

McClatchy DC BUREAU

Kavanaugh in line to decide ‘sleeper case’ that could rein in EPA, other agencies

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Conservative groups and jurists, including U.S. Supreme Court nominee Brett Kavanaugh, have long advocated restricting the latitude of the Environmental Protection Agency and other federal agencies to set rules and regulations, beyond what Congress has specifically authorized.

They may have that chance this fall. The Supreme Court has agreed to hear an obscure case, Gundy v. United States, with implications for the federal bureaucracy, including agencies that set rules for pollution, wildlife protection and food safety.

Numerous business-backed groups — including the Cato Institute, Competitive Enterprise Institute and Pacific Legal Foundation — have filed briefs in the case, hoping it will help advance their goal of “shrinking the administrative state.” Kavanaugh, if confirmed to the court before its next term starts, could cast a decisive vote.

“This is a really important sleeper case,” said Sean Hecht, a law professor at University of California, Los Angeles who has been tracking the Gundy proceedings. If the court rules very broadly, the justices could throw into question numerous legal provisions that currently give the EPA and other agencies latitude to set policy, he said.

President Trump and his advisers have made clear that downsizing the government, both in size and legal authority, is a top priority.

Former Trump strategist Steve Bannon pledged “deconstruction of the administrative state.” Speaking to the Conservative Political Action Conference in February, White House Counsel Don McGahn has said Trump vets potential judges in part on their opinions about the federal bureaucracy. “It’s kind of its own branch of government now, and those decisions tend to trend to the left,” McGahn told CPAC.

Kavanaugh apparently passed Trump’s test, as did Neil Gorsuch, confirmed to the high court last year. Both have criticized past Supreme Court decisions that, in their view, provided the executive branch and federal agencies with excessive authority, unchecked by Congress. Kavanaugh once called it an inevitable outgrowth of legislative gridlock.

“Presidents run for office on policy agendas and it is often difficult to get those agendas through Congress,” Kavanaugh wrote in 2016 in the Harvard Law Review. “So it is no surprise that presidents and agencies often will do whatever they can within existing statutes.”

President Barack Obama, in particular, was unable to pass many of his legislative priorities through a Republican-led Congress, prompting him to rely on executive orders and federal rule-making.

The Gundy case is an unusual one for conservative groups to rally behind. The case involves a convicted sex offender, Herman Avery Gundy, who ran afoul of the 2006 Sex Offender Registration and Notification Act (SORNA). Gundy, who committed his offense before the sex-offender law was enacted, went to court claiming that Congress had unconstitutionally delegated to the Justice Department how to apply the law retroactively.

In taking the case, the Supreme Court rejected some of Gundy's claims, but it agreed to examine if the law violated the "non-delegation doctrine" — a legal principle that the court hasn't used to strike down a law for eight decades.

The non-delegation doctrine sprung from the Constitution's requirement that Congress not delegate the legislating of laws to any agency of government. The high court used the doctrine to strike down two New Deal laws in 1935. Since then, it has effectively abandoned the doctrine, ruling that agencies can formulate regulations and policies, as long as they are acting on direct guidance — known as an "intelligible principle" — from Congress.

For example, Congress has granted the Food and Drug Administration a broad mandate to protect public safety, but it leaves it up to the FDA to determine which drugs should be licensed, and which foods should be recalled.

Conservative groups say agencies such as the EPA and FDA have abused this broad mandate, and engaged in "mission creep" to gradually expand their regulatory reach. Some of them have filed briefs in the Gundy case criticizing the Supreme Court for abandoning the non-delegation doctrine and have urged the court to revive it.

"Unfortunately, this Court has not enforced this principle in the last 83 years," the Pacific Legal Foundation said in a brief. Based in California, the legal foundation regularly challenges environmental laws and regulations that affect property owners and corporations.

Hecht, the UCLA law professor, said a broad high court ruling in favor of Gundy would give small-government groups new legal avenues to target environmental and other laws.

"At a minimum, a Supreme Court decision that was very broad would create the conditions for more legal challenges," Hecht said. "Parties would feel emboldened to say, you can't make us do this under the Clean Air Act, or Clean Water Act, or the Endangered Species Act, because Congress wasn't precise enough in the policy guidance it gave the agency.

But Hecht said it's possible the court will rule against Gundy, or rule narrowly in his favor. Other law professors agree, given the Supreme Court's recent history of declining to revive the non-delegation doctrine.

Ronald Levin, an administrative law expert at Washington University in St. Louis, said the court seems aware that a broad ruling in Gundy "would expose every statute to litigation and potential invalidation," on the grounds that Congress should have been more prescriptive.

“It is wildly unrealistic to think Congress would not delegate authority to administrative agencies,” Levin said. “This country has 300-plus million people. A Congress of 535 people cannot make all the decisions that need to be made for a country of this size.”

Levin said he suspects the Supreme Court accepted the case because of Gorsuch’s past criticism of the Sex Offender Registration and Notification Act. While a judge on the 10th Circuit Court of Appeals, Gorsuch wrote that the law “invests in the nation’s chief prosecutor the authority to devise a criminal code governing a half-million people.”

Groups such the Heritage Foundation hope that Gorsuch will join with conservative justices Clarence Thomas and Samuel Alito in using *Gundy* to prevent Congress from “outsourcing its power.”

Kavanaugh, if confirmed, would likely join in that cause.

As a judge on the DC Circuit Court of Appeals, Kavanaugh repeatedly challenged attempts by federal environmental agencies to expand their regulatory authority. Last year, the DC Circuit ruled against the EPA in an Obama-era program that requires companies to find substitutes for potent greenhouse gases called hydrofluorocarbons with other substances.

“However much we might sympathize or agree with EPA’s policy objectives, EPA may act only within the boundaries of its statutory authority,” Kavanaugh wrote.