



The Legal Limit Report No. 3

The Obama Administration's Assault on Texas

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

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

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The State of Texas has been forced to file multiple lawsuits to prevent the Obama Administration from encroaching on powers reserved for the States. There may be no better example of this Administration's disdain for States than its expansive view of federal power in litigation against the State of Texas. These ten cases show a consistent pattern of an Administration bent on displacing State sovereignty.

1. Obamacare's conditions on Medicaid funding are unconstitutional.

NFIB v. Sebelius, 132 S. Ct. 2566 (2012).

Texas joined 12 other States in arguing that Obamacare's individual mandate and conditions on Medicaid funding are unconstitutional. The Supreme Court in *NFIB v. Sebelius* voted 5-4 to rewrite the individual mandate as a tax, but it also ruled, by a vote of 7-2, that the Medicaid conditions placed on States were unconstitutional.

The Court agreed with the States' argument that withholding existing Medicaid funds from States that rejected expanding Medicaid "serve[d] no purpose other than to force unwilling States to sign up for the dramatic expansion in health coverage effected by the Act." 132 S. Ct. at 2603. As the seven-Justice majority concluded, "Congress may not simply conscript state [agencies] into the national bureaucratic army, but that is what it is attempting to do with the Medicaid expansion." *Id.* at 2606-07 (citation omitted; alteration in original).

2. The Department of Justice imposed unconstitutional preclearance on Texas's redistricting plans. *Texas v. United States*, 133 S. Ct. 2885 (2013).

Under Section 5 of the Voting Rights Act, the Obama Department of Justice opposed Texas's request for preclearance of the State's recently enacted redistricting plans. A three-judge panel of the District of D.C. adopted DOJ's arguments. But the U.S. Supreme Court vacated that decision after finding the Voting Rights Act preclearance coverage formula unconstitutional in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

Shelby County explained that the coverage formula originally created in the 1960s was "based on decades-old data and eradicated practices." *Id.* at 2627. The formula, therefore, was no longer even attempting to remedy current constitutional violations, as required by law: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." *Id.* at 2631.

3. **The Department of Interior imposed an unlawful moratorium on offshore drilling.** *Texas v. U.S. Dep't of Interior*, No. 2:10-cv-02949 (E.D. La.).

Texas sued the Department of Interior to overturn the Obama Administration's second drilling moratorium after the Deepwater Horizon disaster. The Administration re-imposed a drilling moratorium, after a nearly identical drilling moratorium had been invalidated in federal court just weeks earlier. See *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 696 F. Supp. 2d 627 (E.D. La. 2010). The Administration acted unilaterally, rather than consulting with affected States and adequately assessing the economic consequences, as required by federal law. The Administration lifted the moratorium after the suit was filed, so the case was dismissed by agreement.

4. **Obama Administration's EPA tried to expand its power by regulating greenhouse gases.** *Texas v. EPA*, No. 12-1269 (U.S. Supreme Court).

On behalf of 14 States, the State of Texas challenged EPA's finding that it could regulate greenhouse gases under the Clean Air Act on the basis that greenhouse gas emissions contribute to man-made global warming. As Texas argued, EPA's finding never even determined or considered when climate conditions or greenhouse gas concentration levels endanger human health, as was required by law. EPA nevertheless implemented this regulatory agenda, which the U.S. Chamber of Commerce estimates is "the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency." *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, at *14 (D.C. Cir. Dec. 20, 2012) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

The U.S. Supreme Court agreed to hear this case on February 24, 2014. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *cert. granted*, 134 S. Ct. 419 (2013).

5. **The Department of Education illegally withheld from Texas \$830 million in educational funding.** *Texas v. U.S. Dep't of Educ.*, No. 10-60793 (5th Cir.).

The Department of Education improperly rejected Texas's \$830 million share of the \$10 billion Education Jobs Fund. DOE misapplied federal law when it construed an amendment by Congressman Lloyd Doggett that imposed on Texas onerous standards for education funds that no other States had to satisfy. Congress subsequently repealed the Doggett Amendment, Texas received its share of education funds, and Texas dismissed its lawsuit challenging DOE's unlawful act.

6. **EPA tried to override Texas's program for incentivizing facilities to voluntarily comply with air permitting regulations.** *Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012).

Texas prevented EPA from unlawfully stopping the Texas Flex Permits Program—which was created in 1994 under Democrat Governor Ann Richards. The Flex Permits Program is an air permitting program that incentivizes grandfathered operations, which pre-dated Texas's air permitting program that began in 1971, to voluntarily enter into this program. The Clean Air Act

gives EPA responsibility for identifying pollutants and setting national standards, while States retain the power to create permitting programs.

The 5th Circuit held EPA exceeded its power under the Clean Air Act when it tried to block Texas's air permitting program. The court noted that EPA did not disapprove of the program when it was created in 1994 or any of the subsequent five times the program was amended by Texas. The 5th Circuit concluded the federal government had encroached on powers reserved to the States: "It is clear that Congress had a specific vision when enacting the Clean Air Act: The Federal and State governments were to work together, with assigned statutory duties and responsibilities, to achieve better air quality. The EPA's final rule disapproving Texas's Flexible Permit Program transgresses the CAA's delineated boundaries of this cooperative relationship." 690 F.3d at 686.

7. **EPA unlawfully blocked Texas's air permitting program.**

Luminant Generation Co. v. EPA, 675 F.3d 917 & 490 F. App'x 657 (5th Cir. 2012).

More than three years after it was required to act under federal law, EPA disapproved of Texas's Pollution Control Project Standard Permit—that is, its plan to implement federal air quality standards. Under the Clean Air Act, States must adopt and administer plans based on federal standards set by EPA. The 5th Circuit vacated EPA's unlawful disapproval of Texas's plan, finding that "EPA created out of whole cloth" three "extra-statutory standards" while ignoring this "cooperative federalism regime that affords sweeping discretion to the states to develop implementation plans and assigns to the EPA the narrow task of ensuring that a state plan meets the minimum requirements of the Act." 675 F.3d at 932.

8. **EPA illegally imposed a cross-state air pollution rule.**

EPA v. EME Homer City Generation L.P., No. 12-1182 (U.S. Supreme Court).

EPA announced a new Cross-State Air Pollution Rule affecting 27 States, including Texas. But rather than allow these States to implement these standards as required by the Clean Air Act, EPA immediately imposed a federal implementation plan on all 27 States. The D.C. Circuit ruled for Texas and vacated EPA's rule as exceeding its statutory authority. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012). The U.S. Supreme Court heard the case on December 10, 2013. 133 S. Ct. 2857 (2013).

9. **Department of Commerce agency unlawfully promulgated an "emergency" fishing rule in the Gulf of Mexico.** *Texas v. Crabtree*, 2013 WL 2407674 (S.D. Tex. 2013).

An agency within the Department of Commerce, the National Marine Fisheries Services, tried to issue an "emergency" rule shortening the red snapper recreational fishing season in federal waters in the Gulf of Mexico. Texas alleged, and the federal government conceded, that this rule was promulgated simply because federal officials objected to Gulf States setting different rules governing red snapper fishing in their State waters. The Southern District of Texas vacated the emergency federal red snapper rule, finding that States are permitted to govern their own waters and the federal government did not use the procedures required by law to implement an emergency regulation. The court issued a strongly-worded opinion, describing the federal

government's arguments as "circular," "totally unacceptable," and "a mockery," and concluding that the federal government was "robbing from the poor to give to the rich." 2013 WL 2407674, at *9-10, *12.

10. Federal energy agency illegally ordered pipelines to report intrastate business activities. *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258 (5th Cir. 2011).

Texas successfully challenged orders by the Federal Energy Regulatory Commission that required intrastate natural-gas pipelines to make daily Internet posts about their intrastate business activities. The 5th Circuit agreed with the Railroad Commission of Texas that FERC's orders exceeded its jurisdiction under the Natural Gas Act. The court chided the federal government for overstepping its authority, noting that "[t]his distinction between interstate and intrastate natural gas transactions, historically, has always been recognized." 661 F.3d at 263.

* * *

These ten cases will not be the final chapter in the Obama Administration's assault on Texas. Texas has additional lawsuits pending against this Administration, including:

- A challenge to the Equal Employment Opportunity Commission's unlawful hiring guidelines that prevent employers, like Texas, from categorically excluding convicted felons from employment (*Texas v. EEOC*, No. 5:13-cv-0255-C (N.D. Tex.));
- A lawsuit to require EPA to designate areas of the country as complying with national air quality standards, after EPA missed the deadlines for doing so under the Clean Air Act (*North Dakota v. EPA*, No. 1:13-cv-00109-CSM (D.N.D.));
- An action brought by 12 States against EPA, seeking to gain access under the Freedom of Information Act to documents between EPA officials and environmental groups (*Oklahoma v. EPA*, No. 5:2013-cv-00726 (W.D. Okla.));
- A challenge to Title II of Dodd-Frank, which gives the Treasury Secretary and the Federal Deposit Insurance Corporation unilateral authority to take over and liquidate large financial institutions (*State Nat'l Bank of Big Spring v. Lew*, No. 1:12-cv-01032 (D.D.C.)—notice of appeal filed with D.C. Cir.); and
- A case challenging EPA's designation of Wise County as an ozone non-attainment area (*Texas v. EPA*, No. 12-1316 (D.C. Cir.)).

As Americans continue to suffer from a struggling economy, exacerbated by the misguided and botched Obamacare legislation, the worst thing the federal government could do is burden States that have managed to achieve economic growth in spite of the stifling federal regulatory environment. Unfortunately Texas must constantly defend itself against President Obama's expansive view of federal power, and I applaud Texas's legal challenges under the leadership of Attorney General Abbott against this Administration's assault on State sovereignty. I hope others will follow his lead.



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