Expert Analysis: Kavanaugh Comment May Spur Crop Of Nondelegation Cases

By Elbert Lin, Trevor Cox and Erica Peterson
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May Congress delegate legislative authority to executive agencies? The U.S. Supreme Court has long said yes. So long as "Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[1]

But change may be afoot. After the Supreme Court's decision last term in *Gundy v. United States*,[2] which featured a critical dissent by Justice Neil Gorsuch, many speculated that the court's conservative wing may be prepared to revive the long-dormant nondelegation doctrine, and thereby limit Congress's authority to delegate legislative power.[3]

That view now finds further support from Justice Brett Kavanaugh, who did not participate in Gundy, but recently praised the Gundy dissent in a statement respecting denial of certiorari and appeared to suggest that the court revitalize the nondelegation doctrine at least with respect to major policy questions. Such a significant change in the law would offer regulated entities and individuals a potent defense against agency overreach.

The Long-Dormant Nondelegation Doctrine

Proponents of nondelegation, like Justice Gorsuch, trace it to first principles: the U.S. Constitution's distribution of three distinct types of governmental power among the three branches. As Justice Gorsuch explained, the framers believed the lawmaking power — the power to adopt generally applicable rules governing the actions of private individuals — to be the most dangerous of the federal government's powers.[4]

The Constitution vests this authority in Congress. And it would frustrate the constitutional design and threaten individual liberty if Congress could delegate legislative functions to the executive, which would not be subject to the constraints of bicameralism and presentment.[5] Thus, the Supreme Court recognized in the early decades of the republic that the Constitution does not allow Congress to transfer to another branch any "powers which are strictly and exclusively legislative."[6]

According to Justice Gorsuch, the framers offered several important guiding principles for determining whether Congress has permissibly transferred legislative power to another branch.[7]

First, so long as Congress makes the policy decision, it may authorize another branch to "fill up the details."[8] Second, once Congress prescribes a rule governing private conduct, it may make that rule's

application contingent on executive fact-finding.[9] Third, Congress may assign nonlegislative responsibilities to the executive and judicial branches.[10]

Applying those principles, the Supreme Court twice struck down congressional delegations on separation-of-powers grounds in 1935.[11] In *A.L.A. Schechter Poultry Corp. v. United States,* the court rejected Congress's transfer of power to the president "to approve 'codes of fair competition'" for slaughterhouses, because it fit none of the three permissible categories of delegation.[12] And in *Panama Refining Co. v. Ryan*, the court struck a statute that authorized the president to decide whether and how to prohibit the interstate transportation of unlawfully produced petroleum — i.e., to do more than ascertain the existence of facts or "fill up the details."[13]

Since those two decisions, the court has not found any statute unconstitutional on nondelegation grounds. But that may be about to change.

Gundy and the Nondelegation Doctrine's Potential Resurgence

Decided by an eight-member court,[14] Gundy upheld a provision of the Sex Offender Registration and Notification Act, or SORNA, that grants the attorney general "authority to specify the applicability of [SORNA's registration requirements] to sex offenders convicted before the enactment of [SORNA]."[15]

Gundy had challenged his conviction, arguing that Congress's delegation of authority to the attorney general was invalid. Five justices voted to reject the challenge. A four-justice plurality concluded that the provision was not an unconstitutional delegation because Congress had provided an "intelligible principle" to guide the exercise of executive discretion:

"[A] statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform."[16]

Concurring only in the judgment, Justice Samuel Alito provided the fifth vote. Joined by the Chief Justice John Roberts and Justice Clarence Thomas, Justice Gorsuch dissented.

In a short opinion, Justice Alito explained that if a majority of the court were willing to reconsider its approach to legislative delegations, he would support that effort.[17] But given the lack of a majority to do so in Gundy, he concurred with the plurality, concluding that "it would be freakish to single out the provision at issue here for special treatment."[18]

Though he did not say it, Justice Alito's decision may have been strategic. Had he voted to dissent, the court would have split 4-4, affirming without any written opinions. By concurring in the judgment instead, Justice Alito gave both himself and Justice Gorsuch the opportunity to issue opinions. And Justice Gorsuch took full advantage, penning a lengthy, full-throated defense of nondelegation.

The three-justice dissent provides an analytical road map that a majority might follow in revitalizing the nondelegation doctrine. After reviewing the constitutional roots of nondelegation, as summarized above, Justice Gorsuch criticized the intelligible-principle doctrine as having improperly displaced the proper approach to nondelegation.

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The phrase first appeared in *J.W. Hampton, Jr., & Co. v. United States*, in which the court held that a statute would satisfy the separation of powers if Congress provided "an intelligible principle to which the [executive official] is directed to conform."[19] But this was not intended to create a new rule of nondelegation, as Justice Thomas explained in a 2015 opinion cited by Justice Gorsuch.[20]

Rather, the court in J.W. Hampton upheld the statute based on one of the three principles of nondelegation described above — it set down a generally applicable rule contingent on executive fact-finding.

Justice Gorsuch's dissent explained how the intelligible principle remark "began to take on a life of its own," developing into a foundationless doctrine used to authorize expansive delegations of legislative power so long as Congress supplied minimal instructions to guide the executive's discretion.[21]

For example, in 2001, the court upheld Congress's delegation of authority to the U.S. Environmental Protection Agency to set ambient air quality standards at a level "requisite to protect the public health."[22] Noting that it had previously upheld broad delegations to agencies to regulate in the public interest,[23] the court explained that it would not "second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[24]

Like Justice Alito, the three Gundy dissenters invited reinvigoration of the nondelegation doctrine in a future case with a full panel.[25]

A Fifth Justice Voices Support

That brings us to Justice Kavanaugh, who did not participate in Gundy, but recently indicated his support for reconsidering the court's nondelegation cases. On Nov. 25, the court denied certiorari in *Paul v. United States*,[26] a case presenting the same question as Gundy. Justice Kavanaugh's statement respecting the denial of certiorari praised Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine" as possibly "warrant[ing] further consideration in future cases."[27]

Notably, Justice Kavanaugh focused on "a nondelegation principle for major questions."[28] Justice Kavanaugh highlighted that the court has applied "a closely related statutory interpretation doctrine"—that Congress will not be held to have delegated matters of major political or economic significance unless it does so "expressly and specifically."[29]

He then suggested that Justice Gorsuch's approach would take that doctrine a step further; it would foreclose "congressional delegation to agencies of authority to decide major questions" even if expressly and specifically delegated. But Congress could still delegate authority to decide "less-major" questions or "fill-up-the-details decisions."[30]

The Future of Nondelegation

Now that five members of the court have clearly expressed a willingness to reconsider the court's longstanding approach toward nondelegation, it seems likely that cases raising the issue will head their way. If they have not already, nondelegation issues should begin to crop up not only in court cases, but also in regulatory proceedings ranging from enforcement actions to notice-and-comment rulemakings, as parties seek to lay the foundation for future appeals.

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Justice Kavanaugh's focus on the difference between major questions and "less-major" questions may prove extremely important in determining which cases are best suited for Supreme Court review. It could also spawn a plethora of briefs, opinions, and scholarly articles attempting to discern where that line falls.

Perhaps just as important is Justice Kavanaugh's apparent endorsement of the statutory major questions doctrine, an issue on which he wrote favorably while still on the U.S. Court of Appeals for the District of Columbia Circuit. In 2016, the D.C. Circuit upheld the Federal Communication Commission's net neutrality rule, which subjected broadband service to common carrier regulation.[31]

Then-Judge Kavanaugh dissented from the denial of rehearing en banc, concluding in part that the rule was unlawful under the statutory major questions doctrine.[32] He also discussed the doctrine as an exception to Chevron deference in a 2016 law review article on statutory interpretation.[33]

Setting aside broader questions of nondelegation, now-Justice Kavanaugh is positioned to say a thing or two more about the statutory major questions doctrine, if raised by litigants in a future case.

Notes

1. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

2. *Gundy v. United States*, 139 S. Ct. 2116 (2019).

3. See, e.g., Evan Zoldan, *Gundy v. United States*: A Peek into the Future of Government Regulation, *The Hill* (June 21, 2019), https://thehill.com/opinion/judiciary/449687-gundy-v-united-states-a-peek-into-the-future-of-government-regulation; Jeannie Suk Gersen, The Supreme Court Is One Vote Away From Changing How the U.S. Is Governed, *The New Yorker* (July 3, 2019), https://www.newyorker.com/news/our-columnists/the-supreme-court-is-one-vote-away-from-changing-how-the-us-is-governed.

4. Gundy, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

5. Id.

6. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825).

7. Gundy, 139 S. Ct. at 2135–36 (Gorsuch, J., dissenting).

8. Wayman, 23 U.S. (10 Wheat.) at 36.

9. See, e.g., *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813) (upholding a statute imposing a trade embargo if the President found that France or Great Britain were interfering with American trade).

10. Gundy, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

11. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

12. 295 U.S. at 521–22.

13. 293 U.S. at 426–30.

14. Because he did not join the court until after oral argument had occurred, Justice Kavanaugh did not participate in deciding the case.

15. Gundy, 139 S. Ct. at 2122 (quoting 34 U.S.C. §20913(d)).

16. Id. at 2121–23 (quoting Mistretta, 488 U.S. at 372).

17. Id. at 2131 (Alito, J., concurring in the judgment).

18. Id.

19. Gundy, 139 S. Ct. at 2138–39 (Gorsuch, J., dissenting) (quoting J.W. Hampton, 276 U.S. at 409).

20. *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 77–82 (2015) (Thomas, J., concurring) (arguing that the court "should return to the original meaning of the Constitution" that the government may create generally applicable rules "only through the proper exercise of legislative power").

21. See, e.g., Mistretta, 488 U.S. at 379 (upholding assignment of authority to develop sentencing regulations on the basis of an "intelligible principle"); *Lichter v. United States*, 334 U.S. 742, 785 (1948) (upholding delegation of authority to define "excessive profits" earned by military contractors because it provided an "intelligible principle").

22. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001).

23. Id. at 472–74.

24. Id. at 474–75.

25. Gundy, 139 S. Ct. at 2148 (Gorsuch, J., dissenting).

26. 140 S. Ct. 342 (2019) (mem.).

27. Id.

28. Id.

29. Id.

30. Id.

31. *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 697–700 (D.C. Cir. 2016).

32. *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 417–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

33. Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2151 (2016).

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