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A New Wave of Challenges to Health Law

By Sheryl Gay Stolberg

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WASHINGTON — More than a year after the Supreme Court upheld the central provision of President Obama's health care overhaul, a fresh wave of legal challenges to the law is playing out in courtrooms as conservative critics — joined by their Republican allies on Capitol Hill — make the case that Mr. Obama has overstepped his authority in applying it.

A federal judge in the District of Columbia will hear oral arguments on Tuesday in one of several cases brought by states including Indiana and Oklahoma, along with business owners and individual consumers, who say that the law does not grant the Internal Revenue Service authority to provide tax credits or subsidies to people who buy insurance through the federal exchange.

At the same time, the House Judiciary Committee will convene a hearing to examine whether Mr. Obama is "rewriting his own law" by using his executive powers to alter it or delay certain provisions. The panel also will examine the legal theory behind the subsidy cases: that the I.R.S., and by extension, Mr. Obama, ignored the will of Congress, which explicitly allowed tax credits and subsidies only for those buying coverage through state exchanges.

"We have agencies under this administration having an attitude that they can fix a statute, that they can improve upon a statute, that they can look at a statute's clear language and disregard it," Scott Pruitt, the Oklahoma attorney general, who is bringing one of the cases, said in an interview Monday. "The president himself has said on more than one occasion, 'I can't wait on Congress.' In our system of government, he has to."

The subsidy lawsuits grow out of three years of work by conservative and libertarian theorists at Washington-based research organizations like the Cato Institute, the American Enterprise Institute and the Competitive Enterprise Institute. The cases are part of a continuing, multifaceted legal assault on the Affordable Care Act that began with the Supreme Court challenge to the law and shows no signs of abating.

"After the A.C.A. was enacted and after the president signed it, a lot of people — me included — decided that we weren't going to take this lying down, and we were going to try to block it and ultimately either get the Supreme Court to overturn it or Congress to repeal it," said Michael F. Cannon, a health policy scholar at the libertarian-leaning Cato Institute, who helped develop the legal theory for the subsidy cases and will testify in the House on Tuesday.

On Monday, the Supreme Court refused to hear a challenge brought by Liberty University, a Christian college in Virginia, to the "employer mandate," which requires companies with more than 50 employees to offer coverage. In another challenge, the Pacific Legal Foundation, a conservative group, has filed suit claiming that the law is unconstitutional because it was introduced in the Senate, not the House, where tax bills must originate.

The law has also spawned a separate raft of religious freedom cases over its requirement that employers provide insurance coverage for contraception to their workers. The University of Notre Dame plans to file suit on Tuesday challenging an Obama administration rule that exempts religious employers like churches, but not nonprofits, like schools, which may cover contraception through third-party administrators. The Supreme Court agreed last week to hear a pair of similar suits from commercial corporations.

Jonathan Adler, a law professor at Case Western Reserve University and Mr. Cannon's writing partner, predicts the act will be the subject of lawsuits for years.

"Among critics of the law there is a feeling that the law doesn't have the same legitimacy as a law that passed with bipartisan support," he said.

The subsidy cases, if successful, would strike at the foundation of the law. Subsidies and tax credits, which could be available to millions of low- and middle-income Americans, are central to Mr. Obama's promise of affordable care. In drafting the law, Congress wrote that such financial help would be available to people enrolled "through an exchange established by the state" under the law.

But since passage of the Affordable Care Act in March 2010, the vast majority of states — roughly three dozen — decided not to set up their own exchanges, in part because many Republican governors opposed the law. That has left HealthCare.gov, the online federal insurance exchange, to handle the bulk of enrollment requests.

If courts rule that customers cannot get subsidies through the federal exchange, it would "make the HealthCare.gov problems look like a hiccup," Mr. Cannon said.

The House hearing, titled "The President's Constitutional Duty to Faithfully Execute the Laws," will focus largely on the Affordable Care Act. Representative Robert W. Goodlatte, Republican of Virginia and chairman of the committee, argues that Mr. Obama has "changed key provisions in Obamacare without congressional approval," through executive actions, like delaying the employer mandate for one year.

Aides to Mr. Obama say the president offers a legal rationale with each administrative decision, and legal experts say judges ordinarily give agencies like the I.R.S. broad latitude in interpreting federal law. An administration official, speaking on condition of anonymity to discuss pending litigation, defended the I.R.S. interpretation.

"Our position, at bottom, is that when Congress enacted the Affordable Care Act, it was creating a national solution to a national problem," the official said.

Tim Jost, a law professor and health policy expert at Washington and Lee University, agreed, saying that by including a "federal fallback exchange" in the law, Congress clearly intended to extend tax credits to users of HealthCare.gov.

The seeds of the subsidy cases were planted as far back as December 2010, when Thomas P. Miller, a scholar at the American Enterprise Institute, convened a forum to explore legal avenues to undo the health law. By spring 2012, even before the Supreme Court had ruled on the constitutional challenge to the "individual mandate" — the requirement that nearly all Americans purchase insurance or pay a fine — Mr. Miller said he approached Sam Kazman, general counsel of the Competitive Enterprise Institute, about finding plaintiffs.

One plaintiff in the District of Columbia case, David Klemencic, the sole owner of a carpet and flooring store in the town of Ellenboro, W.Va., was also a plaintiff in the constitutional challenge to the individual mandate. In an interview, Mr. Klemencic, who does not have any employees, said he had deep, philosophical objections to any effort by the government to require him to purchase insurance, and would refuse to accept a subsidy even if eligible.

"I go to the doctor now, I go to the dentist now, I take my checkbook and I pay for it," he said. "If I'm forced into some sort of program where it's subsidized by the government, I won't go see a doctor."