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CHARLES KOCH, JR.—THE CASEBOOK AND THE SCHOLARSHIP

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Charles Koch, Jr. wrote a unique casebook. Seventeen years before the Carnegie Report,¹ Charles published a casebook through which students learn by doing what lawyers do when they practice administrative law.² They represent clients, both agencies and those who deal with agencies. They also engage in the internal processes of the agency, developing procedures, providing legal guidance, and negotiating the often Byzantine interactions of political appointees, technical experts, and strong-minded colleagues.

Charles created a new agency, the Wine Trade Commission.³ He peopled the Commission and the related wine industry and consumer interests with characters many of us would recognize. We see them as they struggle through the constitutional issues raised by the Wine Trade Commission Act, the development of agency policies and procedures, implementation of rulemaking and enforcement actions, and judicial review, to the eventual departure of two of the lead characters for jobs in Cleveland.⁴

When I first read the simulation, I was struck by how real it seemed. I knew these people. I did what they were doing. I have often wondered how much the simulation reflected what Charles experienced in Washington. His untimely death provides the unwanted opportunity to explore that question and the larger question of what we can learn about Charles from his casebook and his scholarship. I begin with a review of his career up to the creation of the casebook.

I. THE FTC TO WILLIAM & MARY

Having been raised in a Maryland suburb of Washington, D.C., Charles received his B.A. from the University of Maryland in 1966.⁵ He then earned his J.D. from the

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¹ WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

² See CHARLES H. KOCH, JR., *ADMINISTRATIVE PRACTICE AND PROCEDURE: CASES AND MATERIALS* (2d ed. 1991) [hereinafter *CASEBOOK* (2d ed.)].

³ CHARLES H. KOCH, JR., *TEACHER'S MANUAL, ADMINISTRATIVE PRACTICE AND PROCEDURE: CASES AND MATERIALS*, at ii, S-1–S-18 (2d ed. 1991) [hereinafter *TEACHER'S MANUAL* (2d ed.)].

⁴ *Id.*; see also CHARLES H. KOCH, JR. & WILLIAM S. JORDAN, III, *TEACHER'S MANUAL, ADMINISTRATIVE LAW: CASES AND MATERIALS* Lesson 8B.1, at 709 (4th ed. 2003).

⁵ Charles H. Koch, Jr., Curriculum Vitae, <http://law.wm.edu/documents/directory/koch-44.pdf> (last visited Dec. 12, 2013) [hereinafter Charles H. Koch, Jr., Curriculum Vitae].

George Washington University Law Center, graduating with Honors in 1969.⁶ Charles joined the staff of the Federal Trade Commission (FTC) in 1969, serving for three years in the Bureau of Consumer Protection and three years in the Office of General Counsel.⁷

It was an interesting time to join the FTC. The previous year, Nader's Raiders had issued *The Nader Report*,⁸ which lambasted the FTC as "fat with cronyism, torpid through an inbreeding unusual even for Washington, manipulated by the agents of commercial predators, [and] impervious to governmental and citizen monitoring."⁹ Nader's Raiders consisted of six law students or law school graduates and one recent graduate of Princeton, Edward F. Cox, Jr., who would go on to marry Tricia Nixon and build a very successful career.¹⁰ The others included Judith Areen, later Dean of Georgetown University Law Center; Peter Bradford, later a member of the Nuclear Regulatory Commission; and William Howard Taft IV, later Acting Secretary of Defense and Ambassador to NATO.¹¹

Surely *The Nader Report* itself was an inspiration to Charles as a recent graduate joining the FTC. Moreover, just as Charles was graduating from George Washington, President Nixon asked the American Bar Association (ABA) to conduct a "professional appraisal of the present efforts of the Federal Trade Commission in the field of consumer protection . . . to be delivered by September 15, 1969."¹² After the ABA confirmed *The Nader Report* findings,¹³ President Nixon appointed Caspar Weinberger as Chairman of the FTC with a mandate for the "reactivation and revitalization of the FTC."¹⁴ Weinberger was followed later that year by Miles Kirkpatrick, who had chaired the ABA Commission that had confirmed the work of Nader's Raiders.¹⁵ As described by Edward Cox, Weinberger and Kirkpatrick

consolidated operations into two principal operating bureaus (Competition and Consumer Protection), upgraded the Bureau of Economics to apply sound economic analysis to those operations, established a planning office to set priorities, revamped and upgraded the regional offices to enable local enforcement initiatives,

⁶ *Id.*

⁷ *Id.*

⁸ EDWARD F. COX ET AL., 'THE NADER REPORT': ON THE FEDERAL TRADE COMMISSION (1969).

⁹ *Id.* at vii.

¹⁰ See Edward F. Cox—Chairman, REPUBLICAN PARTY OF NEW YORK STATE, <http://www.nygop.org/page/edward-f-cox> (last visited Dec. 12, 2013).

¹¹ Edward F. Cox, *Reinvigorating the FTC: The Nader Report and the Rise of Consumer Advocacy*, 72 ANTITRUST L.J. 899, 899 n.2 (2005).

¹² *Id.* at 905 (internal quotation marks omitted).

¹³ *Id.* (citing ABA, REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969)).

¹⁴ *Id.* at 906.

¹⁵ *Id.*

and, most importantly, attracted capable young attorneys with a strong commitment to consumer protection.¹⁶

Charles was one of the capable young attorneys at the Commission. One of his closest colleagues was David W. Penn, an economist who also joined the FTC in 1969 and served in the Bureau of Economics while Charles was in the Office of General Counsel. Mr. Penn later went from the FTC to the Department of Energy, the Nuclear Regulatory Commission, to service as the General Manager of Wisconsin Public Power, Inc., and Executive Vice President of the American Public Power Association.¹⁷ Charles was in excellent company.

As Mr. Penn put it in a recent interview, “dawn came” as Weinberger and Kirkpatrick did a great job cleaning up a moribund agency and building trust and pride in its mission and operations.¹⁸ It was a very exciting time for both of them.¹⁹ The two of them worked on data requests, responses to Congress, and the Pre-Merger Notification Program as mergers were happening at a furious pace. Charles loved policy and economics. Mr. Penn kept the data and reports that developed into the Pre-Merger Notification Program, while Charles was responsible for developing the rules.²⁰ At one point in the early days, John Kenneth Galbraith came to a brown-bag lunch and told them the FTC was just a token.²¹ They felt they were working hard for the public against strong odds.

According to Mr. Penn, Charles felt his work at the FTC was an important public service. He felt that the agency was too oriented toward legal process to do much at first. Charles asked, “What could we do, what would the law allow,” particularly as to economic issues.²² Mr. Penn described Charles as “bimodal.”²³ On the one hand, he mused on the great economic policy issues. On the other, he had a “bear trap mind,” able to bring the larger issues down to what he could do in terms of procedures.²⁴ He was interested in how the parts of government worked together and how to make government better and more effective. Once a goal was defined, Charles had a very good sense about how to facilitate achieving it.

When I asked whether Charles was an idealist, Mr. Penn responded that he was “too much of a realist and a bit of a cynic.”²⁵ However cynical, he had a wry sense of

¹⁶ *Id.*

¹⁷ Telephone Interview with David W. Penn, Retired, Wis. Pub. Power, Inc. & Am. Pub. Power Ass’n. (Feb. 7, 2013).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

humor, and “his eyes always twinkled.”²⁶ He was sensible—“let’s build the blocks to make it happen.”²⁷ Charles “did not want to be anywhere where he wasn’t accomplishing something,” which Mr. Penn believes pushed him to pursue the LL.M. he earned at the University of Chicago in 1975 just before joining the faculty at DePaul University College of Law.²⁸ Charles left DePaul for William & Mary in 1979.²⁹

According to his wife Denise, whom he married some years later, the FTC made a real impression on Charles. It gave him his love for administrative law. He talked with her particularly about his involvement in the funeral home rule, which was a big experience for him.³⁰

II. DEVELOPING THE CASEBOOK

In 1981, after publishing several law review articles, Charles joined George Washington law professor Donald Rothschild in publishing the first edition of his casebook, *Fundamentals of Administrative Practice and Procedure: Cases and Materials*.³¹ Although I have not been able to confirm this, I suspect Charles knew Donald Rothschild from his student days at George Washington. Professor Rothschild had joined the faculty in 1968, while Charles graduated in 1969.

Although quite different from the later editions, and not yet including the simulation, the first edition emphasized that it was “an effort to provide materials for practical legal education in how to practice before government agencies.”³² That interest in practical preparation for practice echoes through all of the later editions of the casebook, the more so as the casebook became entirely his own. This Article will emphasize the later editions, particularly the fourth, in which Charles fully incorporated his simulation into the text.³³ But the first edition offered some hints about what was to come.

First, the first edition includes a long note on the daily work of a member of the FTC staff, with the following admonition:

You must always bear in mind that your job is not to prove the rule but to gather as many facts as possible so as to help the Commissioners make their decision. Therefore, you should resist the urge to become an advocate for the proposed rule and you should

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; see also Charles H. Koch, Jr., Curriculum Vitae, *supra* note 5.

²⁹ See Charles H. Koch, Jr., Curriculum Vitae, *supra* note 5.

³⁰ Telephone Interview with Denise Koch, Adjunct Professor of Law, William & Mary Law Sch. (Jan. 30, 2013).

³¹ DONALD P. ROTHSCHILD & CHARLES H. KOCH, JR., *FUNDAMENTALS OF ADMINISTRATIVE PRACTICE AND PROCEDURE: CASES AND MATERIALS* (1981).

³² *Id.* at vii.

³³ See CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 3 (4th ed. 2001) [hereinafter *CASEBOOK* (4th ed.)].

seek comment from anyone who might help provide the necessary information, including those who might oppose the rule.³⁴

Here we see an emphasis on the duty to act as a steward of good government, just as Mr. Penn described in our interview.

Second, the first edition appears to provide practical instruction by presenting the elements of formal adjudicatory procedure in great detail, with a separate chapter of seventy pages on prehearing process, including pleading, discovery, prehearing conferences, and consent settlements.³⁵ There is a similar chapter of 113 pages on the various stages of formal adjudicatory hearings.³⁶ This emphasis appears to reflect the more formal processes of an earlier era, particularly at the FTC.

Finally, we see a faith in human, particularly judicial, ability to modify and manage systems for the public good. In discussing the process for informal rulemaking, particularly the various exceptions to notice and comment, the text asserts, quoting one of Charles's articles from 1976:

A better approach, however, would be the evolution of a broad range of abbreviated public procedures through judicial review of agencies' promulgation procedures to ensure that the choice of procedures comports with basic notions of fairness and does not abuse the agencies' discretion.³⁷

Unfortunately for this aspiration, the Supreme Court, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*³⁸ in 1978, did not have such faith in judicial ingenuity.³⁹

Nearly a decade later, I had the great good fortune to submit a manuscript to the *Administrative Law Review* (ALR) just after Charles had become Editor-in-Chief. He made me an offer, which I declined on the advice of my betters that I should go with the primary journal of a major state law school. He understood that advice and empathized with my situation, even as he pressed to build the ALR into the outstanding journal that it is today. In our recent conversation, David Penn told me that Charles was particularly proud of his work on the ALR.⁴⁰ In fact, Mr. Penn helped him attract writers with economic expertise, including F. M. Scherer, a renowned economist and Professor of Business and Government at the Kennedy School of Government at Harvard.⁴¹ Professor Scherer published a strong critique of the Reagan Administration's

³⁴ See ROTHSCHILD & KOCH, *supra* note 31, at 41.

³⁵ See *id.* at 101–70.

³⁶ See *id.* at 171–284.

³⁷ *Id.* at 513 (quoting Charles H. Koch, Jr., *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1053–54 (1976)).

³⁸ 435 U.S. 519 (1978).

³⁹ *Id.* at 549.

⁴⁰ Telephone Interview with David W. Penn, *supra* note 17.

⁴¹ See F. M. Scherer, HARV. KENNEDY SCH., <http://www.hks.harvard.edu/about/faculty-staff-directory/f.-m.-scherer> (last visited Dec. 12, 2013).

“near obliteration” of the FTC’s role in collecting and disseminating information about the functioning of American industry.⁴²

When I eventually sent Charles a reprint, he responded with congratulations and a request that I review the fictitious enabling act he had prepared for the second edition of his casebook.⁴³ He had done a magnificent job of developing the Wine Trade Commission Act from such diverse sources as the Solar Energy Research, Development, and Demonstration Act of 1974;⁴⁴ the Securities Act of 1933;⁴⁵ the Federal Trade Commission Act;⁴⁶ and the Model State Administrative Procedure Act.⁴⁷ I suggested a citizen suit provision, which he then adapted from the Clean Water Act.⁴⁸

Charles published the second edition of his casebook in 1991.⁴⁹ He dedicated it to his wife Denise, whom he had met in 1982 and married in 1985. Denise told me that Charles had taken a wine appreciation course while living in Washington, D.C., after which he became very interested in wine and began to amass a collection.⁵⁰ That appears to have been the impetus for his choice of the Wine Trade Commission as his fictitious agency. In the second edition and the third, which he published in 1996,⁵¹ Charles maintained that “[t]he pedagogical approach is traditional.”⁵² It was traditional in the sense that Charles presented a collection of excerpted judicial opinions and note materials from which a teacher could present a standard course in administrative law. But Charles also reiterated the first edition’s commitment to a practical education in administrative practice, noting that “[t]he overarching principle at work in this book is a commitment to ‘applied’ administrative law.”⁵³

This time, however, he included his simulation in the Teacher’s Manual, calling it “Days of Wine and Regulation.”⁵⁴ It was now possible to teach administrative law entirely through the work of agency personnel and their counterparts in the private sector. Ben, the new agency lawyer, began, for example, by asking “the big question: should we promulgate a rule first or should we go immediately to a law enforcement

⁴² F. M. Scherer, *Sunlight and Sunset at the Federal Trade Commission*, 42 ADMIN. L. REV. 461, 461 (1990).

⁴³ Letter from Charles H. Koch, Jr. to author (July 16, 1990) (on file with author).

⁴⁴ 42 U.S.C. §§ 5551–5566 (2006).

⁴⁵ 15 U.S.C. § 77a–77aa (2006).

⁴⁶ 15 U.S.C. §§ 41–58 (2006).

⁴⁷ MODEL STATE ADMIN. PROCEDURE ACT (1981).

⁴⁸ Federal Water Pollution Control Act, Pub. L. No. 92-500, 62 Stat. 1155 (codified as amended in scattered sections of 33 U.S.C.).

⁴⁹ See CASEBOOK (2d ed.), *supra* note 2.

⁵⁰ Telephone Interview with Denise Koch, *supra* note 30.

⁵¹ CHARLES H. KOCH, JR., ADMINISTRATIVE LAW: CASES AND MATERIALS (3d ed. 1996) [hereinafter CASEBOOK (3d ed.)].

⁵² *Id.* at viii; CASEBOOK (2d ed.), *supra* note 2, at viii.

⁵³ CASEBOOK (3d ed.), *supra* note 51, at vii; CASEBOOK (2d ed.), *supra* note 2, at vii.

⁵⁴ TEACHER’S MANUAL (2d ed.), *supra* note 3, at 181; CHARLES H. KOCH, JR., TEACHER’S MANUAL, ADMINISTRATIVE LAW: CASES AND MATERIALS 194–219 (3d ed. 1996) [hereinafter TEACHER’S MANUAL (3d ed.)].

adjudication?”⁵⁵ And he and Abby, his primary adversary representing the wine industry, ended the simulation by discussing “the evolution of the WTC’s procedures and their views on reforming administrative law based on their experiences and study.”⁵⁶

In 1993, Charles sent me a revised version of the simulation, noting that recent scholarship suggested to him that “the real innovative effort in rulemaking is happening inside the agencies.”⁵⁷ I responded with various comments. More important, our contacts prompted me to try to arrange to meet Charles in Williamsburg as my family was on the way home from summer vacation. We met at his office at 10:00 a.m. on an August Sunday morning. It was the ultimate faculty scholar’s office: not very large, but stuffed with paper, including a huge collection of what we used to know as advance sheets. Charles was every bit as gracious as I expected. Perhaps because both of us had lived for some years in the South, we had to that point addressed each other with the formality of “Dear Professor Koch” and “Dear Professor Jordan.” That would end as we met each other in person and as the Internet nearly destroyed such respectful salutations, a loss I suspect he regretted.

Charles continued the second edition approach in the third edition with a traditional casebook presentation but a continued “commitment to ‘applied’ administrative law”⁵⁸ and the simulation tucked in the back of the Teacher’s Manual. He finally took the plunge in the fourth edition, fully integrating the simulation into the casebook.⁵⁹ I have no idea what it did to sales, but it actually shortened the book. From 1031 pages in the second edition and 1,029 in the third, both without the simulation, the book was now 789 pages with the simulation fully integrated.⁶⁰ I do not know why that happened, but my sense is that the practicalities of addressing the issues as they arose throughout the simulation were like the practicalities of practice. You have to know the key concepts and the key authorities—although both sides argue them to opposite effects. You need a sense of the underpinnings of the doctrines and the variations in views and interests, which the notes provide in the casebook, but you do not have time for nearly three hundred more pages, just as the agency practitioner must address the issues and move on, perhaps picking up the latest twists at the Fall Conference of the ABA Section of Administrative Law and Regulatory Practice.

III. THE SIMULATION—A STORY OF REAL PEOPLE

In all of its versions, the simulation involved the Wine Trade Commission, an independent agency modeled on the FTC and the Securities and Exchange Commission. This discussion describes the simulation as it had evolved by the fourth edition of the casebook, with occasional reference to previous versions.

⁵⁵ TEACHER’S MANUAL (2d ed.), *supra* note 3, Lesson 2.A.1 & 2, at S-3.

⁵⁶ *Id.* at Lesson 7.D, at S-17.

⁵⁷ Letter from Charles H. Koch, Jr. to author (Jan. 2, 1993) (on file with author).

⁵⁸ CASEBOOK (3d ed.), *supra* note 51, at vii.

⁵⁹ CASEBOOK (4th ed.), *supra* note 33, at 3–6.

⁶⁰ *See generally id.*

The core statutory provision, section 5 of the Wine Trade Commission Act, makes it unlawful, in connection with the purchase or sale of wine in interstate commerce, to commit fraud or to “make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.”⁶¹ Other provisions authorize rulemaking,⁶² enforcement actions involving a “full hearing,”⁶³ and the creation of the private “Wine Merchants Association.”⁶⁴ They also create a duty to promote the wine industry⁶⁵ and provide for judicial review⁶⁶ and citizen suits.⁶⁷

The story begins as Abby, who has joined a large Washington law firm from a small Midwestern town, draws two letters from her apartment building mailbox, one from her mother, the other from the D.C. Bar.⁶⁸ Having passed the bar exam, she goes for a celebratory drink at a nearby bar, where she encounters Ben, whom she had met earlier that day at the Wine Trade Commission.⁶⁹ Abby’s firm represents Gallery, a large wine producer, while Ben recently joined the Office of General Counsel of the Wine Trade Commission.⁷⁰ Through their conversation, we learn the backgrounds of the members of the new Commission, including a Chair rewarded for his political loyalty and members with varied backgrounds and attitudes.⁷¹ It seemed appropriate that two were named Fred and Barney in light of “their stone age mentality.”⁷² Perhaps this is a glimpse of the members of the FTC as Charles joined the agency just prior to its rejuvenation. We also meet Chris, a shrewd, experienced government lawyer as General Counsel, and Ralph, a former criminal trial attorney now Assistant General Counsel.⁷³ He and Ben will battle over whether the Wine Trade Commission’s procedure should be more or less adversarial in nature.

We learn that Ben’s mother is “an irrepressible public interest advocate”⁷⁴ and that he looks forward to “an entertaining venture in the defense of the public interest.”⁷⁵ The judge for whom he had clerked had told him, “Working for a new or revitalizing agency is the most fun in government,” and he was already “surprisingly responsible for foundational decisions about enforcement strategy and methods of proceeding.”⁷⁶

⁶¹ *Id.* § 5(b), at 795–96.

⁶² *Id.* § 8(a), at 798.

⁶³ *Id.* § 7(a)(1), at 797.

⁶⁴ *Id.* § 6(b), at 796.

⁶⁵ *Id.* § 3(a), at 794.

⁶⁶ *Id.* § 9, at 799.

⁶⁷ *Id.* § 12, at 802.

⁶⁸ *Id.* at 3–4.

⁶⁹ *Id.* at 4.

⁷⁰ *Id.*

⁷¹ *Id.* at 5–6.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 4.

⁷⁵ *Id.*

⁷⁶ *Id.*

Is this Charles? We cannot know, but this is the very circumstance in which Charles found himself, as described by David Penn.⁷⁷ Although not new, the FTC was revitalizing in response to the remarkable phenomenon of Nader's Raiders. Charles, David Penn, and so many others were excited about serving the public interest in the interminable struggle against special interests. And the young agency lawyers took on significant responsibilities very quickly. They gathered the data, developed the record, and wrote the rules, just as we see Ben doing in the simulation.

Throughout the simulation, Ben, Abby, Ralph, and the others battle over policy, argue over procedures, and ultimately end up in court, with all the struggles over access and standards of review.⁷⁸ It seems so real. Those of us who were there sat in those long meetings (in my case choking on the smoke of the program director's cigars at the Department of Housing and Urban Development), reviewed those records, produced draft after draft of regulatory language, and filed those pleadings (or, in our case, much to our chagrin, worked with the Department of Justice as they filed pleadings on our behalf).

Just as the practice experiences seem real, so do the relationships. Ben and Abby meet early in their careers. Will something come of it? In the second edition, Abby and Ben's initial encounter begins with Abby considering whether to ask him in and Ben saying, nervously, "Well, tomorrow is a busy day for me," and turning away "wondering whether he should have asked to come in."⁷⁹ In a description that seems to come from his own or his friends' experience, Charles writes, "The moment, if there was one, was lost and their relationship turned in the direction of one of those male/female relationships made closer and more permanent by the fact that it never quite blossomed into romance."⁸⁰ Ben and Abby remain good friends, with Abby preparing a gourmet meal to celebrate Ben's promotion to Chief of the Rulemaking Division, even as Abby has become the new General Counsel of the American Wine Merchant's Association.⁸¹ Still not romantically involved, they each find "special enjoyment in sharing personal triumphs with the other."⁸² In the fourth edition, for reasons we do not know, Ben and Abby do not seem to get so close to romance. They ultimately become good friends, but Abby marries Ben's colleague Ralph and moves with him to Cleveland, taking a law-related job in a standards laboratory. As the simulation ends, she returns to Washington for a meeting, where she sees Ben "holding court" among various bigwigs, seeming "a bit more pompous and self-involved than when she left."⁸³ Still, she knows he will be delighted to learn of "the imminent arrival of her son."⁸⁴ Just as we sat in the meetings and filed the pleadings, we were or knew the people in these personal stories.

⁷⁷ Telephone Interview with David W. Penn, *supra* note 17.

⁷⁸ See generally CASEBOOK (4th ed.), *supra* note 33.

⁷⁹ TEACHER'S MANUAL (2d ed.), *supra* note 3, at S-2.

⁸⁰ *Id.*

⁸¹ See generally *id.*

⁸² *Id.* at S-8.

⁸³ CASEBOOK (4th ed.), *supra* note 33, at 789.

⁸⁴ *Id.*

IV. CHARLES KOCH IN THE CASEBOOK AND THE SCHOLARSHIP

Any scholar's body of work, whether scholarly articles or casebooks, reflects the author's concerns. We can try to discern the scholar's attitudes and beliefs, even the nature of the scholar's mind, from that legacy, in Charles's case a unique casebook and more than thirty articles, not to mention his many other contributions to administrative law.⁸⁵ The nature of the casebook as a story that seems drawn from his experience heightens the sense that his concerns were personal and deeply held, not those of a detached scholar isolated in the ivory tower. In the discussion that follows, I draw upon the casebook and the scholarship in an effort to understand Charles more fully.

A. Belief in the Need for Active Government

Although the casebook appropriately presents the role of government as an open question,⁸⁶ Ben (or perhaps Charles?), as we have already seen, embodies faith in the ability of active government to promote the public interest. Charles asserted both the need for active government and his faith in its possibilities in *Cooperative Surplus: The Efficiency Justification for Active Government*,⁸⁷ in which he responded to Richard Epstein's assertion of "strong constitutional protection for economic liberties."⁸⁸

To Charles, Epstein ignored "the very purpose of our joining together into a cooperative society."⁸⁹ We enter into the "social contract" because "joining a society creates a 'cooperative surplus' from which we all may benefit."⁹⁰ Our ability to interact in society creates a surplus that we could not have achieved alone. He found it constitutionally legitimate to require redistribution of wealth, not only for humanitarian purposes, but also for the utilitarian reason that government provision of food and housing for five people has a greater value than "the second BMW the millionaire would have purchased with" the \$25,000 taken from the millionaire in taxes.⁹¹ Although Charles presented this proposition as an argument, not his personal social-welfare position, it is surely the argument of a supporter of active government.

At least two other articles, not to mention his entire career in administrative law, reflect this commitment. In *Effective Regulatory Reform Hinges on Motivating the*

⁸⁵ See Charles H. Koch, Jr., Curriculum Vitae, *supra* note 5.

⁸⁶ See, e.g., CASEBOOK (4th ed.), *supra* note 33, at 6, 29; see also *id.* at 17 (suggesting "skepticism about the methods" of the regulatory state to achieve its goals); *id.* at 33 (asking which New Deal arguments for the administrative state Abby might "feel uncomfortable asserting today" in explaining agencies).

⁸⁷ Charles H. Koch, Jr., *Cooperative Surplus: The Efficiency Justification for Active Government*, 31 WM. & MARY L. REV. 431 (1990).

⁸⁸ *Id.* at 431.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 433.

“*Street Level*” *Bureaucrat*,⁹² published in 1986 in honor of the fortieth anniversary of the Administrative Procedure Act, Charles responded to the growing pressure for deregulation, which he said was “grounded in social policy thinking that varies little from that supporting the ‘liberty of contract’ doctrines that held sway just prior to the expansion [of the] administrative process.”⁹³ Although presented in rather theoretical and neutral terms, this statement surely reflects a revulsion against the social and economic conditions (child labor and the Triangle Shirtwaist Factory fire, for example) permitted by the attitudes of *Lochner v. New York*⁹⁴ and eventually addressed by the rise of the modern administrative state. He warned, rather modestly, that “care requires that we not overcompensate as we shift the weight away from government.”⁹⁵

He struck a similar tone a decade later in *James Landis: The Administrative Process*,⁹⁶ his paean to this giant of the administrative state. The very fact that Charles chose to commemorate Landis’s career suggests that Charles shared Landis’s view of the need for and possibilities of active government. As he ended the article, Charles made this point directly, asserting that “[u]nless we become somehow an altruistic species, we cannot exist in such close proximity without some order and enforced cooperation. If that does not come from government, then where?”⁹⁷

B. Faith in Administrative Systems

The casebook frequently tasks Ben and his colleagues with designing systems or procedures to achieve the agency’s goals.⁹⁸ Beyond the minima required by the Administrative Procedure Act or the Wine Trade Commission Act, the question is no longer what is required, but what is the best approach, and can that approach serve the public interest? In the rulemaking context, how can the agency best develop the record? What, if anything, should it add to the standard notice-and-comment process to provide the soundest possible basis for the agency’s decision? In the adjudicatory context, particularly informal adjudication, Charles again tasks Ben and his colleagues with determining not only what the statute requires of the agency, but how best to structure the process to achieve the fairness, efficiency, and accuracy so important to sound decision-making, legitimacy, and public acceptance.

⁹² Charles H. Koch, Jr., *Effective Regulatory Reform Hinges on Motivating the “Street Level” Bureaucrat*, 38 ADMIN. L. REV. 427 (1986) [hereinafter Koch, *Effective Regulatory Reform*].

⁹³ *Id.* at 429.

⁹⁴ 198 U.S. 45 (1905).

⁹⁵ Koch, *Effective Regulatory Reform*, *supra* note 92, at 430.

⁹⁶ Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419 (1996).

⁹⁷ *Id.* at 433 (internal citation omitted).

⁹⁸ See, e.g., CASEBOOK (4th ed.), *supra* note 33, Lesson 2A.3, at 134 (considering and making grants); *id.* at Lesson 5B.1, at 452 (rulemaking); *id.* at Lesson 5C.1, at 488 (internal processes for developing a rule); *id.* at Lesson 6A.1, at 533 (reconsidering grants).

Charles's scholarship reflects a faith in the ability to design complex administrative systems to achieve our collective goals. Through most of his career, those systems were complex bureaucracies, or perhaps the judiciary. By the time of his encounter with the electricity industry, however, he seemed to seek more of a structural solution rather than one that involved implementation by the politically influenced bureaucracy.

In his early work on the Freedom of Information Act (FOIA),⁹⁹ he sought both more and better disclosure, in part out of concerns about the burden on the agency staff. Arguing that the FOIA disclosure system primarily benefited private interests to the point of abuse and failed to educate the public as intended, he argued for greater reliance upon agencies and particular private actors, such as the media and researchers, to improve the system.¹⁰⁰ For example, he argued that we should reconceive the public information system without blaming government workers:

This can be accomplished by considering the actions of a hypothetical "right-thinking" agency official who wants nothing more than to serve the public and to comply with the letter and intent of the FOIA. Through this hypothetical bureaucrat, analysis must focus on the structural defects that cannot be attributed to government employees.¹⁰¹

Agencies would change from mere conduits to bodies with "an affirmative duty . . . to insure that the public is informed about official activities."¹⁰² This would not be a system to reduce disclosure, but to move from undifferentiated disclosure almost entirely for private purposes to educationally effective disclosure in which the public would learn the reasons for agency actions.¹⁰³ He saw administrative oversight, such as that undertaken by the Department of Justice, as "more effective and efficient than judicial enforcement."¹⁰⁴ Although the articles reflect an understanding of bureaucratic obstacles to full disclosure as well as of private abuses, fundamentally these proposals reveal a sense that the administrative system can be improved, in part by relying more fully on the good faith and professional integrity of those in the bureaucracy.

Several other articles reflect this faith in human ability to harness complex systems for the public good. Charles's 1996 tribute to James Landis¹⁰⁵ describes Landis's strong

⁹⁹ See Charles H. Koch, Jr., *The Freedom of Information Act: Suggestions for Making Information Available to the Public*, 32 MD. L. REV. 189 (1972); Charles H. Koch, Jr. & Barry R. Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1.

¹⁰⁰ Koch & Rubin, *supra* note 99, at 34–46.

¹⁰¹ *Id.* at 10.

¹⁰² *Id.* at 41.

¹⁰³ *Id.* at 44.

¹⁰⁴ *Id.*

¹⁰⁵ See generally Koch, *James Landis: The Administrative Process*, *supra* note 96.

faith in the ability of government to harness expertise and specialization for the public good.¹⁰⁶ After reading the rest of Charles’s scholarship, I found his description of Landis to be a description of himself. Here, for example, is Charles’s description of Landis’s “growing emphasis on personnel and personnel management”¹⁰⁷:

Rather than “radical surgery,” he urged Hoover, “[t]he real solution . . . lay in attracting talented personnel and giving them power to carry out their tasks.” In his own study, he observed: “The prime key to the improvement of the administrative process is the selection of qualified personnel. Good men can make poor laws workable; poor men will wreak havoc with good laws.” While he advocated merit selection and compensation, he urged that the key to improvement lay in independence and challenge.¹⁰⁸

For both men, expertise is legitimate and vital. Government systems are necessary and can work effectively. But the key is the people—in Charles’s case, the people he had known and with whom he had worked.

In the second edition, we saw, through a quote from his 1976 article, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*,¹⁰⁹ that Charles shared the faith that judicial review could improve the legislative rule-making system. He revealed that attitude in his work on review of agency exercise of discretion. For example, in his early article on this topic, *Confining and Controlling Administrative Discretion Within the Seventh Circuit*¹¹⁰ (before *Vermont Yankee*), he argued that “[t]he development of administrative agencies results from responses to practical problems and, hence, the growth of administrative process concepts has proceeded along pragmatic lines.”¹¹¹ Urging reliance upon “judicial development,” he wrote that:

The answers may lie in the careful thinking that has been done in confining and controlling administrative discretion. The best of this thinking has recognized the practical problems and has set forth principles which can reform administrative decision—protecting the citizen from harmful government action—without preventing the government from functioning for the benefit of its citizens.¹¹²

¹⁰⁶ *Id.* at 427.

¹⁰⁷ *Id.* at 432.

¹⁰⁸ *Id.* (citations omitted).

¹⁰⁹ See *supra* note 37 and accompanying text.

¹¹⁰ Charles H. Koch, Jr., *Confining and Controlling Administrative Discretion Within the Seventh Circuit*, 54 CHI.-KENT L. REV. 275 (1977) [hereinafter Koch, *Confining and Controlling Administrative Discretion Within the Seventh Circuit*].

¹¹¹ *Id.* at 308.

¹¹² *Id.* at 305, 308.

He was referring to the thinking of judges, particularly the Seventh Circuit.

He came back to the theme of judicial ability to handle complex systems in *An Issue-Driven Strategy for Review of Agency Decisions*.¹¹³ In the wake of *National Labor Relations Board v. Curtin Matheson Scientific, Inc.*,¹¹⁴ Charles attacked what he called the “word formula system” for determining the nature of judicial review.¹¹⁵ His term “word formula system” referred particularly to the fact that the application of arbitrary and capricious or substantial evidence review was determined by the nature of the process the agency had used to make the decision in question.¹¹⁶ He argued that the “word formula system,” perhaps adequate for a simpler time, failed when it came to complex administrative decisions because it “lack[ed] flexibility.”¹¹⁷ Because this system “leads a court to evaluate an entire administrative decision, no matter how complex, under a single review standard,” it “robs the review system of both flexibility and precision.”¹¹⁸

In its stead, Charles argued for review based upon the nature of the decision in question. This may seem an unsurprising proposition more than two decades later, but Charles was not simply arguing for different approaches to review of policy or fact, as in *Curtin Matheson Scientific*.¹¹⁹ With respect to review of policy, he asserted that some informal statements that “are not the direct result of the delegated authority to make rules” should nonetheless be subject to limited review.¹²⁰ This seems to simplify things somewhat, but his real point was that “[i]f the review system is to rationally allocate decisionmaking functions, it must do so according to all the factors affecting the relative decisionmaking advantages of the courts and the bureaucracy and not just the nature of the administrative decisionmaking process.”¹²¹ Thus, he challenged the court to do a better job. Perhaps it will be necessary to take into account more than just the procedure used by the agency, but that more demanding task will produce a better result.

He made much the same point as to review of facts. Not content to rely upon the word formula labels, which could result in different scrutiny for essentially similar facts, he argued that review of facts should depend upon the nature of the factual decisions.¹²² The involvement of specific or general facts was more important than the type of proceeding implemented by the agency. Generally, specific facts are subject to greater scrutiny, but he questioned whether general facts should at times be subject to greater scrutiny, while judicial review of specific facts may not be appropriate

¹¹³ Charles H. Koch, Jr., *An Issue-Driven Strategy for Review of Agency Decisions*, 43 ADMIN. L. REV. 511, 512 (1991) [hereinafter Koch, *An Issue-Driven Strategy*].

¹¹⁴ 494 U.S. 775 (1990).

¹¹⁵ Koch, *An Issue-Driven Strategy*, *supra* note 113, at 519.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 520–21.

¹¹⁸ *Id.* at 521, 522.

¹¹⁹ 494 U.S. at 776–81.

¹²⁰ Koch, *An Issue-Driven Strategy*, *supra* note 113, at 523.

¹²¹ *Id.*

¹²² *Id.* at 528.

for the “millions of findings of specific fact” that agencies make every day.¹²³ As he put it, “the degree of agency dominance over specific facts should be measured by the bureaucracy’s ‘comparative advantage.’ . . . The system, and a reviewing court, should base its acceptance of administrative decisions in a specific program on some judgment as to the value of the judicial contribution.”¹²⁴

He proposed a very complex system, one that depended upon the ability of judges to evaluate various disparate circumstances and determine the best degree of review for the particular decision.¹²⁵ His faith in judges to handle this complexity was similar to his 1976 argument, discussed above, that we should rely upon judicial review to drive the “evolution of a broad range of abbreviated public procedures.”¹²⁶

Another, rather different, example of Charles’s faith in human implementation of complex schemes is *A Community of Interest in the Due Process Calculus*,¹²⁷ a comprehensive, complex effort to refocus due process procedural decisions on intertwined interests of individual and community, rather than setting individual and community against each other, as in *Mathews v. Eldridge*.¹²⁸ Charles emphasized sensitivity to both individual concerns, such as personal dignity, and the community’s concerns as a collection of individuals, as opposed to the community’s concerns as an institution.¹²⁹ Much more complex than the utilitarian balance of *Mathews v. Eldridge*, this would not be a simple effort. I shuddered at Justice Scalia’s likely reaction to such a complex approach, with its inherent faith in the individual judge to take so many factors into account.

Charles’s late-career work on the electricity industry, which grew out of his relationship with David Penn, suggests an interesting combination of faith in human ability to design a complex regulatory system and a concern with the politically influenced and parochial attitudes of some regulators. The result is a turn toward a largely private system in which controls are achieved by a system of checks and balances among competing interests rather than through direct commands by regulatory bodies. In *Control and Governance of Transmission Organizations in the Restructured Electricity Industry*,¹³⁰ Charles tackled the extremely complex effort to restructure the electricity industry.¹³¹ In his most extensive examination of a particular substantive area of the regulatory state, Charles seemed almost to recreate the regulatory state for this particular sector of the economy. Driven by the reality that transmission appeared to be an inescapable

¹²³ *Id.* at 527.

¹²⁴ *Id.* at 527–28.

¹²⁵ *Id.* at 558.

¹²⁶ See *supra* note 37 and accompanying text.

¹²⁷ Charles H. Koch, Jr., *A Community of Interest in Due Process Calculus*, 37 HOUS. L. REV. 635 (2000) [hereinafter Koch, *A Community of Interest*].

¹²⁸ 424 U.S. 319 (1976). See generally Koch, *A Community of Interest*, *supra* note 127.

¹²⁹ Koch, *A Community of Interest*, *supra* note 127, at 696.

¹³⁰ Charles H. Koch, Jr., *Control and Governance of Transmission Organizations in the Restructured Electricity Industry*, 27 FLA. ST. U. L. REV. 569 (2000).

¹³¹ See *id.* at 571.

natural monopoly, Charles argued for regional, rather than state, control of transmission through nonprofit Regional Transmission Organizations (RTOs).¹³² The regional approach was necessary to avoid parochial state interests,¹³³ while the nonprofit model was necessary because for-profit RTOs would raise “a real specter of unbridled market power, which, at best, will mean the perpetuation of the regulatory regime.”¹³⁴ He emphasized, however, that “particular care must be taken in designing the internal policy-making, standard setting, and dispute resolution processes” for the RTOs.¹³⁵

Five years later, Charles addressed that very issue. In *Collaborative Governance in the Restructured Electricity Industry*,¹³⁶ he drew upon principles of “collaborative governance” articulated by Jody Freeman¹³⁷ to propose “a governance model that will better serve problem solving and satisfy all the various interests that are involved in the substance as well as the form of governance.”¹³⁸ He again argued for a private, nonprofit scheme in which nonprofit RTOs would perform the regulatory function.¹³⁹ The key was governance structures in which RTOs would be operated by “representative” committees that would assure broader interests, including consumers and similar less powerful groups, would balance parochial industry and state interests in controlling transmission of electric power.¹⁴⁰ He insisted upon “real influence for groups that were industry outsiders under the old vertically integrated regime.”¹⁴¹ Here, again, is the realist who understands the powerful forces of vested interests and the idealist who asserts those forces can be controlled through effective participation by and allocation of power to all involved. He concluded that “[a]ttention to principles of participation (real rather than apparent), accountability, and transparency will foster community satisfaction. But those features will also enhance the overall performance of the RTO-governing institutions.”¹⁴²

In 2009, he took those lessons overseas in *Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring*.¹⁴³ Examining the European Union (EU) situation in detail, Charles argued for a nonprofit RTO-type model, but he recognized

¹³² *Id.* at 584–86.

¹³³ *Id.* at 586 (explaining that RTOs are forced to make objective-based regulatory decisions and thus are in a better position to make decisions than state or federal regulators).

¹³⁴ *Id.* at 613.

¹³⁵ *Id.*

¹³⁶ Charles H. Koch, Jr., *Collaborative Governance in the Restructured Electricity Industry*, 40 WAKE FOREST L. REV. 589 (2005).

¹³⁷ *Id.* at 589–90 (citing Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997)).

¹³⁸ *Id.* at 591.

¹³⁹ *See id.* at 589, 592.

¹⁴⁰ *Id.* at 591–92.

¹⁴¹ *Id.* at 601.

¹⁴² *Id.* at 615.

¹⁴³ Charles H. Koch, Jr., *Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring*, 61 ADMIN. L. REV. 71 (2009) [hereinafter Koch, *Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring*].

the EU is hampered by a regulatory structure unlike that in the United States.¹⁴⁴ Here, we have the Federal Energy Regulatory Commission (FERC) as well as state regulators. FERC has provided us with a means of moving away from state control to a regional model. The EU, however, accomplishes regulation through its member states, without a version of FERC to ease the transition.¹⁴⁵ Nonetheless, Charles argued for the regional model because the U.S. experience had shown that “regulatory cooperation will not get the job done.”¹⁴⁶ Reflecting his belief in the need for some form of regulatory control, he said:

As Adam Smith observed some years ago, business people coming together is never good for the rest of us. ISO/RTO enables grid co-operation with much less opportunity to jointly act against the public or competitors. Indeed, it evolved from business people, both industry members and their customers, seeking a cooperative organization they could trust.¹⁴⁷

In an interesting evolution of his thinking, Charles said of the U.S. experience:

In sum, the private government-like services—including management, rulemaking, enforcement, and dispute settlement—solve many of the governmental tasks without many of the disadvantages of direct governmental involvement. Such entities serve well the sophisticated and complex tasks involved in governing the core segment of the electricity industry, bulk transmission. Fairness, competence, efficiency, and legitimacy radiate out to the entire industry and ultimately to the society it serves.¹⁴⁸

C. Understanding of and Faith in the People of the Bureaucracy

As with James Landis, Charles’s faith in the ability of government to implement programs to address complex problems perhaps necessarily included faith in the bureaucrats administering the system—the agency personnel and the administrative judges. As with his belief in what government could do, his work suggests that his faith in the

¹⁴⁴ *See id.* at 77–78 (explaining the difference between the independent system operator options in Europe and the United States and suggesting that the European solution is to move toward nonprofit ISO/RTO models).

¹⁴⁵ *Id.* at 88.

¹⁴⁶ *Id.* at 96.

¹⁴⁷ *Id.* at 95. “ISO” refers to “independent systems operator,” while “RTO” refers to “Regional Transmission Organization.” As described by Charles, both would be nonprofit and reflect many interests. *See id.* at 77.

¹⁴⁸ *Id.* at 81.

bureaucrats seems to have eroded somewhat over time. Perhaps he simply became more realistic.

As discussed earlier, Charles proposed an administrative system for resolving FOIA disputes in part because he had faith in the bureaucrats—the individuals—who would implement such a system.¹⁴⁹ Charles saw similar opportunities for improvement after his extensive examination of the Social Security Disability appeals system for the Administrative Conference of the United States (ACUS), as reported in *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*.¹⁵⁰ Despite the fact that the appeals system had many flaws and resulted in changes in only five percent of the outcomes,¹⁵¹ Charles and his co-author argued that it should not be abolished, “at least not before one more effort at serious reform.”¹⁵² Noting that the Appeals Council was “composed of talented and dedicated individuals” performing diverse tasks that were impossible to accomplish, they proposed a system-reform approach in which attention would turn from a “case correction” model to having the Appeals Council suggest new policies, develop new practices, and implement new experiments.¹⁵³ Here, again, is an expression of faith in the possibility of a complex system and of those implementing the system if given the appropriate task.

Several other articles reflect this attitude. In *Effective Regulatory Reform Hinges on Motivating the “Street Level” Bureaucrat*, four years before the above study, Charles argued that structural solutions were not enough to respond to the antigovernment attitude of the deregulatory movement.¹⁵⁴ Rather, we must give attention to the attitudes and incentives of the “street level” bureaucrat, the one most often encountered by members of the public.¹⁵⁵ Recognizing that the workforce ranges from excellent to awful and acknowledging that bureaucrats are often strongly risk-averse and inflexible, among other flaws, he urged attention to “methods aimed at motivating administrative decisionmakers, especially those at the implementing or ‘street level,’ to further such goals as fairness, correctness, dignity, and satisfaction.”¹⁵⁶ Through a new code of professionalism, we could create “a new class of professionals who will acquire the pride of professionals in their work.”¹⁵⁷ Ideally, a high regard for bureaucrats would improve

¹⁴⁹ See *supra* note 101 and accompanying text.

¹⁵⁰ Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U. L. REV. 199, 202–03 (1990).

¹⁵¹ *Id.* at 288 (citation omitted).

¹⁵² *Id.* at 319.

¹⁵³ *Id.* at 318–19.

¹⁵⁴ Koch, *Effective Regulatory Reform*, *supra* note 92, at 448–49.

¹⁵⁵ *Id.* at 432–33.

¹⁵⁶ *Id.* at 427–28.

¹⁵⁷ *Id.* at 443.

their performance, as is said to be true in Europe.¹⁵⁸ We might characterize this proposal as a combination of hard-bitten realism about the difficulties we face and an idealistic, human-centered, hopeful approach to a possible solution.

As Charles returned eight years later to an emphasis on the people doing the job, *Policymaking by the Administrative Judiciary*¹⁵⁹ addressed the fact that administrative law judges [ALJs] and other presiding officers will inevitably make agency policy.¹⁶⁰ Recognizing that vertical controls—essentially appeals to agency heads—cannot possibly assure uniformity of policy in administrative decisions, Charles argued that agencies must acknowledge this policymaking role and “incorporate it in to their policymaking arsenal.”¹⁶¹ Given the ineffectiveness of the adjudicative hierarchy, that effort becomes one of educating the administrative judiciary about agency policy. In addition to the vertical approach of having the adjudicators follow the agency’s nonlegislative statements of interpretation or policy, this proposal would recognize that the adjudicators are part of the organic policymaking system of the agency.¹⁶² Through advisory committees or other gatherings, the administrative judiciary could contribute to the development of policy by the agency itself and be made fully aware of the agency’s existing policy decisions.¹⁶³ Once again, the focus is on the individuals doing the work. With appropriate attention to potential problems, agencies should have faith in those individuals and rely upon them at the same time agencies educate them as to existing policies.

Several articles in the latter part of Charles’s career hint at growing concerns about the performance of individual bureaucrats (primarily ALJs, a rather special category of bureaucrat) and about administrative systems to the extent they are strongly subject to political influence. In *Administrative Presiding Officials Today*,¹⁶⁴ published in 1994, Charles reported on an ACUS survey of ALJs and administrative judges.¹⁶⁵ His conclusions and tone are dramatically different from the positive sense one draws from most of his work. He said, for example:

This responsibility gave me a very close look at the administrative law judge (ALJ) corps. What I saw was, to put it bluntly, alarming. My biases are always with the government employees and officials, having been one myself. Indeed, I dedicated my treatise to

¹⁵⁸ See *id.* (citing L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW, 15–17 (2d ed. 1973)).

¹⁵⁹ Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693 (2005).

¹⁶⁰ *Id.* at 694–96.

¹⁶¹ *Id.* at 712.

¹⁶² *Id.* at 740.

¹⁶³ *Id.* at 719–20.

¹⁶⁴ Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271 (1994) [hereinafter Koch, *Administrative Presiding Officials Today*].

¹⁶⁵ *Id.*

civil servants. Still, the more I dealt with the ALJ corps, the more concerned I became. The system has some very serious personnel problems and real, practical solutions are being supplanted by theoretical ones.¹⁶⁶

He found that an unacceptable number of presiding officers, particularly ALJs, did not “perform their function fairly and with an acceptable level of competence and diligence.”¹⁶⁷ They were too isolated from criticism and needed some sort of independent monitoring system, perhaps an ombudsman, so that identifying and addressing the performance of presiding officers would not depend upon individual complaints.¹⁶⁸ He emphasized “one very strong conclusion”:

The present ALJ corp [sic] simply has too many people who should not be in a position of judging others, especially those with no power. The selection process must be designed to assure that citizens meet the right kind of individual when they come before the government. I would go so far as to suggest serious consideration of sophisticated personality testing.¹⁶⁹

Interestingly, Charles did not find the answer in structural or system-design solutions: “[T]he structural and formalized solutions are not as effective as less formal approaches.”¹⁷⁰ He focused on the problems of presiding officers as individualized failures in need of individualized solutions.¹⁷¹ While he proposed structural responses, he returned to an emphasis on the individuals involved in the system: “Our survey, as did the others, discovered an overwhelming commitment to personal and systemic integrity.”¹⁷² He urged attention to hiring the right people, reducing the emphasis on a litigation background, and turning from undue formality to take advantage of procedural flexibility.¹⁷³ Ultimately, much as he suggested looking to “street level” bureaucrats,¹⁷⁴ he urged that we “look beyond traditional, legalistic structure and search for more practical, human solutions.”¹⁷⁵

D. Interest in Foreign Models of Governance

In his clearest break from the co-authored first edition of the casebook, Charles brought European perspectives on governance and administration to bear upon the

¹⁶⁶ *Id.* at 271 (footnote omitted).

¹⁶⁷ *Id.* at 272.

¹⁶⁸ *Id.* at 272–73.

¹⁶⁹ *Id.* at 275.

¹⁷⁰ *Id.* at 281.

¹⁷¹ *Id.*

¹⁷² *Id.* at 287.

¹⁷³ *Id.* at 292–93.

¹⁷⁴ See *supra* notes 154–55 and accompanying text.

¹⁷⁵ Koch, *Administrative Presiding Officials Today*, *supra* note 164, at 295.

students' consideration of American legal principles, even American sacred cows. In addition to describing the European roots of the modern welfare state,¹⁷⁶ Charles challenged the student with references to natural law¹⁷⁷ and the inquisitorial model of the French *Conseil d'État* and the *droit administratif*.¹⁷⁸ These materials require us to go beyond the relatively mundane legal issues, such as what constitutes a property interest or whether cross-examination should be allowed, to consider what we are truly trying to accomplish and whether there are ways to do it that are quite beyond our legal and cultural experiences. To give other examples, Charles questioned whether the United States should have adopted the approach, common in many countries, of presenting questions "to the courts prior to the final legislative or administrative decision,"¹⁷⁹ or the ombudsman concept originally adopted in Sweden in 1713.¹⁸⁰ All of these examples inherently raise the question of what it means to be free and how best to govern fairly and effectively.

Interestingly, Charles's wife Denise had the impression that his interest in comparative administrative law came relatively late in his career, with the European Union project of the Section of Administrative Law and Regulatory Practice of the American Bar Association.¹⁸¹ She said that once he came upon it, he said, "the EU is the biggest administrative agency in the world," and American lawyers were not paying enough attention to it. As a result, he built and taught a course in EU law. According to Denise, "the EU was like a big playground for him."¹⁸²

In fact, Charles revealed his interest in comparative administrative law, and the EU in particular, from the very beginning. His student law review note, *The Application of Article 85, Paragraph 1, of the Treaty of Rome to Intrastate Exclusive Distributorship Agreement*,¹⁸³ examined a European Court of Justice ruling that a Belgian exclusive domestic distributorship agreement could be reached under the Treaty of Rome if it was "likely to affect trade between the Member States' of the Common Market."¹⁸⁴ According to Charles, the decision opened "the door to the elimination of barriers raised by agreements within one Member State."¹⁸⁵

Charles returned to comparative work in 1981 with "*Some Kind of Hearing*" in *England*,¹⁸⁶ in which he compared U.S. due process and the concept of "natural justice,"

¹⁷⁶ CASEBOOK (4th ed.), *supra* note 33, at 22–23.

¹⁷⁷ *Id.* at 151.

¹⁷⁸ *Id.* at 139–42.

¹⁷⁹ *Id.* at 253.

¹⁸⁰ *Id.*

¹⁸¹ Telephone Interview with Denise Koch, *supra* note 30.

¹⁸² *Id.*

¹⁸³ Charles H. Koch, Jr., Note, *The Application of Article 85, Paragraph 1, of the Treaty of Rome to Intrastate Exclusive Distributorship Agreement: S.A. Brasserie de Haecht v. Consorts Wilkins-Janssen*, 2 *CCH Com. Mkt. Rep.* ¶ 8053 (1967), 3 *J.L. & ECON. DEV.* 254 (1968).

¹⁸⁴ *Id.* at 254 (citation omitted).

¹⁸⁵ *Id.* at 260.

¹⁸⁶ Charles H. Koch, Jr., "*Some Kind of Hearing*" in *England*, 23 *WM. & MARY L. REV.* 219 (1981).

both of which experienced explosions at roughly the same time.¹⁸⁷ Despite English criticism about overjudicialization in the United States, Charles found that after a period of misdirection through excessive attention to the trial model and struggle with semantics, we had reached the point where we could, in both adjudication and rulemaking, “seek practical answers to the tough questions of good government.”¹⁸⁸ He found, however, that English “law still may have to struggle through an era of commitment to the trial model.”¹⁸⁹

Charles again returned to comparative law in 2002, with the first of six articles seeking to enhance international and cross-cultural understanding of administrative processes. In *Judicial Review and Global Federalism*,¹⁹⁰ Charles argued that the agreement to strengthen and extend the rules of the World Trade Organization (WTO) was about more than mere free trade.¹⁹¹ It was really about “the emergence of a world government.”¹⁹² Charles described the centralizing effect of judicial review in the EU,¹⁹³ compared U.S. federalism to the EU’s concept of “subsidiarity,”¹⁹⁴ and argued that we were moving toward a “general concession of national sovereignty to supranational institutions.”¹⁹⁵ This article was a heartfelt plea for U.S. lawyers to catch up, combined with optimism about our ability to do so:

The relative parochialism of the U.S. legal community is a severe handicap, but U.S. lawyers have advantages, one of which is that U.S. lawyers are comfortable with a federal system. While considerable catching up is in order, U.S. lawyers are well equipped to deal with the concept of global federalism.¹⁹⁶

The second article, *Envisioning a Global Legal Culture*,¹⁹⁷ built on the first as Charles described the common-law and civil-law systems as likely sources of the legal culture for “an increasingly empowered supranational government.”¹⁹⁸ Charles sought to begin the conversation by providing “the framework for projecting the evolution of the global legal culture.”¹⁹⁹ Once again, he admonished American lawyers “to learn

¹⁸⁷ *Id.* at 220.

¹⁸⁸ *Id.* at 258–59.

¹⁸⁹ *Id.* at 259.

¹⁹⁰ Charles H. Koch, Jr., *Judicial Review and Global Federalism*, 54 ADMIN. L. REV. 491 (2002).

¹⁹¹ *See generally id.*

¹⁹² *Id.* at 491.

¹⁹³ *Id.* at 492.

¹⁹⁴ *Id.* at 503.

¹⁹⁵ *Id.* at 492.

¹⁹⁶ *Id.* at 511 (footnote omitted).

¹⁹⁷ Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT’LL. 1 (2003).

¹⁹⁸ *Id.* at 75.

¹⁹⁹ *Id.*

about the world's legal cultures, starting with the often quite unfamiliar ideologies and practices of the continental European systems."²⁰⁰

In the third article, *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*,²⁰¹ Charles urged that emerging legal systems turn to the civil law as the model for their judicial systems.²⁰² By contrast with the common law, civil-law judges have both more training and less leeway in their decisionmaking. As with the American-administrative process, the system depends less on the private bar, and the judges are more responsible for developing a sound record, at times bringing specialized substantive expertise to the table.²⁰³ More trained to make decisions than to litigate, the civil-law judges are more easily subjected to public scrutiny than the private bar in the common-law system.²⁰⁴ This focus on better judges provides a way for emerging legal cultures to improve relatively quickly and to prepare for their place in a global legal culture that will largely derive from the common-law and civil-law models.

The fourth article, *Judicial Dialogue for Legal Multiculturalism*,²⁰⁵ discusses how the United States and other legal systems have traded and evolved concepts over time.²⁰⁶ Charles urged respect for, continued dialogue with, and recognition of rights under various legal concepts.²⁰⁷ He sought not the imposition of "universal principles," but continuous attention and sharing of concepts to develop better understanding across cultures.²⁰⁸ Continuing the theme of the previous article, he noted, in particular, the importance of assuring the best possible judges, as opposed to the best possible advocates.²⁰⁹ He described U.S. administrative law as having "arrived at a similar strategy in many instances," such as emphasizing sound decisions rather than advocacy in the Social Security adjudicatory system.²¹⁰ He ultimately argued that "[t]he process of judicial exchange among a variety of tribunals, the justification of judicial positions, and the advocacy that drives judicial resolution offers a formidable vehicle whereby the global society can come to grips with the cacophony of legal cultures."²¹¹

²⁰⁰ *Id.*

²⁰¹ Charles H. Koch, Jr., *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 *IND. J. GLOBAL LEGAL STUD.* 139 (2004).

²⁰² *Id.* at 140.

²⁰³ *Id.* at 152–53.

²⁰⁴ *Id.* at 140.

²⁰⁵ Charles H. Koch, Jr., *Judicial Dialogue for Legal Multiculturalism*, 25 *MICH. J. INT'L L.* 879 (2004).

²⁰⁶ *See id.* at 879–80.

²⁰⁷ *Id.* at 901.

²⁰⁸ *Id.* at 902.

²⁰⁹ *Id.* at 890.

²¹⁰ *Id.*

²¹¹ *Id.* at 902.

The fifth article, *Devolution of Implementing Policymaking in Network Governments*,²¹² contrasts the hierarchical U.S. federal system with what he terms the more horizontal “network system” of the EU’s reliance on strong member states and the cross-boundary EU parliament to make and implement its policy decisions.²¹³ Consistent with his interest in policymaking by the U.S. administrative judiciary, Charles emphasized that policymaking at the point of implementation is inevitable.²¹⁴ In the United States, a degree of consistency can be achieved through the administrative hierarchy, but that goal is elusive in a network system. The challenge for such a system, as Charles saw it, is to “engender a sense of justice and legitimacy as policy is applied to its citizens.”²¹⁵

We have already seen the sixth article, the final one of his career, *Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring*,²¹⁶ in which he sought to distill useful lessons from the American electricity deregulation experience for the benefit of the EU.²¹⁷ Together, these six articles, in the short space of seven years, show us an internationalist who went far beyond the “natural justice” and *Conseil d’Etat* references in his casebook to a deep commitment to helping legal communities in this country and elsewhere understand the rapidly developing system of global governance and the lessons we can draw from administrative law as we continue to create that new system.

E. A Drive to Simplify

Although Charles wrote across a wide range of complex issues, he seemed to want to simplify that complexity for the rest of us. One example comes from his early days at DePaul. The other, ironically enough, is his body of work on the nature of discretion and its review. I have not found an obvious hook in the casebook, except, perhaps, that he slimmed it down in the fourth edition to focus on the essentials, as a practitioner would do.

In his second article while still at the FTC, *Prejudgment: An Unavailable Challenge to Official Administrative Action*,²¹⁸ Charles analyzed efforts to use charges of decisionmaker prejudgment to challenge agency decisions.²¹⁹ As the title indicates, he

²¹² Charles H. Koch, Jr., *The Devolution of Implementing Policymaking in Network Governments*, 57 EMORY L.J. 167 (2007).

²¹³ *Id.* at 169.

²¹⁴ *Id.* at 174.

²¹⁵ *Id.* at 198–99.

²¹⁶ Koch, *Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring*, *supra* note 143.

²¹⁷ *See id.* at 72.

²¹⁸ Charles H. Koch, Jr., *Prejudgment: An Unavailable Challenge to Official Administrative Action*, 33 FED. B. J. 218 (1974).

²¹⁹ *Id.* at 218.

found the challenge largely unavailable. He presented the analysis in the hope that “agencies will learn to avoid charges of illegal prejudgment” and to discourage “certain of the more frivolous challenges by the administrative law bar.”²²⁰ As he explained, only prejudgment as to specific facts or personal bias will support such a challenge. “Otherwise,” he hoped, “such challenges should no longer be seriously considered.”²²¹

Ironically, his extensive and complex work on the nature and review of discretion also illustrates his interest in simplification. He tackled this issue over several articles. In the first, consistent with the practical focus of his casebook, he described the development of the administrative state in very practical terms: “The development of administrative agencies results from responses to practical problems and, hence, the growth of administrative process concepts has proceeded along pragmatic lines.”²²² He held out hope for answers from careful thinking about “confining and controlling administrative discretion.”²²³ This seems to be the beginning of the process that David Penn described as musing on larger issues, then using his “bear trap” mind to bring them down to what we could do with them.

That effort continued through the ambitious *Confining Judicial Authority Over Administrative Action*,²²⁴ a comprehensive explanation of both standards of review and reviewability, and *Judicial Review of Administrative Discretion*,²²⁵ an explanation of the nature of and the five types of discretion. His *An Issue-Driven Strategy for Review of Agency Decisions*, described above,²²⁶ was an effort to bring those abstractions down to earth, as was *Judicial Review of Administrative Policymaking*,²²⁷ in which, in the wake of *United States v. Mead Corp.*,²²⁸ he emphasized the importance of distinguishing statutory interpretation from administrative policymaking.²²⁹ Here, and again in *FCC v. WNCN Listeners Guild: An Old-Fashioned Remedy for What Ails Current Judicial Review Law*,²³⁰ Charles settled upon a fairly simple message: It is about the

²²⁰ *Id.*

²²¹ *Id.* at 228.

²²² Koch, *Confining and Controlling Administrative Discretion Within the Seventh Circuit*, *supra* note 110, at 308.

²²³ *Id.*

²²⁴ Charles H. Koch, Jr., *Confining Judicial Authority Over Administrative Action*, 49 MO. L. REV. 183 (1984).

²²⁵ Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986).

²²⁶ *See supra* note 113 and accompanying text.

²²⁷ Charles H. Koch, Jr., *Judicial Review of Administrative Policymaking*, 44 WM. & MARY L. REV. 375 (2002) [hereinafter Koch, *Judicial Review of Administrative Policymaking*].

²²⁸ 533 U.S. 218 (2001).

²²⁹ *See Koch, Judicial Review of Administrative Policymaking, supra* note 227, at 376.

²³⁰ Charles H. Koch, Jr., *FCC v. WNCN Listeners Guild: An Old-Fashioned Remedy for What Ails Current Judicial Review Law*, 58 ADMIN. L. REV. 981 (2006) [hereinafter Koch, *FCC v. WNCN Listeners Guild: An Old-Fashioned Remedy for What Ails Current Judicial Review Law*].

policy.²³¹ Figure out what the statute requires. The rest is policy. Review policy, whether the space left in a *Chevron* analysis²³² or the exercise of judgment as authorized by statute, under the standard designed for that purpose, arbitrary and capricious review as captured in the concept of “hard look” review.²³³

CONCLUSION

This foray through seemingly disparate aspects of the Charles Koch, Jr. canon began with the simulation’s demand, as agency practice itself demands, to develop procedures, processes, and systems to achieve the public good, whether through improving upon our basic informal rulemaking, or determining, with little statutory guidance, how best to implement informal adjudication. Charles did not hesitate to tackle that effort more boldly and on a broader scale. He understood the need to rely upon the “street level” bureaucrat to achieve our public goals, he sought ways to enhance their performance, and he had faith that they and the judiciary could implement a complex approach to due process, one that would more fully respect the dignity of the individual as part of the community. And he took on the massive task of restructuring the electricity industry, both here and in Europe. This was a man of great vision and considerable courage.

²³¹ See *id.* at 983; Koch, *Judicial Review of Administrative Lawmaking*, *supra* note 227, at 376.

²³² Koch, *Judicial Review of Administrative Lawmaking*, *supra* note 227, at 376.

²³³ Koch, *FCC v. WNCN Listeners Guild: An Old-Fashioned Remedy for What Ails Current Judicial Review Law*, *supra* note 230, at 983.