

The 'Administrative State' Lives To Fight Another Day

By **Jimmy Hoover**

Law360, Washington (June 20, 2019, 8:01 PM EDT) -- Conservatives had hoped the U.S. Supreme Court's ruling in *Gundy v. U.S.* would strike a major blow to the so-called administrative state by reviving the long-dormant nondelegation doctrine. While the court refused to do so, the fight is far from over.

In *Gundy*, the justices voted 5-3 **to reject arguments** that a sex offender law is unconstitutional because it delegates too much power to the U.S. attorney general over how it should be enforced. In doing so, the court declined a chance to strike down a federal statute under the nondelegation doctrine for the first time since the 1930s.

But four conservative justices signaled a willingness to revisit the issue in a future case, one where Justice Brett Kavanaugh could participate. He joined the bench after the *Gundy* arguments were held on Oct. 2 and played no role in the court's decision. Observers thus read the court's ruling as a temporary victory for skeptics of the nondelegation doctrine, and litigants may soon try to put the issue back before the justices.

Scholars, lawyers and judges on the political right have clamored for the revival of the nondelegation doctrine in recent years to combat the growth of the myriad federal agencies and regulators that make up the modern executive branch. The doctrine enjoyed a brief heyday in the 1930s when the Supreme Court invoked it twice, invalidating aspects of a New Deal law during Franklin D. Roosevelt's administration.

Although it hasn't been used since, it's still technically on the books, which is why some have deemed it a "shotgun behind the door." Petitioner Herman Gundy, a convicted sex offender being supported by various conservative and libertarian groups, asked the Supreme Court to pull the shotgun's trigger and invalidate a portion of the Sex Offender Registration and Notification Act.

Justice Elena Kagan's opinion for the court declined to do so, citing the far-reaching consequences of such a ruling for administrative agencies.

"[I]f 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," Justice Kagan said.

But Justice Kagan's musings about the dangers of an emboldened nondelegation doctrine don't speak for a majority of the court. That's because Justice Samuel Alito — the swing fifth vote in the case — declined to join her opinion and instead penned his own short concurrence.

In it, he agreed with the ultimate judgment but expressed a willingness to reconsider the issue in a future case.

"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," he said. "But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."

What's more, Justice Kavanaugh, who was confirmed a few days too late to participate in *Gundy*, might also want to see the nondelegation doctrine rejoin the living. Justice Kavanaugh has criticized the growth of agency power in the past through doctrines like Chevron deference, where courts are made to defer to an agency's reasonable interpretation of an ambiguous statute during

rule-making challenges.

Justice Neil Gorsuch, whose hostility to the administrative state was part of the reason he was appointed, wrote a lengthy dissent on behalf of the remaining conservatives — Chief Justice John Roberts Jr. and Justice Clarence Thomas — effectively teeing the issue up for another day.

"In a future case with a full panel, I remain hopeful that the court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code," he said.

The message was not lost on the bar.

"Gorsuch's and Alito's opinions together are nothing short of an open invitation to litigants and lower court judges to present cases to the high court that could fully reinvigorate the nondelegation principle in the foreseeable future," said Todd Gaziano, director of the conservative Pacific Legal Foundation.

"Pacific Legal Foundation is delighted to take up that invitation," he added.

University of Toledo College of Law professor Evan Zoldan said that "a close reading of the opinions indicates that the court may be poised to strike down broad congressional delegations of authority to the executive branch in the future."

"The implications of such a move would be dramatic for modern government. Among other effects, it could call into question the legality of many federal health, safety, and environmental regulations," he said.

It's not clear in what scenario the justices would revisit the issue and how soon, but the Supreme Court will soon rule in another case that could threaten the power of administrative agencies. In the coming days, the justices are expected to rule on whether to overturn what has been a powerful tool agencies use in legal battles known as Auer deference. Related to Chevron deference, Auer instructs courts to defer to an agency's interpretation of its own regulation, unless clearly erroneous.

This time, however, Justice Kavanaugh will have a vote in the matter. Justices Roberts and Kavanaugh **emerged as the potential swing votes** during a hearing in the case in late March, picking out the weaker aspects of each side of the argument as court-watchers tried to glean clues about their positions.

The case is *Gundy v. U.S.*, case number 17-6086, in the Supreme Court of the United States.

--Editing by Emily Kokoll and Jill Coffey.