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STATEWIDE LEGAL AUTHORITY SINCE 1878

By Frank Askin

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A slender majority of the United States Supreme Court has signed on to a principle that if you can "see no evil" and "hear no evil," you are not allowed to speak of evil — even if the "evil" is obvious to reasonable people.

The case, Clapper v. Amnesty International, decided on Feb. 26, involved a challenge to a federal statute that allows the electronic surveillance of individuals who are not "U.S. persons" and are believed to be outside the United States.

Under the amendments to the Foreign Intelligence Surveillance Act (FISA), the government no longer has to allege that surveillance targets are "a foreign power or the agents of a foreign power" to obtain authorization from the secretive FISA Court. It only has to show to the court that the purpose is to obtain "foreign intelligence information."

The challenge was brought on behalf of attorneys and human rights, labor, legal and media organizations that engage in sensitive international communications with people they believe are likely surveillance targets. They argued the provision violated the Fourth Amendment right to be free from unreasonable searches.

The problem, the majority said, was that the plaintiffs, because of the surveillance's secret nature, could not prove their telephonic or email communication was intercepted. Therefore, they had no standing to complain.

In a dissent on behalf of himself and three colleagues, Justice Steven Breyer wrote: "In my views, this harm is not 'speculative.'" He added, "Indeed it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen."

A major disagreement between the majority and the dissent was the significance of the allegation of several plaintiffs that to avoid the eavesdropping, they would face substantial expense of foreign travel to communicate with clients.

The majority opinion of Justice Samuel Alito said those costs were simply the product of their unsubstantiated fear of surveillance.

But Breyer examined the issue with a much more critical eye. He noted that a lawyer representing a client accused of terrorism "must make an assessment whether his client's interests would be compromised should the government acquire the communication."

And "if so, he must either forgo the communication or travel abroad." He added: "Since travel is expensive" and "since forgoing communication can compromise the client's interests," standing was clearly supported by prior cases that allowed parties forced to make substantial expenditures in order to comply with the law to bring a challenge.

Understand that the court did not find the law under attack to be constitutional. It merely held that these particular plaintiffs could not challenge it. Presumably, if a plaintiff could prove his or her communication had been intercepted, the case could go forward. How such an interception could be established absent a government admission is anyone's guess.

Let me acknowledge that as a civil libertarian, I agree with the Breyer group and find it hard to understand how people of ordinary intelligence could think otherwise. And no one would argue that justices are not of, at least, ordinary intelligence. So there must be some other explanation why the five conservative Republicans could reach such a counterintuitive conclusion.

What was obvious and made common sense to Breyer and the liberals (and me) was "speculative" to the conservatives.

What is most interesting about this case is not so much what it tells us about the "law," as what it tells us about lawmakers, which most certainly the members of the Supreme Court are.

Why is it that in case after case the five conservative, Republican-appointed members of the Court look at facts one way and the four liberal-moderate justices see things from a wholly different perspective? Is it mere coincidence? Or is the nature of legal right and wrong inevitably in the eye of the beholder — at least when we are talking about issue of significant public policy.

Wal-Mart Stores v. Dukes, a sex-discrimination case decided in 2011, is another example. Again, the issue the court decided had nothing to do with the alleged discrimination. It was a subsidiary question of whether 1.5 million female employees at stores across the country could band together and sue as a

class action against the differential in wages and promotions with their male counterparts. The factual issue was whether the female class members had a grievance in common.

The majority said no because working conditions were decided individually by local store managers. It dismissed the case.

But writing for the dissenting liberals, Justice Ruth Bader Ginsburg said, "The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex [male] and are steeped in a corporate culture that perpetuates gender stereotypes."

Truth (and right) were once again in the eye of the beholder. •

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