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Next Stop for Obamacare's Mandate: The Supreme Court

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By a vote of three to two, a three-judge panel of the Sixth Circuit Court of Appeals upheld Wednesday the constitutionality of the individual mandate to buy health insurance that is the cornerstone of [Obamacare](#).

In a blow to those who argue the mandate is an overreach of federal government power, Judge Boyce F. Martin Jr., writing for the majority, said, "We find that the minimum coverage provision is a valid exercise of legislative power by [Congress](#) under the Commerce Clause."

Coming from a Jimmy Carter-appointed judge, the finding is hardly surprising. What is noteworthy, however, is that Martin's decision was seconded by Judge Jeffrey Sutton, who was nominated for the bench by former President George W. Bush and who is a former law clerk for U.S. Supreme Court Justice Antonin Scalia—which many who have already covered the decision appear to believe is really the meat of the story. [\[See a slide show of the members of the Supreme Court.\]](#)

Not so fast, says James Taranto, editor of the *Wall Street Journal's* influential [Best of the Web](#), who says Sutton's concurrence "took a more nuanced view of (the mandates) constitutionality" even though the decision is a victory for Obamacare supporters.

"The plaintiffs in the case, *Thomas More Law Center v. Obama*, argued that by ordering people to buy health insurance," Taranto writes, "Congress exceeded its power to regulate interstate commerce because it was regulating 'inactivity' rather than 'activity.' Sutton countered that this argument did not apply to people who already have insurance and thus are already engaged in the 'activity' in question." [\[See editorial cartoons on Obama.\]](#)

"Because the mandate is not unconstitutional when applied to these people," he continued, "Sutton argued it is not unconstitutional on its face as the plaintiffs allege. But Sutton left open the door to future challenges once the law is implemented."

Offering a completely different view is the Cato Institute's Ilya Shapiro, who says simply that "[the sixth circuit got it wrong.](#)"

Shapiro, a senior fellow in constitutional studies and editor-in-chief of the libertarian think tank's *Supreme Court Review*, called the decision in *Thomas More Center v. Obama* "an exercise in unwarranted judicial deference, not by the author of the majority opinion, Judge Boyce Martin, who regularly rubberstamps misuses of federal power, but by concurring Judge Jeffrey Sutton, who avoided the logical implications of this ruling and punted the main issue to the Supreme Court."

[\[Read more about healthcare reform.\]](#)

"Under a document establishing a government of enumerated and therefore limited powers," Shapiro explained, "the burden is on that government to prove that it has the power to do something, not on the plaintiffs to disprove that power. Never has the Supreme Court ratified the federal power to force someone to buy a product in the marketplace under the guise of regulating commerce."

"To allow such a power now is to read out of the Constitution any structural limitations on federal power, which, as Justice Kennedy reminded us for a unanimous Supreme Court two weeks ago in *Bond v. United States*, are the Constitution's first and greatest protectors of liberty." And then, taking on Sutton directly, Shapiro added, "It is shocking that an avowed constitutionalist like Judge Sutton requires Congress to show only a rational basis behind what it does—a 'reasonable fit' between the means it chooses and the ends of regulating interstate commerce—to survive constitutional scrutiny. Under such logic, Congress can do anything it wants so far as it is essential to a larger regulatory scheme. That cannot be the law." [[Check out a roundup of political cartoons on healthcare.](#)]

The decision, which could but is unlikely to be reviewed by the entire Sixth Circuit Court of Appeals, practically guarantees that the constitutionality of the individual mandate, and Obamacare as a whole, will be decided sometime next year by the U.S. Supreme Court—which already has several cases headed that way.

As a political matter, with most legal scholars already predicting that Justice Anthony Kennedy is the crucial fifth vote to either uphold or overturn the law, it is highly likely that America will be hearing more over the next year about the need for one or the other of two current justices—the Obama-appointed Elena Kagan, who may have worked on the healthcare law while a member of the Obama administration, and Bush 41 appointee Clarence Thomas, whose wife actively worked against the passage of Obamacare as a private citizen—should recuse from participating in the decision. There is, of course, a big difference from being a [White House](#) appointee who may have participated in the drafting of a law and being a private citizen, but, when you're trying to tip the scales of justice, you typically don't let facts get in the way.

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