Justice Alan B. Handler: The Jurist as Scholar, Teacher, Craftsman, and Statesman

The Hon. Howard H. Kestin *

It is a very special pleasure to have the opportunity to pay public tribute to my friend Justice Alan B. Handler. I owe him much. As the second-in-command and then head of the New Jersey Attorney General's Division of Law in the early to mid-1960s, he oversaw much of my work effort in my first position as a practicing lawyer. He was my teacher and mentor. I benefited greatly from his high standards of quality and performance and from his capacity to inspire fledgling lawyers to reach beyond themselves as they grew professionally. That capacity to inspire is the stuff of legend among all who ever worked under him. From our professional relationship, we developed a friendship that has been a blessing for me.

In this Essay, I comment on Justice Handler's contributions to administrative law. I confine my analysis primarily to his immense influence on the structural and procedural aspects of the field, including the standards and orientations that apply when intrabranch and interbranch governmental relationships are implicated. No one person in our State's legal history has articulated so much instructive analysis in these areas as has Justice Handler. To begin at the beginning, however, Alan B. Handler's contributions in these areas began long before he became a judge.

Early in his career, as a deputy attorney general (1961-1964) and later as first assistant attorney general (1964-1968), Alan Handler participated directly in no fewer than eighty-eight cases that resulted in reported opinions, with more than half of them from the New Jersey Supreme Court. Most of those cases dealt with important issues of administrative law and governmental relationships, and many of the positions he advanced broke new ground. There are, as well, countless other cases in the background, to which he contributed inspiration and legal reasoning as he advised or oversaw

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the work of others without on-the-record attribution. And, it is generally accepted that the monumental reform of the administrative process achieved in L. 1978, c. 67, amending the Administrative Procedure Act (APA)[1] in fundamental ways and creating the Office of Administrative Law (OAL),[2] was developed on Alan Handler's watch as special counsel to Governor Brendan T. Byrne from 1976 to 1977. The bill was actually introduced on January 30, 1978, after Justice Handler's departure for the New Jersey Supreme Court, and was shepherded through to adoption by his successor as Governor's Counsel, Justice-to-be Stewart G. Pollock, and others.

That assignment as Special Counsel to the Governor led directly to Alan Handler's appointment to the Supreme Court, but the intervening years between his departure from the Attorney General's office for the bench in 1968 and his return to governmental service in the executive branch in 1976 were by no means fallow in terms of his contributions to the development of administrative law. Even as a trial court judge during that period, and certainly as a member of the New Jersey Superior Court, Appellate Division, he had opportunities to contribute to the field in ways that foreshadowed his towering influence as a member of the Supreme Court beginning in 1977.

Alan Handler's opinions in two law division cases decided almost four years apart, for example, together display his devotion to fundamental fairness and procedural regularity along with his innate flexibility and practicality. In *Hamlin v. Matarazzo*,[3] a challenge to a local planning board's action, Judge Handler would not countenance a departure from procedural requirements designed to assure fairness to all parties in interest. The judge held that a local board must explicate its reasons for decision, dealing appropriately with all genuine issues committed to it for resolution; and, further, that in disposing of an appeal from that decision, the governing body "must provide a hearing and state its findings and reasons."[4] Where the absence of such basic requirements suggested that objectors had not been fairly treated, the only remedy was vacation of the planning

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[1] N.J. STAT. ANN. §§ 52:14B-1 to -24 (West 1999).

[2] N.J. STAT. ANN. §§ 52:14F-1 to -13 (West 1999).

[3] 120 N.J. Super. 164, 293 A.2d 450 (Law Div. 1972).

[4] *Id.* at 175, 293 A.2d at 456; *see also* Board of Educ. of Deptford v. Mayor and Council of Deptford, 116 N.J. 305, 316-17, 561 A.2d 589, 594-95 (1989) (applying the same principle in a New Jersey Supreme Court opinion authored by Justice Handler); Winston v. Board of Educ. of South Plainfield, 125 N.J. Super. 131, 138-40, 309 A.2d 89, 92-93 (App. Div. 1973), *aff'd*, 64 N.J. 582, 319 A.2d 226 (1974) (applying the same kind of reasoning in a slightly different procedural context); *see infra* note 11 and accompanying text (discussing *Winston*).

board's action and remandment for reconsideration upon a proper record.[5]

In the other trial court opinion, *City of East Orange v. Livingston*,[6] however, the judge held that a usually mandatory feature of procedural regularity, exhaustion of administrative remedies, could be dispensed with in the interests of justice. Judge Handler stated that "[f]actors which might bear on the question . . . are relative delay and expense, possible prejudice to any of the litigants, the public interest, the nature of the issues, and the extent to which the discretion of the administrative agency should be invoked in an adjudication."[7]

This "interests of justice" orientation, accompanied by the commitment to balancing competing considerations that characterizes the best judicial reasoning, continued to define Judge Handler's analytical approaches as his judicial service shifted to the appellate division, where he served from 1973 to 1976.[8] The powers of administrative agencies were approached expansively to promote the ends of justice generally and achieve legislative ends, but never at

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[5] *See Hamlin*, 120 N.J. Super. at 177, 293 A.2d at 457. Similar reasoning with like result was applied to state agencies years later in New Jersey Supreme Court opinions authored by Justice Handler. *See, e.g.*, Van Holten Group v. Elizabethtown Water Co., 121 N.J. 48, 67, 577 A.2d 829, 839 (1990) ("Administrative agencies must 'articulate the standards and principles [as well as the findings] that govern their discretionary decisions in as much detail as possible.'") (quoting Crema v. New Jersey Dep't of Envtl. Protection, 94 N.J. 286, 301, 463 A.2d 910, 918 (1983)).

[6] 102 N.J. Super. 512, 246 A.2d 178 (Law Div. 1968).

[7] *Id.* at 520, 246 A.2d at 182.

[8] *See, e.g.*, Trap Rock Indus., Inc. v. Sagner, 133 N.J. Super. 99, 108-09, 335 A.2d 574, 579 (App. Div. 1975), *aff'd*, 69 N.J. 599, 355 A.2d 636 (1976). The recurring question of a quasi-judicial officer's inherent authority to engage in a reexamination of the record and a reconsideration of the issues is not to be resolved by "any formulaic application of the principles of collateral estoppel or [r]es judicata, or, by analogy, the rules for relief from judgments or grant of new trials governing our courts." *Id.* at 109, 335 A.2d at 579. Rather, the authority to reconsider is resolved by reference to an administrative agency's concern for

> protect[ing] the public interest and . . . serv[ing] the ends of essential justice. . . .
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> It does not follow, however, that in exercising the necessary and appropriate power to reconsider . . . the Commissioner was free to disregard completely issues that were fully and fairly resolved prior thereto. The power to reconsider must be exercised reasonably, with sound discretion reflecting due diligence, and for good and sufficient cause.

Id. at 109-10, 335 A.2d at 580. Manifestly, the power to reconsider may be exercised only when it is "fair, appropriate or necessary" to do so and in a manner that "serve[s] the ends of administrative justice." *Id.* at 110, 335 A.2d at 580. For a later application of these principles in a different context, see *In re Parole Application of Trantino*, 89 N.J. 347, 364, 446 A.2d 104, 113 (1982).

the price of individual justice and fair play. *General Motors Corp. v. Blair*[9] is a landmark case[10] with these qualities. In that case, while the court upheld the authority of the Division on Civil Rights to promulgate a rule providing for the entry of a default against a respondent which had failed to respond to the Division's interrogatories or to move to strike, it remanded the matter for further proceedings to determine whether the rule could reasonably be applied in the circumstances at hand. Although the court viewed the rule, in general, as attended by sufficient procedural safeguards to protect a party's interests and regarded it as an appropriate exercise of the agency's concern for swift resolution of a controversy committed to its quasi-judicial authority, the demands of justice in the individual case were the ultimate focus.

In a similar vein, in *Winston v. Board of Education of South Plainfield*,[11] a case antedating the advent of independent administrative law judges (ALJs), the court, inter alia, while regarding the authority of the Commissioner of Education and the State Board of Education expansively, held them to be bound by due process requirements and the fair notice standards of the APA in rendering their quasi-judicial decisions. Both were held to be required to provide the parties with a hearing examiner's report before review by the Commissioner and with the report of the State Board's Law Committee before review by the State Board itself.

This blended concept of generous respect for the authority of a state agency coupled with fundamental fairness control was to be a recurring theme in Alan Handler's later opinions, after he ascended to the New Jersey Supreme Court.[12] Of course, the opinions of one

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[9] 129 N.J. Super. 412, 324 A.2d 52 (App. Div. 1974).

[10] This opinion is most often recalled for its holding that a procedural rule governing the conduct of a case before an administrative agency "does not 'operate directly upon members of the public.'" *Id.* at 424, 324 A.2d at 59 (quoting Brown v. Heymann, 62 N.J. 1, 17, 297 A.2d 572, 581 (1972)). The court in *Blair* also noted that state administrative agencies are required to "'adopt rules of practice setting forth the nature and requirements of all formal and informal procedures.'" *Id.* at 425, 324 A.2d at 59 (quoting N.J. STAT. ANN. § 52:14B-3(2) (West 1986)). Furthermore, such rules may be validly promulgated without the prior notice or hearing that is required for rules operating "directly upon members of the public." *Id.* at 424-25, 324 A.2d at 59 (citing N.J. STAT. ANN. § 52:14B-3(2) (West 1986)); *see also infra* note 68 and accompanying text (discussing *Metromedia, Inc. v. Director, Division of Taxation*, 97 N.J. 313, 478 A.2d 742 (1984)).

[11] 125 N.J. Super. 131, 309 A.2d 89 (App. Div. 1973), *aff'd*, 64 N.J. 582, 319 A.2d 226 (1974).

[12] *See, e.g.*, Brady v. Department of Personnel, 149 N.J. 244, 256, 693 A.2d 466, 472 (1997) ("The deference that courts accord an agency's actions that fall within its delegated authority is not without limits."); W. V. Pangborne & Co. v. New Jersey

judge on a multimember court do not reflect his or her own doctrinal thoughts alone, but the author of an opinion may claim the primary responsibility for its tone and underlying flavors, as well as for its instructive value.

Justice Handler's contributions to the structural and procedural aspects of administrative law and to the standards controlling intrabranch and interbranch governmental relationships were unparalleled. They exist apart, virtually as a discrete subject matter, from his involvement with doctrinal development in particular administrative law subject matter areas. Because this selective analysis is intended primarily to cover the broader developments, little will be said about the many public sector cases in which Justice Handler participated as new or clarified specific rules of law were articulated.

Justice Handler's first major contribution to the principles governing intrabranch relationships occurred in *Hinfey v. Matawan Regional Board of Education*,[13] decided barely a year after his service on the Supreme Court began. A conflict existed between the Division on Civil Rights and the Commissioner of Education, both of which claimed subject matter jurisdiction over allegations of gender bias in the administration of a school district's athletic program. Acknowledging the plenary authority of both agencies in different facets of the issues at hand—the Division over alleged violations of the Law Against Discrimination[14] and the Commissioner over controversies and disputes arising under the school laws[15]—the Court

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Dep't of Transp., 116 N.J. 543, 562, 562 A.2d 222, 231 (1989) (holding that an agency's failure to deal expressly and clearly in its rules and regulations or otherwise with its ability to invoke a statute of limitations defense in a suit, after sponsoring administrative resolution of the underlying contract dispute, "constitutes a breach of an implied duty of good faith and fair dealing and the supervening obligation of government to deal scrupulously with the public."); Keyes Martin & Co. v. Director, Div. of Purchase and Property, 99 N.J. 244, 257, 491 A.2d 1236, 1243 (1985) ("The standard under which [the Director] may exercise [his] multi-faceted authority must be broad enough to allow accomplishment of his various obligations, yet sufficiently narrow to prevent abuse."); Uricoli v. Board of Trustees, Police and Firemen's Retirement Sys., 91 N.J. 62, 77, 449 A.2d 1267, 1275 (1982) ("[A] balancing approach is required in order to determine whether forfeiture [of pension rights] is justified under all of the circumstances."); *see also* Holgate Property Assocs. v. Township of Howell, 145 N.J. 590, 601, 679 A.2d 613, 618 (1996) (holding that the Department of Environmental Protection has the statutory authority to issue a permit approval, but it also has an "implied duty . . . to consider local concerns that will be affected by the operation [approved]. An implied duty of a state administrative agency to give notice to the public may be recognized where the exercise of that agency's powers has a distinctive impact on a particular locality and its citizens.").

[13] 77 N.J. 514, 391 A.2d 899 (1978).

[14] N.J. STAT. ANN. §§ 10:5-1 to -42 (West 1999).

[15] N.J. STAT. ANN. §§ 18A:6-9 (West 1999).

observed that "[b]oth . . . are vested with concurrent jurisdiction and are competent to deal with these controversies."[16] The Court referred to considerations bearing upon each agency's interests in resolving controversies committed to its authority and stressed the importance of "principles of comity and deference to sibling agencies [as] part of the fundamental responsibility of administrative tribunals charged with overseeing complex and manifold activities that are also the appropriate statutory concern of other governmental bodies."[17] The Court then articulated a general standard of administrative comity for resolving competing interests:

> Comity and deference to cognate tribunals are designed to assure that a controversy, or its most critical facets, will be resolved by the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter.[18]

Applying this standard in the light of particular statutory and regulatory coverages, the Court held that the matter should be entertained by the Commissioner because the scope of his authority to deal with the issues at hand was broader than that of the Division's. The Commissioner also had the discretion, pursuant to title 18A, section 36-20 of the New Jersey Statutes and title 6, section 4-1.7(g) of the New Jersey Administrative Code, either to deal directly with claims that students or employees had been discriminated against or to refer those claims to other agencies for resolution.

The theme of administrative comity in instances of concurrent subject matter jurisdiction was addressed further in *City of Hackensack v. Winner*.[19] In that case, the two agencies involved, the Civil Service Commission (CSC) and the Public Employment Relations Commission (PERC), had each already adjudicated claims by municipal firefighters that they had been denied promotions unlawfully. In a complaint filed with the CSC, the firefighters alleged that the failures to promote violated civil service laws, i.e., bearing upon merit and fitness. In their complaint filed with PERC a few days later, they alleged that the denials had been motivated by anti-union animus and were therefore unfair practices as defined by the Public Employer-Employee Act[20] and regulations adopted pursuant thereto. The CSC dismissed the charges of civil service law violation on the

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[16] *Hinfey*, 77 N.J. at 528, 391 A.2d at 906.
[17] *Id.* at 531, 391 A.2d at 907.
[18] *Id.* at 532, 391 A.2d at 908.
[19] 82 N.J. 1, 410 A.2d 1146 (1980).
[20] N.J. STAT. ANN. §§ 34:13A-1 to -29 (West 1999).

basis "that the charging parties had failed to show . . . that they had been denied promotions for unlawful reasons[,] . . . [and] particular[ly] . . . that . . . [they] had[ ] not [been] discriminate[d] against . . . because of their union activities."[21] After that determination, PERC held the municipality to have committed unfair employment practices "in that the City's decision not to promote the charging parties had been motivated in part by a desire to discourage employees from participating in union activities."[22]

In reviewing the matter, the Supreme Court, through Justice Handler, concluded "that each agency . . . had a definitive statutory basis for dealing with the case before it."[23] The CSC had "full authority to inquire into the basis for appointments and promotions in the civil service[,]"[24] including the power to determine whether the public employer had acted in bad faith or contrary to any established rule of law. PERC had plenary authority to determine whether a public employer had engaged in unfair practices as defined by law. The Court saw the case as impacted by "multiple and mixed issues involving the statutory concerns of both agencies."[25] It determined after analysis that "the basic dispute involved primarily civil service law."[26] PERC had conceded "that where an unfair practice is not the sole, major or dominant issue in an employer-employee controversy, it would not be improper for the Civil Service Commission to consider that issue if it were otherwise relevant in a civil service proceeding addressing the employer-employee controversy."[27] Using a point of reference articulated in *Hinfey*, as well as its "administrative comity" concept, the Court determined that PERC's jurisdiction over the controversy was not "mandatory" and that, in view of the breadth of the issues involved and the scope of the CSC's authority to decide them, PERC should have abstained from considering the same issue that had been among those adjudicated by the CSC.[28] A common thread running through *Hinfey* and *Winner* is that the agency with the broader scope of authority was deemed to have been the forum of choice.

The opinion in *Winner* also noted the then-recent creation of

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[21] *Winner*, 82 N.J. at 11, 410 A.2d at 1150-51 (partial alteration in original).
[22] *Id.* at 12, 410 A.2d at 1151.
[23] *Id.* at 21, 410 A.2d at 1155.
[24] *Id.* at 18, 410 A.2d at 1154.
[25] *Id.* at 34, 410 A.2d at 1162.
[26] *Id.*
[27] *Winner*, 82 N.J. at 25, 410 A.2d at 1158.
[28] *See id.* at 34-35, 410 A.2d at 1162-63.

the OAL and its central corps of ALJs with authority to hear and render initial decisions for most agencies in State government. The Court saw this reform as tending to provide an opportunity for dealing constructively with the types of problems evinced in *Hinfey* and in *Winner*, even for agencies such as PERC, which were exempted from the requirement to refer contested cases to the OAL for hearing, but which were empowered by title 52, section 14F-8 of the New Jersey Statutes to do so if they chose.[29] With a single ALJ available to hear a matter implicating the subject matter jurisdiction concerns of two or more agencies, a more orderly mechanism could be developed for handling such matters. Shortly after *Winner* was decided, the OAL promulgated title 1, sections 1-17.5 to -17.8 of the New Jersey Administrative Code, provisions of the Uniform Administrative Procedure Rules designed to provide the mechanism suggested by the Court's rationale. These rules contained a "predominant interest" test[30] for determining the manner in which two or more agencies with jurisdictional interests would consider the issues in a contested case.[31]

As a result of Justice Handler's rationale, the standards that he articulated, and the rule adoption that implemented them, unseemly jurisdictional struggles such as those that occurred in *Hinfey* and *Winner* may well be behind us. More recently, the Court, once again through Justice Handler, expressly viewed the approaches articulated in those cases and the procedural framework developed as a result to be the general source for resolving jurisdictional conflicts between agencies of State government.[32]

Conflicts between agencies have also arisen in the context of rulemaking. The Court, through Justice Handler, in *In re Certain Sections of the Uniform Administrative Procedural Rules*,[33] defined the problem with clarity and resolved it with admirable balance. In the administrative reform of 1978, the newly-created OAL was charged to "[d]evelop uniform standards, rules of evidence, and procedures,

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[29] *See id.* at 36-37, 410 A.2d 1146, 1163-64. In *Unemployed-Employed Council of N.J., Inc. v. Horn*, 85 N.J. 646, 649-52, 657-58, 663-65, 428 A.2d 1305, 1307-08, 1311, 1314-15 (1981), Justice Handler and his dissenting dissenting colleagues provided a fuller explication of the history and intendment behind the creation of the Office of Administrative Law (OAL) and the design in exempting certain agencies from the requirement to transmit contested cases to the OAL.

[30] *See* N.J. ADMIN. CODE tit. 1, § 1-17.5 (West 1999).

[31] *See id.* § 1-17.8.

[32] *See* Lemelledo v. Beneficial Mgmt. Corp. of Am., 150 N.J. 225, 273-74, 696 A.2d 546, 555-56 (1997).

[33] 90 N.J. 85, 447 A.2d 151 (1982).

including but not limited to standards for determining whether a summary or plenary hearing should be held to regulate the conduct of contested cases and the rendering of administrative adjudications."[34] Accordingly, the Uniform Administrative Procedure Rules[35] were promulgated. In reviewing a challenge against some of those rules, the Supreme Court held several of the provisions to be invalid exercises of the powers conferred by the Legislature upon the OAL because they impinged unduly on the ultimate decisional authority of agencies generally. Other provisions were upheld as valid exercises of the authority to regulate the conduct of contested cases. Justice Handler articulated the following decisional rationale:

> The [OAL] is fully empowered to formulate rules and regulations that promote efficiency, uniformity, consistency[,] and independence in the handling of contested cases. Nevertheless, in promulgating such rules, the OAL must be mindful of the ultimate statutory jurisdiction of the agency itself. OAL rules designed to regulate administrative hearings in contested cases cannot encroach upon the essential regulatory and decisional authority of the various State administrative agencies.[36]

Balsley v. North Hunterdon Board of Education[37] presented an intriguing interplay between considerations implicated in *Hinfey*, *Winner*, and *Certain Sections of the Uniform Administrative Procedure Rules* and the predominant interest standard of title 1, sections 1-17.5 to -17.8 of the New Jersey Administrative Code. The Court held, on the same basis expressed in *Hinfey*, that the Commissioner of Education had plenary authority to hear and decide issues arising from allegations of unlawful discrimination in education. Nevertheless, the Commissioner had no statutory authority to award counsel fees in such matters. The Division on Civil Rights possessed the authority to make counsel fee awards in discrimination cases, however. No petition had been filed before the Division, and the Court held that the Commissioner could not validly exercise the Division's fee-

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[34] N.J. STAT. ANN. § 52:14F-5e (West 1999); *see also* N.J. STAT. ANN. § 52:14F-5f (West 1999).

[35] N.J. ADMIN. CODE tit.1, §§ 1:1-1 to -21.1 (West 1999).

[36] *In re* Certain Sections of the Uniform Administrative Procedural Rules, 90 N.J. at 107, 447 A.2d at 163; *see also In re* Tenure Hearing of Onorevole, 103 N.J. 548, 557, 511 A.2d 1171, 1176 (1986) (holding that the authority of the OAL "to prescribe suitable rules governing its practice and procedure in contested cases . . . necessarily include[s] standards governing the qualifications of persons appearing in such matters . . . and competence . . . initially to determine issues relating to the possible disqualification on ethics grounds of attorneys appearing before administrative law judges in contested cases.").

[37] 117 N.J. 434, 568 A.2d 895 (1990).

awarding authority. The Court saw the predominant interest mechanism of the Uniform Administrative Procedure Rules to provide the answer. The petitioner could file a claim for counsel fees with the Division ancillary to her claim for substantive relief before the Commissioner. Applying the predominant interest rules, the ALJ would make appropriate provision for the consideration, in sensible order, of all issues by each of the agencies.

The parties, the Division, and at least one amicus curiæ had argued that review by two agencies was "'impractical and cumbersome,'"[38] but the Court noted: "This procedural course . . . is essential to preserve the jurisdictional integrity of the respective agencies."[39] The relative ease with which the matter could be addressed by both agencies through application of the predominant interest mechanism in the Uniform Administrative Procedure Rules was effectively dispositive.

Justice Handler has also authored opinions resolving broader issues of governmental conflict: among the three branches. In *Knight v. City of Margate*,[40] the Supreme Court dealt with the constitutionality of conflicts of interest legislation prohibiting designated public officials and employees, including members of the judiciary, from dealings with casinos.[41] The legislation, as amended, was construed to cover all full-time members of the judiciary, including full-time municipal court judges throughout the State. Its sweep also included part-time municipal court judges in Atlantic City, the only place casinos could lawfully operate. The constitutionality of the statute as thus construed involved the question of whether its control over the judiciary violated Article VI, section 2, paragraph 3 of the New Jersey Constitution, which confers upon the Supreme Court, inter alia, exclusive authority to administer the courts of the State. Justice Handler's opinion reiterated familiar themes he had previously employed: that the "doctrine of the separation of powers denotes not only independence but also interdependence among the branches of government[,]"[42] and that "responsibility is joint and governmental powers must be shared and exercised by the branches on a complementary basis if the ultimate governmental objective is to be achieved."[43] The Court then struck a fine balance.[44] Without

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[38] *See id.* at 445, 568 A.2d at 901.
[39] *Id.* at 446, 568 A.2d at 901.
[40] 86 N.J. 374, 431 A.2d 833 (1981).
[41] *See* N.J. STAT. ANN. §§ 52:13D-16, -17.1 (West 1999).
[42] *Knight*, 86 N.J. at 388, 431 A.2d at 840.
[43] *Id.* at 389, 431 A.2d at 840-41.

relinquishing its constitutional prerogatives, the Court posited its "authority . . . to permit or accommodate the lawful and reasonable exercise of the powers of other branches of government even as that might impinge upon the Court's constitutional concerns in the judicial area."[45] The opinion then surveyed the Legislature's design in extending so pervasively the State's conflicts of interest statutes to cover the advent of casino gambling. The Court went on to evaluate, neither "jealous[ly] or begrudging[ly] . . . but [with] a realistic and fraternal appreciation of the profound concern of the Legislature," whether the circumstances presented "any unbridgeable conflict with the Supreme Court's judicial powers."[46] The Court concluded that the Conflicts of Interest Law with the challenged provisions "does not presently conflict with the constitutional judicial powers of the Supreme Court[,]"[47] and it ruled that the provisions of the statute applied to the judiciary. In an independent exercise of its constitutional authority over the judiciary, and for judicial branch concerns well-expressed in the opinion, however, the Court went on to extend the statutory disqualification on part-time municipal court judges in Atlantic City to all part-time municipal court judges in the State, but confined the post-termination limitations of the statute to such judges themselves and not to their law firms.[48]

Justice Handler's opinion in *Knight* not only displays his formidable analytical powers and talents for lucid expression and tight judicial reasoning, but it also highlights the statesmanship which consistently characterized his decision-making. Treading delicate constitutional ground, he articulated a rationale that sensibly accommodated competing interests to the greatest extent possible, a quality informing so many of his opinions in so many subject matter areas.

The *Abbott v. Burke* cases,[49] concerning school funding, involved the powers and interests of all three branches of government. Justice

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[44] The themes of interdependence and balance were again applied in the same statesmanlike manner in *Karcher v. Kean*, 97 N.J. 483, 497 A.2d 403 (1984) in which the Court was called upon to resolve a conflict between the executive and legislative branches over the Governor's exercise of the line-item veto power of article 5, section 1, paragraph 15 of the New Jersey Constitution. *See id.* at 507, 479 A.2d at 416.

[45] *Knight*, 86 N.J. at 391, 431 A.2d at 842.

[46] *Id.* at 392, 431 A.2d at 842.

[47] *Id.* at 394, 431 A.2d at 844.

[48] *See id.* at 395-97, 431 A.2d at 844-45.

[49] 153 N.J. 480, 710 A.2d 450 (1998) (*Abbott V*); 149 N.J. 145, 693 A.2d 417 (1997) (*Abbott IV*); 136 N.J. 444, 643 A.2d 575 (1994) (per curiam) (*Abbott III*); 119 N.J. 287, 575 A.2d 359 (1990) (*Abbott II*); 100 N.J. 269, 495 A.2d 376 (1985) (*Abbott I*).

Handler authored the Court's opinions in three of the five cases, *Abbott I*, *Abbott IV*, and *Abbott V*; Chief Justice Robert N. Wilentz authored *Abbott II*, and *Abbott III* was a per curiam opinion.

In *Abbott I*, the Court held that the plaintiffs' challenge, on constitutional grounds, to the State's plan for funding public school education, although commenced as a civil action, "should initially be presented to an administrative tribunal... [for] the creation of a[] . . . record sufficient to guide the adjudication of the constitutional issues on any future appeal."[50] Notwithstanding that the case raised difficult and complex constitutional issues, a customary basis for holding the "exhaustion of administrative remedies" requirement not to apply, the Court employed the "interests of justice" test previously used by Justice Handler as a trial court judge[51] to assess the need for exhaustion in the particular case.[52] "[B]ecause the ultimate constitutional issues [were] especially fact-sensitive and relate[d] primarily to areas of educational specialization[,]"[53] the Court concluded that the matter was to be remanded to the Commissioner of Education with a directive that it be transmitted to the OAL to be heard as a contested case. Justice Handler saw the matter as especially amenable for handling as a contested case: "[ALJs] . . . are carefully chosen and trained to provide informed and impartial consideration of the administrative matters before them."[54] Quoting a passage from *Winner*,[55] which explicated the history of, and purpose for, the creation of an independent corps of ALJs, he observed:

> The OAL's obligation and capacity to designate specially qualified judges cannot be overemphasized in the present context. This litigation exemplifies the type of complex, sensitive, important, multi-issue, and cross-disciplinary matter that the Legislature contemplated in authorizing the selection of persons to serve as [ALJs] both from within and without state government.[56]

With respect to the statutory authority of agency heads generally to retain a contested case and act directly to preside over the hearing,[57] the Court added: "[W]here, as here, the Commissioner and the State

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[50] *Abbott I*, 100 N.J. at 279, 495 A.2d at 381.

[51] *See supra* note 6 and accompanying text (discussing the "interests of justice" test employed in *City of East Orange v. Livingston*).

[52] *Abbott I*, 100 N.J. at 296-301, 495 A.2d at 390-93.

[53] *Id.* at 301, 495 A.2d at 393.

[54] *Id.* at 302, 495 A.2d at 394.

[55] *See Winner*, 82 N.J. 1, 36-37, 410 A.2d 1146, 1163-64.

[56] *Abbott I*, 100 N.J. at 302-03, 495 A.2d at 394 (citing N.J. STAT. ANN. § 52:14F-6b (West 1999)).

[57] *See* N.J. STAT. ANN. § 52:14F-8b (West 1999).

Board are defendants, it would constitute an abuse of discretion for the Commissioner not to transfer this case [to the OAL]."[58]

After more than eight months of hearings and other proceedings, the ALJ found the State's school funding scheme deficient when measured by the guarantee in Article VIII, section 4, paragraph 1 of the New Jersey Constitution "of a thorough and efficient system" of public education. The Commissioner declined to accept the ALJ's findings and recommendations; and he rejected the view that the funding of public education bore directly upon the constitutional requirement for substantial equality of educational opportunity. The State Board adopted the Commissioner's decision, and the Supreme Court certified the matter directly.[59] In *Abbott II*, the Court held the extant system of school funding provided in the Public School Education Act of 1975[60] to be "unconstitutional as applied to poorer urban [school] districts."[61] In its per curiam opinion in *Abbott III*, the Court held that a subsequent program for public school funding in the Quality Education Act of 1990,[62] enacted in response to the ruling in *Abbott II*, also failed to meet constitutional requirements.

In *Abbott IV*, the Court spoke through Justice Handler once again. It upheld as facially adequate in the constitutional sense the Comprehensive Educational Improvement and Financing Act of 1996,[63] which had been enacted to supplant the previous plans held to have been unconstitutional. Nevertheless, the Court struck down the standards and mechanisms for funding "special needs districts" because they were "incapable of providing a substantive educational opportunity to public school children in the poorer urban districts that will enable them to achieve a thorough and efficient education."[64]

Recognizing that the primary responsibility for public education resided with the other branches of government and reiterating an oft-expressed "hope that needed comprehensive relief eventually will come from those branches of government more suited to the task,"[65] the Court observed "there can be no responsible dissent from the

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[58] *Abbott I*, 100 N.J. at 302 n.6, 495 A.2d at 393 (citing N.J. CT. R. 1:12-1(f)).

[59] *See Abbott II*, 119 N.J. 287, 297-300, 575 A.2d 359, 364-65 (1990); *see also* N.J. CT. R. 2:12-1 and -2.

[60] *See* N.J. STAT. ANN. §§ 18A:7A-1 to -52 (West 1999).

[61] *Abbott II*, 119 N.J. at 394, 575 A.2d at 412.

[62] N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West 1999).

[63] N.J. STAT. ANN. §§ 18A:7F-1 to -33 (West 1999).

[64] *Abbott IV*, 149 N.J. 145, 188, 693 A.2d 417, 439 (1997).

[65] *Id.* at 202, 693 A.2d at 445.

position that the Court has the constitutional obligation to do what it can to effectuate and vindicate the constitutional rights of the school children in the poverty-stricken urban districts."[66] Accordingly, the Court assumed direct remedial supervision of that aspect of school funding and, after referring the subject for extensive exploration and development by a specially designated judge, devised the plan described in *Abbott V.*

Justice Handler expressed the Court's reluctance to treat a subject matter more suited to processes of the legislative and executive branches. Direct involvement could only be justified by the existence of a constitutional imperative coupled with the inability of the coordinate branches to achieve it.[67] The Court's discomfiture—and Justice Handler's—was evident throughout. The Justices' manifest respect for the coordinate branches and their high regard for the governmental prerogatives of the Legislature and Executive could be overcome only by their fidelity to the New Jersey Constitution and its mandates. A careful parsing of the remedial result announced in *Abbott V* discloses that the Court used as fine a brush and as light a touch as the constitutional imperative allows. The roles of the coordinate branches, also established in the New Jersey Constitution, have been as fully respected as possible within the Court's responsibility to ensure that constitutionally guaranteed rights are vindicated. The result bespeaks a balance not easy to articulate or achieve. The State has been fortunate that so fine a craftsman as Alan B. Handler was available to do the job when the need arose.

Beyond issues of governmental conflict, Justice Handler authored opinions articulating the scope of authority and deference to be accorded administrative agencies both in their rule-making and adjudicative roles. *Metromedia, Inc. v. Director, Division of Taxation*[68] is another landmark case. There, the Court addressed the validity of the Director's assessment of a corporation's tax liability under the New Jersey Corporation Business Tax Act.[69] The Court viewed the standards upon which the calculation was based to be apparently valid as a facial matter, but held applications of those standards to be impermissible because they had not been promulgated in an administrative rule-making conforming with the requirements of the APA. The criteria for determining when a rulemaking is required

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[66] *Id.*; *see also* Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976).

[67] *See Abbott IV*, 149 N.J. at 202, 693 A.2d at 445.

[68] 97 N.J. 313, 478 A.2d 742 (1984).

[69] N.J. STAT. ANN. §§ 54:10A-1 to -40 (West 1999).

were succinctly summarized:

> [A]n agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rule-making or adjudication.[70]

The validity of an individualized determination might be testable adjudicatively, but to permit an evaluation in that mode in the circumstances presented would be to ignore an elemental procedural dichotomy established in the APA to promote concepts of fairness. Indeed, the Court noted that "[f]requently, [an] agency determination is a hybrid, partaking of both the rule-making and adjudicatory mode. . . . Nevertheless, rule-making and adjudication are not interchangeable."[71] Even though "agencies have wide latitude in improvising appropriate procedures to effectuate their regulatory jurisdiction[,] . . . this discretion is not unbounded."[72] The Court relied upon another Handler opinion in *Crema v. New Jersey Department of Environmental Protection*[73] to articulate the distinction it was emphasizing:

> "When the agency is concerned with 'broad policy issues' that affect the public-at-large or an entire field of endeavor or important areas of social concern, or the contemplated action is

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[70] *Metromedia*, 97 N.J. at 331-32, 478 A.2d at 751.

[71] *Id.* at 332, 478 A.2d at 751-52.

[72] *Id.* at 333-34, 478 A.2d at 752.

[73] 94 N.J. 286, 463 A.2d 910 (1983).

> intended to have wide application and prospective effect, rule-making becomes the suitable mode of proceeding."[74]

Turning to the case at hand, the Court balanced the relevant factors and held that the Director's determination "constituted a rule, and that its adoption required compliance with statutory rule-making procedures."[75] The Court stated:

> The challenged determination clearly is one of general applicability to the regulated class. It is essentially prospective in nature, notwithstanding its attempted application to the taxpayer in this case. It was intended to have continuing effect. . . . There is no question . . . that the determination is intended to be a rule of unvarying application to all similar cases.
>
> Further, the determination was not otherwise expressly provided for by the statute, nor was it clearly and obviously implied. . . .
>
> In addition, the Director's determination reflects an interpretation of the enabling law and constitutes a decision on administrative policy, comporting with the general definition of a rule under the APA, N.J.S.A. 52:14B-2(e). The resolution of issues implicated in such a determination is made most appropriately by invoking procedures designed for the adoption of administrative rules. . . .
>
> Further, the agency determination did not itself arise from the development of an evidential record that characterizes adjudication. . . .
>
> Consequently, the Director's determination is not excepted from the APA definition of a rule as an "agency finding in [a] contested case."[76]

Thus, the Court concluded, "the action taken by the Director, despite reliance upon statutory authority, is nonetheless invalid absent the prior promulgation of rules in compliance with the [APA]."[77]

Justice Handler has instructed that the standards and approaches applied in *Metromedia* have inherent limitations. In *In re Certain Amendments to Adopted and Approved Solid Waste Management Plan of the Hudson County Solid Waste Management District*, Justice

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[74] *See Metromedia*, 97 N.J. at 334, 478 A.2d at 752-53 (quoting *Crema*, 94 N.J. at 299, 463 A.2d at 917).

[75] *Id.*, 478 A.2d at 753.

[76] *Id.* at 334-36, 478 A.2d at 753-54 (partial alteration in original) (citing N.J. STAT. ANN. § 52:14B-2(e) (West 1999)); *cf.* General Motors Corp. v. Blair, 129 N.J. Super. 412, 424-25, 324 A.2d 52, 58-59 (App. Div. 1974).

[77] *Metromedia*, 97 N.J. at 337, 478 A.2d at 754-55 (citing *Crema*, 94 N.J. at 299, 463 A.2d at 916-17).

Handler noted: "formal rule-making is not a prerequisite for an administrative regulation if that regulation merely expresses a policy set forth in an existing statute."[78] Nevertheless, where the Department of Environmental Protection had "created its own procedures for" amending waste flow plans and had "opted for notice, publication, comment, and hearing prior to amend[ment] . . . , it ha[d] created public expectations that such procedures [would] be followed."[79] The agency was not free to disregard its own rules even to achieve a legislatively authorized end. It was required to adhere to its own regulations establishing APA-type procedures in connection with amending waste-flow plans.

The *Metromedia* and *Solid Waste Amendments* cases furnish further examples of the use of balanced reasoning in evaluating competing considerations, so characteristic of Justice Handler's approaches. Typically, the scope of an agency's substantive authority has been construed with breadth, whether expressly bestowed or derived by implication,[80] but procedural values designed to promote notice and participation may not be compromised. Stated another way, agency determinations how to achieve their statutory goals are accorded substantial deference,[81] but, at the same time, the agencies are held to

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[78] *In re* Certain Amendments to Adopted and Approved Solid Waste Mgmt. Plan of the Hudson County Solid Waste Mgmt. Dist., 133 N.J. 206, 214, 627 A.2d 614, 618 (1993).

[79] *Id.* at 219, 627 A.2d at 621.

[80] *See In re* Loans of N.J. Property Liab. Guar. Ass'n, 124 N.J. 69, 79, 590 A.2d 210, 215 (1991) ("[S]tatutes should be construed as giving regulatory agencies sufficient implied powers to fulfill legislative objectives."); *accord* Richard's Auto City, Inc. v. Director, Div. of Taxation, 140 N.J. 523, 533, 659 A.2d 1360, 1365 (1995). For examples of how the "implied powers" concept was applied with differing results in Justice Handler's opinions, see *In re Kimber Petroleum Corp.*, 110 N.J. 69, 82-83, 539 A.2d 1181, 1188 (1988) (determining that an implied power existed), *appeal dismissed, Kimber Petroleum Corp. v. Daggett*, 488 U.S. 935 (1988), and *Parisi v. North Bergen Mun. Port Auth.*, 105 N.J. 25, 39, 519 A.2d 327, 335 (1987) (a municipal law case in which no basis to imply a power could be discerned); *see also Terry v. Mercer County Bd. of Freeholders*, 86 N.J. 141, 158, 430 A.2d 194, 203 (1981) (attributing the existence of such broad remedial powers to the Division on Civil Rights as are necessary to achieve the Legislature's purpose in enacting the Law Against Discrimination).

[81] For a case in which the Court expanded on the deference theme, see *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 573-76, 583 A.2d 277, 288-90 (1990). There, fees imposed by municipalities on developers of low-income and moderate-income housing were invalidated on the ground that they had not been authorized by law. *See id.* at 574-76, 583 A.2d at 289-90. Although the power to impose development fees was held not to be precluded under the Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to -329, that power could not be exercised until a regulatory scheme was designed by the Council on Affordable Housing (COAH), which the Legislature had established "as the administrative regulator in the field of

rather strict observance of external and internal procedural requirements designed to promote fairness and regularity in the administrative process.[82]

In a related vein, the Court, through Justice Handler, has continued to apply

> the established principle that, in construing a doubtful statute, resort may be had to the contemporaneous construction, long usage, and practical interpretation given to it by the administrative agency charged with its effectuation. . . . Furthermore, an agency's construction of a statute over a period of years without legislative interference will under appropriate circumstances be granted great weight as evidence of its conformity with the legislative intent.[83]

Notwithstanding such broad principles of deference and expansive interpretation, the Court, again through Justice Handler, has noted a self-evident limitation: "Administrative regulations, of course, cannot alter the terms of a legislative enactment or frustrate the policy embodied in the statute."[84]

Justice Handler has also given us particularized guidance on "standard of review" applications when issues of fairness are directly implicated. In *SSI Medical Services, Inc. v. Department of Human Services*,[85] he reminded us of the classic, limited role of courts in reviewing the decisions of administrative agencies and of one general exception to the limitation. "Ordinarily, reversal is appropriate only

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affordable housing." *Id.* at 577, 583 A.2d at 290. The subject matter of affordable housing and the details of operation, including the articulation of standards governing the imposition of development fees, bore so directly upon important public policies that all significant elements of operation needed to fit appropriately within a carefully crafted, uniform plan which COAH alone had the authority to perfect. *See id.* at 573, 583 A.2d at 288. The Court noted, "The understanding of legislation by the administrative agency responsible for its implementation can be most instructive in ascertaining legislative intent and statutory meaning." *Id.* at 574, 583 A.2d at 289.

[82] Even statutory time frames for agency exercises of their final decision making authority are to be flexibly applied in the absence of countervailing considerations of fairness. *See* King v. New Jersey Racing Comm'n, 103 N.J. 412, 422, 511 A.2d 615, 621 (1986).

[83] Malone v. Fender, 80 N.J. 129, 137, 402 A.2d 240, 244 (1979).

[84] New Jersey Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 82, 86, 411 A.2d 168, 180, 182 (1980) (invalidating a regulation establishing a $100 expenditure threshold for invocation of the requirements of the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J. STAT. ANN. §§ 19:44A-1 to -26, but remanding to the agency to fix a new threshold, "a complex and sensitive matter which the Legislature has committed to agency expertise").

[85] 146 N.J. 614, 685 A.2d 1 (1996).

if the decision of the agency is arbitrary, capricious or unreasonable, or not supported by substantial credible evidence in the record as a whole. . . . However, an agency has no expertise to decide purely legal issues. . . . In such situations, de novo review is appropriate."[86] The Division of Medical and Health Services, in the absence of a validly promulgated rule providing fair notice, was not warranted in applying a "heightened standard of proof" to establish that a claim was filed timely.[87]

Alan B. Handler retired from the Supreme Court in 1999 after more than twenty-two years of service. A tenure of such length is itself a matter of historic significance. But President John F. Kennedy told us how history will measure the contributions each of us has made to the commonweal:

> For of those to whom much is given, much is required. And when at some future date the high court of history sits in judgment on each of us, recording whether in our brief span of service we fulfilled our responsibilities to the state, our success or failure, in whatever office we hold, will be measured by the answers to four questions: First, were we truly men of courage . . . Second, were we truly men of judgment . . . Third, were we truly men of integrity . . . Finally, were we truly men of dedication?[88]

Justice Handler easily passes every element of this test. In addition, he is a jurist of scholarship and erudition, qualities manifested in every opinion that he wrote. His many contributions will survive as teaching vehicles for generations to come, as lawyers and others ponder some of the more difficult questions of governance.

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[86] *Id.* at 620-21, 685 A.2d at 4 (citations omitted).

[87] *See In re* Revocation of the License of Polk, 90 N.J. 550, 566-69, 449 A.2d 7, 15-17 (1982) (discussing preponderance of the evidence as the customary standard of proof in administrative proceedings).

[88] *Address to the Massachusetts State Legislature*, Jan. 9, 1961.