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## OSC: Supreme Court Decision in DHS v. MacLean Upholds Whistleblower Protections

FOR IMMEDIATE RELEASE

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This morning, the Supreme Court of the United States released its [decision](#) in *Department of Homeland Security v. Robert MacLean*, voting 7-2 to uphold a prior ruling by the Federal Circuit in favor of Mr. MacLean. In September, the U.S. Office of Special Counsel (OSC) filed an amicus curiae (friend of the court) [brief](#) with the Supreme Court. Mr. MacLean is a former Department of Homeland Security (DHS) air marshal who disclosed in 2003 that the Federal Air Marshal Service was stopping its coverage of long-distance flights, even though there were heightened intelligence warnings that terrorists were targeting those flights.

“The Supreme Court made the right call in protecting the rights of brave federal whistleblowers who risk their own careers to inform the public about significant threats to public safety,” said Special Counsel Carolyn Lerner.

The Supreme Court’s decision answers a question regarding the scope of exemptions to federal whistleblower protection law. DHS argued that since Mr. MacLean’s disclosures involved sensitive security information (SSI), a category of information created by a federal agency regulation, he was not protected under the Whistleblower Protection Act (WPA). The statute states that whistleblower protections do not extend when a disclosure is “specifically prohibited by law” (or as “required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs”). DHS argued that its regulations should be considered “law.”

The Supreme Court rejected DHS’s argument, holding that “interpreting the word ‘law’ to include rules and regulations could defeat the purpose of the whistleblower statute. That interpretation would allow an agency to insulate itself from Section 2302(b)(8)(A) simply by promulgating a regulation that ‘specifically prohibited’ all whistleblowing.” The citation refers to the section of the WPA that protects whistleblowers from retaliation.

In its amicus brief, OSC wrote: “Of grave concern ... is that agencies could abuse their regulatory power to over-designate the information that is to be prohibited from disclosure as a means of suppressing a broad swath of information and stifling whistleblowers. Likewise, agencies may selectively enforce such broad regulations to punish and deter whistleblowing. This danger is not farfetched. After all, whistleblower protection laws exist because government officials do not always act in the nation’s best interests. In light of Congress’s central goal to encourage disclosures and restrain agencies, it is doubtful that Congress would vest agencies with the power to eliminate the very restraint it placed on agencies’ own actions.”

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*The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC’s primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at [www.osc.gov](http://www.osc.gov).*