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Barack Obama's Supreme Court health care gamble

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By [GLENN THRUSH](#) | 11/15/11 4:38 AM EST Updated: 11/15/11 8:48 AM EST

President [Barack Obama](#) is so confident of the constitutionality of his health care law — and so happy to cast [Mitt Romney](#) as his human shield against the law's critics — that he didn't try to stop the Supreme Court from putting [its review of the law](#) on a fast track that will result in a ruling in the middle of the 2012 campaign.

Yet for all the administration's public optimism about the case's outcome, Obama's eagerness for a final resolution to the wrangling over the law represents no small roll of the political dice, one that could roil an already agitated electorate in [unpredictable ways](#) and quite possibly drag Obama back into the most divisive battle of his presidency.

His gamble: If the conservative Roberts court upholds the [Affordable Care Act](#), it validates a titanic two-year legislative struggle. If the law is struck down, it would put the issue to bed four months before Election Day, fire up the Democratic base and energize angry party donors who'd see the decision as a second Bush v. Gore, a wallet-widening rallying cry.

“This issue would put the Supreme Court more front and center in a way that would focus Democrats on the fact that there will likely be two more appointments in the next term,” said former Obama staffer Bill Burton, co-founder of Priorities USA Action, a Democrat-allied PAC. “When we talk to Democrats across the country, they are mindful of the fact that President Bush appointed two justices to the court. The consequences of a President Romney appointing two more could have a devastating impact on issues that matter to progressives across the board.”

Yet the downside may not be worth the risk.

A decision striking down the individual mandate could galvanize the opposition in what's expected to be a neck-and-neck presidential race, reviving a tea party movement that has lost some momentum. And even Romney's authorship of a similar health care law in Massachusetts might not be enough to protect the White House from the wrath of independents who still blame Obama for a vast new government program that remains, when taken as a whole, widely unpopular.

“This is a big wild card, and anyone who feels they definitively know how this is going to play out doesn't know what they are talking about,” said Eddie Vale, spokesman for Protect Your Care, a pro-reform group backed by labor and progressive donors.

“I think we're looking at a case that could be as significant politically as Roe v. Wade,” adds Ilya Shapiro, a senior fellow in constitutional studies with the libertarian Cato Institute. “If it's struck down, it really hurts the administration because this is their biggest piece of legislation. ... If it's upheld, it will just fire up the opposition even more.”

Democrats say that's overstating the importance of the issue at a time of 9 percent unemployment and talk of a double-dip recession. “This isn't going to be a defining issue in the election,” said a party operative close to Obama, adding that most opponents of the law had made up their minds months, if not years ago.

“We have nowhere to go but up!”

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That isn't a universal sentiment among Democrats. Earlier this year, some progressives urged Obama's legal team, led by then-White House counsel Robert Bauer, now the Obama campaign's lawyer, to file motions that would have delayed the ruling until after the 2012 election. Bauer and his team responded by saying they felt confident in victory and didn't fear the political fallout, two Democrats said.

"I didn't agree," said a person privy to one of the conversations. "But he was very convincing."

When reporters traveling with Obama in Hawaii asked deputy press secretary Josh Earnest on Monday if Obama was "worried about the election year timing" of the decision, he shot back: "He's not. He's not."

Earlier in the day, in fact, Obama had highlighted the reform effort during a campaign stop just hours after the high court announced it would hear arguments on the 11th Circuit Court's decision to strike down the law's requirement that every American obtain health insurance or face a tax penalty.

"Change is health care reform —" Obama said, interrupted by applause from the faithful at the Aulani Disney Resort who had heard news of the decision.

The individual components of the Affordable Care Act are far more popular than the law as a whole, and Obama ticked off the benefits of its most enticing provisions: "After a century of trying, a reform that will finally make sure that nobody goes bankrupt in America just because they get sick. And by the way, change is the 1 million young Americans who are already receiving insurance that weren't getting it before, because they can now stay on their parents' health insurance until they're 26 years old. That's a change that you made. At the same time, it provides everybody protection, so that if you get sick, if you have a pre-existing condition, you can still afford to get health insurance."

Gutting the health care law could have a boomerang effect, firing up the base. But it would also be a huge embarrassment, robbing Obama of a historic legislative accomplishment.

Moreover, it would draw him back into a schoolyard brawl with congressional Republicans at a time when he's doing his level best to distance himself from Congress, an institution whose overall popularity is plumbing the terra incognita of single-digit approval ratings.

And the revival of the health care debate could play a major role in a few selected swing states, especially Virginia, where Republican Gov. Bob McDonnell and Attorney General Ken Cuccinelli have campaigned effectively against the law.

“It’s really got the Republicans here fired up,” said an operative active in Virginia politics, noting that GOP candidates used the health care issue to take control of the state Legislative during off-year elections last week. “If the law is fully or partially struck down, Cuccinelli will whip these guys up all over again.”

Then there’s Ohio. Democratic officials told POLITICO that Obama’s relentless push to pass health care reform alienated independents, the critical swing voters in a quintessential swing state, and anything that reminds voters of the issue is bad news for the president.

That fact was hammered home last week when an otherwise banner night for Democrats — the state’s anti-collective bargaining law was rolled back by an overwhelming vote — was blighted by the 2-to-1 passage of a referendum calling for the end of the Affordable Care Act’s individual mandate.

“Obamacare will be a huge issue next year,” said Republican National Committee spokeswoman Kirsten Kukowski.

“We were always planning on it being a big issue, and last week the Ohio ballot initiative showed it was something that really resonated with voters. [The Supreme Court decision to hear the case] guarantees that it’s going to be out there a little on the early side but right in the heat of the election.”

Obama’s campaign has a simple three-word retort to all of these claims: Willard Mitt Romney.

Romney is a formidable candidate, perhaps the toughest challenger in the GOP field for Obama to face in the long run. But the president’s team couldn’t have bio-engineered an opponent less capable of capitalizing on Obama’s vulnerabilities than the one-time health reform crusader.

“We modeled our health care program largely on what he did in Massachusetts,” Obama campaign strategist David Axelrod told the CBS “Early Show” last month. “Now he says I never intended it be a model for the nation. In 2007, he said this would be a model for the nation. And time and time and time again, Gov. Romney switches from one position to another.

Axelrod, a former senior adviser to Obama in the White House tasked with selling the health care bill to fractious Senate and House Democrats, used the reform to illustrate what he calls Romney’s lack of a philosophical “core.”

Romney “can’t touch us on this. We’ll hammer him,” added a Democratic Obama ally shortly after word of the Supreme Court’s schedule came out.

But Romney’s campaign says it has no intention of remaining silent and plans to hit the Affordable Care Act hard on the grounds that it represents a federal intrusion into state affairs.

“Obamacare is bad policy and it’s bad law,” said Romney spokesman Eric Fehrstrom in an email. “We’ve always maintained that states have powers that are different than the federal government and that the United States Constitution prohibits a one-size-fits-all insurance plan on the entire nation. On health care, what is important is that states retain the ability to pursue their own solutions, not have one imposed on them by Washington.”