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JUDGE WILLIAMS ON ADMINISTRATIVE LAW

Thomas W. Merrill*

It is an honor to speak of Judge Williams's contributions to administrative law. I did not know him well, but greatly enjoyed the interactions we had, either at various conferences or, more recently, as part of the American Law Institute's Restatement Fourth of Property, of which I am an associate reporter and he was a very valued member of the advisory committee.

I nevertheless feel a strong kinship with Judge Williams since I believe he was the one judge in all the country who shared an academic background most similar to mine. He taught Administrative Law, Environmental Law, and Property at Colorado before joining the bench. These are the same three subjects that have been the primary focus of my teaching career. He was also strongly

* Charles Evans Hughes Professor, Columbia Law School.

influenced by the law and economics movement of the 1970s, something which is also characteristic of my own intellectual odyssey. Of course, the match is not perfect. I have never taught oil and gas law and I do not enjoy delving into FERC cases, although I have written a bit about the regulation of fracking. But in reading Judge Williams's opinions and articles, I have always felt I was adsorbing thoughts from someone on my own wavelength.

The first characteristic of Judge William's contributions to administrative law that I would emphasize was his unflinching fidelity to the law. As he emphasized in extra-judicial writing, the Judge was firmly committed to the premise of legislative supremacy. He was especially critical of some decisions of the Supreme Court in the early 1970s that interpreted the Administrative Procedure Act based on a perceived "trend" in previous rulings. "The implicit premise," he wrote, "appears to be that, once a trend has been identified, it is the courts' duty to keep it rolling."[1] This, he pointedly noted, ignores that every desirable procedural principle—like broad access to courts—entails a tradeoff between benefits and costs.[2] Perhaps the courts should be the ones that balance the benefits and costs and draw the line where any particular principle stops. But, as he pointed out,

> Congress's decision to adopt the [Administrative Procedure Act] expressed, presumably, its belief that the courts—and perhaps the citizenry—needed some help. If Congress had fully embraced the judicial answers to the questions posed by administrative proliferation, a statute would not have been necessary. I apologize for mentioning the obvious, but anxiety over obsolescence tends to obscure the point. Absent constitutional imperatives, the congressional voice is

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[1] Stephen F. Williams, *The Era of Risk-Risk and the Problem of Keeping the APA Up to Date*, 63 U. CHI. L. REV. 1375, 1383 (1996).

[2] *Id.*

> decisive. Thus, to state the obvious, one criterion for sound interpretation of the APA must be fidelity to what Congress meant.[3]

Judge Williams's fidelity to the APA and other forms of enacted law was revealed in his judicial opinions, in many ways large and small. Here, I offer but one illustration drawn from his influential decisions setting forth a test for distinguishing legislative rules and interpretive rules.

American Mining Congress v. Mine Safety & Health Administration[4] is probably Judge Williams's most famous administrative law opinion. It is reproduced in all Administrative Law and Legislation and Regulation casebooks. The issue was when coal mining companies must report that one of their employees has been afflicted with a mining-related disease. The applicable regulation, adopted using notice and comment procedures, said that a report must be filed with the agency within 10 days of the "diagnosis" of an illness.[5] The agency then issued a series of letters specifying in greater detail what would constitute a diagnosis. One letter said that an x-ray showing evidence of silicosis or other forms of pneumonoconiosis should be regarded as a reportable diagnosis.[6] The question was whether the letter was a legislative regulation requiring notice and comment, or whether it was merely an interpretive rule, which does not require notice and comment.[7]

Judge Williams took the opportunity presented by the case to set forth a series of propositions about when a rule must be regarded as legislative and hence must be promulgated using notice and

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[3] *Id.* at 1385.
[4] Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106 (D.C. Cir. 1993).
[5] *Id.* at 1107.
[6] *Id.* at 1108.
[7] *Id.* at 1107.

comment procedures. First, a rule is legislative if it provides the necessary precondition for an enforcement action that otherwise would not exist. Second, a rule is legislative if it is published in the Code of Federal Regulations, which is limited by law to regulations that have "general applicability and legal effect."[8] Third, a rule is legislative if it repeals or amends a prior legislative rule. Fourth and finally, a rule is legislative if the agency explicitly invokes its legislative rulemaking authority in promulgating the rule.[9]

Applying these principles, Judge Williams concluded that the agency letter was an interpretive rule because it merely clarified or particularized the previous legislative rule requiring a diagnosis. And the previous rule provided the necessary precondition for an enforcement action without the benefit of the letter clarifying that an x-ray would qualify as a diagnosis.[10] All-in-all, *American Mining Congress* was a creative exegesis that offered significant guidance about a vexing question: how to distinguish legislative from interpretive rules.

Why do I say that this effort illustrates Judge Williams' fidelity to the law? Because in a subsequent decision, *Health Insurance Association v Shalala*,[11] Judge Williams felt compelled to modify his own four-part exegesis. He concluded, based on a careful review of prior decisions, that publication in the Code of Federal Regulations should be regarded as only "a snippet of evidence of agency intent."[12] Indeed, the decision to publish in the CFR is made by the "Administrative Committee of the Federal Register," not by the agency.[13] So the judgment that a rule has "legislative effect" for purposes of publication in the CFR is not made by the agency that promulgates it, but by an another government actor. This does not

[8] 44 U.S.C. § 1510.
[9] *Am. Min. Cong.*, 995 F.2d at 1112.
[10] *Id.*
[11] Health Ins. Ass'n v. Shalala, 23 F.3d 412 (D.C. Cir. 1994).
[12] *Id.* at 423.
[13] 44 U.S.C. § 1510.

deprive the decision to publish in the CFR of all probative value. But Judge Williams was correct to revise his earlier view that it could be taken as a kind of per se category indicative of agency intent.

What I find telling in this episode is Judge Williams's openness to reconsidering his own recently-rendered analysis of the law when confronted with additional evidence suggesting that the analysis needs to be qualified. Rather than engage in elaborate rationalization designed to reconcile his prior opinion with the law, he revised his prior opinion when confronted with evidence that it was in tension with the law. This was characteristic of his administrative law opinions more generally. He always viewed himself as the servant of the law, not its master.

A second feature of Judge Williams's administrative law decisions, superficially in some tension with the first, was his creativity in trying to fill gaps or lacunae in the law. The aforementioned *American Mining Congress* case is a good example. In the face of confusion and inconsistency in the decisional law about the distinction between legislative rules and interpretive rules, Judge Williams identified multiple circumstances that require that a rule must be regarded as legislative.[14] His guidance in *AMC*, I would note, is also relevant in discerning the dividing line between legislative rules and policy statements.

Let me offer another example of Judge Williams's creativity, this one from the law of procedural due process. The Administrative Procedure Act, notoriously, says nothing about the procedures that agencies must apply in rendering informal adjudications involving individuals. To fill that gap, courts have often turned to the Due Process Clause. The Supreme Court led the way, holding in a series of decisions that government beneficiaries are entitled to a due process hearing when government entitlements, including

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[14] *See Am. Min. Cong.*, 995 F.2d at 1110-1111.

government employment, are terminated for cause.[15] The rationale was that government entitlements are "property," and when a beneficiary has been "deprived" of such property, they are entitled to a due process hearing.[16]

At issue in a case called *Griffith v. Federal Labor Relations Authority* was whether a federal government employee denied a pay increase because her performance was deemed by her superior to be unacceptable was entitled to a due process hearing.[17] The Supreme Court had provided little in the way of relevant guidance, its decisions being limited to terminations of employment for cause.[18] And few if any lower court decisions were of help in determining whether to extend the idea of "property" to include a pay increase for acceptable performance, available to nearly all federal employees, but denied to a few.[19] Judge Williams sought to fill the gap by articulating four factors of relevance in determining the scope of due process property.[20]

The first criterion was the precision of the relevant decisional standard. A standard with a relatively settled meaning like "for cause" points toward the application of due process; a vague standard like "acceptable" points away from a constitutionally-mandated hearing.[21] The second criterion was whether the decision has been vested in a particular officer. If a particular officer, like the supervisor in the *Griffith* case, is given discretion to make the decision, this militates against a finding of constitutional property.[22] A third factor was whether the decision was more in the nature of a

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[15] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Arnett v. Kennedy, 416 U.S. 134 (1974).

[16] Board of Regents v. Roth, 408 U.S. 564 (1972); *see generally* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 960-68 (2000).

[17] Griffith v. Fed. Lab. Rels. Auth., 842 F.2d 487 (D.C. Cir. 1988).

[18] Merrill, *supra* note 16, at 966-67, 967 n.299.

[19] *Id.*

[20] *Griffith*, 842 F.2d at 497-98.

[21] *Id.* at 498.

[22] *Id.* at 498.

promotion or a termination. Lower courts had generally denied due process hearings to employees complaining of a failure to promote, and denial of a pay raise seems closely analogous to denial of a promotion.[23] The final factor was whether the legislature in the statutory scheme has evinced a desire to maintain flexibility. Congress, in the relevant statute, had indicated that it wanted the provision for within-grade pay increases to be applied flexibly.[24] This too pointed against a finding that the claimant had a property interest in such a pay increase.

Griffith's four-factor test, like the fixed principles of *American Mining Congress*, has proved to be a very influential opinion. It has been cited or followed in 70 subsequent decisions in the D.C. Circuit alone.[25] I am particularly struck by Judge Williams's careful effort at interstitial lawmaking in this case because he had authored, as an academic before he was appointed to the bench, a highly critical analysis of the Supreme Court's extension of procedural due process to questions involving government benefits.[26] *Griffith v. Federal Labor Relations Authority* reveals that he was highly sensitive to the room for creativity available to a setting judge, as opposed to an academic, and he was never tempted to confuse the two roles.

A third characteristic of Judge Williams's administrative law opinions is a keen sense of the appropriate division of labor between courts and agencies. As he wrote in a short but deeply insightful piece in the *Yale Law Journal*, agencies are specialists and courts are generalists.[27] The heads of agencies may be transient political appointees, leading, as he put it, to "innocent merriment" in

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[23] *Id.* at 499-500.

[24] *Id.* at 501.

[25] Based on Westlaw search conducted on September 8, 2022.

[26] Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

[27] Stephen F. Williams, *The Roots of Deference*, 100 YALE L.J. 1103 (1991).

academic discussions about agency expertise.[28] But, he noted, "agency staffs typically are expert even when agency heads are not."[29] This led him to a functionalist explanation for why courts should defer to agencies, particularly in matters that entail scientific knowledge or the application of law to complex facts:

> A panel of generalists must at a minimum invest a great deal of time to reach a confident conclusion that the specialists erred. Thus, scarcity of resources in the reviewing body, particularly time, compels a degree of deference. It inclines the reviewers to concentrate on the issues that keep coming back to them, such as procedural requirements and broad aspects of substantive law, but not more interstitial ones often characterized as the application of law to fact. On the recurrent issues, the return on investment of effort will be greatest.[30]

This led him to the conclusion that "[f]inding the courts' role must start with asking about their peculiar institutional traits."[31]

This is Stephen Williams at his best. Rather than getting hung up on abstractions based on separation of power or the inherent powers of courts under Article III, he drew on pragmatic considerations informed by intuitions grounded in economic thinking. This yielded a straightforward proposition about the tasks appropriate for each of two institutions given the reality of limited resources, especially of time.

This sense of comparative institutional advantage explains Judge Williams's steadfast commitment to the conception of the respective

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[28] *Id.* at 1105.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1109.

roles of agencies and courts as reflected in the *Chevron* doctrine.[32] As best I can tell, Judge Williams never wavered in his belief that *Chevron* is the proper rubric for addressing the allocation of functions between courts and agencies in resolving disputed questions of law. No fancy distinctions between *Skidmore* deference and *Chevron* deference for him.

Of course, as the saying goes, the devil is in the details. Over time, the *Chevron* doctrine encountered a number of fault lines. Judge Williams always opted for an expansive conception of the doctrine. In this way, he consistently followed the lead of Justice Scalia, whom he replaced on the D.C. Circuit when Scalia was elevated to the Supreme Court.[33] Thus, Judge Williams would apply *Chevron* to agency interpretations reflected in interpretive rules (a position eventually rejected by the Supreme Court in the *Mead* case).[34] He would apply *Chevron* to issues that implicate the scope of agency jurisdiction (a position accepted by the Court—wrongly in my view—in the *Arlington* case).[35] And he endorsed the proposition that *Chevron* really needs only one step, asking whether the agency interpretation is reasonable (a position endorsed by Justice Scalia but

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[32] So named for Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[33] On Justice Scalia's expansive views of the *Chevron* doctrine, see THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 6, 75, 87-88, 90-91, 96-97, 155, 219, 278, 280 (2022).

[34] *E.g.*, Samaritan Health Servs. v. Bowen, 811 F.2d 1524, 1530-31 (D.C. Cir. 1987) (Williams, J.). The Court held in United States v. Mead Corp., 533 U.S. 218, 232 (2001) that interpretive rules "enjoy no *Chevron* status as a class."

[35] *E.g.*, Okla. Nat. Gas Co. v. Fed. Energy Reg. Comm'n, 28 F.3d 1281, 1284 (D.C. Cir. 1994) (Williams, J.). The Supreme Court decision upholding this position is City of Arlington v. Fed. Commc'n Comm'n, 569 U.S. 290 (2013) (Scalia, J.). For my critical comments, see MERRILL, THE *CHEVRON* DOCTRINE, *supra* note 33, at 221-227.

not the full Court—again wrongly in my view).[36] Judge Williams also followed the lead of Justice Scalia in his willingness to strike down agency interpretations as "unreasonable" under the so-called Step Two of the *Chevron* doctrine.[37]

In none of these matters was Judge Williams being particularly innovative, as he was in *American Mining Congress* or in *Griffith*. He clearly perceived the need for further doctrinal development regarding the scope of the *Chevron* doctrine. But he saw little need to strike out on his own in this context, given the efforts of Justice Scalia, whose instincts about the need for a broad but flexible doctrine reflected a perception of comparative institutional advantage that Judge Williams shared.

What Judge Williams did not foresee, or if he did foresee, he would not have found congenial, was the sudden turn in conservative legal thought against the *Chevron* doctrine.[38] Justice Thomas led the way, with his suggestions that *Chevron* deference is inconsistent with Article III of the Constitution and its allocation of the federal judicial power to federal courts. Justice Thomas has now been joined, with some hedging, by Justice Gorsuch. And another newcomer to the Court, Justice Kavanaugh, has written critically about aspects of the *Chevron* doctrine. This assault on *Chevron* has led to a kind of moratorium on invocations of *Chevron* in decisions of the Supreme Court. I suspect that a majority of the Justices would prefer to retain *Chevron*, perhaps with modifications, if only for reasons of stare decisis. But given the emergence of a segment of the Court that

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[36] *See* Waterkeeper All. v. Env't Prot. Agency, 853 F.3d 527, 534 (D.C. Cir. 2017) (Williams, J.). For Justice Scalia's endorsement of this idea, see United States v. Home Concrete & Supply, LLC, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part and concurring in the judgment).

[37] *See, e.g.*, Health Ins. Assn. of Am. v. Shalala, 23 F.3d 412, 416-417 (D.C. Cir. 1994) (Williams, J.). Justice Scalia was the only Supreme Court Justice to strike down an agency interpretation under *Chevron* Step Two. *See* MERRILL, THE *CHEVRON* DOCTRINE, *supra* note 33, at 116-118.

[38] For the conservative abandonment of *Chevron*, see MERRILL, THE *CHEVRON* DOCTRINE, *supra* note 33, at 6-7; 227.

is clearly hostile, and a lack of clarity about the views of the newcomers, it may be some time before the we know the fate of *Chevron*.

Until the Court delivers its verdict, it falls to the lower courts, especially the D.C. Circuit, to attempt to devise a workable doctrine for assessing agency interpretations of law. Judge Williams, if he were still with us, would be an ideal candidate to undertake such a task. Given his respect for the law, especially the settlement reflected in the APA; given his ability to think creatively about unresolved or open legal questions; and especially, given his intuitions about the need to structure court-agency relations in a way that respects their comparative advantages, he would be uniquely positioned to offer constructive suggestions. This is but one of the many reasons why he is sorely missed.

A final point I would make is that Judge Williams was also a keen observer, at least in his extra-judicial writings, about the larger implications of the administrative state. Specifically, he worried that the pace of regulatory lawmaking—which he saw from the front lines—was proceeding at such a rate that the law was becoming incomprehensible to anyone, at least in its larger outlines. This, as he foresaw, creates a threat to the ideal of the rule of law, in the sense that individuals can predict the legal consequences of their actions.[39] Given the rate at which administrative agencies continue to pump out regulations, guidance doctrines, and adjudications, predictability about the law becomes almost impossible for all but the largest corporations that can afford the services of big law firms. For ordinary individuals and small businesses, the requirements of the law that affects them become incomprehensible. As a result, the

[39] Stephen Williams, *The More Law, The Less Rule of Law*, 2 GREEN BAG 2d 403, 405 (1999).

space in which they have the freedom to exercise initiative becomes uncertain at best.

This may be one of the most serious threats we face to the rule of law because there is no obvious solution. In a sense, it represents a kind of prisoners' dilemma, in which every agency has good reasons to enact more binding rules, but no one has an incentive to consider the cumulative effect on society of incrementally adding to the great weight of law. The implications are dire insofar as the mounting pile of law points toward an increasingly oligopolistic structure of society – compliance with law creating a de facto barrier to entry. The increasing concentration of industry will also gradually snuff out the freedom that the rule of law is supposed to provide.

Judge Williams was in a unique position to perceive this threat. Sitting for years on the court that reviews the largest number of administrative actions, he could see the cumulative effect of what was happening in the capital city. Given his academic background and his deep-seated appreciation of the classical liberal values on which our country was founded, he was able to connect the general phenomenon with a more general concern about the future of the rule of law. Of course, as a judge charged with deciding individual cases presented by litigants for his resolution, he was in no position to do anything about the growing threat he perceived. He could only sound the alarm, as he did, and hope that some of the actors responsible for the threat might heed the threat before it is too late to take some form of corrective action.