



Saving Obamacare

As the 46th solicitor general of the United States, Donald B. Verrilli Jr. is best known for the case he made before the U.S. Supreme Court two years ago successfully defending the constitutionality of President Obama's health care reform act. (See *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).) That same year, he scored a big victory when the high court struck down most of a restrictive immigration law passed by the state of Arizona. (See *Arizona v. United States*, 132 S.Ct. 2492 (2012).) Verrilli received his JD from Columbia Law School in 1983. He taught First Amendment law at Georgetown University Law School from 1992 through 2008, and before becoming solicitor general served in the White House as deputy counsel to the president. In January, Verrilli spoke with UC Hastings law professor Rory Little in San Francisco.



Donald B. Verrilli Jr.



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Legally Speaking is a series of in-depth interviews with prominent lawyers, judges, and academics, coproduced by *California Lawyer* and UC Hastings College of the Law.

Q. I want to start with the Supreme Court case that had to do with something called the Affordable Care Act. Some observers were immediately critical of your performance when you argued that case. But then three months later the justices did exactly what you asked them to do. So looking back two years later, what are your thoughts?

The case was argued on a Monday, Tuesday, and Wednesday. But the most important day of the three was the first day, when we were arguing what to the whole world looked like a very dry, abstruse question about whether a statute called The Anti-Injunction Act (26 U.S.C. § 7421(a)) precluded federal courts from hearing this case on the grounds that it was a challenge to a tax. But the reason I thought that first day was so important was not so much because of the act itself. (I realized early on that the Court was going to be OK with concluding that the Anti-Injunction Act wasn't a bar to hearing the case now.) It was because the key to winning this case on the tax power argument was to convince the Court to take the requirement in the law that

said you had to have insurance, and treat it separately from the requirement in the law that said you'd pay a tax if you didn't have insurance. So I decided that first day to spend a lot of my time arguing for that separation. And if you look at the chief justice's opinion you'll see, I think, that that actually was the fulcrum on which this case turned.

The work of the solicitor general never stops. I think it would be interesting to hear about how much work you do besides presenting oral arguments in Court.

Our total budget is about \$10 million, which in the private sector will buy you about three pieces of litigation. But for that \$10 million the taxpayer gets about 30 cases briefed and argued before the Supreme Court every year, about 30 more cases briefed and argued as amicus in the Court, 10 or so cert petitions, and 2,000 or so briefs in opposition.

Two thousand briefs in opposition?

Yeah. When the United States loses a case in the trial court, the Solicitor General by law has to approve the appeal. Believe it or not, the United States loses

about 2,000 cases a year. And so we have to make 2,000 decisions a year about whether to appeal, and those are not rubber-stamped things at all.

I first met you on a hot Washington, D.C., day in August [when we were] clerking at the Supreme Court. And I'm quite grateful that we ended up working together for this guy who we sometimes called "The Boss." It wasn't Bruce Springsteen. It was Justice William Brennan. What do you remember about him?

People have these great reputations, but then when you meet them up close they don't always live up to those reputations. Justice Brennan, however, was just the opposite. He had this wonderful reputation and, up close, he was actually even better than his reputation. He was just a wonderful, amazing human

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being. As you remember, we would have these morning meetings, and instead of requiring us to write bench memos on cases as most law clerks do, he would gather us all together over coffee and have us talk about the cases with him. We got to spend a couple of hours every single day doing this with him. It was really quite remarkable.

Here at Hastings everybody has to take moot court at some point. So what tips would you give young lawyers on how to argue a case?

To me, the most important thing when you're an oral advocate is to be yourself. Don't try to mimic somebody else's style of advocacy. Be an advocate who talks to the judges or justices in the way that you would talk to people, because that's when you're going to be at your most effective. And that means different things for different people. Some are really super-caffeinated and that can be very effective, and some are more thoughtful and that can be very effective as well. Everybody has a different way of interacting with other human beings, and that's what you're doing in oral argument: You're interacting with judges or justices in a human way.

This is not a statistic that you probably want me to mention, but there have been some solicitor generals who have gone on to be justices on the Supreme Court. More, however, have not.

Yes, many, many more have not.

Seven out of forty...

No, it's five out of forty-six ... Not that I'm counting.

So what's next for Don Verrilli?

Well, you know, I'll stay in this job a while longer. It's a wonderful job, and I'm very grateful to have the opportunity to do it. Then I'm hoping I can take a six-month sabbatical, and then I have no idea. But I don't spend one second thinking about that. I'm totally in the moment in this job. ¹

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