



## Why Obama Keeps Losing at the Supreme Court

By: Ilya Shapiro – June 6, 2013

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In cases before the Supreme Court last year, President Barack Obama's Justice Department relied on outlandish legal theories that pushed a constitutional interpretation of extreme federal power. That posture led to unanimous losses in three very different areas of law: religious liberty (*Hosanna-Tabor Church v. EEOC*), criminal procedure (*U.S. v. Jones*) and property rights (*Sackett v. EPA*).

A year later, as the Court prepares to rule on affirmative action, the Voting Rights Act and gay marriage, the administration's track record hasn't improved. Notwithstanding the technical win on the health-care law, which was only achieved thanks to Chief Justice John Roberts's controversial decision to rewrite it, the government has continued to suffer unanimous defeats. Not all its cases are losers, to be sure, but this administration's pursuit of expansive authority tends to lose big.

Consider another major case from the 2011-12 term: *Arizona v. U.S.*

The conventional narrative is that the Supreme Court smacked down a perniciously anti-immigrant Arizona law that gave state police more power to enforce immigration laws. That interpretation simply isn't correct. Only four sections of the law reached the Supreme Court -- most of its provisions weren't even challenged -- and the U.S. won split decisions on three and unanimously lost the fourth.

### Immigration Powers

The three splits involved complicated statutory interpretation regarding pre-emption of state law by federal law. In the ruling on the fourth, however, not a single justice accepted the government's theory that mere federal enforcement priorities -- as opposed to laws or regulations -- trumped state law.

The government argued that discretionary decisions not to enforce certain federal laws overrode parallel state laws that enforced those same laws. The unanimous Supreme Court rejected that breathtaking claim of "pre-emption by executive whim."

In the current term, another trio of cases highlighted the government's overbroad assertions of power.

First, in *Arkansas Fish & Game Commission v. U.S.*, the government tried to take property away from citizens without paying just compensation. It claimed that the Army Corps of Engineers' periodic flooding of a wildlife preserve, causing severe damage, didn't meet the criteria for compensation under the Fifth Amendment's Takings Clause. Even though the Supreme Court has required the government to compensate property owners for temporary physical invasions and permanent flooding, the government argued that it could freely engage in temporary flooding.

The Supreme Court unanimously ruled for the property owners in an opinion by Justice Ruth Bader Ginsburg, not a noted conservative. "No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence," she wrote, "and we decline to create such an exception in this case."

Second, in *Gabelli v. Securities & Exchange Commission*, the government argued that it can prosecute people regardless of any statutes of limitations. Over time, evidence can be corrupted or disappear, memories fade and companies dispose of records. The government, with all its investigative tools, has to bring charges within a reasonable time so that the justice system can operate effectively.

In the case, the SEC sued mutual-fund managers for alleged fraudulent conduct that ceased more than five years earlier. Its lawyers argued that the standard statute of limitations only took effect once the government discovered the claimed wrong-doing.

Discovery Rule

The Supreme Court ruled 9-0 that the Justice Department's reliance on the discovery rule was misplaced because that exception only applies to individual plaintiffs seeking recompense, not to the government bringing enforcement actions for civil penalties.

"Given the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of (the relevant law), we decline to do so."

Finally, in *PPL Corp. v. Commissioner of Internal Revenue*, the government tried to impose double taxation on a company that had paid a windfall tax in the U.K. The government argued that the Internal Revenue Code's foreign-income-tax credit wasn't available to the company because the U.K. statute considered the tax to be on profit rather than income. That contrary theory had already been rejected by lower courts in another case, but the government insisted on presenting it again.

Two weeks ago, the Supreme Court rejected the government's tortured logic on the grounds that what matters isn't a foreign government's characterization of a tax but how the tax applies and whether it would be an income tax if enacted in the U.S.

These cases have nothing in common, other than the government's view that federal power is virtually unlimited: Citizens must subsume their liberty to whatever the experts in a given field determine the best or most useful policy to be.

If the government can't get even one of the liberal justices to agree with it on any of these unrelated cases, it should realize there's something seriously wrong with its constitutional vision.