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John Hrabe: Obamacare in Supreme Court spotlight

By JOHN HRABE
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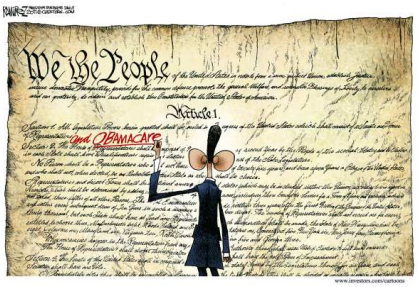

Marbury vs. Madison, *Brown vs. the Board of Education*, *Roe vs. Wade*. As the Supreme Court opens its 2011-12 term Monday, come next June, expect to add a new case to that list of landmark decisions: The States vs. Obamacare.

"The cases so far on the docket are interesting, though not huge blockbusters," explained Erwin Chemerinsky, the founding dean of the UC Irvine School of Law. "But what will really make this term momentous are cases where review has not yet been granted, but that are likely to be heard this year: Arizona's SB1070 [anti-illegal immigration law], the individual mandate in the Affordable Care Act, and affirmative action by colleges and universities."

Earlier this year, a three-judge panel of the 6th U.S. Circuit Court of Appeals upheld the minimum coverage provision of the Patient Protection and Affordable Care Act. Then, in August, a three-judge panel with the 11th Circuit Court of Appeals ruled that Obamacare's individual insurance mandate violated the U.S. Constitution. In a 2-1 decision, the majority wrote, "We have not found any generally applicable, judicially enforceable limiting principle that would permit us to uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers."

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In other words, if Congress can force Americans to buy health insurance, there is no limit to Washington's power.

The Obama administration could have pursued an "en banc review" by the entire 11th Circuit court, but opted instead for a Supreme Court showdown in the middle of the 2012 election campaign. On Thursday, a national small-business group that opposes Obamacare asked the Supreme Court to strike down the entire law, not just the key requirement to buy health insurance or pay a penalty. The group, the National Federation of Independent Business, is joining 26 states in asking for the entire law to be overturned and a speedy ruling in advance of the 2012 presidential election. California is not one of the states.

Retired Supreme Court Justice John Paul Stevens, 91, told Associated Press last week that voters would be better off if they knew the law's fate before casting their ballots in the election next November.

Should the court take up Obamacare, or any of its other highly anticipated cases, you may not hear much about the rest of the docket. This term, the court will consider the Fourth Amendment's applicability to new technology, whether environmental agencies can quash property rights, if indecency statutes are overly broad, and the limits to public employee unions' political power.

Digital-age Searches

The last time Congress updated the Electronic Communications Privacy Act, a 56-kilobyte data connection was considered high-speed, cellphones were solid bricks, and a space-based Global Positioning System remained in research and development. Law enforcement agencies, which love new toys as much as expanded powers, have used this legal lag to test the Fourth Amendment's limits in the digital age.

Jim Dempsey, vice president of public policy at the Center for Democracy & Technology, believes the high court will no longer be able to skirt the constitutional questions raised by new technology. In *United States vs. Jones*, the court will decide whether police must obtain a warrant before tracking a suspect and whether affixing a GPS device to a vehicle is an illegal seizure of personal property.

Up until now, tracking a motor vehicle has not been considered a search. The precedent dates back to the days of "bumper beepers," the clunky and inaccurate technology of the 1980s. Current technologies, Dempsey says, make it possible for police to obtain highly accurate geo-location data for indefinite periods of time at virtually no cost.

It's scary to think that our private information could be available to government agents without a warrant. Just in case the justices fail to protect our Fourth Amendment rights, a coalition of technology and privacy groups have launched an online petition, notwithoutawarrant.com, to encourage Congress to update the federal statutes governing government search procedures.

Property Rights Gutted

by Environmental Fiat

Expanded government powers and loss of individual liberty take on a different form in *Sackett v. EPA*. Ilya Somin, a law professor at George Mason University and expert on constitutional law, warns that the case will decide "whether the government can endanger your property rights without any judicial review."

The Sacketts' story should frighten every property owner in the country. After grading their newly purchased land in Idaho, the Sacketts received an Administrative Compliance Order from the EPA. Bureaucrats demanded that the family reverse their actions or face criminal and civil penalties. But, that wasn't all. The Sacketts were also told that the decision was final; they had no right to a judicial review before the order would take effect.

It's bad enough that unelected government bureaucrats, such as the EPA, are allowed to issue rulings by administrative fiat. But, this case could eliminate altogether our due process to challenge the EPA's authority. Average citizens could only risk challenging the most egregious regulations because losing would mean months, possibly years, worth of accumulated fines.

You won't be surprised to hear that the case comes from the often-reversed 9th U.S. Circuit Court of Appeals, based in San Francisco. That doesn't make a reversal automatic, because, as Somin cautioned, "the court has a long history of consigning property rights to a second-class status."

First Amendment Questions

The justices also will take up two cases on one of this court's most-frequently discussed subjects, the First Amendment. The court returns to the 2009 case, *FCC vs. Fox Television Stations*, to consider whether federal indecency regulations are overly broad. The FCC leveled exorbitant fines against the network for fleeting expletives during awards shows and momentary scenes of nudity in an "NYPD Blue" episode. In the dreams of broadcasters and free-speech purists, the court would use this case to undo the indecency precedent established by *FCC vs. Pacifica*, the 1978 debate over the late comedian George Carlin's "seven dirty words."

Another free-speech case, originating from California, will decide whether individuals can challenge the authority of union bosses. In 2005, when Gov. Arnold Schwarzenegger was still market-testing a conservative ideology, the state's public employee unions imposed a tax on their members to defeat his initiative reform package.

According to the Cato Institute, the SEIU didn't bother to give their members the opportunity to opt-out of its opposition campaign, "effectively forcing 28,000 non-member employees to finance its political speech." This court has a solid track-record on free speech, so it's safe to assume they'll stand up for the speech rights of the rank-and-file, not the union bosses.

New technology, warrantless searches, property rights and free speech – even this term's undercard will be exciting to watch.

John Hrabe is a former Publius Fellow at the Claremont Institute and contributes regularly to the Register.