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Obama Has Lost In The Supreme Court More Than Any Modern President

The Obama administration has lost more of its lawsuits that wound up in the U.S. Supreme Court. That's far short of the modern presidential record.

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Each year, Supreme Court reporters and legal pundits devise a "theme" for the term just ended. They try to connect disparate cases into a coherent narrative about, for example, "the court's turn to the Left," the "triumph of minimalism," or even its "libertarian moment." Such trendspotting is mainly an artificial exercise driven by the vagaries of the docket; it's not like the justices suddenly decide to make ideological shifts or alter jurisprudential approaches.

This term, however, confirmed a very real phenomenon: the Obama administration, by historical standards, has done exceedingly poorly before the Supreme Court. While this conclusion may seem counterintuitive given the term's liberal victories on abortion and affirmative action—or previous terms' rulings upholding Obamacare—the statistics are staggering.

This past term, the federal government won 13 cases and lost 14. Such mediocrity may seem surprising, but the 48 percent win rate is actually the Obama Justice Department's third-best result. The administration's best term was 2013-2014, when it went 11-9 (55 percent), while its worst record of 3-9 (25 percent) came in the abbreviated 2008-2009 term—counting only cases argued after the January 2009 inauguration.

Overall, the administration has managed a record of 79-96, a win rate of just above 45 percent. There's little difference between the first term's 35-44 (just above 44 percent) and second term's 44-52 (just below 46 percent). Now, there may be a handful of cases to add to the totals before the next president takes office, but we can essentially audit the 44th president's judicial books now.

This Is Something New

That audit doesn't look too good when compared to the record of his predecessors. George W. Bush achieved a record of 89-59 (60 percent)—and that's if you fold in all of 2000-2001, including cases argued when Bill Clinton was president in what was an unusually bad term for the government (roughly 35 percent). Clinton, in turn, had an overall record of 148-87 (63 percent), again including all of 1992-1993. George H.W. Bush went 91-39 (70 percent), while Ronald Reagan weighed in with an astounding record of 260-89 (about 75 percent).

While it looks like this is merely a tale of a downwards trend in recent years, Jimmy Carter still managed a 139-65 record (68 percent). Indeed, the overall government win rate over the last 50 years—I've calculated back to the early 1960s—is comfortably over 60 percent.

To be sure, this isn't an exact science, with some judgment calls to be made about certain cases that aren't pure wins or losses for either side. The Supreme Court also used to hear many more cases, so the last 20 years or so are statistically less significant. But even giving Barack Obama every benefit of the doubt, his 45 percent score falls far short of the modern norm—which is really the relevant period, regardless of how well or poorly Andrew Jackson or Benjamin Harrison may have done.

Obama's Own Justices Are Voting Against Him

You could argue, of course, that a simple won-loss rate doesn't tell the whole story. After all, Obama's solicitors general have faced a bench occupied by a majority of Republican appointees. (As did Clinton's, but that didn't stop him from pipping his Republican successor.) But the news gets even worse when you look at unanimous losses.

This term, the federal government argued an incredible 10 cases without gaining a single vote, not even that of one of President Obama's own nominees, Sonia Sotomayor and Elena Kagan. That brings his total to 44 unanimous losses. For comparison, George W. Bush suffered 30 unanimous losses, while Bill Clinton withstood 31. In other words, Obama has lost *unanimously* 50 percent more than his two immediate predecessors.

These cases have been in such disparate areas as criminal procedure, religious liberty, property rights, immigration, securities regulation, tax law, and the separation of powers. Here are some recent unanimous headline-grabbers.

In *Hosanna-Tabor Church v. EEOC* (2012), the government sued a church school that fired a teacher for violating one of its religious tenets. The court ruled that punishing a church for not retaining an unwanted teacher violates the First Amendment.

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 violated the Fourth Amendment, all agreed that it did.

In *Sackett v. EPA* (2012), the government denied property owners the right to contest 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."

While the conventional wisdom about *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 one justice accepted the theory that mere enforcement priorities trump state laws.

In *Horne v. Department of Agriculture* (2013), the government claimed 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 Supreme Court again allowed plaintiffs their day in court—and two years later ruled for them 8-1 on the merits.

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 arrestees' cell phones.

In *Noel Canning v. National Labor Relations Board* (2014), the court invalidated President Obama's National Labor Relations Board appointments essentially because the Senate had not declared a recess when he made them.

Just last week, in *McDonnell v. United States*(2016), the court reversed the conviction of a former Virginia governor because meetings with constituents who seek the favor of elected officials are not the kinds of "official acts" that can be prosecuted under public-corruption statutes.

Obama Thinks He Deserves to Rule Unchecked

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 Anthony 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 Supreme 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.

To be clear, I'm not saying that the government's lawyers are sub-par. Solicitor General Don Verrilli and his predecessors (including Kagan herself) are very well respected, and their staffs are populated by people who graduated at the top of elite law schools and clerked on the Supreme Court. If they're not qualified to represent the government, nobody is.

No, this is a situation where, as noted Supreme Court advocate Miguel Estrada put it a few years ago when asked to opine on the administration's poor record: "When you have a crazy client who makes you take crazy positions, you're gonna lose some cases."

So the reason this president has done so poorly at the high court is because he sees no limits on federal—especially prosecutorial—power and accords himself the ability to enact his own legislative agenda when Congress refuses to do so. The numbers don't lie.

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