CHIEF JUSTICE RICHARD J. HUGHES—ARCHITECT OF A RESPONSIVE ADMINISTRATIVE PROCESS

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> The administrative process is a governmental tool. It is no more conservative or liberal than the automobile that carries the bureaucrat to his work. It can be used to go right, left, or down the center of the road. It is used both as an instrument of law reform and as a protection against law reform.[1]

Author of landmark opinions designed to insure and protect fundamental rights in other vital areas,[2] Chief Justice Hughes has clearly earned distinction as architect and effective advocate of a responsive administrative process, one which vigilantly seeks to assure fair treatment to the individual while fostering enlightened understanding and cooperation between the individual and state government. His has been a truly compassionate approach to law reform.

Following adoption of the 1947 State Constitution, then Governor Alfred E. Driscoll, in his annual message to the Legislature in January 1948, urged enactment of legislation "to make the procedure

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[1] I KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §1.12, at 52 (2d ed. 1978); *see id.* §1.03, at 14 (1958).

[2] *See, e.g.*, Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193 (1975), *republished*, 69 N.J. 133, 351 A.2d 713 (1975), *cert. denied sub nom.* Klein v. Robinson, 423 U.S. 913 (1975). In *Robinson*, the Chief Justice commented: "The people in 1875 ordained the Legislature to be their agent to effectuate an educational system but did not intend to tolerate an unconstitutional vacuum should the Legislature default in seeing to their specification that the system be thorough and efficient." 67 N.J. at 352, 339 A.2d at 202–03. In *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976), he stressed that "the law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of." *Id.* at 44, 355 A.2d at 665. In *In re* Yengo, 72 N.J. 425, 371 A.2d 41 (1977), the Chief Justice warned "[a]n intoxication with judicial power which would ignore basic constitutional precepts is a wholly unacceptable syndrome that cannot be tolerated in New Jersey courts." *Id.* at 450, 371 A.2d at 57. And, in *In re* Gaulkin, 69 N.J. 185, 351 A.2d 740 (1976), the decision was arrived at "with an appreciation of the emergence and the social and legal recognition of spousal autonomy and retention of separate identities and interests, notwithstanding the sympathetic relationship of an ongoing marriage. . . ." *Id.* at 194, 351 A.2d at 744–45.

of our administrative agencies conform to accepted standards of fair and uniform administration according to the rule of law."[3] The Governor's drive to achieve a forward-looking state administrative procedure act enlisted support from many individuals and groups. Among those in the forefront were Arthur T. Vanderbilt, then Chief Justice designate, Nathan L. Jacobs, later Associate Justice of the Supreme Court, Milton B. Conford, later Presiding Judge for Administration of the Appellate Division of the Superior Court, and Alfred C. Clapp, then State Senator from Essex County, editor of the New Jersey Law Journal and later Presiding Judge of the Appellate Division. Despite vigorous efforts on its behalf, however, the proposed "beneficial and much needed legislation"[4] fell short of adoption. In this respect the modernization of our state government provided by the new state constitution and the innovations flowing from it remained incomplete.

While further attempts to secure passage of an administrative procedure act were made in succeeding legislative sessions, it was not until 1968, during the administration of then Governor Richard J. Hughes, that a model Act was brought to fruition. In that year the Legislature adopted Senate No. 667, designed to regulate practice and procedure of state administrative agencies. The measure was presented to the Governor but returned by him to the Senate with his objections, for reconsideration.[5] His eleven page conditional veto message accompanying the return of the bill attests to his extensive and comprehensive analysis of the measure and his dedication to the task of assuring "that its provisions reflect both the needs and the nature of New Jersey's government and its people."[6] He recommended amendments to "ease administrative difficulties, and yet, . . . preserve the protections and benefits to both the people and the government so clearly intended by the Legislature."[7] The bill was amended and re-enacted with his recommendations,[8] and today

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[3] [1948] MANUAL OF THE LEGISLATURE OF NEW JERSEY 676, 679 (Governor Driscoll's First Annual Message). In his annual message, the Governor pointed out that:

> This will require that we establish by statute a code of administration and procedure which will apply to the various departments resulting from the reorganization [pursuant to 1947 N.J. CONST. art. V, § IV, para. 1]. We have in the new Federal Administrative Procedure Act, and the long legislative history behind it, a very useful source from which to develop legislation best fitted to our needs.

Id.

[4] Editorial, *Revising Our Administrative Procedure*, 71 N.J.L.J. 140 (Apr. 15, 1948).

[5] *See* N.J. CONST. art. V, § I, para. 14(b).

[6] Conditional Veto Message of December 27, 1968, at 1.

[7] *Id.*

[8] The legislation was approved January 14, 1969. An Act concerning practice and procedure of administrative agencies of the State, [1968] N.J. Laws ch. 410, at 1408, 1417 (N.J. STAT. ANN. §§ 52: 14B-1 to -15 (West 1970)).

stands as a monument to his devotion to basic principles of responsible and responsive government. What was said regarding the Federal Administrative Procedure Act by United States Senator Pat McCarran, while chairman of the Senate Committee on the Judiciary, is equally applicable to the state version which was fashioned by Governor Hughes and the Legislature in 1968.

> The Administrative Procedure Act is a strongly marked, long sought, and widely heralded advance in democratic government. It embarks upon a new field of legislation of broad application in the "administrative" area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other. Although it is brief, it is a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men.[9]

And so, after a struggle extending over two decades, it was under the effective leadership of Richard Hughes, in partnership with a cooperative Legislature, that New Jersey ultimately achieved a giant step forward in the development of administrative law.[10]

Richard Hughes became Chief Justice of the State Supreme Court in December 1973. Since then, he has on many occasions called for a more responsive administrative process, bottomed on firm principles of "rightness and fairness." His opinions in the field of administrative law effectively attest to the strength of what Professor Jaffe refers to as a reason for judicial review of agency action:

> The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and

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[9] Quoted in Gwynne, *Administrative Procedure Act: A Warning Against Its Impairment by Legislation*, 34 A.B.A.J. 8 (Jan. 1948).

[10] *See* Editorial, *The A.P.A. Enacted*, 92 N.J.L.J. 52 (Jan. 23, 1969). See also the reported comments of the President of the State Bar Association in the news item: *Administrative Procedure Act Adopted*, appearing in the same issue of the *Law Journal*. 92 N.J.L.J. 49 (Jan. 23, 1969).

conceptions of the "common law," and the ultimate guarantees associated with the Constitution.[11]

In *Avant v. Clifford*,[12] the Chief Justice demonstrated not only his deep understanding and appreciation of due process requirements, but at the same time his insistence that agency action be grounded on fair treatment, both of the individual and of the public interests. The case involved a challenge to disciplinary procedures in effect in the state prison system.[13] The Chief Justice's direct and positive approach to the issue became immediately evident when he declared:

> While we consider here procedural due process in its constitutional sense, it should also be remembered that in the exercise by New Jersey courts of their function of review (as here) of the action of administrative agencies (such as the Department of Institutions and Agencies), we have not been satisfied with enforcement of naked constitutional right, but have gone further to strike down arbitrary action and administrative abuse and to insure procedural fairness in the administrative process.[14]

Not content with mere recognition of procedural due process rights of state prison inmates in prison disciplinary proceedings detailed by the United States Supreme Court in its 1974 landmark opinion in *Wolff v. McDonnell*,[15] and obviously concerned for the impartial character of the disciplinary hearings, the Chief Justice said:

> Beyond *Wolff*, however, we think the "rightness and fairness" standard now firmly established in New Jersey law would better be satisfied if two members of the Adjustment Committee[16] were not to be selected from the correctional officer staff. The pervasive and understandable friction between correctional officers and prisoners noted in *Wolff* ought not be exacerbated by two of the three members of the "impartial tribunal" being correctional personnel. Thus, from now on there must be no more than one correctional officer on the Adjustment Committee.[17] Ideally, the supervisory correc-

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[11] Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 275 (1955); Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 410 (1958).

[12] 67 N.J. 496, 341 A.2d 629 (1975).

[13] The agency's actions in promulgating standards governing such procedures are, in light of N.J. STAT. ANN. § 52:14B-2(a) (West 1970), "exempt from subjection to the requirements of the Administrative Procedure Act." 67 N.J. at 557, 341 A.2d at 662.

[14] 67 N.J. at 520, 341 A.2d at 642 (footnote omitted).

[15] 418 U.S. 539 (1974).

[16] The Adjustment Committee conducts disciplinary hearings in the institution.

[17] By agency regulation, "any staff member who reported, investigated or, under normal circumstances, witnessed the incident being considered" and "any staff member who played a

> tional officer and the institutional staff member might be joined by an institutional "outsider" such as a departmental official from the central office, or some like designee whose membership on the committee would dilute the apparent, though unintended, overbalancing of the Adjustment Committee (as presently constituted) by members of the correctional officers staff.[18]

Additionally, the Chief Justice urged amendment of the agency Standards to require "that in those cases where the Committee 'deems' confrontation and cross-examination '[un]necessary for an adequate presentation of the evidence' (Standard 254.274) the reasons for such denial be entered in the record and made available to the inmate."[19] He reasoned:

> Such a requirement would appear to us to represent a more precise accommodation of the competing interests and would afford greater flexibility than would an absolute bar to or requirement of confrontation and cross-examination. A further advantage to be derived from this requirement would be that compliance therewith would provide *prima facie* evidence which will enable reviewing authorities (see Standard 254.288) and, if necessary, the courts, to determine whether or not there has been a proper exercise of discretion.[20]

He added that with this refinement of the agency Standards, "the hearing provided in the case of inmate disciplinary infractions is completely adequate to meet standards of 'fairness' and due process."[21]

Avant also proceeded to solve what the Chief Justice termed "the nagging problem" of how to accommodate "the important parallel interests of the state in institutional security and criminal prosecution while offering full protection to the inmate's dual rights, *i.e.*, his right to be heard in defense or extenuation of the charge against him and his Fifth Amendment privilege against self-incrimination."[22] Pointing out that "[t]o be free to speak in defense or extenuation, a way must be found to immunize whatever the prisoner says or whatever evidence may be derived from what he says from use against him in a subsequent criminal proceeding for the establishment of guilt of the offense involved,"[23] the opinion adopted the "use"

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significant part in having the charges referred to the committee," may not sit as a member of the Adjustment Committee. *See* 67 N.J. at 526, 341 A.2d at 646.

[18] *Id.* at 526–27, 341 A.2d at 646.

[19] *Id.* at 532, 341 A.2d at 649.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 537–38, 341 A.2d at 652 (footnote omitted).

[23] *Id.* at 540–41, 341 A.2d at 653.

immunity approach stated by a federal district court in *Sands v. Wainwright*.[24] Thus:

> with regard to testimony given at any type of prison disciplinary proceedings including those in which the grievous loss is, as heretofore defined, punitive segregation, administrative segregation or the loss of any type of gain time, the inmate therein proceeded against is in each such case entitled to "use" immunity in a subsequent criminal prosecution to the extent that his statements shall not be used affirmatively against him. [357 F. Supp. at 1093].[25]

While acknowledging the need, in the circumstances, for the grant of a "use" immunity, the Chief Justice at the same time indicated his agreement with the Second Circuit in *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of New York*,[26] that such "use" immunity "is 'relatively costless' since 'the government, as prosecutor, is in substantially the same position*** as it would have been if the witness [respondent prisoner] had insisted on remaining silent.' "[27]

Beyond this, on the issue of sufficiency of legislative standards to guide agency exercise of its delegated authority,[28] *Avant* lends added strength to New Jersey's modern approach which recognizes that " 'the exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments under the police power.' "[29] The Chief Justice noted that here it is in the context of an

> elaborate legislative scheme that the Commissioner exercises the authority given him by *N.J.S.A.* 30:1-12. . . . Added to this, of course, must be considered his inherent authority for the maintenance of discipline, and the promulgation of reasonable rules to that end, which necessarily accompanies the legislative assignment to him of responsibility for the governance of the institutions.[30]

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[24] 357 F. Supp. 1062 (M.D. Fla.), *vacated and remanded*, (for failure to convene a three-judge district court), 491 F.2d 417 (5th Cir. 1973), *cert denied*, 416 U.S. 992 (1974).

[25] 67 N.J. at 542, 341 A.2d at 654.

[26] 426 F.2d 619, 628 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972) (previous decision at 383 F.2d 364 (2d Cir. 1967), *rev'd*, 392 U.S. 280 (1968)).

[27] 67 N.J. at 543, 341 A.2d at 655.

[28] Here, "to determine general policy and to promulgate rules and regulations pertaining to administration of the correctional institutions of the state . . . ." *Id.* at 547, 341 A.2d at 657.

[29] *Id.* at 550, 341 A.2d at 658–59 (quoting from Ward v. Scott, 11 N.J. 117, 123–24, 93 A.2d 385, 388 (1952)).

[30] 67 N.J. at 549, 341 A.2d at 658.

A further insight into the Chief Justice's deep concern for a responsive administrative process is afforded by his opinion in *Pascucci v. Vagott.*[31] At issue there was the validity of a regulation of the Division of Public Welfare, then in the Department of Institutions and Agencies, setting lower levels of financial assistance to eligible needy persons classified as "employable" than to those classified as "unemployable."[32] The regulation provided for a maximum allowance of $178 per month to adults who "because of physical, mental or emotional handicaps are unable to accept employment," a class designated as unemployable; and, as to employable adults, the regulation limited the monthly allowance to $119.[33] The individual appellants, welfare recipients, were classified as employables and thus relegated to the lower level of assistance.

Combining compassion with forceful logic, the Chief Justice concluded that the regulatory discrimination "must be set aside as to those who are unemployed solely because of lack of employment opportunity."[34] After disclosing an obvious conflict between this regulatory discrimination and the legislative standard,[35] he observed:

> While a broad grant of authority to the Commissioner may encompass different treatment of various classes of recipients, the Commissioner's powers in this regard are not unlimited. And even though accorded the benefit of the presumption of validity and regularity generally afforded to administrative regulations, such regulatory discrimination must be reasonable and not arbitrary and be in overall furtherance of the broad welfare assistance goals of the Legislature. . . .
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> In this respect a conflict seems apparent between the legislative standard of *N.J.S.A.* 44:8-108 describing as eligible needy persons those who are unemployable either because of physical disability or job unavailability, and the regulation which improperly breaks down the one category into two. . . .

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[31] 71 N.J. 40, 362 A.2d 566 (1976).

[32] *Id.* at 43, 362 A.2d at 568.

[33] *Id.* at 44, 362 A.2d at 568.

[34] *Id.* at 50, 362 A.2d at 572. As to the three individual appellants, the decision was made retroactive in application. As to all others similarly situated it was made "prospective in nature" to become "effective not earlier than 60 days from the date of filing of this opinion." *Id.*

[35] Embodied in N.J. STAT. ANN. § 44:8-108 which, he noted, at the time defined "public assistance" to mean

> assistance rendered to needy persons not otherwise provided for under the laws of this State, where such persons are willing to work but are unable to secure employment due either to physical disability *or inability to find* employment . . . .

71 N.J. at 49, 362 A.2d at 571 (emphasis added). For amendments to the statute following the decision in *Pascucci v. Vagott*, see An Act to amend the "General Public Assistance Law," approved May 13, 1947 (P.L. 1947, c. 156), [1977] N.J. Laws ch. 286, at 1109-12 (N.J. STAT. ANN. § 44:8-108 (West Cum. Supp. 1978-1979)).

> Respondents[36] would defend the discriminatory employable-unemployable classification by suggesting that unemployables probably have special needs justifying higher benefit levels. Yet no one has come forward with factual data, studies or reports to establish that the unemployed "employable" suffers less from cold, hunger or sickness, or pays less for food, shelter or clothing, that his human misery is lessened where joblessness results from economic handicaps rather than mental, emotional or physical impediments.[37]

And, in *In re Suspension of Heller*,[38] we find his insistence that where "the task of the regulatory agency is 'to protect the health and welfare of members of the public' by assuring that all licensed practitioners are qualified, competent and honest, the grant of implied powers is particularly important."[39]

These are some examples of Richard Hughes' dedication to the advancement of a sound administrative process. Blessed by unique opportunity and ability to lead both the executive and judicial branches of our state government, he has built into that process lasting benefits of fair play and understanding for all the people of New Jersey of this and future generations.

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[36] The respondents in the case were state and local welfare agencies and officials.

[37] 71 N.J. at 50, 362 A.2d at 571–72 (citations omitted).

[38] 73 N.J. 292, 374 A.2d 1191 (1977).

[39] *Id.* at 303–04, 374 A.2d at 1197.