Gundy v, United States
139 S.Ct. 2116 (2018)

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), 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.

I

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. * * *

SORNA makes "more uniform and effective" the prior "patchwork" of sex-offender registration systems. * * * The Act's express "purpose" is "to protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for [their] registration." §20901. To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before. The Act also backs up those requirements with new criminal penalties. Any person required to register under SORNA who knowingly fails to do so (and who travels in interstate commerce) may be imprisoned for up to ten years. See 18 U. S. C. §2250(a).

The basic registration scheme works as follows. A "sex offender" * * * must register—provide his name, address, and certain other information—in every State where he resides, works, or studies. See §§20913(a), 20914. And he must keep the registration current, and periodically report in person to a law enforcement office, for a period of between fifteen years and life (depending on the severity of his crime and his history of recidivism). See §§20915, 20918.

Section 20913—the disputed provision here—elaborates the "[i]nitial registration" requirements for sex offenders. §§20913(b), (d). Subsection (b) sets out the general rule: An offender must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" (or, if the offender is not sentenced to prison, "not later than [three] business days after being sentenced"). Two provisions down, subsection (d) addresses (in its title's words) the "[i]nitial registration of sex offenders unable to comply with subsection (b)." The provision states:

> "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

offenders and for other categories of sex offenders who are unable to comply with subsection (b)."

Subsection (d), in other words, focuses on individuals convicted of a sex offense before SORNA's enactment—a group we will call pre-Act offenders. * * * For the entire group of pre-Act offenders, once again, the Attorney General "shall have the authority" to "specify the applicability" of SORNA's registration requirements and "to prescribe rules for [their] registration."

Under that delegated authority, the Attorney General issued an interim rule in February 2007, 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. * * * That rule has remained the same to this day.

Petitioner Herman Gundy is a pre-Act offender. The year before SORNA's enactment, he pleaded guilty under Maryland law for sexually assaulting a minor. After his release from prison in 2012, Gundy came to live in New York. But he never registered there as a sex offender. A few years later, he was convicted for failing to register, in violation of §2250. He argued below (among other things) 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. §20913(d). The District Court and Court of Appeals for the Second Circuit rejected that claim, * * *, as had every other court (including eleven Courts of Appeals) to consider the issue. We nonetheless granted certiorari. 583 U. S. __ (2018). Today, we join the consensus and affirm.

II

Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." §1. * * * But * * * 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. * * * "[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."

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. * * * Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I.

And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself.

That is the case here, because §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. This Court has already interpreted §20913(d) to say something different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible. * * * And revisiting that issue yet more fully today, we reach the same conclusion. The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues. Given that statutory meaning, Gundy's constitutional claim must fail. Section 20913(d)'s delegation falls well within permissible bounds.

A

This is not the first time this Court has had to interpret §20913(d). In *Reynolds v. United States*, the Court considered whether SORNA's registration requirements applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did. We read the statute as adopting the latter approach. But even as we did so, we made clear how far SORNA limited the Attorney General's authority. And in that way, we effectively resolved the case now before us.

Everything in *Reynolds* started from the premise that Congress meant for SORNA's registration requirements to apply to pre-Act offenders. The majority recounted SORNA's "basic statutory purpose," found in its text, as follows: "the 'establish[ment of] a comprehensive national system for the registration of [sex] offenders' that includes offenders who committed their offenses before the Act became law." That purpose, the majority further noted, informed SORNA's "broad[ ]" definition of "sex offender," which "include[s] any 'individual who was convicted of a sex offense.' " And those two provisions were at one with "[t]he Act's history." Quoting statements from both the House and the Senate about the sex offenders then "lost" to the system, *Reynolds* explained that the Act's "supporters placed considerable importance upon the registration of pre-Act offenders." In recognizing all this, the majority (temporarily) bonded with the dissenting Justices, who found it obvious that SORNA was "meant to cover pre-Act offenders." * * *

But if that was so, why had Congress (as the majority held) conditioned the pre-Act offenders' duty to register on a prior "ruling from the Attorney General"? The majority had a simple answer: "[I]nstantaneous registration" of pre-Act offenders "might not prove feasible," or "[a]t least Congress might well have so thought." * * *

On that understanding, the Attorney General's role under §20913(d) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. That statutory delegation, the Court explained, would "involve[] implementation

delay." But no more than that. Congress had made clear in SORNA's text that the new registration requirements would apply to pre-Act offenders. So (the Court continued) "there was no need" for Congress to worry about the "unrealistic possibility" that "the Attorney General would refuse to apply" those requirements on some excessively broad view of his authority under §20913(d). Reasonably read, SORNA enabled the Attorney General only to address (as appropriate) the "practical problems" involving pre-Act offenders before requiring them to register. The delegation was a stopgap, and nothing more. * * *

B

[In Part B of the opinion, the plurality noted that Gundy argued that the language of section 20913(d) ("specify the applicability") was broad enough to authorize the Attorney General to impose whatever registration requirements the Attorney General desired on pre-Act offenders, including exempting them entirely from registration. The plurality criticized Gundy's argument as focusing on language in isolation, rather than in context. The plurality argued that statutory interpretation is "a 'holistic endeavor' which determines meaning by looking not to isolated words, but to text in context, along with purpose and history." The plurality argued that the language should be read in context with the rest of section 20913(d), and with the purpose of the statute (section 20901) to establish a "comprehensive system" for registration of sex offenders. The plurality also noted that the statute's definition of "sex offender", on its face, includes pre-Act and post-Act offenders. The plurality also noted that several statements in the legislative history indicated that Congress intended the law to apply to pre-Act offenders. Finally, the plurality returned to the title and language of section 20913(d) and pointed out that they demonstrate that at the time of SONRA's enactment, many pre-Act offenders were unable to comply with the law/s registration requirements. In light of the evidence from the text, purpose and legislative history, the plurality argued that section 20913(d) was written] "to give [the Attorney General] the time needed (if any) to address the various implementation issues involved in getting pre-Act offenders into the registration system. * * * In that way, the whole of section 20913(d) joins the rest of SONRA 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." * * *

C

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.

As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the delegee's exercise of authority. * * * Those standards, the Court has made clear, are 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. 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. We more recently affirmed a delegation to an agency to issue whatever air quality standards are "requisite to protect the public health." And so forth.

In that context, the delegation in SORNA easily passes muster * * * 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. * * * By stating its demand for a "comprehensive" registration system and by defining the "sex offenders" required to register to include pre-Act offenders, Congress conveyed that the Attorney General had only temporary authority. Or again, in the words of Reynolds, that he could prevent "instantaneous registration" and impose some "implementation delay." That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds. * * *

We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

Justice Kavanaugh took no part in the consideration or decision of this case.

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. * * *

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.

I

* * * [After citing the language of Section 20913(d), the dissent wrote]

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. And he is free to change his mind on any of these matters "at any given time or over the course of different [political] administrations." Congress thus gave the Attorney General free rein to write the rules for virtually the entire existing sex offender population in this country—a situation that promised to persist for years or decades until pre-Act offenders passed away or fulfilled the terms of their registration obligations and post-Act offenders came to predominate. * * *

These unbounded policy choices have profound consequences for the people they affect. * * *

II

* * *

B

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? * * * 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." * * * Second, once Congress prescribes the rule governing private conduct, it may make

the application of that rule depend on executive fact-finding. * * * Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. * * *

C

Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations. * * *

After *Schechter Poultry* and *Panama Refining*, Congress responded by writing a second wave of New Deal legislation more "[c]arefully crafted" to avoid the kind of problems that sank these early statutes. And since that time the Court hasn't held another statute to violate the separation of powers in the same way. Of course, no one thinks that the Court's quiescence can be attributed to an unwavering new tradition of more scrupulously drawn statutes. Some lament that the real cause may have to do with a mistaken "case of death by association" because *Schechter Poultry* and *Panama Refining* happened to be handed down during the same era as certain of the Court's now-discredited substantive due process decisions. But maybe the most likely explanation of all lies in the story of the evolving "intelligible principle" doctrine.

This Court first used that phrase in 1928 in *J. W. Hampton, Jr., & Co. v. United States,* where it remarked that a statute "lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform" satisfies the separation of powers. No one at the time thought the phrase meant to effect some revolution in this Court's understanding of the Constitution. * * * Still, it's undeniable that the "intelligible principle" remark eventually began to take on a life of its own. * * * More recently, too, we've sought to tame misunderstandings of the intelligible principle "test" * * *

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.

While it's been some time since the Court last held that a statute improperly delegated the legislative power to another branch—thanks in no small measure to the intelligible principle misadventure—the Court has hardly abandoned the business of policing improper legislative delegations. When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.

Consider, for example, the "major questions" doctrine. Under our precedents, an agency can fill in statutory gaps where "statutory circumstances" indicate that Congress meant to grant it such powers. But we don't follow that rule when the "statutory gap" concerns "a question of deep 'economic and political significance' that is central to the statutory scheme." * * * Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.

Consider, too, this Court's cases addressing vagueness. "A vague law," this Court has observed, "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." And we have explained that our doctrine prohibiting vague laws is an outgrowth and "corollary of the separation of powers." It's easy to see, too, how most any challenge to a legislative delegation can be reframed as a vagueness complaint: A statute that does not contain "sufficiently definite and precise" standards "to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens. And it seems little coincidence that our void-for-vagueness cases became much more common soon after the Court began relaxing its approach to legislative delegations. Before 1940, the Court decided only a handful of vagueness challenges to federal statutes. Since then, the phrase "void for vagueness" has appeared in our cases well over 100 times. * * *

III

A

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. Of course, what qualifies as a detail can sometimes be difficult to discern and, as we've seen, this Court has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct. But it's hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch. * * *

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. * * *

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. ***

The statute here also sounds all the alarms the founders left for us. Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA's application to pre-Act offenders, it passed the potato to the Attorney General. And freed from the need to assemble a broad supermajority for his views, the Attorney General did not hesitate to apply the statute retroactively to a politically unpopular minority. Nor could the Attorney General afford the issue the kind of deliberative care the framers designed a representative legislature to ensure. * * *

B

* * *

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."