Conversations With...

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The Issue: Healthcare Information and Commercial Speech after *IMS Health Inc. v. Sorrell*

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, former Pennsylvania Governor **Dick Thornburgh** leads a discussion with IMS Health general counsel **Harvey Ashman** and Bancroft PLLC partner **Paul Clement** that delves into the U.S. Supreme Court's 2011 decision in *IMS Health Inc. v. Sorrell.* The Court's ruling invalidated on First Amendment grounds a Vermont statute prohibiting commercial uses of anonymized physician prescription data. Mr. Ashman and former Solicitor General of the U.S. Clement discuss the value of such healthcare data, the Court's reasoning in *Sorrell*, and the broader impact the majority opinion will have on commercial speech regulation and healthcare information.

Governor Thornburgh: Before we address the specifics of the Court's ruling in *Sorrell*, let's get a sense for where this case came from. Harvey, what type of information does IMS Health collect, from whom is it collected, and who is interested in the data?

Harvey Ashman: If I might take license, let me begin with the last part of your question to set the stage for the others. To begin, everyone has interest in data—commercially, professionally, and personally. Healthcare is a special area in which data are essential. What that means is that information drives our understanding of how care is delivered, what care is needed, how best to treat and prevent illness, and how much the care costs and how to manage those costs. In sum, it is impossible to manage individual patient care or public health in general without data. In healthcare, data save lives.

IMS Health has been collecting data in the healthcare arena for over 50 years. The data in question are stripped of patient identifiers at the source, so they are anonymous and individual privacy is protected. Our business model is to inform healthcare stakeholders, so we collect data as it becomes available. Today, that includes anonymous pharmacy data, medical claims data, and many offshoots that further enhance decision-making. We gather data such as these from virtually all stakeholders, involving hundreds of thousands of data sources around the world. As you can imagine, this represents a highly evolved set of skills and competencies. In effect, IMS specializes in assimilating diverse data sets in a manner that turns information into actionable insights.

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Harvey Ashman

Governor Thornburgh: So one main purchaser of such data healthcare product companies, like pharmaceutical manufacturers. Why are the data valuable to them?

Mr. Ashman: As I indicated earlier, virtually all healthcare stakeholders utilize these data, including government agencies (such as FDA, CDC, CMS, etc.), health researchers, managed care organizations, payers, consumer groups, and others. It is important to note that these entities do not always have the resources to pay full price for data. For example, government and health researchers often receive the data at highly discounted prices.

So, when one examines the revenues generated by these data, it is no surprise that they are derived predominately from commercial entities. That is why the answer to your question is yes, the main purchasers are commercial entities including pharmaceutical manufacturers, biotechnology companies, and medical device companies. Frankly, the revenues from these sources make possible the *pro bono* and highly discounted provision of data to government agencies and academic researchers. This helps advance the delivery of high-quality, cost-effective healthcare.

Governor Thornburgh: How do governments and private researchers use the data?

Mr. Ashman: We are very proud of the contributions our information and related services make toward government oversight and involvement and health research. The uses are too numerous to discuss here, so I will provide a description of a few important applications.

To the Federal Government, our prescription databases represent an understanding of the medicines that are prescribed in the U.S. and around the world, as well as the clinical conditions for which they are used. As such, they allow for the monitoring of risks associated with the use of prescription drugs, an accurate assessment of their frequency of use and their possible link to specific side effects. Not surprisingly, they have also played a key role in safety programs for newly launched products.

In recent years, CDC has used our prescription databases to monitor the spread of H1N1 flu; using our data, CDC was able to show the benefits of their work in reducing hospitalizations and deaths.

And with respect to health research, the IMS Institute for Healthcare Informatics has supported academic research around the country and has relationships with many nationally-recognized institutions of learning. Just in the past few years over 100 studies supported by IMS data have been published in key medical journals. Those studies addressed the quality, delivery, and cost-effectiveness of current healthcare policy and practice. In that way, our assets and capabilities can support an important public-good. In addition, recently the IMS Institute reported on drug shortages related to pharmaceutical products. The findings serve to shed light on this national concern and provide input into strategies to prevent shortages going forward.

Governor Thornburgh: States such as Maine, New Hampshire, and Vermont took action in the previous decade to prohibit the sale or use of this data for pharma company marketing. How did the legislatures justify the need for such laws?

Mr. Ashman: The best known statute is Vermont's because it went to the Supreme Court. When it enacted its law, the Vermont Legislature expressly asserted that in its view, the so-called "marketplace for ideas" on medicine safety and effectiveness was "one-sided," meaning that manufacturers were communicating with doctors about their prescribing practices far more frequently than those paying for the prescriptions such as insurers and the State itself. Because the State was concerned that this might lead to poor decisions by doctors—even though the information that was being conveyed by the pharma companies was totally accurate—the State decided to hinder the expression of the manufacturers. Its strategy was to block the use of data as a means of finding doctors who would be interested in learning more about pharma products. Conversely, the State decided to permit itself and insurance companies to use the same data to contact doctors to persuade them not to use brand-name pharma products.

As you are aware, we opposed these laws for many reasons, particularly for their negative impact on patient care. Even if pharma marketing increases use of some more expensive drugs, those will often be better drugs. In many cases, more expensive prescriptions can significantly reduce overall healthcare costs by improving patient health and avoiding or reducing the need for hospitalization, surgery, and other measures. We could not see how the very blunt legislative approach taken by Vermont could accomplish its intended purposes, a position that stood the test of time and considerable debate in over 20 other states, all of which chose not to adopt essentially identical bills.

Governor Thornburgh: The laws only prohibited companies like IMS from selling such data to companies like GlaxoSmithKline and Pfizer, correct? Did it allow other sales and uses of the data?

Mr. Ashman: The laws allowed virtually every other use. They were designed to impact one audience only—pharmaceutical manufacturers.

The very same data could be sold to and used by government, managed care organizations payers, consumers, researchers, academic detailers, etc., even for commercial purposes. The data could be posted on the Internet or given-away free of charge.

Governor Thornburgh: Do laws such as these—targeted prohibitions on sales and use of data to "level" the information marketplace—set off warning bells for constitutional lawyers like you, Paul?

Paul Clement: They certainly do, and your description of the laws really raises two distinct causes for constitutional concern. One is the "targeted" nature of these prohibitions. Whenever a governmental entity promulgates laws that at least appear to favor certain viewpoints

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Paul Clement

or speakers over others, it invites First Amendment scrutiny. Speaker- or viewpoint-based discrimination traditionally faces a very high hurdle—namely, strict scrutiny—outside of the commercial context. And even where "commercial speech" is concerned, the Court has frequently applied an "intermediate" level of scrutiny under *Central Hudson* that requires prohibitions to advance directly a substantial governmental interest and to restrict speech no more than necessary to further that interest.

The other cause for concern is the governmental interest asserted here—i.e., to level the information marketplace. Since the mid-1970s, with its decisions in *Bigelow v. Virginia* and *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court has recognized that commercial speech has value in the marketplace of ideas and that the First Amendment protects the dissemination of truthful and nonmisleading commercial messages about lawful products and services. This was at least in part because of the Court's recognition that the public has an interest in receiving such commercial information. In recent Terms, the Court has more generally separated cases that it thinks are real or pure First Amendment cases from those that are not because, for example, they involve government speech, public employees, or school discipline. The Court therefore has protected protests at funerals and struck down laws prohibiting sales of violent videogames to minors while permitting schools to punish students for referencing drug paraphernalia on banners. The Court will ultimately settle on the proper mode of analysis for commercial speech cases, but until it does, a perception that the government is choosing among speakers or attempting to control the amount of speech in the market place is what can lead the Court to view a case as a "real" or "pure" free speech case, even though it arises in a commercial context.

Governor Thornburgh: But when IMS Health challenged the New Hampshire law in court, the U.S. Court of Appeals for the First Circuit didn't share your opinion. What did the First Circuit rule?

Mr. Clement: The First Circuit held in *IMS Health v. Ayotte* that the challenged parts of New Hampshire's law "fall outside the compass of the First Amendment" and therefore required only the "rational basis" review applicable to economic regulations, a level of scrutiny that the law easily survived. New Hampshire's "Prescription Information Law" provided that, subject to enumerated exceptions, patient-identifiable and prescriber-identifiable information "shall not be licensed, transferred, used, or sold" by certain people and entities "for any commercial purpose," which was defined to include marketing and "any activity that could be used to influence sales or market share of a pharmaceutical product." *Ayotte* at 47. The law did not prohibit the transfer or sale of aggregated non-identifiable patient or prescriber information data. The principal basis for the court's decision to apply rational basis review was its conclusion that the state sought to regulate only the conduct of data companies like IMS—i.e., their aggregation, manipulation, and sale of prescriber-identifying information for "narrowly defined commercial ends"—and not their speech.

Writing for the court, Judge Selya based this conclusion on the fact that the information had "become a commodity" and therefore its aggregation, manipulation, and sale could be regulated in the same manner as any other commodity, such as "beef jerky."

In the alternative, the First Circuit also concluded that even if the law did regulate speech, it was commercial speech and the law would survive "intermediate" scrutiny using the *Central Hudson* balancing test—*i.e.*, where speech concerns lawful activity and is not misleading, a regulation is permissible only if it (i) advances a substantial governmental interest; (ii) directly advances the interest; and (iii) restricts speech no more than necessary to further the interest. The court focused its analysis on one of three interests asserted by New Hampshire—containing prescription drug cost—and how the information that IMS provides to pharmaceutical sales representatives enhances their success in selling brand-name drugs, which typically cost more than do generic drugs.

Governor Thornburgh: What impact did the First Circuit's ruling have on your legal strategy in challenging a similar law passed in Vermont?

Mr. Ashman: Fundamentally, our strategy did not change. We firmly believed the laws were unconstitutional on the basis of the First Amendment. However, in Vermont, we had the opportunity to fully develop our strategy and content due to the lengthy trial and testimony.

The First Circuit's decision did make clear to us that we should redouble our effort to demonstrate the value of our speech and the likely ineffectiveness of the Vermont law in holding down unnecessary costs. We called upon an economist to show that the cost of pharmaceutical products would go up if prescription data became unavailable. We asked doctors from Vermont, New Hampshire, and Massachusetts to explain why it was important to them that marketers should have familiarity with their prescribing decisions. We also brought to court a former general counsel of the Food and Drug Administration who provided testimony concerning the high cost of developing drugs and the limited time period that manufacturers have to recover those costs through drug sales.

Governor Thornburgh: The consolidated challenges of IMS Health and the Pharmaceutical Research and Manufacturers of America (PhRMA) to Vermont's law fared differently in the U.S. Court of Appeals for the Second Circuit than you did in the First Circuit. What, in a nutshell, was the outcome there?

Mr. Ashman: The Second Circuit held that the sale of information is protected by the First Amendment, rejecting the First Circuit's contrary view. It also held that sale of information may be a form of noncommercial speech entitled to the strongest First Amendment protection, but that the law could not survive even the lesser First Amendment standards that the Supreme Court has applied to commercial speech. In applying the commercial speech test, the Second Circuit found that the law did not directly advance Vermont's interests in reducing costs or protecting privacy and that the

state had many alternatives for advancing those interests without restricting speech at all.

Governor Thornburgh: Paul, the Supreme Court rejected IMS's appeal of the First Circuit loss. Why do you think the Court granted review to Vermont's *cert* petition from the Second Circuit loss?

Mr. Clement: More often than not, we are left to speculate as to why the Court grants *certiorari* in one case, rather than another. Once in a while, though, the Court tells us why they took a case, and this is one such case. The Court pointed to a division of authority in the Circuits. An acknowledged and unambiguous split of authority had developed over the constitutionality of similar state statutes, with the First and Second Circuits taking starkly different approaches to the free speech implications of laws targeting the use of aggregated data. Circuit splits are the leading reason that *certiorari* is granted and especially given what the Court itself said, the division of authority is likely the principal reason for the grant in *Sorrell*.

The Court probably also considered Sorrell a better vehicle than *Ayotte* to decide the free speech questions presented. As Harvey noted, *Sorrell* was a consolidated challenge to the Vermont law and included as plaintiffs not only a data company but also a pharmaceutical industry group. The free speech rights of both the data collectors and users therefore were presented to the Court more cleanly in the *Sorrell* petition than they could have been in the *Ayotte* petition. The Court knew it could reach the First Amendment issues in *Sorrell* without having to worry too much about whose First Amendment rights were at stake.

Governor Thornburgh: An interesting array of *amicus* briefs were filed on the side of IMS Health and PhRMA in the Supreme Court. Were they effective at supporting and amplifying your arguments?

Mr. Ashman: I am very confident they were because they provided the Court with a wide range of careful thoughts about the consequences of the decision for not only patients, physicians, and pharmaceutical manufacturers, but also the economy as a whole, and the future of knowledge discovery. We thought it would be important for the Court to understand that that case would have a very broad impact. WLF, which has always played a leadership role on these questions, filed a tremendous brief. We were gratified that organizations such as the Reporters' Committee for Freedom of the Press, Bloomberg News, Hearst Corporation, and McGraw-Hill could make this point very effectively. Having the support of the U.S. Chamber of Commerce also helped persuade the Court, I believe, that inappropriate state regulation of information is bad for business and bad for consumers. In order for companies to grow and prosper, they need an unimpaired view of the dynamics of the markets they serve. WLF, the Chamber, and other organizations dramatically made that point in their briefs.

Governor Thornburgh: Justice Kennedy's majority opinion in Sorrell explicitly stated that "heightened judicial scrutiny" was warranted for the type of

conclusion?

Mr. Clement: Critical to the majority's conclusion were the particulars of the challenged law's express language and declared purpose and how the Court thought the law operated in practice. In its background discussion, the Court was careful to explain that the legislative findings showed the Vermont legislature to have been focused upon the content of the marketing and sales messages being communicated by pharmaceutical companies in the "marketplace for ideas on medicine safety and effectiveness"; the frequency of those messages; and their efficacy. *Sorrell* at 2661. The Court also noted that the statute authorized funding for "education programs" to counter the messages of the pharmaceutical industry and that an earlier version of the law—and one not even at issue in the case—had gone so far as to require pharmaceutical sales representative themselves to "provide information about alternative treatments," information that presumably could undercut their own message. The Court also relied upon the district court's findings indicating that the law targeted pharmaceutical manufacturers by virtue of their being "essentially the only paying customers of the data vendor industry" and the fact that the practice of "detailing" is one carried out almost exclusively by those manufacturers' sales representatives in connection with brand-name drugs.

Based upon these facts, the Court was unambiguous about its principal concern: Because the law proscribed selling or giving away prescriber-identifying information "for marketing," but allowed it "for purposes other than marketing" and specifically prohibited pharmaceutical companies from using the information for that purpose, the law disfavored speech with a particular content (*i.e.*, marketing) and it disfavored particular speakers (*i.e.*, pharmaceutical manufacturers). *Sorrell* at 2663. And because the law therefore burdens protected speech, the First Amendment requires heightened judicial scrutiny. As I alluded to earlier, in most Supreme Court First Amendment cases, the real battles are over the level of scrutiny and whether a case implicates the core of the First Amendment or a more peripheral concern, like government speech. I think what convinced the majority to view this as implicating the core of the First Amendment was the palpable sense that the government was choosing among speakers.

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Governor Thornburgh: Why, after focusing so intently on heightened scrutiny, did Justice Kennedy then decline to apply such scrutiny, and instead evaluate the burden on pharmaceutical companies' speech rights under the traditional *Central Hudson* test for commercial speech?

Mr. Clement: The Court explained that the outcome of the case would be the same whether it applied heightened scrutiny or the "commercial speech inquiry" of *Central Hudson*. *Sorrell* at 2667. In that situation, the Court, as it has done in past, applied its existing precedent. Of course the Court did break new ground on a difficult constitutional issue by deciding that heightened scrutiny applies to commercial speech in some cases, but it left it to lower courts to work through how to apply that scrutiny in

future cases. By applying *Central Hudson*, however, the Court also was able to address at least some of the confusion among the lower courts over how to analyze commercial speech more generally under the existing framework, confusion that was only exacerbated by the starkly different results reached by the First and Second Circuit's application of intermediate scrutiny to similar statutes. Finally, the Court's decision to say that heightened scrutiny applies and then resolve the case under *Central Hudson* underscores that the majority views *Central Hudson* as a demanding test. This is not the first time that the Court has avoided a more definitive holding on the proper treatment of commercial speech by finding that the government program fails the *Central Hudson* test. One lesson is that the *Central Hudson* test may be more demanding than some lower courts have understood.

Governor Thornburgh: What does this flirtation with heightened scrutiny mean for future commercial speech cases? Will lower court judges construe *Sorrell* to mean that content- or viewpoint-based discrimination on commercial speech must withstand scrutiny higher than *Central Hudson*?

Mr. Clement: This seems to be a much more serious flirtation with heightened review than we have seen from the Court previously in the area of commercial speech. The Court noted in *Greater New Orleans Broadcasting Ass'n v. U.S.* (which is cited in *Sorrell*) that judges and scholars were calling for the repudiation of *Central Hudson's* balancing test in favor of a more straightforward and stricter test for restrictions on commercial speech. But the Court did not address those calls in that case other than to say that "reasonable judges may disagree about the merits of such proposals." The Court went on to apply the *Central Hudson* test. Individual justices have also indicated a willingness to rethink *Central Hudson*. In *44 Liquormart, Inc. v. Rhode Island*, Justice Scalia expressed "discomfort" with the decision and Justice Thomas expressed his desire to abandon *Central Hudson* altogether in favor of a rule of *per se* illegality where the government's asserted interest is to "keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace."

Sorrell is different. The Court did not avoid deciding whether heightened scrutiny is available in commercial speech cases as it did in *Greater New Orleans.* It stated unequivocally that the First Amendment requires stricter scrutiny of a speaker- and content-based regulation on commercial speech than other regulations—and in particular one that prohibits or burdens commercial speech "because of disagreement with the message it conveys." Lower courts therefore now do need to consider whether a regulation challenged on First Amendment grounds is one that should be subject to heightened scrutiny under *Sorrell* or intermediate scrutiny under *Central Hudson.* What the lower courts will be looking at is whether the purpose, text, and effect of a law indicate discrimination on the basis of content or speaker. If so, *Sorrell* indicates that heightened scrutiny is appropriate.

Governor Thornburgh: Some have said that the Court declined to rule on whether the Vermont law violated IMS Health's First Amendment rights. Harvey, what are your thoughts on this and how does that perception affect state legislatures who may look at this issue anew?

Mr. Ashman: I don't agree with the premise that the Court did not decide whether the law violated IMS Health's First Amendment rights. The Court held the law imposes a speaker- and content-based burden on protected expression, and that circumstance was sufficient to justify application of heightened scrutiny and to invalidate the law. This vindicated the First Amendment right of IMS Health to continue gathering and publishing information to its subscribers. The Court also reiterated that "the creation and dissemination of information are speech within the First Amendment," and this is precisely what IMS Health does. We think this closes the door to this type of legislation.

Governor Thornburgh: What factors led the majority to conclude that under *Central Hudson*, there was no substantial fit between the state interests and the means the law used to advance them?

Mr. Ashman: In its evaluation of Vermont's interest in protecting prescriber privacy, the Court pointed out that the law allowed pharmacies to share prescriber-identifying information with anyone for any reason save one—they could not allow the information to be used for marketing. Under the law, the information could be published on the front page of a daily newspaper. This showed that the law had not been tailored to serve any legitimate privacy interest. The Court also found no fit between the state's economic interests and the means to advance them because the law was designed to work in such a roundabout way. Instead of imposing direct regulations on the prescribing of products that the state regarded as unnecessarily expensive, it hindered speech that had been effective in persuading doctors to prescribe those products. The Court pointed out that the law had been shown to be too broad by the fact that Vermont doctors viewed targeted detailing based on prescriber-identifying information to be very helpful because it allowed sales people to shape their message to each doctor's practice.

Governor Thornburgh: The Court found that if physician privacy was an interest Vermont was trying to protect, it didn't coherently advance that interest through the challenged law. Do you think the Court intimated that a broader ban on information sale or disclosure might have been upheld?

Mr. Ashman: I don't read the opinion as suggesting such a law would be upheld. I read it as simply saying there was no need to consider in this case whether such a law would be upheld. If Vermont or any other state were to enact such a law, I am confident that it would be easily invalidated because it would restrict both commercial and noncommercial uses of information and therefore be subject to strict scrutiny. Vermont created exceptions to its law for non-commercial uses of information in order to attempt to ensure that the Court would apply intermediate scrutiny. If Vermont were to

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remove the exemptions and reenact the law, it would be even more difficult to justify than the law that was invalidated.

Governor Thornburgh: Paul, at the end of Justice Kennedy's opinion, he notes that some content-based restrictions, ones that have "neutral justifications," may be permissible. He mentions laws that protect against "fraud" and "false or misleading" speech. Why did Justice Kennedy include this, and what implications could such dicta have?

Mr. Clement: The Court has always treated false or fraudulent speech differently, essentially suggesting that such speech is not protected by the First Amendment, at least in a commercial context. One could think of prohibitions of fraudulent or false speech as being content-based, since it is the content of the speech that turns a truthful claim into a false or misleading one. I think Justice Kennedy was just flagging this issue and perhaps trying to prevent lower courts from overreading *Sorrell*. That said, I do think one of the interesting questions that will come before the Court is the extent to which the First Amendment requires procedural protections or some sort of margin for error before a speaker is punished because the speech is determined to be false or misleading. As you know, the government in areas like off-label marketing has tried to treat even truthful speech about off-label uses as "false and misleading." Eventually, I think the Court will need to provide further guidance about the line between false or fraudulent speech and closely-related protected speech.

Governor Thornburgh: Will state legislatures get the underlying message the Court sent in *Sorrell*, Harvey? Will they find a way to address "escalating" health care costs that doesn't burden protected speech?

Mr. Ashman: As I mentioned earlier, other states considered these laws as a model for their own legislation. Over 20 states considered virtually identical bills, and none passed. The reasons were varied, and were legal and policy oriented.

First, these data are extremely valuable in a healthcare setting and will be increasingly so in the future. Many states rely on the use of these data to manage their respective populations' health. Payment reform is another high priority in the States and will need information identical to those involved in *IMS Health vs. Sorrell.*

Next, patients can be harmed by data restrictions. By slowing communication about, and the use of, new and beneficial medicines, the benefits to patients are delayed. Further, the safety programs mentioned previously are undermined, clearly an undesirable and unintended consequence. There were other, less restrictive ways to accomplish the same objectives.

And finally, it was not apparent that the bills would have the desired effect.

Governor Thornburgh: Do you expect states and/or the federal government to intensify the "academic" or counter-detailing efforts, which the Court described Vermont was utilizing as a result of *Sorrell*?

Mr. Ashman: This is an ongoing effort by government and payers alike. Various states have begun academic detailing programs but to my knowledge the jury is still out as to its cost-effectiveness. Also, there is no national "standard" regarding its goals (cost reduction vs. quality improvement for example), guidelines, and regulation. There will be much to learn.

Governor Thornburgh: Paul, Justice Breyer's dissent forecasts efforts to dismantle other regulations where "commercial" speech is impacted, such as FDA rules. Do you expect *Sorrell* to be deployed in this way successfully?

Mr. Clement: Without question *Sorrell* will have an effect on other laws and regulations and will be cited by those who challenge regulations on First Amendment grounds, especially when the government suggests it is entitled to greater latitude because a case involves commercial speech. The majority opinion has enough focus on the discrimination between speakers that I think some courts will point to that language as a basis for distinguishing *Sorrell*. Nonetheless, there are some other regulatory regimes that do distinguish among speakers—for example, the government's off-label use regime prohibits pharmaceutical manufacturers from engaging in speech that a doctor is free to engage in—and *Sorrell* will surely be cited in those contexts. More broadly, *Sorrell* is a good example of a regulatory regime that could be characterized either as regulating speech or commercial conduct. The lesson for litigants is that successfully characterizing the regulatory regime as implicating the First Amendment is a key to success. I would look for *Sorrell* to be a key case in that battle over characterization.

Governor Thornburgh: Harvey, Paul, thank you for participating in this WLF Conversations With.

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The Honorable Dick Thornburgh is a former Attorney General of the United States, two-term Governor of Pennsylvania, and Under-Secretary-General of the United Nations. He is currently Of Counsel to the law firm K&L Gates LLP and Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

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Paul D. Clement is a partner at the law firm Bancroft PLLC. Mr. Clement served as the 43rd Solicitor General of the United States from June 2005 until June 2008. Prior to his confirmation as Solicitor General, he served as Acting Solicitor General for nearly a year and as Principal Deputy Solicitor General for over three years. He previously clerked for Associate Justice Antonin Scalia of the U.S. Supreme Court.