

Brevity, Speed, and Deference: An Account from the Williams Chambers¹

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One of the leading books on administrative law advocates judicial review for “sound governance.”² Reviewing the book while sitting on the D.C. Circuit, Judge Williams posited that, even if “judges are smarter than agency heads, or have more time on their hands, or have cleverer clerks,” the proper institutional role requires more deference.³ Divining “sound governance” is not for courts. The Judge concluded by quoting Milton’s poem about the role of the blind: “They also serve who only stand and waite.”⁴

That endorsement of judicial deference presents a puzzle. While Judge Williams did often follow his own advice (as when he upheld the Federal Communications Commission’s abandonment of the fairness doctrine),⁵ some of the Judge’s best-known opinions refused to defer to agency or congressional judgments. For example, in 2016, he would have vacated the FCC’s net neutrality rule almost exclusively on policy grounds,⁶ and in 2012, he would have struck down Congress’s coverage

1. Days before Judge Williams was hospitalized in May 2020, Hausman defended his doctoral dissertation before Ho and O’Connell, among others. We emailed a picture of the Zoom defense with three of his former clerks to the Judge. He immediately replied: “That’s wonderful. I feel very pleased, but of course today’s great salutations are to the new DR!”

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2. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 213 (1990).

3. Stephen F. Williams, *The Roots of Deference*, 100 *YALE L.J.* 1103, 1109 (1991).

4. JOHN MILTON, *POEMS, &C. UPON SEVERAL OCCASIONS* 59 (1673), *reprinted in* THE *POETICAL WORKS OF JOHN MILTON* 85 (Rev. H.C. Beeching, M.A., ed., Oxford: Clarendon Press 1900).

5. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989). Commentators contrasted Judge Williams’s deferential approach in this case with the more exacting “hard look” standard of arbitrary and capricious review of agency policy determinations. *See, e.g.*, STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY PROBLEMS, TEXT, AND CASES* 386 (4th ed. 1999) (citing *Syracuse Peace Council* as an example of “relatively little scrutiny” in reviewing an agency decision).

6. *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 744 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part).

formula for the preclearance regime in the Voting Rights Act, as the Supreme Court later did.⁷

We don't attempt to solve this puzzle, but we do suggest that it is less puzzling than it may at first appear. Two less known aspects of the Judge's decision-making were predicated on courtesy and deference to agencies and human agency: his brevity and speed. While brevity functions as a courtesy to litigants, it also spurs speed, and speed is a matter of deference. Getting a judicial opinion sooner means more time for the agency to issue a new rule or adjudication.

A central debate in administrative law concerns whether courts have imposed too many procedural requirements on agencies, delaying agency policymaking.⁸ Judges can add to that delay, sometimes waiting months to issue opinions. Because remand is a common result of judicial review that does not uphold agency decisions, delay can be an important cost of losing for the agency. Avoiding judicial delay is therefore a modest form of deference—one that Judge Williams consistently exercised.

I. The Cost of Words

Delivering a draft opinion to Judge Williams meant fetching a book cart. Drafts were to be accompanied by the volumes of the Federal Supplement, Federal Reporter, and United States Code cited in the opinion. Why? The Judge liked reading physical books, but we suspect that he also had a less obvious reason for asking his clerks to haul piles of reporters around the courthouse. New clerks learned that each citation meant physical labor. When a string cite weighed 50 pounds, you thought twice about adding it. Needless words bore a cost.

In fact, you can spot a Williams opinion by the length of the scroll bar in Westlaw: you don't have to scroll far to reach the end.⁹ Scrolling back and forth from law to facts often won't be necessary either: the Judge preferred to sprinkle facts throughout his opinions, as needed, rather than listing them in a single, hard-to-remember section at the beginning.¹⁰ In just a few minutes, you can usually read the whole opinion, rather than scanning for the important parts.¹¹

7. *Shelby Cty. v. Holder*, 679 F.3d 848, 884-88 (D.C. Cir. 2012) (Williams, J., dissenting), *rev'd*, 570 U.S. 529 (2013).

8. *See infra* notes 23-27.

9. The Judge believed in brevity at the character level as well: he used contractions in his opinions.

10. *See, e.g., R.J. Reynolds Tobacco Co. v. FDA*, 810 F.3d 827, 828-29 (D.C. Cir. 2016) (summarizing key facts in a single paragraph at the start before returning to relevant facts throughout).

11. We are guilty of lengthening the existing literature on judicial brevity. *See, e.g., Julie A. Oseid, The Power of Brevity: Adopt Abraham Lincoln's Habits*, 6 J. ASS'N LEGAL WRITING DIRECTORS 28 (2009); Bruce M. Selya, *In Search of Less*, 74 TEX. L. REV. 1277, 1279 (1996) ("I

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In chambers, the search for judicial efficiency started with bench memos, which did not exist. Instead of asking clerks to write a memo about a case soon to be argued, the Judge started by reading the briefs. He then sent his clerks a short memo of his own, asking a series of questions. We responded to the questions with whatever research was needed, and the process repeated itself until we had settled the issues.

This procedure saved clerks untold hours in irrelevant rabbit holes, and it also had the advantage of failing to produce any document that could form the basis for an opinion. Instead, the back-and-forth between Judge and clerk contained only the necessary cases and an informal sketch of what would be decisive for the holding. When the time came to compose the opinion, the task was to write from scratch, not to pare down an existing document. That fresh task, like the gathering of physical sources, encouraged brevity. And the need to start anew also meant that clerks began opinions knowing how they would end, allowing them to lead the reader quickly and clearly to the dispute's resolution.

With the clerk's draft in hand and the cart of sources next to his desk, the Judge started over again. To the disappointment of clerks who had hoped to see their turns of phrase in the Federal Reporter, the Judge rewrote rather than edited. While the Judge sometimes moved big parts of the clerk's draft into his own, for many years in an outdated version of WordPerfect, he relegated most of the clerk's text to the end of the document, which the clerk then deleted. Just as the Judge believed in limits on congressional delegation to agencies, he believed in limits on judicial delegation to clerks.¹² The result was better—and usually briefer. (This desire for brevity did not bar nice turns of phrase or witty references: the Judge asked one of us to track down Tom Wolfe's *A Man in Full*³ for a short concurring opinion.)¹⁴ As the Judge explained to another one of us, a writer's effort in reducing length is effectively a transfer from writer to reader.

That principle extended to doctrine. Unnecessary arguments at best slow down the reader; at worst, they lead the reader to misunderstand the decision. As steps proliferated in administrative legal standards, the Judge

think that, if judges can steel themselves to abjure rote recitations of established legal principles, forgo superfluous citations, and work consciously toward economies of phrase, the game will prove to be well worth the candle.”); Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405 (1994) (suggesting that more opinions remain unpublished in order to reduce the volume of published decisions).

12. This principle can be thought of as a kind of in-chambers analogue to the internal nondelegation doctrine described as underpinning *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201.

13. TOM WOLFE, *A MAN IN FULL* (1988).

14. *United States v. Maccado*, 225 F.3d 766, 776 (D.C. Cir. 2000) (Williams, J., concurring) (“Maccado seems reminiscent of the luckless Conrad Hensley in Tom Wolfe’s *A Man in Full*, though to be sure a good deal more feckless.”).

resisted. “I am suspicious of anything that involves prongs,” he told one of us. Readers of his opinions might remain happily unaware that *Chevron*¹⁵ involves more than one step. This preference reflected not only the Judge’s commitment to brevity, but also his substantive understanding that the distinction between the two steps is illusory.

This judicial approach defied easy categorization.¹⁶ One of us remembers discussing formalism and functionalism with the Judge at lunch. Asked the Judge, “Am I a functionalist or a formalist?” Responded the clerk, “I don’t know.” And the Judge, “Neither do I.” On the one hand, the Judge saw cases as puzzles, in which the correct answer could often (but certainly not always) be found through deduction from statutes, rules, and cases. But even in such straightforward instances, he believed in giving the reader real reasons—explaining, like a functionalist, the purposes of the doctrine that he was applying.

The Judge’s preference for minimalism in resolving disputes therefore did not preclude intellectual exploration. As a former law professor, he had a penchant for using cases to explore broader implications. While deciding a standing case during one of our clerkships, for example, he became perplexed by the phrase “legally protected interest” from *Lujan v. Defenders of Wildlife*.¹⁷ In *Lujan*, Justice Scalia had described the invasion of a legally protected interest as part of the irreducible constitutional minimum of Article III standing.¹⁸ Lower courts had then turned this into an inquiry that resembled a determination of whether there was a cause of action.¹⁹ The puzzlement over how this language had shaped lower courts’

15. 467 U.S. 837 (1984). In the classic two-step formulation, courts first ask whether “the statute is silent or ambiguous with respect to the specific issue” and then ask “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. As the Judge recognized, however, no agency interpretation is reasonable if it conflicts with unambiguous statutory text; as a result, the two steps together mean that the court must “defer to the [the agency’s] reasonable interpretations” of its statute. *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 313 (D.C. Cir. 2015). As Judge Williams worked on reducing steps, courts have arguably added additional ones. *See, e.g.*, Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

16. We are reminded of an exchange about “ideal point” models with the Judge. Such models scale actors based on votes in cases to estimate “ideal points” in a latent policy space, typically interpreted as left-right ideology. The Judge was quick to point out that such empirical scales might not recover a coherent ideology if “liberals” voted in favor of economic regulation and against social regulation, while “conservatives” voted against economic regulation and in favor of social regulation. “Classical liberals,” voting against both forms of regulation, might appear to be centrists. The Judge’s defiance of categories extended to brilliantly interrogating social science’s categories, inspiring papers on such topics. *See, e.g.*, Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813 (2010).

17. 504 U.S. 555, 560 (1992).

18. *Id.*

19. *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (holding that plaintiffs need not show that their interest is legally protected in order to demonstrate standing). *But see* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988) (arguing that standing should be understood as a merits inquiry concerning whether an interest is legally

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determinations resulted in a concurrence to his own opinion, longer than the opinion itself, discussing the possible meanings of the phrase.²⁰ The concurrence is like an appendix: readers need not proceed to it to understand the holding. But those who do are rewarded. The concurrence explains why “legally protected” should not be understood to impose a requirement that the relevant interest is protected by substantive law. That approach would commingle the merits and standing inquiries, in violation of *Data Processing*.²¹

The Judge’s explanation proved useful in future cases across the courts of appeals.²² This is Williams brevity: a short, easy-to-understand opinion followed by a concurrence that clarified a muddy area of law, albeit one the Judge implicitly invited most readers to skip in the interest of time.

II. Speed as Deference

The same respect for litigant-readers that motivated the Judge to wage a gentle war on length also led him to prize speed. He rarely discussed his reasons for speed with us, maybe because he considered them obvious. Speed, in opinion-writing and in other tasks, was the natural result of courtesy to colleagues and litigants. The Judge responded to emails within a day, and he thought that litigants, too, deserved prompt responses.

Like brevity, speed was the result of a system in chambers. The Judge expected to receive opinion drafts from clerks within two weeks of argument. He then rewrote carefully, reading each case that the opinion cited and making the prose his own. Unlike us clerks, he never put the work off, often returning the opinion to clerks within days. Judge Williams arrived to chambers early—except when he had Russian classes, which allowed his clerks to sleep a bit more. He worried if his clerks put in more than an eight-hour day on court tasks, cautioning that if we worked efficiently, we should have plenty of time for other pursuits, such as finishing doctoral dissertations.

protected and that “[m]ore damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision”).

20. *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363 (D.C. Cir. 2005) (Williams, J., concurring).

21. 432 F.3d 359 (D.C. Cir. 2005); *Judicial Watch*, 432 F.3d at 364; *see also* Ass’n of Data Processing Serv. Org. v. Camp, 397 U.S. at 153 (“The ‘legal interest’ test goes to the merits. The question of standing is different.”).

22. *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff’d sub nom.* *District of Columbia v. Heller*, 554 U.S. 570 (2008); *see* *Cottrell v. Alcon Labs.*, 874 F.3d 154, 163-64 (3d Cir. 2017); *Ass’n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 951 n.23 (9th Cir. 2013); *Wilderness Soc’y v. Kane Cty., Utah*, 581 F.3d 1198, 1211 (10th Cir. 2009), *on reh’g en banc sub nom.* *Wilderness Soc’y v. Kane Cty., Utah*, 632 F.3d 1162 (10th Cir. 2011).

Speed may help explain why the Judge was more hesitant than some of his colleagues (and perhaps than we would be) to defer to the decisions of agency officials.²³ A classic complaint about judicial review of agency action²⁴ is that it has the effect of “slowing and shackling the administrative process.”²⁵ Judicial review might hobble agencies, making them jump through more hoops before reaching a decision, in either rulemaking or adjudication.²⁶ In these accounts, the high chance of a loss during judicial review makes agencies more cautious, slowing them down and wasting resources.

Most of the delay occasioned by judicial review likely arises from steps agencies must take in anticipation of judicial review,²⁷ but courts can also delay agency action in a more direct way: through the time it takes to produce a judicial opinion. Suppose, plausibly, that the agency’s goal is to implement its preferred policy as soon as possible. Its first preference might be to impose a new informal rule that withstands judicial review. But under certain circumstances, the speed of judicial review can be as important as its outcome. After all, when an agency loses a lawsuit under

23. In a recent example, Judge Williams dissented from a panel’s decision affirming the FCC’s net neutrality rule on the ground that the agency’s decision-making was arbitrary and capricious. See *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 744 (D.C. Cir. 2016) (Williams, J., dissenting). As one commentator explained, whereas the majority deferred to the Commission’s understanding of the record, “Judge Williams was unafraid to dive deeply into the details of the agency’s rulemaking proceeding.” Daniel Lyons, Opinion, *Net Neutrality and the Changing of the Guard on the D.C. Circuit*, WASH. POST: VOLOKH CONSPIRACY (June 16, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/16/net-neutrality-and-the-changing-of-the-guard-on-the-d-c-circuit-guest-post-by-daniel-lyons> [https://perma.cc/TYR6-38HS].

24. Most commonly, the target of complaint is judicial review under the arbitrary and capricious test, also commonly referred to as ‘hard look review.’ See 5 U.S.C. § 706(2)(A) (2018); see also *Pikes Peak Broad. Co. v. FCC*, 422 F.2d 671, 682 (D.C. Cir. 1969) (coining the term).

25. Irving R. Kaufman, *Judicial Review of Agency Action: A Judge’s Unburdening*, 45 N.Y.U. L. REV. 201, 206 (1970).

26. See *id.* (skeptically describing the view that “[t]he delay and cost of the procedures [courts] impose . . . may stifle the effective enforcement of agencies’ programs”). This argument has been particularly prominent in the rulemaking context, where the phenomenon is known as “ossification.” See, e.g., William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393 (2000). One result of ossification is that agencies make policy by other means—adjudications, for example, or various types of guidance—and the public loses the benefit of notice and public comment. See, e.g., *id.* at 394; Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987) (arguing that judicial review caused the National Highway Traffic Safety Administration to shift from issuing regulations to issuing recalls, at least in part).

27. See, e.g., Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 67 (1995) [hereinafter *Seven Ways*] (tracing “significant delay and resources costs” to the “judicially enforced duty to engage in reasoned decisionmaking”). Compare Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1498 (2012) (“Every study of economically significant rulemakings has found strong evidence of ossification—a decisionmaking process that takes many years to complete and that requires an agency to commit a high proportion of its scarce resources to a single task.”) (emphasis added), with Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209 (2018) (arguing that the delay associated with ossification has benefits as well as costs).

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the Administrative Procedure Act (APA), the outcome is nearly always remand, which often gives the agency another opportunity to impose its policy (after modifications). Agencies might be more willing to accept defeat in litigation if it comes with the gift of time.²⁸

Speed and deference are therefore, to some admittedly small degree, substitutes.²⁹ We never heard the Judge articulate this perspective, and we wish that we could ask his views now. But we think that the Judge's own habits were at least consistent with the notion that speed is one form of deference, if not to agencies, then to human agency.

Imagine a federal court system in which most opinions were readable within a few minutes and were handed down within a month of argument. In such a system, the costs of litigation would be slightly lower, and agency decisions might receive slightly less deference. Judicial remands could work more to improve agency decision-making than to thwart it.

The converse is, unfortunately, more relevant: in APA litigation as we know it, judicial delay offers an additional ground for deference to agency judgment. But we're grateful to Judge Williams for allowing us to imagine another world.

28. Consider a prominent recent example, unrelated to Judge Williams, of defeat made worse by delay. In *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), twenty-six states challenged the Deferred Action for Parents of Americans and Lawful Permanent Residents program, which would have granted work permits and temporary safety from deportation to certain parents of U.S. citizens and lawful permanent residents. The panel affirmed the district court's injunction of the program, over a dissent that concluded with the observation that there had been "no justification," for the panel's delay in issuing the opinion. *Id.* at 219. The delay mattered. By the time the Fifth Circuit's decision was affirmed by an equally divided Supreme Court, *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam), the 2016 election was a few months away, and the Obama Administration no longer had time to alter the program and try again.

29. This is consistent with Pierce's suggestion that deference doctrines might reduce delay by reducing the chance of remand and therefore allowing the agency to move more quickly. See Pierce, *Seven Ways to Deossify Agency Rulemaking*, *supra* note 25, at 66. Pierce focuses on delay in agency decision-making procedures and on the high risk of judicial invalidation rather than on judicial delay. See *id.*