

HOW SHALL THE RAILROAD RATE STRUCTURE BE REGULATED IN THE PUBLIC INTEREST?*

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I

OF POLITICAL FOOTBALLS, THE *Georgia* CASE, AND THE *Class Rate* CASE

The general subject of this symposium, interterritorial freight rates, has long been a political football. Whenever a southern politician has been unable to find a real political issue to present to the public, he has had only to pick up this particular football and run with it, to the loud applause of his self-supplied rooting section, to gain wide acclaim and support.

The late Commissioner Eastman adverted to this political aspect of the problem in his dissenting opinion in *Alabama v. New York Central Railroad Company*, where he said:

The Commission is called upon to decide this case, on the record, after it has in effect been decided, in advance and without regard to the record, by many men in public life, of high and low degree, who have freely proclaimed their views on what they conceive to be the basic issues. Their thesis has been that the section of our country generally known as the South is our "Economic Problem No. 1," because, among other things, it is low in industrial development, and that a major reason for this condition has been and is an unfair adjustment of freight rates which has favored the producers of the North and burdened those of the South. It has become a political issue. While, however, the South gave birth to the issue, public representatives of the West now cry out against like supposed oppression, and public representatives of the North or East, as it is variously called, have risen in defense of their section.

Under such conditions, it is not easy to decide the case without being influenced by emotional reactions, one way or the other, which should play no part in the decision.¹

The last governor of Georgia to hold office before that state tried the novel experiment of having two governors at the same time, the Honorable Ellis Arnall, ran himself into national prominence carrying this political football in his broken-field

*The subject of this paper, under a slightly different tentative title, had been assigned to and accepted by Mr. Elmer A. Smith, Senior General Attorney of the Illinois Central System, but he was prevented by illness from writing the paper. At a very late date, and with a minimum of time for preparation, Mr. Alderman complied with an urgent request that he write the paper. [Ed.]

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¹235 I.C.C. 255, 333 (1939). See the dissenting opinion of Mr. Justice Jackson in *New York v. United States* (the *Class Rate* case), 67 Sup. Ct. 1207 (1947).

run before the Supreme Court of the United States, in his triple-threat capacity as client, advocate, and press agent, in the *Georgia* case.²

Immediately after the arguments on the question whether Georgia should be granted leave to file its bill of complaint in the original jurisdiction of the Supreme Court in that case, Governor Arnall, who made the argument for the State of Georgia, predicted through the press, and quite accurately, the five-to-four division by the Court which followed two months and twenty-two days later, thus demonstrating his prowess as press agent and prophet.³ He topped off that political touch-down with several brilliant appearances on "Information, Please" and with several ostentatiously recondite articles in the *Atlantic Monthly*, and now he is off on a country-wide speaking tour, and obviously "going places," still carrying the same political football of alleged discrimination against Georgia and the South in inter-territorial freight rates.

All these athletics and histrionics completely overlook the fact that the Interstate Commerce Commission, acting pursuant to its exclusive, original, regulatory powers under the Interstate Commerce Act, has entirely wiped out the very disparity in levels of interterritorial class rates⁴ which was the sole basis of the complaint of the State of Georgia in that case, and that the Supreme Court has affirmed that action by the Commission, over the violent protest of the eastern states and of the western railroads.⁵

It is pertinent to point out that the political issue with (or on) which Governor Arnall is running is now a moot-ball as well as a football. Also, the positions taken by the states of the North and East and by the railroads of the West, in the court review of the Commission's order in the *Class Rate* case, demonstrate, as Commissioner Eastman had suggested in the above quotation, that the South has no more of a monopoly of talent in the field of political football than it has in the field of intercollegiate football. We may have more flashy individual runners, but certainly no monopoly of talent. As in so many human problems, it is largely a question of whose ox is goared, if the metaphor be changed, or of whose goal line is being crossed, if the metaphor be preserved.

At least, those representing the states of the North and East and the railroads of the West in their assaults on the Commission's equalizing order in the *Class Rate* case followed the traditional and statutory method of appearing before the Commission and then, when aggrieved by its decision, of seeking three-judge-court review of its order, with ultimate appellate review by the Supreme Court, and did not seek, as did the State of Georgia and the Department of Justice of the United States, as

² *Georgia v. Pennsylvania R.R.*, 324 U. S. 439 (1945).

³ Incidentally, in his victory in the first stage of that *cause célèbre*, Governor Arnall ran roughshod over the author of this paper, whose argument against the jurisdiction of the Court to entertain Georgia's bill, made on behalf of the southern railroad defendants, was rejected by the majority of five and was followed only by the late Chief Justice Stone, and by Associate Justices Roberts, Frankfurter and Jackson.

⁴ *Class Rate Investigation, 1939, Consolidated Freight Classification*, 262 I.C.C. 447 (1945).

⁵ *New York v. United States*, 67 Sup. Ct. 1207 (1947).

amici curiae in the *Georgia* case,⁶ to by-pass the Commission completely and to have the Supreme Court, in an original suit, deal directly with alleged discrimination in rates by injunction under the Sherman Act, in violation of all previous precedents.

In view of Mr. Eastman's reference to "emotional reactions" which ought to have no influence upon decision of such controversial issues, it is interesting to look at the emotional content of Georgia's position and contentions in that case. The case was brought in the name of the State, by her Attorney General, pursuant to a formal order to the Attorney General issued by Governor Ellis Arnall, in which the Governor made an extraordinary attack upon the Interstate Commerce Commission. The following are recitals made in that highly emotional order:

Georgia and the South have been shackled to the nation as colonial dependencies subject to economic exploitation, domination and control; and

The prevailing discriminatory freight rate system impeding the development of the South should be ended and the trade barriers erected against the South should be abrogated; and

Georgia and the South should be readmitted to the Union on a basis of full fellowship and equality; and . . .

. . .

The discriminatory and detrimental freight rate structure now imposed upon Georgia and the South is the creature of pernicious sectional politics; and

The Interstate Commerce Commission has been and is derelict in its duty, is a party to the illegal practices herein recited and does condone, aid and abet them; . . .

That reckless charge against the Commission by Georgia through her Governor was made at a time when the Commission had taken volumes of evidence in the *Class Rate Investigation*, had heard Georgia fully in evidence and argument and on brief, and when even such a prophet as Governor Arnall could not know what the Commission's subsequent decision was to be, else he would hardly have made that charge.

What the Commission did, months after the Governor of Georgia made his reckless charge, was to sustain fully the position of Georgia and of the other southern states. It found unreasonable the existing differential in interterritorial class rates from the South and West to official territory, higher than the intraterritorial class rates within official territory, and held that differential⁷ to be an unreasonable preference to official territory as a whole and to shippers and receivers of freight located there, as against shippers and receivers of freight in the South and West. In an effort to equalize the situation and to eliminate the preference which it found to exist, the Commission ordered that the existing interstate class rates applicable to freight traffic moving at the classification ratings within southern, southwestern, and western trunk-line territories, interterritorially between those territories, and inter-

⁶ I said, in my argument in the *Georgia* case, that the Department of Justice might be appearing as the "friend of the Court" but that it certainly was not appearing as the friend of the Interstate Commerce Commission.

⁷ A differential which the Commission itself had established, in view of differences in conditions between the territories, in a long series of cases. See the discussion in 262 I.C.C. 447, 526 *et seq.* (1945).

territorially between each of those territories and official territory, be *reduced* 10 per cent, subject to unimportant qualifications, and that such rates for freight traffic moving within official territory (the North or East) be *increased* 10 per cent, likewise subject to unimportant qualifications.⁸ That action the Supreme Court affirmed.⁹

That action produced the most vigorous attacks from the states of the North and East, whose shippers were subjected to the 10 per cent increase in rates and whose railroads were the beneficiaries of that rate increase for which they had not asked. It produced equally vigorous attack from the railroads of the Southwest and West, which contended that the 10 per cent reduction in their rates was confiscatory. The railroads of the South, which had been the objects of such bitter abuse by the Governor of Georgia, although they were grievously hurt by the 10 per cent reduction in their rates, did not attack the Commission's action in the court proceeding but expressed their willingness to carry out the order.

II

THE SUPREME COURT ALSO SPLITS ON THE *Class Rate Case*

The decision by the Supreme Court in the *Class Rate case*,¹⁰ handed down on May 12, 1947, comes appropriately to hand just before this symposium goes to press. This is fortunate, because otherwise this issue of LAW AND CONTEMPORARY PROBLEMS ran the risk of being as moot as Governor Arnall's political issue. Current events move so swiftly that it takes fast footwork to keep "contemporary."

Following a well-developed habit of recent years, the Court was sharply divided on this case. Mr. Justice Douglas wrote for the majority an elaborate opinion of sixty-two printed pages. He reviewed the Commission's proceedings and decision in great detail. He pointed out that "the Commission's over-all conclusion was that the classifications in force and the class rates computed from them harbor inequities which result in unlawful discriminations in favor of Official Territory and against the other territories."¹¹

He recognized that "it is, of course, obvious that the causal connection between rate discrimination and territorial injury is not always susceptible of conclusive proof. The extent of that causal relation cannot in any case be shown with mathematical exactness. It is a matter of inference from relevant data."¹² He made an elaborate review of much of the data from which the Commission drew its ultimate inference of prejudice and discrimination against the South and West and preference of official territory. In the main it was the old story that the East is far more highly industrialized than the other territories, "in spite of recent marked increases elsewhere, especially in the South."¹³

⁸ See Mr. Justice Douglas' opinion for the Supreme Court in *New York v. United States*, 67 Sup. Ct. 1207, 1212-13 (1947).

⁹ *Ibid.*

¹⁰ *New York v. United States*, 67 Sup. Ct. 1207 (1947).

¹¹ *Id.* at 1220.

¹² *Ibid.*

¹³ *Id.* at 1221.

Without substituting its own independent judgment on the basic question, the majority of the Court in effect bowed to the expert, administrative judgment of the Commission in drawing the inference, from the mass of data before it, that the disparities in rates between the territories reflected something more than differences in natural advantages justifying differences in rates.

The majority indulged this traditional deference to the Commission's informed, expert judgment in refusing to give effect to the principal argument of the northern states, which the Court stated as follows: "It is, therefore, argued that what the Commission has sought to do is to equalize economic advantages, to enter the field of economic planning, and to arrange a rate structure designed to relocate industries, cause a redistribution of population, and in other ways to offset the natural advantages which one territory has over another."¹⁴

The majority bowed to the Commission's expert judgment on elaborate cost studies, pointing out that "these problems of transportation economics are complicated and involved."¹⁵ It supported the Commission's judgment on these complicated questions for the reasons stated in *Board of Trade v. United States*:

The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.¹⁶

It was on that ground that Mr. Justice Douglas' opinion overruled the vigorous contention of the western railroads that the 10 per cent reduction in their rates was confiscatory. The showing of confiscation, he said, was not conclusive, hence an empirical experience under the new rates should be accumulated to determine the correct answer to "a problem which is in flux." The western roads could go back to the Commission after that empirical experience. "The Commission," said the opinion, "has not placed the western roads in a strait-jacket."¹⁷

But the majority opinion evoked sharp dissents from Mr. Justice Frankfurter and Mr. Justice Jackson.

The former saw the Commission's decision as fatally defective in that, while it undertook to remove a discrimination against the other territories and a preference in favor of official territory, it did not make necessary findings to show that the remedies proposed fitted the requirements of reasonableness of rates. He said there was no showing that the Commission's remedy produced equality among the territories and, in characteristic phrase, added: "The Procrustean bed is not a symbol of

¹⁴ *Id.* at 1223.

¹⁵ *Id.* at 1234.

¹⁶ 314 U. S. 534, 546 (1942). That quotation might well be the text for the thesis of this paper, which is, quickly and directly stated, that the freight rate structure can only be regulated in the public interest by the Interstate Commerce Commission under the Interstate Commerce Act as amended, and that nothing but chaos can be the result of attempts by the Department of Justice to substitute for that regulation a case-by-case interference with the rate structure by court cases brought under the antitrust laws.

¹⁷ *New York v. United States*, 67 Sup. Ct. 1207, 1236 (1947).

equality. It is no less inequality to have equality among unequals. The findings do not reveal how it happened that putting 10 per cent on and taking 10 per cent off respectively will beget just the right adjustment."¹⁸ He concluded:

Administrative experts no doubt have antennae not possessed by courts charged with reviewing their action. And so it may well be that to the expert feel the justifiable correction to an imbalance between Official Territory rates and the rates of other territories is a shift of 10 per cent in the respective rates—Official Territory rates increased 10 per cent and rates elsewhere decreased 10 per cent. But courts, charged as they are with the review of the action of the Commission, ought not to be asked to sustain such a mathematical coincidence as a matter of unilluminated faith in the conclusions of the experts.¹⁹

In a separate dissent, in which, however, Mr. Justice Frankfurter joined, Mr. Justice Jackson was more forthright and less metaphorical in his criticism of the majority opinion. He used language reminiscent of his recent experience as a prosecutor, starting with: "I find it impossible to agree with this extraordinary decision"²⁰—and warming up from that start forward.

He pointed out that the 10 per cent rate increase affecting the northeastern part of the United States was not asked by the railroads in that territory, that it "goes to the prosperous and the insolvent ones alike, and is not even claimed to be necessary to pay the cost of service and a fair return on the property used in rendering it."²¹

"This additional assessment," he said, "is in no sense compensation for handling the traffic which the railroads concede was adequately compensated before. It is really a surtax . . . added solely to increase shipping costs in the Northeastern part of the United States for the purpose of handicapping its economy and in order to make transportation cost as much there as it does in areas where there is less traffic to divide the cost."²²

He pointed out the concession that the alleged discrimination in favor of the Northeast could not be removed by reducing the higher rates in the South and West by more than 10 per cent, "because the railroads of the South and West, in view of their costs, could not bear further decrease. So the only other way of equalizing the rates and making it as costly to move goods there as anywhere in the United States, is to make the shippers in the Northeastern territory pay the railroads this additional 10 per cent which they have not asked and do not need."²³

"The Court's approval of this order," he declared, "is based on an entirely new theory of 'discrimination.' It has never before been thought to be an unlawful discrimination to charge more for a service which it cost more to render."²⁴ Discrimination heretofore has been found to exist only when an unequal charge was exacted for a like service, or vice versa. But now it is held to be an unlawful discrimination if railroads of the Northeast do not make the same charge as other railroads in the

¹⁸ *Id.* at 1247.

¹⁹ *Id.* at 1249.

²⁰ *Id.* at 1242.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ This has been the basic thesis of the railroads of the South throughout the years of controversy over the interterritorial freight rate relationships. It had always been the Commission's basic thesis prior to its decision in this case.

South or West, for a different transportation under different cost conditions. The Government frankly advocates this new concept of discrimination as necessary to some redistribution of population in relation to resources that will reshape the nation's social, economic, and perhaps its political life more nearly to its heart's desire."²⁵ He made a long quotation from the Government's brief²⁶ showing that such was exactly the new concept advocated by "the Government," which means, in this instance, the doctrinaires of the Department of Justice. And following that quotation he said: "The Court's entire discussion of the discrimination feature of this case is an acceptance of the Government's position without which the last support for this order would fail."²⁷

On the basic legal question he was categorical, saying:

No authority can be found in any Act of Congress for the imposition of this surcharge on the Northeast solely to penalize it for being able to transport goods cheaper due to its density of population and volume of traffic. The policy of Congress remains as it long has stood: "adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service." Interstate Commerce Act, §15a(2). . . . Congress has never intimated, much less declared a purpose to deprive the territory in which fifty per cent of the nation's consumers reside of the benefit of this policy. . . .

The Court never before has confided to any regulatory body the reshaping of our national economy. In *Texas & Pacific R. Co. v. United States*, 289 U. S. 627, the following statement of the law was made: "a tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is unlawful; and obviously, what the carrier may not lawfully do, the Commission may not compel."²⁸

He showed that the Commission has heretofore accepted that statement as the law and held that it is not within its power "to equalize natural disadvantages of locations"²⁹ or "to equalize commercial conditions."³⁰

Mr. Justice Jackson recognized the difficulty of the problem with which the Commission had to wrestle and commented wisely:

I long have heard the complaint that freight rates discriminated against the South. I have been inclined to suspect it to be true and have hoped to see an impartial and exhaustive study and decision on the subject. But this case does not meet that description. The student of economics will be puzzled at the Court's citation of the fact that the average employed person in the South earns only half as much as those in the Northeast as being in some way attributable to these freight rates. And the student of the judicial process will find instruction in the contrast between today's decision and that of *Interstate Commerce Commission v. Mechling* [67 Sup. Ct. 894 (1947)], in its regard for inherent advantages, in its attitude to "unsifted" averages as a basis for raising rates and in its deference to the administrative expertise of the Interstate Commerce Commission. . . .

But by administrative succession and judicial fiat the regulatory power of the Federal Government over commerce is now used to force a surtax on transportation of one section

²⁵ *Id.* at 1242-1243.

²⁶ *Id.* at 1243.

²⁷ *Ibid.*

²⁸ *Id.* at 1243-1244.

²⁹ *Stoves, Ranges, Boilers, and House-Heating Furnaces*, 182 I.C.C. 59, 68 (1932).

³⁰ *Id.* at 74.

of the country admittedly not needed to compensate the railroad for the carriage but to take away from its inhabitants one of the advantages inherent in its density of population, regardless of the disadvantages which density of population also causes.

The observation of Commissioner Mahaffie in this case seems to me appropriate and accurate:

“ . . . In a country so vast as this with its widely varied resources and differing transportation needs it seems to me a mistake to try to compel general equality in rates except to the extent equality is justified by transportation conditions. I think the effort to do so must necessarily fail. But I am afraid the process of finding out whether it can be done will be painful and costly. The prejudice findings on which the new adjustment is largely predicated are calculated, if carried to a logical conclusion, to lead to a rigid rate structure based on mileage. While this may seem on its face to be equitable its accomplishment would entail radical industrial and agricultural readjustments. I doubt if the country should be required to incur the expense of making them.” (262 I.C.C. at 708.)³¹

If the author of this paper were privileged to vote on the merits of the *Class Rate* case, he would unhesitatingly vote with Justices Frankfurter and Jackson and Commissioner Mahaffie. He is profoundly convinced that the Commission was finally pushed by the unceasing political drives of the Southern Governors and of the representatives of the West to seek a mythical equality by disregarding controlling industrial, commercial and transportation differences between those sections and the Northeast.

However, that in no wise alters his basic thesis that the rate structure can be regulated in the public interest only by the Interstate Commerce Commission under the Interstate Commerce Act, and that nothing but chaos can result from the efforts of the Department of Justice to interfere with that regulation, or to take it over, by antitrust cases in the courts.

The railroads of the South, on whose behalf the present writer is speaking without their authorization, view the logomachy over the class rates with pained but philosophical detachment. They have had ten per cent of their rate legs lopped off on the bed of Procrustes but they have had the fortitude to take that torture and to try to continue to serve the South, walking on their truncated and bloody stumps. They did not attack the Procrustean order. They took it.

Yet, even as this is being written, the representatives of Georgia are vigorously arguing before the Special Master of the Supreme Court in the *Georgia* case that the railroads of the South have conspired with the northern lines to discriminate against the South, from which we get our living, and to prefer the Northeast, from which the northern carriers get their living. It is further—and with utter inconsistency—argued that the northern carriers have coerced and controlled us so as to give us more favorable rates than the northern carriers themselves have enjoyed. A strange conspiracy; it sounds like Alice in Wonderland.

³¹ *New York v. United States*, 67 Sup. Ct. 1207, 1245-1246 (1947).

III

THE DEPARTMENT OF JUSTICE ENTERS THE POLITICAL ARENA OF FREIGHT RATES

One of the most important lessons of the Nuremberg trial and its searching autopsy of the Nazi leadership is that propaganda is a weapon by no means peculiar to "special interests" in the narrow sense, or to politicians running for office, but that it is one of the habitual and most powerful weapons of governments, heads-of-state, self-constituted Führers, and all the tribe of bureaucrats,³² in whose hands it ranks in destructiveness second only to the atomic bomb.

In recent years a clique in the Antitrust Division of the Department of Justice, under the inspiring leadership of the garrulous and ubiquitous Thurman Wesley Arnold³³ and carried on by his disciples Wendell Berge,³⁴ Arne C. Wiprud,³⁵ and James E. Kilday,³⁶ has been propagandizing throughout the length and breadth of this country in a double attack against the Interstate Commerce Commission and against the railroads. Their thesis is that the conference method of rate making by the railroads, through rate conferences and bureaus, is a vast conspiracy in violation of the antitrust laws, and that the Interstate Commerce Commission—together indeed with many other governmental agencies—has compounded, condoned and officially approved this conspiracy.

It is the obvious purpose of these gentlemen to destroy the Interstate Commerce Commission and its jurisdiction over rate-making and to substitute for its regulation under the Interstate Commerce Act a case-by-case regulation by the Antitrust Division of the Department of Justice and by the courts under the antitrust laws. That purpose is exemplified by the conduct of the Department in its appearance in the

³² "Crat," from the Greek, means "the strong man." The bureaucrat is "the strong man of the bureau." "Bureau" is a most interesting word. It comes from the French *bure*, meaning the green baize cloth with which government desks used to be covered. This green cloth had an inherent and limitless capacity for self-extension. By the first extension the word came to mean the desk itself covered with the green cloth, *le bureau*. By another extension it came to mean the office or room in which a government functionary sat at that green-covered desk. "Bureaucrat" was the strong government functionary at that desk in that office. Bureaucracy is the strength of government departments. It still has the inherent tendency to spread all over the place.

³³ Member, Wyoming Legislature, 1921; Mayor, Laramie, Wyo., 1923-24; Dean of Law School, University of West Virginia, 1927-30; Professor of Law, Yale University, 1930-38; Board of Visitors, Harvard Law School, 1944-; Assistant Attorney General in charge of Antitrust Division, Department of Justice, 1938-43; Associate Justice, U. S. Court of Appeals, D. C., 1943-45; now head of the firm of Arnold and Fortas, general practice of law, Washington, D. C. Author, *inter alia*, of: *THE SYMBOLS OF GOVERNMENT* (1935); *THE FOLKLORE OF CAPITALISM* (1937); *THE BOTTLENECKS OF BUSINESS* (1940); *DEMOCRACY AND FREE ENTERPRISE* (1942); *CARTELS OR FREE ENTERPRISE?* (1945). [From his autobiographical note in *1 MARTINDALE-HUBBELL, LAW DIRECTORY* 271 (1947).] Recently announced as one of the trustees of the estate of the late Evalyn Walsh McLean and joint custodian of the Hope Diamond.

³⁴ Who recently resigned as Assistant Attorney General, in charge of the Antitrust Division, Department of Justice, to enter private practice, after holding his position just long enough to make the opening statement for the Government in the Lincoln, Nebraska, case, *United States v. Association of American Railroads, et al.*, 4 F. R. D. 510 (D. C. Nebr. 1945).

³⁵ Until recently Special Assistant to the Attorney General in the Antitrust Division of the Department of Justice. Author of *JUSTICE IN TRANSPORTATION* (1945). It is understood that he has recently joined the staff of Mr. Robert R. Young, of the Chesapeake & Ohio group of railroads, presumably to help the latter in his current attack on the rest of the railroad industry.

³⁶ A subordinate in the Antitrust Division.

Georgia case as *amicus curiae* and by its complaint and arguments in the Lincoln, Nebraska, suit.

These gentlemen, who are no shrinking violets, try their cases first by propaganda, in the press, in books, and in public addresses, and only secondarily in the courts, which are made sounding-boards for further propaganda. I observe that Mr. Wendell Berge is included in this symposium for a paper under the title *The Rate-Making Process*. I have no doubt that his paper will be substantially the same as his opening statement of the case for the Government in the Lincoln, Nebraska, case. I also have no doubt that it will disclose his basic thesis that railroad rate-making should be regulated by the Department of Justice and the courts in suits under the antitrust laws rather than by the Interstate Commerce Commission under the Interstate Commerce Act.

It is further noted that Mr. Arne C. Wiprud is included in this symposium for a paper entitled *Corrective Action Under the Antitrust Laws*. It is to be anticipated that his paper will elaborate the thesis of the Department's campaign and of his book, *Justice in Transportation*.

Finally, it is observed that Mr. Robert R. Young, Chairman of the Board of Allegheny Corporation and of the Chesapeake & Ohio Railway Company, is listed for a paper entitled *A National Transportation Policy*. It is doubted that his paper will be a discussion of *the* national transportation policy declared by Congress in the Transportation Act of 1940. It may well be anticipated that it will present Mr. Young's personal ideas as to how he would reshape a new transportation policy and will exemplify the campaign he has been broadcasting, in the press, on the radio, in advertisements, and in testimony before Congressional committees, against all the railroad industry of the United States except the small segment which he claims to control.

Shortly after the *Georgia* case and the case at Lincoln, Nebraska, were brought, and even before the procedural and jurisdictional questions involved could be argued before the respective courts, Mr. Arne Wiprud, following the fixed pattern of the Antitrust Division of trying its cases first by propaganda to the public, published a book entitled *Justice in Transportation*, which frankly sought "to carry the issue to the public." It contains an introduction by Thurman Wesley Arnold. It is a brief for the Government's theory in the Lincoln, Nebraska, suit.

That book is not only a bitter attack against the railroads and against the whole conference method of rate-making, but it is an equally bitter attack against the Interstate Commerce Commission, past and present. Not content with that, it attacks the Congress (inferentially, at least), three Presidents of the United States, the wartime Secretary of War and Secretary of the Navy, the Director of the Office of Defense Transportation, the War Production Board, the Civil Aeronautics Board, the Bituminous Coal Commission, and virtually everybody in authority except the Department of Justice.

The present symposium is not the place for any attempt at detailed answer to

Mr. Wiprud's book and Mr. Arnold's introduction. Quite a bibliography has built up around that book. A very vigorous, historical and thoroughly documented answer to it has been made by Charles D. Drayton, of the District of Columbia bar, in a book entitled *Transportation Under Two Masters*, with a foreword by Bernard M. Baruch. A scholarly and critical appraisal of Mr. Wiprud's book was made by Mr. Elmer A. Smith in an article in *Railway Age*³⁷ on August 4, 1945. A penetrating discussion of the whole subject of the application of the antitrust laws to regulated industries, and a further answer to the thesis of Mr. Wiprud's book, from the pen of Mr. Elmer A. Smith, appeared in 1946.³⁸ A further discussion of the same problem by Mr. Smith appeared in the *American Economic Review Proceedings* in May, 1946.³⁹

Those who may have been impressed by Mr. Wiprud and Mr. Arnold in *Justice in Transportation* would do well to read the above-cited discussions before making up their minds as to whether it is in the public interest for the Interstate Commerce Commission to continue to regulate railroad rate-making under the Interstate Commerce Act or whether that regulation should be taken over by the Antitrust Division of the Department of Justice by antitrust suits in the courts.

This campaign by the Antitrust Division of the Department of Justice against the railroads and against the Interstate Commerce Commission, to interfere with and disrupt the Commission's regulatory jurisdiction and to subject railroad rate making to Sherman Act supervision, first broke into the open in 1942 when the Division sought indictments against a large number of railroad traffic officers for alleged violations of the Sherman Act in the making of rates. The other departments of the Government, which were engaged in the prosecution of the war, and which knew the tremendous contribution the railroads were making to its prosecution, persuaded the Attorney General to discontinue the proceedings because to have carried them on would have seriously disrupted the contribution of the railroads to the war effort.

This was the first serious attempt by the Government in forty-four years, since the decisions in *United States v. Trans-Missouri Freight Association*⁴⁰ in 1897, and in *United States v. Joint Traffic Association*⁴¹ in 1898, to subject railroad rate making to the Sherman Act. And during those forty-four years a wholly antithetical philosophy of regulation by an agency of Congress, the Interstate Commerce Commission, had been progressively built up and made effective by Congress. The doctrinaires of the Department of Justice would wipe out those forty-four years of history and return us to the wholly inconsistent philosophy of 1898.

The Antitrust Division followed up its campaign by joining hands with the State of Georgia in its suit in the Supreme Court and by bringing its antitrust suit at Lincoln, Nebraska.

³⁷ Smith, *Rate-Making and the Antitrust Law*, 12 I.C.C. PRACTITIONER'S JOUR. 1117-1135 (1945), reprinted from *Railway Age*, Aug. 4, 1945, p. 208.

³⁸ Smith, *The Application of the Antitrust Laws to Regulated Industries*, 14 I.C.C. PRACTITIONER'S JOUR. 181-200 (1946).

³⁹ Smith, *The Interstate Commerce Commission, The Department of Justice, and the Supreme Court*, 36 AM. ECON. REV. PROCEEDINGS 479 (1946).

⁴⁰ 166 U. S. 290 (1897).

⁴¹ 171 U. S. 505 (1898).

IV

THE BULWINKLE BILL

This campaign by the Department raises a question of tremendous public importance. It is the question whether the nation's carriers are to be subjected to two different and necessarily inconsistent policies of regulation: the Interstate Commerce Act policy, administered by the agency Congress has empowered to carry out that policy, and a Sherman Act policy, to be administered by an agency of the Executive through court actions. It is obvious that the railroads cannot function under two such masters. The two policies are in irreconcilable conflict.

The question concerns the shippers of the country as gravely as it does the carriers. The shippers are opposed to the philosophy of the Department of Justice with a unanimity such as has never before been seen on any public question. So are all other departments and agencies of the Federal Government and so are the regulatory commissions of the states. Everybody is out of step but the Department of Justice. Nobody else wants "Justice" (the Department) "in transportation" beating around on the delicate rate structure with its Sherman Act bludgeon.

Pursuant to a virtually universal demand for a clarification of the conflict of philosophies produced by the campaign of the Department, the so-called Bulwinkle Bill⁴² is pending in Congress.

It is not, as it has often been misrepresented to be, a bill generally to exempt the railroads from the antitrust laws. It would make it perfectly clear that agreements by carriers through the conference and rate-bureau method of rate making would be subject to regulation by the Interstate Commerce Commission and that, when approved by that body as in furtherance of the national transportation policy, such agreements would be exempted from the antitrust laws. The effect of the bill is clearly explained in the House Committee report as follows:

The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

The bill provides for no relief from any provision of law other than the antitrust laws. Notwithstanding the approval of an agreement by the Commission, all provisions of the Interstate Commerce Act will apply to the carriers and to action taken by them to the same extent and in the same manner as though such agreement had not been approved.⁴³

The indispensable necessity of the preservation of the conference and bureau method of rate making and of clarifying legislation like the Bulwinkle Bill cannot be better shown than by the following quotation from the testimony of Mr. East-

⁴² H. R. 2536, 79th Cong., 2d Sess. (1946).

⁴³ H. R. REP. No. 1212, 79th Cong., 1st Sess. 6 (1945).

man⁴⁴ in support of a like bill in the first session of the Seventy-eighth Congress. He said:

The railroads of the country constitute a connected and interlacing system of lines over which freight cars of all ownerships circulate freely, and a very great part of the traffic moves under joint rates in which at least two and often many separate railroads participate. The same is true, although in lesser degree, of the other carriers. It is also true that there is a great interdependence between rates. Where there is more than one route between two points, as a practical matter the rates must ordinarily be the same over all the routes. Even in the case of rates from widely separated origins to a common market, a change in one of the rates may impel changes in them all. A change in the rate basis on one commodity between certain points may even force changes in the rates on other commodities between different points.

It must be evident to any reasonable man that the carriers cannot respond to all the duties imposed by law, if each individual carrier acts in a vacuum. It is a situation, under all the conditions, which plainly calls for consultation, conference, and organization and for many acts of a joint or cooperative character; and this seems, in effect, although some of the testimony might suggest otherwise, to be admitted by the Department of Justice. For my own part, I have no doubt whatever that organizations of the carriers, such as have been described by witnesses which have preceded me, in general serve a very useful purpose and are desirable in the public interest. They save much trouble for the shippers, as I believe the shippers will tell you. In saying this, I do not mean to imply that these organizations are not subject to abuse or that they should not be brought under some measure of public regulation. I shall go into that matter when I come to the discussion of the bill which is before you.

At this point, however, let me make a general observation. These so-called rate bureaus and other like organizations of the carriers are not new. They have existed and have functioned for many years, and so far as the railroads are concerned, they had their roots in the past which antedated the creation of the Interstate Commerce Commission. The shippers of the country are well organized and are very much alive to their own interests, as they have repeatedly demonstrated.

If the rate bureaus and the like had, over their long history, been the source of grave abuse which prejudiced seriously the interest of the shippers, you may be sure that long since there would have been an uprising and that this situation would have been made clear to you by a heavy tide of complaints pouring into the Commission and into the Congress of the United States. If there has been or is such a tide, it has somehow escaped my knowledge. I believe this hearing will demonstrate that such complaint as there is has its source, not in the shippers of the country, but in the lawyers and economists of the Department of Justice.⁴⁵

That testimony was discussed and made a part of the record in the hearings on the Bulwinkle Bill in the Seventy-ninth Congress.⁴⁶

As shown by the committee report following those hearings,⁴⁷ not a witness

⁴⁴The late Joseph B. Eastman, then Director of the Office of Defense Transportation and formerly Chairman of the Interstate Commerce Commission, acknowledged leader in the field of railroad regulation.

⁴⁵*Hearings before the Senate Committee on Interstate Commerce on S. 942, 78th Cong., 1st Sess. 830-831 (1943).*

⁴⁶*Hearings before the Committee on Interstate Commerce on H. R. 2536, 79th Cong., 1st Sess. (1945).*

⁴⁷H. R. REP. No. 1212, 79th Cong., 1st Sess. 3 (1945).

appeared in opposition to the bill. It had the virtually unanimous support of all interests directly interested in transportation, including governmental authorities, Federal and state, carriers of all kinds, shippers throughout the country, railroad labor, and agricultural and livestock interests.

The Attorney General wrote a letter stating that he did not favor the bill in its existing form. Governor Arnall of Georgia, by a telegram, expressed opposition to the bill. He was invited by the committee to appear and testify, but he did not appear. This letter and this telegram were the only opposition to the bill.

The House passed the bill by a vote of 277 "yeas" against 45 "nays."

The Senate committee held hearings on that bill⁴⁸ in March, April, and May, 1946, and built up a record of 2,416 pages. There was the same substantial unanimity of all interests of the country, except the Department of Justice, in support of the bill. Messrs. Thurman Arnold, Wendell Berge, and James E. Kilday appeared against it.

On June 18, 1946, the bill was reported favorably, with certain amendments, by the Senate Committee, but ran into the legislative jam at the end of the session and did not come to a vote on the floor.

Hearings⁴⁹ were again held by the Senate committee at the present session on S. 110 (the Bulwinkle Bill, H. R. 2536, with the amendments as reported by that committee in the previous Congress), on January 21 and February 4, 1947. There was the same substantial unanimity of all interests save the Department of Justice in support of the bill. Mr. Wendell Berge, Mr. James E. Kilday, and Mr. Arne C. Wiprud appeared, and the Attorney General filed a short statement, in opposition.

That is the present status of the public reaction to the Department's campaign to subject carrier rate making to Sherman Act regulation. The facts are more eloquent than words could be.

The latest expression by the Interstate Commerce Commission on the subject is in its Sixtieth Annual Report, November 1, 1946, in which, after reviewing the prior proceedings on the Bulwinkle Bill and its previous recommendations that it be passed, the Commission said:

In previous reports we have expressed the fear of danger that undue breadth in interpreting and applying the Sherman Antitrust Act may interfere with carrying out the national transportation policy declared in the preamble to the Interstate Commerce Act, which forbids "unfair or destructive competitive practices." We believe that this danger still exists and are therefore recommending elsewhere in this report that the Congress by appropriate legislation remove the continuing uncertainty concerning the legality of joint action by carriers and freight forwarders subject to the Interstate Commerce Act, exercised through rate bureaus and conferences.⁵⁰

⁴⁸ *Hearings before the Senate Committee on Interstate Commerce on H. R. 2536, 79th Cong., 2d Sess. (1946).*

⁴⁹ *Hearings before the Senate Committee on Interstate and Foreign Commerce on S. 110, 80th Cong., 1st Sess. (1947).*

⁵⁰ 60 I.C.C. ANN. REP. 53 (1946).

V

THE NEW POLICY FOR PUBLIC REGULATION OF RAILROADS, BUILT UP SINCE 1898, IS A
COMPLETE DEPARTURE FROM THE SHERMAN ACT PHILOSOPHY OF
UNBRIDLED COMPETITION

The Interstate Commerce Act,⁵¹ which created the Interstate Commerce Commission and inaugurated the new public policy for special, public regulation of railroads, became law on February 4, 1887, more than three years before the enactment of the Sherman Act⁵² on July 2, 1890.

The legislative history of the later Sherman Act shows clearly that the Congress did not intend that Act to apply to railroads, because it was deemed that the prior Interstate Commerce Act covered their regulation.

Mr. Wiprud⁵³ makes a generalized assertion to the contrary, declaring that the legislative history of the Sherman Act shows that Congress intended to include railroads and their rate-making conferences within its prohibitions. But a careful analysis of that legislative history⁵⁴ demonstrates exactly the reverse.

The Sherman Act passed the Senate in the precise form in which it now appears on the statute books. In the House, Congressman Bland of Missouri offered an amendment which provoked the only disagreement between the two Houses. This would have inserted an express clause outlawing every contract or agreement "to prevent competition in the transportation of persons or property from one State or territory to another."

When the House returned the Senate bill with the Bland amendment, the Senate in turn amended the House amendment so as to make it outlaw only such transportation contracts or agreements as had the effect of raising transportation rates "above what is just and reasonable." The House managers in conference accepted the Senate amendment. This would have left the power of defining and determining "just and reasonable rates" where it was thought to have been vested by the Act to Regulate Commerce of 1887, in the Interstate Commerce Commission.

The debates show clearly the prevailing view that the House amendment was not germane to the Sherman Bill because that bill was not intended to cover matters already regulated by the Act to Regulate Commerce. And on that ground, in a subsequent conference report, each house receded from its respective amendment, with the result that the original Senate bill passed without amendment, the precise form in which the Sherman Act appears on the statute books today.

That legislative history makes it entirely clear that Congress did not intend the Sherman Act to cover and regulate railroads in their rate making, because it was thought that that field of regulation had been covered by the Act to Regulate Commerce.

However, in the decade following the enactment of the Sherman Act, the Su-

⁵¹ 24 STAT. 379 (1887), 49 U. S. C. §1 *et seq.* (1940).

⁵² 26 STAT. 209 (1890), 15 U. S. C. §§1-7 (1940).

⁵³ ARNE C. WIPRUD, *JUSTICE IN TRANSPORTATION* 110-111 (1945).

⁵⁴ See CHARLES D. DRAYTON, *TRANSPORTATION UNDER TWO MASTERS* 13-22 (1946).

preme Court, in a series of cases,⁵⁵ held that the Interstate Commerce Act had conferred on the Interstate Commerce Commission no power whatsoever to fix or prescribe rates, either maximum or minimum, with the result that the Interstate Commerce Act, as so construed, was no effective regulation of railroad rate making.

It was on this very ground that the Court held, first in the *Trans-Missouri Freight Association Case*,⁵⁶ by a five-to-four decision in 1897, and secondly in the *Joint Traffic Association Case*⁵⁷ in 1898, that the Sherman Act applied to traffic association agreements for the fixing of freight rates.

The law at that time in our history left carrier rate making to the rule of the claw and the fang, to unbridled and unregulated competition under the philosophy of the Sherman Act, because the Commission had no power to regulate it under the Interstate Commerce Act as then construed.

The Government, in the second of those two cases, recognized the extent to which the then prevailing doctrine of unbridled and unregulated competition would enable the larger and more powerful railroad to destroy the weaker. The Solicitor General, in his closing argument in that case, said:

It may be conceded that the law of the survival of the fittest is a hard one; that the necessity of competition under existing conditions presses heavily upon the weak. But, after all, competition is not only the life of trade, but the underlying basis of our social and industrial life. There may be a better way, but we have not yet found it.⁵⁸

Competition drives the weak to the wall, the fittest survive, but the greatest good to the greatest number results. . . .

The best railroad, the one constructed and equipped and managed in the best way, will get the bulk of the competitive business, and it ought to. It can afford to carry the traffic at lower rates than the poorer roads, and it ought to be allowed to, in the public interest.⁵⁹

Of the Interstate Commerce Act as it then existed he said:

The Interstate Commerce law declares that all charges must be reasonable and just. It provides no means for securing this desideratum except competition.⁶⁰

And he pointed out the complete lack of rate-making power by the Commission, saying:

The common law requires that rates shall be reasonable and fair. So does the Interstate Commerce law. But this is a mere declaration, and there is no adequate remedy to enforce the right. The commission has no power to prescribe a reasonable rate and enforce it, or to declare that a rate is unreasonable and prohibit it.⁶¹

And the Court, in the *Joint Traffic Association Case*, squarely recognized the reach and thrust of that prevailing claw-and-fang philosophy. Mr. Justice Peckham said:

⁵⁵ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1897); *I.C.C. v. Cincinnati, N. O. & T. P. Ry.*, 167 U. S. 479 (1897); *I.C.C. v. Alabama U. Ry.*, 168 U. S. 144 (1897); and *United States v. Joint Traffic Association*, 171 U. S. 505 (1898).

⁵⁶ 166 U. S. 290 (1897).

⁵⁷ 171 U. S. 505 (1898).

⁵⁸ *Id.* at 546.

⁵⁹ *Id.* at 547-548.

⁶⁰ *Id.* at 550.

⁶¹ *Id.* at 557.

. . . An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.⁶²

Since 1898 wholly new concepts of carrier regulation have progressively developed. More and more detailed regulation by the Commission has been substituted for the free and unregulated competition to which carriers were left by the philosophy of 1898. The "better way" has been found.

By section 4 of the Hepburn Act of 1906⁶³ the Commission was first given the very power to fix maximum rates which it did not have when the *Joint Traffic Association Case* was decided. That Act amended section 15 of the Interstate Commerce Act⁶⁴ so as to give the Commission express power to determine just and reasonable maximum rates and to establish through routes and maximum joint rates, to prescribe divisions of joint rates and the terms and conditions under which such through routes shall be operated. And section 5 of the Act of 1906⁶⁵ further amended the Act so as to give the Commission the power to award rate damages or reparation, in the first instance, with provision for enforcement of such award by court action by any person for whose benefit such award was made.

Since the Act of 1906, every legislative step has been in the direction of more complete and exclusive authority of the Commission over railroads.

The Act of June 18, 1910, known as the Mann-Elkins Act,⁶⁶ first gave the Commission power to suspend rates. The Transportation Act of 1920⁶⁷ first gave the Commission power to fix minimum rates. And the latter Act wrote into the law a wholly new national transportation policy.

That new national transportation policy was first analyzed and described by Chief Justice Taft in *Wisconsin Railroad Commission v. Chicago, B. & Q. Railroad Company*,⁶⁸ sustaining a state-wide order of the Commission requiring the raising of intrastate rates above the level fixed by the state commission, to prevent discrimination against interstate and foreign commerce.

The new policy sought to develop and preserve a national transportation system, and to that end sought to protect weak railroads against the very unrestricted competition which, in 1898, the Government and the Court recognized might enable the strong railroads to destroy the weak ones. And in the *New England Divisions Case*⁶⁹ the Court gave effect to that new policy by sustaining exercise by the Commission of its power over divisions of rates to take from the strong and give to the weak.

⁶² *Id.* at 577.

⁶³ 34 STAT. 589 (1906), 49 U. S. C. §15 (1940).

⁶⁴ 24 STAT. 384 (1887), as amended, 49 U. S. C. §15 (1940).

⁶⁵ 34 STAT. 590 (1906), 49 U. S. C. §16 (1940).

⁶⁶ 36 STAT. 551 (1910), 49 U. S. C. §15 (1940).

⁶⁷ 41 STAT. 484 (1920), 49 U. S. C. §15(1) (1940).

⁶⁸ 257 U. S. 563 (1922).

⁶⁹ 261 U. S. 184 (1923).

And referring to those two cases, the Court in *Dayton-Goose Creek Railway v. United States*, sustaining an order of the Commission requiring surrender of excess profits under the recapture clause, said, through the Chief Justice:

In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.⁷⁰

That new transportation policy was recognized in *Railroad Commission v. Southern Pacific Company*⁷¹ in connection with the power and duty of the Commission to control new investments, construction and extensions, as applied to the building of a new union station.

It was recognized in connection with the Commission's power over extensions and abandonment of lines in *Texas & P. Railway Company v. Gulf, C. & S. F. Railway Company*,⁷² and in *Piedmont & Northern Railway Company v. Interstate Commerce Commission*.⁷³

Since that initial effort at reshaping regulation of railroads to "ensure . . . adequate transportation service,"⁷⁴ Congress has extended Federal regulation in connection with other forms of transportation and has elaborated more fully the objectives to be achieved by its legislation.⁷⁵

The Transportation Act of 1940 carried this new policy farther, gave it a new, express definition as the "National Transportation Policy," and extended it to water carriers as well as to highway motor carriers and railroads.

That Act begins with the declaration of that policy, which states as its purposes, *inter alia*:

. . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust dis-

⁷⁰ 263 U. S. 456, 478 (1924).

⁷¹ 264 U. S. 331 (1924).

⁷² 270 U. S. 266, 277, 278 (1926).

⁷³ 286 U. S. 299, 311 (1932).

⁷⁴ The New England Divisions Case, 261 U. S. 184, 189 (1923).

⁷⁵ Air Commerce Act of 1926, 44 STAT. 568 (1926), as amended, 49 U. S. C. §171 *et seq.* (1940); Air Mail Act of 1934, 48 STAT. 933 (1934), as amended, 39 U. S. C. §463 *et seq.* (1940); Air Mail Act of 1935, 49 STAT. 614 (1935), 39 U. S. C. §469 *et seq.* (1940); Civil Aeronautics Act of 1938, 52 STAT. 973 (1938), 49 U. S. C. §401 *et seq.* (1940); Motor Carrier Act of 1935, 49 STAT. 543 (1935), 49 U. S. C. §301 *et seq.* (1940); and compare Title II of the Transportation Act of 1940, 54 STAT. 898, 929 (1940), 49 U. S. C. §901 *et seq.* (1940); see *McLean Trucking Co. v. United States*, 321 U. S. 67, 81-82 (1944).

criminations, undue preferences or advantages, or *unfair or destructive competitive practices*; . . .⁷⁶

No longer is the harsh Sherman Act rule of free and unregulated competition left applicable; "unfair or destructive competitive practices" are expressly forbidden.

That declaration of the "National Transportation Policy" ends:

. . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.⁷⁷

The inevitable result of this wholly new regulatory policy, with its complete departure from the unrestrained and unregulated competition philosophy of the Sherman Act, is that the Court now holds: "Certain then it is that the Anti-trust Laws are inapplicable in all their apparent breadth to carriers by rail or water,"⁷⁸ and that "in the case of combinations of common carriers the Sherman Law is qualified by the Interstate Commerce Act, . . . and, in the case of shipping combinations, by the Merchant Marine Act."⁷⁹

In the *McLean Trucking Company* case⁸⁰ the Supreme Court affirmed a judgment of a statutory district court of three judges refusing to set aside orders of the Commission authorizing consolidation of seven large motor carriers. The Department of Justice, as a part of its campaign against the Commission, and as it has so often done in recent years,⁸¹ rushed in to confess error in the Commission's orders and to seek to overturn them, instead of defending them in accordance with its traditional duty. It argued that the Commission had failed to give due weight to the prohibitions and policies of the antitrust laws. The argument in its full sweep was rejected by the Court as being an attack upon the national transportation policy declared by Congress. "But," said the Court, "taken for less than that, it poses a problem of accommodation of the Transportation Act and the anti-trust legislation, to which we now turn. In doing so we note that the former is the later in time and constitutes not only a more recent but a more specific expression of policy."⁸²

The Court in that case pointed out that "the national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887."⁸³ It traced much of that history, especially that beginning with the Trans-

⁷⁶ 54 STAT. 899 (1940), 49 U. S. C., note preceding §1 (1940). (Emphasis supplied.)

⁷⁷ *Ibid.*

⁷⁸ *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U. S. 500, 514 (1936), reaffirmed in *Georgia v. Pennsylvania R.R.*, 324 U. S. 439, 453 (1945).

⁷⁹ *Tigner v. Texas*, 310 U. S. 141, 148 (1940), and cases there cited.

⁸⁰ *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944).

⁸¹ *Associated Transport, Inc.—Control & Consolidation*, 38 M. C. C. 137 (1942); *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503 (1944); *American Trucking Associations v. United States*, 56 Fed. Supp. 394 (1944); *Interstate Commerce Commission v. Mechling*, 67 Sup. Ct. 894 (1947).

⁸² *McLean Trucking Co. v. United States*, cited *supra*, note 80, at 79.

⁸³ *Id.* at 80.

portation Act of 1920, which it said "marked a sharp change in the policy and objectives embodied in those efforts,"⁸⁴ and ending in the Transportation Act of 1940. Of that history the Court said:

The history of the development of the special national transportation policy suggests, quite apart from the explicit provision of sec. 5(11), that the policies of the anti-trust laws determine "the public interest" in railroad regulation only in a qualified way. And the altered emphasis in railroad legislation on achieving an adequate, efficient, and economical system of transportation through close supervision of business operations and practices rather than through heavy reliance on the enforcement of free competition in various phases of the business . . . has its counterpart in motor carrier policy.⁸⁵

The Interstate Commerce Act, as amended, makes it mandatory for railroads to consult, confer, agree, and take joint action, by requiring them to make joint rates and joint routes. For the reasons pointed out so cogently by Mr. Eastman, they can carry out these mandatory duties only by the conference and rate-bureau method of arriving at the agreements required.

The campaign by the Department of Justice to subject the conference and bureau method of rate making to the prohibitions of the antitrust laws is an attack at the heart of the system of regulation and the national transportation policy which Congress has set up in the public interest. It is a direct attack upon the Interstate Commerce Commission. It is directly against the public interest as determined by Congress.

VI

CONCLUSION

Neither the *Georgia* case nor the Lincoln, Nebraska, case has been decided on the merits. The decision by the Supreme Court in the *Georgia* case on April 23, 1945,⁸⁶ merely held that the Court had original jurisdiction to allow the filing of a bill charging that certain carriers had coerced and controlled others in establishing discriminatory rates and that such coercion and control, if proved, would violate the antitrust laws.

As pointed out earlier in this paper, the only rate discrimination of which Georgia complained in that case has subsequently been completely wiped out by the Commission in the *Class Rate* case, and by the affirmance by the Supreme Court of the orders in that case. The basis of Georgia's case in so far as the interterritorial rate structure is concerned seems now entirely moot. Whether the *Georgia* case remains open for a decision on coercion and control and for an injunction, if they be found to have existed, remains to be seen. It seems plain, however, that any injunction based on such a finding would be a new kind of injunction of only academic import because confessedly the Court cannot, by injunction, reach and regulate the rates. The Court itself still holds that rate regulation as such is exclusively the function of

⁸⁴ *Ibid.*

⁸⁵ *Id.* at 83.

⁸⁶ 324 U. S. 439 (1945).

the Commission, having been committed to it by Congress for the defense of the public interest.

The Interstate Commerce Commission sometimes makes mistakes, just as do the courts, Congress, and all human institutions. But that Commission, with its long history, has established a reputation for fairness, due process, non-political and judicial attitude, and for expertness in its field unequalled by any other quasi-judicial, administrative body.

It is unquestionably in the public interest for that Commission to continue its regulation of the freight rate structure under the national transportation policy declared by Congress. The public interest would be destroyed and chaos would be produced by turning that regulation over to the doctrinaires of the Department of Justice to administer under the philosophy of unbridled competition embodied in the antitrust laws.