The Nondelegation Doctrine And Enviro Regs, Post-Gundy

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Sometimes a case comes along that looks like a simple affirmation, but really foreshadows a significant policy change. The U.S. Supreme Court's recent decision in Gundy v. United States is just such a case, and may have opened the door to a revitalization of the long-dormant nondelegation doctrine.

Such a move could have significant impacts on federal government regulation under environmental statutes. It's been 84 years since the Supreme Court declared a law to be unconstitutional under the nondelegation doctrine, but based on Gundy, it seems more likely than ever that the court will return to enforcing the constitutional responsibility of Congress to not delegate its legislative powers.

The Nondelegation Doctrine

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The nondelegation doctrine has its roots in Article I, Section 1, of the U.S. Constitution, which provides that "All legislative Powers herein granted shall be vested in the Congress of the United States." As the Supreme Court has held, "Congress cannot delegate legislative power. ... [I]t is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[1]

Despite the certainty of the court's words, it has long been reluctant to enforce that constitutional requirement. The court instead has required that Congress provide an "intelligible principle to which the [agency must] ... conform."[2]

Indeed, only twice has the court struck down a law under the nondelegation doctrine. Both Panama Refining Co. v. Ryan and Schechter Poultry Corp. v. United States were decided in 1935, and since then, the court has taken a permissive approach to the nondelegation doctrine. Most recently, in Whitman v. American Trucking Associations Inc., the court upheld a section of the Clean Air Act that directed the U.S. Environmental Protection Agency to set air quality standards at a level that is "requisite to protect the public health with an adequate margins of safety."[3]

The court upheld the regulation on the reasoning that "requisite" meant neither higher nor lower than necessary, and that, while the criteria left room for administrative lawmaking, it "fits well within the scope of the discretion permitted by our precedent."

Gundy v. United States

This case involved a provision of the 2001 Sex Offender Registration and Notification Act, or SORNA, that confers on the attorney general the authority to "specify the applicability" of SORNA's registration requirement for sex offenders who were convicted prior to the enactment of SORNA. By a plurality of the four liberal justices, the court held that SORNA did not violate the nondelegation doctrine.

Despite the plurality's continued marginalization of the nondelegation doctrine, the case portends a potential revitalization of the doctrine. Importantly, Justice Brett Kavanaugh had not been confirmed when the case was argued and thus did not participate in the decision, leaving

only eight justices to decide. Justice Samuel Alito concurred in judgment only, writing that "since 1935, the court has uniformly rejected nondelegation arguments [but if] a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."

Justice Neil Gorsuch, in a dissent joined by Chief Justice John Roberts and Justice Clarence Thomas, argued that SORNA "endow[s] the nation's chief prosecutor with the power to write his own criminal code" and gives the attorney general "free rein to write rules." Gorsuch argues that the court has "an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities." This being the case, Gorsuch would have found SORNA to be unconstitutional under the nondelegation doctrine.

Thus, the question has become whether Kavanaugh will be a fifth vote for revitalizing the nondelegation doctrine, and if so, what impacts it might have within the federal environmental regulatory regime.

Justice Kavanaugh and the Nondelegation Doctrine

Though Kavanaugh has not directly addressed the question of the nondelegation doctrine, his 2017 dissent from the United States Court of Appeals for the D.C. Circuit's decision to decline to reconsider its approval of the Federal Communications Commission's "net neutrality" regulations provides some hints that he may be receptive to revisiting the court's approach to the doctrine.

In arguing against the FCC's regulation, then-Judge Kavanaugh argued that that if "an agency wants to exercise expansive regulatory authority over some major social or regulatory activity ... an ambiguous grant of statutory authority is not enough." Many court observers expect Kavanaugh to cast the fifth vote to, as Alito asked for, "reconsider the approach [the Court] has taken for the past 84 years."

Environmental Regulation Under the Nondelegation Doctrine

Some of the broadest delegations of legislative power made by Congress can be found in this country's environmental statutes. Take, for instance, the Endangered Species Act, which allows agencies to create and use vague definitions of critical habitat and sub-species; or the Clean Air Act and Clean Water Act, which delegate incredible amounts of broad discretion to set technology and emissions standards.

As a result of the court's permissive approach to the nondelegation doctrine over the last 84 years, the EPA has greatly expanded the scope of its regulations, with near-impunity. A return of the nondelegation doctrine will provide an opportunity to reexamine those regulatory schemes.

It remains to be seen whether Congress simply directing the EPA to establish "requisite" standards will be sufficient, as it was in Whitman v. American Trucking Associations Inc. It will likely be years before a case challenging the nondelegation doctrine makes it back to the court, but it will be very interesting to watch what statutes are challenged after the invitation by Alito. If the court ends up limiting the ability of Congress to delegate power to the agencies, it would not just affect current agency authority — it could make it much more difficult for a future administration to deal with climate change without congressional action.

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[1] Field v. Clark, 143 U.S, 649, 692 (1892).

[2] J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394 (1928).

[3] Whitman v. American Trucking Associations Inc., 531 U.S. 457 (2001).