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ADMINISTRATIVE LAW - SCOPE OF JUDICIAL REVIEW - DOCTRINE OF THE BEN AVON CASE- INDEPENDENT DETERMINATION BY COURT OF BOTH LAW AND FACTS WHERE CONFISCATION QUESTION INVOLVED

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COMMENTS

ADMINISTRATIVE LAW — SCOPE OF JUDICIAL REVIEW — DOCTRINE OF THE BEN AVON CASE — INDEPENDENT DETERMINATION BY COURT OF BOTH LAW AND FACTS WHERE CONFISCATION QUESTION INVOLVED — A recent decision by the United States Supreme Court¹ renders desirable a reexamination of the scope of judicial review of

¹ *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 60 S. Ct. 1021 (1940).

orders and decisions made by administrative bodies, and more specifically a reexamination of the doctrine of the *Ben Avon* case.² There are several possibilities as to the finality that may be accorded to administrative fact determinations: first, findings may be conclusive and binding upon the reviewing court; second, they may be conclusive if supported by substantial evidence; third, they may be subject to independent determination by the court. To what extent, if any, the scope of review should take the last-mentioned form has been, and still is, one of the most troublesome and debatable aspects of administrative law.³ As government regulation increases, the need for more commissions, boards, and agencies increases, with a corresponding need for greater efficiency on the part of all administrative bodies—hence the demand by administrative bodies, backed by many students of administrative law, for more freedom of action and less interference by the judiciary.⁴ On the other hand, increasing regulation affects more interests and more people, and this group naturally seeks to assure the correctness of administrative action by subjecting it to greater judicial control.

The usual rule is that findings of fact made by administrative bodies are conclusive if supported by substantial evidence.⁵ However, where there is a question of confiscation involved, the party raising such question is said to be constitutionally entitled to a court's independent determination of both law and facts. This, in short, is the doc-

² *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 527 (1920).

³ The following are some of the leading discussions: Freund, "The Right to a Judicial Review in Rate Controversies," 27 W. VA. L. Q. 207 (1921); Green, "The Ohio Valley Water Case," 4 ILL. L. Q. 44 (1921); Isaacs, "Judicial Review of Administrative Findings," 30 YALE L. J. 781 (1921); Cooper, "Administrative Justice and the Role of Discretion," 47 YALE L. J. 577 (1938); Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court," 35 HARV. L. REV. 127 (1921); Wiel, "Administrative Finality," 38 HARV. L. REV. 447 (1925); Buchanan, "The Ohio Valley Water Company Case and the Valuation of Railroads," 40 HARV. L. REV. 1033 (1927); 50 HARV. L. REV. 78 (1936). Interesting suggestions may be found in a series of essays written under the sponsorship of the American Bar Association entitled: "To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?" 25 A. B. A. J. 453, 543, 770, 838, 940, 1018 (1939).

⁴ An argument frequently made in favor of curbing judicial interference is that it would increase administrative responsibility. The more weight that is given to the administrative process, the more prestige attaches to the administrative body itself. See McGuire, "Judicial Review of Administrative Decisions," 26 GEORGETOWN L. J. 574 at 600 (1938).

⁵ Cooper, "Administrative Justice and the Role of Discretion," 47 YALE L. J. 577 at 589 (1938), and cases there cited.

trine of *Ohio Valley Water Co. v. Ben Avon Borough*,⁶ reiterated and more fully discussed in *St. Joseph Stock Yards Co. v. United States*.⁷ The *Ben Avon* case involved a rate order of the Pennsylvania Public Service Commission fixing the maximum rates to be charged by the Ohio Valley Water Company. The company, claiming error in the valuation of its plant, appealed under the state public service act to the superior court,⁸ and that court, passing on the weight of the evidence, decided that there had been an undervaluation and sent the case back to the commission. The Pennsylvania Supreme Court⁹ reversed the superior court, holding that since there was competent evidence supporting the commission's valuation, such valuation was, under the statute, conclusive and final. The United States Supreme Court in turn reversed the Pennsylvania Supreme Court on the ground that as interpreted the statute precluded an independent determination by the court, to which the company was entitled under the due process clause of the Fourteenth Amendment.¹⁰

The basic reasoning of the Court in the *Ben Avon* case depends on two propositions: (1) that rate-making is a legislative function,¹¹ and (2) that the legislative body cannot be the judge of its own power. A confiscatory rate is unconstitutional, and whether a particular rate is confiscatory depends on the correctness of the valuation. Therefore, there must be an independent determination of the facts, i.e., valuation, by a court.¹² This reasoning has been subjected to much criticism.¹³ Yet there are those who believe the *Ben Avon* principle sound and fair.¹⁴ No effort will be made at this point to discuss the rationale of the

⁶ 253 U. S. 287, 40 S. Ct. 527 (1920).

⁷ 298 U. S. 38, 56 S. Ct. 720 (1936).

⁸ *Ben Avon Borough v. Ohio Valley Water Co.*, 68 Pa. Sup. 561 (1917).

⁹ *Ben Avon Borough v. Ohio Valley Water Co.*, 260 Pa. St. 289, 103 A. 744 (1918).

¹⁰ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 40 S. Ct. 557 (1920). Justice McReynolds, speaking for the Court, said, 253 U. S. at 289: "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. . . . 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 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."

¹¹ This proposition was laid down in the now famous case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 S. Ct. 67 (1908).

¹² Landis, "Administrative Policies and the Courts," 47 *YALE L. J.* 519 at 521 (1938); Buchanan, "The Ohio Valley Water Company Case and the Valuation of Railroads," 40 *HARV. L. REV.* 1033 at 1037 (1927).

¹³ See citations, *supra*, note 3.

¹⁴ 32 *ILL. L. REV.* 50 (1937); Duffy, "To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?" 25 *A. B. A. J.* 838 (1939).

basic propositions. The field is one in which hyper-technical legalistic, or syllogistic, reasoning is inadvisable. Practical considerations must not be held in abeyance. Courts are still groping for a workable theory which will determine the scope of judicial review in a particular case. The ultimate goal is efficient and just administration, and at the same time a proper balance between judicial power on the one hand and administrative power on the other.

That the Supreme Court has not been impervious to the practical considerations so important in the regulatory process is clear.¹⁵ Although the language in the *Ben Avon* case was broad enough to apply to any claim of confiscation, its actual application has been narrower. Where a valuation is made for tax purposes, there is no right to an independent determination of facts.¹⁶ Again, the taking of private property by eminent domain is only constitutional if a just compensation is paid; yet findings by an administrative body as to the value of property sought to be condemned are not subject to an independent determination by a reviewing court.¹⁷ In either of these cases an erroneous valuation would be equivalent to an unconstitutional taking of property.

This wide variation in the Supreme Court's holdings has been pointed out by critics of the *Ben Avon* doctrine.¹⁸ The soundness of the decision has also been attacked on practical grounds, such as undue prolongation of the rate-making process, high costs of litigation, and the burden on the judiciary.¹⁹ Elements of time and expense, though weighty, are not determinative if it can be shown that justice and fairness demand a court's independent judgment. It has been definitely settled that due process does not necessarily require judicial process.²⁰ Yet the notion that justice may be secured only at the hands of the

¹⁵ The Court sanctions certain summary actions by administrative officers. *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 S. Ct. 101 (1908).

¹⁶ *Helvering v. Rankin*, 295 U. S. 123, 55 S. Ct. 732 (1935). An excessive valuation means that the exaction is greater than the law authorizes.

¹⁷ *Crane v. Hahlo*, 258 U. S. 142, 42 S. Ct. 214 (1922); *Bauman v. Ross*, 167 U. S. 548, 17 S. Ct. 966 (1897). The same applies to valuation for tariff purposes, *Hilton v. Merritt*, 110 U. S. 97, 3 S. Ct. 548 (1884).

¹⁸ See particularly the dissenting opinion by Justice Brandeis in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 at 73, 56 S. Ct. 720 (1936). See also Landis, "Administrative Policies and the Courts," 47 *YALE L. J.* 519 at 524 (1938).

¹⁹ "A delay of ten or fifteen years, an expenditure of millions of dollars, constant interruption of administrative proceedings by appeals to the courts, have brought the regulatory process into contempt. The practice of appealing to the Court on every issue of fact relating to valuation has transformed what should be a business-like proceeding into a bitter, wrangling lawyers' battle." Landis, "Administrative Policies and the Courts," 47 *YALE L. J.* 519 at 524-525 (1938).

²⁰ *McMillen v. Anderson*, 95 U. S. 37 at 41 (1877); *United States v. Ju Toy*,

judiciary still prevails. Courts make the final decisions on questions of law because they are thought of as being experts on the law. Critics of the *Ben Avon* case make an analogous argument that if the administrative body is more expert at the valuation process its valuation should be final where supported by evidence and not arbitrary. As one writer put it:

“Whether the courts actually furnish security to liberty and property; whether administrative findings upon ‘facts’ such as valuation, which are matters of judgment, are more likely to be ‘wrong’ than the conclusions of courts; and whether the courts or administrative agencies are better equipped to give due weight to the interests of the community: these are the crucial questions. . . .”²¹

Whatever hope was entertained for narrowing the doctrine or eventually overruling it was shattered, for the time being at least, by *St. Joseph Stock Yards Co. v. United States*.²² Prior to that decision the *Ben Avon* case was cited approvingly in several opinions, its validity being assumed without discussion.²³ The *St. Joseph* case involved rates set by the secretary of agriculture under the Packers and Stockyards Act.²⁴ The Court, through the Chief Justice, took occasion to reiterate and clarify its position as to the necessity for an independent judicial determination of facts.²⁵ There was a vigorous dissent by Justice Brandeis wherein he pointed out the inconsistency between the majority’s holding and various other decisions where valuations were made by an administrative agency and no independent judicial determination was

198 U. S. 253 at 263, 25 S. Ct. 644 (1905).

²¹ Fuchs, “Concepts and Policies in Anglo-American Administrative Law Theory,” 47 *YALE L. J.* 538 at 566 (1938).

²² 298 U. S. 38, 56 S. Ct. 720 (1936).

²³ Among these were: *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U. S. 679, 43 S. Ct. 675 (1923); *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 44 S. Ct. 169 (1924); *Ohio Utilities Co. v. Ohio Public Utility Comm.*, 267 U. S. 359, 45 S. Ct. 259 (1925); *Lehigh Valley R. R. v. Board of Public Utility Comms.*, 278 U. S. 24, 49 S. Ct. 69 (1928).

²⁴ 42 Stat. L. 159 (1921), 7 U. S. C. (1934), § 181 et seq.

²⁵ The district court had denied that petitioner was entitled to an independent judgment. Although that court attempted to distinguish the *Ben Avon* case, the distinction made was unconvincing, and from the tenor of the decision one may gather that the court wanted to set the stage for the Supreme Court to overrule the *Ben Avon* doctrine. (D. C. Mo. 1935) 11 F. Supp. 322. The court said at 327: “Is there anything in the Constitution which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?”

required. A further argument for practicality was made.²⁶ "Responsibility is the great developer of men," and if ultimate responsibility is transferred to others it will tend to "emasculate or demoralize" the administrative agency.²⁷ "The supremacy of law," stated Justice Brandeis, "demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly."²⁸ Nevertheless, the majority adhered to the idea that rate-making is legislative and that what the legislature could not do directly it could not do indirectly, by means of an administrative agency; that the legislature could not preclude a court's independent determination by mere delegation of its duties to such agency.

But there may be a valid ground for different treatment of rate-making depending on whether the function was performed by the legislature itself or by an administrative body.²⁹ The procedure whereby the administrative body makes its findings is more judicial in nature and the body is more expert in its particular field. In fact, the Herculean task of determining the valuation of a large public utility is more adapted to treatment by a specially trained expert body—though called a "board" or "commission"—than by a judge who deals with all sorts of questions and who therefore naturally lacks such specialized training. The chief danger to preferring the findings of the former to that of the latter is that such a board or commission may be over-zealous and minimize the rights of private property as against service to the community. But the mere possibility of abuse should not carry sufficient weight to overcome the desirability of expert action. The Court in the *St. Joseph* case did make a substantial concession to expertness when it stated that there is a strong presumption in favor of the conclusions reached by a "legislative" agency after full hearing.³⁰

An independent judicial determination of fact may be based upon one of three distinct types of record: (1) a full trial *de novo*; (2) administrative record supplemented by the introduction of additional evi-

²⁶ Emphasis was placed on the enormous task of independent judicial review, on the great delay, and on the costs involved. See *supra*, note 19.

²⁷ *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 at 92, 56 S. Ct. 720 (1936).

²⁸ *Id.*, 298 U. S. at 84.

²⁹ 50 HARV. L. REV. 78 at 83 (1936).

³⁰ *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 at 54, 56 S. Ct. 720 (1936): "It follows, in the application of this principle, that as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne."

dence;³¹ and (3) the record of the administrative agency alone. A trial de novo would largely vitiate the efforts of the administrative body by reducing it to the status of a master in chancery. On the other hand, adoption of the third method above mentioned would prevent the holding back of pertinent evidence by the utility,³² and would make the final determination more expeditious and less costly from both the utility's and the government's standpoints. Limiting the independent determination solely to evidence introduced before the commission would effectively narrow the doctrine of the *Ben Avon* case. A court would decide the facts according to the weight of the evidence produced before the commission. An express overruling of the case would obligate the courts to uphold the facts if supported by substantial evidence, even if against the actual weight of the evidence. The difference between these two positions is not great and it becomes smaller when consideration is given to the view that the burden is on the public utility clearly to show confiscation.³³ But however desirable this limitation may be, it does not square with the Supreme Court's actual decisions.

In *Crowell v. Benson*,³⁴ for example, the party was held entitled to a full trial de novo on "jurisdictional facts." However, the decision was based on Article III of the Constitution, which defines the extent of judicial power, and not on the due process clause. On the other hand in *Tagg Bros. & Moorhead v. United States*³⁵ it was held that no new evidence is admissible where a rate order is attacked merely as unreasonable and not as confiscatory. Since the question was not squarely before the Court, it refused to decide whether the admission of additional evidence on the issue of confiscation was proper. Several years later the Supreme Court did state its views in *Baltimore & Ohio R. R. v. United States*,³⁶ a case involving an order of the Interstate Com-

³¹ Courts frequently refer to this second form as a trial de novo, and their classification consists, therefore, of two categories, instead of three as here suggested.

³² In *Manufacturers Ry. v. United States*, 246 U. S. 457 at 490, 38 S. Ct. 383 (1918), the Court said: "Certainly, where the Commission, after full hearing, has set aside a given rate . . . it should require a clear case to justify a court, upon evidence newly adduced but not in a proper sense newly discovered, in annulling the action of the Commission upon the ground that the same rate is so unreasonably low as to deprive the carrier of its constitutional right of compensation." The Court reiterated this in the *St. Joseph* case, 298 U. S. 38 at 53, showing its disapproval of withholding evidence.

³³ *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 at 53, 56 S. Ct. 720 (1936); *Dayton Power & Light Co. v. Ohio Public Utilities Comm.*, 292 U. S. 290 at 298, 54 S. Ct. 647 (1934).

³⁴ 285 U. S. 22, 52 S. Ct. 285 (1932).

³⁵ 280 U. S. 420, 50 S. Ct. 220 (1930).

³⁶ 298 U. S. 349, 56 S. Ct. 797 (1936).

merce Commission as to the division of joint rates. A majority of the Court held that the appellant company was entitled to introduce evidence in addition to that contained in the record of the commission.³⁷ The concurring opinion of four justices disagreed with the Court's conclusion on this issue; but being of the opinion that the issue of confiscation was not before the Court, the concurring justices refused to state what evidence would be admissible.

In view of the constant disagreement among the justices themselves, it is difficult to make any generalization on the present state of the law as to the finality of administrative findings on constitutional questions. As has been said by one writer, considering the division of the Court in the leading cases in the field, the ultimate decision is likely to reflect the minority's view rather than the majority's.³⁸ With the added consideration of the recent change in the Court's personnel, any indication of wavering from the established precedents must be carefully watched.

Going back to the question of the scope of review of constitutional fact questions, the recent case of *United Gas Public Service Co. v. Texas*³⁹ may be interpreted as an indication of a recession from the Ben Avon doctrine, although technically the decision is consistent with it. It was there decided that in determining the question of confiscation, the state has power to require issues of fact to be decided by a jury. After defining "fair value," the trial court had submitted to the jury the single issue whether the rate order was "unreasonable and unjust" to the company. Justices McReynolds and Butler, both of whom were of the majority in the *St. Joseph* and the *Baltimore & Ohio R. R.* cases, dissented on the ground that the public service corporation was denied an opportunity for an independent judicial determination, stating that "the proceedings in the state courts seem an empty show."⁴⁰ A majority of the Court felt that the Fourteenth Amendment does not compel a state to abandon "the time-honored method of resolving questions of fact by a jury."⁴¹ The difference is really one between an independent determination such as would be made in equity and one that would be made at law. Any argument that could have been made for a judge's superiority, because of his judicial training in weighing evidence, was therefore negated by this decision. Certainly as between a jury of laymen and a public service commission the question which possesses

³⁷ See in this respect *Manufacturers Ry. v. United States*, 246 U. S. 457, 38 S. Ct. 383 (1918), a case decided prior to the Ben Avon case.

³⁸ Landis, "Administrative Policies and the Courts," 47 *YALE L. J.* 519 at 529 (1938).

³⁹ 303 U. S. 123, 58 S. Ct. 483 (1938).

⁴⁰ 303 U. S. at 158.

⁴¹ 303 U. S. at 141.

greater proficiency and skill is hardly arguable.⁴² And from the general standpoint of fairness and justice there is no reason to prefer a jury of laymen to an administrative body.

In the recent case of *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*⁴³ the Supreme Court again faced the problem of the scope of judicial review. This case involved an oil production proration order of the Texas Railroad Commission, whereby each well was allowed to produce a stated percentage of its "hourly potential" capacity. Marginal wells were freed from this formula by being permitted to produce up to twenty barrels per well. The oil company argued that the proration formula used was discriminatory and constituted a confiscation of its property. It claimed that insufficient consideration was given to the depth of its reserves, and to the acreage upon which the respective wells were located. A further claim was made that the special allowance to marginal wells would tend to drain away the company's reserves. The district court held the evidence showed that as to this complainant the order was confiscatory, and, therefore, the commission was enjoined from enforcing the order.⁴⁴ The circuit court of appeals affirmed,⁴⁵ but the Supreme Court reversed, three justices dissenting. Speaking for the majority, Justice Frankfurter stated:

"Except where the jurisdiction rests, as it does not here, on diversity of citizenship, the only question open to a federal tribunal is whether the state action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercise of the state's regulatory power. A controversy like this always calls for fresh reminder that courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."⁴⁶

And again later Justice Frankfurter said:

"It is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."⁴⁷

⁴² True, the judge would still rule on admissibility of evidence and guide the proceedings in general, but this is relatively unimportant in cases of this type. The verdict of the jury could never be set aside in such case, because our basic assumption is that there is substantial evidence either way.

⁴³ 310 U. S. 573, 60 S. Ct. 1021 (1940).

⁴⁴ *Rowan & Nichols Oil Co. v. Railroad Commission of Texas*, (D. C. Tex. 1939) 28 F. Supp. 131.

⁴⁵ (C. C. A. 5th, 1939) 107 F. (2d) 70.

⁴⁶ 310 U. S. 573 at 580-581.

⁴⁷ *Id.* at 584.

Speaking for the Chief Justice, Justice McReynolds, and himself, Justice Roberts stated that the opinion of the majority announced principles with respect to review of administrative action contrary to those which had been long established. The proration order was challenged as confiscatory and not merely as unfair, and Justice Roberts pointed out that under such circumstances the Court could not abdicate its jurisdiction to test the order. In a consideration of the ramifications of the decision, particularly of its effect on the *Ben Avon* case, the alignment of the justices should not be overlooked. Significant is the fact that the newer members of the bench agreed with Justice Frankfurter, while three of the older justices strongly dissented. Stare decisis has not been too great a hurdle for the present Court to clear. Only a few months before this case was decided the Court took occasion to say that "Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies."⁴⁸

When viewed in the light of the *United Gas Co.* case, the *Rowan & Nichols Oil Co.* case shows a tendency to confine within narrow limits the *Ben Avon* doctrine. It is to be expected that the doctrine will be limited as much as possible, but whether it will be overruled is difficult to say. It is true that in the *Rowan & Nichols Oil Co.* case the oil company was denied an independent determination of the validity of the order.⁴⁹ But a proration order does not involve precisely the same considerations as a rate-making order. Proration involves even more technical and scientific competence than does valuation. So many varying factors—such as acreage, density, permeability, and sand thickness—must be accounted for that some discrimination is inevitable.⁵⁰ A rate order is based on the valuation of the particular utility's property and it is either confiscatory or not, regardless of another company's rates; whereas from its very nature, a proration order applies to many owners of wells. That conservation of oil is desirable is no longer arguable. The nature of the subject matter is one factor that should influence the Court in determining the extent of review.⁵¹

⁴⁸ Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U. S. 134 at 146, 60 S. Ct. 437 (1940).

⁴⁹ Nowhere in the majority opinion is "confiscation" mentioned; the opinion rather refers to "fairness" of the proration formula. However, since the oil company claimed confiscation, the exact terminology employed should not be important. Perhaps the omission of the word "confiscation" was deliberate, the Court not wishing to refer to the *Ben Avon* or the *St. Joseph* cases.

⁵⁰ Ely, "The Conservation of Oil," 51 HARV. L. REV. 1209 at 1227-1228 (1938).

⁵¹ The nature of the subject matter may require different treatment not merely because of the relative difficulties involved, but also because of the relative importance of the issues. One frequently cited illustration is that between exclusion of an alien and deportation. In case of exclusion an administrative finding that the individual is

Due process demands fairness and justice. What scope of review fairness and justice demands should depend on many factors: (1) the nature of the subject matter; (2) the relative independence of the administrative agency; (3) the procedural safeguards of the administrative process; (4) the administrative personnel; (5) the relative ability of courts and the administrative body to deal with the particular problem; and even (6) the magnitude of the investment.⁵² That the scope of review is actually being molded by some of these factors is evident from an examination of the decisions.⁵³ For instance, as stated above, a distinction is made between valuation for tax purposes and for rate-making purposes. Different administrative bodies are differently treated by the courts.⁵⁴ Perhaps the *Rowan & Nichols Oil Co.* case is merely a recognition of this fact. Certainly the emphasis in the opinion was all on the peculiar difficulties of proration. But even if the decision merely confirms the fact that the scope of review depends on factors such as the nature of the subject matter and the comparative qualifications of a court and an administrative body, still the *Ben Avon* doctrine is thereby narrowed. If this is the effect of the decision, the Court could in each case look into the circumstances and then determine what the scope of review ought to be.⁵⁵ Therefore, unless the situation presented is on all fours with the *Ben Avon* case, the possibility of denying an independent fact determination would exist.

The language used by Justice Frankfurter is very broad, and indications are toward further limitations on the doctrine of the *Ben Avon* case. Probably the case will be limited to its facts—to rate-making for large public utilities, where the investments are large and general regulations are stringent. The Court may desire to cling to the rule, confining itself to a gradual process of narrowing its effect.

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an alien is conclusive: *United States v. Ju Toy*, 198 U. S. 253, 25 S. Ct. 644 (1905); but when deportation is the issue, the party is entitled to an independent judicial determination as to whether he is a citizen of the United States. *Ng Fung Ho v. White*, 259 U. S. 276, 42 S. Ct. 492 (1922).

⁵² Davis, "To What Extent Should Decisions of Administrative Bodies Be Reviewable by the Courts?" 25 A. B. A. J. 770 (1939). The author suggests that perhaps the magnitude of the investment explains the *Ben Avon* case.

⁵³ Landis, "Administrative Policies and the Courts," 47 *YALE L. J.* 519 at 531 (1938).

⁵⁴ See Frankfurter, "Summation of the Cincinnati Conference on Functions and Procedure of Administrative Tribunals," 24 A. B. A. J. 282 at 285 (1938), where Judge Hough was quoted as saying: "When I have before me a case on review from the Interstate Commerce Commission, almost instinctively I want to sustain their order. When I have before me a case to review of the Federal Trade Commission, almost instinctively I want to reverse it."

⁵⁵ Such a theory would bring into conflict the advantages of flexibility from the court's viewpoint with the disadvantages of uncertainty from the litigant's viewpoint, as to the extent of judicial review.