The Near Death Experiences of Doctrines of Delegation and Deference to Administrative Agencies

By Maranda E. Fritz and Aaron D. Lebenta

The court is moving toward more conservative positions that reflect a resistance to the authority wielded by administrative agencies within the executive branch.

New York Law Journal (7/18/2019) In opinions issued during the last two weeks of the 2018 term, the Supreme Court addressed the hotly debated issues of the flow of power to administrative agencies from Congress, on the one hand, and courts on the other hand. The specific outcomes of those cases—the court's apparent acquiescence to *Auer* deference and to broad congressional delegation—may leave practitioners disinclined to press those issues going forward. But a further review and comparison of those decisions in *Gundy v. United States*, 139 S. Ct. 2116 (2019) and *Kisor v. Wilkie*, No. 18-15, — S. Ct. —, 2019 WL 2605554 (June 26, 2019) reveals that the non-delegation doctrine was certainly revived, with its fate now squarely in the hands of Justice Brett Kavanaugh, while the *Auer* doctrine was narrowed or, in the words of Justice Neil Gorsuch, "maimed, enfeebled—in truth zombified," and five justices still look forward to its "interment."

These interwoven and layered issues begin with consideration of the extent to which Congress is constitutionally permitted to delegate legislative authority to agencies within the executive branch. At the next analytical level are principles of agency deference, and the extent to which the courts are obligated to defer to the administrative agencies' interpretation of either statutes or agency regulations. Conservative courts and commentators have bemoaned the broad acceptance of both broad congressional delegation and judicial deference to administrative agencies, and the "unprecedented proliferation of a vast administrative state over the last eight and a half decades." Carrie Severino, "What *Gundy v. United States* means to the non-delegation doctrine (https://www.nationalreview.com/bench-memos/fragmented-gundy-court-suggests-the-nondelegation-doctrine-might-have-a-future/)," National Review (June 21, 2019); see, e.g., David Schoenbrod, "The Delegation Doctrine: Could the Court Give It Substance?," 83 Mich. L. Rev. 1223, 1231 (1985); Philip Hamburger, *Is Administrative Law Unlawful?* p.378 (2014); Gary Lawson,

"Delegation and Original Meaning," 88 Va. L. Rev. 327, 340 (2002); Brett M. Kavanaugh, "Fixing Statutory Interpretation, Judging Statutes," 129 Harv. L. Rev. 2118 (2016) (book review). Justice Samuel Alito has expressed "concern about the aggrandizement of the power of administrative agencies" while Justice Clarence Thomas bluntly stated that *Auer* deference disrupts the appropriate balance of power, "ceding the courts' authority to independently interpret and apply legal texts." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J. concurring) (Thomas, J. concurring) (Scalia, J. concurring). Even Justice Antonin Scalia, the author of the *Auer* decision, harshly criticized the rule and stated that he would "abandon[] *Auer*" and "restore the balance originally struck by the APA." Id. at 1213.

The addition of Justices Gorsuch and Kavanaugh only served to reenergize the debate and the conservative justices, writing separately and in lengthy opinions by Justice Gorsuch, are unquestionably making substantial headway.

'Gundy' and the Non-Delegation Doctrine

The permissibility of Congress' delegation of a legislative function to administrative agencies within the executive branch was the subject of *Gundy*, in which the majority of the court, enabled by the concurring vote of Justice Alito, declined to find that the statute contravened the non-delegation doctrine. Four of the justices, however, made plain their embrace of that doctrine while Justice Kavanaugh remained on the sidelines, not able to participate in the decision.

The majority opinion by Justice Elena Kagan describes the non-delegation doctrine as follows: "Article I of the Constitution provides that 'all legislative Powers herein granted shall be vested in a Congress of the United States. §1. Accompanying that assignment of power to Congress is a bar on its further delegation.'" Id. at 2123 (citation omitted). Delegation is permissible, the majority stated, "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.'" Id. (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) (alterations in original). The majority reviewed the decades of authority applying that language of an "intelligible principle," compared the legislation at issue to innumerable other instances of broad delegations of authority by Congress, and concluded that the legislation at issue "easily passes muster." Id. at 2129.

But the view expressed in the majority opinion appears not to be shared by the five conservative members of the court. Although Justice Alito cast the deciding vote *with* the majority, he wrote separately to communicate his interest in "reconsidering" the "84 years" of authorities that have acceded to broad and arguably ill-defined congressional delegations of authority to

administrative agencies. Perhaps referring to the fact that Justice Kavanaugh could not participate in the case, Justice Alito stated that "if a majority of this Court were willing to reconsider the approach we have taken [to delegation] for the past 84 years, I would support that effort." Id. at 2131. Because the majority "is not willing to do that," he evaluated the provision based on the current state of the law, concluded that the statute did contain a "discernible standard" to guide the agency, and so voted to affirm. Id.

That disagreement with a broad view of delegation was articulated at length in the protracted dissenting opinion. Joined by the Chief Justice and Justice Thomas, Justice Gorsuch insisted that the statute "scrambles" the legislative process ordained by the Constitution "that only the people's elected representatives may adopt new federal laws restricting liberty." Id. (Gorsuch, J. dissenting). The prohibition on Congress' ability to transfer that power to make laws, the dissent pointed out, served a critical purpose. The framers, viewing an "excess of law making" as a "disease[]" of government, *wanted* "to make lawmaking difficult." Id. at 2134 (Gorsuch, J., dissenting). The "detailed and arduous processes for new legislation" not only constrained the ability of government "to restrict the people's freedoms" through the passage of laws but also "promote[d] deliberation" and "fair notice." Id. at 2134 (Gorsuch, J., dissenting).

But, the dissent acknowledged, Congress may make the policy decisions and "authorize another branch to 'fill up the details.'" Id. at 2136 (Gorsuch, J., dissenting). According to the dissent, the proper standard for such delegation was articulated by the court early on: "Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts and the public to ascertain' whether Congress's guidance has been followed." Id. at 2136 (Gorsuch, J., dissenting). The dissent explained that the failure of the courts properly to apply this stricter standard stems from the "misadventure" of "the evolving 'intelligible principle' doctrine." *Id*. at 2138, 2140 (Gorsuch, J., dissenting). Beginning in the late 1940s, a "mutated version" of that principle developed and "began to take on a life of its own." Id. at 2139 (Gorsuch, J., dissenting). That mutation then served as the basis for the court's failure, for decades, to rein in the untoward abdication by Congress of its obligation to circumscribe the authority delegated to the executive branch. Justice Gorsuch ended his opinion with what appeared to be yet another reference to the fact that Justice Kavanaugh did not participate in the case, setting forth his hope that "[i]n a future case *with a full panel*, ... the Court may yet recognize that, while Congress can enlist considerable help 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 code. That 'is delegation running riot.'" Id. at 2148 (Gorsuch, J., dissenting) (emphasis added).

Given the views expressed loudly and clearly by the Chief Justice, Justice Gorsuch, Justice Thomas and Justice Alito, the outcome of the case can be seen as an anomaly, with a full revival of the non-delegation doctrine dependent on the view of Justice Kavanaugh.

'Kisor v. Wilkie' and Agency Deference

A similar turn of events occurred in *Kisor v. Wilkie* in which the Supreme Court granted certiorari to determine whether to overrule the doctrine of *Auer* deference, pursuant to which courts defer to an "agency's construction of its own regulation." 2019 WL 2605554, at *4. The Supreme Court in the end voted 9-0 to reverse and remand that case, and the majority of the Supreme Court declined to overturn *Auer*, this time aided by a vote from the Chief Justice. But Chief Justice Roberts' vote appears to have been based on the majority's reversal of the lower court and its willingness to sharply limit the scope of *Auer*. Concurring in part, the Chief Justice emphasized the extent and importance of the constraints that the majority imposed on *Auer* deference, stating that given the majority's delineation of "the prerequisites for, and limitations on *Auer* deference," "the distance between the majority and Justice Gorsuch is not as great as it may initially appear." Id. at *15.

The four remaining justices stated their desire to "inter" or "retire" the *Auer* doctrine. Justice Gorsuch, now joined by Justices Thomas, Kavanaugh and Alito (in part), observed that lower courts have "afforded *Auer* deference mechanically, without conducting the inquiry the Court *now* holds is required." Id. at *33 (emphasis added). He confirmed that *Auer* was "reengineered" by the majority to require "a multi-step, multi-factor inquiry" in which courts must "'exhaust all the traditional tools of construction' before they even consider deferring to an agency." Id. (internal quotation marks and citation omitted). As stated by the majority, *Auer* only applies when "the law runs out"; "if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading." Id. at *8. "[O]nly when that legal toolkit is empty and the interpretative question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" Id. (citation omitted).

And even when a provision is "genuinely ambiguous" and *Auer* deference is appropriate, the Supreme Court made abundantly clear that a court should defer *only* to "the agency's 'authoritative' or 'official position' rather than any more ad hoc statement not reflecting the agency's views." Id. at *9. "[A] court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." Id. "[T]he agency's interpretation must in some way implicate its substantive expertise," and it must be the product of deliberation. "[A]n agency's reading of a rule must reflect [its] 'fair and considered judgment,'" which means "a court should decline to

defer to a merely 'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack.'" Id. at *10 (alterations in original) (citations omitted).

Justice Gorsuch described at length the extent of changes wrought by the majority's opinion, describing the majority's opinion as having "transformed *Auer*." Id. at *16 (Gorsuch, J., concurring), writing that the majority imposed "so many new ... qualifications and limitations on *Auer* ... [that] the doctrine emerges maimed and enfeebled—in truth, zombified." Id. at *16. But that was not enough: Justice Gorsuch looked forward to the day when the court, instead of "neuter[ing]" *Auer*, "will find the nerve it lacks today and inter *Auer* at last." Id. And Justice Kavanaugh, joined by Justice Alito, more succinctly expressed their agreement "with Justice Gorsuch's conclusion that the *Auer* deference doctrine should be formally retired." Id. at *34.

Conclusion

The court is moving toward more conservative positions that reflect a resistance to the authority wielded by administrative agencies within the executive branch. Practitioners confronted with agency action should continue to assess whether any congressional delegation comports with Congress' obligation to articulate "sufficiently definite and precise" standards. And where government agencies argue in favor of deference to their litigation positions, we should bear in mind that a "mechanical" application of *Auer* deference, and the traditional iteration that the court should defer to an agency position so long as it is not "plainly erroneous or inconsistent with the regulation," have been replaced by far more stringent guidance.

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