

Bloomberg Law[®]

Supreme Court Rejects Attack on Agency Power—For Now

Jordan S. Rubin, Rossella Brevetti, and Kimberly Strawbridge Robinson

June 20, 2019

Conservatives and libertarians eager to dismantle the so-called administrative state and limit governmental power are hopeful after the Supreme Court's decision in a sex offender registration case June 20, even if the court didn't buy their arguments this time.

A divided court said in *Gundy v. United States* that Congress didn't violate the non-delegation doctrine when it allowed the attorney general to decide if the Sex Offender Registration and Notification Act's registration requirements should apply to those convicted of sex crimes before the law's passage.

The doctrine bars Congress from transferring its legislative power to another branch of government. Conservatives see the doctrine as a potential bulwark against Congress giving too much power to governmental agencies. But for decades, the high court has given Congress broad leeway to pass along its authority.

The justices' split opinions and the fact that Brett Kavanaugh didn't vote in the case give conservatives and libertarians hope that the doctrine won't be dead forever, with a pending challenge to President Trump's right to impose steel tariffs presenting an opportunity for the high court to revisit the issue soon.

"The clearest takeaway is that a plurality of justices are willing to consider nondelegation arguments, so we should expect litigants to begin raising these arguments more frequently," said Case Western Reserve University School of Law professor Jonathan H. Adler, an administrative law scholar. He said it "will be particularly interesting to see if the nondelegation arguments challenging Trump's tariffs or the emergency declaration gain traction in light of the *Gundy* concurrence and dissent."

The delegation in this case "easily passes constitutional muster," Justice Elena Kagan wrote for the 5-3 majority.

"Indeed," she wrote, if the delegation here is unconstitutional, "then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."

Kagan was joined by the other three Democratic-appointees and—notably in the result—by Justice Samuel Alito, who wrote a short concurrence saying that, in a future case, he's willing to reconsider the longstanding approach the court has taken in this area.

At least three justices are ready to reconsider that approach now, as made clear by Justice Neil Gorsuch's dissent joined by Chief Justice John Roberts and Justice Clarence Thomas. The case was argued on the second day of the term, before Kavanaugh joined the court, so he didn't vote.

The decision stemmed from the case of Herman Gundy, who, before SORNA's enactment, pleaded guilty in Maryland to sexually assaulting a minor. He was released from prison in 2012 and went to live in New York. But he didn't register there as a sex offender and was convicted for that failure.

On appeal, he argued that Congress unconstitutionally delegated legislative power when it authorized the attorney general to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. The majority rejected that argument, as had every other court in the country that considered it, Kagan said.

The law at issue here "does not give the Attorney General anything like the 'unguided' and 'unchecked' authority that Gundy says," she wrote, quoting Gundy's brief disapprovingly.

Alito noted in his concurrence that, "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."

He said he'd be willing to reconsider that approach, but because a majority of the court in the case isn't, he said "it would be freakish to single out the provision at issue here for special treatment." He joined Kagan's opinion, he said, because he "cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years."

After noting Alito's reticence, Gorsuch wrote in a lengthy dissent joined by Roberts and Thomas that, "Respectfully, I would not wait."

The dissent is "powerful and likely prophetic," Todd Gaziano of the Pacific Legal Foundation, a public interest group promoting limited government, said. Combined with Alito's concurrence, he said it "signals that five current justices would be willing to act, if Justice Kavanaugh is so disposed."

Door Open, Tariff Opportunity

The justices could announce as soon as June 24 whether they'll review the constitutional challenge to Trade Expansion Act Section 232 brought by the American Institute for International Steel (AIIS), a trade association of steel users supporting free trade.

The Cato Institute's Ilya Shapiro said that Alito's concurrence "certainly left the door open" on the non-delegation doctrine. With the court now at nine justices, with Kavanaugh participating, the court may have the appetite to revisit the doctrine, he said. The libertarian institute filed an amicus brief supporting AIIS's position. It filed one supporting Gundy, too.

Fordham Law's Abner Greene, a constitutional scholar, said that, even if a majority reinvigorates the doctrine, they could do so minimally, or incrementally. "It's impossible to know but the door is now clearly open."

The case is Gundy v. United States, U.S., No. 17-6086, affirmed 6/20/19.