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Paul Clement offers his perspective after dozens of Supreme Court arguments, including cases on the Affordable Care Act, Guantánamo, and gay marriage.

## National Public Radio Supreme Court reporter Nina Totenberg calls Paul Clement

“a walking superlative.” Former U.S. Attorney General John Ashcroft compares him to Michael Jordan. Tom Goldstein, publisher of the widely read *SCOTUSblog*, says, “My opinion remains unqualified that he is the best.” So, as a matter of opinion, Clement is to many the leading member of the Supreme Court bar. In all events, as a matter of fact, since 2000, Clement has argued some 65 cases before the U.S. Supreme Court—more than anyone else throughout this time.

Clement, 47, is a native of Cedarburg, Wisconsin, and a graduate of the Cedarburg public schools. He received a bachelor’s degree from Georgetown University’s School of Foreign Service and a master’s in economics from Cambridge University before graduating from Harvard Law School. He clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit and Justice Antonin Scalia at the U.S. Supreme Court. He was deputy solicitor general before becoming solicitor general of the United States. He now is in private practice with Bancroft PLLC in Washington.

Clement delivered the annual E. Harold Hallows Lecture at Marquette University Law School on March 4, 2013, a talk titled “The Affordable Care Act in the Supreme Court: Looking Back, a Year After.” Earlier that day, he took part in an “On the Issues with Mike Gousha” session for Marquette law students. The following are individual excerpts from his remarks at those two events, with minor editorial changes. ►►



Paul Clement

## National security legal issues in the aftermath of the September 11, 2001, terrorist attacks

I was at the Justice Department on 9/11 as a deputy, and my boss, Solicitor General Ted Olson, lost his wife on one of the planes. We learned that while we were in the office. To say that all of this impacted us personally is an understatement. The attacks had a really transformative effect professionally because, in addition to a broader stewardship over the whole process, on a number of the 9/11-specific issues, it was so clear to everybody that these issues were going to eventually find their way to the Supreme Court. . . .

We had some World War II-era precedents that were the closest thing even on point. Yet World War II was obviously such a different situation, of formal, declared war and all that, that it was really trying to construct legal positions and defend the president's prerogative based on some legal materials that didn't fit 9/11 and the post-9/11 world very directly. If you look at the trajectory of these 9/11 cases, the administration tended to do very well in the lower courts, in part because these World War II-era cases, maybe reflecting the nature of World War II, were pretty deferential to the executive branch. Then, when they got to the Supreme Court, the Bush administration lawyers, myself included, tended not to be as successful. I mean, usually not losing outright—more like, okay, you need to remand for more process or a little more of this. I think all of that was a healthy process that's still playing out.

## How the Bush and Obama administrations have handled national security cases

It's been a healthy development that you now have a Democratic administration that's wrestling with the same basic problems, because in the Bush administration, we got a lot of criticism for some of our policies in the war on terror. I think if you would have looked only at the campaign rhetoric from the 2008 election, boy, you would have thought that things would be fundamentally different now. Guantánamo would be closed within a year and all that. You look around and, boy, things haven't changed that much. The legal positions have not really changed that much. Both political parties have had an opportunity to wrestle with these issues, and I think they recognize that they're fundamentally difficult issues. It's one thing if you had a constitution

that was focused like a laser beam on these problems, but instead you have very general guarantees and you have this recurring problem, which is basically, under our system, if we're not on a war footing on these legal issues, almost everything the executive's doing is completely wrong—right? Generally, if you hold a suspect, you have 72 hours to charge or release, and that's not what we are doing down in Guantánamo, obviously. That has required both administrations to make the argument that, well, this is an exercise in the war power. . . .



Paul Clement was welcomed to Marquette Law School for the E. Harold Hallows Lecture on March 4, 2013, by an overflowing crowd that included students, faculty, alumni, and other practicing lawyers and judges.

It continues to be very interesting and really historic. I think when we look back on this period, we will see these judicial decisions and executive decisions as really being fundamentally important about how we constitute ourselves as a society and how we deal with these situations. I think it's been a little bit of a frustration for the justices and, to a certain extent, for the executive branch as well that, under both parties, Congress is not addressing these problems very specifically.

## On the claim that the rulings of judges in the Affordable Care Act cases matched the politics of the presidents who appointed them

Commentators drew one conclusion from the various district court rulings: That you needed to know one thing about the district court judge to know how the district court ruled. If the district court was appointed by a Republican president, they held that the act was unconstitutional. If the district court judge



was appointed by a Democratic president, they upheld the law as constitutional. This was a particularly sort-of-pernicious conclusion, if you ask me, for people to draw. It's accurate but pernicious. Because in many ways, the health care case, for a variety of reasons, was a case that was unusually closely watched not just by legal commentators, but by the general public. And so for the general public to be told that constitutional law is really just politics by other means and all you need to know is the party of the president who appointed a district court judge to

know how [that judge] will rule, that's a dangerous thing for people to have in mind.

Fortunately, there was a tonic for this line of description of these cases. And the tonic was the courts of appeals. . . . The Eleventh Circuit's was a case that I was involved in. And, importantly, there a two-judge majority that involved both a President Bush 41 appointee and a President Clinton appointee struck down the law's individual mandate as unconstitutional. Conversely, in the Sixth Circuit and D.C. Circuit cases, you had very distinguished, very well-respected court of appeals judges appointed by Republican presidents, such as Jeff Sutton, last year's Hallows lecturer, and Judge Laurence Silberman, for whom I clerked on the D.C. Circuit, voting to uphold the law's constitutionality. So this sort of simple narrative, that all you need to know is the president that appointed the judge, did break down. And I think that was every bit as healthy as the prior sort of explanation was pernicious.

## Moot court work before the Affordable Care Act arguments

In one of my moot courts, I was berated by one of the justices. At the time, you never like your moot justices berating you. But you always thank them after the fact. I was berated by one of the justices about why wasn't this Necessary and Proper Clause issue decided in *McCulloch*, the case involving the Bank of the United States? . . . I thought long and hard about that series of questions. And it occurred to me in part of the discussion after the moot that the best answer to that line of questions was to remind the Court that, you know, there has to be a limit on the necessary and proper power, just like there has to be a limit on all of the powers granted to Congress in Article I, Section 8. And no matter how broad the power was in the *McCulloch* case, that maybe the Supreme Court would have had a different perspective if people had actually been forced to put deposits in the Bank of the United States—which would be far more comparable to the individual mandate. And, sure enough, at the actual argument, Justice Breyer asked me a question that only Justice Breyer could ask, which is to say it had many parts. And one of the parts focused on the *McCulloch* case and the Bank of the United States. And thanks to that moot court, I was able to give exactly that answer. ▶▶

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### The challenge of trying to win the Affordable Care Act case

There were four separate cases, essentially, before the Court. But even that understates it a little bit because there were really six separate issues. There were the four I mentioned: jurisdiction, or the Anti-Injunction Act; constitutionality, or the individual mandate; severability; and Medicaid. But on the individual mandate, there really were three separate issues, because the government had sort of three strings to its bow, if you will. They had three arguments about what constitutional power supported the individual mandate. They said it was a valid exercise of the commerce power. They said it was a valid exercise of the necessary and proper power. And, at the very back of their brief, they mentioned the taxing power as an additional authority that would support the statute.

So one way of thinking about the challengers' burden in this case was they really had to run the table on those three issues because any one of those powers would be sufficient to sustain the constitutionality of the individual mandate. And to make the challenge even more daunting, four justices had made pretty clear in prior cases that they were not going to be receptive to an argument that limited Congress's power in this area. So there were really five justices who might be receptive to arguments for limiting the commerce power and the necessary and proper power. And so with five justices and three issues, the challenge for the challengers was, essentially, to run the table to the tune of going 15 for 15. The good news is the challengers went 14 for 15. The bad news, from the perspective of my clients, is 14 out of 15 isn't good enough.

### Winning on the individual mandate issue

I think it is a very fair statement and a very fair summary of the health care case that the individual

mandate was struck down as unconstitutional. Now, you may say that is delusional thinking from a lawyer who argued the case unsuccessfully. But, in reality, the Court's decision on this point and, particularly, the chief justice's opinion, which was the decisive opinion on this, really does support the proposition that the statute that Congress actually passed, which put a mandate on individuals to purchase health care insurance, was, in fact, struck down as in excess of Congress's power under the commerce power and the necessary and proper power. And only by, essentially, reinterpreting the provision not as a mandate on individuals to buy insurance but as a tax on those who do not buy insurance, was the Court able to save the statute.

### On Chief Justice John Roberts's unanticipated holding that the mandate could be upheld as a tax

How remarkable is that? The Supreme Court had six hours of argument on this case. And the taxing power argument got maybe, generously, three minutes of the six hours. . . . I guess another takeaway from today's lecture is, six hours was not enough. They needed more time to talk about the taxing power argument. . . .

Obviously, knowing what I know now, would I do things differently? Sure. I'd start with the taxing power. And, you know, every time somebody tried to ask me about the commerce power, I'd say "No, that's easy. Don't worry about that. But let me tell you about the taxing power. . . ." But, I have to say, if I would have told my clients, not knowing what I know now, that, "Guys, I think, you know, this case is all going to turn on the taxing power, and we've got to sort of stop focusing on the commerce power and just flip the order of the brief around," I think I would have been fired. 'Cause, you know, you have to remember . . . , none of the lower court decisions went off on the taxing power. >>



## The spending power aspect of the Court's ruling

This was sort of the silent part of this case, the part nobody really focused on that much, which may turn out to be the single most important part of this case. On that, seven justices—not five, not four—seven justices said that the statute exceeded Congress's power under its spending power because it was too coercive of the states. The states effectively had no realistic choice but to accept the Medicaid funds because of the way that Congress structured the program—particularly, the fact that Congress tied the new expanded Medicaid program to the old program. So even states that wanted nothing to do with the new program and the new money, but were perfectly happy with the program they had and had had for 35 years, they faced a choice of losing all their Medicaid funds if they didn't take the new money. And seven justices said that was a bridge too far.

Now, the reason I think this is so significant is because, for small “p” political reasons, I rather doubt we're going to have a lot of new individual mandates. I mean, whatever you think about the constitutional issue, I don't think politically that played that well in the long run. But spending power legislation permeates the federal statute books. The United States Code is full of spending power legislation. And if you care about federalism, spending power issues are very important because the basic doctrine of the Court is that the very few things you can't do through the commerce power and the necessary and proper power, you can still get states to do if you make it a condition of receiving federal funds. . . . If you can, basically, without limit, put conditions on the states and say if you want this bucket of federal funds, you must agree to the following conditions, then there's no practical limit on federalism at all. The Court, by saying that there is a step that Congress can go that's too far, has, I think, breathed some life into federalism and the spending power.

## The impact of the Affordable Care Act decision

Given the amount of attention paid to the case, there's an argument that it was a real constitutional moment. But I think, in some respects, it was a constitutional moment averted because the Court, in a decision that is five to four on virtually all aspects, except the spending power, ultimately upheld the statute under

the taxing power rationale. But in the process, the chief justice, joined by the four dissenting justices, imposed substantial limits on the commerce power and the necessary and proper power. . . . If they'd gone the other way and basically said, as four justices were willing to and a lot of commentators thought the Court would be willing to, and said basically, but for a few unusual circumstances like the *Lopez* case and maybe the *Printz* case, there are really no limits on federalism, then I think that would have really been the constitutional moment and the momentous holding of the Court. . . .

Although the health care case, in the end, was not decided exactly the way the challengers had hoped, I do think, in some respects, the single most important takeaway from the decision was there were not five votes to say that there really is no meaningful judicial review of federalism constraints on Congress. There are constraints. Again, the power is very substantial, very broad in the wake of the New Deal precedents of the Court. But it remains a limited power. And the challenge for the federal government in future cases will remain putting a limiting principle on an assertion of Congress's power.

## His reaction to descriptions of him as “the go-to guy” for Republicans or conservatives for big cases

My aspirations would be to be the go-to guy for people who have Supreme Court cases or important court of appeals cases, without respect to the political aspects of the case or whether you think this is a Republican position or a Democratic position. My interest in the law is very broad. I say that appellate law is a great profession for people with short attention spans. I mean, last week, I was arguing a case about arbitration. The week before, I was arguing a case about taxes. There are plenty of people who are tax lawyers, spend their whole life in the tax code, and that's great for them. But for me, I wouldn't want to do that. . . . It really is my aspiration to have a much broader spectrum of cases and clients than would be suggested by this “go-to guy” for the Republicans. The good news from my standpoint is I think my practice does bear that out.

## Winning and losing Supreme Court cases

As an appellate lawyer, you tend over time to get less and less focused on wins and losses. You can't not be focused on them, especially because you have clients and clients are excessively focused on wins and losses, and

you can't lose sight of that. But there are certain cases where you could write your brief in crayon, and you are still going to win—I mean, somebody came to you with a winning case. There are other cases where somebody came to you with the case that most lawyers would just get crushed on and you put every bit of your skill and trade into it. Another lawyer might have a 10 percent chance of success, and you get it up to the point where it's got a 40 percent chance of success, and then, percentages being what they are, you still lose. I don't at the end of that say, "Well, that was all wasted effort." I sort of feel like, no, it was great effort and, in some ways, I feel that's a much greater contribution than if I have a case that starts with an 80 percent chance of success and I get it to 85 percent. . . . If I can take a case that might look kind of one-sided and get it to the point where it seems like a much closer call, maybe that manifests itself in the decision they write, maybe it's a more nuanced decision, maybe it leaves open something that would otherwise be closed off. I feel like that's where I'm really adding some value.

### Whether he still gets nervous before Supreme Court appearances

I've always said if I ever get to the point where I'm no longer nervous, I'm going to find something else to do. . . . One of the things that you just absolutely have

to do before you go in front of the Supreme Court is to prepare and prepare and prepare and prepare. What keeps you going that final mile is the nerves. I mean, if you got to the point where you're like, "I can do this. I'm not going to embarrass myself," you'd eventually embarrass yourself.

### Preparing for a Supreme Court argument

I'm a big believer in the moot courts. It's like the old American Express commercial: I wouldn't leave home without them. I wouldn't go into the Supreme Court of the United States without having done at least two moot courts, where you get a group of individuals, colleagues who are really smart, and you try to basically simulate the kind of questions the justices are going to ask. Even if you've heard the question before, it's hard to answer a question coherently from a Supreme Court justice. If you've never heard the question or a question like it before of that type, it's well-nigh impossible. . . .

The other thing that I've learned over time is you can't really be over-prepared for a Supreme Court argument, so you really have to acknowledge the fact that you're not going to have quite as much time as you'd like. You're not going to be able to turn over every stone in the process of preparing. So what I've found over time is that you want to figure out, "All

right, what kind of case is this, and what kind of preparation is going to be rewarded?" Some cases are very record intensive, so you really have to bear down in the record. Some cases are precedent intensive, so what you need to do is really read every Fourth Amendment ►►



Eckstein Hall's Appellate Courtroom on the occasion of the 2013 Hallows Lecture presented Paul Clement with more than his usual group of nine people asking questions.

case the Supreme Court has decided in the last 20 years or something. Sometimes, it's the administrative regulations that you really have to understand inside and out, so you can see how this whole seemingly complicated web of regulations fits together.

### Whether he focuses on specific justices in arguments before the Supreme Court

One way to define a Supreme Court advocate's job is to get to five for your client. It can be very satisfying to have four justices give a ringing endorsement to your position, but it's still called a loss, last time I checked. . . . In most cases, you have a theory as to how you're going to get to five, and sometimes it involves one justice playing a critical role. Very often, it's building a coalition where you were going to have some justices adopting one position and another justice or two adopting a different position. Those are the hardest cases because, any time you are building a coalition, you have to figure out how to get these additional people on board without losing the people you started with. In some ways, that can be the most challenging. One thing that's a little bit different about arguing cases in the Supreme Court relative to the courts of appeals is that in the Supreme Court, all nine justices are free to have their own view of a particular area of the law. In the lower courts, if there's a Supreme Court case on point, even if they don't like it much, they might grouse about it a little bit, but they're going to follow the Supreme Court case.

### Why he doesn't use notes while appearing before the Supreme Court

Most people bring notes to the podium, but they're there more as a security blanket. At the Supreme Court of the United States, if they ask you a question and you are standing there paging through some notes trying to see what you wrote down, you are not serving your client well. I'm probably one of a handful that goes up there without any notes, but most of the lawyers, certainly the good lawyers there, they're not looking at what they brought up there. That's just something that kind of help them sleep a little better the night before. . . . The questions are so important, and you really don't want anything to distract you from trying to pick up on the nuance.

Sometimes people have this idea that the ideal argument would be: you get up there and you say everything you wanted to. You use some lofty rhetoric.



U.S. District Judge Charles N. Clevert, Jr., Milwaukee Mayor Tom Barrett, and Paul D. Clement talk after the Hallows Lecture.

If you were to do that, and the justices weren't asking questions, I mean, you might as well just be talking to a wall, right? Even though it makes your job harder, you want lots of questions.

### The effect of public and news media attention to a case

**Y**ou can't just block it out and ignore it because it's a part of the overall system in which your cases are being litigated. I don't think the justices are terribly swayed by what's in the press, but, on the other hand, would you want your client to just get beaten up in the press completely and there to be no counter response? Of course you wouldn't want that. And would you want to make an argument on behalf of your client that's just going to be low-hanging fruit for somebody to pick on in another forum? No, you want to try to make your arguments in a way principally directed at the court, but you don't want to ignore everything that's going on entirely. . . . I don't think I'd do what I do if I thought it was just politics by other means. So you don't ignore it, but you don't get caught up in everything that's going on around you.

### On leaving a major law firm, King & Spalding, over a matter of principle

Probably the most difficult and challenging professional decision I had to make came in private practice. I was retained by the House of Representatives to represent them in the challenges to the Defense of Marriage Act, which occurred after the Obama administration decided they were no longer going to

defend the statute. At that point, the House was thrust into the role of defending the statute and in many respects, it struck me as a very familiar role because, as the solicitor general, you are responsible for defending the constitutionality of acts of Congress without regard to whether you think they're good policy or not. . . .

I undertook that representation, and there was a big outcry because, in certain quarters, it's a very unpopular position to be defending that statute. Ultimately, the firm made a decision that it wanted to drop the representation and, at that point, I really had a fork in the road. I could either stick with my firm, where I had been even before my government service and had a lot of friends and had been building up an appellate practice for a couple of years. Or I could stick with my client.

I [had] told them I will represent them and made the commitment to represent them and, as much as on a personal level it probably would have been easier to stick with the firm and steady paycheck and all of that, my conception of what the lawyer's role is is that you don't walk away from a representation because it's proven unpopular in a particular quarter. I mean, you make a commitment to a client and, absent some sort of ethical reason that you have to withdraw, you should stick by your client, and that's what I did.

I was really heartened by the response out there in the profession. It really was, I think, a great moment for the profession. At some level, you can't expect non-lawyers to fully get it because I think non-lawyers always have a little bit of trouble understanding the idea that the lawyer represents the client. That doesn't mean the lawyer thinks the client is awesome. It doesn't mean that the lawyer even thinks that the client is, say, not guilty. It just means that you are honor-bound to represent that person zealously and to the best of your ability and to try to discharge your responsibilities to the client. . . . This whole system doesn't work if people don't defend clients who are unpopular for whatever reason, for one reason or another. I like to say that people who are popular in all corners generally don't need legal representation. . . .

## What drew him to the law

One thing is I have a brother who is 12 years older who went to law school when I was all of about nine years old or something. So the idea of going to law school was something that was presented at a pretty early age as a distinct possibility. Then, as I got to the point of really deciding whether I wanted to go to law

school, I thought that it would be a great way to engage in public service in kind of an active way. But I really didn't know quite what to expect. When I first went to law school, I probably assumed I would be some kind of corporate lawyer, not quite knowing what that meant. I went to Harvard Law School, and the vast majority of my classmates seemed very down on corporations, and I was sort of a Republican, and I kind of liked corporations, so I figured this would be good—go be a corporate lawyer. But as I got more and more into understanding the profession and the way that it worked, I was more and more drawn to the litigation side of the house.

## His experiences as a law clerk for Judge Silberman and then for Justice Scalia

I would recommend a judicial clerkship to anyone who has any interest in the litigation side of the profession. But if you decide to have a clerkship, the single most important variable as to whether it's going to be a merely good experience or just an unbelievably great experience is for whom you clerk. You often don't have a lot of control over that. You put your applications out and see if anybody's interested. I was very fortunate because both of the individuals for whom I clerked were not only tremendous people, not only great intellects, but they had a lot of Washington experience, a lot of different service in the executive branch as well as the judicial branch. They were also people who were really interested in engaging orally. . . . Not much else is that intimidating when you've mixed it up with Justice Scalia and been told, "That's absolutely wrong. What are you thinking?" and you actually push back a little bit and say, "Well, then, boss, think about it this way."

## Getting back to Wisconsin

My wife and I have three boys, and we make a point of getting back to Wisconsin every summer because we think it's important for them to understand that Washington is not entirely normal.

## On the state of Marquette Law School

It is unfortunate to have a White Sox fan at the helm. [Interruption noting that Dean Kearney's predecessor was a Cubs fan.] Right, there is that—moving in the right direction, right. . . . But it is a shame. I mean, with this beautiful view of Miller Park, you really ought to have a Brewers fan at the helm. ■