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Drawing the line on health care

Conservative judges here previewed Supreme Court's choice

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Judges Jeffrey Sutton and James Graham made it clear last year they weren't the biggest fans of President Barack Obama's health care law.

It was intrusive, they said, and a significant extension of government power.

But when the judges on Cincinnati's most powerful court considered whether the law was constitutional, the two conservatives reached dramatically different conclusions. Graham declared it unconstitutional, while Sutton became the first conservative federal judge in the nation to uphold it.

The two judges' decisions now are potential previews of the arguments the U.S. Supreme Court's five

conservative justices will make when they rule in June on whether health care reform should live or die. The court's four liberal justices are expected to uphold the law, so the conservatives will likely decide its fate.

If just one of them follows the same reasoning Sutton did, the law probably will survive. If all five see the law the way Graham did, it won't.

The justices, of course, get the final word and are unlikely to seek much legal guidance from anything Sutton and Graham wrote about health care last year for the U.S. 6th Circuit Court of Appeals, which is a step down from the Supreme Court.

But the different paths Sutton and Graham chose reveal how conservative judges, such as those on the Supreme Court, might weigh the constitutionality of health care reform and, in particular, the "individual mandate" that requires people to purchase health insurance.

The 6th Circuit was the first of the nation's federal appeals courts to rule on the law, with Sutton joining with the liberal Judge Boyce Martin to uphold it. Sutton and Graham's opinions helped frame the debate, especially for conservatives.

“The 6th Circuit opinions were thorough, careful and insightful, and they provided models for subsequent judges to build upon,” said Chris Bryant, a constitutional law professor at the University of Cincinnati. “There’s no question it was the playbook everyone was playing out of.”

Appeals judges first to test arguments

On one side, Graham embraced those challenging the law and adopted the traditional, conservative arguments against the mandate. He said the Constitution’s Commerce Clause, which allows Congress to regulate interstate commerce, does not entitle the government to require the purchase of health insurance.

“If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress’s Commerce Clause authority would be,” wrote Graham, who was appointed by President Ronald Reagan. “To approve the exercise of power would arm Congress with the authority to force individuals to do whatever it sees fit.”

Sutton, on the other hand, agreed the law raised important questions about government intrusions into private affairs, but he ultimately concluded the health care market falls under Congress’s regulatory authority. He said Americans without health insurance consume more than $100 billion a year in medical services, a cost that is passed on to everyone else.

Sutton said the mandate is a constitutional way, though perhaps not the ideal way, to cover the cost of expanding coverage to tens of millions of Americans, as the health care law would do.

He said he shared a “lingering intuition” with many Americans that “Congress should not be able to compel citizens to buy products they do not want.”

But Sutton, who was appointed by President George W. Bush, ultimately concluded that “not every intrusive law is an unconstitutionally intrusive law.”

Sutton’s decision stunned many because he is not only widely respected, but also reliably conservative. He clerked for conservative Supreme Court Justice Antonin Scalia, and some Republicans have speculated he might one day join Scalia on the high court.

But if Sutton gave conservative justices a potential road map to uphold the law, there was little indication during the Supreme Court’s oral arguments last month that the justices are inclined to follow it.

Instead, they repeatedly hammered the government's position with statements along the lines of those Graham made in his dissent at the 6th Circuit. Scalia, for example, questioned whether upholding the law would give Congress the unfettered authority to require the purchase of any product, including broccoli.

The justices focused on the broadest possible challenge to the law, known as a "facial challenge," which contends the law is unconstitutional under every circumstance.

That's the approach Graham took, as well.

Sutton, however, said the law "as applied" in certain circumstances is constitutional because the health care market undoubtedly qualifies as interstate commerce. He said the failure to buy health insurance could be subject to regulation because that decision affects the entire health care market.

An uninsured person who gets hit by a bus, for example, will receive medical care whether he can pay for it or not – a cost that is then passed on to everyone else.

Sutton left the door open to later court challenges, but said the law cannot be rejected out of hand.

"He's saying there could be ways to apply this law in a constitutional manner," said Ilya Shapiro, a senior fellow at the libertarian Cato Institute, who filed briefs opposing the law with the Supreme Court.

"But the Supreme Court did not focus on that issue."

Local court set stage, but justices get last word

Supporters of the law still hold out hope that Sutton's reasoning could sway a conservative justice and save health care reform. No matter what the Supreme Court does, some of the law's advocates say the justices could have learned from Sutton and Graham's approach to the case, even if they disagree with their conclusions.

Ron Pollack, executive director of Families USA and a supporter of the law, attended the arguments at the 6th Circuit and at the Supreme Court and found the high court lacking. He said Sutton and Graham were respectful and focused on the law, while some of the conservative justices, particularly Scalia and Samuel Alito, were unsparingly hostile.

"I'd expected a more thoughtful dialogue," said Pollack, who has argued before the Supreme Court.

Despite the tough questions, some caution against reading too much into them. Oral arguments can reveal a justice's thinking, but they also are an opportunity to test theories and challenge assumptions.

During arguments in the 6th Circuit, Sutton grilled the government's lawyer about the mandate and at one point declared that "it's just not proper to make people buy things."

Both sides say that while the 6th Circuit's approach and opinions may have helped frame the debate, the Supreme Court justices have been thinking about these types of constitutional questions for years and are unlikely to be swayed by the lower court judges.

"It doesn't seem likely they'd go to Judge Sutton and say, 'Gee, I hadn't thought of that before,' " said Arthur Hellman, a University of Pittsburgh law professor whose specialty is the appeals courts.

It's also possible the justices could stake out some uncharted ground not covered by the 6th Circuit or any other lower court. That's because the justices can redefine, limit or even overturn the legal precedents that guided the lower court decisions.

"The lower courts simply have to take the precedents as they are," Shapiro said. "Lower courts are certainly more limited in what they can do."

Hellman said that's why the Supreme Court's final decision – and the reasoning the justices will use to make it – is so difficult to predict. No matter how important the 6th Circuit decision might have been, the justices ultimately will go their own way.

"The 6th Circuit set an agenda for discussion for awhile," Hellman said. "The big difference ... is the Supreme Court justices have more leeway in explaining what they stand for."

The high court is expected to rule on the law in June.

Long road to Supreme Court began in Cincinnati

The U.S. 6th Circuit Court of Appeals in Cincinnati was the first federal appeals court in the nation to rule on the constitutionality of the Affordable Care Act, President Barack Obama's landmark health reform law.

Seven other circuit courts reviewed the law's controversial "individual mandate," which requires Americans to either buy health insurance or pay a penalty. Four did not rule, deciding either that those who sued did not have legal standing or that it was too soon because the mandate had not yet been enacted.

Three circuit courts heard arguments and issued opinions. The 6th Circuit and the Washington, D.C., Circuit upheld the mandate. The 11th Circuit in Florida struck it down.

Although all of the cases covered similar legal ground, the Supreme Court accepted the 11th Circuit case for review. The other cases played prominent roles in briefs filed by both sides. The opinion of the 6th Circuit's Jeffrey Sutton, in particular, was cited several times by government lawyers in their arguments to uphold the law.

Handicapping the High Court

The liberal justices: Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan and Sonia Sotomayor all are expected to favor upholding the law. Court watchers believe their track records and their questions during oral arguments gave little indication any of the Democratic-appointed justices would break ranks.

The conservative justices: John Roberts Jr., Anthony Kennedy, Clarence Thomas, Samuel Alito Jr. and Antonin Scalia appear to hold the fate of the law in their hands. If one backs the law, it likely will survive. If none does, it has little chance.

The potential swing votes: Kennedy is considered the most likely swing vote. It's a role he has played before as he sometimes breaks with conservatives and joins the liberal justices. Prior to oral arguments, some experts thought Roberts and possibly Scalia could be persuaded to uphold the law. But neither gave any indication they were leaning that way during oral arguments.