

# General Outline for 2 FEB 2016

## Case Briefs

### **Clapper v Amnesty International (Supp p1)**

#### Brief Facts:

Amnesty Int'l (Amnesty) works with certain foreign persons who feel they are under threat of surveillance by the US government and Amnesty feels it will suffer or is suffering injury as a result of 50 USC S1881a which authorizes the government to seek permission to surveil qualified targets.

#### Procedural History:

P sought injunction and damages for expenses incurred. Lower court allowed standing based on a lower standard.

#### Issue:

Is alleged injury resulting from foreign surveillance a justiciable question?

#### Holding:

Lower court is reversed (improper standard applied). Not in this case because P lacks standing due to remoteness/speculative nature of injury. P contends that expenditures made to avoid a speculative injury is sufficient for standing, but court disagrees because the causal link between these expenditures and the possibility that they will prevent some future harm under S1881a is too tenuous and not imminent.

(no injury, no causation = non-justiciable, no standing; see Lujan for elements discussion)

S1881a authorizes but does not mandate surveillance - Amnesty is speculating that it will be or is a target by virtue of its contact with others who may or may not in fact be targets. Amnesty is not privy to the intelligence decisions of the government and cannot be certain that it is being or will be targeted.

S1881a is not the only authority under which such surveillance might occur and so traceability is questionable too, even if imminence is proved or assumed.

No guarantee of success, even if authorized and pursued under S1881a - no injury, no claim. Moreover, actions based on fear of hypothetical future harm that is not imminent does not manufacture injury for purposes of standing.

#### Dissent:

There is no question as to whether a tap is a concrete injury. We ask only whether a tap is imminent or actual. P's have and continue to engage in conversations that are the subject of 1881a. The government has a strong motive to tap the conversations. And the government's behavior has shown that it has in the past tapped this type of conversation and thus is likely to continue to do so. Finally, it has become easier to do so because of this law. We should assume

that the government is doing and will continue to do its job, absent evidence from them to the contrary. Certainty is not meant to be taken literally - virtual certainty has been enough in the past and should remain so. Given the probability that the government will tap an Amnesty call at some point, imminence should be met for the injury element of standing.

### **Hollingsworth v Perry (Supp p6)**

#### Pro His

Same sex couple challenges restriction on same sex marriage resulting in CA Supreme Court legalizing same sex marriage. Prop 8 passes banning same sex marriage. Same sex couple challenges prop 8 and CA Supreme Court upholds prop 8. Same sex couple sues in federal district court but CA government refuses to defend. Federal district court allows prop 8 proponents to stand in defense and they lose. Proponents try to appeal and circuit court is unconvinced so asks CA Supreme Court for authorization of D's to appeal on behalf of government which they affirm. Circuit Court hears the case (we don't have this in the supplement, but presumably they lose again) and then the case is appealed to the US Supreme Court.

#### Facts

In 2008, the California Supreme Court declared unconstitutional the limitations placed on use of the official designation of "marriage." A year later, a ballot initiative, Proposition 8, was passed and became an amendment to the California State Constitution. Prop 8 said that same-sex couples may not legally marry. A same sex couple filed a federal action and won its case against basically all the government officials in the state. The state had refused to defend the case so it was defended instead by the proposition 8 initiators. They were allowed to defend/intervene at the district court level. When they lost and tried to appeal, however, the circuit court was not convinced they had standing and asked the state SC to tell them whether they could assert an argument for the state which was answered in the affirmative. The circuit court heard the case which was then appealed to the US Supreme Court.

#### Issue

If an amendment is adopted/ratified and the state government chooses not to defend it and a 3rd party intervenes to defend but loses, may it also intervene to appeal? Essentially, does the 3rd party have standing on appeal if the injunction is not against it so that it suffers no concrete injury?

#### Rule

Prudential Standing - 3rd Parties generally do not have standing because they have not suffered an injury in a "personal and individual way." If they do not have a direct stake, then they have no standing (see Lujan).

#### Holding

Circuit Court is vacated and remanded for dismissal for lack of standing. District Court ruling stands (P there had direct stake/injury, even though D didn't and was intervening on behalf of the State who refused to defend).

Petitioners (D) have no standing because they were not enjoined by the District Court. They have suffered no injury and thus have nothing to appeal. They have no right to act as agents of the people of California, as claimed. They were authorized by the State Supreme Court via question certified by the federal circuit court only to assert the state's interest - meaning they could argue in defense of the proposition. Here, they were trying to defend an injunction against various government representatives, not the proposition itself. Their only grievance in a general one - they lack a personal and individual injury. The governor/AG was enjoined from enforcing a law, not the petitioners. The governor/AG could appeal, but not the petitioners.

#### Dissent

Hogwash. The initiative process was meant to give the people the power to do what their elected representatives would not: enact laws they felt necessary. They exercise their right to self-governance in this way. By not allowing the official proponents appeal an injunction that bars enforcement of their initiative, we give the governor and other officials a pocket veto. They need only refuse to defend a law in federal court to avoid enforcing it. By giving them this power, we are removing the power from the people to self-govern and overturning a century-old process at the same time.

#### **United States v Windsor (Supp p11)**

#### Pro His

Case was brought in federal district court but AG refused to defend. BLAG was allowed to intervene on behalf of the government. Windsor won, and the government (via BLAG) appealed the judgment. Then the Court invited an appointed amicus to argue whether the case was justiciable, which is the subject of this hearing. This is NOT the merits case.

#### Facts

A same sex couple married legally in Canada moved to New York where one died and her widow was forced to pay federal estate tax that would not have been paid by a same sex couple's surviving spouse. Section 3 of DOMA defined marriage as between one man and one woman which caused the tax in controversy.

#### Issue

Does the government have standing to appeal and does this Court have jurisdiction to hear the appeal if it does? More explicitly, if there is lack of controversy, do we have jurisdiction under const A3.

#### Rule

There is standing if there is an injury and if there is adversarial presentation of the arguments which may be satisfied by amicus briefs, then we can hear the case without violating self-imposed rules regarding earnest controversy. (These rules are according to the majority opinion and only the standing side of the coin uses a cite; the controversy question does not include a cite)

\*Page break for clarity

## Holding

The government suffers injury by having to pay a refund to the widow which creates a case because the government refused to do so and the amicus briefs and presentation by BLAG is sufficiently adversarial to create an earnest controversy. While the government agrees with the position of the plaintiff, it still acts in opposition and only refunds the money on order of the lower court. Basically, actions speak louder than words, so there is in fact a case in controversy even if the government wants the same outcome but is forced by law to act against that desire. The case may be heard on the merits.

## Dissent

Scalia:

When Windsor won, her refund was ordered. The government agreed it should pay the refund. If everyone agrees, why are we here? Where is the controversy? We may not decide what the law is whenever a law conflicts with the Constitution - we may only decide the outcome of lawsuits where there is a controversy. Here there is none, so why do we have jurisdiction? If there is no opposing party, then having a stake is irrelevant.

## Class Discussion

### Hypo 1

We started the class with a hypothetical that is roughly reproduced here:

D credit reporting company publishes false information about P, but it's false information that (allegedly) doesn't cause him any economic or even reputational damage (like falsely claiming he has an advanced degree).

P sues under the Fair Credit Reporting Act (Assume it's true that the publication violates that act), seeking statutory damages as provided by that Act for the violation.

D moves to dismiss, claiming P lacks an injury for standing purposes.

What result?

In my small group, the argument is this: if the violation is an injury by statute, then all 3 elements of Lujan are met. If not, then no injury is available for standing purposes.

Full class discussion:

Lujan test

Injury - 2 parts, invasion of a legally protected interest which is a) concrete/particularized and b) actual or imminent

a) Violation is possibly not concrete, question is whether Congress can create a procedural harm (violation of act = injury)

a. Economic or reputational harm would likely be viewed as a real injury, but has P suffered a real life injury?

b) Violation is actual, but no actual harm resulted from violation.

Hypo is based on currently pending *Spokeo v Robins* (<http://www.scotusblog.com/case-files/cases/spokeo-inc-v-robins/>) and there are 3 possible outcomes:

1. No standing, dismissed
2. Having false information published about you is an actual harm which on its own is a harm sufficient for standing
3. Congress can create a procedural injury: violation of statute is injury on its own = standing is established

We then discussed argument for the second outcome: Congress creates property rights all the time, including copyright, welfare benefits, etc.; why not create a property right in an honest credit report?

### **Clapper v Amnesty (Supp p1)**

When we came to this case we began with a brief summary of the facts (you can review them above in the case brief section). In a sentence, Amnesty works with potential targets of the FISA intelligence program and doesn't want its communications wiretapped and sought to enjoin its operation. This gets into standing issues because there was no concrete injury claimed. (need injury, causation, and redressability + check prudential standing doctrines listed on CB p47-50 #4-7)

#### **Clapper Holding and Reasoning**

No standing because no proof that an injury is occurring or ever will but Prof raised evidentiary problem: We don't know the injury will be suffered because the surveillance would be classified and likely would remain so unless a prosecution resulted.

One thing Amnesty could have claimed: If the government had actually tried to use the information and had to reveal that they listened to a protected conversation, standing would exist because of a violation of client-attorney privilege or US targeting, etc.

Another argument: Amnesty should have pled injury from invasion without a warrant without reference to the particular statute, but this isn't its strongest argument. Stronger argument: Amnesty could argue loss of clients who refuse to talk to them because of the possible surveillance. As the attorney, you might ask your client (Amnesty, here): Is there anything concrete that you know has gone wrong as a result of this statute and practice? To which they might respond, "Yes, our clients all quit us for being surveillance targets." Court might dismiss this argument as a 3rd party intervention, but it's probably your best bet.

### **Hollingsworth v Perry (Supp p6)**

We moved on to this case VERY briefly and were told we'd discuss in more depth next day or next week possibly. I included the case brief on this case even though there was not as much discussion as on *Clapper v Amnesty*. This is a "standing light" question: Even if there was standing in the district court, if there is no D with standing on Appeal, then there is no standing to appeal (bottom para on Supp p7).

### **United States v Windsor (Supp p11)**

We moved to this case next and gave it a similarly light touch in class. Again, I included the brief anyway, because I'm good like that. In a nutshell, AG chose not to defend the law - Executive declined to defend the law, but chooses to enforce the law for the express purpose of trying to get the Court to strike the law. All parties wanted the same outcome so no real controversy. Per Prof - collusion, "dirty" case.

How did the Court try to get around the Executive's attempt at collusion?

1. Court decided there was an actual injury to separate the standing question from the due process question
2. Court allowed lawyers for Congress send lawyers to be the D, so that case/controversy would be satisfied and the court could have jurisdiction

Outcome: Strike DOMA as unconstitutional

There will be handout on ICON regarding standing, but you should read from CB p45-53 if you want the book version.

Moving on, we used another hypothetical to discuss

### **Mootness and Ripeness**

#### **Hypo 2**

IC enacts ordinance that allows police to hold people for 48 hours on mere suspicion

P gets locked up for suspicion, and asks lawyer to file complain from jail seeking an injunction against the suspicion detention act

Will or won't the court hear the case for justiciability?

\*Our group mentioned all the same things the class did so I'm only including the class version.

Argument for hearing it: repeatable harm

Argument against hearing it: City argues mootness, no more injury since P was released

"Capable of repetition, yet evading review" \*\*This is important in a lot of cases so make sure you understand it. Example: Roe v Wade - sometimes an injury is time limited, but this shouldn't preclude the court from hearing the issue (courts are slow, that's not fair to P's) because it could easily come up again in the future.

P must typically show that the injury will happen to P again in the future (In Roe, P could become pregnant again). City would then argue that P has no way of knowing he'll be held on suspicion again (not likely to repeat harm alleged). So what to do?

Voluntary ending of the challenged behavior does not typically end the case; exception: when it is not possible for D to resume (example, government enacts policy change that prevents challenged behavior).

A brief summary of this hypo's relevant doctrines:

Mootness (standing to begin with, but not at the end)

Ripeness (there is an injury that can be remedied in the future, but the injury hasn't occurred yet; \*\*This is much like the standing issue because the injury is speculative/not imminent)

Class adjourned.

I. TUESDAY 2/2 OUTLINE

a. Cases

i. Clapper v. Amnesty International

1. Posture: Plaintiffs (numerous human rights orgs, lawyers and journalists) challenged a provision for the Foreign Intelligence Surveillance Act (FISA) claiming that it violated the First and Fourth Amendments. The district court granted summary judgment to the government and the appeals court reversed. The case is here appealed further to the Supreme Court.
2. Facts: Plaintiffs challenged FISA's authorization of electronic surveillance by the government of non-U.S. persons outside the U.S. for foreign intelligence purposes. The new provisions would require plaintiffs to take costly measures to maintain confidentiality in their international communications. The District Court held that plaintiffs did not have standing to bring their challenge because they had no proof that they were subject to surveillance under FISA, but the Court of Appeals reversed, holding that plaintiffs had standing based on a reasonable fear of injury and costs incurred to avoid such.
3. Issue: Do plaintiffs have standing to seek speculative relief under FISA?
4. Holding: No. Claiming a possibility that their communications will be intercepted is not enough to establish an actionable future injury and no present injury can be established from plaintiff's decision to take costly measures to protect their communications. The dissenting justices argued that the future harm was not speculative and should have established standing because of the high probability that the government would intercept their communications in the future.
5. Class discussion: Could standing have been argued because people in other countries were unwilling to engage in communication with Amnesty International because of government surveillance under FISA? Probably.

ii. Hollingsworth v. Perry

1. Posture: Plaintiffs, one gay and one lesbian couple, sued the state of California claiming that Proposition 8, which amended the state Constitution to provide that "only marriage between a man and a woman is valid or recognized" violated their Fourteenth Amendment right to equal protection under the law. The state officials named in the suit refused to defend Proposition 8 so the petitioners in this case stepped in and countersued to defend it. The district court held that the law violated the U.S. Constitution and the court of appeals affirmed. The case is here appealed further to the Supreme Court.
2. Facts: California voters first passed Proposition 22 in 2000, establishing a legal understanding that marriage was a union between one man and one woman. The California Supreme Court reviewed the law in 2008 and held that it was invalid under the California Constitution, which



required the term “marriage” to include couples of the same sex. The citizens of California retaliated by passing Proposition 8 in the same year, which was the cause for plaintiffs to bring this suit. Petitioners were strong proponents of the law and countersued to ensure that marriage in California would continue to be limited to heterosexual unions.

3. Issue: Do the petitioners have standing to argue in defense of Proposition 8?
4. Holding: No. Federal courts only have authority to decide cases in which the complaining party has suffered a “concrete and particularized injury” for which the court can provide redress. Petitioners were not actually affected by Proposition 8 and only had a generalized grievance that it might be overturned. The dissenting justices argued that the Supreme Court should defer to states’ rights in determining which parties have standing. Because California law allows third parties to assert the state’s interest when officials decline to, the California Supreme Court’s determination of the petitioners’ standing should be binding.
5. Class discussion: Standing-like question of whether the party is the defendant in the lower court, if they must have standing to appeal.

iii. United States v. Windsor

1. Posture: Plaintiff widow filed suit seeking a declaration that the Defense of Marriage Act (DOMA) was unconstitutional. A group of representatives intervened when the government declined to defend DOMA and motioned to dismiss the case. The district court denied the motion and held that DOMA was unconstitutional. The court of appeals affirmed and the case is here appealed further to the Supreme Court.
2. Facts: Plaintiff and her wife were a homosexual couple who were married in Canada and had their marriage recognized under New York law. When plaintiff’s wife died and left her entire estate to the widow the federal government imposed \$363,000 in taxes that would have been exempted if the couple’s marriage were recognized under federal law. Plaintiff brought this suit in an attempt to overrule DOMA and the President and Attorney General announced that they would not defend it. The Bipartisan Legal Advisory Group of the House of Representatives intervened to defend DOMA and motioned to dismiss the case but this action was denied and the case was heard.
3. Issue: Does the Defense of Marriage Act deprive same-sex couples who are legally married under state laws of their Fifth Amendment right to equal protection under federal law?
4. Holding: Yes. States have the authority to define marital relationships and DOMA undermines that power. DOMA imposes a “disadvantage, a separate status, and so a stigma” on homosexual couples, thereby violating the Equal Protection Clause the Fifth Amendment. The

dissenting justices argued that the Supreme Court did not have the jurisdiction to review this case nor the power to invalidate democratically enacted legislation.

5. Class discussion: The executive declined to enforce the law and all parties involved wanted it repealed until the BLAG intervened. Is this sort of collusive behavior common and accepted?

b. Hypothetical discussion

- i. Defendant credit reporting company publishes false information about plaintiff, but it's false information that (allegedly) doesn't cause him any economic or even reputational damage (like falsely claiming he has an advanced degree).
- ii. Plaintiff sues under the Fair Credit Reporting Act (assume it's true that the publication violates that act), seeking statutory damages as provided by that Act for the violation
- iii. Defendant moves to dismiss, claiming plaintiff lacks an injury for standing purposes. What result?
- iv. Viable positions
  1. There is no injury because the false info causes no damage.
  2. Congress can create an injury by creating a legal right. Violation of a legal right created by congress is an injury.
  3. Having false information published is an actual harm which can suffice for standing, even if the false info is complimentary.

c. Mootness and ripeness

i. Mootness

1. If the matter being adjudicated is no longer an issue then legal proceedings can have no effect, rendering the issue moot.
2. Exception: Capable of repetition but evading review. Pregnancy is the classic example.
3. Defendant cannot make case moot merely by halting injurious behavior.

ii. Ripeness

1. May have claim that court can remedy in future, but not yet.
2. No standing if the injury is speculative and not imminent.