

THE HILL



Court angst for left over healthcare

By Sam Baker - 01/18/12 05:00 AM ET

Supporters of President Obama's healthcare reform have lost the high level of confidence they once displayed that the Supreme Court would throw out constitutional challenges to the law's individual mandate.

Many liberals and some Democratic leaders initially waved off lawsuits challenging the law's individual mandate, saying the suits were "frivolous" political stunts.

But that tone has shifted significantly since the Supreme Court devoted nearly six hours to arguments in the case — a modern record. That the high court would set aside so much time for the landmark case suggests that the justices certainly don't see the challenges as a waste of time.

The law's critics were also encouraged that the justices agreed to hear arguments against its Medicaid expansion. That part of the suit does not meet the criteria the court usually uses when deciding which cases to consider.

To be sure, supporters of the law still say they think the high court will rule in their favor. But the decisions by the justices have occasioned a note of caution in their voices.

"I think probably the courts took the minimum coverage requirement more seriously than a lot of us had expected ... but I still think that the Supreme Court is going to have to stray pretty far from established precedent to find that it's unconstitutional," said Timothy Jost, a Washington and Lee University law professor who supports the healthcare law.

Some congressional Democrats are openly worried that the conservative court will strike down the mandate. And though party leaders have maintained confidence that the law will ultimately prevail, their early braggadocio has mostly disappeared.

When Florida first filed its healthcare lawsuit, Rep. Debbie Wasserman Schultz (D-Fla.) slammed the case as "grasping at straws" and without legal merit.

“This challenge to healthcare reform is nothing more than pure politics,” she said last March. “It is a stunt to boost the attorney general’s gubernatorial campaign and a waste of the taxpayers’ money.”

Asked recently whether Wasserman Schultz still sees the case that way — and, if so, whether it’s a mistake for the Supreme Court to be spending so much time on it — her office said only that she’s “confident that the Supreme Court will validate the constitutionality of this law.”

When then-Speaker Nancy Pelosi (D-Calif.) was asked about the constitutionality of the individual mandate in 2009, she responded, “Are you serious?” But more recently, Pelosi cited the major implications of the healthcare suit as she urged the Supreme Court to televise arguments in the case. It would be the first time the justices have ever permitted cameras into their chambers.

Lawmakers are clearly loath to say the Supreme Court is wasting its time, especially with the president’s signature domestic achievement on the line. But even before the court announced its nearly unprecedented hearing schedule, the challenges were gaining traction and credibility.

Jost said the states have improved their arguments against the mandate as their case has moved through the courts. Their initial brief was rife with factual errors, he said, but the challenge came into sharper focus during arguments and later briefings.

“I think that some of us have been surprised that claim got as far as it did, but it is a claim that one can argue,” he said of the states’ case against the mandate.

Not everyone on the left has started taking the lawsuits more seriously. Ian Millhiser, a legal analyst at the liberal Center for American Progress, said the case is “utterly lacking in merit.” He acknowledged that the states’ challenge is being taken more seriously now, but said the change owes only to a successful public-relations campaign.

“It’s baffling to me that that’s happened,” he said.

There is reason for liberals to be confident: The mandate has a 2-1 record in federal appeals courts, and the two decisions upholding it were written by judges with unquestionable conservative credentials. Only one judge at any level threw out the entire law along with the mandate, and the states have never won their challenge to the law’s Medicaid expansion.

Still, conservatives are finding a bit of vindication in the changing tone on the left.

“The narrative certainly has shifted,” said Ilya Shapiro, a legal analyst with the libertarian Cato Institute who opposes the law. “In the beginning, it was conventional wisdom that this was political sour grapes, legally frivolous, that sort of thing.”

Some of the Republican attorneys general who most aggressively challenged the healthcare law, including Virginia's Ken Cuccinelli, did have clear political aspirations. But conservative legal experts have always said the constitutional questions are legitimate.

"It's really disingenuous to claim that it's a slam-dunk" for either side, Shapiro said.

Shapiro said that at the beginning of the process, he saw less than a 50 percent chance the states would ultimately win. But he's more optimistic now.

"It's breathtaking to see federal judges saying, 'Yeah, that is the way the Constitution should be read,' " he said. "Once you have facts on the ground, it makes it more realistic."