter is kept secret by statute, as

19   opposed to by regulation. So given that it's all tied

20   in together, it's very tempting to say, I'll tell you

21   when it's a statute rather than a regulation. And then

22   you go and read the -- the exemption 3 and you say it's

23   a statute when, 1, it leaves no discretion on the issue,

24   or 2, it establishes particular criteria for

25   withholding; or three, it refers to particular types of

1 matter. So we look at the statute to see if it does

2 that. That's what I thought I was supposed to do, to

3 decide whether it's the statute that's doing it or the

4 regulation. And the one that gives me the most trouble

5 on those three is the last one, because it does seem to

6 refer to a particular type of matter, though in very

7 general terms. But so what do you think of what I've

8 just said?

9   MR. KATYAL: Your Honor, we think the best

10 way of understanding specific is to think about its

11 opposite, which is general. And "detrimental to the

12 security of transportation" is general. Yes, if it

13 refers to a particular -- you know, it does refer to a

14 particular matter. Well, any statute is going to refer

15 to some sort of particular matter, but we think Congress

16 had something deeper in mind. And, of course, the

17 Freedom of Information Act --

18   JUSTICE BREYER: I see that. I see that.

19 You'd have to say critical infrastructure facilities are

20 on one side of the line. This is on the other.

21   Now, what about the analysis I just went

22 through? What do you think of that? Is that the

23 correct legal analysis, in your opinion?

24   MR. KATYAL: Well, I think -- I think not.

25 I think you can pick any definition of specificity. My

1   worry about adopting the FOIA one is, as Justice Scalia

2   was pointing out to my friend,that this statute

3   affirmatively distinguishes in (b)(8) between "law, rule

4   and regulation" in the first clause and "law" in the

5   second. And I think Congress is saying, unlike FOIA,

6   that rules and regulations don't themselves do the

7   prohibiting. It is only law. That is why the phrase is

8   "specifically prohibited by law." There isn't anything

9   like that in FOIA. And, indeed, FOIA has two purposes,

10   as this Court in Robertson said, one of which is to

11   empower agencies. It has nine different exemptions all

12   about empowering agencies --

13   JUSTICE KENNEDY: But the gravamen of your

14   position is that after Congress enacted these statutes,

15   anything that came within the WPA definition could be

16   disclosed until Congress passed another statute? That's

17   what you want us to hold?

18   MR. KATYAL: No, no, not at all, Your Honor.

19   I think that as long as it has a notwithstanding clause,

20   as many things even before the Whistleblower Protection

21   Act did have, or it has a specific prohibition about

22   specific matters to be disclosed, unlike the general

23   prohibition here, "detrimental to the security of

24   transportation," that's enough. But there's also a more

25   fundamental point --

1   JUSTICE KENNEDY: Where could I look to find

2   examples of where, before the regulation, there would be

3   information pertaining to airline flights that could not

4   be disclosed?

5   MR. KATYAL: Well, I'm not sure about

6   airline flights, but, for example, 10 U.S.C. 2640(h)

7   says, quote, "The Secretary of Defense may, not

8   withstanding any other provision of law, withhold from

9   public disclosure safety-related information." And so

10   that is a notwithstanding any other provision of law.

11   JUSTICE KENNEDY: But that doesn't apply to

12   this Respondent.

13   MR. KATYAL: Well, I'm saying in general,

14   Your Honor, Congress has available to it tools --

15   JUSTICE KENNEDY: You're saying that this

16   Respondent, until there was a second statute, was not

17   prohibited from disclosing anything within the broad

18   reach of the WPA of "uncovered a violation of matters

19   relating to specific danger to public health or safety."

20   MR. KATYAL: That is correct, Your Honor.

21   We are saying that --

22   JUSTICE KENNEDY: So Congress passed a

23   statute saying: And we'll pass another statute sometime

24   before this has any effect?

25   MR. KATYAL: Your Honor, Congress in 114(r)

1   was not dealing with the Whistleblower Protection Act.

2   The language at the start is "Notwithstanding FOIA." We

3   certainly think Congress could deal with it if they

4   wanted to, but I think, as the members of Congress brief

5   points out, they likely won't. Why? Because people

6   like Mr. MacLean promote the national security. They

7   don't harm it.

8   JUSTICE ALITO: Can I ask you about that?

9   You say in your brief Mr. MacLean contacted a reporter

10   with a history of responsible reporting about TSA who

11   maintains close connections with Congress. Now, suppose

12   that he instead contacted a reporter working for a

13   foreign state-controlled news agency and the information

14   was not quickly released to the public, so that the

15   information was out there and could have been obtained,

16   perhaps, by terrorists before Congress was aware of this

17   and before the agency was aware of it and before it was

18   able to take corrective action. Would there be any

19   reason why that would not fall under the statute, as you

20   understand it?

21   MR. KATYAL: Justice Alito, I don't believe

22   the Whistleblower Protection Act deals with that. Of

23   course, Congress could, by circumscribing the Act in

24   various ways. But here's what I think Congress did in

25   (b)(8). They said not just can Congress pass a specific

1   exemption or a nonspecific one with a "notwithstanding"

2   clause. They said the President, by executive order,

3   can deal with precisely this problem and it doesn't

4   require classification and it doesn't require somehow

5   two systems that are going to --

6   JUSTICE BREYER: In your view you don't even

7   need the President. In your view, the President

8   wouldn't get involved because you have to have a very

9   specific statute. That's your view.

10   MR. KATYAL: No, Your Honor.

11 Justice Breyer, there are two different ways in (b)(8)

12 for Congress to deal with the problem.

13   JUSTICE BREYER: I know that. I'm just

14 saying but you don't even get into it because it was in

15 a regulation and not in a statute. And if it's not in a

16 statute, then you don't even get into that.

17   MR. KATYAL: Right. I'm dealing with the

18 circumstance that Justice Alito's posited, in which you

19 have 60,000 people who might leak to foreign media or

20 something like that. And if the government believes

21 that, they can solve that problem literally today by

22 walking out of this courtroom, having an executive order

23 that says SSI material, like the material here, air

24 marshal information, is exempt from the Whisteblower

25 Protection Act. Congress passed that clearly in (b)(8).

1   And as Justice Scalia says, that's the way to promote

2   accountability. They didn't want unelected agencies --

3   the fox to guard the hen house.

4   JUSTICE ALITO: That may be. But I doubt that if

5   Congress had thought about the situation that I posited,

6   they would be content with the possibility of a

7   disclosure that wasn't really a disclosure to the full

8   public.

9   MR. KATYAL: Well, I think, Justice Alito,

10   Congress has dealt with this question about how to

11   whistleblow, do you need an exhaustion requirement, and

12   so on, and other things. And every single time --

13   they've amended the Act four times. And every single

14   time, they've said the problem is not too many

15   whistleblowers, it's too few. Congress recognizes it's

16   really hard for someone like Mr. MacLean, other

17   whistleblowers, to go to the media because they put

18   their job at risk, they get fired. And then they have

19   to spend years litigating, as this litigant has, just to

20   get his job back. And they do that only in the name of

21   public interest. There's no private gain or anything

22   like that.

23   So, Justice Kennedy, of course Congress can

24   prohibit the disclosure of this information in general.

25   They have in 114(r). The question before the Court here

1   is have they done so with respect to the Whistleblower

2   Protection Act? Have they done something specific

3   enough to deal with the Whistleblower Protection Act?

4   And the answer to that, we think, is no because --

5   JUSTICE SCALIA: I'm a little concerned

6   about your acceptance of the hypothetical that the

7   whistleblower doesn't blow the whistle to anybody except

8   the Soviet Union. Do you really think that that's what

9   the statute means when it says to take or fail to take

10   or threaten to take personnel action with respect to any

11   employee because of any disclosure of information which

12   the employee or applicant reasonably believes evidences

13   a violation of law, rule or regulation, gross mis --

14   don't you think it's implicit in that he's disclosing it

15   to somebody who could remedy the problem as opposed to

16   an enemy?

17   MR. KATYAL: It may very well be precisely

18   right. Our simple point here is that, whatever that

19   standard is, that's a constant in this case. And if to

20   the extent the Court is worried about it at all, I think

21   Congress in (b)(8) provided mechanisms to deal with

22   that, either a specific or nonspecific order or an

23   executive order that doesn't require classification. It

24   doesn't require mucking up at all the classification

25   system.

1   JUSTICE SOTOMAYOR: I'm troubled because, you know, the

2   facts are very much in your favor here, because he

3   disclosed it publicly, but under your scenario or under

4   your position, if he published every day until the

5   executive order came out the schedule of which flights

6   air marshals will be on and he would come out and just

7   say, I think we need more air marshals, that would be --

8   that would not be a violation. They couldn't fire him for that.

9   MR. KATYAL: Justice Sotomayor, Congress has

10   dealt with that, I think, at various points in the

11   Whistleblower Act, asking the question, is this too

12   loose a standard and so on. Every single time they

13   concluded not. Why? Because it is so hard for

14   whistleblowers to come forward. The former government

15   officials' brief at page 34 gives you data on this.

16   There have been 203 cases that have gone to the Federal

17   Circuit, whistleblower cases, and they've won --

18   whistleblowers have won a whopping three of them. There

19   have been 56 cases that have gone to the MSPB. Again,

20   whistleblowers have won three of them.

21   CHIEF JUSTICE ROBERTS: Which way does that

22   cut? It seems to me that cuts very much against you.

23   In other words, whistleblowers are blowing the whistle

24   all the time without any justification. That's I

25   thought the government's point, that this requires, puts

1   all the eggs in the basket of whatever the whistleblower

2   happens to think is a good disclosure.

3   MR. KATYAL: I think not, Mr. Chief Justice.

4   I think Congress each time has looked at this situation

5   and has said every single time, we need more

6   whistleblowers to come forward, because that's the human

7   failsafe against a machine bureaucracy.

8   JUSTICE BREYER: Congress -- I mean, I know

9   people don't want to bring this up. But actually the

10   staffs of congress do consider these problems. They

11   write them down. They say what the answer is and the

12   members are informed.

13   Now, in this particular case, if you happen

14   to read the conference reports, you get the answer. It

15   says, what does it mean not specifically prohibited by

16   law? And then in both the House report and the Senate

17   report, it tells you, go back to what we passed two

18   years ago, namely, the FOIA exemption, and that's what

19   it means. And so that's why I got the thought that

20   maybe that is what it means. And once you have that

21   thought, you then see the country isn't going to fall

22   apart because they wrote in the presidential exemption

23   as well.

24   So reading what the staffs actually wrote,

25   perhaps I'm biased in that respect, believing that the

1   members of Congress do think about these problems

2   through staff, we have the answer to this case leaving

3   only open whether it is specific enough or not, and you

4   make an argument that it's too general.

5   Now, why shouldn't I follow that approach?

6   MR. KATYAL: So I think generally, you

7   should -- you should, Justice Breyer. That is, I think

8   the conference report, and this is quoted in our brief

9   at page 24, this is unlike almost any case I've seen

10   before this Court in recent years in which the

11   conference report so clearly gives you the answer to the

12   question presented.

13   JUSTICE BREYER: There are three reports.

14   One is really for you, and that's the conference report.

15   The Senate report is somewhat against you because it

16   picks up the FOIA -- or the FOIA exemption, and says

17   that's what this means, even though you don't want to do

18   that and --

19   MR. KATYAL: Your Honor --

20   JUSTICE BREYER: -- I would read all of

21   them, the House report, too.

22   MR. KATYAL: -- let -- let me address the

23   Senate report and the FOIA stuff. We think even under

24   the FOIA standard, we don't think this is a particular

25   matter, that that itself is too general.

1   But, Justice Breyer, there's two other

2   things about that Senate report --

3   JUSTICE SOTOMAYOR: Excuse me.

4   Then you would say that under FOIA -- I

5   mean, assuming I follow Justice Breyer's approach -- you

6   would be leading to the conclusion that the

7   government -- if a FOIA request is made, the government

8   has to disclose it because it doesn't -- because it's

9   not -- the -- the statute is not referring to a

10   particular type of matter to be withheld. It's not

11   particular enough for you.

12   MR. KATYAL: Well, I think that the language

13   of 114(r) in the first notwithstanding clause is enough

14   to basically just bracket FOIA.

15   With respect to the -- the Senate report --

16   JUSTICE SOTOMAYOR: Just answer my question.

17   You're saying the government couldn't withhold it under

18   FOIA?

19   MR. KATYAL: No, I think that they could

20   under FOIA, which has a very different situation, which

21   it's empowering agencies to try and make certain

22   exemptions. The Whistleblower Protection Act, I think,

23   should be read with the reverse view in mind.

24   Justice Breyer, the Senate report, the

25   Senate language of the bill didn't even have the word

1   "specifically" in it. So I'd urge you not to look at

2   the Senate report when reading the word "specifically."

3   I agree there's some language where they talk about

4   Robertson and the like, but actually, page 154 has the

5   text of the Senate bill, and it doesn't even have

6   "specific" in it. So that's why we would caution

7   against using that as your template for deciding what

8   "specific" is.

9   JUSTICE ALITO: Mr. Katyal, if you agree

10   with the suggestion that this could be remedied by the

11   President through an executive order, could I -- do you

12   agree with that?

13   MR. KATYAL: I do.

14   JUSTICE ALITO: Now, could I ask you how

15   that would -- how that would work out? Let's say --

16   let's just take this example. Suppose the information

17   in question concerns the -- the layout in a particular

18   airport. There's an area that -- that some employee of

19   the TSA thinks is not secure. So that's the

20   information. Then the information comes out that

21   there's this problem with that particular airport and

22   the -- the TSA employee thinks that it's not being

23   remedied, so this person wants to disclose it.

24   Now, how would that -- this information has

25   to be disclosed to a certain number of people associated

1   with that airport in order for the problem to be

2   remedied. So how would that be dealt with in an

3   executive order? The President has to issue an

4   executive order about that specific thing and say, this

5   can be disclosed to security people at the airport, the

6   local police, maintenance people who are going to fix

7   that. How would you deal -- how would that be dealt

8   with?

9   MR. KATYAL: Two different ways. One is

10 through the classification regime. The other, as we've

11 been talking about with Justice Breyer, is through the

12 nonclassified SSI system. The President can pick up the

13 SSI system, in general, under the B-8 exemption because

14 it does deal with national defense and foreign affairs.

15   There are parts of SSI which may not fall

16 within it, but for the most part, things like this

17 would. And so the President could designate that

18 information subject to the exception to the

19 Whistleblower Protection Act. I don't think he has to

20 get into details about who it has to be shared with and

21 who it doesn't, but he certainly could.

22   With respect to the classification regime,

23 he could also use the classified system to try and

24 exempt this information as well. My friend on the other

25 side says, oh, no, we can't share information with

1 uncleared people, foreign people and the like. As our

2 brief at page 52 points out, the classification regime

3 already is supple enough to provide that, as long as it

4 is in the defense of the homeland, as your hypothetical

5 would.

6   And more to the point, this Court's decision

7 in Eagan, which my friend cites, says that the

8 classification regime is entirely a creature of the

9 executive and can be modified at will. So if they

10 really believe that you need to do this and share even

11 classified information with uncleared parties, they can

12 do that.

13   But I think -- so we're not requiring some

14 sort of specificity requirement, either in the executive

15 order or in the congressional solution that is so every

16 jot and tittle or anything like that. Now --

17   JUSTICE SCALIA: Mr. Katyal, are there

18 criminal penalties for violation of -- of this statute?

19   MR. KATYAL: Not of SSI material, but there

20 are of classified information.

21   JUSTICE KAGAN: Mr. Katyal, can we go back

22 to your legal argument, and let me make sure I

23 understand it. You're saying don't use the revised

24 exemption 3 standard. 114(r) is narrower than that; is

25 that right?

1   MR. KATYAL: That's correct.

2   JUSTICE KAGAN: So that all of our exemption

3   3 cases essentially become irrelevant; is that right?

4   MR. KATYAL: Correct.

5   JUSTICE KAGAN: But the -- and you're doing

6   that based solely on the notwithstanding FOIA language; is that

7   right?

8   MR. KATYAL: Well, I am saying that. I

9   wouldn't want to go too far. I don't think our argument

10 depends on this. In other words, I think if you adopted

11 the FOIA 3 standard, I still think that this language,

12 which is detrimental to the security of transportation,

13 is so capacious, heaven knows what it means.

14   I mean, Mr. MacLean, of course, thought what

15 he was doing was promotion of the national security --

16 of transportation security, not detrimental to it.

17   JUSTICE KAGAN: I mean, it's very general

18 language, that's absolutely true. And if you were

19 writing on a clean slate, you might say, gosh, that's

20 very general language. But -- but we're not writing on

21 a clean slate, and all our exemption 3 cases seem to

22 suggest that very general language can meet the bar.

23   And so I'm just looking at -- there's this

24 case GTE Sylvania, which was a statute that prohibited

25 disclosure, if disclosure was not fair in the

1   circumstances and reasonably related to effectuating the

2   purposes of the Consumer Product Safety Act. And we

3   said that was enough, which it's like you look at that

4   and you say, why is it enough? But that's what we said.

5   MR. KATYAL: Right. But again, I think -- I

6   think the FOIA context is very different than here

7   because FOIA is something about empowering agencies to

8   restrict disclosures. As this Court's decision in

9   Robertson said, that that there was a preexisting

10   legislative history about how they wanted to keep in

11   place the 100 statutes or so that are anti-disclosure.

12   The Whistleblower Act, I think, has the

13   reverse idea in mind. We see this texturally, for

14   those -- for those who -- who are focused on the text,

15   because the statute distinguishes, in the first part,

16   between law, rule, and regulation and law. And I think

17   it's specifically prohibited by law. And what Congress

18   is saying by that phrase in the context of this statute

19   is, unlike FOIA, we're not about trying to empower

20   agencies through general language.

21   And I think this is the most natural way to

22   understand what the statute says. I mean, I think

23   when -- when -- when the word "specific" is used, I

24   think the most helpful way of understanding what

25   Congress had in mind is to think of its opposite

1   general. That there are two boxes, and detrimental to

2   the security of transportation sounds very much like,

3   frankly, the TSA's mission statement and not anything

4   more than that.

5   JUSTICE KENNEDY: If -- if Congress wanted

6   to reach your position and it had a choice of the words

7   it would use in the second part of the statute, could it

8   say "statute" instead of "law" and it would just come

9   out the same way?

10   MR. KATYAL: They certainly could use

11   statute. The -- the --

12   JUSTICE KENNEDY: And -- and for purposes of

13   this case and generally, there'd really be no

14   difference?

15   MR. KATYAL: Well, I think there may

16   arguably be a difference. This is found in the

17   conference report language. They said, we didn't use

18   "statute" for a particular reason, which is because they

19   wanted to sweep in not simply the statute and the U.S.

20   code, but also judicial interpretation.

21   JUSTICE SCALIA: Oh, yeah, I'm sure that's

22   what they all had in mind. I have no doubt of that.

23   (Laughter.)

24   MR. KATYAL: Well, Justice Scalia, let me

25   answer because, first of all, it is what Congress said

1   in the conference report, which is, of course, what

2   Congress votes on. And I understand many people don't

3   like legislative history, but this is the apex of

4   legislative history, as Chief Justice Rehnquist pointed

5   out in the Simpson case --

6   JUSTICE SCALIA: Does -- does Congress vote

7   on the conference report?

8   MR. KATYAL: They do vote on the conference

9   report.

10   JUSTICE SCALIA: The whole -- the whole

11   House? Each separate House?

12   MR. KATYAL: I believe that the answer to

13   that is yes. But I'd also say, the other thing about it

14   is that I do think Congress actually -- what they were

15   saying in the report made some sense because the

16   language is specifically prohibited by law. And I think

17   what Congress was trying to do was sweep in things like

18   the Trade Secrets Act in which even if that language

19   might look general to a lay observer, the words "trade

20   secrets" have been fleshed out by courts over time.

21   CHIEF JUSTICE ROBERTS: Well, I'm a little

22   -- maybe this doesn't make any sense, but you've been

23   focusing on specifically as referring to the material

24   that is covered. Can't it also refer to the -- the

25   prohibition, specifically prohibited? In other words,

1 it actually has to say, "You cannot disclose this." You

2 think it's specifying what "this" is. Couldn't it

3 equally be well specifying how direct the ban must be,

4 "specifically prohibited"?

5   MR. KATYAL: Right. So this is the argument

6 in the government's reply brief which comes up for the

7 first time. It's never been advanced by anyone.

8 There's no support for it in the -- in the legislative

9 history or I think even, really, the text of the

10 statute. I think "specifically" refers to "such

11 disclosure." The phrase is "if such disclosure is not

12 specifically prohibited by law," and so I think

13 "specifically" is best read as referring to such

14 disclosure.

15   Justice Breyer, back to your question about

16 the Senate report in 102(d)(3), which is what you were

17 asking about earlier. It's real important -- I think

18 it's important that I say that the Court -- excuse me,

19 the Congress when they passed the Whistleblower Act

20 rejected the idea that 102(d)(3) --

21   JUSTICE BREYER: I think I'm talking about

22 the report on the Whistleblower Act.

23   MR. KATYAL: Exactly.

24   JUSTICE BREYER: And the report on the

25 Whistleblower Act, which it came two years after FOIA,

1   the Senate committee said, "Those disclosures which are

2   specifically exempted from disclosure by a statute which

3   requires that matters be withheld from the public in

4   such a manner as to leave no discretion on the issue or

5   by a statute which establishes particular criteria for

6   withholding or refers to particular types of matters to

7   be withheld." That is word for word.

8   MR. KATYAL: Right. But --

9   JUSTICE SCALIA: Did the Senate vote on

10   that, Mr. Katyal? Did the Senate vote on the Senate

11   committee report?

12   MR. KATYAL: They did not --

13   JUSTICE SCALIA: And did the Senate

14   committee vote on the Senate committee report?

15   MR. KATYAL: I don't believe they did.

16   JUSTICE SCALIA: No, they don't.

17   MR. KATYAL: But, Justice Breyer, that

18   Senate bill that that language is interpreting doesn't

19   even have the word "specific" in it. So that -- the

20   actual bill the Senate is using is at page 154 of that

21   report, it doesn't have it in it, and that's why I don't

22   think it's the best guide for what "specific" means.

23   Now, there is language, as you say, about

24   102(d)(3) saying 102(d)(3) would meet a specific

25   prohibition. In section 2306 of the actual

 1   Whistleblower Act, which, Justice Scalia, Congress voted

 2   on exempts 102(d)(3). Congress didn't buy this argument

 3   that the Government has come up with right now that says

 4   that the Senate -- the Senate report means that

 5   102(d)(3) was a specific prohibition because they added

 6   this language "no provision of this chapter shall be

 7   construed to impair the authorities and responsibilities

 8   set forth in section 102." And so Congress itself

 9   didn't believe this notion that 102(d)(3) was specific.

10   They wanted something --

11   JUSTICE BREYER: You might be right about

12   that, but what's bothering me is the more general

13   question of driving an interpretive wedge between the

14   FOIA exemption and the Whistleblower Act. I mean,

15   that's going to get everybody good and mixed up, I

16   think.

17   MR. KATYAL: Your Honor, I don't think our

18   answer depends on that. That is, I think that this

19   doesn't meet the --

20   JUSTICE BREYER: Yeah, but which in your

21   opinion is the wiser way to go about it? I mean,

22   assuming that this statute is not specific enough, which

23   is the better way to go about it? To say the

24   Whistleblower Act is special or to say interpret them

25   both alike?

1   MR. KATYAL: I think either is equally

2   plausible because FOIA and the Whistleblower Protection

3   Act are two very different statutes. This Court has

4   said in Robertson that FOIA has two goals, one of which

5   is about empowering agencies. Here, nobody has said

6   that. The text of the Act never refers to empowering

7   agencies as Justice Scalia said. And Congress with

8   respect to the Whistleblower Act is concerned about

9   incentivizing them to come forward. That's what the

10   Members of Congress brief says, as well as the Office of

11   Special Counsel brief. There's no fear about chilling

12   FOIA requests for heaven's sakes.

13   JUSTICE KAGAN: But that suggests that we

14   take, essentially, the same language and read it two

15   different ways, just dependent on our sense of the

16   purpose of the underlying statute. Is that right?

17   MR. KATYAL: Well, I think that is available

18   to the Court. But again, you can use the FOIA standard

19   and there is no way --

20   JUSTICE KAGAN: But I'm just asking if we --

21   your decoupling argument is essentially based on the

22   notion that these two statutes have very different

23   purposes and, therefore, we can take those very

24   different purposes and read the very, very similar

25   language differently.

1   MR. KATYAL: Yes, Justice Kagan, for

2 purposes of 114(r), which, of course, bothers to specify

3 only FOIA by saying "notwithstanding FOIA" and then goes

4 through the detrimental transportation security.

5 Doesn't specify the Whistleblower Act. Congress can, of

6 course, deal with this by having a more general

7 notwithstanding clause.

8   JUSTICE SCALIA: I thought you were relying

9 on text. I thought you were relying on the difference

10 between law and law, rule, or regulation.

11   MR. KATYAL: Absolutely. That's our primary

12 --

13   JUSTICE SCALIA: It's not just purpose.

14   MR. KATYAL: Absolutely. So that's our

15 primary argument --

16   JUSTICE SCALIA: Thank you. I was worried

17 for a minute.

18   MR. KATYAL: Thank you. Thank you. If the

19 Court isn't worried with anything else --

20   CHIEF JUSTICE ROBERTS: Thank you, counsel.

21   Mr. Gershengorn you have 4 minutes left.

22   REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

23   ON BEHALF OF THE PETITIONER

24   MR. GERSHENGORN: Thank you, Mr. Chief

25 Justice.

1   I'd like to make two principal points.

2 First, the question here is whether -- the principal

3 question I'd like the Court to decide is whether this

4 disclosure was specifically prohibited by statute. We

5 believe it is, and I think it's very interesting today

6 -- Justice Kagan, you pointed out that the precedent

7 seems to require that. Justice Breyer, you pointed out

8 that the legislative history in the Senate report seems

9 to require that result. Justice Alito and Justice

10 Kennedy, you pointed out that the practical effects of

11 Respondent's position would seem to be grave. Mr. Chief

12 Justice, you pointed out and we completely agree that

13 the term "specific" which is critical to their argument

14 could just as easily, and we think properly, mean

15 express, which is what it means here. And Justice

16 Scalia, you asked about criminal penalties, but the

17 statute itself does not provide criminal penalties just

18 as Mr. Katyal said, but it does provide civil penalties.

19   We think in that situation where you have

20 the prior case law, the legislative history, the

21 practical effects and the plain text that to say that a

22 statute that mandates nondisclosure regulations does not

23 specifically prohibit disclosure is just a very odd

24 construction.

25   The principal practical arguments we've

1   heard today are that we don't have to worry because

2   Congress could have had an executive order to make it

3   work. We continue to think there is no dispute that the

4   SSI system doesn't work under Mr. Katyal's construction.

5   The idea that what Congress expected was a duplicative

6   executive order to mimic the SSI scheme seems very odd

7   to us, and seems like a very odd way to construe

8   congressional statutes.

9   There was a concern here that there's this

10   fox guarding the hen house. That may be a concern with

11   the Whistleblower Protection Act, but it has no

12   application here, where Congress itself mandated the

13   nondisclosure regulations, and did so knowing precisely

14   what those regulations were when it did so.

15   And finally, there's been some suggestion

16   that the facts are in Mr. MacLean's favor here. I would

17   only say this. What Mr. MacLean -- what a TSA employee

18   has before them is not a full picture of the threats, is

19   not a full picture of the resource constraints, is not a

20   full picture of the other means that the agency is

21   taking and is not possessed with the same experience

22   that TSA has.

23   JUSTICE SCALIA: Excuse me, I hate to

24   interrupt you, but you worry me. I assume that if we

25   find for your friend on the other side, the SSI

1   regulations are not null and void. They would still

2   apply to everybody except whistleblowers. Isn't that

3   right?

4   MR. GERSHENGORN: Yes.

5   JUSTICE SCALIA: It would still be a

6   violation for anybody to make those disclosures unless

7   he's doing it in a whistleblower capacity.

8   MR. GERSHENGORN: It would be -- yes, Your

9   Honor, but the standard in whistleblowing is do you

10   reasonably believe that there is a specific and

11   substantial danger to public safety? That is a judgment

12   made on the information known -- reasonably known to the

13   employee and readily ascertainable. It is not a

14   judgment made with the full picture of the security

15   consequences.

16   I suggest to the Court, as a step back, that

17   the right way to think about this case is that in a

18   situation where the statute mandates nondisclosure --

19   just as if the Chief Justice were to tell the marshal to

20   bar me from the courtroom, that it would be perfectly

21   reasonable to say that the Chief Justice had expressly

22   prohibited, specifically prohibited, my presence in the

23   courtroom, even if the marshal were the one standing at

24   the door.

25   JUSTICE GINSBURG: Do you know how come that

1   is, Mr. Gershengorn?

2   MR. GERSHENGORN: Excuse me?

3   JUSTICE GINSBURG: How common it is to have

4   regulations specifically mandated as opposed to

5   authorized or permitted.

6   MR. GERSHENGORN: Your Honor, we're not

7   aware of very many statutes like the SSI statute, where

8   Congress has expressly mandated regulations. There are

9   things like the 102(d)(3) of the National Security Act,

10   which generally says to the CIA director, protect

11   sources and methods, and statutes like that.

12   There are, of course, a wide range of

13   nondisclosures, but we're focused principally on the

14   nondisclosure provisions here. We respectfully ask the

15   Court to hold that this is specifically prohibited by

16   law and in particular by the SSI statute.

17   JUSTICE BREYER: We would never bar you from

18   the courtroom.

19   CHIEF JUSTICE ROBERTS: He wasn't talking

20   about you. Thank you, counsel.

21   The case is submitted.

22   (Whereupon, at 11:05 a.m., the case in the

23   above-entitled matter was submitted.)

24

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