

Statement of

The Honorable Chuck Grassley

United States Senator
Iowa
May 12, 2011

Prepared Statement of Ranking Member Chuck Grassley
Senate Committee on the Judiciary
Executive Business Meeting
Donald B. Verrilli, Jr., to be Solicitor General of the United States
Thursday, May 12, 2011

Mr. Chairman,

On February 14 of this year, I met with Donald Verrilli in my office. This was shortly after his nomination on January 26, to be Solicitor General of the United States. At that time I didn't know much about him. However, in my visit, I learned about his background including that he currently serves as a Deputy Counsel to the President; that he previously served in the Department of Justice as an Associate Deputy Attorney General; and that he had been a litigator in private practice for more than 20 years.

I was informed that he has argued twelve cases, and participated in more than 100 cases, before the Supreme Court of the United States. Mr. Verrilli served for over fifteen years as an adjunct professor of constitutional law at the Georgetown University Law Center. He clerked for Associate Justice William J. Brennan, Jr., of the United States Supreme Court, and Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit. These are impressive credentials and I congratulate him for his accomplishments.

During that visit, I found Mr. Verrilli to be pleasant and courteous. We had a good discussion on a variety of topics including his view of the role of Solicitor General; his views of the Solicitor General being the "10th Justice;" his current duties as Deputy Counsel; and the duties and issues he was involved in while at the Department of Justice, particularly the national security issues. At the conclusion of that visit, I was comfortable with the nomination.

Shortly thereafter, the administration announced it had determined the Defense of Marriage Act (DOMA) was unconstitutional. Accordingly, the administration would no longer defend the act in pending lawsuits. At that moment, I realized what would have been a fairly routine confirmation hearing for the Solicitor General had taken on another dimension. Another twist was added the day before Mr. Verrilli's hearing. On March 29, I was informed that Mr. Verrilli was recused on DOMA matters. The basis of the recusal was the administration's ethics pledge, which requires recusal for two years on any matter which the former employer is substantially involved. I was disappointed that this information had not been made available to members of the committee much earlier. Mr. Verrilli should have discussed this with me during his earlier

visit. Perhaps the White House felt that they could simply hide behind this recusal and not discuss the issue at the hearing. If this was their thinking, it was an inappropriate and failed strategy.

The very first question at the hearing related to DOMA. Not surprisingly, Mr. Verrilli announced that he was recused from the matter and had no involvement with the administration's decision. A number of questions followed, by more than one Senator. I was somewhat perplexed by his assertion that he had not given these matters any serious legal thought. What troubled me even more were his statements that he considered the matter closed and would give it no consideration in the future, even if confirmed. I would note that his recusal period has since ended, so that is not a bar to his future involvement.

Perhaps the greatest disappointment was Mr. Verrilli's responses to questions about the independence of the office. He seemed to buy into the notion that he was still the President's lawyer. He gave lip service to the two traditional exceptions to the Solicitor General defending a statute - first, if the statute violates separation of powers by infringing on the President's constitutional authority; and second, if there is no reasonable argument that can be advanced in defense of the statute. I would note that neither of these applies to DOMA. Mr. Verrilli then appeared to create a third exception - one that is not supported by practice or tradition. He stated he would defend a statute's constitutionality "unless instructed by my superior not to do so."

This position advocated by the nominee - that interference in the rule of law, by the President or by the Attorney General is an appropriate reason not to defend statutes - is extremely troubling. That position is not the standard of the office. It is not what the nation expects from its Solicitor General. His response gave me great pause about supporting the nominee.

Therefore, I gave Mr. Verrilli ample opportunity to address my concerns. In extensive written questions I asked the nominee to review and comment on testimony given by previous Solicitor General nominees. In particular, I asked many questions regarding statements by prior Solicitors General regarding the independence of the office. I asked him to review cases where the Department of Justice had made a determination not to defend a statute. I asked him to analyze those cases as to the rationale for not defending the statute. In addition, I asked him to review and comment on a number of Supreme Court cases that address serious constitutional issues.

I reviewed his answers to my written Questions for the Record. I commend Mr. Verrilli for his serious approach to the task of providing responses. In most cases he gave thoughtful answers. In many instances he declined to provide his views on the topic, but gave general assertions that he would follow the law. In other instances he claimed confidentiality. I do not agree with his assertion of confidentiality in most of the instances where he raised that as a basis for not responding. In other circumstances, such a response would be unacceptable. In the past, such responses, or allegations of similar responses, have resulted in a failed confirmation or withdrawal of the nomination.

Based upon my review of his responses, I am more comfortable with the notion that Mr. Verrilli understands the duty of the Solicitor General. I believe, because of my questions and the time he spent contemplating the issues, he will be a better Solicitor General than he otherwise would have been. Mr. Verrilli has been exposed to decades of thought and experience by this review. On

the whole, I concluded that Mr. Verrilli now has a greater sensitivity to the necessity of independence in the office. In numerous answers he provided a much better response than he did at his hearing. He indicated he would not lend his name or that of the office to carry out any order which he believed to be based on partisan political consideration or other illegitimate reasons. Rather than do so, he said he would resign from office. I will hold him to that pledge.

I want to be clear about my tepid support for Mr. Verrilli. He is nominated to an executive branch position with a limited term. My lukewarm support is based largely on the nature of the office to which he will be appointed, if confirmed.

I will put the administration on notice, as well as Mr. Verrilli, this committee, the media, and any other interested party. My less than enthusiastic vote for Mr. Verrilli to be Solicitor General of the United States is limited to that office alone. No entity or individual should presume my support for Mr. Verrilli for any other future office to which he may aspire or to which he may be nominated - be it in the executive, judicial, or legislative branch of government.

Furthermore, as ranking member of this committee, I will vigorously carry out my oversight responsibilities to ensure the Solicitor General and his subordinates are performing as they should. I will be watching to make certain Mr. Verrilli complies with his oath of office, with his obligation to the Constitution and statutes of the United States, with his duties of the office, and with the assurances he has given the Senate in his oral and written testimony. I expect nothing less from all officials of government. I have every expectation that Mr. Verrilli, if confirmed, will honorably live up to those duties, obligations, and assurances.