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Obama Flunks the Constitutional Test

Has a U.S. president ever been shut out before the Supreme Court so often?

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As the world awaits the Supreme Court's rulings on Obamacare and gay marriage, pundits have engaged in a phony war that misses a larger story: the court's rejection of the government's extreme claims of unlimited federal power. Indeed, the Obama administration has already lost *unanimously* 20 times, having passed in its first five years the Bush DOJ's number across two full terms (15).

While it's still too early to make conclusions about the current Supreme Court session, in its previous three terms—effectively in the 30 months from January 2012 to June 2014—the government's *goose-egg* rate was three times Bush and double Clinton (23 in eight years).

Again, those are statistics for cases in which President Obama failed to pick up even the votes of his own nominees. The overall rate looks even worse: in the last two terms, the solicitor general's office won 39 and 55 percent of its cases, against a 50-year average of about 70 percent.

Since some people think that overall rate isn't a fair measure given that five of the nine justices were appointed by Republican presidents—although the government record in 5-4 cases isn't bad—let's stick to the recent cases where the justices fully agreed.

Between 2012 and 2014, the high court ruled unanimously against the government in such disparate areas as religious liberty, criminal procedure, property rights, immigration, securities regulation, tax law, and the presidential recess-appointment power. Here's a sampling:

1. In *Hosanna-Tabor Church v. Equal Employment Opportunity Commission* (2012), the government sued a church school that fired a teacher for violating one of the church's religious tenets. The unanimous court ruled that punishing a church for failing to retain an unwanted teacher in this context violates the First Amendment.

2. In *United States v. Jones* (2012), the government claimed the power to attach a GPS device to a suspected drug dealer's car and monitor his movements without a warrant. While the justices had differing opinions on why this action violated the Fourth Amendment, all agreed it was unconstitutional.

3. In *Sackett v. Environmental Protection Agency* (2012), the government denied property owners the right to challenge an order to stop building their house. The court ruled that access to courts is the least the government can provide in response to "the strong-arming of regulated parties" by federal agencies.

4. While the conventional wisdom regarding *Arizona v. United States* (2012) is that the high court smacked down a perniciously anti-immigrant state, Arizona actually won unanimously on its most controversial "show me your papers" provision. Not a single justice accepted the government's theory that mere enforcement priorities trump state laws. In what may foreshadow the ultimate result of the 25-state challenge to President Obama's latest executive actions on immigration—now on appeal after the government lost in district court—the unanimous Supreme Court rejected that breathtaking claim of "pre-emption by executive whim."

5. In *Arkansas Fish & Game Commission v. United States* (2013), the government argued that damage caused by temporary flooding didn't merit compensation under the Fifth Amendment—even though Supreme Court precedent holds temporary physical invasions and permanent flooding to be takings. Justice Ginsburg, not a noted conservative, wrote the Court's ruling for the property owners.

6. In *Gabelli v. SEC* (2013), the government argued that it can prosecute people regardless of any statutes of limitations, depending on when it discovers malfeasance. The 9-0 Court found that the government, with all its investigative tools, has to bring charges within a reasonable time so that the justice system can operate effectively.

7. In *Horne v. Department of Agriculture* (2013), the government, not having learned its lesson from *Sackett*, claimed that raisin farmers weren't entitled to judicial review of a byzantine New Deal-era program that confiscated crops in an attempt to regulate prices. The Court again allowed plaintiffs their day in court.

8. In *Riley v. California* (2014), the Supreme Court ruled that the government needs to get a warrant if it wants to search the digital information stored on the cell phones of people it arrests.

9. In *Noel Canning v. National Labor Relations Board* (2014)—in what was perhaps the most surprising case to garner all of the Democratic appointees' votes—the Court invalidated President Obama's NLRB appointments essentially because the Senate had not declared a recess when he made them.

The government's arguments across this wide variety of cases would essentially allow the executive branch to do whatever it wants without meaningful constitutional restraint. This position conflicts with another unanimous decision, *Bond v. United States* (2011). *Bond* vindicated a criminal defendant's right to challenge her federal prosecution. As Justice Kennedy wrote, "federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake."

Curiously, *Bond* again came before the Court in 2014—on the question of whether a weapons-trafficking statute could be used against someone who used household chemicals in a bizarre

revenge plot—and again the government lost unanimously. Perhaps that's a harbinger for *Horne*'s return to the Court, now also on the merits of the underlying (raisin-takings) claim.

These cases have nothing in common, other than the government's view that citizens must subsume their liberty to whatever the experts in a given field determine the best policy to be. If the government can't get even one of the liberal justices to agree with it on any of these unrelated issues, there's something seriously wrong with its constitutional vision.

In short, if the government loses in this term's Obamacare case, it won't be because its lawyers had a bad day in court or because the justices followed their political preferences. It will be because this administration continues to make legal arguments that don't pass the smell test.

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