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Why Bush judge backed mandate

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Ever since the early days of the health-care reform law, its supporters have argued that there is a "conservative" argument to be made for the constitutionality of the law. And they think they need just one of the Supreme Court's four conservatives, or swing vote Anthony Kennedy, to take it up.

Now, a conservative federal appeals judge has gift-wrapped that argument — and legal experts say his decision to uphold the constitutionality of the health care overhaul could make it easier for one of the conservative Supreme Court justices to do the same.

The legal opinion came from Judge Jeffrey Sutton, a member of the three-judge panel for the 6th Circuit Court of Appeals that upheld the law Wednesday. Sutton, who was nominated to the federal bench by President George W. Bush, wrote a concurring opinion agreeing with a lower court that the law's requirement that nearly all Americans buy insurance is constitutionally sound.

The case was brought by the conservative Thomas More Law Center, which plans to appeal the decision to the Supreme Court in about 30 days.

Sutton became the first Republican-appointed judge to uphold the law, known as the Patient Protection and Affordable Care Act. He's also drawing attention because he's a jurist cut from the same cloth as Chief Justice John Roberts: Both favor deferring to legal precedents and not making drastic moves unless absolutely necessary.

That similarity is leading some legal experts to see Sutton's decision as foreshadowing for how Roberts might rule.

"Sutton's outlook is all fours with Roberts," says Frank Cross, a University of Texas law professor who has studied politics in the courts. "They're exactly the same type of judge. … I think this is a cue as to how he would react."

And the law's supporters hope Sutton's decision sends signals about other conservative justices, too.

Simon Lazarus, public policy counsel of the National Senior Citizens Law Center and a strong proponent of the law's constitutionality, believes Sutton's argument could resonate with Roberts as well as with justices Samuel Alito and Anthony Kennedy. All have suggested at one point or another that they'd rather have significant political decisions come from the legislature, not from the courts.

Lazarus called Sutton's opinion "a very deliberate and incredibly well-crafted memo to the conservative bloc on the Supreme Court."

"Whether they go along with it or not is not clear," he said. "But proponents of the ACA could never have anticipated such an effective argument."

Sutton's position is significant because, until this week, the judges who have ruled on the

merits of the approximately 30 challenges to the law have done so along the partisan lines of the presidents who appointed them. In addition to being a Bush nominee, he also clerked for Justice Antonin Scalia.

Sutton's conservative case for the insurance mandate, as laid out in his 26-page concurring opinion, amounts to this: Supreme Court precedent, like it or not, favors a growing expansion of the Commerce Clause, and Congress has wide latitude to address the nation's problems and has a presumption of constitutionality.

He subtly suggests throughout his opinion — which concurs with Judge Boyce F. Martin's majority opinion — that he doesn't like the law but thinks it must be upheld.

"Call this mandate what you will — an affront to individual autonomy or an imperative of national health care — it meets the requirement of regulating activities that substantially affect interstate commerce," he wrote.

Sutton also sides with the government on a key issue: that not buying health insurance is "activity" that can be regulated. His opinion rips apart the opponents' argument that choosing to not buy health insurance is akin to sitting at home, asking to be left alone. He argues that those people who don't buy insurance choose to be "self-insured."

"Inaction is action, sometimes for better, sometimes for worse, when it comes to financial risk," Sutton wrote, pointing to business mogul Warren Buffett's decision not to buy or sell a stock as an example of when inaction is action.

Sometimes, "the best thing he could have done is the informed, even masterful, inaction of saying no," Sutton wrote.

Sutton's argument is "just devastating" for the opponents of the law, Lazarus said. "And coming from him, it's particularly devastating."

But opponents of the law read Sutton's opinion as a helpful outline of how the Supreme Court might strike down the law. Sutton listed all of the legal precedents that support upholding the mandate and said the court would have to strike them down to strike down the mandate.

"There is another way to look at these precedents — that the Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so," Sutton wrote.

Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute, calls it the "put up or shut up" dare to the Supreme Court. "He says, 'if you're going to strike this down, you're going to have to define the limiting principle.' "

Ilya Somin, an assistant professor of law at George Mason University who believes the mandate is unconstitutional, warns that Sutton's argument goes further than other judges who have upheld the law. He says Sutton's opinion would allow for Congress to implement mandates to buy anything — health-related or not.

"The only constraint he implies is it has to have a 'substantial effect on the economy,'" Somin said. "But that's true of failure to buy any product."

Sutton argued that Congress can mandate this purchase only because of the uniqueness of the health care market — an argument that the federal government relied on more in the appeals cases than in the district courts.

“Regulating how citizens pay for what they already receive (health care), never quite know when they will need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life,” he wrote. “Not every intrusive law is an unconstitutionally intrusive law.”

The 6th Circuit is one of three appeals panels that heard oral arguments in suits over the mandate this spring, but it is the first to issue a ruling. This summer, rulings are expected from the 4th Circuit — which heard two cases brought by the Commonwealth of Virginia and Liberty University in May — and the 11th Circuit, which heard the high-profile case brought by 26 governors and attorneys general.

The 3rd Circuit heard arguments in another case earlier this month, and the 9th Circuit is expected to hear arguments next month. The five appeals cases all but ensure the 6th Circuit won’t be the only one to uphold the mandate.

Sutton hints that if opponents of the law want it overturned, they have to do it in the public and the legislature, not the courts.

Throughout his opinion, he points to the landmark 1819 case of McCulloch v. Maryland, in which the courts settled an issue that was then almost as controversial as the mandate by ruling that Congress has the power to institute a national bank. While the courts approved the creation and renewal of the bank, after the decision, Congress never approved it again.

“Today’s debate about the individual mandate is just as stirring, no less essential to the appropriate role of the national government and no less capable of political resolution,” Sutton wrote. “Time assuredly will bring to light the policy strengths and weaknesses of using the individual mandate as part of this national legislation, allowing the peoples’ political representatives, rather than their judges, to have the primary say over its utility.”