Roll Call

Barrett, with Scalia as model, may be a moderate on regulation

At stake is court deference to regulators' interpretation of statutes

October 8, 2020

Jim Saksa

Nothing seems likely to deter Senate Republicans from confirming 7th Circuit Court of Appeals Judge Amy Coney Barrett to the Supreme Court — not next month's elections, not three senators in quarantine, and not her relatively blank record on legal principles that underpin the administrative state.

Barrett's confirmation hearings, scheduled for next week, will probably reveal little about how she would rule on any given case and are expected to focus on controversial issues — abortion, gay marriage, the coming election — rather than the doctrines buttressing the federal regulatory regime.

But Barrett would join a court whose conservatives have signaled a willingness to rethink two bedrocks of administrative law — Chevron deference and the non-delegation doctrine — using legal theories University of Chicago law professor Eric Posner has warned would "eat away at the constitutional foundations of the New Deal system, which is essential for protecting health and safety, the environment and much else."

Judges invoke Chevron deference when they can't decide what a contested bit of legislation means by accepting a government agency's reasonable understanding of the text. The non-delegation doctrine says the legislature can't hand over law-making powers to the executive branch, but the court has upheld Congress's broad allocations of rule-making power to agencies so long as they're limited by some "intelligible principle."

Conservative jurists have begun to question the two concepts which, combined, have empowered government agencies by allowing Congress to grant them expansive rule-making discretion and adopting their statutory interpretations in legal disputes.

A CQ Roll Call review of Barrett's legal opinions and academic writing revealed a few hints at how she would rule in cases that revisit Chevron and non-delegation, and legal experts say her commitment to originalist jurisprudence provides some more.

But there are limits to the past's predictive powers.

Ilya Shapiro, director of the Cato Institute's Center for Constitutional Studies, doesn't thinks Barrett's academic writings provide much insight into how she'd rule on administrative cases.

“She reads the law closely and you can’t say with knee jerk reaction that she’ll uphold or overturn agency action,” said Shapiro.

Peter M. Shane, a law professor at Ohio State University's Moritz College of Law, mostly agreed.

“I don’t think the appointment of any additional conservative member of the court is going to be good news for those in Congress who might have hopes of re-energizing the regulatory state,” said Shane. “How bad the news is, I think is hard to predict.”

Barrett says she’ll model herself after the late Justice Antonin Scalia, for whom she clerked.

“His judicial philosophy is mine too: A judge must apply the law as written,” she said at her nomination announcement. “Judges are not policymakers, and they must be resolute in setting aside any policy views they might hold.”

But Barrett isn’t the first Republican nominee to invoke Scalia’s jurisprudence — Neil Gorsuch did as well. But since joining the court, Gorsuch has emulated the more aggressive originalism of Clarence Thomas than Scalia’s. Originalists generally decide a statute or executive action’s constitutionality by looking to the original public meaning of the article in question.

Thomas, and now Gorsuch, have been more willing to rip up settled precedent than Scalia was. “I’m an originalist,” Scalia once said. “I am not a nut.”

It’s unclear whether Barrett would hew closely to Scalia’s trunk of originalism once on the court, or branch out like Gorsuch, but she has given a lot of thought to the question of when jurists — particularly originalists — should set aside precedent. In a 2013 Texas Law Review article, she argued that the Supreme Court recognizes a “weak” presumption of stare decisis — precedent — on constitutional issues, compared to more binding versions for common law and statutory opinions.

But she accepted the idea of “superprecedents” that “no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds,” suggesting she might be willing to leave alone the decades of court opinions comprising administrative law.

Scalia was a fan of both Chevron deference and a permissive view of non-delegation doctrine, applying both in cases throughout his career.

“In the long run Chevron will endure because it more accurately reflects the reality of government, and thus more adequately serves its needs,” he wrote in 1989.

According to Shane, Scalia thought both concepts promoted qualities he prized in jurists: objectivity and humility.

“If you tell me, as a judge, that I can set aside a statute because I think it is insufficiently specific — that it's delegation of authority is just too vaguely defined — then it is inevitable that statutes I don't like on policy grounds, they are going to look awfully general,” Shane said. “And statutes that I'm in favor of, they are going to look pretty darn specific.”

Non-delegation doctrine

The five Republican appointees on the court have indicated a willingness to revisit non-delegation doctrine, although a majority hasn't come together yet in a single given case.

The court will probably invoke non-delegation sometime soon, regardless of Barrett's confirmation — even though it has only been used twice, both in 1935, to invalidate a law — but she could affect how far it's willing to restrict Congress from granting agencies broad discretion in executing statutes.

In the extreme, it could cripple the modern regulatory state, but most experts doubt the court would go that far.

"It's unlikely that the court will hold that Congress cannot delegate rule-making authority," said Kathryn Kovacs, a Rutgers Law professor. "It could, on the other hand, require Congress to provide more textual constraints on agency discretion beyond the intelligible principle that current doctrine requires. So, the Court could move towards wanting Congress to specify, for example, the criteria for guiding decision making."

Barrett wrote about a subset of non-delegation doctrine in a 2014 Cornell Law Review article on Congress's ability to give the president the power to suspend the writ of habeas corpus. She presented the Constitution's Suspension Clause as one exception to "Congress's otherwise expansive power to implement legislation as it sees fit," and indicated there may be others.

"[T]he Suspension Clause stands as an exception to the nondelegation doctrine, which emphasizes the extremely broad leeway that Congress enjoys in assigning responsibilities to the Executive Branch," she wrote. "[T]he notoriously lax 'intelligible principle' test reflects the Court's conclusion that the decision of how to carry out routine social and economic policy belongs almost entirely to Congress."

That suggests Barrett may be willing to rethink non-delegation doctrine in limited settings, but not join in a blanket revision.

Will Chevron deference run out of gas?

While none of Barrett's 107 opinions on the 7th Circuit involved non-delegation doctrine, one did deal with Chevron. In that case, Cook County v. Wolf, Barrett dissented from the majority's holding that the administration went too far in redefining when an immigrant could be considered a public charge. She would have deferred to the Department of Homeland Security.

Barrett noted in written comments during her confirmation to the 7th Circuit that lower courts are strictly bound by Supreme Court precedent, meaning she could have seen it as her job to perform a Chevron analysis, regardless of her thoughts about it.

But Shane noted that courts deferred to agencies before Chevron, and even if the court tossed it out, the impact might be muted.

"It's very unclear that getting rid of Chevron would result in judicial decisions going a different way," Shane said. "I think it's just too hard to tell."

And regardless of where Barrett stands ideologically, Shapiro doesn't expect a seismic shift in the court's approach to these topics.

"I wish that this court would cut back the administrative state significantly," he said. "Certainly, with [Chief Justice John] Roberts in the middle and being an incrementalist and minimalist, you're not going to have sweeping, broad strokes."