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The National Security Delegation Conundrum

Harlan G. Cohen
Gabriel M. Wilner/UGA Foundation Professor in International Law and Faculty Co-Director of the Dean Rusk International Law Center *University of Georgia*, hcohen@uga.edu

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by Harlan Grant Cohen

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Waiting for *Gundy*

How much authority—how much room to make policy choices—can Congress delegate to the president and executive branch? This was the question at the heart of *Gundy v. United States*, a case heard by the Supreme Court this past term. On its face, the case was about sex offender registration. In setting the registration rules going forward, Congress left it to the attorney general to decide the complicated question of how those rules should apply to those previously convicted, perhaps even to those who already served their sentences. After the attorney general decided to apply the registration rules across the board, a previously convicted sex offender, Herman Gundy, failed to register, and was then convicted of violating the statute, and sentenced. The question specifically before the Court was whether Congress had unconstitutionally delegated too much discretion, too much of its legislative power, to the attorney general.

But for the Court and its close observers, the issue was much broader. Since the 1930s, no statute has been held to unconstitutionally delegate

too much of Congress' power. The Court has consistently held that as long as Congress includes an "intelligible principle" in a statute, meaning some guidance from Congress on how it wants the executive branch to apply the discretion it's delegating, the delegation is valid. On that basis, Congress has delegated vast authority to the president, and the administrative agencies he or she oversees, to issue rules designed to protect our air and water from toxic emissions, to guarantee product safety, to set labor standards, to decide what drugs are safe for use, to monitor food safety, and much, much more. The entire modern regulatory state is built on these congressional delegations to expert executive branch bodies to make rules governing an increasingly complex world.

Then, *Gundy* threw all of that into question. A decision that found Congress had delegated too much authority would impact, and likely threaten, a vast, unpredictable range of rules on subjects as varied as drug safety and highway regulation, health codes and environmental regulations. With a new line-up of justices on the Court (not including Justice Kavanaugh, who was not confirmed until after oral argument in Gundy), supporters of the regulatory state watched in trepidation; while opponents watched with hope.

But, another more specific group was also watching *Gundy* with anticipation. Among the vast array of congressional delegations to the executive branch is Section 232 of the Trade Expansion Act of 1962, a statute granting the president authority to issue tariffs on imports he or she finds threaten national security. It was under that statute that President Donald Trump had issued controversial high tariffs on

aluminum and steel imports from a range of countries, including allies like Canada. Challenging those tariffs, lawyers representing the American Institute for International Steel argued that the delegation in section 232 was unconstitutionally broad. If threats to national security could include steel and aluminum imports from allies, the concept has no rational bounds, they argued. A lower court found against the plaintiffs on the basis of precedent, but expressed sympathy for their position. The case was awaiting a decision on certiorari as the decision in *Gundy* was being announced.

Those worried about the national security tariffs were thus watching *Gundy* for hints about how to challenge those trade delegations. And many weren't just worried about section 232. Over the years, Congress has delegated vast authority to the president when he or she identifies a threat to national security or declares a national emergency. Different statutes, using different language, authorize the president to raise tariffs; to sanction states, institutions, and individuals; to redirect funds to projects Congress has not authorized; to deny certain individuals or groups entry into the United States; and to use military force.

In the past two years alone, Trump has *claimed* such authority to unilaterally issue steel and aluminum tariffs under Section 232 and threaten the same on auto parts; to implement a travel ban targeting majority-Muslim countries under the Immigration and Naturalization Act (INA); to threaten Mexico with tariffs under the International Emergency Economic Powers Act (IEEPA) if it didn't do more to stop migration to the U.S.; to find funds for a border wall that Congress

specifically chose not to support; to continue attacks under the 2001 Authorization of Use of Military Force (AUMF), originally passed to go after the perpetrators of 9/11, on militant groups in Syria and elsewhere; and to float the possibility under the same AUMF of war with Iran (an interpretation the State Department seems to have thankfully mostly dropped) .

For many watching these developments, these congressional delegations, justified on national security grounds, seemed like a blank check. To address these concerns, this group would love to see national security delegations rolled-back or disciplined, and a revitalized non-delegation doctrine, which would limit the discretion Congress could delegate, would certainly help. *Gundy*, thus, set those favoring a regulatory state and those worried about a national security one on a collision course. A win for environmental regulation would be a loss for constraining emergency powers and vice versa.

Heads I Win; Tails You Lose

But if that trade-off seems strange or unfair, the reality of *Gundy* was worse—both could lose! The majority in *Gundy* — in a decision written by Justice Kagan, and joined by Justices Breyer, Ginsburg, and Sotomayor — delivered a seeming win for the regulatory state. Reading the statute narrowly, they concluded that the delegation contained an "intelligible principle," and following the Court's precedent, upheld the statute and Gundy's conviction. Begrudgingly joining the majority was Justice Alito, who explained that he was only joining because there was no majority in favor of reconsidering the Court's permissive precedent.

The opinion Justice Alito presumably would have joined was the dissent authored by Justice Gorsuch and joined by Chief Justice Roberts and Justice Thomas. The dissenters, if there had been more of them, would have resurrected the non-delegation doctrine and found the delegation to the attorney general in *Gundy* unconstitutional. In so doing, they would have allowed delegations in three narrower circumstances: (1) to merely "fill-up the details" of a statute, (2) where the statute delegated only a finding-of-fact on which action under the statute might turn, and (3) in areas where congressional powers overlapped with those of the president, most notably on issues of foreign affairs and national security. In other words, if the dissenters had their way—which, with Justices Kavanaugh and Alito's votes they might have—much of the administrative state could be declared unconstitutional and dismantled, while the expansive delegations to the president on national security would remain untouched.

As expected, those who support the work of administrative agencies, like the Environmental Protection Agency (EPA) or the Food and Drug Administration (FDA), were relieved by the majority's opinion, but anxious at the possibility of a future majority in favor of the dissent. Supporters of the tariff case, and the potential it held for constraining national security delegations, were disappointed, a sense confirmed when certiorari before judgment was denied four days later.

No Way Out

The two main *Gundy* opinions thus highlight the imbalanced stakes of current constitutional non-delegation doctrine. Those worried about

unchecked presidential authority over national security can't argue against the breadth of congressional delegations without threatening the entire administrative state. "National security" or "emergency" or "threat" may be very broad principles to work with, but they aren't obviously any broader than terms like "fair" or "reasonable" used in other statutes. But taking that risk hardly promises success. While those worried about executive national security authority can't argue that national security delegations are more constitutionally suspect than others; those supporting national security delegations (or opposing the regulatory state) can argue that are they less.

The only existing constitutional principle to distinguish between national security and other delegations works only to strengthen the standing of the former. The principle, that foreign affairs and national security are different, was most famously articulated in *United States v. Curtiss-Wright*, a decision cited by the dissenters in *Gundy* and which was notably decided by the same justices who invalidated New Deal legislation on non-delegation grounds—the last justices to do so. Support on the Court for a strong non-delegation doctrine has long been connected with support for a powerful national security president.

There was a time, not that long ago, when it looked like the Court might be moving away from that dynamic. In contexts other than delegation, various justices across the ideological spectrum had expressed skepticism of executive branch claims to special foreign affairs or national security deference. Chief Justice Roberts, for example, rejected the president's claims to special authority in *Medellín* (to order Texas to comply with an international judgment) and *Bond* (to interpret

the Chemical Weapons Convention) and would have rejected the president's claims to exclusive authority to issue statements about Jerusalem's status in *Zivotofsky v. Kerry*. Given these signals, some wondered if *Curtiss-Wright* was still good law or still had any force.

But the *Gundy* opinions suggest that an old equilibrium has returned. The more conservative justices, aligned with the dissent, favor disciplining the administrative state but not the national security president. Just last term, writing for a conservative majority to uphold the travel ban in *Trump v. Hawaii*, Chief Justice Roberts, wrote that the "comprehensive" delegations to the president in the INA to exclude aliens "exuded deference." This term, Roberts joined the *Gundy* dissent, along with other justices in the *Trump v. Hawaii* majority.

Facing them on the other side of the Court are justices who *might* be more concerned about the dangers of unchecked presidential national security powers. Their prior decisions, upholding deference in *Zivotofsky v. Kerry*, for example, suggest that concern is far from categorical and that they too may be prone to blink when national security might be on the line. What seems much more categorical is their faith in the administrative state and defense of the intelligible principle doctrine.

Some might argue that worrying about some delegations while favoring others is exactly as it should be. You take the good with the bad. Recognizing that delegation grants the president authority you want him or her to have and authority you'd rather he or she didn't, might act as a discipline, tempering enthusiasm for the administrative state and preaching congressional restraint. But it doesn't. Expansive delegations

on all subjects are the norm. And to the extent it does give some pause to those who favor the regulatory state but worry about national security discretion, it worries only them. Their mirror image, those who favor broad executive discretion on national security issues but despise the administrative state, aren't forced to accept any trade-offs. They can have their cake and eat it too. Existing doctrine gives them a ready-made way to distinguish national security delegations from other questions, but one that only works in their favor.

Cutting the *Gundy*-ian Knot

So where does that leave those who are concerned about undisciplined presidential actions in the name of national security or emergencies? Is an unwanted trade war with Canada, Japan, and the European Union, simply the cost of safe drugs? Congress seems the obvious route to avoid that trade-off. These are delegations; Congress could take the powers back. Putting aside the fact that after *Zivotofsky v. Kerry*, some justices might allow broad executive discretion even in the absence of any statutory authority (or contrary to statutory discipline), any congressional attempt to wrest these powers back would likely need to overcome a presidential veto, and thus require a congressional supermajority. Expecting Congress to muster that on questions of foreign policy that members might prefer not to own, seems vaguely delusional. Or to put it another way, imagine what a president would need to do in order to muster such a supermajority against him or her. Whatever you're now picturing, I imagine you'd rather not wait to see it happen.

So while lobbying Congress seems imperative, a path through the courts cannot simply be renounced. The focus might turn, as it already has, to the specifics of particular cases, arguing not against the underlying delegation but its use. In any given case, those concerned might argue that terms like national security or emergency have been abused. They might point to the process behind the action and argue bad faith. They might propose a narrower reading of the statute (with a whiff of constitutional avoidance) that the president's actions fail. Each claim would face an uphill battle, but would at least hold out hope that a majority of justices, liberated from focusing on the broader delegation question, might coalesce. Alternatively, those concerned might try to minimize the national security or foreign affairs aspects of a statute, arguing that whatever the statute's language, the powers it invoked are really Congress's alone. Or as *Just Security's* Kristen Eichensehr has argued, it might mean providing less deference to the president under a version of the *Youngstown* analysis when a majority of Congress has voted their disapproval.

But the holy grail for those concerned about unbridled presidential national security, foreign relations, or emergency powers remains a principle that can explain why delegations in those categories are MORE concerning than ordinary domestic ones. Some arguments are out there: One might argue, for example, that national security, foreign relations, and emergency delegations are different because they tend to externalize their costs onto non-citizens who cannot fully access the American political process. But that argument is more attractive to scholars than courts, and anyway, is met by the doctrinal counterargument that the president is the constitutional actor best situated to assess foreign

opinions. In general, a principle likely to convince the Court remains elusive. Ironically though, Justice Gorsuch's *Gundy* dissent might suggest an avenue worth exploring.

Fact-finding Fallacies

Justice Gorsuch's second category of acceptable delegations are those that involve merely presidential fact-finding. At first glance, this second category seems designed to protect foreign affairs and national security delegations as much as the third. Many such delegations are structured exactly that way. They allow the president to take certain actions after a finding of a threat to national security or emergency. But thinking more deeply about the fit reveals a problem with such delegations: they are fact-finding in name only.

"National security," "emergency," and other similar triggers pretend to be factual scenarios that can be ascertained when they are, in fact, nothing of the sort. Such terms lack any stable meaning; fact-finding is illusory, because there is no established baseline. Such terms are not even normative judgments like "fair" or "reasonable." Instead, they are merely empty labels to be filled, like the definitions section of a contract. To put it another way, fact-finding doesn't find a national security issue, it constructs one. It is basically the delegation of story-telling. The fact-finding doesn't discipline the delegation, but instead creates and enables it.

While this realization may not be a test for unconstitutional delegations, it might point in the direction of one, explaining what instinctively might

worry many about the nature of delegations used to unilaterally fund projects, exclude aliens, start trade wars, or designate enemies. It might also provide guidance for future delegations, suggesting more concrete factual scenarios that might serve as triggers of presidential power. What is clear though is that until a test or principle is found, the national security delegation conundrum will remain.