COMMISSIONER BENJAMIN’S REPORT ON ADMINISTRATIVE ADJUDICATION IN NEW YORK

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IN his annual message to the New York Legislature in January, 1939, after recalling that at the 1938 election the people had rejected a proposal that would "freeze into the Constitution a rigid procedure" for "the judicial review of the facts as well as of the law of virtually all decisions of administrative officers and agencies," Governor Lehman announced: "Modification of procedure, if needed, should be undertaken only after careful study of each administrative process on an individual basis. As part of my plan always to improve and perfect the administrative branch of government, I intend to appoint a commissioner under the executive law to study the entire problem of administrative rulings." On March 3, 1939, Governor Lehman appointed Robert M. Benjamin as commissioner under section 8 of the Executive Law "to study, examine and investigate the exercise of quasi-judicial functions by any board, commission or department of the State."

Working with a counsel and eight associate counsel, Commissioner Benjamin investigated the administrative procedure of the various departments, boards and commissions of New York, studying statutes, rules, regulations, annual and other reports of the agencies themselves, supplemented by further descriptive material prepared by the agencies at his request, and other published reports and studies. During his investigation Commissioner Benjamin directly observed the administrative procedure of these boards, commissions and departments in their offices and hearing rooms, and also held public hearings and conferences in order to get the viewpoint of labor organizations, business or-


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1 Benjamin Report I.
2 Id. 1-2.
8 Id. 1.
ganizations, bar associations and interested individuals. Regarding each particular department, board and commission, Commissioner Benjamin and his staff prepared a separate memorandum containing an historical note, a detailed description of existing administrative procedure, a statement of the type of judicial review now available, and concluding with critical comment and recommendations. On these broad foundations Commissioner Benjamin prepared his report, and submitted it to Governor Lehman in March, 1942. His detailed memoranda dealing separately with the various departments, boards and commissions could not be completed for publication concurrently with his report, but they were taken into account in the recommendations contained in his report.

Administrative adjudication, says Commissioner Benjamin, poses “the problem of reconciling, in the field of administrative action, democratic safeguards and standards of fair play with the effective conduct of government.” He continues:

“On the part of the administrator there must be not merely an intention to do justice, but an appreciation that justice is only half done if the person dealt with cannot recognize it.

“. . . On the part of those with whom the administrator deals there must be . . . a willingness to cooperate in working harmoniously under procedures that may be less than perfect. . . . By and large, the administrators themselves are as much interested in the problems . . . as the public and the bar are interested. By and large, I have found among the public and the bar an absence of heat, an understanding of the difficulties, and a desire to approach the problems constructively and objectively.”

Commissioner Benjamin concludes that “the existing system of administrative adjudication and legislation and judicial review has worked reasonably well and reasonably to the satisfaction of the pub-

4 Id. 2-5.
5 Id. 8.
6 Id. 369.
7 Id. 8, note 2.
8 Id. 9, 10. Administrative action in the state of New York, even in the sensitive field of labor relations, has generated surprisingly little heat. See New York State Joint Legislative Committee on Industrial and Labor Relations, Preliminary Report (1939) (N. Y. Leg. Doc. 57); id., Report (1940) (N. Y. Leg. Doc. 57); id. (1941) (N. Y. Leg. Doc. 51); id. (1942) (N. Y. Leg. Doc. 47).

In the federal field, however, debate between critics and defenders of administrative procedure has been unpleasantly acrimonious. For critics, see Report of the President's Committee on Administrative Management 67-69 (1937) (S. Doc. 8, 75th Cong., 1st sess.), and accompanying letter of President Roosevelt, id.
iii-iv; Reports of Special Committee on Administrative Law of American Bar Association, 58 A. B. A. Rep. 407 (1933); 59 id. 539 (1934); 60 id. 136 (1935); 61 id. 720 (1936); 62 id. 789 (1937); 63 id. 331 (1938); 64 id. 281 (1939); 65 id. 215 (1940); 66 id. 143-144 (1941); Pound, "Modern Administrative Law," 51 Va. B. A. Proc. 372 at 382 (1939); Pound, CONTEMPORARY JURISTIC THEORY (1940); Pound, "The Place of the Judiciary in a Democratic Polity," 27 A. B. A. J. 133 (1941); Pound and McGuire, "Administrative Procedure Reform Moves Forward," id. 150; Pound, "For the Minority Report," id. 664 at 667-668; Pound, statement, HEARINGS BEFORE SUBCOMMITTEE OF SENATE JUDICIARY COMMITTEE ON S. 674, S. 675, and S. 918, 77th Cong., 1st sess. (1941), pt. 4, pp. 1579-1584 (hereinafter cited as S. HEARINGS); Bailey, "Dean Pound and Administrative Law—Another View," 42 Col. L. Rev. 781 (1942).


"lie," but he believes that "in many respects the existing system can be improved." 9

The proposal that there should be a code of procedure analogous to the Civil Practice Act to bring about some uniformity in administrative adjudication and to provide some guidance to the persons affected is dismissed by Commissioner Benjamin because of the diversity of position which the state occupies in proceedings before various boards, commissions and departments, 10 and because of the diversity in the mode of initiating proceedings,11 and the diversity in the mode of specifying the issues,12 and the diversity in the mode of conducting hearings.13 Uniform procedure, Commissioner Benjamin believes, is neither feasible nor desirable,14 and responsibility for satisfactory procedure should be placed on the administrator charged with the operation of the procedure, and "legislation should not go too far in filling in procedural details."15

Proceeding to the question of separation of the functions involved in quasi-judicial action, Commissioner Benjamin states that "The doctrine of the separation of powers has never been ... a dogmatic rule."16 "Neither, on the other hand," he continues, "has the objection that a

9 BENJAMIN REPORT 10.
10 Id. 24-29, citing Board of Standards and Appeals, Department of Labor, Bureau of Motor Vehicles, Public Service Commission, Water Power and Control Commission, Unemployment Insurance Appeal Board, State Labor Relations Act, State Tax Commission, Department of Agriculture, Medical Grievance Committee, Board of Regents.
11 Id. 29-30, citing Alcoholic Beverage Control Law, Insurance Law and State Labor Relations Act.
12 Id. 30-34, citing State Labor Relations Board, Bureau of Motor Vehicles, Unemployment Insurance, Public Service Commission.
13 Id. 34-35.
14 Id. 35-36.
15 Id. 37-38, citing with approval the recently revised Insurance Law, id. 38, 41. The minority of the Attorney General's Committee recommended legislative statements of policy, principles and standards for the guidance of administrators. REPORT OF ATTORNEY GENERAL'S COMMITTEE 214-215. See also Dulles, "The Effect in Practice of the Report on Administrative Procedure," 41 Col. L. Rev. 617 at 626 (1941); Dulles testimony, S. HEARINGS, pt. 3, pp. 1148-1149. This proposal was disapproved by the majority of the Attorney General's Committee on the ground that general provisions will be merely hortatory and that particular provisions for particular agencies should be based on prolonged agency-by-agency study. REPORT OF ATTORNEY GENERAL'S COMMITTEE 191-192. See also Biddle testimony, S. HEARINGS, pt. 3, pp. 1438-1440; Feller, "Administrative Law Investigation Comes of Age," 41 Col. L. Rev. 589 at 608-609 (1941); Davison, "Administrative Technique—The Report on Administrative Procedure," 41 Col. L. Rev. 628 at 640-641 (1941); Hart, "The Acheson Report: A Critique," 26 Iowa L. Rev. 801 at 817-818 (1941).
separation of functions would unduly impair administrative responsibility and effectiveness been universally operative. Separation of functions among different agencies exists..."

Applying these conclusions to the Department of Labor, Commissioner Benjamin recommends that the functions of the present State Labor Relations Board be divided between two boards

"... independent of each other, each consisting of three members appointed by the Governor, by and with the advice and consent of the Senate, and removable by the Governor for cause. The terms of office of the members of each board would be staggered ... so that ... both boards should be made up, in the same proportions, of appointees of the same appointing power. ... I recommend that one of the new boards (which I suggest calling the State Labor Relations Board) should have the function of adjudication in unfair labor practice cases, and in representation cases should have the functions of adjudication (including the adjudication of objections to the conduct of elections) and formal certification of bargaining representatives; and that the other board (which I suggest calling the State Labor Relations Authority) should exercise all other functions, including the investigation of charges with respect to unfair labor practices and of controversies concerning the representation of employees, the negotiation of voluntary adjustments of alleged violations of the Act, the determination whether or not to issue complaints with respect to alleged unfair labor practices and the issuance of such complaints, the litigation of unfair labor practice cases before the Board, the supervision of voluntary agreements relating to the selection of bargaining representatives, the presentation of evidence or argument at hearings before the Board in representation cases where that is necessary to supplement the presentation by the other parties, the

17 BENJAMIN REPORT 45-47, citing in the Department of Labor the Board of Standards and Appeals (three members) and the Industrial Commissioner, each independent of the other in appointment, compensation and tenure, each appointed by the governor with the advice and consent of the Senate, and all removable by the governor, the board being empowered to review the validity or reasonableness of any rule or order under the Labor Law; also citing the Unemployment Insurance Appeal Board, appointed by the governor for fixed terms, and removable only by the governor, and the unemployment insurance referees, appointed by the industrial commissioner subject to the Civil Service Law, but "under the Appeal Board's 'supervision, direction and administrative control.' The referees and the Appeal Board review determinations made in the first instance by the Division of Placement and Unemployment Insurance of the Department of Labor, with regard both to claims for benefits and to the liability of employers for contributions to the unemployment insurance fund. On occasion the Industrial Commissioner, through the Division, actively participates as a party in hearings before the referees or the Appeal Board." Id. 47.
conduct of elections (whether held on consent or by direction of the Board), and the litigation of all enforcement and other proceedings in court. The allocation of staff would follow corresponding lines, the Board's staff to include trial examiners and other personnel necessary to assist it in adjudication, the Authority's staff to include trial attorneys and other personnel necessary to assist it in its varied functions.18

The reasoning by which Commissioner Benjamin arrives at this recommendation deserves analysis.19

To the objection that "separation of functions would unduly impair administrative responsibility and effectiveness," Commissioner Benjamin answers that this is cogent as regards an agency like the Public Service Commission and the Insurance Department engaged in the continuing regulation of a field of industrial or business activity, but is not cogent as regards the State Labor Relations Board, which is not administrative in that sense but is simply a litigating and adjudicating agency to determine whether an employer has violated the act, or to determine who is entitled to represent the employees in collective bargaining.20

18 BENJAMIN REPORT 48-49. Proposals analogous to this have been endorsed by the minority of the Attorney General's Committee and many others. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE 203-209, 248-250. See also REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 67-71 (1937); COMMITTEE ON MINISTERS' POWERS REPORT 73-79, 88-100, 115-116 (1932) (Cmd. 4060); HENDERSON, THE FEDERAL TRADE COMMISSION 83-84, 327-329 (1924); LASKI, A GRAMMAR OF POLITICS 129-130 (1925); DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 252-253 (1927); DULLES, "The Effect in Practice of the Report on Administrative Procedure," 41 Col. L. Rev. 617 at 621-625 (1941); See also Dulles testimony, S. HEARINGS, pt. 3, pp. 1152-1156; Groner testimony, id. 1361 et seq.; FRANK, IF MEN WERE ANGELS 140-146, 250 (1942); Dickinson, "The Acheson Report: A Novel Approach to Administrative Law," 90 Univ. Pa. L. Rev. 757 (1942).

Proposals analogous to this have been opposed by the majority of the Attorney General's Committee and many others. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE 55-60; LANDIS, THE ADMINISTRATIVE PROCESS (1938); JAFFE, "Invective and Investigation in Administrative Law," 52 Harv. L. Rev. 1201 (1939); Landis, "Crucial Issues in Administrative Law," 53 Harv. L. Rev. 1077 (1940); GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941); Feller, "Administrative Law Investigation Comes of Age," 41 Col. L. Rev. 589 (1941); JAFFE, "The Report of the Attorney General's Committee on Administrative Procedure," 8 Univ. Chi. L. Rev. 401 (1941); Schoene, Book Review, 50 Yale L. J. 1499 (1941).

19 For an extensive compilation of the authorities and arguments pro and con upon this subject, see Montague, "Reform of Administrative Procedure," 40 Mich. L. Rev. 501 at 516-527 (1942).

20 BENJAMIN REPORT 49-50. "... policy," says Commissioner Benjamin, "plays a proper, and often a necessary, part ... in interpreting a statute which the adminis-
To the objection that "separate agencies might be in such conflict on questions of policy in the interpretation and enforcement of the Act as to cause a breakdown in effective enforcement," Commissioner Benjamin answers that complete agreement on all questions of policy is not "necessarily desirable," and that conflict to the point of impeding effective enforcement will be avoided by creating two boards each of three members appointed in the manner he suggests. This also is his answer to the objection that by withholding cases from litigation, or by litigating too many cases, a separate litigating agency may frustrate or clog or otherwise control enforcement policy.

Negotiating voluntary adjustments, Commissioner Benjamin believes, will be facilitated by separating that function from the adjudicating function, and there will then be eliminated the pressure now implicit in negotiations conducted by the adjudicating agency.

Experience with the Board of Standards and Appeals, the Unemployment Insurance Appeal Board, and the Industrial Board (the final quasi-judicial authority in workmen's compensation) convinces Commissioner Benjamin that a separate adjudicating agency can attain an understanding of the realities without exercising the prosecuting function, and will not tend to become legalistic or unrealistic in interpreting and developing the act.

To the objection that if the adjudicating function is to be separated from the prosecuting function it might as well be left to the courts, Commissioner Benjamin answers that

"... a more coherent and consistent interpretation and development of a statute such as the Labor Relations Act will grow out of initial adjudication in every case by a single tribunal, which constantly deals with related questions, than would be possible if initial adjudication were by a diversity of courts. ... adjudication under the Act calls ... for expertness, in the sense of familiarity

...
with history and present practice in the field of labor relations, which is most likely to be achieved by a board constantly engaged in such adjudication. 25

"... such expertness also involves a risk that the tribunal, familiar with evils that sometimes exist in a field, may find such evils where they do not in fact exist. But that risk can easily be avoided by a tribunal aware of it and aware of its own responsibilities; and in my judgment the advantages of expertness outweigh this possible disadvantage. 26"

Nor can internal separation of functions accomplish the object of two independent boards, in Commissioner Benjamin's opinion, for it cannot "properly go as far as the separation that I recommend between the proposed Authority and the proposed adjudicating board. The functions that I recommend assigning to the proposed Authority are of too great consequence to be assigned to subordinates unless supervision and ultimate control are left in more responsible hands."

To the proposal that "all hearings be conducted by trial examiners appointed by, and subject to removal only by, some agency independent of the Board," Commissioner Benjamin answers:

"... If the decisions of such independent trial examiners were, as is sometimes suggested, given finality (subject only to judicial review), the change would be not merely a change in internal organization; the trial examiners would constitute an independent adjudicating agency, but without the advantages of consistent adjudication that would be afforded by the unified independent adjudicating Board which I recommend. If, on the other hand, the decisions of such trial examiners were not given finality, the change in internal organization would not go far enough towards accomplishing the purposes of a separation of functions. The existence of the Board's ultimate power to review and reverse would, even if it were not frequently exercised, tend to impair the confidence in impartial adjudication which it is a primary purpose of the separation of functions to foster. In any case where the Board actually reversed a decision of the trial examiner favorable to the respondent, the very fact of the trial examiner's independence would aggravate the objection to the Board's duality of function." 28

25 Id. 53-54.
26 Id. 54, note 12.
27 Id. 64, and see also 63-65.
28 Id. 65-66. Trial examiners independent of the agency were recommended by the majority and minority of the Attorney General's Committee, see REPORT OF
As regards the expense of a State Labor Relations Board separate from a State Labor Relations Authority, Commissioner Benjamin says:

"... If the cost of setting up the proposed three-man Authority is thought to be excessive in relation to the benefits to be realized, it would be better, in my judgment, to continue the present unitary structure of the Board rather than to set up in place of the Authority an agency headed by an individual, which, while it would cost less, would involve the particular disadvantages that I have noted." 29

Commissioner Benjamin's basic reason for assigning to a State Labor Relations Authority the present prosecuting function of the State Labor Relations Board is that these functions, as now combined in the present board,

"... may, through creating the appearance of prejudgment and bias, impair that confidence and cooperation on the part of those with whom the administrator deals which the most effective and successful administration requires. The administrator's own recognition of his dual position tends, in proportion to his conscientiousness and his appreciation of the importance of procedure fair in appearance as well as in substance, to create a self-consciousness that interferes with the expeditious and effective performance of his quasi-judicial duties." 30

"The Labor Relations Board," Commissioner Benjamin continues, "operates in a field in which strong feelings are still involved. It is charged with the enforcement of legal rights and obligations only recently secured or created by statute, and not yet fully accepted by all those with whom the Board deals. ... It is


29 BENJAMIN REPORT 55. See also id. 54-55, 62.

30 Id. 55. For an example of this in Judge Frank's experience while he was a member and Chairman of the Securities and Exchange Commission, see FRANK, IF MEN WERE ANGELS 120-122, 140-147, 250 (1942).
called upon often to decide difficult and delicate questions of fact, such as the question of the motive of an employer alleged to have discharged an employee for union activity—questions not only difficult and delicate, but of a character such that the absence of prejudgment or bias in adjudication cannot be the subject of convincing demonstration. In these circumstances all the advantages of dividing between different agencies the functions of litigation and adjudication are emphasized."  

Commissioner Benjamin is emphatic, however, that the circumstances favoring a separation of this board's adjudicating and prosecuting functions "are comparatively infrequent," and do not exist in agencies like the Public Service Commission, which operate in "fields traditionally within the legislative or executive power" and are charged with the "continuing regulation of a field of industrial and business activity."  

Investigation, specification of the issues, notice, opportunity to be heard, the conduct of hearings, the behavior of the hearing officer and other representatives of the agency, the representation of outside parties, and all the elements of the hearing procedure, Commissioner Benjamin reviews with specific suggestions to guide the administrator in particular cases. Instead of empowering an administrative agency to punish for contumacy or itself to enforce compliance, he would afford the agency a more expedited procedure for applying to the court to do these things.  

He summarizes the statutes governing the issuance, service and enforcement of subpoenas and subpoenas duces tecum by various agencies, and approves the policy of the New York decisions that, in the absence of explicit legislation to the contrary, an outside party is entitled to the issuance of ordinary subpoenas without disclosing to the agency the names of witnesses or the character of the testimony sought from them.  

He summarizes the New York decisions that the exclusionary rules of evidence are not legally binding in agency proceedings even when the statute does not provide that the rules of evidence shall not control. He compares the "legal residuum" rule with the "substantial

31 Benjamin Report 55-56.  
32 Id. 67-68.  
33 Id. 71-132.  
34 Id. 132-134.  
evidence” rule, and expresses his preference for the latter. He summarizes the decisions on cross-examination, and the decisions holding that where a hearing is prescribed by statute nothing must be taken into account by the agency that has not been introduced in some manner into the record of the hearing.

Sometimes the volume of hearings, says Commissioner Benjamin, requires that “power of final decision be vested in a considerable number of referees or other like hearing officers, perhaps subject to administrative review discretionary with the reviewing body.” Sometimes “the hearing officer may be given power (perhaps with the concurrence of some other officer) to decide finally in favor of the outside party, while a final decision against the outside party can be made only by the head of the agency or other superior officer.” Often it is “clearly impracticable for deciding officers to read and analyze all or even a major part of the record in cases that they must decide.” Reversing for want of proper findings a determination of the Commissioner of Agriculture and Markets denying an application for a milk dealer’s license, the New York Court of Appeals has held that though the statute authorized delegation of the power to conduct hearings, it required the commissioner himself to make the formal decision. Holding that where the determination of the commissioner is adverse to the applicant there must be “findings which will show the particular matter determined against him,” the court said:

“... That determination must be made by the Commissioner, though in reaching it, practical considerations may lead him to rely rather upon the report or memorandum of the Director of Milk Control or other officer or employee than upon independent examination of the testimony produced at the hearing.”

The process of decision, the “examiner-report” procedure, the con-

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38 BENJAMIN REPORT 181-194. 40 Id. 194-206.
39 Id. 192-193.
41 Id. 206-221.
42 Id. 223, citing workmen’s compensation and motor vehicle license revocation proceedings.
43 Id. 224-225, citing Board of Regents and Medical Grievance Committee; State Liquor Authority and its members and its chief executive officer; State Tax Commission and various officers of the Income Tax Bureau.
44 Id. 227, citing State Labor Relations Board, deciding in a year cases aggregating 55,000 typed pages exclusive of exhibits; Public Service Commission deciding in a year cases aggregating 69,000 pages exclusive of exhibits; and State Liquor Authority, deciding in a year 362 license revocation cases.
tent and form of the decision, its publication and enforcement, advisory rulings, the selection and training of quasi-judicial personnel, the procedure for formulating quasi-legislative regulations, their filing and publication, Commissioner Benjamin reviews with specific suggestions to guide the administrator in particular cases.\(^{46}\)

Decisions of the Court of Appeals, Commissioner Benjamin concludes, "hold that the scope of review of determinations of fact is the same whatever the language of the particular review statute, and that the uniform rule as to the scope of such review is the 'substantial evidence' rule."\(^{47}\) Thus, under a statute providing that findings of the

23, 27 N. E. (2d) 221 (1940). Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936), decided several weeks before the Elite Dairy decision, is clearly in conflict with it, but is not mentioned therein. In Joyce v. Bruckman, 257 App. Div. 795 at 797, 15 N. Y. S. (2d) 679 (1939), a determination of the State Liquor Authority revoking a liquor license was annulled on the ground that five commissioners acting as a judicial board could not make a determination "when four of them conceded knew nothing of the facts on which the determination was based, excepting what they were told by the fifth member." Here the court cited the Morgan decision but not the Elite Dairy decision. Commissioner Benjamin concedes the conflict between the Elite Dairy decision and the Morgan decision, but states: "The Morgan cases [i. e., Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936), Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773 (1938), rehearing denied with opinion 304 U. S. 23, 58 S. Ct. 999 (1938), United States v. Morgan, 307 U. S. 183, 59 S. Ct. 795 (1939), and United States v. Morgan, 313 U. S. 409, 61 S. Ct. 999 (1941)] were decided not on the ground of due process but on the ground of statutory construction of the provision for a 'full hearing' in the statute there considered; they are therefore not of binding effect on the courts of this State." BENJAMIN REPORT 248.

For an extensive compilation of the comments pro and con the Morgan cases, see Montague, "Reform of Administrative Procedure," 40 MICH. L. REV. 501 at 507-508, note 22 (1942). The majority and minority of the Attorney General's Committee, without mentioning any of these decisions, were both emphatic that "review should be given by the officials charged with the responsibility for it, and the review so given should include a personal mastery of at least the portions of the records embraced within the exceptions. In agencies headed by a board, commission or authority, further division of labor may be necessary to provide the time for individual attention by the agency heads. . . . In single headed departments and agencies . . . all pretense of consideration of each case by the agency head [should] be abandoned and . . . there [should] be created either boards of review, as in immigration procedure, or chief deciding officers who shall exercise the final power of decision. But if the agency head in these departments does review a case, he must assume the burden of personal decision." REPORT OF ATTORNEY GENERAL'S COMMITTEE 52-53. See also dissenting opinion of Clark, J., in National Labor Relations Board v. Baldwin Locomotive Works, (C. C. A. 3d, 1942) 128 F. (2d) 39 at 60-65. For an extensive compilation of the authorities and arguments pro and con on this subject, see Montague, supra, at 505-516.

\(^{46}\) BENJAMIN REPORT 221-325.

\(^{47}\) Id. 328, citing Stork Restaurant v. Boland, 282 N. Y. 256, 26 N. E. (2d) 247 (1940), and Weber v. Town of Cheektowaga, 284 N. Y. 377, 31 N. E. (2d) 495 (1940).
State Labor Relations Board "as to the facts, if supported by evidence, shall be conclusive," the Court of Appeals held

"... The evidence produced by one party must be considered in connection with the evidence produced by the other parties. Evidence which unexplained might be conclusive may lose all probative force when supplemented and explained by other testimony. The Board must consider and sift all the evidence—accepting the true and rejecting the false—and must base inferences on what it has accepted as true. Choice lies with the Board and its finding is supported by the evidence and is conclusive where others might reasonably make the same choice." 48

"The substantial evidence test," says Commissioner Benjamin, "as defined by the Stork Restaurant case, is thus a test of the rationality of a quasi-judicial determination, taking into account all the evidence on both sides." 49

The Civil Practice Act, section 1296, listing the questions to be determined by the reviewing court in certiorari proceedings under article 78, which is the review procedure applicable to the great majority of administrative agencies of the State of New York, provides:

"In a proceeding under this article, the questions involving

49 Benjamin Report 329. This differs from the "substantial evidence" rule debated by the majority and minority of the Attorney General's Committee, under which, as the minority complained, "the courts need to read only one side of the case, and if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored." Report of Attorney General's Committee 211. The trend of decisions in the Supreme Court of the United States and other federal courts is now to narrow the review. For an extensive compilation of decisions, see Montague, "Reform of Administrative Procedure," 40 Mich. L. Rev. 501 at 533, note 98 (1942). See also Dickinson, "Judicial Review of Administrative Determinations: A Summary and Evaluation," 25 Minn. L. Rev. 588 (1941); Dickinson, "Administrative Management, Administrative Regulation and the Judicial Process," 89 Univ. Pa. L. Rev. 1052 (1941); Dickinson, "The Acheson Report: A Novel Approach to Administrative Law," 90 Univ. Pa. L. Rev. 757 (1942).

"Under existing standards," the majority of the Attorney General's Committee declared, "the courts may narrow their review to satisfy the demands for administrative discretion, and they may broaden it close to the point of substituting their judgment for that of the administrative agency." Report of Attorney General's Committee 91. The majority of the Attorney General's Committee believed that no legislation is now needed, and that "Only by addressing itself to particular situations, and not by general legislation for all agencies and all types of determinations alike, can Congress make effective and desirable change." Id. 92. For an extensive compilation of the authorities and arguments pro and con upon this subject, see Montague, supra, at 533-536.
the merits to be determined upon the hearing are the following only . . .

"6. Whether there was any competent proof of all the facts necessary to be proved in order to authorize the making of the determination.

"7. If there was such proof, whether, upon all the evidence, there was such a preponderance of proof against the existence of any of those facts that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court triable by a jury, would be set aside by the court as against the weight of evidence."

Commissioner Benjamin states that the Court of Appeals "has construed subdivision 7 to mean that a quasi-judicial determination may be set aside only where, upon the same evidence, a jury verdict would necessarily be set aside, as a matter of law, i.e., where a contrary verdict might properly have been directed. . . . The scope of review under subdivision 7, so construed, is the same as the scope of review under the substantial evidence rule." Accordingly, Commissioner Benjamin recommends amending present subdivisions 6 and 7 (and the paragraph introductory thereto) so as to read

"Where the determination under review was made as the result of a hearing held, and at which evidence was taken, pursuant to statutory direction, the following question shall also be determined:

"6. Whether, upon the entire record of the hearing, each of the findings of fact necessary to support the determination is itself supported by substantial evidence."

Commissioner Benjamin concluded that it is not desirable to broaden or narrow the scope of review beyond that represented by the substantial evidence rule:

"... The interests of the parties require, I believe, that quasi-judicial determinations of fact be subjected at least to the test of rationality which the substantial evidence rule provides, both be-


51 Benjamin Report 339.
cause review of this scope affords a means of correcting abuses in individual cases and because the cautionary effect of the prospect of such review should help to assure proper administrative adjudication in the first instance. The existence of factors (considered in my discussion of quasi-judicial procedure) that may tend towards bias or prejudgment in administrative adjudication adds force to this conclusion. So does the circumstance that often the quasi-judicial decision is made by one who has not seen the witnesses or heard their testimony and that the decision may, indeed, be contrary to the recommendation of the hearing officer who did hear the testimony. Approaching the problem from the other side, my observation convinces me that review as broad as under the substantial evidence rule is entirely consistent with effective administration."

"Decisions of the New York Courts," Commissioner Benjamin observes, indicate that "no broader scope of review will be applied to determinations of 'jurisdictional fact' (however defined) than to other factual determinations." 53

52 Id. 338-339. "My view," says Commissioner Benjamin, "that it is not desirable that the reviewing court be permitted to substitute its judgment for a rational judgment of the administrative tribunal is not based solely on the assumption that an administrative tribunal is especially qualified to arrive at correct determinations of fact in the field in which it operates. Often that is so, but I recognize that the ideal is not always realized in practice. Nor is my view based solely on the argument (which I believe to be sound) that satisfactory administrative adjudication is more likely to result where a reasonable degree of responsibility is imposed on the administrative judge than where supervision is carried too far. At least as important as either of these considerations is a consideration applicable to those fields (the most numerous) where adjudication is only one part of a larger administrative process. Unless an administrative agency operating in such a field is permitted to act on the basis of its own adjudication, when that adjudication is rationally supportable, the whole process of administration will be unduly impeded." Id. 337-338. See also Frank, If Men Were Angels 179-189 (1942).

53 BENJAMIN REPORT 340, citing Matter of Dimino v. Independent Warehouses, 284 N.Y. 481 at 484, 31 N.E. (2d) 911 (1940), cert. denied Independent Warehouses v. Dimino, 313 U.S. 569, 61 S.Ct. 946 (1941) (determination that deceased workman was not engaged at the time of his injury in a maritime service on navigable waters); Miles v. Colegrove, 258 App. Div. 1014, 16 N.Y.S. (2d) 988 (1940), aff'd. without opinion 284 N.Y. 609, 29 N.E. (2d) 924 (1940) (determination that workmen’s compensation claimant was not a farm laborer); Matter of Morton, 284 N.Y. 167, 30 N.E. (2d) 369 (1940) (determination that unemployment insurance benefit claimant was an employee rather than an independent contractor). These New York decisions are clearly in conflict with Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527 (1920); Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285 (1932); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720 (1936), but the authority of these three decisions of the Supreme Court of the United States is now threatened by Railroad Commission of Texas v. Rowan & Nichols
Commissioner Benjamin's outstanding recommendation is a continuing investigation of administrative procedure by a Division of Administrative Procedure created in the Executive Department, and headed by a Director of Administrative Procedure appointed by the Governor. This director with two assistants and a small stenographic and clerical force, beginning upon the foundations of Commissioner Benjamin's report and his accompanying detailed memoranda on the various departments, boards and commissions of the state, can continue to study the procedure of each of these administrative agencies, and can furnish expert assistance to each agency. It can receive from the public complaints and suggestions regarding procedure, can assist in an advisory capacity in correcting conflicts and overlapping jurisdiction in the procedure of different agencies, and can administer the legislation called for by the state constitution for the publication of rules and regulations of these administrative agencies. It can report to the Governor annually or more frequently on the results of the director's work, and can recommend any legislation that he thinks desirable. A somewhat similar recommendation for an Office of Federal Administrative Procedure was made by both the majority and minority of the Attorney General's Committee on Administrative Procedure, and has proved to be the most popular recommendation emanating from that committee.

There is sound basis for these recommendations. Administrative procedure has always benefited from official investigations. Some investigators have been highly critical, such as the President's Committee on Administrative Management, and the majority of the Special


54 BENJAMIN REPORT 18.
55 Id. 18-21.
56 REPORT OF ATTORNEY GENERAL'S COMMITTEE 6 (1941).
58 REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 67-69 (1937), and accompanying Letter of President Roosevelt, id. iii-iv. See
Committee of the House of Representatives that investigated the National Labor Relations Board. Others have been more sympathetic, such as the Committee on Ministers' Powers in Great Britain, the Attorney General's Committee on Administrative Procedure, and now Commissioner Benjamin. But whether critical or sympathetic,

PENNOCK, ADMINISTRATION AND THE RULE OF LAW 20, 74, 222 (1941); CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 412-413, 700, 709-714, 725 (1941). Compare Willoughby, PRINCIPLES OF LEGISLATIVE ORGANIZATION AND ADMINISTRATION (1934); BLACHLY AND OATMAN, ADMINISTRATIVE LEGISLATION AND ADJUDICATION (1934).


60 COMMITTEE ON MINISTERS' POWERS REPORT (1932). Some of the members of this committee are listed in Montague, "Reform of Administrative Procedure," 40 Mich. L. Rev. 501 at 518, note 50 (1942). Critical publications and events that led to the appointment of this committee are discussed passim in authorities cited in note 8, supra, and in Montague, supra, at 520 note, 523 note; also Port, ADMINISTRATIVE LAW (1929), with foreword by Justice Sankey; Robson, "The Report of the Committee on Ministers' Powers," 3 Pol. Q. 346 (1932); PENNOCK, ADMINISTRATION AND THE RULE OF LAW (1941); CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 630-633, 702 (1941).

each investigation has focused attention, spread knowledge, indicated dangers, recommended safeguards, revealed weaknesses, suggested remedies, and stimulated improvements in administrative procedure. Three investigations have been particularly helpful: the Committee on Ministers’ Powers with its report and its accompanying Memoranda Submitted by Government Departments and Minutes of Evidence; the Attorney General’s Committee with its report and its minority views and recommendations and its accompanying monographs containing staff studies of twenty-seven separate federal agencies; and now Commissioner Benjamin with his report and accompanying detailed memoranda containing studies of various boards, commissions and departments of the state of New York. Official investigators seldom bolster their reports with references to earlier official investigators. Throughout the Attorney General’s Committee report and its minority views and recommendations, however, there are indications that both the majority and minority studied the reasoning and conclusions of the Committee on Ministers’ Powers, and the President’s Committee on


The prevailing habit in America has been to ignore or belittle the reasoning and conclusions of the Committee on Ministers’ Powers. Montague, “Reform of Administrative Procedure,” 40 Mich. L. Rev. 501 at 520, note (1942), and authorities there cited. The notion that the committee found nothing wrong in British administrative procedure is refuted by the variety and cogency of the committee’s criticisms and comments. See Committee on Ministers’ Powers Report 5, 6, 24, 41, 50, 54-70, 78-84, 88, 92-110, 115-118 (1932). The notion that the committee has had no result in Great Britain is also incorrect. See Carr, Concerning English Administrative Law 27-30, 115-116, 122-125, 175-176 (1941). Some of the committee’s conclusions are debatable, particularly from the standpoint of American conditions, but they were the unanimous conclusions of the most distinguished group of legislators, public officials and legal authorities that have ever joined in an official investigation of administrative procedure. Referring in 1938 to the Committee on Ministers’ Powers Report and the accompanying Memoranda Submitted by Government Departments and Minutes of Evidence, Justice (then Professor) Frankfurter stated that they “constitute, perhaps, the most illuminating analysis yet formulated of those processes of government which are the stuff of administrative law.” Frankfurter, a foreword to a discussion of current developments in administrative law, 47 Yale L. J. 515 at 518 (1938). For an extensive compilation of extracts from and comments upon the Committee on Ministers’ Powers Report, see Montague, “Reform of Administrative Procedure,” 40 Mich. L. Rev. 501 at 518-520 (1942).
Administrative Management, and the Special Committee of the House of Representatives that investigated the National Labor Relations Board. Commissioner Benjamin's conclusions may be debatable, but comparing his report point by point with all these earlier reports, it is plain that on every disputed question Commissioner Benjamin has weighed every argument pro and con contained in these earlier reports. The Committee on Ministers' Powers Report was excelled by the Attorney General's Committee Report, and the latter is now excelled by the Benjamin Report.64 These three successive reports have each contributed immeasurably to the improvement of administrative procedure. Continuing improvement can now be assured by continuing official investigation, through an Office of Federal Administrative Procedure as recommended by the majority and minority of the Attorney General's Committee, and through a Division of Administrative Procedure in the Executive Department of the State of New York as recommended by Commissioner Benjamin.

64 These three reports are landmarks in administrative procedure. What is now sorely needed is someone of discernment, knowledge and literary skill sufficient to do for administrative procedure today what was done for English constitutional law two generations ago by A. V. Dicey, in his INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (editions of 1885, 1886, 1889, 1893, 1897, 1902, 1908, 1915, 1939) and his LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY (editions of 1905, 1914) and by F. W. Maitland in his 1887-1888 lectures at University of Cambridge posthumously published in his CONSTITUTIONAL HISTORY OF ENGLAND (1908).