

Roberts shuffles the deck with health care decision

By Tony Mauro

WASHINGTON — Before John Roberts became chief justice, he was known as one of the most nimble oral advocates to argue before the U.S. Supreme Court. To prepare for his cases, he would write hundreds of potential questions on index cards, and then shuffle them so he could be ready to answer them in any order.

On Thursday, the final day of his sixth term as chief justice, Roberts showed he has carried that skill of shuffling the deck with him. In leading the majority ruling on the landmark Affordable Care Act cases, Roberts managed to stay true to his conservative roots while still, at the end of the day, crafting a majority that upheld the law that conservatives so roundly hate.

In so doing, he may have pulled off what once seemed impossible: a 5-4 ruling against the individual mandate on commerce clause grounds, while keeping the court – and his legacy – unsullied by charges of elbowing Congress aside or deciding the case on the basis of political or policy preference. In *Arizona v. United States* on Monday, Roberts was also the crucial vote in a key immigration case that struck down all but one provision of an Arizona law embraced by conservatives.

In the health care cases, Roberts was able to attack the health insurance requirement as something that would "vastly expand power," and he described the Medicaid deal offered to states as a coercive "gun to the head." Six other justices joined him striking down the Medicaid expansion. But Roberts could also profess judicial modesty, leaving in place a law that Congress passed, but one he clearly dislikes.

These conflicting themes may not have been easy to mesh together for a divided Court. Justices Antonin Scalia, Anthony Kennedy, Samuel Alito and Clarence Thomas, usually Roberts' allies, joined in a dissent that bears some marks of having once been a majority. For one thing, it was called a "joint dissent" with four authors – whereas a dissent usually takes the form of being authored by one justice and joined by the others.

"I wonder if it was once was 5-4 the other way, but somewhere along the way, the conservatives lost Roberts," said Fordham Law School professor Abner Greene. If Roberts made that switch, he may have had the court's legacy in mind.

"He was clearly aware of his place in history," said Greene. "Striking down the entire law could have been a black mark on this court."

"One can only speculate about Roberts' motives for proceeding as he did," said Brookings Institution scholar Bill Galston. "It is certainly possible that, like Chief Justice Charles Evans Hughes in the mid-1930s, he had one eye focused on jurisprudence and another on the standing of the institution he heads. This may be another 'switch in time' that saved the court from becoming embroiled in a full-fledged confrontation with the executive and legislative branches."

Robert's opinion reflects that sense of history. "Members of this court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments," Roberts wrote. "Those decisions are entrusted to our nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."

Roberts also wrote, "Resolving this controversy requires us to examine both the limits of the government's power, and our own limited role in policing those boundaries."

Critics of the Affordable Care Act were disappointed with Roberts. The Cato Institute's Ilya Shapiro said he was "shocked and appalled that he would illegitimately rewrite the law — twice, making the mandate a tax and changing the terms of the Medicaid expansion — in order to save it. He judicially enacted a law much different than the one Congress passed." Shapiro added, "I wonder if Michael Luttig would've done differently had he been George W. Bush's choice instead of John Roberts."

But liberal commentators who are unaccustomed to applauding Roberts were positive on Thursday, some of them framing it wishfully as a new chapter in his chief justiceship. "Today, it really became the Roberts Court," said Erwin Chemerinsky, dean of UC-Irvine School of Law. "Chief Justice Roberts joined with the liberal justices to uphold the individual mandate. In his seven years on the court, rarely has he done so when the court has been ideologically divided."

"It was an act not only of judicial statesmanship but judicial creativity and in keeping with his hero, John Marshall, who engaged in legal twistification," said George Washington University Law School professor Jeffrey Rosen. "He is clearly differentiating himself from his conservative colleagues."

But Rosen cautioned not to expect a total transformation from Roberts. "This is by no means an end to 5-4 decisions; in some ways it will increase his ability to preside over polarized decisions such as next term in affirmative action, and voting rights."