



# **The Legal Limit**

## **The Obama Administration's Attempts to Expand Federal Power**

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*U.S. Supreme Court Rejects Obama Administration  
DOJ's Expansive View of Federal Power*

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



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

*U.S. Supreme Court Rejects Obama Administration DOJ's*

*Expansive View of Federal Power\**

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The Obama Administration, through its Department of Justice, has repeatedly advocated a radical theory of sweeping federal power. The Administration's view of federal power is so extreme that, since January 2012, the U.S. Supreme Court has *unanimously* rejected DOJ's arguments for more federal power nine times.

Notably, four Justices who were nominated by Democratic presidents denied the Obama Administration's overreaches—President Obama picked two of them himself. As Ilya Shapiro noted in *The Wall Street Journal* on June 5, 2012, “When the administration can’t get even a single one of the liberal justices to agree with it in these unrelated areas of law, that’s a sign there’s something wrong its constitutional vision.”

If Obama's Department of Justice were successful in its cases, the federal government would have the power to:

- Attach a GPS to a citizen's vehicle to monitor his movements, without having any cause to believe that person 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 eliminate their ability to 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 whenever the President desires (*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 a property owner's constitutional defenses (*Horne v. USDA*); and
- Drastically expand federal criminal law (*Sekhar v. United States*).

The arguments advanced in these cases demonstrate an astonishing view of federal power on behalf of the Obama Administration, worthy of further examination.

If the Department of Justice had won these cases, the federal government would be able to electronically track all of our movements, fine us without a fair hearing, dictate who churches choose as ministers, displace state laws based on the President's whims, bring debilitating lawsuits against individuals based on events that occurred years ago, and destroy a person's private property without just compensation.



Luckily, we do not have to live in that America. The framers of our Constitution created the separation of powers to ensure that judicial power checks executive power. And, the U.S. Supreme Court did just that when it unanimously rejected the Obama Administration's far-reaching positions in these nine cases decided between January 2012 and June 2013.

Below are summaries of those nine cases:

**United States v. Jones, 132 S. Ct. 945 (2012): OBAMA ADMINISTRATION SEEKS POWER TO ELECTRONICALLY TRACK AMERICANS WITHOUT CAUSE, IN VIOLATION OF THE FOURTH AMENDMENT**

In *United States v. Jones*, DOJ attempted to secure carte blanche authority to monitor the public movements of anyone, at any time, without providing any reason at all.

DOJ sought the right for the government to attach a Global Position System device to a vehicle and monitor its movements without cause, unsuccessfully arguing that the Fourth Amendment, which protects Americans from unreasonable search and seizure, does not extend to electronic tracking devices.

The President's lawyers stated that the information collected by a GPS system is already in public view and a person should not expect it to be private. Thus, according to DOJ, police could attach a GPS to a car and monitor its movements in public without a search warrant or any cause to believe a crime would be committed.

The Supreme Court unanimously overruled DOJ's Orwellian position—all nine Justices agreed that a search occurs when police attach a GPS to a car and monitor its movements.

**Sackett v. EPA, 132 S. Ct. 1367 (2012): OBAMA ADMINISTRATION ATTEMPTS TO SEVERELY CURTAIL PROPERTY RIGHTS WITHOUT GIVING CITIZENS PROCESS TO CHALLENGE EPA**

In *Sackett v. EPA*, DOJ sought to prevent a landowner from challenging Environmental Protection Agency orders and fines.

The EPA's Clean Water Act, which prohibits the discharge of pollutants into "the waters of the United States," was at the center of this dispute. If EPA believes someone is violating this provision, the agency can issue an administrative order requiring the property owner to remedy the problem, and then file a lawsuit if the owner doesn't comply with the order. And, when EPA issues a compliance order and then prevails in a subsequent lawsuit, the property owner can be fined up to \$75,000 per day.

The Sacketts owned a 2/3-acre residential lot in Idaho, where they wanted to build their dream home. The lot was north of a lake, but separated from the lake by several lots that already had buildings on them.

Before constructing their new home, the Sacketts filled part of their lot with dirt and rock, prompting the EPA to claim the Sacketts forced pollutants into the nearby waterway. EPA stated the Sackett's property was within its jurisdiction because it was "adjacent" to "navigable water."

EPA then issued a compliance order to the Sacketts, directing them to restore the lot, give EPA access to the lot, and provide EPA with records about the property.

The Sacketts wanted to challenge EPA's order as exceeding its authority, especially since they were facing potential fines of \$75,000 per day. They asked EPA for a hearing and EPA denied the request. The Sacketts then filed a lawsuit against the EPA in federal district court.

But, DOJ argued that the Sacketts could not challenge the EPA's compliance order until *EPA* filed a lawsuit *against the Sacketts* to enforce the order. According to DOJ, "EPA's discretion to determine when and whether suit should be filed, and its ability to use the compliance-order mechanism for its intended purpose, would be substantially undermined if compliance-order recipients could immediately hale the agency into court."

DOJ effectively wanted to put the Sacketts into a Catch-22: either the Sacketts complied with the EPA order, or they faced fines of up to \$75,000 per day while waiting for EPA to sue.

The Court unanimously rejected DOJ's outlandish argument.

The opinion observed that "the Sacketts cannot initiate [a civil action brought by EPA], and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional \$75,000 in potential liability."

The Court went on to state, "it is hard for the Government to defend its claim that the issuance of the compliance order was just 'a step in the deliberative process' when the agency rejected the Sacketts' attempt to obtain a hearing and when the *next* step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action)."

If DOJ had won its case, the EPA would be able to extort settlements from Americans who don't have the ability to challenge these orders while they face fines of up to \$75,000 per day. Thankfully, the Court stopped DOJ in its tracks.

**Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012):  
OBAMA ADMINISTRATION SEEKS TO DENY CHURCH'S RIGHT TO SELECT  
MINISTERS UNDER THE FIRST AMENDMENT**

In *Hosanna-Tabor v. EEOC*, DOJ argued it had the right to oversee a church's choosing of ministers, a plain violation of the First Amendment.

In one stunning exchange with Justice Elena Kagan, a DOJ lawyer explained the administration's thinking.

Justice Kagan asked, "Do you believe, Ms. Kruger, that a church has a right that's grounded in the Free Exercise Clause and/or the Establishment Clause to institutional autonomy with respect to its employees?"

The DOJ lawyer replied, "We don't see that line of church autonomy principles in the Religious

Clause jurisprudence as such.”

Justice Kagan—who was nominated by President Obama and had served as his former Solicitor General—later remarked that it was “amazing” that DOJ believed that “neither the Free Exercise Clause nor the Establishment Clause has anything to say about a church’s relationship with its own employees.”

Indeed, the Court’s opinion unanimously rejected DOJ’s cramped reading of the First Amendment and recognized the ministerial exception. *Hosanna-Tabor* explicitly stated, “We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization’s freedom to select its own ministers.”

**Arizona v. United States, 132 S. Ct. 2492 (2012): OBAMA ADMINISTRATION SEEKS TO DISPLACE STATE LAW ANY TIME THE PRESIDENT DECLARES ENFORCEMENT PRIORITIES**

In *Arizona v. United States*, DOJ tried to take away states’ rights to create their own laws on the basis that the federal government had different law enforcement priorities.

Even though the Court did hold that federal law preempted three out of four of Arizona’s immigration laws at issue in the case, no Justice accepted DOJ’s theory that mere federal enforcement priorities—as opposed to federal statutes passed by Congress or regulations enacted by federal agencies after public participation—trumped state law.

Under the Supremacy Clause, a state law can be preempted when a state law is in “conflict with federal law” on the basis that “compliance with both federal and state regulations is a physical impossibility” or the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

In *Arizona v. United States*, DOJ tried to concoct a new form of preemption: “federal enforcement-discretion preemption.” Meaning, when government has discretion to choose whether to enforce certain federal laws, the states are categorically prohibited from enacting their own laws as a backup mechanism for enforcing existing federal laws.

None of the Justices accepted DOJ’s far-reaching argument.

The majority found three of the four challenged state laws preempted, but on the basis that existing congressional statutes—not executive enforcement priorities—preempted these state laws. All three dissenting Justices similarly rejected DOJ’s enforcement-priority theory of federal preemption as well.

Had the Court accepted DOJ’s new theory of preemption, the federal government would have drastically expanded its authority to wipe out state law based on the whims of the executive branch.

**Gabelli v. SEC, 133 S. Ct. 1216 (2013): OBAMA ADMINISTRATION SEEKS TO EXPAND GOVERNMENT POWER TO PUNISH CITIZENS**

In *Gabelli v. SEC*, DOJ argued it had the discretion to impose severe penalties on Americans based on events that happened years, or even decades, earlier.

The Investments Advisers Act of 1940 authorizes the Securities and Exchange Commission (SEC) to seek civil penalties against an investment adviser who defrauds a client. But the SEC must generally do so under the statute of limitations provision that applies to many other government penalties. This statute of limitations requires the government to bring a civil enforcement action “within five years from the date when the claim first accrued.” In this case, DOJ argued that the “discovery rule” exception should apply – that is, this five-year statute of limitations should not begin to run until the government discovered, or could have reasonably discovered, the alleged fraud.

The Court found that DOJ’s invocation of the discovery rule was misplaced. *Gabelli* said “we have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties.”

The Court also posited that the government “is not like an individual victim who relies on apparent injury to learn of a wrong,” but is rather constantly investigating potential violations with “many legal tools at hand to aid in that pursuit.” Additionally, it noted government suits “involve penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers” and that “the SEC as enforcer is a far cry from the defrauded victim the discovery rule evolved to protect.”

Had DOJ prevailed, the federal government would have gained significant new authority to punish citizens by manipulating the intention of a law intended to protect defrauded citizens, not government regulatory agencies.

**Arkansas Fish & Game Commission v. United States, 133 S. Ct. 511 (2012): OBAMA ADMINISTRATION SEEKS TO VIOLATE PRIVATE PROPERTY PROTECTION**

In *Arkansas Fish & Game Commission*, DOJ attempted to take property away from citizens without just compensation.

The case begins with a decision by the U.S. Army Corps of Engineers to release water from a dam at a slower than usual rate. This gave downstream farmers a longer harvest time, but it also resulted in an extended period of flooding for a particular wildlife and hunting preserve that is used a timber resource.

The owners of the preserve sued the federal government, alleging a temporary taking of their property without just compensation. The trial court found that “the Corps’ deviations caused six consecutive years of substantially increased flooding,” which resulted in a temporary taking that destroyed or degraded “18 million board feet of timber.”



DOJ argued that the government should be able to flood land, on a temporary basis, and not pay property owners just compensation for damage caused by the flooding. But the Court unanimously scuttled DOJ's theory and found no reason to create a "temporary-flooding exception" to the Takings Clause.

In fact, the Court said the parade-of-horribles argument advanced by DOJ was overblown:

Time and again in Taking Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest. We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment's instruction. While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases.

If the Court accepted DOJ's arguments, the federal government would have the ability to tamper with a private citizen's property without paying just compensation. The Takings Clause, on its face, rejects this position, which is precisely why the Supreme Court unanimously denied DOJ's effort to expand federal authority at the expense of individual rights.

**PPL Corp. v. Commissioner of Internal Revenue, 133 S. Ct. 1897 (2013): OBAMA ADMINISTRATION SEEKS POWER TO IMPOSE DOUBLE-TAXATION**

In *PPL Corp. v. Commissioner of Internal Revenue*, the Administration argued for power to manipulate tax laws to impose double-taxation on taxpayers.

Taxpayers get a U.S. tax credit for foreign income taxes paid. In 1997, the United Kingdom imposed a one-time "windfall tax" on certain companies. PPL Corp.'s subsidiaries paid this tax, and then PPL Corp. claimed the U.S. tax credit. The IRS wanted to collect more taxes, so it argued that however the foreign government characterizes its tax should determine whether it counts, under U.S. law, as an income tax.

The Court unanimously rejected the Administration's argument to collect more taxes. Longstanding, established U.S. law provides that a tax is characterized based on its substance or economic effect—and not the tax's form or label. The unanimous Court found that the U.K. windfall tax was an excess profit tax, which the U.S. treats as an income tax. In doing so, the Court made sure that the Obama Administration's IRS cannot arbitrarily twist the law whenever it wants more taxes.

**Horne v. USDA, 133 S. Ct. 2053 (2013): OBAMA ADMINISTRATION SEEKS TO LIMIT PROPERTY OWNER'S CONSTITUTIONAL DEFENSES**

In *Horne v. USDA*, DOJ argued that a property owner couldn't defend against a fine imposed when the owner refused to turn over property without just compensation, and instead had to pay the fine and then bring a separate lawsuit to try to recover just compensation.

The Hornes were California raisin growers who were fined about \$650,000, under a New Deal-era

program, when they refused to follow a federal government order to turn over 47 percent of their raisin crop without just compensation. The Hornes wanted to defend against this fine by asserting that the Fifth Amendment's Takings Clause denied the federal government the authority to issue this order. But DOJ argued the Hornes couldn't raise this defense—instead they had to pay the fine, and then bring a separate lawsuit in Washington D.C. in the Court of Federal Claims.

The Court unanimously rejected DOJ's attempt to limit the Fifth Amendment rights of property owners. The Court held that a party can raise a constitutional defense to an assessed fine, rather than having to pay the fine in one proceeding and then bring a separate lawsuit to recover that same money.

**Sekhar v. United States, 133 S. Ct. 2720 (2013): OBAMA ADMINISTRATION SEEKS TO DRASTICALLY EXPAND FEDERAL CRIMINAL LAW**

In *Sekhar v. United States*, the Administration argued that the federal crime of extortion should be expanded far beyond the centuries-old meaning of extortion.

Sekhar, a partner in an investment firm, anonymously threatened the general counsel of the New York State Comptroller's office. Sekhar told the general counsel that if he did not recommend that the state retirement fund invest with Sekhar's firm, then Sekhar would disclose an alleged affair involving the general counsel to his wife, government officials, and the media.

The government argued that Sekhar committed extortion, under the federal Hobbs Act. According to the government, it did not have to prove that Sekhar was trying to obtain actual tangible property. Instead, the government believed it only had to show that Sekhar was trying to obtain the general counsel's "intangible property right to give his disinterested legal opinion to his client free of improper outside interference."

The Court unanimously rejected the Administration's argument, recognizing that the crime of extortion—both at common law and in the federal statute—has required obtaining actual property. The Court called the government's argument "absurd," noting that Congress had criminalized extortion and not mere coercion. In doing so, the Court upheld obvious congressional limits on federal criminal law, instead of accepting the government's unprecedented argument for an extreme expansion of the well-settled meaning of extortion.

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When President Obama's own Supreme Court nominees join their colleagues in unanimously rejecting the Administration's call for broader federal power nine times in 18 months, the inescapable conclusion is that the Obama Administration's view of federal power knows virtually no bounds.





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