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Maintaining the Constitution's Separation of Powers

by

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On Tuesday, the U.S. Supreme Court will hear oral arguments in *Gundy v. United States*. Herman Gundy is asking the court to vacate his conviction for failing to register as a sex offender under the Sex Offender and Registration Notification Act (SORNA). Of course Mr. Gundy has much at stake personally in the outcome of his case.

But so do we all, for the decision in Gundy may have broad implications for the way fundamental separation of powers principles are enforced. This is because Mr. Gundy claims SORNA violates the “nondelegation doctrine” which, at least in theory, prohibits Congress from delegating to any other entity “legislative powers,” all of which the Constitution, by its terms, vests in Congress.

In purporting to limit delegation of Congress' legislative power to the Executive Branch, the nondelegation doctrine is central to maintaining the separation of powers at the core of the Founders' Constitution.

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For those, like me, who believe the structure of government is as important as the Bill of Rights in protecting citizens against abuses of government power and ensuring accountability for the actions of government officials, the extent to which Supreme Court enforces — or refrains from enforcing — the nondelegation doctrine is of great import.

And it is of import to the functioning of modern administrative state as well.

Here's the essence of Mr. Gundy's claim. For sex offenders convicted after enactment of SORNA, Congress set forth in detail the various aspects of the registration requirements. But for offenders, like Mr. Gundy, convicted before SORNA's enactment, Congress left it entirely up to the U.S. Attorney General to determine the statute's applicability and implementation.

In fact, SORNA is so devoid of any direction that the statute can be read to give the Attorney General unlimited discretion to decide if, when and how sex offenders convicted prior to SORNA's adoption must register.

In a nondelegation doctrine challenge, the Supreme Court in 1928 declared: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." Remarkably, the last time the court held a statute unconstitutional for violating the nondelegation doctrine was in 1935.

That year, in *Panama Refining Co. v. Ryan*, the court held unconstitutional the New Deal's National Industry Recovery Act authorization to the president to prohibit the shipment of so-called "hot oil." The court concluded the law did not state "whether, or in what circumstances or under what conditions, the President is to prohibit the transportation" of the embargoed oil.

The court explained that if the law were allowed to stand, "instead of performing its law-making function, the Congress could at will and as to such subjects as it chose to transfer that function to the President or other officer or to an administrative body."

Since 1935, we have witnessed what Justice Benjamin Cardozo's once called "delegation running riot" and, with it, the increasing power of unelected agency bureaucrats. For example, the court has condoned a delegation to EPA to adopt regulations "requisite to protect public health." So, too, Congress' delegation to the FCC merely to act in the "public interest" in promulgating regulations.

The court has an opportunity in *Gundy* to reinvigorate the nondelegation doctrine. There is no way to read SORNA's delegation of authority to the Attorney General as anything but standardless delegation absent any intelligible principle.

James Madison's Federalist No. 51 is an excellent tutorial explaining why the Founders created a structure of government based on separation of powers. Madison called the "separate and distinct exercise of different powers of government essential to the preservation of liberty." Essential because separation of powers inhibits the accumulation of too much power in one branch and

focuses accountability on those government officials responsible for making decisions that affect our lives.

As long as Congress is allowed to engage in directionless delegations to administrative agencies, it will be more difficult to hold our elected representatives accountable for their actions. And, at the same time, it will be difficult for the courts to hold unelected agency officials accountable for their actions under statutes so ambiguous that they lack any truly guiding intelligible principles.

Mr. Gundy has presented the court with a strong case for vacating his failure-to-register conviction. The court should avail itself of the opportunity presented not only to vindicate Mr. Gundy's claim but to breathe new life into the now nearly moribund nondelegation doctrine.

By ruling that Congress must provide more specific directions in laws in order to avoid unconstitutional delegations of its authority, the court can promote democratic accountability while providing a welcome check on the exercise of unbridled discretion by too many agency bureaucrats.

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