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# Can you keep a secret?

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LAST week's hotly anticipated US Supreme Court decision on President Barack Obama's health-care legislation was surprising in many ways. But the most remarkable thing was that it was a surprise at all.

Even Mr Obama had two speeches prepared for Thursday morning, not knowing the outcome.

In a town notorious for its leaks, one of the most important decisions this year was kept secret for three months.

The justices voted on the decision on March 30, with the opinions written and circulated at least by mid-June.

Dozens of people would have known the result of the case.

None of them said a word.

"Those who know don't talk," quipped Justice Ruth Bader Ginsburg at a speech to the American Constitution Society last month. "And those who talk don't know."

This is, to say the least, unusual in Washington, DC. It did not staunch the flood of ill-informed commentary, of course, with thousands of articles and weeks of television punditry on the law and politics of the case.

As we know now, the vast majority of that punditry was misconceived. Virtually everyone assumed that the decision would rest on Article I, Section 8 of the US Constitution and whether the legislation was a valid exercise of the power of Congress to "regulate commerce" among the states. Most also appeared reconciled to the fact that the court would strike down some or all of the legislation.

Indeed, when the first pages of the judgment were read, setting out a narrow interpretation of the commerce clause, Fox News and CNN both wrongly reported that "Obamacare" had been struck down.

In fact, the deciding legal factor was Chief Justice John Roberts' willingness to regard the requirement to obtain insurance as a form of tax. Holding his nose, perhaps, he voted for the first time with his liberal colleagues in a 5-4 decision that has done much for the reputation of the court.

Surprised, Fox, CNN and many others had to issue embarrassing corrections.

The ability to keep such an important decision secret can be contrasted with the routine leaks from other parts of the United States government.

Though the CIA is in the business of keeping secrets, for example, we know a great deal about many highly classified programmes – from the use of cyber warfare to attack Iran's nuclear programme to on-going efforts in support of Syria's rebel groups.

**It is somehow charming that the US Supreme Court, whose justices still communicate by court messenger or, on occasion, by facsimile, is better able to keep secrets than America's spies.**

Leaking has become such a problem that, on June 25, National Intelligence director James Clapper announced changes in the polygraph test administered every seven years to those with security clearances. Designed to root out moles working for foreign governments, it will now include questions about whether an agent has disclosed classified information to the media.

The White House and Congress are even worse, with the details of "secret" meetings routinely shared with sympathetic journalists minutes after the event.

One reason for the difference is the number of people involved. Though dozens of people would have known the Supreme Court's decision – the justices, their clerks, some court employees – over four million individuals hold security clearances in the US government. The chances of leaking and getting away with it are far higher.

A second reason is that leaks are rarely accidental.

Some leaks may be in the public interest, such as the disclosures of torture and warrantless electronic surveillance under the Bush administration. Others may be legitimate explanations to reporters of classified national security programmes.

Still other leaks may be intended to achieve political ends – boosting or discrediting the president, for example.

A Supreme Court justice, by contrast, has little reason to leak a decision early. Apart from anything else, an out-of-context leak would detract from what is distinctive about judicial decisions: that they are (or should be) meticulously reasoned.

The rest of the court employees tend to be fiercely loyal to the justices and have little to gain from leaking – and much to lose. Law clerks in particular tend to go on to stellar careers after their year at the Supreme Court; an allegation of leaking would see that career come crashing down to earth.

A third factor is that the Internet has radically transformed this landscape, with the ability to share information widely but anonymously.

WikiLeaks is the most prominent example of this. Many US government employees are now in the absurd position of being forbidden to read classified documents freely available on the Internet.

Closer to home, the rise of social media and real-time "citizen journalism" have shaken up the news landscape considerably.

It is somehow charming that the US Supreme Court, whose justices still communicate by court messenger or, on occasion, by facsimile, is better able to keep secrets than America's spies.

And that in an age of leaks and spin, even the media – and we along with it – can still be surprised.

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