Gundy v. United States
588 U.S. __ (2019)

Vote: 5 (Alito, Breyer, Ginsburg, Kagan, Sotomayor)
3 (Gorsuch, Roberts, Thomas)
Judgment/Opinion of the Court: Kagan
Opinion Concurring in the Judgment: Alito
Dissenting Opinion: Gorsuch
Not Participating: Kavanaugh

In 2006, Congress passed the Sex Offender Registration and Notification Act (SORNA), which requires sex offenders to register where they live or work before completing their prison sentence or face criminal penalties. The question in this case centered on the approximately 500,000 "pre-Act" offenders: those individuals convicted of a sex offense before SORNA's enactment, many of whom are no longer in prison. For these offenders, SORNA delegates to the U.S. Attorney General (who heads the Department of Justice) authority to "specify the applicability" of SORNA's registration requirements and to prescribe rules for their registration.

Six months after SORNA's enactment, in February 2007, the Department of Justice issued an interim rule specifying that SORNA's registration requirements apply in full to "sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." The final rule, issued in December 2010, reiterated that SORNA applies to all pre-Act offenders.

Herman Gundy was a pre-Act offender. A year before SORNA's enactment, he pleaded guilty under Maryland law for sexually assaulting a minor. After his release from prison in 2012, Gundy moved to New York, but he never registered there as a sex offender. A few years later, he was convicted for failing to register.

In challenging his conviction Gundy argued that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders. After a federal trial court and court of appeals rejected his argument, Gundy asked the Supreme Court to hear his case

Justice Kagan announced the judgment of the Court and delivered an opinion, in which Justice Ginsburg, Justice Breyer, and Justice Sotomayor join.

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U. S. C. §20913(d), [which authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders] enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not. Under §20913(d), the Attorney General must apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment. That delegation easily passes constitutional muster…

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch "powers which are strictly and exclusively legislative." *Wayman* v. *Southard* (1825). But the Constitution does not "deny[ ] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s]." Congress may "obtain the assistance of its coordinate Branches"—and

in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. *Mistretta* v. *United States* (1989). "[I]n our increasingly complex society, replete with ever changing and more technical problems," this Court has understood that "Congress simply cannot do its job absent an ability to delegate power under broad general directives." So we have held, time and again, that 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." *J. W. Hampton, Jr., & Co.* v. *United States* (1928)…

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. . . .

[Section] 20913(d) does not give the Attorney General anything like the "unguided" and "unchecked" authority that Gundy says. The provision, in Gundy's view, "grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time." If that were so, we would face a nondelegation question. But it is not. . . . Gundy bases that argument on the first half of §20913(d), isolated from everything else—from the second half of the same section, from surrounding provisions in SORNA, and from any conception of the statute's history and purpose. . . .

So begin at the beginning, with the "[d]eclaration of purpose" that is SORNA's first sentence. There, Congress announced . . . that "to protect the public," it was "establish[ing] a comprehensive national system for the registration" of "sex offenders and offenders against children." The term "comprehensive" has a clear meaning—something that is all-encompassing or sweeping [citing Webster's Third New International Dictionary]. That description could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders. . . .

The Act's legislative history backs up everything said above by showing that the need to register pre-Act offenders was front and center in Congress's thinking. Congress designed SORNA to address "loopholes and deficiencies" in existing registration laws [quoting the House Report]. And no problem attracted greater attention than the large number of sex offenders who had slipped the system. According to the House Report, "[t]he most significant enforcement issue in the sex offender program is that over 100,000 sex offenders" are "'missing,' meaning that they have not complied with" then-current requirements. Imagine how surprising those Members would have found Gundy's view that they had authorized the Attorney General to exempt the missing "predators" from registering at all.

With that context and background established, we may return to § 20913(d). . . . . Both the title and the remaining text of that section pinpoint one of the "practical problems": At the moment of SORNA's enactment, many pre-Act offenders were "unable to comply" with the Act's initial registration requirements. That was because, once again, the requirements assumed that offenders would be in prison, whereas many pre-Act offenders were on the streets. In identifying that issue, § 20913(d) itself reveals the nature of the delegation to the Attorney General. It was to give him the time needed (if any) to address the various implementation issues involved in getting pre-Act offenders into the registration system. "Specify the applicability" thus does not mean "specify *whether* to apply SORNA" to pre-Act offenders at all, even though everything else in the Act commands their coverage. The phrase instead means "specify *how* to apply SORNA" to pre-Act offenders if transitional difficulties require some delay. In that way, the whole of § 20913(d) joins the rest of SORNA in giving the Attorney General only time-limited latitude to excuse pre-Act offenders from the statute's requirements. Under the law, he had to order their registration as soon as feasible.

Now that we have determined what § 20913(d) means, we can consider whether it violates the Constitution. The question becomes: Did Congress make an impermissible delegation when it

instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible? Under this Court's long-established law, that question is easy. Its answer is no.

[The *Hampton* standard], the Court has made clear, [is] not demanding. "[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.' " Only twice in this country's history (and that in a single year) have we found a delegation excessive—in each case because "Congress had failed to articulate *any* policy or standard" to confine discretion; see *A. L. A. Schechter Poultry Corp.* v. *United States* (1935); *Panama Refining Co.* v. *Ryan* (1935). By contrast, we have over and over upheld even very broad delegations. Here is a sample: We have approved delegations to various agencies to regulate in the "public interest." We have sustained authorizations for agencies to set "fair and equitable" prices and "just and reasonable" rates. … And so forth.

In that context, the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found). The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds.

Indeed, if 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. Consider again this Court's long-time recognition: "Congress simply cannot do its job absent an ability to delegate power under broad general directives." Among the judgments often left to executive officials are ones involving feasibility. In fact, standards of that kind are ubiquitous in the U. S. Code. See, *e.g.,* 12 U. S. C. §1701z–2(a) (providing that the Secretary of Housing and Urban Development "shall require, to the greatest extent feasible, the employment of new and improved technologies, methods, and materials in housing construction[ ] under [HUD] programs…

It is wisdom and humility alike that this Court has always upheld such "necessities of government." We therefore affirm the judgment of the Court of Appeals.

Justice Alito, concurring in the judgment.

The Constitution confers on Congress certain "legislative [p]owers," Art. I, §1, and does not permit Congress to delegate them to another branch of the Government. Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.

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. 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.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

Justice Gorsuch, with whom The Chief Justice and Justice Thomas join, dissenting.

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?

Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice Alito supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait….

At the time of SORNA's enactment, the nation's population of sex offenders exceeded 500,000, and Congress concluded that something had to be done about these "pre-Act" offenders too. But it seems Congress couldn't agree what that should be. So Congress simply passed the problem to the Attorney General. For all half-million pre-Act offenders, the law says only this, in 34 U. S. C. §20913(d):

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender.

Yes, that's it. The breadth of the authority Congress granted to the Attorney General in these few words can only be described as vast. As the Department of Justice itself has acknowledged, SORNA "does not require the Attorney General" to impose registration requirements on pre-Act offenders "within a certain time frame or by a date certain; it does not require him to act at all." If the Attorney General does choose to act, he can require all pre-Act offenders to register, or he can "require some but not all to register." For those he requires to register, the Attorney General may impose "some but not all of [SORNA's] registration requirements," as he pleases…

These unbounded policy choices have profound consequences for the people they affect. Take our case. Before SORNA's enactment, Herman Gundy pleaded guilty in 2005 to a sexual offense. After his release from prison five years later, he was arrested again, this time for failing to register as a sex offender according to the rules the Attorney General had then prescribed for pre-Act offenders. As a result, Mr. Gundy faced an additional 10-year prison term—10 years more than if the Attorney General had, in his discretion, chosen to write the rules differently…

In Article I, the Constitution entrusted all of the federal government's legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

If Congress could pass off its legislative power to the executive branch, the "[v]esting [c]lauses, and indeed the entire structure of the Constitution," would "make no sense." Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President. And if laws could be simply declared by a single person, they would not be few in number, the product of widespread social consensus, likely to protect minority interests, or apt to provide stability and fair notice. Accountability would suffer too. Legislators might seek to take credit for addressing a pressing social problem by sending it to the executive for resolution, while at the same time blaming the executive for the problems that attend whatever measures he chooses to pursue. In turn, the executive might point to Congress as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to " 'disguise . . . responsibility for . . . the decisions.' "…

Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test? [T]he framers took this responsibility seriously and offered us important guiding principles.

First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to "fill up the details." [*Wayman* v. *Southard.]* [This means that] 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.

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. [For example,] Congress…made the construction of the Brooklyn Bridge depend on a finding by the Secretary of War that "the bridge wouldn't interfere with navigation of the East River." The Court held that Congress "did not abdicate any of its authority" but "simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the secretary of war as an agent to ascertain that fact." *Miller* v. *Mayor of New York* (1883).

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch. *[E.g.,] Wayman* itself might be explained by [this] principle as applied to the judiciary: Even in the absence of any statute, courts have the power under Article III "to regulate their practice."…

Returning to SORNA with this understanding of our charge in hand, problems quickly emerge. Start with this one: It's hard to see how SORNA leaves the Attorney General with only details to fill up. [It's] hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch…. SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations…

Nor can SORNA be described as an example of conditional legislation subject to executive fact-finding. To be sure, Congress could have easily written this law in that way. It might have required all pre-Act offenders to register, but then given the Attorney General the authority to make case-by-case exceptions for offenders who do not present an " 'imminent hazard to the public safety' " comparable to that posed by newly released post-Act offenders. It could have set criteria to inform that determination, too, asking the executive to investigate, say, whether an offender's risk of recidivism correlates with the time since his last offense, or whether multiple lesser offenses indicate higher or lower risks than a single greater offense.

But SORNA did none of this. Instead, it gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders….

Finally, SORNA does not involve an area of overlapping authority with the executive. Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers. But SORNA stands far afield from any of that. It gives the Attorney General the authority to "prescrib[e] the rules by which the duties and rights" of citizens are determined, a quintessentially legislative power…

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. That "is delegation running riot."