LEGISLATIVE RESTRICTION OF FEDERAL JURISDICTION OVER LOCAL RATE REGULATION

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Although the federal courts have been expanded quantitatively to meet the growing needs of the country, and have, from time to time, been given added jurisdiction by Congress, there has always existed a policy of keeping specific classes of litigation out of the lower federal courts.[1] Many people, furthermore, have been impressed with the idea that the federal courts afford opportunities, through removal of causes to them because of diversity of citizenship[2] or other reasons, for escape from state law, state regulation and the duties of local citizenship.[3] Four types of restriction of the jurisdiction of federal district courts were offered in recently proposed legislation in Congress:[4] elimination of jurisdiction involving diversity of citizenship; denial of the right of removal to foreign corporations on the ground of diversity of citizenship;[5] increases in jurisdictional amount involved; and denial of jurisdiction to interfere by injunction or otherwise in intrastate utility regulation cases. The last springs from

[1] The controversy over the proper extent of concurrent jurisdiction of lower federal courts and of state courts began in the Constitutional Convention. Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, (1928) 41 Harv. L. Rev. 483; Felix Frankfurter, Distribution of Judicial Power Between United States and State Courts, (1928) 13 Cornell L. Q. 499. Many specific acts limit the jurisdiction of the district courts, among them: 24 Stat. 552 (1887); 36 Stat. 291 (1910); 43 Stat. 938 and 43 Stat. 941 (1925).

[2] Paul Howland, Shall Federal Jurisdiction of Controversies between Citizens of Different States Be Preserved? (1932) 18 A. B. A. Jour. 499. See discussion of the part played by the Supreme Court in allaying this irritation in, Federal and State Court Interference, by Charles Warren, 43 Harv. L. Rev. 345 (1930).

[3] Charles N. Campbell, Is Swift v. Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction? (1932) 18 A. B. A. Jour. 809.

[4] On the Norris bill see discussion in The Jurisdiction of the Federal Courts based on Diversity of Citizenship. Robert C. Brown, 78 Univ. of Pa. L. Rev. 179 (1929). Hon. J. Parker, The Federal Jurisdiction and Recent Attacks Upon It, (1932) 18 A. B. A. Jour. 433. Mr. Howland's Article, supra note 2. Memorandum of views of the Chicago University Law School Faculty, 31 Mich. L. Rev. 59 (1932), on then pending legislation: Senate Bill No. 939, House Bill No. 11508 (The Norris-La Guardia bill); Senate Bill No. 937, House Bill No. 10594 (Attorney General's bill); Senate Bill No. 3243 (Johnson Bill) and House Bill No. 4526 (The Bulwinkle Bill).

[5] There are numerous law review articles voicing the opposition to the ruling that foreign corporations are citizens in diversity of citizenship cases as laid down in Railroad v. Letson (1884) 2 How. (43 U. S.) 497; (1927) Black and White Taxi Co. Case (1927) 276 U. S. 518 and others.

aroused interest in the public utility problem and the enormous amount of litigation and expense arising from the efforts of utility management to mitigate, delay or avoid state regulation. Known as the "Johnson bill," it was enacted into law as of May 14, 1934, amending the first paragraph of section 24 of the Judicial Code, as follows:

> "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law, or in equity in the courts of such State."
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> The second section of the amendment provides that suits already pending shall not be affected.[6]

This amendment purports to take away the *nisi prius* jurisdiction of the matters therein mentioned from the district courts. Will it stand the test of constitutionality? Will it be effective in the attainment of a long sought objective: the strengthening of administrative boards and commissions within the states in the perplexing field of utility regulation? What treatment is it receiving at the hands of the courts?

I. CONSTITUTIONALITY

1. AS A LAWFUL EXERCISE OF CONGRESSIONAL POWER

The law known as the Judicial Code of the United States, under which the present lower courts of the federal system are created and organized, was adopted by Act of Congress, March 3, 1911 and put in force January 1, 1912.[7] It marked the abolition of the Circuit Courts which had existed from the beginning of the Federal Government and a recognition of expanding needs.

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[6] 48 Stat. Part 1, 775, amending 36 Stat. 1091, U. S. C. p. 866; 28 U. S. C. A. 41 (1).

[7] 36 Stat. 1087, 28 U. S. C. A., p. 3.

It has been subjected to constant amendment in the manner that the Johnson Act amends it, and its entire subject matter is a recognition of the legislative power of Congress over the jurisdiction to be exercised by the district federal courts. Under it they are courts of distinctly limited jurisdiction. The power of Congress in this field would seem to be so well established that it could not be questioned yet it was made an issue in one of the cases discussed later herein.[8]

2. UNDER THE "DUE PROCESS" PROVISION

That the constitutionality of the Johnson Act would be tested in the particular districts upon the issue of due process in the state courts was foreseeable in the language of the last part of section one: "where a plain, speedy, and efficient remedy may be had at law, or in equity in the courts of such state." Judge Parker has made a strong point of the difference between the state and federal courts in the matter of judicial review.[9] So had Mr. David E. Lillienthal.[10] Those urging the defects of the provisions for such review in the states go back to the famous statement of Mr. Justice Holmes: "If the railroads were required to take no active steps until they could bring a writ or error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rates and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain."[11] This statement indicates

[8] Numerous opinions from Turner v. Bank, (1799) 4 Dall. (4 U. S.) 10 down to Kline v. Burke Construction Co., (1922) 260 U. S. 226 have accepted or upheld the power of Congress to limit the jurisdiction of the courts which it "may from time to time ordain and establish," Constitution, Art. III, Sec. 1. Jurisdiction may be withdrawn even in a pending case. Ex Parte Yerger (1869) 8 Wall. (75 U. S.) 104; The Assessors v. Osborne (1869) 9 Wall. (76 U. S.) 567, 575. See the argument of Mr. Howland and Mr. Parker, regarding the necessity for Congress to place the full judicial power set forth in the Constitution in the courts it creates, in the articles cited in foregoing notes. The latter view was advanced in Mississippi Power and Light Co. v. City of Jackson, commented on hereafter.

[9] Note 4, supra. The federal court would in theory show its own fact findings, the state record might review only part of a board's findings.

[10] The Federal Courts and State Regulation of Public Utilities, 43 Harv. L. Rev. 379. Part of his statement is the text to note 21, post.

that the state court record, based on a finding of facts by an extra-judicial body, the commission, is not such a record as will satisfy the judicial review. The court should make its own investigation of the facts in an impartial way. It implies that the courts will do this and the tenor of the decision is that the allocation of the judicial power under the constitution requires courts to do this independently.

Crowell v. Benson[12] supports the viewpoint that the delegation of the finding of facts to an administrative body or its representative is not constitutional, absent any provision, express or implied, for judicial review. In that case the principle laid down does seem to be true as to specific facts, *i. e.* the two jurisdictional facts, and the court held that, absent an express provision, such a power to review to determine the existence of such facts is implicit. If Congress intended otherwise the law would be unconstitutional in its denial of due process, and unconstitutionality will not be presumed. Chief Justice Hughes considered such a review indispensable under the definition of the judicial power in the Constitution. Its absence "would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do, upon the facts, and the finality as to facts becomes in effect finality in law."[13] "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to 'a fair opportunity for submitting the issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts' "[14] (citing *Ohio Valley Water Co. v. Ben Avon Borough*[15] and other cases.) "We think that the essen-

[11] Prentis v. Atlantic Coast Line R. R. (1908) 211 U. S. at 228.

[12] Crowell v. Benson (1932) 285 U. S. 22. See comments, 30 Mich. L. Rev. 1312; 80 Univ. of Pa. L. Rev. 1055; 21 Calif. L. Rev. 266.

[13] Crowell v. Benson, supra note 12, p. 57.

[14] Ibid., p. 60.

[15] (1920) 253 U. S. 287. Mr. Justice McReynolds delivered the opinion, Brandeis, Holmes and Clark, JJ., dissenting.

tial independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal Court should determine such an issue upon its own record and the facts elicited before it."[16] The dissent of Justices Brandeis, Stone and Roberts does not seem to the writer to afford much comfort to those who disagree with the majority opinion. They favored reversal on a mere technicality, namely that the trial court should be reversed because his decision was wrong in requiring a trial de novo, instead of a judicial review of the existence of certain facts. Had they represented a majority, their decision would very easily have been misinterpreted as dispensing with judicial review. It is not believed that these justices intended any such result. The majority view certainly lays down the principle that there must be such a trial by an independent tribunal of the issues regarding the existence of certain "pivotal" facts, whether we call them "jurisdictional facts" or by some other name. As Mr. Dickinson says, "The practical result of the doctrine of jurisdictional fact is to throw open for complete re-examination in court facts, which, if they were not held to be "jurisdictional," would be concluded either by the decision of the administrative body or at least by the evidence at its disposal. This doctrine has an obviously different incidence and value when applied to some types of administrative decisions and officers from what it has when applied to others."[17] He draws a distinction between summary decisions by an inspector and the formal decisions rendered as the result of hearing testimony and argument which are preserved in a written record.

In the *Ben Avon* case,[17a] the court said: "Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal. . . . In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial

[16] Crowell v. Benson, supra note 12, p. 64.
[17] Crowell v. Benson, Judicial Review of Administrative Determination of Constitutional Fact. John Dickinson, 80 Univ. of Pa. L. Rev. at 1060.
[17a] Note 15, supra.

tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."[18] The repetition of the necessity for independent judgment by the courts is important. If the statutory appeal provided for is not judicial in character, or is merely legislative as in the *Prentis v. Atlantic Coast Line Co.* case, constitutional protection under due process is not provided for, and this is important under the Johnson Act, because practically all rate cases involve the issue of confiscation. The dissent of Mr. Justice Brandeis in the *Ben Avon* case does not afford comfort to the opponents of duplicate fact finding: "Where a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review."[19] It is to be noted that he seems positive of the "constitutional right" to a judicial review.

Due process involves judicial review and for that purpose there must be a record to review. Admitting that it must show reasonable notice and hearing with opportunity to present evidence and arguments, deemed vital, it is bound to present enough to assist the court in determining whether error of law was committed. Mr. Dickinson admits that this includes "the question whether it reached conclusions of fact which could not have been reached on the same evidence by reasonable men."[20] This would seem to require more than the determination of jurisdictional facts, for a commission might very well have proof of its jurisdiction in the matter, yet find the facts of value and return thereon so as to produce confiscation of property. It seems that the record presented for court review must present findings of other than jurisdictional facts as such. The difference between the state and federal court review in establishing such a record has been fully set forth by Mr. Lillienthal. He maintained that, "Unless an adequate record is before the state supreme court when it reviews the commission order, effective appeal to the United Stats Supreme Court is out of the question. In those states in which review may be denied simply upon representations in the

[18] Ohio Valley Co. v. Ben Avon Borough (1919) 253 U. S. at page 289.
[19] Ibid., l. c. 295.
[20] 80 Univ. of Pa. L. Rev., l. c. 1061.

petition for review and without the court having a complete record before it, state review is hazardous and resort to the federal court in the first instance a plain necessity."[21] Judge Parker and Mr. Lillienthal differed from Mr. Frankfurter in regard to the merits of and need for state jurisdiction in preference to federal jurisdiction in utility litigation but the two former based their opinions on the procedure and the record from a practical standpoint. Mr. Warren had pointed out the same difficulty facing local jurisdictions. The opinions of Mr. Justice Holmes, Chief Justice Hughes and Mr. Justice McReynolds,[22] without citing others, indicate a unanimity of thought on the part of the Supreme Court majorities, and indeed of the other justices, that the judicial review is indispensable, except in the findings of certain administrative bodies created by Congress.[23]

II. Will the Johnson Act Aid in Solving the Utility Problem?

The discussion above under due process seems to indicate a favorable answer to this question only where the states provide for judicial review that will meet the requirements of the act itself: "where a plain, speedy, and efficient remedy may be had at law, or in equity in the courts of such State." Direct efforts by the states to compel litigation of local causes against foreign corporations or non-residents in the local courts have largely failed where the mode was prohibition of removal to the federal courts or making submission to local judicial jurisdiction a condition of doing business within the state.[24] Incorporation in a foreign state for the purpose of creating a diversity of citizenship and obtaining the benefit of removal to federal courts is annoying, but not invalid.[25] The few instances where the Su-

[21] Article, supra note 10.

[22] Supra notes 11, 12, and 15.

[23] Crowell v. Benson (supra note 12) p. 50. "Thus the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from constitutional courts in which the judicial power conferred by the Constitution can be deposited)—to examine and determine various matters, arising between the government and others, which, from their nature do not require judicial determination and yet are susceptible of it." (quoted from Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272.) For a survey of the conclusiveness of fact findings by administrative bodies of the Federal Government, see Conclusiveness of the Federal Trade Commission's Findings of Facts. Gregory Hankin, 23 Mich. L. Rev. 233 (1924).

[24] Terral v. Burke Construction Co. (1922) 257 U. S. 529.

[25] Regan v. Farmer's Loan and Trust Co. (1893) 154 U. S. 362, 391;

preme Court has sustained concurrent jurisdiction in cases where there was diverse citizenship do not benefit the utility issues.[26] The Johnson Act affords the states opportunity to secure adequate control of the regulation of utilities in a fair and constitutional manner, and it seems wise for them to adjust their procedure so as to meet the requirements of due process that may be learned from the adjudicated cases.

Procedure, provided in the various states for appeals from public utility commissions or other boards under various names, places the states in three groups. The first group provides for judicial review upon appeal, allows injunctive relief upon varying terms suspending the rates or requiring bonds in the interim and the like, and does not prescribe nor limit the types or extent of evidence to be considered by the courts. A second group provides by statutes for appeals from orders of the commission, with an alternative remedy of injunction in some jurisdictions, but limits the evidence to be reviewed by the courts to that produced before the commission or more strictly, in some jurisdictions, to that involved in an application for a rehearing before the commission, with added limitation on the powers of the appellate court to reject or modify the administrative ruling. The third group provides by constitutional provision for an administrative board having a combination of legislative, executive and judicial functions, with limited provisions for appeal to some court, usually the supreme court of the state and decided restrictions on the power of the appellate court in the matter of review.[26a]

The problem of the federal district courts under the Johnson Act is bound up with the state provisions. The district judge or

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Black and White Taxi Co. v. Brown and Yellow Taxi Co. (1927) 276 U. S. 518.

[26] Kline v. Burke Construction Co. (1922) 260 U. S. 226. Here the Supreme Court reiterated the doctrine that the lower federal courts secure their jurisdiction "wholly from authority of Congress."

[26a] Statutes of the first type: Code of Alabama, 1923, sections 9691, 9692, 9699; R. S. Mo. 1929, sections 5234-5237; Illinois Rev. Stat. (Smith-Hurd) 1927, Chap. 111⅔, sec. 72.

Statutes of the second type: General Laws of California (Deering) 1931, Art. 6386, section 67; Digest of Statutes of Arkansas, Crawford and Moses, 1921, section 1698 (no new evidence, record before the commission, appeal to Supreme Court, section 1699); Compiled Laws of Colorado, 1921, Sections 2960 et seq.

Constitutional provisions, third type: Oklahoma, Art. 9, section 18, in Statutes of Oklahoma, Harlow, 1931, section 13598; Virginia Code, 1924, The Michie Co., Article XII, sections 156, d-g.

a three judge court must decide whether jurisdiction has been denied under the act. In the first group above, it would seem clear that the district court has no jurisdiction. In the second group there would arise the problem offered by the *Ben Avon* case. In the third group the *Prentis* case would have to be considered. Consideration would be generously given to the interpretation of the supreme courts of the various states, with the knowledge that such cases would probably be before the Supreme Court of the United States on writ of error. Such procedure will involve no insignificant delays. Mr. Justice Brandeis, dissenting in the *Ben Avon* case, said, "The objections to the valuation made by the company raise no question of law but concern pure matters of fact; and the finding of the Commission, affirmed by the highest court of the State, is conclusive upon this court."[27] But he had previously admitted that, "This court may, of course, upon writ or error to a state court 'examine the entire record, including the evidence,—to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter.' "[28] The rate regulation cases, involving unlawful deprivation of property, are such that the fact-issue is decisive of the constitutionality.[29] That the benefits of the Johnson Act may accrue to all of the states, it is believed that states in the second and third group, as classified above, should take steps to provide for a judicial review which will meet the requirements of the decisions heretofore mentioned. The benefits are too great to be sacrificed to administrative independence.

III. THE CASES

Several cases involving the application of the Johnson Act have reached the district courts. In *Georgia Continental Telephone Co. v. Georgia Public Service Commission*,[30] on July 13, 1934, a three judge court denied an interlocutory injunction against an order of the commission and dismissed the proceeding without prejudice to a bill in the state courts covering the same subject matter. An interlocutory order had been issued previously, enjoining an order of the commission affecting rates of the

[27] 253 U. S. at p. 299.
[28] 253 U. S. at p. 298.
[29] U. of Pa. L. Rev., p. 1072.
[30] 8 F. Supp. 434.

utility. Later, after further investigation, a new order was issued by the commission and in the meantime the Johnson Act became law. Although the act provides for retention of jurisdiction in cases pending at the time of its enactment, it would seem that the court properly ruled that the supplemental proceeding to bring the new order within the scope of the pending suit was not within the proviso. The court decided that the hearing before the state commission was not unreasonable, was based on facts and data furnished by the plaintiff, and these were not claimed by the utility to be wrong or mistaken. In answer to the claim that the commission considered other evidence in its files not a part of the records before them, it was shown that this consisted of annual reports of the utility and answers by it to a questionnaire and that these could not be matter of surprise. A State Court had held that under the Georgia law, the Commission in fixing a future rate acts legislatively and like a legislature is not bound to grant any hearing, but if it does so, it is a matter of grace. While doubting that a subordinate legislative agency may consistently with due process fix rates without a hearing, the court pointed out that the Johnson Act denied jurisdiction to the federal court if, in fact, reasonable notice was given and a hearing held. Holding that if it were an original bill it ought to be dismissed as not within the jurisdiction of the court, this court, in the exercise of discretion, held that the supplemental proceeding ought not to be entertained. One of the judges, Judge W. I. Grubb, dissented. An interesting contention of the utility was that the commissioners were disqualified because of coercion by the governor and for financial interest, in as much as the governor had been elected on a reduction of rates platform and the commissioners appointed to carry it out. This was not given much consideration, the court saying: "Courts will test these acts on their several merits, but will not investigate the politics of appointment."

On the allegations of the bill it is evident that the court retained jurisdiction solely to determine whether the claim of lack of due process was upheld. That being present, it was without further jurisdiction. If the Georgia state court was right in holding that the commission acts legislatively, will that make any difference in the appeal to the state courts? Does the fact that the state court held that the commission need not give notice and

hold a hearing constitute an obstacle to due process later when the utility seeks its remedy in that court? We shall look forward to the outcome of this case, if it is litigated further, in the light of the leading cases heretofore discussed. Constitutionality from the standpoint of the power of Congress to pass the Johnson Act was not presented.

In *Mississippi Power and Light Co. v. City of Jackson, Miss.*,[31] an injunction was sought to restrain the enforcement of a municipal ordinance which reduced the rates charged for electricity, on the grounds that they would result in confiscation. A transcript of the stenographer's notes of the proceedings before the mayor and commissioners showed that there were due notice, hearings, appearances of plaintiff's authorized representatives, request for definite figures from the utility to furnish evidence to sustain the current rates, and persistent refusal to do so. The federal judge refused an injunction on the ground that there was available a plain remedy in the chancery courts of the state of Mississippi, and sustained the constitutionality of the Johnson Act and therefore the inapplicability of the Declaratory Judgments act to the situation. The evidence of due notice and hearing sustained the ruling that there was no lack of due process before the commissioners. The suggestion that the state laws conferred upon the state courts legislative powers in matters of appeal in rate issues was answered thus: "Comity requires that in a case of this character we leave the state court to deal with the constitutionality of a state statute applicable to its own judicial system." However, authority of state decisions was shown that the state chancery court had independent jurisdiction to pass on confiscation issues raised by municipal ordinance.

It was urged that the phrase, "solely upon the ground of diversity of citizenship or the repugnance of such order to the constitution," in the Johnson Act disclosed an intent to withdraw jurisdiction from the federal courts only where one such ground was raised and not where both were present. The court ruled that the word *solely* modifies the compound phrase and means in the absence of some other valid ground of federal jurisdiction. The claim that the restriction of the judicial power of the United States in limiting the jurisdiction of the district court in such

[31] 9 F. Supp. 564, January 24, 1935.

issues as confiscation was unconstitutional was evidently argued by attorneys for the utility with much force, since the court went to considerable length to overrule this contention in a scholarly historical presentation of the rulings on this issue.

This case, like the preceding one, presents the situation raised by the Johnson Act in its most favorable light and leaves the states their duty of furnishing due process. If the Mississippi and Georgia courts have not, under their judicial codes, the power to provide due process, we may look again to repetition of the arguments of the *Ben Avon* case in the Supreme Court.

On February 9, 1935, in the District Court for the Western Division of the State of Oklahoma, a three judge court handed down its opinion in *Cary v. Corporation Commission of Oklahoma.*[32] The bill of complaint alleged that the Corporation Commission had made an order reducing the price which the plaintiff might charge his customers for gas from 25 cents to 18 cents per thousand cubic feet; that the order had been affirmed by the Supreme Court of Oklahoma in pursuance of the *legislative power* conferred upon it by the state constitution; and that the order deprived the plaintiff of its property, since the rates were confiscatory. As a distinct ground for equitable relief plaintiff alleged that the order was in conflict with the Fourteenth Amendment to the Constitution of the United States, in that no court of the state, *acting in a judicial capacity,* may inquire into or review the order complained of. A motion to dismiss was filed by the defendants on the ground that under the Johnson Act, the court was without jurisdiction. Owing to the uncertainty and conflict in the state decisions, the majority of the court felt that it could not do otherwise than grant the temporary injunction until the supreme court of the state determined that the Oklahoma constitutional plan of utility control affords a judicial review, in some state court, of an order of the Corporation Commission affecting rates chargeable by a public utility. Since the jurisdiction of the federal courts is restricted by the Johnson Act only "where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State" the three judges were of the unanimous opinion that "it cannot now be said that there is a 'plain' remedy in the courts of the state." If review

[32] 9 F. Supp. 709. A bond to cover the difference between the existing and proposed rates was required in the interim.

by the supreme court of Oklahoma is found to be "legislative" and but the "last step in the administrative machinery," plaintiff could not appeal from an adverse ruling to the Supreme Court of the United States in a matter of confiscation of property, and would be deprived of the substantial right of a decision on a constitutional question by a federal tribunal. This ruling is in the light of *Federal Radio Commission v. Nelson*,[33] which holds that Congress cannot confer upon the Supreme Court of the United States jurisdiction to review administrative or legislative questions.

In this case there is the added problem of the constitutionality of a state constitution that provides for administrative regulation without recourse to the courts. Its solution on appeal should fall within the purview of the *Prentis* decision. It is extremely doubtful that the Oklahoma regulatory procedure provides "due process."

Seven federal judges have taken part in the foregoing decisions and on the various issues raised have upheld the constitutionality of the Johnson Act. In all the cases, the existence of adequate judicial review in some court of the state was involved. Without it federal jurisdiction in matters of state utility regulation still exists and the *Prentis, Crowell v. Benson* and *Ben Avon* rulings will have to be taken into consideration by the state courts in these and subsequent cases, if local regulation of local utilities is to make headway.

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[33] (1932) 289 U. S. 266, 53 S. Ct. 627, 77 L. Ed. 1166.