



## The Federal Government's "Police Power" and the Takings Clause: Part I

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Last week, Judge Starr (NDTX) ruled that the federal government lacks a general "police power" to "take" bump stocks without providing "just compensation." He gave the defendants another opportunity to "explain which enumerated power justifies the federal regulation and whether it allows a taking without compensation." Is the source the Commerce and Necessary and Proper Clauses? Judge Starr wrote, "If the federal government opts for the commerce power, it should discuss the limitations in *Lopez* and *Morrison*."

The federal government may have some difficulty with this order. The federal courts *routinely* refer to a federal "police power," but do not specify the source of that authority.

Consider *Kam-Almaz v. U.S.* (Fed. Cir. 2012). In this case, an ICE officer seized the plaintiff's laptop at an international airport. While the computer was in the government's custody, "its hard drive failed, destroying much of Kam-Almaz's business software." The Plaintiff brought a takings claim against the government, and sought compensation for "lost business contacts." The federal government contended that it "lawfully seized the laptop pursuant to its police power." The Federal Circuit agreed:

Our precedent is clear: "**Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause.**" *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008); see also *Acadia*, 458 F.3d at 1331–32. . . .

Lawful seizures performed pursuant to such authority necessarily fall within the government's power to police the border. **The "police powers . . . are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."** *The License Cases*, 46 U.S. 504, 583(1847) (opinion of Taney, C.J.). As we have noted, "[a]lthough the precise contours of the principle are difficult to discern, it is clear that the police power encompasses the government's ability to seize and retain property to be used as evidence in a criminal prosecution." *AmeriSource*, 525 F.3d at 1153.

The ellipses in the *License Cases* citation are misleading. The omitted word are "...the police powers **of a State** are..." Here is the full passage from Chief Justice Taney's opinion:

It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet

admitted to be equally valid. **But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.** And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.

Does the federal government have "inherent" powers? *Lopez* tells us no: "The Constitution creates a Federal Government of enumerated powers." But there is at least one exception to this rule. *Nishimura Ekiu v. U.S.* (1892) held that Congress's power to exclude aliens is "inherent in sovereignty." The Court explained:

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war."

The language in *Nishimura Ekiu* is remarkably similar to Taney's analysis in the *License Cases*. But that holding stands till this day. Even Justice Scalia—usually a stickler for the separation of powers—acquiesced to this doctrine. In *Arizona v. United States* (2012) admitted that "there was no need [for the Framers] to set forth control of immigration as one of the enumerated powers of Congress."

I think these analyses are wrong, and *Lopez* is right. Rather, Congress's implied powers under the Necessary and Proper Clause can be read to support an exclusionary power. (I articulated this position in a [2018 essay](#)).

But for present purposes, let's assume that a power to exclude aliens may be an "inherent" power. Perhaps that authority would also embrace the power to seize property at the border. In that sense, *Kam-Almaz* may have reached the right result for the wrong reason. But the inherent power over immigration would not support a "police power" for the federal government to seize property within the borders.

A federal "police power" must come from another one of Congress's enumerated powers, including the Commerce Clause and the Necessary and Proper Clause. I will discuss both of these provisions in Part II of this series.

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