

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

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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:

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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 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's that'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 statute 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 Whistleblower  
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

25

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