

be to evaluate the ideas expressed, but rather to earmark partisan expressions and make an initial determination as to whether the requirements of representative presentation are being met.⁴²

JUDICIAL REVIEW OF INTERSTATE COMMERCE COMMISSION ORDERS DENYING REPARA- TIONS TO SHIPPERS*

WHEN a shipper sues a railroad for reparation of excessive freight payments,¹ Section 9 of the Interstate Commerce Act requires him to elect as his forum either the Interstate Commerce Commission or a federal district court.² Initial election of the district court, however, does not always spare

42. A suggestion along these lines was made to the FCC during the hearings on broadcaster editorializing by Professor Milton D. Stewart, formerly of Columbia University. Communication to the YALE LAW JOURNAL from Milton D. Stewart, dated Nov. 30, 1949, in Yale Law Library.

It is possible, of course, that the task of performing a content audit to determine whether the requirements of fairness are being met could be performed by a private body. The Commission on Freedom of the Press has recommended the establishment of such a body, privately subsidized and independent of both government and the communications industry, "to appraise and report annually upon the performance of the press." COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 100 (1947). With respect to radio in particular, the Commission also recommended the organization of local listening groups to evaluate radio's performance in the various communities. *Id.* at 104. In both cases the Commission apparently envisages one of the major responsibilities of these bodies as being the determination of whether there is adequate and representative treatment of public issues.

Doubtless such private bodies, responsibly managed, would be of great assistance to the FCC in enforcing the "fairness" formula. The fact, however, is that such groups do not now exist, and no significant movement to organize them is under way. Since the FCC directly bears the duty of insuring fairness, it would seem appropriate, if not obligatory, for the Commission to assume responsibility for establishing an auditing body vital to its performance of that duty. A body of expert content analysts formed and financed by the government, perhaps with formal independence from FCC supervision, seems the most feasible solution. In view of the Commission's broad powers to regulate in the public interest, this proposal can scarcely be challenged as uniquely exposing broadcasters to the threat of "governmental bias."

* *United States v. ICC*, 337 U.S. 426 (1949).

1. Excessive payments may arise, for example, when a shipper claims that the rate paid was unreasonable, *e.g.*, *Texas & P.R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), or different from that published in the carrier's tariff, *e.g.*, *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), or drawn from the wrong tariff, *e.g.*, *Standard Oil Co. v. United States*, 283 U.S. 235 (1931), or that discrimination has taken place in that other shippers have been charged lower rates, *e.g.*, *Pennsylvania R.R. v. International Coal Co.*, 230 U.S. 184 (1913).

2. "[A]ny person or persons claiming to be damaged by any common carrier . . .

the shipper the necessity for eventual resort to the Commission. When the suit is based on the unreasonableness of the carrier's rates or practices, the ICC cannot be ignored, since it alone can rule on a question of reasonableness.³ In such cases, it has always seemed that there were three procedures available. First, plaintiff-shipper could press his entire claim before the ICC. Second, he could seek a determination of the reasonableness issue before the ICC, and, if successful, bring his suit for reparation in the district court.⁴ Third, it was thought that he could initiate his action in the district court, which would stay the proceedings until a supplemental bill was filed setting forth a favorable ICC determination on reasonableness.⁵

may either make complaint to the Commission, . . . or may bring suit . . . for the recovery of damages . . . in any district court of the United States; . . . but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." 24 STAT. 382 (1887), 49 U.S.C. § 9 (1946).

3. The Commission must have "primary jurisdiction" to decide all issues of reasonableness in order to prevent the discrimination barred by the Interstate Commerce Act. For if different juries awarded reparations on the basis of their divergent estimates of what rates or practices are reasonable, one shipper could receive a larger award than others. *Morrisdale Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 304 (1913) (practices—discrimination in allotment of cars); *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247 (1913) (allowances—for shipper performance of railroad duties); *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (rates).

In some reparations cases there is no question for the Commission to determine. Thus, when the carrier's alleged action is *per se* a violation of the Act, the district court can decide the entire case. *E.g.*, *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) (deviation from published tariff rates). See Miller, *The Necessity for Preliminary Resort to the Interstate Commerce Commission*, 1 GEO. WASH. L. REV. 49 (1932); Note, 51 HARV. L. REV. 1251 (1938). Furthermore, a question for the ICC's primary jurisdiction no longer exists after one shipper has obtained a ruling that a particular rate or practice is unreasonable; another shipper similarly situated may use it as the basis for a court suit. See *Phillips Co. v. Grand Trunk W. Ry.*, 236 U.S. 662, 665 (1915).

4. See *Pennsylvania R.R. v. Clark Coal Co.*, 238 U.S. 456, 470-1 (1915); *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 257 (1913); *Stamps v. Chicago R.I. & P. Ry.*, 253 I.C.C. 557, 559 (1942).

5. An example of this procedure is found in *Southern Ry. v. Tift*, 206 U.S. 428 (1907). Cf. *Keith Ry. Equipment Co. v. Ass'n of American Railroads*, 268 I.C.C. 759 (1947); see *Thompson v. Texas M. Ry.*, 328 U.S. 134, 147-9 (1946).

Absent unusual circumstances it was not clear whether the district court could hold the original complaint. Compare *General American Tank Car Co. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940) (stay granted); *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 267 (1913), with *Armour & Co. v. Alton R.R.*, 111 F.2d 913, 918-9 (7th Cir. 1940) (stay denied), *affirmed without discussion of this point*, 312 U.S. 195 (1941). See *United States v. ICC*, 337 U.S. 426, 438 n.7, 439 (1949), discussed in note 17 *infra*.

If the shipper fails to first file a complaint in the court, he risks not obtaining a Commission ruling before the two-year statute of limitations in the court has run. 43 STAT. 633 (1925), as amended, 54 STAT. 913 (1940), 49 U.S.C. § 16(3) (1946). Thus, the present case was before the Commission for more than three years. Trans-

Until last year, a shipper who used either of the two circuitous procedures would receive substantial benefits: he retained not only his right to appeal from the district court,⁶ but, more important, his opportunity for judicial review from a Commission denial of the requisite declaratory order on reasonableness.⁷ If, on the other hand, he tried to escape this procedural merry-go-round by asking the Commission to award reparations directly,⁸ the

cript of Record, pp. 72-3, 144, *United States v. ICC*, 337 U.S. 426 (1949). To obviate this practical difficulty, the Commission has recommended that the shipper first institute his action in the district court. *Bell Potato Chip Co. v. Aberdeen Truck Line*, 43 M.C.C. 337, 343 (1944). See *Morrisdale Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 304, 314 (1913).

6. 28 U.S.C. § 1291 (Supp. 1949). This is the usual appellate procedure from district court to court of appeals. The appealable issues will be narrow. See note 8 *infra*.

7. *El Dorado Oil Works v. United States*, 328 U.S. 12 (1946). This has only been true since *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939), which overruled the "negative order" doctrine. Under this doctrine orders which denied relief to the complainant before the Commission were, with few exceptions, not subject to judicial review. *Procter & Gamble v. United States*, 225 U.S. 282 (1912) (rate changes for future); *Standard Oil Co. v. United States*, 283 U.S. 235, 238 (1931) (reparations; alternative holding). See 50 CONG. REC. 4531-8, 4543-4 (1913); 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 406-17 (1931).

8. This has been the shipper's regular course of procedure, evidently because the ICC can render the later court suit superfluous by simply adding to its findings a single paragraph awarding reparations. 24 STAT. 382 (1887), 49 U.S.C. § 9 (1946). If the shipper chooses the court in cases involving reasonableness of rates, the ICC still must find that the rate charged was unreasonable and determine what the reasonable rate would have been. *Texas & P.R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (by implication); see *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 427-8 (1915). Since the shipper need not prove actual damages, *Southern P.R.R. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918), the court would then determine the amount of reparations by applying the difference between the rates to the amount of goods shipped. Since this is little more than a mathematical computation, few carriers would refuse to settle after loss of the reasonableness question before the Commission.

In cases bottomed on discrimination which contain an issue of reasonableness, the ICC must find that discrimination did in fact exist. *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247 (1913). When the court later determines the amount of reparation, it has a larger function than mere mathematics since the shipper must prove that he was actually harmed. *ICC v. United States ex rel. Campbell*, 289 U.S. 385, 389-90 (1933); cf. *Pennsylvania R.R. v. International Coal Co.*, 230 U.S. 184 (1913). But the Commission can decide this issue, too, cf. *Louisville & N.R.R. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916) (ICC has full power to award whatever damages are due), and it has regularly done so in the past, as the shipper usually elects to have the Commission award reparations. See 30 ICC ANN. REP. 75-6 (1916). The court suit is again unnecessary.

For these reasons shippers have rarely chosen the district court; in most cases in which they have, the issue within the Commission's primary jurisdiction and requiring the circuitous procedure has been raised by the carrier as a defense. *E.g.*, *General American Tank Car Co. v. El Dorado Terminal Co.*, 308 U.S. 422 (1940); see *United States v. ICC*, 337 U.S. 426, 464 n.11 (1949) (dissenting opinion).

shipper was severely penalized: he was held to have elected the ICC as his final forum and thereby to have lost all right to judicial review.⁹

In *United States v. ICC*¹⁰ the Supreme Court upset this confusing pattern of administrative-judicial relationships; judicial review was granted to a shipper even though he had elected the Commission as his forum. The United States, aggrieved by allegedly unreasonable practices of several railroads transporting munitions for the Army during the war,¹¹ asked the ICC to award reparations. Finding for the carriers, the Commission entered a negative order dismissing the complaint.¹² Despite the supposed bar to judicial review, the Government then requested a three-judge district court to enjoin enforcement of the order.¹³ The court dismissed the action for want of jurisdiction, basing its decision in part on the standard construction of Section 9—since the shipper is denied a “right to pursue” his remedy in both forums, an election of the ICC as the original forum also imports an election not to turn to the courts for judicial review.¹⁴

In reversing on appeal, the Supreme Court offered a fresh interpretation:

9. *Ashland Coal & Ice Co. v. United States*, 61 F. Supp. 708 (E.D. Va. 1945), *aff'd per curiam*, 325 U.S. 840 (1945); *Brady v. United States*, 43 F.2d 847 (N.D.W. Va. 1930) (alternative holding), *aff'd per curiam*, 283 U.S. 804 (1931); *Standard Oil Co. v. United States*, 283 U.S. 235, 239-40 (1931) (alternative holding); *see Hillsdale Coal & Coke Co. v. Pennsylvania R.R.*, 237 Fed. 272, 274 (E.D. Pa. 1916) (excellent summary of procedural possibilities open to shipper). *But cf. Mitchell v. United States*, 313 U.S. 80, 92-3 (1941). Although the *Standard Oil* and *Brady* cases depended in part on the now-defunct negative order doctrine, *see note 7 supra*, the decision in the *Ashland* case made clear that this was not crucial to the result. *See Rochester Telephone Co. v. United States*, 307 U.S. 125, 140 n.23 (1939). Moreover, although the *Standard Oil* and *Brady* cases contained no question of reasonableness, the *Ashland* holding rejected this as a ground for distinction. *See Reply of Appellants to Appellees' Motion to Affirm Judgment*, pp. 4-8, *Ashland Coal & Ice Co. v. United States, supra*. *But see Texas & P.R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907).

10. 337 U.S. 426 (1949).

11. The Government sought reparation for performing certain transportation services for the carriers at the Norfolk rail-ship transshipment point. Since the reasonableness of a practice—refusal to grant rate allowances for the services—was in question, neither the ICC nor the carriers seriously contested the existence of primary jurisdiction. *Brief for Appellees*, pp. 74-5; *Brief for Interveners*, pp. 57-62; *cf. Armour & Co. v. Alton R.R.*, 312 U.S. 195 (1941).

12. *United States v. Aberdeen & Rockfish R.R.*, 269 I.C.C. 141 (1947).

13. Under 28 U.S.C. §§ 1336, 2321, 2325 (Supp. 1949), formerly 28 U.S.C. §§ 41(28), 44, 47 (1946).

14. 78 F. Supp. 580 (D.D.C. 1948). The principal ground for the district court's dismissal was a want of justiciable controversy, since the United States was suing itself. The Supreme Court, brushing aside this objection, recognized the dispute as “traditionally justiciable.” *United States v. ICC*, 337 U.S. 426, 430 (1949). *See notes, 49 Col. L. Rev.* 640 (1949), 62 *HARV. L. Rev.* 1050 (1949), 27 *N.C.L. Rev.* 345 (1949). After this phase of the suit was dismissed, the Government stood in the same position as any private shipper, and the doctrine of the case has been so applied. *Great Lakes Steel Corp. v. United States*, 337 U.S. 952 (1949).

Section 9 only prohibits the "initiation" in the district court of totally new suits demanding reparations; it does not, therefore, preclude judicial review of Commission orders.¹⁵ The requirement in Section 9 of an election of remedy is thus reduced¹⁶ to a mere prohibition against instituting simultaneous actions in both forums.¹⁷ Under this interpretation Section 9 has no practical effect. Even if there were no Section 9, shippers would not use both the district court and the Commission. When reasonableness is in issue, the court must refer the shipper to the ICC,¹⁸ where a reparations suit would already be pending. There the reparations issue would be decided together with reasonableness, and this decision would be *res judicata* in the district court.¹⁹

15. *United States v. ICC*, 337 U.S. 426, 434 (1949). The Government's court action was not regarded as a "new" suit since in an injunction proceeding the shipper only asks the court to enjoin the order and remand the case to the Commission; he does not ask for damages in the court.

The Court's interpretation of Section 9 finds some warrant in the section's scanty legislative history. According to Senator Cullom, sponsor of the Interstate Commerce Act, the shipper's common-law remedies and those before the Commission co-exist, with Section 9 merely prohibiting simultaneous suits. 17 CONG. REC. 3471 (1886). *But cf.* *Texas & P.R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). However, no specific mention was made of judicial review.

16. The Court purported to leave the existing pattern of review undisturbed, but in practical effect it overruled *Ashland Coal & Ice Co. v. United States*, 61 F. Supp. 708 (E.D. Va. 1945), *aff'd per curiam*, 325 U.S. 840 (1945); *George Allison & Co. v. United States*, 12 F. Supp. 862 (S.D.N.Y.), *aff'd per curiam*, 296 U.S. 546 (1935); *Brady v. United States*, 43 F.2d 847 (N.D.W. Va. 1930), *aff'd per curiam*, 283 U.S. 804 (1931); and *Standard Oil Co. v. United States*, 283 U.S. 235 (1931). *See United States v. ICC*, 337 U.S. 426, 444-6, 467-71 (1949) (dissenting opinion), and page 771 *supra*.

17. Apparently as an attempt to buttress its holding, the Court pointed to the fact that on the question of reasonableness all roads lead to the ICC. It concluded, therefore, that the Government had not had sufficient choice of forum to constitute an election under Section 9. *United States v. ICC*, 337 U.S. 426, 435-9 (1949). But it is not clear just what the Court meant by this conclusion. It could have meant that contrary to past views, see cases cited in notes 4 and 5 *supra*, the entire claim must be prosecuted before the ICC whenever the claim contains an issue which the ICC alone can determine. If so, there is obviously no choice of forum in such cases. However, in cases where there is no issue which the ICC alone can decide, a choice still remains. Thus the rationale pitched on absence of choice of forum would leave a whole class of ICC reparations orders unreviewable, a result which the main holding of the case seems clearly to negate. See note 15 *supra*. Moreover, no warrant for such a distinction is to be found in the statute. 24 STAT. 382 (1887), 49 U.S.C. § 9 (1946); note 2 *supra*.

On the other hand, the Court may have meant merely that a shipper must go first to the ICC to obtain a determination on reasonableness, and then to the district court if he so desires. If so, the shipper has a real choice of forum in all cases. But this would mean no judicial review in any case where the shipper selected the ICC to hear his entire case, a result precisely contrary to the main holding of the case.

18. See note 3 *supra*.

19. When the ICC decides reparations cases it sits in a quasi-judicial capacity. *See Baer Bros. v. Denver & R. G. Ry.*, 233 U.S. 479, 486 (1914); *ICC v. United States ex rel.*

Although the Court has thus destroyed the practical effect of Section 9, its decision brings to an end the unfortunate use of that section to prevent a shipper from obtaining judicial review when he chooses the Commission. This procedural plight which had plagued the shipper was not shared by the defendant carrier, who has always retained full opportunity for review²³ not only on the damage issue²¹ but also on the Commission's determination of reasonableness.²² Moreover, the old interpretation put a premium on circuitous, piecemeal litigation because the shipper could obtain review only by jockeying back and forth between court and Commission.²³ And

Campbell, 289 U.S. 385, 388 (1933). A decision in such a capacity is *res judicata*. Landreth v. Wabash Ry., 153 F.2d 98 (7th Cir. 1946); Happy Coal Co. v. Hartbarger, 251 Ky. 779, 65 S.W.2d 977 (1933); *cf.* Arizona Grocery Co. v. Atchison T. & S.F. Ry., 284 U.S. 370 (1932). Moreover, the shipper cannot save out particular items of damage for a later court suit. Louisville & N.R.R. v. Ohio Valley Tie Co., 242 U.S. 288 (1916).

When reasonableness is not in issue, a fruitless race to judgment might ensue, if simultaneous actions were permitted; *res judicata* bars further action in one forum after judgment in the other. See McClellan v. Carland, 217 U.S. 268, 281-2 (1910).

20. The Court drew heavily on this general argument of fairness. United States v. ICC, 337 U.S. 426, 435 (1949). See McLean Lumber Co. v. United States, 237 Fed. 460, 466 (E.D. Tenn. 1916). Compare Railway Express Agency v. United States, 6 F. Supp. 249 (S.D.N.Y. 1934) (carrier granted review), with George Allison & Co. v. United States, 12 F. Supp. 862 (S.D.N.Y.), *aff'd per curiam*, 296 U.S. 546, (1935) (shipper denied review of same ICC order). In the case of orders setting future rates both the shipper, *e.g.*, Youngstown Sheet & Tube Co. v. United States, 295 U.S. 476, 479 (1935), and the carrier, *e.g.*, Hudson & M.R.R. v. United States, 313 U.S. 98 (1941), can obtain review.

21. The Commission's findings are only *prima facie* evidence and the carrier may rebut them in the district court with new evidence. 34 STAT. 590 (1906), as amended, 49 U.S.C. § 16(2) (1946). Meeker v. Lehigh Valley R.R., 236 U.S. 412, 430 (1915); Willamette Iron & Steel Works v. Baltimore & O. Ry., 29 F.2d 80 (9th Cir. 1928).

22. The scope of review here is confined to examination of the Commission's jurisdiction and the arbitrariness of its determination. Penn Anthracite Mining Co. v. Delaware & H. Ry., 16 F. Supp. 732 (M.D. Pa. 1936), *aff'd*, 91 F.2d 634 (3d Cir.), *cert. denied*, 302 U.S. 756 (1937); Glenn's Falls Portland Cement Co. v. Delaware & H. Ry., 65 F.2d 490, 494 (2d Cir. 1933). On the scope of review generally, see ICC v. Illinois C.R.R., 215 U.S. 452, 470 (1910); ICC v. Union Pacific R.R., 222 U.S. 541, 547 (1912); 2 SHEARFMAN, *op. cit. supra* note 7, at 385-92 (1931); ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 87-92 (1941).

23. This interpretation forced the shipper to choose between judicial review and the cheap and easy remedy before the Commission which Congress intended to provide for all shippers in reparations actions. See SEN. REP. No. 46, 49th Cong., 1st Sess. 214 (1886); 30 ICC ANN. REP. 75 (1916). However, under the Motor Carrier Act the shipper must follow the expensive procedure in every case, since the ICC has no power to award reparations. See Bell Potato Chip Co. v. Aberdeen Truck Lines, 43 M.C.C. 337, 342-3 (1944).

The Commission itself, in an analogous situation, has refused to award reparations on the ground that to do so would encourage piecemeal litigation. A shipper who has not requested reparations in his original suit cannot bring a second case demanding them. 49 CODE FED. REGS. § 1.32(b) (Cum. Supp. 1944); see Virginia-Carolina Chemical Corp. v. Akron, C. & Y. Ry., 248 I.C.C. 519 (1942); Nelson Fuel Co. v. Chesapeake & O. Ry., 120 I.C.C. 723, 727-8 (1927).

the unwary, by requesting the Commission to award reparation, lost their rights to review on a mere point of pleading.²⁴

Once the Supreme Court had decided to grant review to the shipper, it had next to consider whether a one- or three-judge court would entertain the Government's suit for an injunction. In the lower court, the United States had applied for and received a three-judge tribunal. It was this tribunal which had dismissed the suit on jurisdictional grounds. In reversing this dismissal, the Supreme Court also reversed the lower court's provision for a three-judge court and remanded the case to the one-judge forum.²⁵

Under a strict construction of the statute, a three-judge court was in order: while one-judge courts have jurisdiction to enforce ICC orders commanding the affirmative payment of money, actions to enjoin Commission orders must be heard by a three-judge bench.²⁶ But Congress, according to the legislative history, intended this "extraordinary" three-judge expedient to be used only in cases of grave "public importance."²⁷ The formalistic test laid down by the terms of the statute would have compelled a three-judge court.²⁸ But the Supreme Court ignored the statute and relied instead on the factual test of "public importance."²⁹ The Government's

24. Cases cited note 16 *supra*. Furthermore, the Commission's order should be reviewable because it settles finally the rights and duties of adverse parties in a substantial dispute. Cf. *El Dorado Oil Works v. United States*, 328 U.S. 12, 18-19 (1946); *Rochester Telephone Co. v. United States*, 307 U.S. 125 (1939). And, while the Administrative Procedure Act does not expand the shipper's review, see 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1946), the Court's decision is in harmony with congressional intent to make administrative determinations reviewable wherever possible. See H.R. REP. No. 1980, 79th Cong., 2d Sess. 41 (1946). Cf. *Shields v. Utah I.C.R.R.*, 305 U.S. 177, 183-5 (1938).

25. *United States v. ICC*, 337 U.S. 426, 443-4 (1949).

26. 28 U.S.C. §§ 1336, 2321, 2325 (Supp. 1949), formerly 28 U.S.C. §§ 41 (27) and (28), 44, 47 (1946). Proceedings to enforce orders not requiring payment of money, *i.e.* with future effects, are also placed in the three-judge court. *Id.* § 2321.

27. *United States v. Griffin*, 303 U.S. 226, 232-3 (1938); see *Brady v. United States*, 43 F.2d 847, 851 (N.D.W. Va. 1930), *aff'd per curiam*, 283 U.S. 804 (1931). Compare SEN. REP. No. 355, 61st Cong., 2d Sess. 2 (1910), with 36 STAT. 539 (1910), 28 U.S.C. § 2321 (Supp. 1949). See note 30 *infra*.

28. "An . . . injunction restraining the enforcement . . . of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges. . . ." 28 U.S.C. § 2325 (Supp. 1949), formerly 28 U.S.C. § 47 (1946).

29. There two tests fail to meet each other logically and often do not coincide to give the same jurisdictional answer. The *Brady* cases, *infra*, are an excellent example. The Commission awarded Brady only a small part of his claimed reparation; he then filed a petition in the three-judge court to set aside the award. This petition was dismissed as not being within the class of cases "intended" to be heard by a three-judge court—factually, it was not of public importance. *Brady v. United States*, 43 F.2d 847, 851 (N.D.W. Va. 1930) (alternative holding), *aff'd per curiam*, 283 U.S. 804 (1931). Because he could not ask the one-judge court to enjoin the ICC order, 28 U.S.C. § 47 (1946), now 28 U.S.C. § 2325 (Supp. 1949), Brady brought a suit in that court to enforce the partial award; he also asked the court to increase the reparations allowed. But review was again denied: on the statutory level, the one-judge court can only enforce the partial

action, a suit to determine liability for past, private wrongs, was not factually of great moment to the general public.²⁹ Consequently, one-judge review was decreed.

Compelling arguments support this curtailment of the use of three-judge courts, and, consonantly, statutes providing for them have always been strictly construed.³¹ Three-judge procedure has two distinctive features, both designed for cases of extreme importance. First, the special tribunal can give more careful consideration to the issues. Second, by appeal as of right to the Supreme Court, important matters can be settled quickly.³² Reparation actions, in contrast to suits which will settle future rates or practices, are not sufficiently imperative³³ to warrant calling judges from their regular duties to staff the three-judge courts.³⁴ Nor do they warrant the streamlined method of appeal which the three-judge court provides.³⁵

In light of the comparative unimportance of reparation suits the Supreme

award and may not alter the ICC findings to the shipper's advantage. *Baltimore & O.R.R. v. Brady*, 288 U.S. 448, 457-8 (1933) (alternative holding).

In the past the lack of correspondence between the statute and legislative intent has not been crucial: Section 9 of the Interstate Commerce Act barred review in either court (see pages 772-3 and note 9 *supra*), except when the shipper had merely sought a declaratory order on reasonableness from the Commission—a situation which has rarely arisen. *El Dorado Oil Works v. United States*, 328 U.S. 12 (1946) (problem of one-*versus* three-judge jurisdiction not expressly considered). But the reinterpretation of Section 9 in *United States v. ICC*, 337 U.S. 426 (1949), requires that one of the two courts take jurisdiction and thus brings the conflict into sharp focus.

30. In contrast to suits determining future railroad rates or practices in which the whole business community is interested. See SEN. REP. No. 355, 61st Cong., 2d Sess. 1-2, 6-7 (1910); SEN. REP. No. 1242, 59th Cong., 1st Sess. 2, 4 (1906); *ibid.*, pt. 2, at 2. The Government in the instant case stands in the position of a private shipper. See note 14 *supra*.

31. *E.g.*, *United States v. Griffin*, 303 U.S. 226 (1938) (dismissing review of ICC order in three-judge court); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949) (dismissing charge of unconstitutionality of Hawaiian statute); *Phillips v. United States*, 312 U.S. 246 (1941) (dismissing charge of unconstitutionality of action by state official).

32. See *United States v. Griffin*, 303 U.S. 226, 233 (1938); *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10, 14 (1930). See also 42 CONG. REC. 4846-7 (1908). If needless jurisdictional argument and error occur, as in the instant case, the purpose of speed is defeated. See MOORE, JUDICIAL CODE COMMENTARY 51-4, 549-50 (1949); Beruffey, *The Three Judge Federal Court*, 15 ROCKY MOUNT. L. REV. 64, 79 (1942).

33. See note 30 *supra*.

34. One of the judges must come from the circuit bench; the other two may be district judges. 28 U.S.C. § 2284 (Supp. 1949). See *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 375 (1949); *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934). See 45 CONG. REC. 7254-5 (1910).

35. See *Moore v. Fidelity & Deposit Co.*, 272 U.S. 317, 321 (1926). Appeal as of right is granted by 28 U.S.C. § 1253 (Supp. 1949). See MOORE, *op. cit. supra* note 32, at 481-6, 540-50.

In the eight-year period, 1938-45, the Supreme Court heard a total of 86 ICC cases on direct appeal from three-judge district courts. 14 I.C.C. PRACT. J. 560 (1947). Since many of these were unimportant cases, inadequate per curiam judgments have obtained the force of Supreme Court precedent.

Court contrived a reasonable solution by placing review in the one-judge court. It could do so, however, only by denying meaning to the plain words of the Judicial Code.³⁶ Moreover, the supreme factor of decision is now "public importance"—a concept so difficult to apply that it can hardly hope to reduce needless jurisdictional argument or simplify the choice of court for confused litigants.³⁷

The solution lies not in the kind of judicial ingenuity practised by the Court in the instant case, but rather in legislative destruction of the troublesome distinctions between one- and three-judge courts.³⁸ All review of ICC

36. See note 28 *supra*.

37. Only three years earlier, the Supreme Court approved three-judge court review of an ICC negative declaratory order on reasonableness in a reparations case. *El Dorado Oil Works v. United States*, 328 U.S. 12 (1946). Presumably the doctrine of *United States v. ICC*, 337 U.S. 426 (1949), would now place such review in the one-judge court. But the Supreme Court did not settle the question by distinguishing or overruling the *El Dorado* case.

For a supreme example of confusion in review procedures in ICC cases occasioned by "public importance," see *United States v. Griffin*, 303 U.S. 226 (1938) and *United States v. Jones*, 336 U.S. 641 (1949) (connected cases).

38. When this distinction between courts was originally drawn, Congress desired to place only important review actions in the three-judge court. See SEN. REP. NO. 355, 61st Cong., 2d Sess. 1-2 (1910). At that time affirmative orders with future effects were the only ones reviewable by injunction suit, and, since these were considered important, Congress placed jurisdiction to hear all injunction actions in the three-judge court. 36 STAT. 539 (1910), as amended, 28 U.S.C. § 2321 (Supp. 1949). Orders affirmatively awarding reparations (considered unimportant) were reviewable for the carriers in enforcement actions in the one-judge court. See notes 21 and 22 *supra*; *cf.* *Baltimore & O. R.R. v. Brady*, 288 U.S. 448 (1933). Negative orders on both future questions and reparations were at that time not reviewable at all. See note 7 *supra*.

This congressional plan was first breached in 1939 when the negative order doctrine was overruled. *Rochester Telephone Co. v. United States*, 307 U.S. 125 (1939). Negative orders with future effects, which properly can be considered of public importance, then became reviewable in the three-judge court. *E.g.*, *ICC v. Hoboken M.R.R.*, 320 U.S. 368, 370 (1943). But three-judge review was also opened for publicly-unimportant declaratory orders on past unreasonableness in reparations cases. *El Dorado Oil Works v. United States*, 328 U.S. 12 (1946).

The reinterpretation of Section 9 of the Interstate Commerce Act in *United States v. ICC*, 337 U.S. 426 (1949), meant that the much greater number of factually unimportant cases in which the shipper seeks an ICC award of reparations would, under the statute, become reviewable in the three-judge court. It was this result that the Supreme Court avoided by ignoring the statute and placing such review in the one-judge court.

The congressional line between important and unimportant cases could be redrawn by legislative declaration that only orders with future effects will receive three-judge treatment. But this would be unwise because simultaneous review of different facets of the same case in different courts would become possible in the many cases in which the shipper seeks both reparations for past overpayments and rate changes for the future. *E.g.*, *George Allison & Co. v. United States*, 12 F. Supp. 862 (S.D.N.Y.), *aff'd per curiam*, 296 U.S. 546 (1935). In *United States v. ICC*, *supra*, the Government originally sought both reparations and future changes (Transcript of Record, p. 150-1), but the latter issue became moot at the end of the war. *United States v. Aberdeen & R. R.R.*, 269 I.C.C. 141, 147 (1947).

orders should be placed in a single court—the court of appeals.³⁹ This would obliterate the cloudy lines between differing procedures, yet retain careful three-judge consideration and speedy final judgment for important cases.⁴⁰

39. Review of administrative orders in the courts of appeals is the standard modern procedural device. See Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1088–9 (1940). ICC practitioners, however, oppose such a change on the grounds that ICC orders are peculiarly important (but see page 777 and note 30 *supra*) and that the present procedure has worked well (but see pages 777–8 and note 29 *supra*). Curry, *Proposed Legislation Imperils Long Established and Highly Important Statutory Procedure for Review of I.C.C. Orders*, 14 I.C.C. PRACT. J. 380 (1947); Statements of Harry C. Ames and Commissioner Aitchison to the House Judiciary Committee, reprinted in 14 I.C.C. PRACT. J. 549, 554 (1947).

A bill, introduced into the Eightieth Congress, would have granted jurisdiction to the courts of appeals to hear injunction actions against certain listed ICC orders. H.R. 1468, 80th Cong., 1st Sess. § 2 (1947). This bill would not have affected the present scheme for review in any enforcement proceedings. H.R. REP. No. 1619, 80th Cong., 2nd Sess., reprinted in 15 I.C.C. PRACT. J. 533 (1948). To the extent that court of appeals jurisdiction and certiorari would have replaced the three-judge court and direct appeal, the bill was good. H.R. 1468, *supra*, § 10. But in adding a third review forum, it would have opened the possibility of greater confusion.

Moreover, the bill would not have changed the provisions for review in any actions between private parties, including reparations. See H.R. REP. No. 1619, *supra*, 15 I.C.C. PRACT. J. 533, 536 (1948). As a result the difficult line between one- and three-judge jurisdiction remained.

Congress now might well consider the abolition of the district court as an alternative original forum in which the shipper may bring a reparations action. 24 STAT. 382 (1887), 49 U.S.C. § 9 (1946). The shipper now retains his right to judicial review without following the circuitous procedure necessary in primary jurisdiction cases to elect the court. *United States v. ICC*, 337 U.S. 426 (1949). See note 8 *supra*.

40. See note 32 *supra*. Judicial dislocation in less vital cases would also be obviated. See notes 34 and 35 *supra*.

Actions to enforce ICC orders for the payment of money are presently brought in the one-judge district court. Since the Commission's findings, except on questions within its primary jurisdiction, are only prima facie evidence, see notes 21 and 22 *supra*, the defendant-carrier may obtain a jury trial. The proposed placement of review in the courts of appeals, therefore, raises the question of whether or not such a solution infringes the carrier's constitutional right to jury trial. See *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915); see 5 ICC ANN. REP. 10 (1891). *But cf.* *Southern Ry. v. Tift*, 206 U.S. 428, 438 (1907) (objection of invasion of right to jury trial dismissed without explanation).

In all reparation cases requiring preliminary resort to the Commission, the Interstate Commerce Act has by implication abrogated the common-law actions. *Texas & P. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (rates); *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247 (1913) (discriminatory practice). However, in cases not requiring Commission action the statute formally preserves common-law rights to sue. 24 STAT. 387 (1887), 49 U.S.C. § 22 (1946); *Pennsylvania R.R. v. Sonman Coal Co.*, 242 U.S. 120 (1916). But the common law action has been completely altered. The rate charged need not now be proven unreasonable; the shipper has only to show a deviation from the published tariff rate. *E.g.*, *Pennsylvania R.R. v. International Coal Co.*, 230 U.S. 184 (1913). Moreover, in actions based on discrimination when the rate was not unreasonable, the existence of a right to sue at common law was so unclear that in both England and the United States legislation was necessary to make the action effective.