THE NATIONAL LAW JOURNAL

SCOTUS Mystery: Why Is the Gundy Decision Taking So Long?

Tony Mauro

June 6, 2019

On Oct. 2 of last year, the second day of the Supreme Court's term, the justices heard arguments in a major separation-of-powers case, *Gundy v. United States*.

The questions from the bench came fast and furious. But once the arguments were over, the court's handling of the case has been anything but fast. It's been 247 days since the argument, and the court has yet to issue its opinion as it nears the end of the current term.

The long delay in the court's decision-making has been a mystery and a cause for consternation among court-watchers who view the case as a crucial milestone in the effort to shrink the power of federal regulators and bureaucrats.

"This is going to be a momentous decision, and everyone on the court knows it," said Todd Gaziano of the Pacific Legal Foundation, who filed an amicus brief in Grundy. "I thought from the start that it was going to take a long time." But few "momentous" cases take this long.

The Gundy case is a test of the "nondelegation doctrine," which states that under the Constitution, Congress may not delegate its legislative duties to other branches of government.

The vehicle for examining the doctrine is the Sex Offender Registration and Notification Act (SORNA), which delegates to the attorney general the power to issue certain regulations. Plaintiff Herman Gundy ran afoul of the regulations and is challenging them as an example of Congress delegating too much power to the executive branch, especially in the context of a criminal case.

The Cato Institute's Ilya Shapiro wrote in an amicus brief, "Herman Gundy was punished for violating a law that no legislature enacted. He now stands convicted of a crime based on the attorney general's whim. Few insults to the principles of a free society could be greater."

The government argues that the delegation in the SORNA law is appropriate because it is backed by an "intelligible principle" that justifies and limits the delegated authority.

It is a thorny case, but the long period of time between argument and decision is rare. Theories abound on why it is taking so long.

The first complication is that only eight justices were on the bench during the Oct. 2 argument. Brett Kavanaugh was not sworn in until Oct. 6. But if his absence produced a 4-4 tie, the court would probably have used a familiar tool in such cases: scheduling the case for reargument after

the ninth justice arrives. That occurred in *Knick v. Township of Scott*. It was argued Oct. 3, and then reargued Jan. 16. That case, too, has not been decided.

Another possibility is that whoever wrote the majority opinion lost the 5-3 majority, leaving the court to decide if the case needs to be reargued. Justice Sonia Sotomayor is likely to be the author of the majority, because she is the only justice who has not written an opinion in a case argued in the October cycle. Another plausible explanation is that the justices were still writing and circulating concurrences and dissents until the last minute. Gaziano predicts the decision will be a "magnum opus" with many pages.

Whatever the problem is, the mystery will likely be solved soon.

"I predict that if there's no decision heading into the last week of June, the chief justice will announce on the last day that it's being held over for reargument," Cato's Shapiro said. "In my view, that wastes a lot of resources and they should just let Kavanaugh participate in the decision making based on his reading of the briefs and argument transcript."

By longstanding tradition, new justices do not vote on cases that were argued before they joined the court. But court experts acknowledge that if they wanted to, new justices could participate, because the court at the time of handing down the opinion would include the new justice.

William Suter, the former clerk of the Supreme Court, told NLJ in 2017, "I know of no statute or rule that would prohibit a new justice from participating in such a case."

But he added, "I think the 'common sense rule' would be that a new justice would not participate. It would look fishy, especially if the newbie voted with the majority in a 5-4 decision."