

A photograph of the Supreme Court building's columns and steps. The image shows several tall, fluted columns made of light-colored stone, standing on a series of wide steps. The perspective is from a low angle, looking up at the columns. The lighting is bright, casting shadows on the steps and columns.

The Legal Limit Report No. 5

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the Obama Administration's arguments 20 times.*

By U.S. Senator Ted Cruz (R-Texas)

THE LEGAL LIMIT: THE OBAMA ADMINISTRATION'S ATTEMPTS TO EXPAND FEDERAL POWER

Report No. 5: Supreme Court has unanimously rejected Obama Administration's arguments 20 times since 2009

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The Obama Administration's view of federal power is so extreme that since President Obama took office in January 2009, the U.S. Supreme Court *unanimously* rejected his DOJ's arguments for additional federal power *twenty times* in cases involving a federal party.

Notably, Democratic presidents nominated four of the Justices who have disagreed with the Obama Administration's radical pursuit of sweeping federal power; President Obama nominated two of them.

The Obama Administration's losing rate stands out among previous modern presidents, especially as it has escalated dramatically over the last five years. The George W. Bush Administration unanimously lost at the Supreme Court 15 times while representing federal parties. The Clinton Administration unanimously lost 23 times at the Supreme Court.

In the last five years, Obama's DOJ had more unanimous Supreme Court losses while representing federal parties than Bush's DOJ had in all eight years of Bush's presidency. President Obama's unanimous Supreme Court loss rate, for the five and half years of his presidency, is nearly double that of President Bush and is 25 percent greater than President Clinton.

Also, this tally does not capture all of the Obama Administration's losing arguments, as it does not include unanimous rejections for more governmental power made in the Obama Administration's friend-of-the-court (amicus) briefs supporting non-federal parties, which would put the Obama Administration's losses much higher. For example, in *McCullen v. Coakley*, No. 12-1168 (June 26, 2014), the Court unanimously rejected the position advanced in an Obama Administration amicus brief that Massachusetts could stifle the free speech rights of people counseling women outside abortion clinics.

The Obama Administration's losses have spiked considerably since 2012 as President Obama got closer to entering his second term.

As our first *Legal Limit* report detailed, in the eighteen months from January 2012 to June 2013, the U.S. Supreme Court unanimously rejected the Obama Administration's arguments for more federal power nine times. If Obama's DOJ had been successful in those cases the federal government would have had the power to:

- Attach GPSs to a citizen's vehicle to monitor his or her movements, without having any cause to believe that a person has committed a crime (*United States v. Jones*);
- Deprive landowners of the right to challenge potential government fines as high as \$75,000 per day and take away their ability have a hearing to challenge those fines (*Sackett v. EPA*);
- Interfere with a church's selection of its own ministers (*Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*);
- Override state law through presidential fiat (*Arizona v. United States*);
- Dramatically extend statutes of limitations to impose penalties for acts committed decades ago (*Gabelli v. SEC*);
- Destroy private property without paying just compensation (*Arkansas Fish & Game Commission v. United States*);
- Impose double income taxation (*PPL Corp. v. Commissioner of Internal Revenue*);
- Limit property owners' constitutional defenses (*Horne v. USDA*); and
- Drastically expand federal criminal law (*Sekhar v. United States*).

This report documents the rest of the Obama Administration's unanimous losses on behalf of federal parties at the U.S. Supreme Court. In the Court's most recent term ending in June 2014, the Justices unanimously rejected its arguments for increased governmental power, on behalf of federal parties, *four more times*. And in President Obama's first three years in office, 2009 to 2011, the Court handed his Administration *seven additional* unanimous losses. If President Obama's lawyers had won these cases, his Administration could:

- Unilaterally install officers and bypass the Senate confirmation process (*NLRB v. Noel Canning*);
- Search the contents of cell phones without a warrant (*Riley v. California*);
- Use international treaties to displace state sovereignty over criminal law (*Bond v. United States*);
- Expand federal mandatory minimum sentencing laws (*Burrage v. United States*);
- Apply arbitrary immigration rules (*Judulang v. Holder*);
- Bring prosecutions after statutory deadlines (*United States v. Tinklenberg*);

- Ignore certain veterans' challenges to administrative agency rulings (*Henderson ex rel. Henderson v. Shinseki*);
- Override state prosecutorial decisions by treating minor state drug offenses as aggravated felonies under federal law (*Carachuri-Rosendo v. Holder*);
- Undermine Congress's power to define criminal laws and the jury's role in criminal cases (*United States v. O'Brien*);
- Charge drug buyers with crimes committed by drug sellers (*Abuelhawa v. United States*); and
- Ignore mental states needed for federal criminal convictions (*Flores-Figueroa v. United States*).

Below are summaries of these eleven cases:

NLRB v. Noel Canning, No. 12-1281 (June 26, 2014): OBAMA ADMINISTRATION CIRCUMVENTS CONSTITUTION'S CHECKS AND BALANCES BY MAKING ILLEGAL "RECESS" APPOINTMENTS

In *NLRB v. Noel Canning*, the Obama Administration argued that it should be able to make "recess" appointments and evade the Senate confirmation process even when the Senate is not in recess.

The second session of the 112th Congress began on January 3, 2012. One day later, President Obama made three "recess" appointments to the National Labor Relations Board. The Senate was holding sessions every three days from December 17, 2011 to January 23, 2012 (when the Senate returned for ordinary business). The Obama Administration argued that this was a valid exercise of the President's Recess Appointments Clause power.

The Court unanimously rejected the Administration's argument, finding "that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue."

Both the majority and concurring opinions recognized that Congress dictates when it is in session, and a President bent on forcing controversial nominees through the Senate cannot disregard that congressional determination. The Court therefore refused to grant the Obama Administration its requested loophole to evade the Senate's constitutional power to provide advice and consent on nominees.

Riley v. California, No. 13-132 (June 25, 2014): OBAMA ADMINISTRATION SEEKS POWER TO SEARCH CELL PHONES WITHOUT CAUSE, IN VIOLATION OF THE FOURTH AMENDMENT

Riley v. California held that the government must generally obtain a warrant before searching the contents of someone's cell phone.

Obama's DOJ argued that any time it arrests an individual the government should be able to search the digital information on that person's cell phone—even if the government does not have a warrant confirming that the government has particularized suspicion of a specific crime.

The Supreme Court unanimously rebuffed the Obama Administration's attempt to invade the Fourth Amendment privacy rights of Americans.

As the Court explained: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."

***Bond v. United States*, No. 12-158 (June 2, 2014): OBAMA ADMINISTRATION SEEKS TO USE TREATIES TO DISPLACE STATE CRIMINAL LAW**

In *Bond v. United States*, DOJ argued that an international treaty gave Congress the power to create federal criminal law for wholly local conduct, even if Congress did not provide a clear statement that it was seeking to displace state criminal law.

During the course of a domestic dispute, Carol Anne Bond put toxic chemicals on another woman's car, mailbox, and door knobs, resulting in minor chemical burns. Bond could have been charged with state crimes, like assault, aggravated assault, or harassment. Instead, federal prosecutors charged Bond under the statute implementing the Chemical Weapons Convention, which was designed to eradicate chemical weapons of mass destruction.

The Court unanimously held that this statute implementing a treaty cannot be interpreted to cover local criminal conduct.

Rather than accept DOJ's argument that would have undermined state sovereignty, the Court concluded: "Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach. The Chemical Weapons Convention Implementation Act contains no such clear indication, and we accordingly conclude that it does not cover the unremarkable local offense at issue here."

***Burrage v. United States*, 134 S. Ct. 881 (2014): OBAMA ADMINISTRATION SEEKS TO EXPAND FEDERAL MANDATORY MINIMUM SENTENCING LAWS**

In *Burrage v. United States*, the government tried to apply a 20-year mandatory minimum sentence to a defendant who sold one gram of heroin, but the Court held that no mandatory minimum sentence applied.

The defendant sold one gram of heroin to Joshua Banka, a long-time drug user, who had already used various other drugs that day. Banka then used some of the heroin and died the next morning. Medical experts said multiple drugs were in Banka's system at the time of death, including heroin, codeine, alprazolam, clonazepam, and oxycodone. DOJ argued that the defendant should be subject to a 20-year mandatory minimum sentence that applies when "death or serious bodily injury results" from a defendant's unlawful distribution of heroin.

The Court unanimously rejected the Obama Administration's argument that the 20-year mandatory minimum sentence could apply when use of the sold drug is merely a contributing factor to death, rather than the but-for cause. In other words, the mandatory minimum sentence did not apply because DOJ could not prove that Banka would have lived if he had not taken the heroin—rather, the other drugs in Banka's system could have caused his death.

UNANIMOUS LOSSES PRIOR TO 2012:

Judulang v. Holder, 132 S. Ct. 476 (2011): OBAMA ADMINISTRATION SEEKS TO APPLY ARBITRARY IMMIGRATION RULES

Judulang v. Holder invalidated rules dictating when the Attorney General can grant an alien relief from deportation. The old rules examined whether an alien's conviction fell within a statutory list of convictions, and if so then the government would conduct a multi-factor analysis to determine whether relief was warranted. The Obama Administration argued for a "comparable-grounds" rule that evaluated whether the deportation ground consisted of a set of crimes "substantially equivalent" to the statutory list of convictions; if it did not, then the alien was not eligible for relief.

The Court unanimously found these rules "arbitrary and capricious," explaining that "[b]y hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in the country—the BIA [Board of Immigration Appeals] has failed to exercise its discretion in a reasoned matter." *Judulang* further stated that alleged administrative efficiency of DOJ's position would not justify haphazard enforcement of the law.

United States v. Tinklenberg, 131 S. Ct. 2007 (2011): OBAMA ADMINISTRATION TRIES TO BRING PROSECUTION AFTER STATUTORY DEADLINE

United States v. Tinklenberg denied the government's attempt to prosecute a defendant after the Speedy Trial Act's deadline for prosecuting had already passed. The Speedy Trial Act requires the government to prosecute an individual within 70 days of indictment or appearance, and the Act contains various exclusions for certain delays. The Obama Administration argued that weekends and holidays during a 20-day period of transporting a defendant for a competency evaluation should not count towards the Speedy Trial Act's deadline.

The Supreme Court unanimously rejected the Obama Administration's position, noting that "Congress has tended specifically to exclude weekend days and holidays from statutory time periods of 10 days when it intended that result." The Court therefore determined that the

government must adhere to the express statutory requirements Congress imposes, and it cannot creatively circumvent those requirements to bring a prosecution.

Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197 (2011): OBAMA ADMINISTRATION SEEKS TO IGNORE VETERAN'S CHALLENGE TO ADMINISTRATIVE AGENCY'S RULING

Henderson ex rel. Henderson v. Shinseki unanimously rejected the government's argument that the Department of Veterans Affairs can wholly ignore a veteran's appeal of a VA regional office's benefits ruling when the appeal was not filed within the 120-day deadline. DOJ argued that the 120-day deadline is jurisdictional, so if a veteran files the appeal outside the deadline then the VA completely lacks authority to consider it.

The Court unanimously rebuffed the Obama Administration. It noted that all the cases DOJ relied upon dealt with the jurisdictional consequences for missing a deadline *in court*—not before an administrative agency. *Henderson* ruled that the government cannot treat administrative VA rulings as the equivalent of court lawsuits, particularly when Congress has expressed longstanding solicitude for veterans. The Court explained that Congress did not provide “any clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag.”

Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010): OBAMA ADMINISTRATION SEEKS TO OVERRIDE STATE PROSECUTORIAL DECISIONS AND TREAT MINOR DRUG OFFENSES AS AGGRAVATED FELONIES UNDER FEDERAL LAW

Carachuri-Rosendo v. Holder prevented DOJ from treating the state crime of minor drug possession as an aggravated felony under federal law.

Carachuri-Rosendo was a lawful permanent resident of the United States, and he faced deportation for committing two misdemeanor state drug offenses: (1) possession of a small amount of marijuana, for which he received a sentence of 20 days in jail; and (2) possession without a prescription of one antianxiety tablet, for which he received a sentence of 10 days. Carachuri-Rosendo argued that he was eligible for cancellation of removal on the basis that he had never committed an aggravated felony. DOJ argued that Carachuri-Rosendo had committed an aggravated felony, because his second drug conviction qualified as a drug trafficking felony. According to DOJ his second misdemeanor drug offense could theoretically have resulted in more than a year sentence (the definition of a felony under federal law) if the state had sought a sentencing enhancement.

The Court unanimously held that a second simple drug possession offense is not an aggravated felony when the state conviction was not based on the fact of a prior conviction. The Court rejected the Obama Administration's position, describing it as, “to say the least, counterintuitive and ‘unorthodox.’” It also emphasized that DOJ may not use a “hypothetical approach” to “denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns.” Rather, the government must defer to the prosecutorial decisions of state authorities where state convictions are concerned.

United States v. O'Brien, 560 U.S. 218 (2010): OBAMA ADMINISTRATION SEEKS TO UNDERMINE CONGRESS'S POWER TO DEFINE CRIMINAL LAWS AND THE JURY'S ROLE IN CRIMINAL CASES

In *United States v. O'Brien*, the Supreme Court rejected DOJ's argument that it only had to prove to a judge by a preponderance of the evidence that the defendant's firearm qualified as a machine gun, rather than proving it to a jury beyond a reasonable doubt.

DOJ conceded that it could not prove to a jury beyond a reasonable doubt that the firearms defendants used during an attempted robbery were fully automatic machine guns, which would have resulted in a crime with a 30-year mandatory minimum sentence. So the DOJ dismissed that charge. Instead, DOJ pursued charges that defendants use firearms in furtherance of a crime of violence, which only carried a 5-year mandatory minimum sentence. But DOJ then argued that defendants' sentences could be enhanced based on the fact that the firearms they used were fully automatic machine guns, and that the government only had to prove that to a judge by a preponderance of the evidence—a lower burden of proof than beyond a reasonable doubt.

The Supreme Court unanimously rejected the Obama Administration's attempt to undermine the jury's role in criminal cases. The Court found that a congressional amendment to the relevant statute did not change Congress's determination that whether a firearm was a machine gun was an element of the crime that therefore had to be proven to a jury beyond a reasonable doubt. *O'Brien* therefore preserved Congress's power to define federal criminal laws.

Abuelhawa v. United States, 556 U.S. 816 (2009): OBAMA ADMINISTRATION SEEKS TO EXPAND FEDERAL DRUG LAWS

Abuelhawa v. United States DOJ argued that a cocaine buyer could be charged as a drug seller, under a federal law making it a felony "to use any communication facility in committing or in causing or facilitating" certain drug felonies. The defendant used a cell phone to call a drug seller and arrange to buy cocaine two separate times. The government said the defendant drug buyer's use of the cell phone meant that he should be charged with facilitating the drug sale—even though he was the drug buyer.

The Court unanimously rejected the government's argument, finding that common usage of the word "facilitate" foreclosed the government's argument. The Court also noted that Congress had already calibrated the penalties for drug buyers and sellers, and the government's position would have usurped this legislative power.

Flores-Figueroa v. United States, 556 U.S. 646 (2009): OBAMA ADMINISTRATION IGNORES MENTAL STATE NEEDED FOR FEDERAL CRIMINAL CONVICTION

In *Flores-Figueroa v. United States*, the Obama Administration argued that it did not have to prove the mental state required by the statutory language passed by Congress for federal aggravated identity theft.

The Supreme Court unanimously rejected this position. The statute imposes a mandatory consecutive 2-year prison term if, during or in relation to the commission aggravated identity theft, the offender “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” DOJ argued the government did not have to show the defendant knew that identification belonged to another person. The Court emphasized that practical enforcement and prosecutorial efficiency do not allow the government to ignore a statute’s natural meaning and clear congressional intent.

Though the statute imposes a requirement that is undoubtedly bad policy—which Congress should change—the Obama Administration showed a desire to unilaterally re-write the law rather than work with Congress to amend the statute.

The remaining nine decisions, from January 2012 to June 2013, where the Supreme Court unanimously rejected the Obama Administration’s arguments for expanded federal power are described in detail in Legal Limit Report No.1

All Legal Limit reports are available at www.cruz.senate.gov/lawless



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