Non-Delegation Revisited?: The Court's Changing Views in Light of Gundy v. United States

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By: Jacob Bruce, Staff Editor, Vol. 112

The basis of the non-delegation doctrine is straightforward and rooted in the principle of separation of powers: Congress may not fully delegate its strictly legislative powers to the executive, or some other branch of government.[1] The Court's current test requires little to show the delegation is not strictly legislative, Congress must only provide some "intelligible principle" upon which the executive branch can rely while carrying through their delegated authority.[2] Consequently, this broad discretion has resulted in the Court's almost constant deference to the executive's authority.[3] Only twice in the Supreme Court's jurisprudence, both during the height of the New Deal, has the Court found that such an "intelligible principle" was lacking.[4] This viewpoint existed almost entirely undisturbed for eighty-five years until *Gundy v. United States* was decided in 2019. Although the plurality decided the case along nearly identical lines as previous cases, a lukewarm concurrence from Justice Samuel Alito and a dissenting opinion from Justice Neil Gorsuch, joined by Justice Clarence Thomas and Chief Justice John Roberts, seem to suggest that the non-delegation doctrine may soon experience an overhaul.[5]

The controversy in *Gundy* centered around 34 U.S.C. § 20913(d), a portion of the Sex Offender Registration and Notification Act (SORNA).[6] Specifically, this subsection granted the Attorney General the authority to determine the applicability of SORNA's registration requirement to offenders convicted prior to SORNA's enactment.[7] Justice Elena Kagan, writing for a plurality of the Court, upheld the statute, finding that delegation of authority fell squarely within the "intelligible principle" standard, as the statute sufficiently conveyed "Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible."[8] Justice Kagan also highlighted the policy implications underlying the current non-delegation doctrine regime, stating that "if SORNA's delegation 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."[9]

Three members of the Court, led by Justice Gorsuch, dissented.[10] Justice Gorsuch began by noting the Framers intentional approach to separation of powers, specifically their desire to vest legislative authorities solely with Congress.[11] Undoubtedly, Justice Gorsuch points out, these views were heavily influenced by the writings of John Locke, who posited, "the legislative cannot transfer the power of making laws to any other hands; for it being by a delegated power from the people, they who have it cannot pass it over to others."[12] In Justice Gorsuch's view, the Framers viewed the greatest danger of the new post-Constitutional federal government as "the power to enact laws restricting the people's liberty."[13] Thus, the Framers created a system in Article I of the Constitution which was designed to promote deliberation and a "detailed and arduous process for new legislation."[14] Given this context, Justice Gorsuch analyzed the "intelligible principle" standard, and ultimately concluded that this test was a "mutilated version" of the remark made by Chief Justice

William Howard Taft with "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[15] Rather that creating a new judicial standard for non-delegation, Justice Gorsuch opined, Chief Justice Taft was merely describing the "traditional rule that Congress may leave the executive the responsibility to find fact and fill up details."[16] Justice Gorsuch then set out the parameters of a new test:

> To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgements? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.[17]

Given the current Court's composition it seems probable that the Court will in the future give ample consideration of the "Gorsuch test" in future cases invoking the non-delegation doctrine.[18] At the time *Gundy* was decided, the Court had only eight confirmed members. The swing vote in *Gundy* came from Justice Alito, whose lukewarm concurrence further hinted that a reconsideration of non-delegation doctrine principles may soon be underway.[19] Justice Alito made this clear, stating, "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."[20] Since only three justices were willing to depart from the current standard, however, Justice Alito joined Justices Kagan, Sonia Sotomayor, Ruth Bader Ginsburg, and Stephen Breyer in upholding the precedent.[21] In the five years which have passed since *Gundy*, two additional justices with a sharply originalist philosophy have been confirmed to the Court, leading some to believe there may be as many as six justices in support of a more stringent application of the non-delegation doctrine.[22] Justice Brett Kavanaugh specifically has since lent his endorsement to the doctrinal basis of the "Gorsuch test" in just his first several months on the Court, albeit in the form of a statement respecting a denial of certiorari.[23] Although the future is still yet to be written with respect to the non-delegation doctrine, it seems as likely as ever that the Court's almost ninety-year-old "intelligible principle" standard may soon give way to a new test, along the lines of the one posed by Justice Gorsuch, which will inevitably result in a far more stringent threshold for Congress's delegation of authority to the executive.[24]

Considered in the light of historical context, Justice Gorsuch's new test not only breathes new life into a largely stale and underutilized legal doctrine, but it also adheres more closely to the separation of powers principles the Framers prioritized in drafting the Constitution. As Justice Gorsuch pointed out, the Framers were intentional in their design of the federal system, with the role of making policy judgments placed squarely within the legislative branch.[25] The Framers did not merely do so because it was simple or efficient, but rather to ensure a deliberative process on policymaking decisions, especially with respect to laws restricting the liberty of American citizens.[26] Thus, the Court should, at its next opportunity, strongly consider adopting the "Gorsuch test" as a replacement for the "intelligible principle" standard for the appropriate delegation of legislative responsibilities to the executive branch.

[1] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825).

[2] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

[3] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474-75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 373 (1989)).

[4] See A.L.A Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *see also* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[5] Jonathan Hall, *The Gorsuch Test: Gundy v. United States, Limiting the Administrative State, and the Future of Nondelegation*, 70 Duke L.J. 175, 214 (2020).

[6] Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).

[7] *Id.* at 2122.

[8] *Id.* at 2129.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 2133 (Gorsuch, J., dissenting) (citing Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

[12] *Id.* (Gorsuch, J., dissenting) (quoting John Locke, Second Treatise §141.).

[13] *Id.* at 2134 (Gorsuch, J., dissenting) (citing The Federalist No. 48 (James Madison)).

[14] *Id.*

[15] *Id.* at 2139.

[16] *Id.*

[17] *Id.* at 2141.

[18] Hall, *supra* note 5, at 214.

[19] Gundy, 139 S. Ct. at 2130 (Alito, J., concurring).

[20] *Id.*

[21] *Id.*

[22] Peter J. Wallison, *An Empty Attack on the Nondelegation Doctrine*, Am. Enter. Inst. (Apr. 22, 2021), www.aei.org/op-eds/an-empty-attack-on-the-nondelegation-doctrine/ (http://www.aei.org/op-eds/an-empty-attack-on-the-nondelegation-doctrine/).

[23] Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (denying certiorari on the basis the case raised the same issue the Court resolved in Gundy v. United States, 139 S. Ct. 2116 (2019)).

[24] Hall, *supra* note 5, at 202.

[25] Gundy, 139 S. Ct. at 2133 (Gorsuch, J. dissenting).

[26] *Id.* at 2134.

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