

The importance of *Gundy v. U.S.*

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By [Peter J. Wallison](#) . . . *Gundy v. United States* is not listed in most media accounts of important matters now before the Supreme Court, yet this case could profoundly change how courts intervene to preserve the constitutional separation of powers in the future. Involving just one individual petitioner, Herman Avery Gundy, and only one issue – how to interpret a provision in the Sex Offender Registration and Notification Act of 2006 (SORNA) – the Court’s decision could signal a change in the direction of the Supreme Court on separation of powers issues, and begin an era in which Congress will not be permitted to give administrative agencies broadly conceived powers to make rules and regulations.

For these reasons the case has drawn amicus briefs from 13 groups, including the ACLU, New Civil Liberties Alliance, Pacific Legal Foundation, and 15 Criminal and Administrative Law Professors. Predicting a result is also difficult because only eight justices took part; the argument occurred on October 2, before Justice Kavanaugh had taken his oath of

office.

Gundy arose because a provision in SORNA appears to give the Attorney General the opportunity to impose a portion of the act retroactively on individuals who had been convicted of sex offences under state law before SORNA was enacted. The act was intended to create a comprehensive national system of registration for convicted sex offenders under state or federal law, requiring them to register with the federal government as well as the state in which they were convicted, and to keep their registration current in each jurisdiction in which they reside.

The act also contains a special provision for offenders who were convicted under state law **before** SORNA's enactment: "The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this act."

In a prior case – **Reynolds v. US** – considered by the Court in 2012, the Court (Justice Breyer writing for the majority) held (7-2) that the act's language about the Attorney General's authority with respect to "pre-Act offenders" was not applicable to these individuals until the Attorney General issued the regulation contemplated by the statutory language. Thus, the Court had decided in 2012 that the Attorney General was empowered by the language of the act to determine who among the pre-Act offenders would be subject to the registration requirements and who would not.

This raised a question that the Court had not decided in **Reynolds**, but had to confront in **Gundy**: could the Attorney General both declare that a pre-Act offender was required to register under SORNA and then prosecute him for having failed to register? This placed the power to make a law and the power to enforce it in the same hands – a classic violation of the separation of powers and a clear delegation of legislative authority.

[Read the full analysis here at American Enterprise Institute.](#)