



Meet Paul Clement, The Man On The Verge Of Destroying Obamacare

[Brett LoGiurato](#) | Apr. 5, 2012, 11:07 AM

As U.S. Solicitor General Donald Verrilli was wrapping up three days of oral arguments on the Affordable Care Act (Obamacare), Paul Clement, Verrilli's opponent, noticed what didn't fit.

In closing arguments in *The United States Department of Health and Human Services, et al. v. Florida*, Verrilli spewed out an emotionally heavy appeal to the nine justices who had probably already made up their minds about the constitutionality of President Barack Obama's Patient Protection and Affordable Care Act. He attempted to connect the problem of affording insurance to individual's freedoms and personal liberty.

"It was more akin to something a trial lawyer would give to a jury rather than a Supreme Court argument," said Ilya Shapiro, a senior fellow in constitutional studies at the libertarian Cato Institute.

Up stepped Clement, the man who has helped put the fate of Obama's signature legislative achievement in doubt. The cliché among experts is that though a Supreme Court case is rarely won on the oral arguments, it can often be lost. In this case, the stark contrast between the unflappable Paul Clement, a former Solicitor General himself, and the at-times shaky Verrilli.

One thing in Paul Clement's expansive arsenal is that he is quick on his feet. Another thing is that he is clued in to what animates the judges, what earns their attention.

"Let me just finish by saying I certainly appreciate what the Solicitor General says, that when you support a policy, you think that the policy spreads the blessings of liberty," Clement said in his final argument, [according to court transcripts](#). "But I would respectfully suggest that it's a very funny conception of liberty that forces somebody to purchase an insurance policy whether they want it or not."

Said Shapiro: "He just totally tore that apart."

This is Paul Clement, still one of the government's worst nightmares for another month. Clement, a partner at the small private firm Bancroft PLLC, is scheduled to argue seven cases before the high court this term, the most ever for a lawyer in private practice.

The biggest deal -- akin to Vice President Joe Biden's infamous statement on the bill when Obama signed it -- was the health care case. Clement drew rave reviews for his performance last week, in which he made the case that the Obama-sponsored health care reform legislation is unconstitutional. Supporters of the bill are now terrified that it might get overturned.

And later this month, he will be back *again* against the federal government, this time arguing to uphold Arizona's controversial immigration law.

"This week the country saw Paul at his best in the area of advocacy," said Viet Dinh, the founding partner of Bancroft, who has known Clement since the pair's days at Harvard Law School.

"Simply pigeonholing him as the country's greatest advocate is actually an understatement of his ability. He is one of the best strategic thinkers I know beyond the narrow advocacy. The way he approaches the client's problem, the way he identifies the client's interests, the way he frames those interests into a litigation posture and the way he carries it out, it really is a soup-to-nuts command of his profession."

'LeBron James of law'

When Clement left government in 2008, Evan Tager of the firm Mayer Brown drew up the easiest layman's comparison for Clement: "He's the "LeBron James of law."

Clement served as the 43rd U.S. Solicitor General under President George W. Bush's administration. He argued and won cases like *Gonzales v. Carhart* -- which challenged Congress' Partial-Birth Abortion Act -- and *Gonzales v. Raich*, a case that many proponents of the Affordable Care Act cite as an example of why it should be upheld.

After leaving the government, Clement was law's biggest star, and everyone was watching to see where he would go.

"I knew there would be a massive bidding war and that he would probably break a lot of records in terms of what he could command out of the SG's office," Tager said.

Seven years before that bidding war, though, is when Tager first saw the potential. Tager has heard of Clement's oral argument skills, but he has only seen him argue once.

Tager is more familiar with Clement's penchant for writing the briefs that set the tone for the oral argument. His first experience with Paul Clement was with a brief he wrote for *Cooper Industries v. Leatherman Tool Group, Inc.*, a 2001 case that established the standard of review for Federal Appeals Courts when taking on punitive-damages awards cases.

Tager was so moved by Clement's brief on the case that he called Clement to introduce himself.

"I remember thinking, this is a complicated area of law," Tager said. "There's a lot of insider baseball here, and I think he's figured it out. And not a lot of people have."

Clement's [brief on the Affordable Care Act lays the groundwork](#). It is void of political jargon, instead focusing on the key question of whether the minimum coverage provision of the Affordable Care Act exceeds Congress' powers under Article I of the Constitution to regulate interstate commerce.

It is also void of any legal jargon that would weigh it down. And it serves as persuasion to the one justice Clement thinks he needs to convince -- Anthony M. Kennedy. Clement cites Kennedy's opinions 10 times throughout the brief. No other judge is mentioned more than twice.

"His reputation, deservedly, is of someone who is quite good at both," Tager said of oral arguments and brief writing.

If there is little opportunity to alter judges' predisposed notions in the briefs, then the oral arguments offer even less of a window. But to experts, there were several examples within the hearings that highlighted the contrast between Clement and Verrilli that could have had at least some sway.

One such example came at the end of Tuesday's arguments, when Justice Samuel Alito continually pressed Verrilli to state a limiting principle to a mandate. Later, in the course of responding to other questions, Clement blasted Verrilli's definition by saying it was "simply a description of the insurance market."

"I think the contrast in performances between Paul Clement and Solicitor General Verrilli was pretty stark," said Shapiro, who thinks it is now "65 percent" likely (up from 55 percent before the hearings) the court will strike down the law.

"I don't think the case was won or lost based on that. But the difference in the skill and the advocacy was evident to everybody."

The other big case

On the surface, *Arizona v. United States* and the health care case look nothing alike. The health care debate centered around a single principle: the mandate. *Arizona v. United States*, which deals with Arizona's Support Our Law Enforcement and Safe Neighborhoods Act, contains four provisions that the Supreme Court could rule to uphold or strike down.

But when you look closely, the two cases boil down to one fundamental principle: Federalism — the relationship between the U.S. federal government and the states. In each case, how much power does the federal government have?

In his next case, Clement [will argue that federal immigration laws should not prevent Arizona from enforcing its own cooperative law enforcement.](#)

Gabriel J. Chin, a law professor at the University of Arizona, said there is more room for a strong lawyer like Clement to have an effect with his brief and oral argument in this case. The health care case was so thoroughly covered in the press and in the briefs that it left little room for the justices to be surprised.

The two major principles in the Arizona case are well accepted. The federal government directly controls issues of immigration. State governments, on the other hand, are allowed to do things within their police powers for their own reasons, even if they indirectly affect immigration.

So it comes down to the arguments of where specific instances fit inside or outside of these principles. That's where Chin thinks justices could be swayed.

"The question is, which principle applies to particular aspects of Arizona's law?" Chin said. "That, I think, a good argument, good illustrations, good examples really could change the court's view. They may not be decided -- at least some of them."

Behind the curtain, Paul Clement is as simple to figure out as one of his case arguments.

"The one thing about Paul Clement is that there is very little drama," said Dinh, Bancroft's founding partner. "There is very little surprise."

If Paul Clement ends up doing his part in the court striking down the Affordable Care Act, and if he ends up doing his part to uphold provisions of the Arizona immigration law, he will simply move on to the next case. The argument of Clement's place in the legal world is widely agreed upon.

Said Dinh: "He is the top player at the top of his game in the best league in the world."