

Waking the "Zombies"

Possible Changes to EPA's Longstanding Article I Administrative Discretion in Rulemaking

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Background

In a recent case taking up these two threshold issues, the Court did not restrict congressional delegations of legislative rulemaking power to agency discretion or the agency's power to interpret its own rules, but instead signaled that future cases on these issues likely would be reviewed more closely and potentially with a more limiting result in both examples. EPA's controversial rules interpreting and redefining the phrase, "Waters of the United States" under the Clean Water Act, and comparable EPA rules under the Clean Air Act, are among many rules that are the subject of litigation, and almost certainly will be impacted by future decisions of the Court.

In *Gundy v. United States*, a 5-3 majority of the Court evaluated the Nondelegation Doctrine, which bars Congress from transferring its legislative power to another branch of government. The doctrine, though infrequently analyzed, has been leniently interpreted by courts to defer to Congress and afford agencies broad discretion. The *Gundy* Court again voted to uphold the current, more lax view of the Nondelegation Doctrine.

The doctrine is founded in Article I of the Constitution, which provides that "all legislative powers herein granted shall be vested in the Congress of the United States." This is understood to operate as a bar on further delegations of "powers which are strictly and exclusively legislative." Nevertheless, the Court has long held that Congress may confer substantial discretion to the executive agencies so long as the congressional legislative act lays down an "intelligible principle" to which the person or agency must conform.

This legal analysis requires the Court to construe the statute in question to figure out what task it delegates and what instructions it provides. Applying this test, the Court in *Gundy* noted "Only twice in this country's history (and that in a single year [1935]) have we found a delegation excessive - in each case because 'Congress had failed to articulate any policy or standard' to confine discretion."

Intelligible Principle Interpretation

Gundy cites numerous cases following the "intelligible principle" test, including *Whitman v. American Trucking*, which upheld a statutory delegation under the Clean Air Act in light of its "purpose, factual background and context." *Gundy* upheld a sex-offender rule on similar reasoning, finding that an "intelligible principle" as applied in earlier cases could be found for the agency's reasoning, but four of the Justices signaled they were ready for a more restrictive interpretation of the doctrine in a later case. In his dissent, Justice Gorsuch said of the majority opinion:

This mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked. Judges and scholars

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representing a wide and diverse range of views have condemned it as resting on ‘misunderst[ood] historical foundations.’

Instead, according to Gorsuch and the dissenters, the appropriate meaning of intelligible principle should be grounded in *Touby v. United States*, an earlier case which questioned whether more specific guidance than an “intelligible principle” is required. Justice Gorsuch appears on board with a more detailed inquiry, stating:

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 judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

New Standards for Agency Rules

In his concurring opinion, Justice Samuel Alito voiced his support for reconsidering the Court’s approach to analyzing the Nondelegation Doctrine, flatly stating that the Constitution “does not permit Congress to delegate [its legislative powers] to another branch of the government.” Although Alito concurred with the majority in *Gundy*, that was to avoid the “freakish” act of singling out the provision at issue, given the majority’s refusal to overturn 84 years of the “intelligible principle” paradigm. However, adding up Alito’s concurrence, Justice Kavanaugh’s addition to the Court, and the dissent in *Gundy*, there may now be a path for the long-established “intelligible principle” standard to be on its way out, or at least defined more narrowly.

If EPA’s rules (or those of another agency) are put to this more restrictive test under the Nondelegation Doctrine in a future Supreme Court case, EPA (or another agency) will have a greater challenge to defend its rules by showing that the authority given it by Congress does not exceed the Article I limits. If the statute in question does not match the *Touby* test and Justice Gorsuch’s related interpretation, or some similar standards devised by the Court, disapproval of the rule at issue becomes more likely than the reflexively deferential result by the Court in *Gundy*.

Takeaway

Predicting outcomes in future Supreme Court cases is a bit like forecasting the weather, but with Justice Kavanaugh participating in the next round of cases (he had not been sworn in at the time of *Gundy*) and given Justice Alito’s expressed criticism of the lax Nondelegation Doctrine (even though he voted with the majority), it appears that, at a minimum, a new and more stringent test will be applied in the next case which deals with the doctrine. Article I may have become zombieified since 1935 and not used to restrict overly-broad congressional delegations of legislative powers to regulatory agencies, but it could be brought back to life and used to narrow agency rulemakings.

Note: This is the first of three alerts on limitations of EPA’s discretionary powers to be reviewed. EPA’s authority to interpret its own rules and EPA’s enforcement discretion will be addressed in later, separate alerts. Also, warning: Zombies are not real and there is no pejorative intent in use of the term; “Zombie” is a descriptor used by courts for long-embedded laws, rulings or amendments that are inactive but brought to life by new events.

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CONTACT

For more information on how the new appointments to the Supreme Court may affect discretions in rulemaking, please contact one of the attorneys listed below or the Stinson LLP contact with whom you regularly work.



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