

Judge Stephen F. Williams and the Underestimated History of the Non-Delegation Doctrine

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CSAS Working Paper 21-32

The Gray Center's Symposium in Honor of Judge Stephen F.
Williams



Antonin Scalia Law School
C. BOYDEN GRAY CENTER
FOR THE STUDY OF THE
ADMINISTRATIVE STATE
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Introduction

Judge Stephen F. Williams famously authored several opinions while on the D.C. Circuit that came to be considered part of the administrative law canon. But one of his most famous and influential cases is often misunderstood. In *American Trucking Ass'ns, Inc. v. E.P.A.* (“American Trucking”),¹ Judge Williams displayed his ability to discern nuances in legal doctrines that were well supported by reason and precedent but overlooked by many others.

American Trucking involved Judge Williams’s application of the nondelegation doctrine, which “bars Congress from transferring its legislative power to another branch of Government.”² This doctrine had been widely misperceived to be an abandoned relic from decades-old Supreme Court cases, but Judge Williams understood and applied its ongoing influence.

This essay explains the common understanding of the nondelegation doctrine as a discarded tool of statutory interpretation and then explains how this misstates history and precedent. Then, I examine Judge Stephen F. Williams’s insightful application of this doctrine in *American Trucking* and his awareness of the doctrine’s continued relevance. Lastly, I briefly discuss *American Trucking*’s ongoing impact on the nondelegation doctrine.³

I. The Nondelegation Doctrine’s Underestimated Influence Before *American Trucking*.

As I have previously noted, reports of the nondelegation doctrine’s impotence have been greatly exaggerated.⁴ The conventional account of the nondelegation doctrine starts with *A.L.A. Schechter Poultry Corp. v. United States* (“Schechter Poultry”)⁵ and *Panama Refining Co. v. Ryan* (“Panama Refining”)⁶ in 1935 and ends with the Supreme

¹ *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) *aff'd in part, rev'd in part sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

² *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

³ Portions of this essay have been adapted from my earlier article that also examined the nondelegation doctrine’s commonly misunderstood history and its relation to Judge Williams’s *American Trucking* opinion. See C. Boyden Gray, *The Nondelegation Canon’s Neglected History and Underestimated Legacy*, 22 Geo. Mason L. Rev 619 (2015).

⁴ *Id.*

⁵ 295 U.S. 495 (1935).

⁶ 293 U.S. 388 (1935).

Court's reversal⁷ in 2001 of Judge Williams's opinion in *American Trucking*.⁸ This account asserts that the doctrine had no significant impact in between or after those cases and is now essentially a dead letter.

First, this conventional history of the nondelegation doctrine begins with *Panama Refining*. In 1935, the Supreme Court struck down a provision of the National Industrial Recovery Act ("NIRA") authorizing the president to restrict the interstate shipment of hot oil to state-imposed volume limits.⁹ Although NIRA enumerated various "policies" that Congress intended to implement (e.g., "to eliminate unfair competitive practices," "to reduce and relieve unemployment," or "otherwise to rehabilitate industry and to conserve natural resources"), this "general outline of policy" included "nothing as to the circumstances or conditions in which" the president should actually exercise his powers, and thus the Court found "nothing . . . which limits or controls the authority conferred by the provision."¹⁰

The Court held that this lack of a limiting principle in NIRA's hot oil provision violated the nondelegation doctrine.¹¹ Relying on its observation in a previous case that an act of Congress "is not a forbidden delegation of legislative power" if the act "lay[s] down . . . an intelligible principle to which the [administrator] is directed to conform,"¹² the Court found no intelligible principle in NIRA's hot oil provision. The Court added that if the hot oil provision "were held valid" despite the lack of a limiting principle, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function."¹³

Second, *Schechter Poultry*, decided four months after *Panama Refining* represents the only other successful application of the nondelegation doctrine, according to the conventional account. Another section of NIRA authorized the president to promulgate "codes of fair competition" but failed to provide any further direction as to what might constitute "fair competition."¹⁴ While "unfair competition" was "a limited concept" well rooted in the common law,¹⁵ and "unfair methods of competition" was a

⁷ 581 U.S. 457 (2001).

⁸ *Am. Trucking Ass'ns*, 175 F.3d 1027.

⁹ *Pan. Ref.*, 293 U.S. at 433; *id.* at 436 (Cardozo, J., dissenting).

¹⁰ *Id.* at 417, 419 (majority opinion).

¹¹ *Id.* at 430.

¹² *Pan. Ref.*, 293 U.S. at 429-30 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (internal quotation marks omitted).

¹³ *Id.* at 430.

¹⁴ *Schechter Poultry*, 295 U.S. at 530-31.

¹⁵ *Id.* at 531.

broad term adopted in the Federal Trade Commission (“FTC”) Act and intended by Congress to be adjudicated on a case-by-case basis by the “quasi-judicial” FTC,¹⁶ the NIRA’s term “fair competition” boasted neither the FTC Act’s terminological specificity nor its procedural rigor.¹⁷ Therefore, the Court found the NIRA provision to be “a sweeping delegation of legislative power [which] finds no support in the” Court’s precedents and thus “unconstitutional.”¹⁸

Then, the conventional account asserts that the nondelegation doctrine faded into insignificance because it was never again successfully employed to invalidate a statute. This account points out that even Judge Williams’s opinion in *American Trucking* sixty years later, which merely attempted to limit an agency’s interpretive discretion under the nondelegation doctrine, was promptly overturned by the Supreme Court.

But this is a misreading of precedent and history. Judge Williams understood that the nondelegation doctrine had never ceased to critically influence judicial decisions. Although the Supreme Court has upheld many broadly worded statutes, the Court has continued to apply the doctrine repeatedly as a canon of construction to narrowly read statutory grants of authority to administrative agencies.¹⁹

For example, in *Kent v. Dulles*, the Court rejected the secretary of state’s assertion that the federal statute delegating him power to issue passports gave him broad discretion to deny passports to communists and communist sympathizers.²⁰ Citing *Panama Refining*, the Court noted that the broadly worded statute’s “standards must be adequate to pass scrutiny by the accepted tests,” and it construed the statute narrowly to deny the secretary power to unilaterally control communists’ freedom of movement.²¹

The Court similarly deployed the doctrine in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (“Benzene Case”), just a few years before Judge

¹⁶ *Id.* at 533.

¹⁷ *Id.*

¹⁸ *Id.* at 539, 541-42.

¹⁹ See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (“In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”).

²⁰ 357 U.S. 116, 129 (1958).

²¹ *Id.* at 129 (citing, *inter alia*, *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 420-30 (1935)). The statute in question read, “The Secretary of State may grant and issue passports ... under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.” *Id.* at 123.

Williams took his seat on the D.C. Circuit.²² In the *Benzene Case*, the Occupational Safety and Health Act's ("OSH Act") Section 3(8) delegated to the labor secretary authority to promulgate standards "which require[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."²³ In addition, regarding "toxic materials or harmful physical agents," the OSH Act's Section 6(b)(5) directed the secretary to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity."²⁴ Based on these provisions, the secretary concluded that "no safe exposure level can be determined" for any carcinogen, and thus set an exposure limit of one part benzene per million parts of air (1 ppm).²⁵

This expansive interpretation of the OSH Act met sharp resistance on the Court.²⁶ A four-justice plurality rejected the labor secretary's argument that Sections 3(8) and 6(b)(5) effectively imposed no minimum thresholds governing the secretary's exercise of regulatory power: "Under the Government's view," Section 3(8) "imposes no limits on the Agency's power, and thus would not prevent it from requiring employers to do whatever would be 'reasonably necessary' to eliminate all risks of any harm from their workplaces."²⁷ As for Section 6(b)(5), the Court disapprovingly noted that "the Government [took] an even more extreme position," claiming authority to "impose standards that either guarantee workplaces that are free from any risk of material health impairment, however small, or that come as close as possible to doing so without ruining entire industries."²⁸

If the plurality's analysis had been limited merely to statutory interpretation, the *Benzene Case* would have had little lasting significance. But, crucially, the justices construed the OSH Act provisions narrowly not merely based on traditional tools of statutory interpretation, but because to read it otherwise would implicate the nondelegation doctrine:²⁹

If the Government was correct in arguing that [neither OSH Act provision requires the Secretary to make a showing of *significant risk*], the statute would

²² 448 U.S. 607 (1980) (plurality opinion).

²³ *Id.* at 612 (quoting OSH Act § 3(8) 29 U.S.C. § 652(8) (2012)) (internal quotation marks omitted).

²⁴ *Id.* (quoting OSH Act § 6(b)(5)) (internal quotation marks omitted).

²⁵ *Id.* at 613.

²⁶ *See generally id.* at 640-43.

²⁷ *Id.* at 640-41.

²⁸ *Id.* at 641.

²⁹ *Id.* at 646.

make such a “sweeping delegation of legislative power” that it might be unconstitutional under the Court's reasoning in *A. L. A. Schechter Poultry Corp. v. United States* and *Panama Refining Co. v. Ryan*. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.³⁰

This condemnation of a “sweeping delegation of legislative power” demonstrates that the nondelegation doctrine is far more than a legal theory that expired in 1935. To the contrary, the Supreme Court has continued to apply this doctrine since *Shechter Poultry* and *Panama Refining* in ways that significantly constrain agency discretion.³¹

The Supreme Court's approach in the *Benzene Case*, more than the strict application of the nondelegation doctrine in the 1930s, gave rise to Judge Williams's approach to the doctrine just a few years later.

II. Judge Williams and the Nondelegation Doctrine: *International Union* and *American Trucking*.

Judge Williams's renowned ability to discern nuances in legal doctrines and delve deeper than the obvious analysis is showcased by his rejection of the “conventional account” of nondelegation as an ineffectual doctrine that died in 1935. His opinions in *International Union* and *American Trucking* evidence his thorough understanding of the nondelegation canon arguments that survived the *Schechter Poultry* era and are displayed in the *Benzene Case*.

In *International Union of United Auto., Aerospace & Agr. Implement Workers of Am. v. Occupational Health and Safety Administration* (“*Industrial Union*”), Judge Williams authored an opinion that rejected a regulation by the Occupational Safety and Health Administration that required employers to “lockout or tagout” energy isolating

³⁰ *Id.* at 646 (citations omitted). Although Justice Rehnquist did not join this four-justice plurality opinion, he wrote a concurrence, agreeing with the majority's position that the secretary should not have power to “eliminate marginal or insignificant risks of material harm right down to an industry's breaking point.” *Id.* at 683 (Rehnquist, J., concurring). Justice Rehnquist's preferred remedy would have been to strike down part of Section 6(b)(5) to prevent the secretary from setting a standard without first identifying the “safe” level of exposure. *Id.* at 687-88. Justice Rehnquist's focus on “ensuring that Congress itself [[rather than agencies] make the critical policy decisions” was in keeping with Judge Williams's later opinion in *American Trucking Associations, Inc. v. U.S. E.P.A.*, 175 F.3d 1027 (D.C. Cir. 1999) *aff'd in part, rev'd in part sub nom. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001), and ultimately came to be shared by a Court majority in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). *Id.* at 687.

³¹ See, e.g., *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *Kent v. Dulles*, 357 U.S. 116 (1958).

devices, such as circuit breakers, when maintaining or servicing industrial equipment.³² “Lockout or tagout” procedures are designed to reduce injuries related to ordinary industrial equipment: for example, placing a “lock” on a circuit breaker, so that equipment cannot start up until the lock is removed.³³ This regulation was therefore referred to as the “lockout/ tagout” rule.³⁴

In this case, Judge Williams rejected the agency’s construction of the OSH Act that would have placed no substantive constraints on the secretary’s authority to regulate matters other than those involving toxic materials.³⁵ Judge Williams recognized the *Benzene Case*--especially its identification of “significant risk” as an appropriate “threshold requirement” implied by the statute--as “a manifestation of the Court’s general practice of applying the nondelegation doctrine mainly in the form of ‘giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.’”³⁶ This reliance on the *Benzene Case* marked a turning point for the nondelegation doctrine, as the holding in *Benzene* that condemned delegations of power was merely a plurality opinion, and had not previously been viewed as a resurgence of support for the nondelegation doctrine.

The D.C. Circuit sought a limiting principle that would save the OSH Act from violating nondelegation principles, such as the “significant risk” requirement in the *Benzene Case*. And Judge Williams proposed an implicit cost-benefit standard for regulation as the saving construction.³⁷

Several years after *International Union*, Judge Williams most famously applied the nondelegation doctrine in *American Trucking*. This case involved an industry challenge to EPA’s National Ambient Air Quality Standards (“NAAQS”) for particulate matter and ozone. In the Clean Air Act Amendments of 1970, Congress directed the EPA to promulgate NAAQS for each “criteria pollutant,” to review those standards every five years, and to “make such revisions in such criteria and standards and promulgate such new standards as may be appropriate.”³⁸ In July 1997, EPA published

³² *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Occupational Safety & Health Admin.*, 938 F.2d 1310, 1312 (D.C. Cir. 1991), *supplemented sub nom. Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Occupational Safety & Health Admin., U.S. Dep’t of Lab.*, No. 89-1559, 1991 WL 223770 (D.C. Cir. Sept. 16, 1991).

³³ *Id.*

³⁴ *See generally id.*

³⁵ *Id.* at 1316.

³⁶ *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989)).

³⁷ *Id.* at 1321.

³⁸ 42 U.S.C. § 7409 (2012); *see also Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 462 (2001) (citing 42 U.S.C. § 7409(a)).

NAAQS revisions for “particulate matter” and ozone.³⁹ Industry groups and certain states filed petitions with the D.C. Circuit arguing that the standards were too strict, while environmental groups filed petitions arguing that the standards were too lenient.⁴⁰ The key to the consolidated case, from all parties’ perspectives, was what constituted an “appropriate” NAAQS revision.

The various petitioners did not make nondelegation the central focus of their challenges to the NAAQS revisions; instead, “the briefs largely focused on whether EPA’s explanation showed reasoned decision-making, and on whether the agency had violated any of the ‘regulatory reform’ statutes of the 1980s and 1990s.”⁴¹

But some petitioners did squarely raise the nondelegation issue in the D.C. Circuit-- not as an argument to strike down the statute altogether, but rather as a constitutional principle demanding a narrowing interpretation of the broad statute, just as in the *Benzene Case*.⁴² For example, the non-state petitioners argued the EPA administrator’s insistence on promulgating new ozone standards despite the lack of scientific certainty regarding the new standards’ public health impacts risked violating *Panama Refining’s* instruction that statutes must confine agencies to “making . . . subordinate rules within prescribed limits.”⁴³ These petitioners argued that the statute should be construed as providing intelligible criteria for what constitutes an appropriate NAAQS revision.

The most expansive nondelegation arguments were set forth in the amicus briefs of Senator Orrin Hatch and Congressman Tom Bliley.⁴⁴ After initially tracing the doctrine’s origins in nineteenth century case law to the nondelegation doctrine’s “high-water mark” in *Schechter Poultry* and *Panama Refining*, Representative Bliley cautioned that “it would be a mistake to say that the doctrine lost vitality” after those two cases, for “the doctrine survives, as a crucial canon of statutory construction and

³⁹ See *Whitman*, 531 U.S. at 463 (citing National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997)). For ozone, EPA set an “8-hour” standard at 0.08 parts per million (ppm); for particulate matter, EPA set a variety of new standards. National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. at 38,856.

⁴⁰ *Am. Trucking Ass’ns*, 175 F.3d 1027.

⁴¹ Craig N. Oren, *Whitman v. American Trucking Associations --The Ghost of Delegation Revived ... and Exorcised*, in ADMINISTRATIVE LAW STORIES 7, 27 (Peter L. Strauss ed. 2006).

⁴² Brief of Non-State Clean Air Act Petitioners & Interveners at 47, *Am. Trucking Ass’ns*, 175 F.3d 1027 (No. 97-1441), 1998 WL 35240573.

⁴³ *Id.* (quoting *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 421(1935)) (internal quotation marks omitted).

⁴⁴ The briefs were co-written by Alan Raul, Nathan Forrester, and the author of this Article.

administrative restraint.”⁴⁵ In addition, he argued that the Clean Air Act’s lack of a guiding intelligible principle for setting “appropriate” revised NAAQS was demonstrated by the fact that the agency failed to demonstrate any significant risk that the new regulations would alleviate: “As in *Benzene* and *International Union*, this Court should interpret the Clean Air Act to require that any new NAAQS be targeted to the reduction of a significant health risk.”⁴⁶

In response, EPA only cursorily addressed these arguments, asserting that an intelligible principle was found in the statute’s delegation of power to promulgate NAAQS that are “requisite to protect the public health” with “an adequate margin of safety.”⁴⁷

This failure to offer more robust counterarguments cost the EPA when Judge Williams, comparing this case with the opinion he authored in *International Union*, held that EPA’s interpretation of the Clean Air Act violated the nondelegation doctrine. But, instead of invalidating the statute itself—à la *Schechter Poultry*—the D.C. Circuit panel remanded the matter to EPA so that the agency could try its hand at identifying and honoring the Act’s intelligible principles, as the Labor Department had done on remand in *International Union*.⁴⁸ Alternatively, Judge Williams wrote, if the agency ultimately could not find guiding principles in the Act, “it [could] report to the Congress, along with such rationales as it has for the levels it chose, and seek legislation ratifying its choice.”⁴⁹ Like the *Benzene Case*, the D.C. Circuit held that EPA’s new standards would need to adopt a standard more significant than zero-risk in order to accord with the Constitution.⁵⁰

At the time, Judge Williams’s *American Trucking* opinion was perceived as a radical attempt to resurrect a dead doctrine.⁵¹ But in the context of cases like *Benzene*, Judge Williams’s opinion was, in fact, a mild and natural application of the doctrine. His understanding of the doctrine’s vitality as a canon of construction enabled him to

⁴⁵ Brief of Amicus Curiae Congressman Tom Bliley at 19, *Am. Trucking Ass’ns*, 175 F.3d 1027 (No. 97-1441), 1998 WL 35240577.

⁴⁶ Brief of Amicus Curiae Congressman Tom Bliley at 27, *Am. Trucking Ass’ns*, 175 F.3d 1027 (No. 97-1441), 1998 WL 35240577.

⁴⁷ Brief for the Petitioners at 23, *Browner v. Am. Trucking Ass’ns*, 529 U.S. 1129 (2000) (No. 99-1257), 2000 WL 1010083.

⁴⁸ *Am. Trucking Ass’ns*, 175 F.3d at 1037-38.

⁴⁹ *Id.* at 1040.

⁵⁰ *Id.* at 1038.

⁵¹ See generally Oren, *supra* note 37.

cabin the agency's discretion by requiring an intelligible principle be articulated, and he did not even consider taking harsh action like striking down the statute.⁵²

Although the Supreme Court reversed Judge Williams's opinion, this did not lead to the doctrine's demise, and the Court, in fact, championed aspects of the opinion below. For example, the Supreme Court agreed with Judge Williams that an intelligible principle was needed but stated that the court, not the agency, should determine whether an impermissible delegation occurred.⁵³ This shift of interpretive power from agencies to the courts, for purposes of the nondelegation inquiry, effectively decreased the situations in which *Chevron* deference may be applied.

In addition, Justice Scalia's opinion "quoted with approval the definition of 'requisite'" that was offered at oral argument -- 'sufficient, but not more than necessary.'⁵⁴ Justice Scalia cited the *Benzene Case* approvingly for its imposition of a similar "substantial risk" limiting principle.⁵⁵ The EPA had convinced Justice Scalia that the agency lacked carte blanche to tighten the NAAQS indefinitely, but only by conceding, consistent with Judge Williams's opinion, that the Act authorized the EPA to tighten NAAQS only when necessary to prevent "significant or substantial" public health risks.⁵⁶ In short, Judge Williams's precise, scalpel-like implementation of the nondelegation doctrine in *American Trucking* may have startled those who only knew the "conventional account" of the doctrine, but Judge Williams knew his opinion was an advancing step on an existing path. Although the Supreme Court revised Judge

⁵² *Am. Trucking Ass'ns*, 175 F.3d at 1038.

⁵³ *Whitman*, 531 U.S. at 472-73 ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.... The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise--that is to say, the prescription of the standard that Congress had omitted--would itself be an exercise of the forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer.").

⁵⁴ See Linda Greenhouse, *E.P.A.'s Right to Set Air Rules Wins Supreme Court Backing*, N.Y. TIMES, Feb. 28, 2001, at A1.

⁵⁵ *Whitman*, 531 U.S. at 473-74.

⁵⁶ *Id.* at 473. Cost-benefit analysis, while mentioned as a possible limiting principle in Judge Williams's *International Union* opinion, could not be used in this situation because the E.P.A. is barred from considering any factor other than "health effects relating to pollutants in the air." *Am. Trucking Ass'ns*, 175 F.3d at 1038 (citing *Nat. Res. Def. Council, Inc. v. Adm'r, U.S. E.P.A.*, 902 F.2d 962, 973 (D.C. Cir. 1990), *opinion vacated in part*, 921 F.2d 326 (D.C. Cir. 1991)) But the Court noted that "States may consider economic costs when they select the particular control devices used to meet the standards, and industries experiencing difficulty in reducing their emissions can seek an exemption or variance from the state implementation plan." See *Whitman*, 531 U.S. at 493 (Breyer, J., concurring) (citing *Union Elec. Co. v. E.P.A.*, 427 U.S. 246 (1976)).

Williams's suggested solution for the nondelegation problem that the Supreme Court recognized, the case bolsters the nondelegation doctrine's influence on jurisprudence today.

III. The Nondelegation Doctrine's Next Frontier and the Continued Impact of *American Trucking*.

In *Whitman v. American Trucking*, the Supreme Court declined to strike down a statute under the nondelegation doctrine.⁵⁷ But the Court did not renounce Judge Williams's application of the doctrine in the opinion below altogether, and it remains a crucial canon of construction, empowering courts to rein in agency overreach through limiting constructions of broad statutes.

In recent years, *American Trucking*'s legacy has been in the spotlight as Supreme Court justices have voiced support for the sterner, *Shechter Poultry* form of the doctrine that does not merely require an agency interpretation to articulate an intelligible principle but advocates for striking down a statute that simply does not have such a principle. For example, in his dissent in *Gundy v. United States*, Justice Gorsuch argued that a federal sex offender statute should be struck down for delegating too much discretion to the Attorney General.⁵⁸ Justice Gorsuch emphasized that Congress must set standards "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed."⁵⁹

Four more justices have voiced support for a more active nondelegation doctrine. Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's *Gundy* dissent. Although Justice Alito did not join, he indicated that he also supports a strong form of the non-delegation doctrine. He noted that, in another case, he would support an effort to "reconsider the approach we have taken for the past 84 years" if a majority of the Court was willing to take that step.⁶⁰ In fact, Justice Alito cited *Whitman v. American Trucking* in support of the principle that Congress may not delegate its legislative powers to another branch of government.⁶¹ And Justice Kavanaugh later echoed this support of the nondelegation doctrine in his statement regarding the denial of certiorari in *Paul v. United States*:⁶² "I write separately because Justice Gorsuch's scholarly

⁵⁷ *Id.* at 486.

⁵⁸ *Gundy*, 139 S. Ct. 2116 (Gorsuch, J., dissenting).

⁵⁹ *Id.* at 2136.

⁶⁰ *Id.* at 2130-31 (Alito, J., dissenting).

⁶¹ *Id.* at 2130.

⁶² *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari).

analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”⁶³

Although it remains to be seen what form the doctrine’s influence will ultimately take—whether Justice Gorsuch’s or Judge Williams’s or something else altogether—with an increasingly large administrative state, the doctrine will likely only increase in relevance. And Justice Williams’s perspicacious understanding of the doctrine’s unceasing impact as a canon of construction, displayed in *American Trucking*, will continue to provide a vehicle for courts to safeguard separation-of-powers principles without striking down statutes. Even Professor Sunstein now acknowledges that the doctrine plays a larger role. “Far from being a dead letter, it is flourishing. In terms of administrative law and regulatory practice, it greatly matters. It affects administrative behavior; it produces multiple losses for agencies in court.”⁶⁴

Conclusion

Judge Williams’s tenure on the D.C. Circuit has left a lasting impact on many aspects of administrative law. One of his most far-reaching contributions was his role in changing the conventional narrative surrounding the nondelegation doctrine. Even the Supreme Court, in its reversal of *American Trucking*, emphasized that agencies remain obligated to demonstrate that their legislative regulations actually respond to “significant” risks of harm.⁶⁵ To allow otherwise would be to assume that Congress gave the agencies *carte blanche* to impose regulatory burdens for no reason at all—the epitome of unbounded delegations of legislative power.

Therefore, the Court acknowledged and approved the nondelegation doctrine as it was applied for decades after *Panama Refining* and *Schechter Poultry*, up to and including *American Trucking*. As William Faulkner wrote, the past is not dead— “it’s not even past.”⁶⁶ And Judge Williams’s legacy certainly never will be.

⁶³ *Id.*

⁶⁴ Cass Sunstein, *The American Nondelegation Doctrine*, 86 Geo. Wash. L. Rev. 1181 (2018).

⁶⁵ *Whitman*, 531 U.S. at 473.

⁶⁶ William Faulkner, *REQUIEM FOR A NUN* 73 (Vintage Books 2011) (1951).