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A Fundamental Change In U.S. Law Is Underway

By

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Both foreign and United States lawyers need to understand that the relationship between the federal courts and federal regulatory agencies in the U.S. is undergoing a major revision, shifting deference away from the agencies and strengthening the federal courts' review of agencies actions.

This will affect virtually every federal agency: the Patent Office, the Food and Drug Administration, the Environmental Protection Agency, the IRS, the Department of Veteran's Affairs, etc. Lawyers representing clients before a federal agency or seeking review of an agency's action who fail to take advantage of these evolving doctrines will not be meeting their responsibilities to their clients. Foreign lawyers need to understand that there will be fewer regulatory changes simply because an administration changes. There should be greater regulatory stability and more of a return to the rule of law.

The modern regulatory state in the U.S. rests on three core Supreme Court pillars.

(a) Article I, Sec. 1 of the Constitution states that "All legislative Powers herein granted shall be vested in a Congress of the United States" Nevertheless, since 1935 the Supreme Court has held that Congress may delegate substantial discretion to the administrative branch to implement and enforce Congress' laws (including adopting regulations with the force of law) so long as it "lays down by legislative act an intelligible principle" to which the person or body that exercises the power is directed to conform in carrying out authority (the so-called "nondelegation clause" doctrine);

(b) The federal courts, according to Supreme Court precedent, have an obligation to defer to an administrative agency's interpretations of the statutes it administers in a rule the agency issues if the rule has gone through the notice and comment

rulemaking process (the so-called "*Chevron* deference" after the 1984 case in which it was established);

(c) The federal courts, according to Supreme Court precedent, have an obligation to defer to an administrative agency's reasonable interpretation of its own rules (the so-called "*Auer* deference" after the 1997 case in which it was established).

As shown below, on June 26, 2019, *Auer* deference all but collapsed in a 4-1-4 decision, *Kisor v. Wilkie*, 588 U.S.____, 139 S.Ct. 2400 (2019). The lineup of the opinions in that decision show that *Chevron* deference is even more vulnerable and is also likely to be overturned or significantly curtailed. Finally, only six days earlier in *Gundy v. United States,* 586 U.S. ___, 139 S. Ct. 2116 (2019)., the traditional view of the nondelegation doctrine was upheld by four justices; three justices (including the Chief Justice) dissented. Justice Kavanaugh took no part. Mr. Justice Alito concurred in the result but cautioned that "If a majority of this Court were willing to reconsider the approach we have taken [to the nondelegation clause doctrine] for the past 84 years, I would support that effort." If he means by that a majority without his vote, the nondelegation doctrine is safe for the moment, but if he means a majority with his vote, that last pillar too will likely be reconsidered.

In *Kisor*, a Korean war veteran was refused retroactive disability benefits by the Department of Veterans Affairs (the "VA"). The Court of Appeals for the Federal Circuit affirmed the decision based on *Auer* deference, and the Supreme Court granted cert. to determine whether *Auer* should be overruled. Four justices, in their opinion, voted to sustain *Auer* only after sharply hedging it in. For the doctrine to apply at all, the regulation must be "genuinely ambiguous", the interpretation must "reflect an agency's authoritative, expertise-based fair [or] considered judgment". If the law gives an answer - if a court concludes that there is only one "reasonable construction of a regulation - then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." And of course, the "agency's reading must fall 'within the bounds of reasonable interpretation'" and it must in some way implicate the agency's "substantive expertise." All these must be determined by the court before it considers whether to apply *Auer* deference.

The dissent by Justice Gorsuch, with whom Justices Tomas, Kavanaugh, and Alito concurred, would have overturned *Auer* deference in its entirety as an encroachment of the power of the judiciary to say what the law is, and a threat to the liberty of citizens since it places interpretative power in the very agency that adopts and enforces the regulation. The Chief Justice voted not to overturn *Auer* because with all the limits imposed by the majority (including with his vote) "the distance between the majority and

Justice Gorsuch is not as great as it may initially appear." Essentially, one deferential doctrine down, two to go.

As to *Chevron* deference, however, the Chief Justice issued a warning: "Issues surrounding judicial deference to agency interpretations of their own regulations [*Auer* deference] are distinct from those raised in connection with judicial deference to agency interpretations of statues enacted by Congress [*Chevron* deference] …. I do not regard the Court's decision today to touch upon the latter question." Since saying what laws mean is quintessentially a judicial function, that is a plain warning that *Chevron* is in for a drubbing. If there is any doubt about that, Justices Kavanaugh and Alito expressly joined in the Chief Justice's warning and of course Justice Gorsuch (with whom Justice Thomas joined) wrote a stinging opinion that would have overturned all deference to administrative agencies.

The issue of the nondelegation clause doctrine came up in *Gundy v. U.S.,* 586 U.S. ___, 139 S. Ct. 2116 (2019). Congress had expanded the registration requirements for sex offenders and prescribed how and when sex offenders already sentenced for such an offense or subsequently convicted had to register. But as to the five hundred thousand people convicted before the statute was amended "[t]he 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 offenders." A plurality of four justices (in this case an eight-member court) sustained the statute because it thought that Congress intended (but did not say) that the statute should be applied to previously convicted offenders, and that the imputed intention supplied the "intelligible principle" that sustained the delegation. Justice Alto concurred in the judgment because of the historic interpretation of the non-delegation clause doctrine, but, as noted above, said that he would join in reconsidering the doctrine if a majority wanted to do so.

Subsequently, Mr. Justice Kavanaugh joined the Court. In *Paul v. United States*, decided in November 2019, 140 S.Ct. 342 (2019), the Court denied a petition for writ of certiorari because, according to Justice Kavanaugh, that case raised the same statutory interpretation issue that the Court had resolved earlier in the year in *Gundy*. However, Justice Kavanaugh took the opportunity to indicate that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." And he proceeded to summarize two alternative approaches: either Congress must (i) decide the major policy question itself and then delegate the authority to regulate and enforce the policy it has decided on, or (ii) Congress may "expressly and specifically" delegate to the agency the authority to do both. He also acknowledged that the dissenting opinion of Justice Gorsuch would

preclude the second approach and limit Congress to delegating only "the authority to decide less-major or fill-up-the-details decisions."

The good side of all of this is the turn back toward the founding principles of separation of powers as a protection of the liberties of the people and the avoidance of a tyrannical central government. Perhaps one reason why presidential elections have increasingly taken on a bitter "winner takes all" tone is that so much power has been delegated to the executive branch that a change in administrations brings with it the power of administrative agencies to change their interpretation of the laws and rules they administer and enforce. With greater judicial check on the administrative state, fewer people may feel threatened by a change in administration. If one wants a better understanding of the underlying issues of federalism, it is worth reading the opinion of Justice Gorsuch in the *Gundy* decision.