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ADMINISTRATIVE JUDGES AND AGENCY POLICY DEVELOPMENT: THE KOCH WAY

Ronald M. Levin*

ABSTRACT

Among the creative contributions that the late Charles H. Koch, Jr., made to administrative law thinking was his exploration of the present and potential role of administrative judges as policymakers. Charles stood in firm opposition to recent trends that, in his view, had served to strengthen the policymaking role of administrative judges at the expense of agency heads. He insisted that ultimate control over the policy direction of a program should rest with the officials who have been appointed to administer that program. While adhering to this baseline, however, Charles gravitated over time toward a nuanced view that sought to define an affirmative role for administrative judges in the policymaking process. He suggested, for example, that these judges could be helpful to agencies by initiating proposals for new directions and by building records that would enable agencies to appraise those proposals. In this sense, he argued, administrative judges could work in collaboration with, rather than at cross-purposes with, the agencies to which they are answerable.

This memorial essay aims to review Charles's analysis of this generally neglected topic and to contribute a few additional insights to the discussion. After examining the background issue of where ultimate policy control should rest, the essay describes and evaluates several of Charles's ideas for refinement of the role of administrative judges as policymakers. In addition, the essay takes up related questions regarding agencies' use of regulations and guidance documents to circumscribe the policy choices that administrative judges make.

INTRODUCTION

The scholarship of the late Charles H. Koch, Jr., ranged over numerous topics in administrative law, both domestic and global, as the articles in this memorial symposium attest. For my contribution, I will focus on an article that Charles wrote about the role of administrative judges as policymakers. I corresponded with Charles on this subject in the spring of 2011, shortly before his passing, and I will draw upon that correspondence, as well as the underlying article, as the basis for reviewing and probing his analysis of the topic and for adding some thoughts of my own.

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In the early 1990s, Charles participated as one of several consultants to the Administrative Conference of the United States (ACUS) in a study of the administrative law judiciary.¹ The study examined the roles of both “administrative law judges” (ALJs) and other administrative adjudicators, often called “administrative judges” (AJs).² The ACUS recommendation emanating from that study articulated a seemingly unequivocal position:

Where the agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ’s (or AJ’s) role is to apply such policies to the facts that the judge finds in an individual case.³

As Charles noted to me in our recent correspondence, he would have agreed with that statement at the time the ACUS made it. But, he continued, after talking with administrative judges “I began to see that our (ad law’s) thinking is insufficient”⁴ In his more evolved view, he ceased to regard policymaking as falling exclusively within “the realm of the agency.”⁵ Accordingly, he eventually undertook to envision and describe an affirmative role for administrative judges in the process of administrative policymaking. This role, he thought, could include policy incubation and related record-building.⁶ In this fashion, he argued, the interaction between administrative adjudicators and agency heads in regard to policymaking could be coordinated rather than antagonistic.⁷ He spelled out this vision most comprehensively in an article published in the *Alabama Law Review* in 2005, entitled *Policymaking by the Administrative Judiciary*.⁸

¹ Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr. & Jeffrey S. Lubbers, *The Federal Administrative Judiciary*, 1992 A.C.U.S. 773.

² *See id.* at 779–81.

³ ACUS Recommendation 92-7, *The Federal Administrative Judiciary*, 57 Fed. Reg. 61,760, 61,763 (Dec. 29, 1992).

⁴ E-mail from Charles H. Koch, Jr. to author (April 21, 2011) (on file with author).

⁵ ACUS Recommendation 92-7, 57 Fed. Reg. at 61,763.

⁶ *Id.*

⁷ *Id.*

⁸ Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693 (2005) [hereinafter Koch, *Policymaking*], reprinted in 25 J. NAT’L ASS’N ADMIN. L. JUDGES 49 (2005). Charles published a shorter version of the same basic analysis in Charles H. Koch, Jr., *Administrative Judges’ Role in Developing Social Policy*, 68 LA. L. REV. 1095 (2008) [hereinafter Koch, *Developing Social Policy*]. The latter article has had a global reach of its own, as it has been translated into Chinese. 79 ADMIN. L. REV. (CHINA) 140 (Song Dong & Deng Yun-cheng trans., 2012). I include a few citations to this shorter piece in the present essay, but where I refer in the text to “the article,” I mean the more comprehensive treatment in the *Alabama Law Review*. Finally, for an op-ed version of the argument, see Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, ADMIN. & REG. L. NEWS, Spring 2004, at 2.

In the following pages, I will offer what amounts to a review essay responding to that article.

I hope that a close look at Charles's writing in this area will prove worthwhile not only as a tribute to a learned and insightful scholar, but also because the subject is a comparatively neglected one. Administrative adjudication as a whole gets much less attention in modern scholarship than rulemaking does. Furthermore, the precise role that administrative judges should play in this process is not as well defined as it might be. A recent article by Russell Weaver and Linda Jellum describes them as "neither fish nor fowl" in the administrative law bestiary.⁹ I hope in this essay to clarify some taxonomic issues. I will first examine the background issue of where ultimate policy control should rest. Then I will identify, and critically evaluate, several of Charles's ideas for refinement of the role of administrative judges as policymakers. My analysis first explores these ideas as they play out in purely adjudicative contexts; then it brings the role of regulations and policy guidance into the equation.

In this essay, I follow Charles's terminology by referring to the frontline adjudicators in administrative litigation as "administrative judges." As he noted, the more common term "administrative law judges" is sometimes used in a broad sense,¹⁰ but careful writers limit it to those individuals who fit within a civil service category of hearing officers who enjoy specific tenure and salary protection under the Administrative Procedure Act (APA).¹¹ Many other adjudicators, typically called administrative judges or AJs, lack the job and salary protection of ALJs, but they perform essentially identical functions at the agencies in which they are housed.¹² For present purposes, I use the term "administrative judges" to encompass both categories, as Charles did. I refer to "administrative law judges" only when the context makes the narrower term directly relevant.

I. ADMINISTRATIVE JUDGES AND POLICY CONTROL: ALTERNATIVE CONCEPTIONS

The starting point for Charles's analysis was the familiar proposition that agencies often use the adjudication process as a vehicle for policy development.¹³ The classic administrative law cases of *SEC v. Chenery Corp.*,¹⁴ *NLRB v. Wyman-Gordon Co.*,¹⁵ and *NLRB v. Bell Aerospace Co.*¹⁶ are commonly cited for the insight that agencies must have broad discretion to use adjudication rather than rulemaking for this purpose.¹⁷

⁹ Russell L. Weaver & Linda D. Jellum, *Neither Fish Nor Fowl: Administrative Judges in the Modern Administrative State*, 28 WINDSOR Y.B. ACCESS JUST. 243 (2010).

¹⁰ See Koch, *Policymaking*, *supra* note 8, at 701 & n.40.

¹¹ 5 U.S.C. §§ 5372, 7321 (2006).

¹² See Koch, *Policymaking*, *supra* note 8, at 701 n.40.

¹³ *Id.* at 696–700.

¹⁴ 332 U.S. 194 (1947).

¹⁵ 394 U.S. 759 (1969).

¹⁶ 416 U.S. 267 (1974).

¹⁷ See, e.g., *Chenery II*, 332 U.S. at 202–03; *Wyman-Gordon Co.*, 394 U.S. at 772; *Bell Aerospace Co.*, 416 U.S. at 294.

Even an agency that is generally receptive to the latter process will usually recognize that rulemaking is unsuitable in some policy-laden contexts, such as where a consensus on how to deal at large with the subject matter would be too difficult to forge. From the pervasiveness of policy in adjudication, it is only a short step to the truism that the officials who hear those cases—administrative judges—will inevitably have to make policy judgments on interstitial issues that arise in the course of deciding those cases.¹⁸

But this inescapable aspect of the decisional process is not quite the same as policy *making*, if by that term we mean the creation of norms that will have staying power. As the ACUS recommendation quoted above reflects, federal law has generally treated the agency head as the authoritative source of policy within the agency. A representative pronouncement from the case law is that of the D.C. Circuit in *Iran Air v. Kugelman*.¹⁹ In that case, an exporter that had been exonerated at the trial level in a sanctions case argued that, under the language of the applicable judicial review statute, the ALJ's decision could not be reversed by the agency head to the detriment of the exporter.²⁰ In an opinion by then-Judge Ruth Bader Ginsburg, the court concluded that, even if the statutory language was susceptible of that interpretation, the implications of the exporter's reading rendered it inherently implausible:

The Under Secretary responds . . . that the agency head—the Secretary or his designee—“must be the final administrative arbiter of legal questions concerning the export control program,” and therefore must “ha[ve] the power to correct legal errors of the ALJ.” . . . We agree. Whatever else Congress meant . . . it did not mean to disarm the agency head when the ALJ incorrectly reads the law in the charged party's favor.

It is commonly recognized that ALJs “are entirely subject to the agency on matters of law” [quoting Professor Antonin Scalia].

As one veteran ALJ explained:

The basic concept of the independent administrative law judge requires that he conduct the cases over which he presides with complete objectivity and independence. In so operating, however, he is governed, as in the case of any trial court, by the applicable and controlling precedents. These precedents include the applicable statutes and agency regulations, the agency's policies as laid down in its *published* decisions, and applicable court decisions

¹⁸ See Koch, *Policymaking*, *supra* note 8, at 702 & n.42, 717.

¹⁹ 996 F.2d 1253 (D.C. Cir. 1993).

²⁰ *Id.* at 1257.

... [O]nce the agency has ruled on a given matter, [moreover,] it is not open to reargument by the administrative law judge; ... although an administrative law judge on occasion may privately disagree with the agency's treatment of a given problem, it is not his proper function to express such disagreement in his published rulings or decisions.²¹

A corollary of the court's position is that an administrative judge's decisions do not have precedential effect in the federal system. As Charles noted, a regime in which AJs tend to adhere to prior decisions by other AJs can promote desirable evenhandedness in some situations, but, in other circumstances, the attempt to maintain such consistency would be unmanageable and may interfere with the goal of providing individualized justice.²² In any event, the value of adherence by AJs to "horizontal" precedent in a given situation should be considered in prudential terms, rather than as a matter of formal legal obligation.²³ In short, even where the AJ's decision remains, the final agency action for purposes of an individual adjudication, the cases seem to indicate that it should not be understood as declaring the policy of the agency in a wider sense.²⁴

²¹ *Id.* at 1260 (citation omitted) (quoting Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 62 (1979), and Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 ADMIN. L. REV. 9, 12–13 (1973)); see also *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) ("An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law.").

²² Koch, *Policymaking*, *supra* note 8, at 711–12.

²³ *Id.*; Koch, *Developing Social Policy*, *supra* note 8, at 1099 n.13 ("[AJs] should not feel in any way bound by their colleagues' prior treatment of like cases."). Similarly, according to the Seventh Circuit, disagreements among administrative judges' decisions within a single agency do not constitute a breach of the agency's duty to avoid arbitrary inconsistency. See *Ho v. Donovan*, 569 F.3d 677, 681–82 (7th Cir. 2009). The petitioner in *Ho v. Donovan* complained that an ALJ in his case had been less lenient than other ALJs in other cases. *Id.* at 681. In an opinion by Judge Easterbrook, the court responded:

Explanation is required when *the agency* changes course. "The agency" means the Secretary, and the Secretary has not revised either regulations or practices. It is common for subordinate officials, including ALJs, to have different understandings of rules' meaning. That different ALJs apply [the regulation in this case] differently does not show that the agency has changed course; it shows only why there is a need for appellate review within any system of adjudication. None of the ALJs is authorized to set or change agency policy; only the Secretary can do that. If ALJs apply the regulations differently, the remedy is an appeal to the Secretary.

Id. at 682.

²⁴ See also *Ucelo-Gomez v. Gonzales*, 448 F.3d 180, 186–87 (2d Cir. 2006) (holding that immigration judges' decisions, even if summarily affirmed by the Board of Immigration Appeals, do not constitute the agency's position for purposes of the *Chenery* doctrine that an administrative decision may be upheld only on grounds endorsed by *the agency*; thus, a remand to obtain an authoritative ruling from the Board was required). The court interpreted *INS v.*

As I will explain below, Charles would not have agreed with the court in *Iran Air* that ALJs should refrain from even mentioning their disagreements with agency policy while deciding cases, but, in other respects, he fully agreed with the thrust of the court's position. As he wrote, "the administrative review authority, either the agency head or its representative, has the final word—the power to speak for the 'agency' as a whole."²⁵ Elsewhere he declared: "It is . . . necessary that the agency have the final authority regarding policy. That authority is necessary for uniformity and consistency."²⁶ Moreover, Charles argued, "[a]dministrative judges are one level further removed from the democratic institutions than are the agencies they serve."²⁷ Although delegations to agencies are inevitable, he said, they are monitored indirectly through political oversight, but administrative judges lack even that indirect form of accountability to the democratic process.²⁸

These theoretical premises of the federal system are embedded in, and also reinforced by, what Charles termed the hierarchical model of administrative adjudication.²⁹ The APA codifies a version of that model. Under that Act, an ALJ makes an "initial" or "recommended" decision, which is then appealable to the agency head or another decisionmaking body that sets policy for the agency.³⁰ The APA underscores the agency's primacy by providing that, in such an appeal, "the agency has all the powers which it would have in making the initial decision."³¹

The above generalizations about administrative judges' policymaking responsibilities, or lack thereof, do not hold true in all agency adjudication systems. If we expand our perspective to examine the domain of state administrative law, as well as atypical federal programs, we can see a range of structural arrangements that give administrative judges a louder voice on policy than the standard federal model permits. For example, about half the states have established central panels of ALJs.³² In a central panel system, adjudicators are housed within an entity that is structurally removed

Orlando Ventura, 537 U.S. 12 (2002), as establishing the same proposition by implication. *Ucelo-Gomez*, 448 F.3d at 186.

²⁵ Koch, *Policymaking*, *supra* note 8, at 701.

²⁶ *Id.* at 733.

²⁷ Koch, *Developing Policy*, *supra* note 8, at 1103.

²⁸ *Id.*

²⁹ See Koch, *Policymaking*, *supra* note 8, at 700–01.

³⁰ 5 U.S.C. § 557(b) (2006). An initial decision "becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule." *Id.* A recommended decision, in contrast, is merely a recommendation to the agency leadership, which must take action before any legally effective decision can flow from the proceeding. Thus, under the APA model, review of the ALJ's decision by the agency heads is either an option (as with the initial decision) or a necessity (as with the recommended decision). See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 82 (1947) [hereinafter ATTORNEY GENERAL'S MANUAL].

³¹ § 557(b).

³² See James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401, 403–06 (2005) [hereinafter Flanagan, *Update*].

from any one agency whose decisions they review.³³ Some federal regulatory schemes have a split-enforcement or split-function model, in which an enforcement agency's decisions are reviewed by a separate adjudicatory tribunal.³⁴ The most drastic departure from the federal model is to give administrative judges final decisional authority, meaning that their decisions may be reviewed by a court, but not by the originating agency. Louisiana and South Carolina have some of the most prominent systems of this kind.³⁵

A full evaluation of these alternatives to the standard federal model is outside the scope of this essay. For present purposes, it should suffice to make clear that Charles did not support alternatives of this kind. Models in which administrative judges' decisions may not be reviewed by agency heads have been widely criticized in the scholarly literature.³⁶ Charles joined in that criticism,³⁷ but he also went further. His article included a substantial critique of the central panel system—whether or not it provided for an appeal back to the agency.³⁸ Much of the administrative law world accepts the central panels approach, at least at the state level.³⁹ But Charles disapproved of it, arguing that central panel judges, who serve multiple agencies, lack “the expertise and experience inherent in the traditional scheme”; thus, he continued, “the panel structure replaces a specialized, program-sensitive judicial community with an isolated, generalist administrative judiciary.”⁴⁰ Likewise, he was critical of the split-enforcement model,⁴¹

³³ *Id.* at 401.

³⁴ See generally George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987) (discussing the split-enforcement model and proposing recommendations for its use).

³⁵ Flanagan, *Update*, *supra* note 32, at 406–10. Flanagan counts Florida, North Carolina, and Oregon as states with “de facto finality” because they have adopted procedures or standards of review that make it difficult for agencies to overturn ALJ decisions. James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1376–82 (2002) [hereinafter Flanagan, *Redefining*].

³⁶ See, e.g., Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 454–63 (1999); Flanagan, *Redefining*, *supra* note 35, at 1399–1420; Flanagan, *Update*, *supra* note 32, at 410–34; Jim Rossi, *Final, but Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 64–66 (2004); Weaver & Jellum, *supra* note 9, at 258. For a more positive view, see *NCALJ Panel Discussion: ALJ Decisions—Final or Fallible?*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 191 *passim* (2005) (comments of Judge John Hardwicke, in dialogue with Professors Flanagan and Rossi).

³⁷ See Koch, *Policymaking*, *supra* note 8, at 736–37.

³⁸ *Id.* at 733–35.

³⁹ See, e.g., Flanagan, *Update*, *supra* note 32, at 402; see also MODEL STATE ADMIN. PROCEDURE ACT §§ 601–607 (2010) (providing a model statute for states that desire to establish a central panel).

⁴⁰ Koch, *Policymaking*, *supra* note 8, at 733–36; see also *infra* note 58 and accompanying text.

⁴¹ Koch, *Policymaking*, *supra* note 8, at 738–39.

although its defenders include some highly regarded academic observers.⁴² In his view, this model detracted too much from the enforcement agency's ability to develop policy through the adjudicative process, as *Wyman-Gordon* and kindred cases contemplate.⁴³

My correspondence with Charles in 2011 confirmed that he had not changed his mind about the unwisdom, as he saw it, of these alternatives to the traditional hierarchical model. I pointed out that in recent months the National Conference of the Administrative Law Judiciary (NCALJ) had sought to induce the ABA House of Delegates to oppose Article 6 of the 2010 Model State Administrative Procedure Act (MSAPA), in part because it did not invite states to consider giving final decisional authority to ALJs. I described how the ABA's Administrative Law Section had led the opposition to this resolution and had successfully negotiated to induce the NCALJ to accept a weaker version, which the House of Delegates then passed.⁴⁴ Charles heartily approved: "Beating back the final decision movement is god's work. We need to do more Theoretically it short circuits the whole administrative adjudication strategy. Ad law types need to take a strong and effective stand."⁴⁵

What is intriguing about Charles's conception of the administrative judge as policy-maker is that he evolved it *within* the bounds of his commitment to the model in which the ultimate control of policy rests with the agency head. The next section of this essay outlines his perspective.

II. ADMINISTRATIVE JUDGES AND POLICY DEVELOPMENT WITHIN THE HIERARCHY

The gist of Charles's thesis was that, within limits, AJs should occasionally be willing to challenge prevailing agency precedent, and agencies should be receptive to considering these challenges.⁴⁶ He argued that, in the administrative world, *stare decisis* is by no means absolute.⁴⁷ Agencies may not ignore their precedents, but they are free to revise them if they acknowledge that they are doing so.⁴⁸ *Stare decisis* promotes stability, predictability, and reliance, but agencies should also be willing to adapt to

⁴² See *id.* at 738 (discussing favorable assessments by Daniel Gifford and Richard Fallon, together with skeptical comments by other scholars).

⁴³ *Id.* at 738–39.

⁴⁴ For the final resolution, see ABA House of Delegates, Resolution 112 (Feb. 14, 2011), available at http://www.americanbar.org/content/dam/aba/directories/policy/2011_my_112.authcheckdam.pdf.

⁴⁵ E-mail from Charles H. Koch, Jr. to author (May 20, 2011) (on file with author).

⁴⁶ See Koch, *Policymaking*, *supra* note 8, at 712.

⁴⁷ *Id.* at 703.

⁴⁸ *Id.* at 703–05. Today Charles could cite *FCC v. Fox Television Stations, Inc.* for this proposition. 556 U.S. 502 (2009). *Fox* would, however, cast doubt on the immediately following language in Charles's article: "[Agencies] are allowed to continually adjust their precedent so long as they apply the new view until faced with a sound reason for adjusting that view; they are held to precedent only until a change can be justified." Koch, *Policymaking*, *supra* note 8, at 703. Under *Fox*, an agency does not necessarily need to justify a *change* in precedent; generally, it only needs to justify its new position on its own terms. 556 U.S. at 515.

new circumstances and to learn from experience.⁴⁹ Drawing upon the theories of Professor Evan Caminker regarding the role of hierarchy in the civil litigation system,⁵⁰ Charles considered the potential benefits that may ensue when an adjudicator engages in “underruling”⁵¹ of precedents that are out of keeping with the judge’s conscience and “street-level perspective.”⁵² To this extent, Charles would have parted company with the ALJ who, as quoted in *Iran Air*, maintained that an administrative law judge should simply keep quiet about any policy disagreements that he or she may have with agency leadership.

Charles made clear (and explained that Caminker also made clear) that an AJ’s “creative deviation,” if tolerated at all, should be exceptional.⁵³ Adherence to precedent should be the norm, not only because the agency head has a right to control the agency’s policies in the program as a theoretical matter, but also because such adherence promotes efficiency and public confidence in the agency’s case law.⁵⁴ Indeed, the agency has the option to spurn any such “assistance” from the AJ if it finds no merit therein. But Charles urged agency heads to give serious consideration to policy inputs from below: “Justice seems best served by a norm of obedience in which the lower-level adjudicators generally seek to obey agency policy expressed in superior precedent, and where an administrative review authority representing the agency as an institution is available to test that obedience but take advantage of studied disobedience.”⁵⁵ He also urged agencies to experiment with creative methods of bringing administrative judges into the policymaking process.⁵⁶ As he recognized, judges in civil-law nations typically play an “inquisitorial” role in controlling their proceedings, and there is room for administrative judges to follow the lead of that model.⁵⁷

The affirmative role that Charles thought administrative judges should play helps to explain why he did not approve of the central panel systems that have been so widely adopted in the states. In such a system, he argued, administrative judges are generalists and do not acquire the specialized knowledge that is crucial to the contributions that they should make to the policymaking process.⁵⁸

⁴⁹ Koch, *Policymaking*, *supra* note 8, at 704–05.

⁵⁰ See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 866–67 (1994).

⁵¹ Koch, *Policymaking*, *supra* note 8, at 706–07.

⁵² *Id.* at 709.

⁵³ *Id.* at 706–07; see Caminker, *supra* note 50, at 867.

⁵⁴ Koch, *Policymaking*, *supra* note 8, at 707–08.

⁵⁵ *Id.* at 709.

⁵⁶ *Id.* at 710–11; see also ACUS Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41,352, ¶3(d) (June 10, 2013) (suggesting that the Social Security Administration should allow ALJs to serve for limited periods on the Appeals Council, in part to “benefit the Appeals Council by introducing the perspectives and insights of ALJs”).

⁵⁷ Koch, *Policymaking*, *supra* note 8, at 700 n.36.

⁵⁸ *Id.* at 733–34.

An issue that Charles's article left open is how far the administrative judge may go in challenging the agency's prevailing policy. The judge might actually enter judgment in defiance of precedent. Or the judge might explain why he or she disagrees with the agency's extant policy but adheres to it in the actual disposition of the case at the hearing level. The latter choice would put the onus on the party who would benefit from a changed policy to take an appeal and prevail on the agency heads (or other superior reviewing authority) to consider whether to alter the policy to conform to the judge's suggestion. In my correspondence with Charles, I noted that the latter is the approach that the Supreme Court expects from the lower courts.⁵⁹ He agreed that this might be the better solution for an administrative judge.⁶⁰ I do not suggest that this qualification should somehow be retrospectively read into Charles's articles, but at the very least it points toward a course of action that administrative judges should consider in "underruling" situations. Indeed, an administrative judge's opinion routinely becomes part of the judicial review record,⁶¹ and a reviewing court would surely be attentive to the agency's response, or lack of response, to the judge's analysis.

III. BUILDING A RECORD

Charles's analysis of the potential positive contributions that administrative judges can make in policymaking found concrete expression in his discussion of record-building at the hearing level. He contended that an administrative judge must sometimes go beyond the parties' choices in order to build an adequate record for agency policymaking.⁶² As he noted, an agency's development of new policy in adjudication must often rest on a foundation of "legislative facts."⁶³ "Unfortunately," he wrote, "the

⁵⁹ See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); see also *United States v. Hatter*, 532 U.S. 557, 567 (2001) (reaffirming this expectation but overruling precedent as recommended by lower court); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (same).

⁶⁰ E-mail from Charles H. Koch, Jr. to author (May 20, 2011) (on file with author).

⁶¹ See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951).

⁶² Koch, *Policymaking*, *supra* note 8, at 729–30.

⁶³ *Id.* at 726–27. Even in the courts, the policymaking task sometimes leads judges to take account of nonrecord facts, although some scholars are ambivalent about this tendency. See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012); Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51 (2013). Agencies have traditionally been viewed as having even more leeway in this regard. See Ernest Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 43 & n.190; see also 2 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 10.6, at 750–54 (4th ed. 2002) ("The court has long allowed agencies to resolve issues of legislative fact based on judgment and expertise, rather than evidence."). Nevertheless, modern doctrines of "hard look" judicial review circumscribe an agency's ability to act on the basis of unsupported claims of expertise. See, e.g., *Int'l Union v. MSHA*, 626 F.3d 84,

administrative hearing, like the trial, is controlled by the litigants The parties—even the agency staff—are not motivated to introduce those facts because they may not be necessary to resolve the particular dispute. Indeed, the parties may have some incentive to divert attention from these facts.”⁶⁴ The judge must therefore play an active role in assembling the necessary record. Charles also contemplated that administrative judges should “actively seek experts related to the issues,”⁶⁵ make creative use of official notice to expand the record (after giving parties an opportunity for rebuttal),⁶⁶ and solicit intervention by interested persons whose participation could contribute to a fuller airing of the issues than the original parties would have supplied.⁶⁷

The “unfortunately” quoted in the preceding paragraph is an eye-opener. Not everyone would think, at least at first blush, that party control of the development of the record is unusual, let alone regrettable. In order to evaluate Charles’s somewhat unorthodox line of argument, I think it will be helpful to consider several discrete situations.⁶⁸ The first and perhaps least problematic would arise where the administrative judge undertakes to build a record for consideration of a policy innovation that she knows or has good reason to expect will be one that the agency itself wants to see explored. The agency might have given this signal in dicta in an earlier case, or even in an opinion remanding this very case for further consideration. With respect to this situation, Charles’s arguments about the judge’s role are quite persuasive. The policy-making process should begin at the hearing level, so that the facts can be developed in an orderly way and the parties can be heard regarding them.⁶⁹ He offers a cogent analogy between the judge’s proactive inquiry and the traditional doctrine of official notice, under which an agency has long been permitted to rely on evidence that the parties did not choose to bring out, provided that the parties are given an adequate opportunity for rebuttal.⁷⁰ Continuing with the premise that the agency *wants* the judge

94 (D.C. Cir. 2010); *Tripoli Rocketry Ass’n v. ATFE*, 437 F.3d 75, 83 (D.C. Cir. 2006); Jim Rossi, *Judicial Review of Issues of Fact*, in *A GUIDE TO POLITICAL AND JUDICIAL REVIEW OF FEDERAL AGENCIES* 159, 171–75 (John Duffy & Michael Herz eds., 2005).

⁶⁴ Koch, *Policymaking*, *supra* note 8, at 727 (emphasis added).

⁶⁵ *Id.* at 728.

⁶⁶ *Id.* at 729.

⁶⁷ *Id.* at 730.

⁶⁸ One familiar situation in which administrative judges may be expected to develop a record proactively occurs when the statute *requires* the agency’s decision to turn on an issue that a litigant did not address. For example, the judge might help a pro se litigant, such as a disability benefits claimant, meet the required burden of proof. *See, e.g.*, Koch, *Policymaking*, *supra* note 8, at 726 & n.165; *see also* *Heckler v. Campbell*, 461 U.S. 458, 470–73 (1983) (Brennan, J., concurring) (faulting the ALJ in that case for failing to fulfill this responsibility); *id.* at 473–76 (Marshall, J., concurring in part and dissenting in part) (same). I do not discuss this function here, because such a case would almost invariably turn on established policy, not a policy innovation.

⁶⁹ Koch, *Policymaking*, *supra* note 8, at 726–29.

⁷⁰ *Id.* at 729. As mentioned above, agencies are sometimes permitted to act on the basis of unsupported factual propositions. *See supra* note 63. Charles’s point, however, was that

to lay a foundation for the policy initiative in question, I see no reason to question Charles's suggestion that the judge may liberally resort to inviting interested persons to file amicus briefs⁷¹ or even to intervene in the proceeding.

A second situation would be one in which the agency head has not indicated interest in a potential new policy, but one of the parties wants to make a case for such a policy change. Again, the hearing level is the logical stage in the adjudicative process at which any legislative facts that must underlie such a new policy should be developed. In principle, the administrative judge could accommodate the party's goal without having to take a position personally as to the desirability of the policy change. However, the judge might well have some decisions to make about how much leeway to allow the party's advocacy of the policy, especially if the policy would be at odds with long-standing or settled agency precedent. Charles emphasized in his article that administrative judges have experience and familiarity with the agency's case law and practices that they can bring to bear on their role in the development of administrative policy-making.⁷² A judge might well want to draw on that valuable experience and knowledge in deciding whether to allow the party to put on a full case, or merely tender an offer of proof, or do something in between.

Finally, we have the situation in which neither the agency nor a party has sought exploration of a potential new policy, but the administrative judge thinks it would be a good idea. Under these circumstances, is record-building for such a policy shift an appropriate function for the judge? Charles's answer was essentially what one would expect from the thesis of the article: Administrative judges should generally adhere to agency policy, but occasionally they should nudge the agency to consider a new initiative and should proactively find facts that would form the predicate for such consideration.⁷³

However, what is distinctive about the record-building function is that it may impose costs on the parties to the case. Those costs may include protracted delay as well as the possible burdens of having to present a case in opposition to the proposed policy. Detours into issues that the parties have no interest in pursuing could potentially get out of hand. Charles was not oblivious to these concerns.⁷⁴ He remarked that

where sound practice (if not due process) does require an agency to build a record, this factual development should ordinarily occur at the hearing stage, at which an ALJ or AJ typically presides.

⁷¹ As Charles recognized, in the litigation that led up to *Wyman-Gordon*, the NLRB did invite amicus briefs before deciding on and announcing its new policy of requiring employers to furnish lists of employees to unions. See Koch, *Policymaking*, *supra* note 8, at 730; see also Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 *YALE L.J.* 571, 599 (1970).

⁷² Koch, *Policymaking*, *supra* note 8, at 730.

⁷³ *Id.* at 727, 730.

⁷⁴ In comparable circumstances, other authors have been less circumspect. A recent article recommends that courts should regularly invite notice and comment on the legal and policy issues raised by cases pending before them. See Michael Abramowicz & Thomas B. Colby,

[t]he litigants, both the private litigant and the agency staff, are now engaged in a policymaking proceeding and acquire the responsibility for representing either the established policy or a need for adjustment. This is an unfair burden. A judge must weigh the fairness of doing what is essentially “agency” business at the expense of the private party.⁷⁵

Thus, for example, “where the need [for intervention] strays too far beyond the focus of the individual dispute, the better approach [for the judge] may be to note the need and leave the job of considering how to incorporate broader participation to the agency.”⁷⁶ A fair inference from these cautionary words would seem to be that the extent to which the administrative judge may properly build a record for new policy issues during an adjudication should depend in significant part on how much burden this choice would place on the litigants in the case.

IV. RULES AND GUIDANCE DOCUMENTS

Another dimension of the challenge of defining and delimiting the status of administrative judges as policymakers is uncertainty about the appropriate role of regulations and guidance documents in establishing agency policy. The presence or absence of such controls does much to determine, as a practical matter, the amount of space that administrative judges possess for policymaking in the (limited) sense that Charles’s thesis envisioned. Indeed, he discussed this aspect of the issue at length in his article.⁷⁷

A. *What Agencies May Do*

Charles built his analysis around the familiar distinction between legislative rules (also called “substantive rules,” and sometimes “regulations”), on the one hand, and guidance documents (interpretive rules and policy statements), on the other.⁷⁸ Legislative rules have the force of law.⁷⁹ Accordingly, they are binding not only on the public,

Notice-and-Comment Judicial Decisionmaking, 76 U. CHI. L. REV. 965 (2009). The authors argue persuasively that this procedure would improve the quality of judicial decisionmaking, at least some of the time. *Id.* at 1006–17. But they make no mention of the litigants’ countervailing interest in obtaining a speedy and inexpensive resolution of their dispute.

⁷⁵ Koch, *Policymaking*, *supra* note 8, at 731.

⁷⁶ *Id.* at 730.

⁷⁷ *Id.* at 713–20.

⁷⁸ Charles termed this class of documents “nonlegislative rules” in his *Alabama Law Review* article, Koch, *Policymaking*, *supra* note 8, at 715, but termed them “guidance documents” in a later article. See Koch, *Developing Social Policy*, *supra* note 8, at 1102. Both terms are commonly used.

⁷⁹ See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); ATTORNEY GENERAL’S MANUAL, *supra* note 30, at 30 n.3; Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 473–84 (2013).

but also on the agency and its employees, including its ALJs.⁸⁰ This proposition is generally acknowledged (although Charles was less categorical about it than some other writers).⁸¹ To be sure, the *meaning* of a legislative rule may be debatable in a given case. Essentially, however, the status of these rules as a constraint on the agency is not controversial. Administrative judges must comply with such a rule until it is revoked or invalidated, just as an agency head must.⁸²

With guidance documents, it is a different story. By definition, they do not have the “force of law,” but they surely exert, and should exert, some constraining effects within the agency.⁸³ The manner and extent to which this is true is not well defined in modern administrative law.⁸⁴ And if the point is unclear as to staff generally, one might be even more uncertain about the effect of such pronouncements on administrative judges, who in at least some contexts are expected to maintain “independence” from the agency leadership. Many AJs do not believe such documents are binding on them.⁸⁵

Charles spoke to the uncertain status of agency guidance in his article.⁸⁶ His basic claim that such statements have less bite than legislative rules is undeniable, but his effort to explain their status in doctrinal terms strikes me as not altogether successful. He discussed *Morton v. Ruiz*⁸⁷ as standing for the proposition that agency personnel may deviate from the prescriptions of an agency manual when it is “fair” to do so,⁸⁸ but *Ruiz* is not a well-regarded case among administrative law scholars,⁸⁹ and Charles’s

⁸⁰ Koch, *Policymaking*, *supra* note 8, at 714–15 & n.103.

⁸¹ Charles detected some wiggle room in the Supreme Court case of *United States v. Caceres*, 440 U.S. 741 (1979). Koch, *Policymaking*, *supra* note 8, at 714 n.103. However, *Caceres* may be better seen as a perplexing outlier that is anything but helpful in determining the legal effect of legislative rules. *See, e.g.*, Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 579–82, 584 (2006). Indeed, the actual rule in *Caceres* may not have fallen within the category of legislative rules in the first place, although the Court did not focus on that point. *See id.* at 580, 601.

⁸² Koch, *Policymaking*, *supra* note 8, at 715.

⁸³ *See, e.g.*, *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995) (“Indeed, what purpose would an agency’s statement of policy serve if agency employees could not refer to it for guidance?”).

⁸⁴ For a severely critical assessment of efforts to apply the “binding effect” criterion, see Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 346–52 (2011). As one indication of the subtlety of the law’s line-drawing in this area, see ACUS Recommendation 92-2, *Agency Policy Statements*, 57 Fed. Reg. 30,103, 30,104, ¶ 3 (July 8, 1992) (stating that an agency may make a policy statement “authoritative for staff officials,” but should nevertheless “advise staff [that] such policy guidance does not constitute . . . an independent basis for action”).

⁸⁵ Charles H. Koch, Jr., *Administrative Presiding Officials Today*, 46 ADMIN. L. REV. 271, 283–84 (1994) [hereinafter Koch, *Presiding Officials*].

⁸⁶ Koch, *Policymaking*, *supra* note 8, at 715–17.

⁸⁷ 415 U.S. 199 (1974).

⁸⁸ Koch, *Policymaking*, *supra* note 8, at 716.

⁸⁹ *See, e.g.*, Kenneth Culp Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823, 843 (1975) (“Administrative law would benefit if part V of the *Ruiz*

reading of it is also open to doubt.⁹⁰ He went on to rely on *Skidmore v. Swift & Co.*⁹¹ for the proposition that a nonlegislative rule should carry weight with the courts only in proportion to its “power to persuade.”⁹² Yet, that case speaks to judicial review of agency interpretations of law; it is hard to accept the implication that an administrative judge should be able to depart from any agency guidance document, including a statement of policy, whenever the judge thinks the document “unpersuasive.”⁹³ In short, I am sure that Charles’s intuition was correct, but there is a need for further analysis.

The issue of agencies’ leeway to control administrative judges through policy guidance has rarely been litigated, but an interesting New Hampshire state court decision provides a context for discussion. In *Asmussen v. Commissioner, New Hampshire Department of Safety*,⁹⁴ the assistant commissioner of the State department of safety held a meeting with the hearings examiners in the department who presided over administrative license suspension (ALS) hearings.⁹⁵ At the meeting, he directed the examiners to admit hearsay evidence and to ask questions of police officers to help them fulfill their burden of proof;⁹⁶ admonished them to keep reports brief and not to conduct hearings as though they were courtroom trials;⁹⁷ and directed them “not to dismiss a proceeding automatically on technical grounds,” but [instead] to allow the police officer to proffer the required proof.⁹⁸ And, in a remark that the hearings examiners may have thought added insult to injury, he cautioned the examiners not to “act like judges.”⁹⁹ The department followed up with a memorandum reiterating these instructions.¹⁰⁰

There was no doubt that the assistant commissioner regarded the memorandum as binding on the examiners. At a later meeting, he told the examiners that if they could

opinion could be erased from the reports.”); Merrill, *supra* note 81, at 583–84 (describing *Ruiz* as a “remarkable” case); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own “Laws,”* 64 TEX. L. REV. 1, 18 (1985) (“[T]he *Ruiz* Court simply overstated the applicable principle [in several respects].”).

⁹⁰ In *Ruiz*, the Court declined to enforce criteria in an unpublished Bureau of Indian Affairs manual that purported to deny general assistance benefits to otherwise eligible Indians. 415 U.S. at 236–37. The Court said that such a denial of benefits could only be made pursuant to published standards, as required by the APA, the agency’s internal procedures, or both. *Id.* at 230–36. Charles’s interpretation of this ruling as a generalized message that courts or agency personnel may decline to follow “unfair” applications of a guidance document was, at best, a debatable inference.

⁹¹ 323 U.S. 134 (1944).

⁹² Koch, *Policymaking*, *supra* note 8, at 717.

⁹³ Elsewhere in his writing on administrative judges as policymakers, Charles did draw a sharper distinction between law interpretation and policymaking. See Koch, *Developing Social Policy*, *supra* note 8, at 1096–97 & n.7.

⁹⁴ 766 A.2d 678 (N.H. 2000).

⁹⁵ *Id.* at 685.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 685–86.

not carry out department policies, they could resign,¹⁰¹ and he actually did remove one recalcitrant examiner from ALS hearings until the latter could be “retrained.”¹⁰²

Litigation challenging the validity of the memorandum was commenced by examiners as well as respondents in ALS proceedings. One question in the case was whether the assistant commissioner was attempting to exert improper command influence over the examiners.¹⁰³ The court firmly rejected that claim:

Part I, Article 35 of the New Hampshire Constitution provides in part that “it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.” . . . “A judge is a member of a separate and independent branch of government, bound only to decide cases in accordance with the constitution and laws of New Hampshire and of the United States” The hearings examiners in this case, by contrast, are employees of the department of safety, an executive branch agency, and their “impartiality” must be considered within the context of the policy-making responsibility that officials of the agency, including the assistant commissioner, hold

On issues of policy and legal interpretation, hearings examiners are subject to the direction of the agency by which they are employed, and their independence is accordingly qualified. Influence ordinarily is not deemed improper unless it is aimed at affecting the outcome of a particular proceeding. Thus, the assistant commissioner’s “efforts . . . to ensure that [the hearings examiners’] decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with ‘live’ decisions.”¹⁰⁴

In this case, the court concluded, “[n]one of the instructions were aimed at affecting the outcome of a particular proceeding,”¹⁰⁵ and thus they were permissible despite their mandatory nature.¹⁰⁶

By distinguishing between influence that is “aimed at affecting the outcome of a particular proceeding”¹⁰⁷ and supervision relating to “issues of policy and legal interpretation,”¹⁰⁸ the court in *Asmussen* found a way to defuse, if not entirely dismiss, objections based on the decisional independence of the hearing examiners.¹⁰⁹

¹⁰¹ *Id.* at 686.

¹⁰² *Id.*

¹⁰³ *Id.* at 692.

¹⁰⁴ *Id.* at 692–93 (citations omitted).

¹⁰⁵ *Id.* at 693.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 692.

¹⁰⁹ *Id.*

In federal administrative law, to which the New Hampshire court looked for inspiration,¹¹⁰ agency heads do, indeed, generally avoid interference with ALJs in their adjudication of individual cases. The APA itself contains some restrictions in this vein.¹¹¹ Moreover, customary administrative law practice has transcended the limited statutory provisions on point. The norm is that there should be little if any direct contact between ALJs and other agency personnel respecting decisions in individual cases, except in hearings on the record.¹¹² For non-ALJ adjudicators, the norm of independence is less entrenched in law, but reportedly not very different in practice, at least for full-time administrative judges.¹¹³ The 2010 revision of the Model State Administrative Procedure Act adopted a similar principle for use at the state level, and that specific provision triggered little if any controversy during the drafting process.¹¹⁴

To be sure, as Charles noted, the administrative judge's insulation from consultation with knowledgeable staff members within the agency bolsters the underlying Koch thesis that such judges should not be regarded as policymakers.¹¹⁵ But, regardless, the court in *Asmussen* found that this norm was largely beside the point, because the assistant commissioner's issuance of policy guidance did not entail intervention into specific cases.¹¹⁶ Indeed, it was akin to rulemaking, to which the ex parte contact restrictions associated with adjudication generally do not apply.¹¹⁷

¹¹⁰ *Id.* at 693–94.

¹¹¹ 5 U.S.C. § 554(d)(1) (2006) (forbidding ALJs to “consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate”); § 554(d)(2) (forbidding agency staff who perform adversary functions to supervise ALJs). *See generally* ABA SECTION OF ADMIN. L. & REG. PRACTICE, A GUIDE TO FEDERAL AGENCY ADJUDICATION 156–58 (Jeffrey B. Litwak ed., 2d ed. 2012) [hereinafter ABA ADJUDICATION GUIDE].

¹¹² *See* William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991, 1009–10 (1978); Antonin Scalia, Chairman's Message, *Separation of Functions: Obscurity Preserved*, 34 ADMIN. L. REV. v, viii–ix (Wint. 1982).

¹¹³ *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 343–45 (1992); *see also* Koch, *Presiding Officials*, *supra* note 85, at 278–79 (noting survey results indicating that AJs perceive less agency interference with their decisional independence than ALJs do).

¹¹⁴ MODEL STATE ADMIN. PROCEDURE ACT § 408(b) (2010). In contrast, the Act's extension of separation of functions restrictions to contacts between agency heads and nonadversary staff, section 408(e), was at odds with prevailing law and enormously controversial. *See* Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 WIDENER L.J. 707, 721–39 (2011).

¹¹⁵ Koch, *Policymaking*, *supra* note 8, at 712–13 n.98; *see also* Pedersen, *supra* note 112, at 1010.

¹¹⁶ The court cited in this connection to the case law that grew out of the so-called Bellmon review program, through which the Social Security Administration attempted to control adjudication of disability cases during the Reagan administration. *See Asmussen v. Comm'r, N.H. Dep't of Safety*, 766 A.2d 678, 692–93 (2000). Judicial responses to Bellmon review were, in fact, mixed, depending on whether judges in particular cases perceived the program as exerting de facto pressure to deny benefits claims. *See* ABA ADJUDICATION GUIDE, *supra* note 111, at 216–17 n.85.

¹¹⁷ In support of ex parte contacts in rulemaking, the court relied on the well-known case of *Sierra Club v. Costle*, 657 F.2d 298, 405–08 (D.C. Cir. 1981), and the discussion of it in

In dictum at least, the D.C. Circuit has staked out a similar position to that of the New Hampshire court. In *CropLife America v. EPA*,¹¹⁸ the EPA issued a directive declaring that it would no longer evaluate the safety of pesticides by relying on human studies prepared by outside parties, except where such reliance was “legally required.”¹¹⁹ One issue in the case was whether the quoted phrase meant that the directive left the agency’s ALJs free to “require” consideration of such studies.¹²⁰ The court rejected this interpretation of the directive, stating that “the reality of agency operations makes it clear that ALJs *cannot* independently rule on the legality of third-party human studies, because they may not ignore the Administrator’s unequivocal statement prohibiting the agency from considering such studies.”¹²¹

B. What Agencies Should Do

If one accepts the teachings of authorities such as *Asmussen* and *CropLife*, an agency *may* use guidance documents, as well as rules, to constrain administrative judges. Indeed, this can be an important facet of effective program management, especially at agencies with large caseloads.¹²² Charles’s article started from that premise

Charles’s treatise. *Asmussen*, 766 A.2d at 693 (citing 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 6.10, at 454 (1985)).

¹¹⁸ 329 F.3d 876 (D.C. Cir. 2003).

¹¹⁹ *Id.* at 878.

¹²⁰ *Id.* at 881.

¹²¹ *Id.* at 882; *see also* Auth. of Educ. Dep’t Admin. Law Judges in Conducting Hearings, 14 Op. O.L.C. 1, 2 (1990) (“ALJs are bound by all policy directives and rules promulgated by their agency, including the agency’s interpretations of those policies and rules. . . . [T]hey owe the same allegiance to the Secretary’s policies and regulations as any other Department employee.” (citations omitted)). The *CropLife* example is ambiguous in that the court called the press release a “binding regulation.” 329 F.3d at 881. However, the court’s word choice should not be read too literally. It is an example of the tendency among many courts to *reclassify* an informal document as “legislative” en route to holding that an agency should have engaged in notice and comment before promulgating it. I agree with Professor Anthony that this usage is imprecise, because such a document cannot “be” a legislative rule. Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1048 (2000). A better formulation is that, in such a case, a court is misusing, or is expected to misuse, a guidance document by treating it as though it *were* binding.

¹²² *See, e.g.*, ACUS Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg 41,352, 41,354, ¶ 3(a) (June 10, 2013) (“The [Social Security Administration’s] Appeals Council should advise and assist policymakers and decisionmakers [in disability benefits cases] by . . . [i]ssuing Appeals Council Interpretations (ACIs), with greater frequency, in order to: [a]ddress policy gaps; promote greater consistency and uniformity throughout the adjudicatory process; and establish precedents upon which claimants and their representatives may rely.”); Grant Bagley, *Current Procedures and Standards for Making Medicare Coverage Decisions*, in GUIDE TO MEDICARE COVERAGE DECISION-MAKING AND APPEALS 17, 36–37 (Eleanor D. Kinney ed., 2002) [hereinafter ABA MEDICARE GUIDE] (discussing proposals for use of guidance documents regarding Medicare coverage issues).

and went on to address the issue of how agencies *should* use that authority. In brief, his position was roughly the same as the advice he gave with respect to the application of *stare decisis* to precedents, as I have discussed above.¹²³ That overlap is hardly surprising. After all, various commentators, including myself, have argued that agency guidance documents are in many ways analytically equivalent to case law precedents.¹²⁴

More specifically, Charles returned to his thesis that agency heads should consider accepting and benefitting from administrative judges' occasional deviations from the policies stated in rules and guidance documents. He thought that this process was important to the ongoing development of agency policy. "Policy change must percolate up through the process, and hence each level has a role in sharpening [a] rule through interpretation."¹²⁵ Experience with the application of a rule can point towards adjustments over time. Thus, for example, "a potential policy-making contribution exists when judges look behind [the language of a] rule to conclude that strict application of the rule would not further its purpose in the individual case before them";¹²⁶ such a creative move might "launch a policy inquiry throughout the administrative hierarchy."¹²⁷

On the other hand, Charles also cautioned that administrative judges should "*generally* . . . give effect to both nonlegislative and legislative rules,"¹²⁸ in part to protect the reliance interests of citizens who look to rules and other policy pronouncements for guidance. He also saw a need for "strong agency review to reassert the value of consistency, the authority of the agency over policy, and any process values compromised by straying from the rule as promulgated."¹²⁹ Importantly, he argued that the necessary "balanc[e] between flexibility and stability"¹³⁰ did not have to be the same in every administrative context; "[e]ach individual administrative program may strike the appropriate balance differently, determining the appropriate attitude for the agency's judges to take towards agency rules and policy pronouncements."¹³¹ The goal of these accommodations was to integrate administrative judges' perspectives into the enterprise: "Policymaking should be seen as a coordinated effort in which the judge's individual decisions contribute to policy development rather than an adversarial process in which the judge struggles against the agency's policymaking efforts."¹³²

¹²³ See *supra* notes 46–52 and accompanying text.

¹²⁴ See Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497, 1501–02 (1992); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 934–37 (2004); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1472–74, 1486 (1992); *cf.* *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001) ("Interpretive rules may sometimes function as precedents.").

¹²⁵ Koch, *Policymaking*, *supra* note 8, at 718.

¹²⁶ *Id.*

¹²⁷ Koch, *Developing Social Policy*, *supra* note 8, at 1101.

¹²⁸ Koch, *Policymaking*, *supra* note 8, at 719 (emphasis added).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

The theses that Charles aired in his article echoed the themes of a recent law reform debate in which I participated.¹³³ I served for a few years as the ABA advisor to the drafting committee for what became the 2010 MSAPA. As a practical matter, I acted as a liaison between the committee and the ABA's Administrative Law Section. At one point the committee tentatively adopted a provision that was intended to confirm the non-binding nature of agency guidance documents:

A guidance document may be considered by a presiding officer or final decision maker in an agency adjudication for its persuasive effect but the guidance document does not have the force and effect of law and does not bind the presiding officer and the final decision maker in the exercise of discretion.¹³⁴

What troubled me about this language was that it appeared to say that the impact of a guidance document on a presiding officer (i.e., an ALJ) in a contested case should be the same as its impact on an agency head, despite the different roles that these two figures play in the agency's hierarchical structure. It could be read to suggest, for example, that if the appointed head of an agency publishes a pro-management policy statement, and a pro-labor ALJ is not "persuaded" by it, the ALJ must be free to go her own way.

I brought the proposed language before the Council of the Administrative Law Section for discussion. The ensuing deliberation reflected a belief that the propriety of an ALJ's decision to depart from an agency policy statement may depend on context. Some Council members argued that if a policy statement were twenty years old and apparently out of sync with the agency's current regulatory approach, the ALJ might well decide to assume that the agency heads would not adhere to it if asked, or at least should open up the disputed issue for fuller consideration. This argument attracted significant support. But, others argued, what if the agency head then reaffirmed its policy, and the ALJ nevertheless declined to adhere to the agency's view in an indistinguishable case six months later? There was general agreement that an ALJ's "creative deviation" from the policy statement would be much harder, if not impossible, to justify under those circumstances. In short, the Council's discussion was marked by essentially the same striving for nuance that one sees in Charles's scholarship in this area. At the same time, the discussion also implied that the MSAPA drafters would be wise to avoid trying to settle too much about the hierarchical relationship between ALJs and agency heads through legislation. After I reported the Council's discussion to the drafting committee, it replaced the provision quoted above with milder language, which appears in the 2010 MSAPA as adopted.¹³⁵

¹³³ In fact, this experience was part of what impelled me to commence the correspondence with Charles that I have been discussing in this essay.

¹³⁴ MODEL STATE ADMIN. PROCEDURE ACT § 310(g) (Apr. 6, 2009) (working draft) (on file with author).

¹³⁵ See MODEL STATE ADMIN. PROCEDURE ACT § 311(f) (2010) ("A guidance document may be considered by a presiding officer or final decision maker in an agency adjudication, but

One additional situation in which courts frequently consider whether a guidance document or policy statement is “binding” occurs when a litigant claims that such a document should have been issued through the notice-and-comment procedures of the APA.¹³⁶ Among the few cases that have considered how this doctrine applies to administrative judges is *Warder v. Shalala*.¹³⁷ In that case, plaintiffs challenged an interpretive ruling by the Health Care Financing Administration (HCFA) that narrowly construed the Medicare Act’s criteria for reimbursement of medical expenses.¹³⁸ In rejecting this challenge, the First Circuit declared that “[a]n interpretative rule binds an agency’s employees, including its ALJs, but it does not bind the agency itself.”¹³⁹ The phrasing of this declaration was somewhat overstated, or at least obscure. In fact, the First

it does not bind the presiding officer and the final decision maker in the exercise of discretion.”). Even this revised subsection (f) is troublesome insofar as it declares that a guidance document “does not bind” a presiding officer. Read for all it could be worth, that proposition would be inconsistent with *Asmussen* and kindred authorities. A benign interpretation of the sentence would be that it is intended to allow a private party that disagrees with an agency guidance document to contest it at both the hearing and agency appeal levels—but the provision does not prevent a presiding officer from saying (or even being instructed to say) that any decision to abandon the policy will have to be made by the final decisionmaker. This interpretation would harmonize subsection (f) with other language in section 311 that overtly seeks to preserve vertical relationships within the administrative hierarchy. *See infra* note 140 and accompanying text. However, subsection (f) can also be read as directly inviting ALJs to override agency policies with which they may disagree. For this reason, states that are considering enactment of section 311 would be well advised to omit this subsection and thereby avoid unnecessary confusion.

¹³⁶ In *Asmussen* itself, the New Hampshire court held that some, though not all, of the assistant commissioner’s memoranda should have been issued through rulemaking procedure. *Asmussen v. Comm’r, N.H. Dep’t of Safety*, 766 A.2d 678, 694–95 (N.H. 2000). I will not discuss this part of the court’s opinion in depth, because it revolved around applications of an unusual New Hampshire statute that expressly defines “rule” to include statements that “prescribe . . . policy, procedure or practice requirement[s] binding on persons outside the agency.” N.H. REV. STAT. ANN. § 541-A:1(XV) (2013) (emphasis added). The critical question, therefore, was whether various directives, nominally addressed to hearings examiners, were nevertheless “binding on persons outside the agency.” *See Asmussen*, 766 A.2d at 693. This analysis resembled the reasoning that a federal court might use in applying the federal APA exemption that allows rules “relating to agency management or personnel” to be issued without notice and comment. 5 U.S.C. § 553(a)(2) (2006); *see, e.g., Tunik v. MSPB*, 407 F.3d 1326, 1342–44 (Fed. Cir. 2005) (holding that a regulation that protected ALJs from being removed from pending cases was outside the scope of the exemption, despite its relevance to “personnel,” because “the removal of ALJs implicates not only the rights of an individual ALJ being removed, but also the broader interest of the public in having private rights adjudicated by persons who have some independence from the agency opposing them”).

¹³⁷ 149 F.3d 73 (1st Cir. 1998).

¹³⁸ *Id.* at 75.

¹³⁹ *Id.* at 82 (quoting KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3, at 104 (3d ed. 1996 & Supp. 1997)).

Circuit may have misapplied the distinction in *Warder* itself.¹⁴⁰ However, I think the court was on the right track. Its distinction reflected, if somewhat ambiguously, the emerging understanding that an agency may legitimately use a guidance document to bind its employees if it also ensures that affected persons will have an adequate opportunity to contest the document at some later stage in the administrative process, i.e., at a higher level in the bureaucracy.¹⁴¹ Under this reasoning, an agency has discretion to open up a guidance document to challenge at the administrative judge level or not. In fact, the HCFA (now the Centers for Medicare & Medicaid Services) apparently does allow such challenges in some circumstances and not in others.¹⁴² The tradeoff between efficiency and percolation can be different in varying contexts. Again, an attractive feature of such discretion is that it leaves the agency free to make the kind of prudential choices that Charles advocated, instead of having to apply a conceptual test of whether the guidance document is “binding” or not.

Writing about *Warder* in a listserv post shortly after the case was decided, Professor William Jordan commented that “it is legal and may be appropriate for the agency to bind its ALJs to interpretations that the agency itself has already adopted. Indeed, in the HCFA context, this is important as [a] matter of agency management in order to achieve a degree of consistency among many ALJ decisions.”¹⁴³ However, he continued:

This proposition does not necessarily mean [that] it is wise for the agency to bind its ALJs in this way. There may be value in

¹⁴⁰ The district court stated that the HCFA ruling in dispute “is binding on all HCFA components, including the ALJs who hear Medicare appeals.” *Warder v. Shalala*, 1997 U.S. Dist. LEXIS 7029, *14–15 (D. Mass. May 7, 1997). Even more telling, perhaps, was the same court’s statement that “because the Ruling is binding on all levels of HCFA, it would be futile to require the plaintiffs to pursue this challenge administratively before allowing it to be brought in federal court.” *Id.* at *18 n.10. Although the court of appeals did reverse the district court, it did not take issue with the statements just quoted. Thus, it seems possible that the HCFA ruling did “bind the agency itself,” in which case the plaintiffs’ procedural challenge should have succeeded.

¹⁴¹ See Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3436–37 (Jan. 25, 2007) (stating that significant guidance documents should not contain “mandatory language . . . unless . . . the language is addressed to agency staff and will not foreclose consideration by the agency of positions advanced by affected private parties”); MODEL STATE ADMIN. PROCEDURE ACT § 311(c) (2010) (“A guidance document may contain binding instructions to agency staff members if, at an appropriate stage in the administrative process, the agency’s procedures provide an affected person an adequate opportunity to contest the legality or wisdom of a position taken in the document.”).

¹⁴² Eleanor D. Kinney, *Medicare Beneficiary Appeals Processes*, in ABA MEDICARE GUIDE, *supra* note 122, at 65, 74–75; *cf.* *Erringer v. Thompson*, 371 F.3d 625, 631 n.10 (9th Cir. 2004) (stating that local coverage determinations in Medicare “do not bind ALJs or the federal courts”).

¹⁴³ Posting of William S. Jordan, III, jordan@uakron.edu, to adminlaw@chicagokent.kentlaw.edu (Sept. 10, 1998) (on file with author).

leaving the issue open for ALJs to grapple with and refine through the adjudicatory process. This would presumably strengthen any decision the agency ultimately makes because the agency would have had to consider contrary positions in greater depth. But management concerns . . . may override [this] interest¹⁴⁴

Aficionados of irony will appreciate the coincidence (if it was one) that Bill Jordan, Charles's future casebook collaborator, so perfectly anticipated the thrust of the analysis that Charles would afterwards articulate in greater depth in the article discussed in this essay.

CONCLUSION

The foregoing reflections on Charles's view of administrative judges as policy-makers are intended to be exploratory, not definitive. I hope that they evoke, even if they cannot fully capture, Charles's capacity for subtlety and nuance. His work in this area of administrative adjudication, as in many other areas, bears appreciation for its attention to and respect for complexities. Even where one could disagree with his conclusions, the work is stimulating and valuable. If this short essay lacks some of that subtlety,¹⁴⁵ I hope it will have the offsetting virtue of continuing the dialogue and making his perceptions more widely known within the world of administrative law scholarship.

¹⁴⁴ *Id.*

¹⁴⁵ In the interest of brevity, I have refrained from addressing a few incidental themes in Charles's article, notably his discussion of cognitive errors and perceptual distortions that may influence administrative judges (like other people). See Koch, *Policymaking*, *supra* note 8, at 720–26.