

ACA, Marriage Cases Only Fraction Of Verrilli's Legacy

By **Daniel Wilson**

Law360, Nashville (June 2, 2016, 8:45 PM ET) -- While history will best remember outgoing U.S. Solicitor General Donald B. Verrilli Jr. for his work to uphold the landmark Affordable Care Act and his successful advocacy for same-sex marriage rights, his skills also shone through in less prominent wins and even nominal losses, former colleagues said.

President Barack Obama announced Thursday that Verrilli will step down on June 24 after serving as the nation's top U.S. Supreme Court advocate since June 2011, the longest stint in the role since Erwin Griswold under Presidents Lyndon Johnson and Richard Nixon. His decision to resign comes with the Obama administration in its final months and the high court done with oral arguments for this term.

During his time as solicitor general, Verrilli personally argued 30 cases before the high court while contributing to and overseeing many more. He took the lead role in several prominent victories for the administration, cases that have had a "consequential" impact, making the nation "better, more just," former U.S. Attorney General Eric H. Holder Jr. said in a tweet Thursday following Verrilli's announcement.

His final argument before the court came in April, defending the administration's contentious executive orders delaying deportation for certain undocumented immigrants. A decision in that case is still pending.

Verrilli's most prominent win came in the 2012 *National Federation of Independent Business v. Sebelius* decision, in which a 5-4 majority upheld the constitutionality of a number of major parts of the sweeping ACA, with the exception of a mandatory Medicaid expansion. The solicitor general seems justifiably proud of this case, according to a Mayer Brown LLP partner Andrew J. Pincus, a law school classmate of Verrilli.

"I've had occasion to hear him talk about [the case] and I think he recognizes the tremendous improvement in so many millions of people's lives that comes with certainty of access to health care. ... It has had, and will continue to have, just an enormous impact on the lives of so many people," Pincus said.

Verrilli's performance as an advocate during an unusually long session of oral arguments stretching across three days had been widely criticized by court watchers ahead of the decision, including a stumble where he literally choked in front of the justices.

But the constitutionality of the law was ultimately backed by Chief Justice John Roberts, the author of the opinion, who found the penalty for refusing to comply with the statute's individual mandate, requiring people to hold health insurance, could "reasonably be characterized" as an exercise of the government's taxation authority. Verrilli once again took point in the 2015 *King v. Burwell* case, a challenge to ACA tax credits administered through federally run insurance exchanges, that time coming out with a 6-3 victory.

Verrilli will also be remembered for his argument against the Defense of Marriage Act, a federal ban on same-sex marriage, in the 2013 *U.S. v. Windsor* case and subsequently against state bans on same-sex marriage in the 2015 *Obergefell v. Hodges* case, in which the high court majority found a constitutional right to same-sex marriage.

Both opinions were tight 5-4 decisions, with Verrilli's work on the *Windsor* case in particular a demonstration of his skill not only as an oral advocate but also in the work leading up to that point, according to Pratik A. Shah, another former assistant in the Office of the Solicitor General and now co-head of Akin Gump Strauss Hauer & Feld LLP's Supreme Court and appellate practice.

There was some disagreement behind the scenes about the particular strategy to take in the high-profile case, with the additional complication that certain government attorneys had previously been in the position of defending — in some cases, for years — the law they were now being asked to try and strike down, Shah claimed.

But with Verrilli's guidance and leadership, everyone involved in the case felt they had been given "a fair shake" and that their concerns had been heard, even if the ultimate strategy taken was not in line with their personal views, according to Shah.

"Given the tapestry of different emotions and interests and dynamics going on in that case, I think it really would not have turned out the way it did — or at least the process, I think, would have been a lot more difficult — but for Don's steady hand, calming influence and, at times, commanding presence," Shah said.

Shah said that Verrilli had been unanimously admired by his colleagues in the Office of the Solicitor General, not only as a "brilliant" lawyer but also as an "exceptional" leader and person, praise echoed by Latham & Watkins LLP partner Melissa Arbus Sherry, who spent five years as an assistant to the solicitor general, several of them alongside Verrilli.

"He always put the interests of the United States ahead of his own," Sherry said. "And he argued some of the most important cases of our generation. We were incredibly lucky to have him at the helm for as long as we did, and his contributions to the SG's office, to the jurisprudence and to the country will be felt for many years to come."

Verrilli had been similarly well-regarded in his more than two decades in private practice ahead of joining the U.S. Department of Justice, the majority of them at Jenner & Block LLP, building a reputation as "creative and intelligent person — also genuinely nice," according to his longtime colleague Paul M. Smith, chair of the firm's appellate and Supreme Court practice.

"He's always been a wonderful colleague who was the person you'd go to in the office to talk through the knottiest, most difficult problems," Smith said, noting the firm would welcome Verrilli — who has yet to indicate his future plans — back with open arms.

Smith said that one of Verrilli's key strengths in private practice had been his "passionate" advocacy for clients. Although he may have outwardly dialed that passion down in his time in public service, it is still evident in his work as solicitor general, even in lower-profile cases, said William M. Jay, a former assistant to the solicitor general and now head of Goodwin Procter LLP's appellate litigation practice.

Jay pointed as an example to Verrilli's work to help secure a favorable outcome for the government on three of four issues involved in the 2012 *Arizona v. U.S.* case, a challenge to an Arizona law intended to combat undocumented immigration, winning on some of the issues by a "much larger margin than expected." That decision had been overshadowed by the first ACA high court case, which came shortly after, but was no less a demonstration of his skill in shaping an argument, according to Jay.

"I think that he's a very good oral advocate and strategist," Jay said, noting that in several instances across his career as solicitor general, Verrilli has argued more than one case in a single Supreme Court sitting — an "extremely difficult" feat given the necessary preparation.

The ability to secure a favorable ruling against the perceived odds is a recurring pattern in Verrilli's work, Pincus said, using his "extraordinary" skill as an advocate to achieve the government's desired outcome in a number of cases where the perceived views of the majority of the justices are "not necessarily in sync" with the government's view of the law ahead of the case being decided.

And even cases widely viewed as losses for the administration have demonstrated Verrilli's ability to defend the interests of the government, Pincus claimed, such as the unanimous 2014 *National Labor Relations Board v. Noel Canning* ruling. That decision invalidated several recess appointments made by Obama to the NLRB, with the justices ruling that "pro forma" sessions being held by the U.S. Senate meant it was not actually in recess when the appointments were made.

But if the high court had followed the more sweeping reasoning put forward by a lower court, it could have effectively gutted the recess appointment power entirely, and Verrilli's advocacy helped convince the justices to make a far less sweeping ruling, according to Pincus.

"He seems to me he did exactly what a solicitor general is supposed to do, which is to work hard to preserve, to protect the power of the executive branch and the federal government in general," Pincus said.

--Editing by Katherine Rautenberg and Christine Chun.
