How the U.S. Supreme Court Could Dramatically Alter the Environmental Regulatory Landscape by Embracing the ‘Non-Delegation Doctrine’

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As 2020 opened, astute U.S. Supreme Court watchers turned their attention from the long talked about future of “Chevron deference” to the suddenly real possibility that the entirety of administrative law could be upended.

Beginning with the confirmation of Justice Gorsuch to the Supreme Court in early 2017, there has been anticipation and/or concern that the court would bring an end to one of the cornerstone principles of administrative law known as “Chevron deference”. Since its landmark decision in Chevron U.S.A. v. NRDC (1984), the Supreme Court has applied “Chevron deference” in instances where a statute such as the U.S. Clean Air Act (CAA) is silent or vague on a particular issue. In such cases, Chevron permits an agency such as the U.S. Environmental Protection Agency (EPA) to “fill in the blanks” utilizing the agency’s special technical expertise. As Congress lacks technical expertise in air pollution, for example, the heavy lifting of managing air quality is not done by the Clean Air Act itself (the statute passed by Congress), but through the regulations adopted by EPA under authority delegated to the agency by Congress.

Critics of “Chevron deference” see it as an impermissible abdication of constitutionally granted judicial and legislative powers to the executive branch. Although Chevron has yet to be overturned, the Supreme Court’s June 2019 decision in the case of Kisor v. Wilkie struck a blow at the related concept of “Auer deference”. While Chevron is applied by courts in cases of statutory ambiguity, Auer has traditionally been applied in matters involving regulatory ambiguity since the court’s decision in Auer v. Robbins (1997). Although Auer was not completely overturned by the court’s Kisor decision in 2019, the instances in which agencies such as EPA are afforded “Auer deference” have been substantially curtailed. Specifically, courts are directed to exhaust all traditional rules of regulatory construction before throwing up their hands and deferring to an agency’s own interpretation. In this sense, Kisor presents a roadmap for the eventual curtailment or overturning of “Chevron deference” in...
matters pertaining to statutory construction. [Editor’s Note: Read last month’s Etcetera column (http://pubs.awma.org/flip/EM-Feb-2020/etcetera.pdf) for more on the “Auer deference” court decision.]

Meanwhile, a much more significant harbinger of possible changes in administrative law passed largely unnoticed in late November. In a somewhat obscure statement regarding the Supreme Court’s denial of a petition for certiorari (the court’s formal refusal to hear a case on appeal), Justice Kavanaugh wrote broadly about statutory interpretation and the concept of the constitutional “non-delegation doctrine”. While the Constitution contains no explicit language prohibiting Congress from delegating regulatory rulemaking authority to a federal agency such as EPA, a conservative subset of legal scholars has long believed that Congress is nonetheless doctrinally prohibited from delegating its legislative powers with respect to “major policy decisions” to administrative agencies. The belief springs from Article I of the Constitution, which provides that “[a]ll legislative powers herein granted shall be vested in a Congress of the United States.”

The Supreme Court has only sparingly invoked the non-delegation doctrine as a matter of statutory interpretation—and then, only in the 1930s in efforts to strike down portions of President Franklin D. Roosevelt’s New Deal. In the 90 years since, the court’s position has been that, in order for a regulatory agency to exercise authority over a “major” policy question of great economic and/or political importance, Congress must: (1) decide the major policy question itself and delegate regulation and enforcement to the agency; or (2) expressly and specifically delegate to the agency the authority to decide the major policy question and its regulation and enforcement. It is this second bucket of delegated authority that allows the bulk of federal regulations to survive legal challenges based on the non-delegation doctrine. This is also the area causing the conservative justices of today’s Supreme Court the most concern.

Justice Kavanaugh’s November 2019 statement was the first “official” position he had taken on the matter of congressional delegation of legislative authority since his appointment to the court. In June 2019, Justice Gorsuch wrote a dissenting opinion in Gund v. United States that breathed
new life into the non-delegation doctrine. Justice Kavanaugh had not yet joined the court at the time that *Gundy* was heard, so he played no part in the decision.

While overturning *Chevron* could result in a piece-by-piece assault on the enforcement of environmental regulations promulgated by EPA, a full-on adoption of the non-delegation doctrine by the Supreme Court could dismantle the federal environmental regulatory scheme in its entirety. A decision by the Supreme Court that Congress itself must settle all major policy questions regarding air quality could, for example, leave legislators themselves responsible for the highly technical process of establishing and periodically reviewing the National Ambient Air Quality Standards for the six criteria pollutants under the Clean Air Act. Similarly, New Source Performance Standards and Maximum Achievable Control Technology Standards would arguably need to be set and periodically reviewed by Congress—with EPA on the sidelines relegated to a purely administrative and enforcement role.

Given that a strict application of the non-delegation doctrine would apply to all federal agencies and impact the validity of thousands of federal regulations, the federal government as we know it would quickly grind to a halt as agencies waited for Congress to wade through myriad technical issues in scores of different regulatory disciplines.

EPA once invoked the judicial doctrine of “absurd results” in its unsuccessful defense of the ill-fated greenhouse gas tailoring rule. The absurd results doctrine allows courts to interpret a statute in a way that is contrary to its plain language in order to avoid “absurd” legal consequences. Here, the Supreme Court may be wise to check itself and preemptively apply the absurd results doctrine to its own consideration of the non-delegation doctrine.

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