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THE APPOINTMENT OF FEDERAL
DISTRICT JUDGES

BY KENNETH C. SEARS*

In this country a great deal of attention is given to the rules of law. It is believed that not enough attention on the other hand is given to the personnel of our courts. The product of any organization will depend largely upon the men who are a part of the organization. Under our notions of democracy we seem to have had a very prevalent idea that almost any man with ordinary judgment can make a good judge. Yet we are constantly debating how our judges should be selected. While numerous methods of selection have their advocates, many believe that it is necessary to appoint judges in order to obtain the proper type. The federal bench would afford an ideal testing place for this manner of selection, if the judges were in fact appointed by the President, free from political influences. It is the purpose of this article, therefore, to consider the present status of appointing federal judges (and more particularly how free such appointments are from political influence) by examining a recent appointment, in view of pronouncements from high sources that a change was to be made in the method of appointment heretofore prevailing.

Article II, sec. 2 of the Constitution of the United States provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law . . . ." It will be assumed, what does not seem open to dispute, that the President is to use his own discretion in making the nominations. It will also be assumed that it was never intended by those who framed and those who favored the ratification of the Constitution that the senators of the United States should usurp in effect the power to nominate and by a system of political racketeering impose their will on the President.

There is frequently a great difference between political theory and political practice. It is believed that today for all practical purposes in many if not most instances the senators from each state

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are really making the nominations to the federal district courts. This is a subversion of the Constitution, which both the President and the senators take their oaths to support and defend. The federal judiciary has been subject to many attacks during its history. The writer is of the opinion that it is as a whole far superior to the average state judiciary, and that as an organization it is the best that the United States affords. Nevertheless, it is believed that it is not what it should be and that it never will be that which it could be made if the Presidents of the United States would really insist and enforce the spirit of the Constitution and refuse any longer to be dictated to by senators in the matters of appointments of the federal district judges.

There was reason to believe at the outset of President Hoover’s administration that he would challenge the Senate in the exercise of its racket. The dominant note of his administration, so far as utterances go, is that of law enforcement. In his message to Congress,¹ December, 1929, he directed attention to the “National Commission on Law Observance and Enforcement.” He stated, “The commission has been invited to make the widest inquiry into the shortcomings of the administration of justice, and into the causes and remedies for them.” He also stated that the department of justice had been striving to “use increasing care in examining into the qualifications of those appointed to serve as prosecutors.” He omitted to state that the department was using “increasing care” to examine into the qualifications of those suggested for judicial appointment. However, the bar was given to understand at the beginning of President Hoover’s administration that such would be the case.² Perhaps the experience gained in the Watson and Hopkins appointments explains the omission.

1. Reference to the testimony and exhibits before the sub-committee of the Senate Judiciary Committee will be designated by the letter R. References to volume 72 of the Congressional Record will be designated by letters C. R.

2. Letter from President Hoover to Fred E. Britten of Stuart, Florida, dated Sept. 26, 1929 (the latter had protested against an appointment of a district attorney who was not the selection of the organization) :

“It is the natural desire of the administration to build up and strengthen the Republican Party in the State of Florida. That can be done in cooperation with the state organization if the organization presents candidates who measure up to my requirements of public service. This is an obligation in the interest of the people of the state, and the first tenet in that program is that no longer shall the laws of the United States be flouted by federal officials; no longer shall public office be regarded as mere political patronage, but that it shall be public service.

“I note your demands that the organization shall dictate appointments in Florida irrespective of merit or my responsibility, and that you appeal to the opponents of the administration to attack me. I inclose herewith a copy of
So it was that in the American Bar Association Journal for August, 1929, President Hoover was complimented for rendering "real service to the movement to maintain the high standards of the judiciary, and to improve its personnel where necessary, by his attitude on the selection of federal judges." It was also stated in this editorial, "The advice of those who are in the best position to judge is to be asked." The writer of the editorial also quoted from an address before the American Law Institute by Attorney General William D. Mitchell. These were his words:

"Tonight I want to say to you that one of the things that this administration is most earnest about is to see to it that the men who are selected for posts on the federal bench shall be men of integrity and ability, and in every way qualified for these posts. One of the inspiring things to me has been, since I have undertaken to participate in this work, to find that President Hoover responds instantly to any effort or assistance that is made or given to aid him in procuring for these positions the men who are qualified from every point of view."

It is unfortunate, to say the least, that the appointments of Judge Watson and Judge Hopkins by President Hoover have been subject to severe criticism. It is not only important to have excellent judges, but it is also important to have the public believe a statement which I issued last March. That statement was no idle gesture."

Attorney General Mitchell on April 26, 1929, in a radio address announced what was understood to be a new policy concerning the appointment of federal judges. He stated in part:

"For these reasons, the President of the United States has no single function of more vital importance than the nomination and appointment of judges of the federal courts. . . A great problem in judicial appointments is the extent to which political influence is allowed to enter into them. . . There should be no difference of opinion about the proposition that the primary qualifications for judicial office should be integrity, character, experience, and knowledge of the law, together with wisdom and sound judgment. . . If a judicial appointment is the result merely of political activity, the public knows it. The average citizen does not want his judges appointed for that reason. . . One of the elements entering into the present problem of law enforcement is the selection to the federal bench of men of the highest qualifications, who by their example and impartial and able administration of the law will increase respect for law and contribute to the solution of these problems.

3. 15 Am. Bar Assn. Jour. 486. Senator La Follette called attention to article 2 of the Canons of Professional Ethics: "It is the duty of the bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of judges. . . The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves."

4. This address was delivered in Washington on May 11, 1929, while Senator Reed's recommendation in favor of Mr. Watson was pending in Mr. Mitchell's office. (C. R. 815.)
that they are excellent judges.\(^5\) The appointment of Albert L. Watson to the federal district court for the middle district of Pennsylvania was strongly challenged and was the subject of fairly extensive hearings before a sub-committee of the Senate Judiciary Committee. Whatever may be the merits of the situation, these appointments have been asserted by the *St. Louis Post Dispatch*,\(^6\) in articles by Paul Y. Anderson, a staff correspondent, as conclusive of the proposition that President Hoover has yielded to political pressure and has abandoned the standard of merit for federal judges. This is a serious charge, and it is here proposed to examine the facts with reference to the appointment of Mr. Watson with a view of ascertaining whether the charges made are justified by the record.

The following assertions were made by the *St. Louis Post Dispatch*:

1. Clarence Balentine and Albert L. Watson were the two candidates for the appointment in Pennsylvania. Balentine had the endorsement of one hundred and forty-seven of the two hundred active members of the bar of Lackawanna County, of which Scranton is the county seat. Watson was endorsed by thirty lawyers scattered over the twenty-two counties comprising the judicial district.

2. Watson had appeared as counsel in only six contested cases during twenty-six years of practice. Most of his practice had been uncontested divorce cases. For two years he had abandoned his practice to become a bond salesman.


4. When Attorney General Mitchell failed to recommend Watson promptly, Senator Reed was "understood" to have told the President that unless Watson was nominated, the Pennsylvania delegation in Congress would not answer for the consequences.

5. Senator Borah, chairman of the sub-committee of the Senate Judiciary Committee, asked Attorney General Mitchell concerning the report that Watson had been appointed by the President

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\(^5\) "In America, where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration." (Preamble to Canons of Professional Ethics.)

\(^6\) Two articles which appeared in the summer of 1929 and on November 16, 1929. The same writer had two paragraphs in *The Nation* for December 4, 1929. There was also an editorial on the subject in *The Baltimore Evening Sun*. See also C. R. 815.
without his, Mitchell's, recommendation. Mitchell told Borah over
the telephone that he preferred not to write a letter but would give
him the facts in a confidential interview. Borah declined this. Mit-
chell was invited to appear before the full judiciary committee.
Mitchell appeared, but did not wish to give formal testimony. He
stated that he had not been satisfied with Watson's qualifications,
but had decided that no better candidate was then available, and had
reluctantly given his approval.

6. The Pennsylvania Railroad has more than twenty-eight
hundred miles of track, a number of large shops, and more than
fifteen thousand employees in the middle district of Pennsylvania.
Mr. Atterbury's efforts, "it has been argued," have placed Mr.
Watson under obligation to the railroad.

The above statements will be considered in order.

1. The number of lawyers in the Lackawanna County bar
seems to be somewhat uncertain. It was estimated by the witnesses
from one hundred and seventy-five to two hundred and twenty-five.:
It would appear as if Mr. Balentine was an active candidate. On
the contrary, Mr. Watson testified that he had stated at the outset
that he would not ask anybody to support him and that he never
made such a request. Mr. Balentine's petition was signed by one
hundred and twenty-three members of the Lackawanna County bar.
There were also petitions in his behalf signed by members of the
bars of the following counties: Monroe, Wayne, Huntington, Sul-
vivan, Cumberland, Susquehanna, Montour, Wyoming, Pike, Mifflin.
While there is nothing to show that any petition was prepared on
behalf of Mr. Watson, yet there is in the record a compilation of
the various persons and organizations who approved of his selection.
Fifty-nine lawyers from Lackawanna County endorsed him. About
forty-five lawyers from Luzerne, Dauphin, Lycoming, Susquehanna,
Adams, Columbia, Northumberland, Wyoming, and York counties

7. Mr. Powell's estimate was 225. (R. 75.) Mr. Martin thought the
number was about 200 but he yielded to Mr. Powell's estimate of 225.
(R. 105.) Mr. Wentzel's estimate was 175 to 200. (R. 21.)

8. R. 140. See also R. 107-8. This could be true and still there could
have been solicitation in behalf of Judge Watson. Compare testimony of
M. J. Martin: "I was asked to support him prior to the approval of the Act
of Congress, a few days before that . . . ." (R. 50.) Senator Reed stated
to the Senate: "I was reminded of him (Watson) continuously, and the
letters in the committee hearings show constant communications from people
in that district urging that be be appointed when the place was created."
(italics supplied; C. R. 755.)

9. Counting "Levy & Levy" as only one. (R. 125-6.) Cf. Mr. Martin's
testimony: "One hundred and forty-seven members of that (Scranton) bar
signed a petition for another candidate." (R. 105-106.)
approved of Watson's appointment. Eight judges of various courts of common pleas in Pennsylvania and four judges of the superior court of Pennsylvania also endorsed him.\(^{10}\) In the hearing before the sub-committee on September 24, 1929, a delegation appeared in behalf of Mr. Watson. In the delegation there were eighteen lawyers who approved of Mr. Watson's appointment, and it was stated that they had made the trip and paid their own expenses in order to refute the argument that Mr. Watson was not satisfactory to the bar of Lackawanna County.\(^{11}\) Indeed, there was testimony before the committee that Mr. Watson was almost the unanimous choice of the members of the Lackawanna County bar.\(^{12}\)

Judge Watson had been selected by Mrs. Worthington Scranton, the woman member of the national Republican committee for Pennsylvania, as her choice for the position, even before the act creating the additional judgeship had become a law.\(^{13}\) Apparently there was activity in his behalf before the act of Congress was signed by the President.\(^{14}\) Therefore, it is all the more significant that such a large number of the members of the Lackawanna bar signed the petition of Mr. Balentine. It is possible that Mr. Watson realized that he would not be the first choice of the Lackawanna bar, and for that

10. R. 130.
11. R. 61.
12. Mr. Powell: "... I do not believe there would be three members of that bar of Lackawanna County out of 225 members who would say that Judge Watson is anything other than their preference." (R. 75.) This testimony is hardly acceptable in view of the fact that 123 members of the Lackawanna County bar endorsed Clarence Balentine and only a few of his endorsers signed up for Judge Watson also. (See the exhibits, R. 125-6, 129-30.)

Mr. Frank E. Donnelly, speaking in the presence of the delegation of lawyers who appeared in Washington in behalf of Judge Watson, stated to the sub-committee: "... outside of the statement of M. J. Martin ... I can assure you that we do not know of a single member of our bar even privately who has been opposed to the confirmation of Judge Watson." (R. 98.)

13. During the debate in the Senate, this statement was made by Senator Reed: "It is not in the record but it is the truth that before even a bill was introduced to create this additional judgeship Mrs. Scranton brought Judge Watson to my house in Washington, and they brought with them tables showing the number of cases pending, the number of cases decided, and so forth, arguments in favor of the creation of the additional judgeship; and she said to me at the time that she hoped Judge Watson would be the appointee. I replied that it was too soon to decide that; we had first to decide whether anybody was to be an appointee. That was in the fall of 1928." C. R. 825. See testimony of Judge Watson, R. 140.

14. Mr. Martin wrote a letter to Senator Reed on Feb. 26, 1929 (the day that it was announced that Congress had passed the bill creating an additional judgeship). He stated: "I am told that you will be asked to support the appointment of Albert L. Watson, of this city." Then he set forth his objections to Mr. Watson. (R. 156.) See note 8, supra.
reason adopted the attitude that he "would not ask anyone to support" him. Then, he knew that he had an important person in the political organization in charge of his candidacy.

2. The second charge, in effect, challenged Mr. Watson's legal ability. Upon this question, there was a large amount of testimony and it was divergent. There was no testimony, however, that he had appeared as counsel in only six contested cases during twenty-six years of practice, nor that most of his practice had been uncontested divorce cases. The statement that he had abandoned his practice for two years to become a bond salesman is erroneous. He was in Minneapolis for about that time working for a bond house and other clients in a legal capacity.15

Mr. Charles Wentzel, Jr., who was a reluctant witness and appeared only in response to a senate subpoena, had been the deputy prothonotary of Lackawanna County for twenty-two years. He testified that while he had been in the office Mr. Watson had had probably a dozen cases, and he had no particular impression of Mr. Watson as a trial lawyer in the Lackawanna County courts.16 He thought that since Mr. Watson had been off the bench, January, 1928, his practice had probably increased, and that he had probably four or five cases then with the exception of divorce cases of which he had several. Most of the divorce cases were uncontested.

Mr. A. O. Vorse, clerk of the federal court, at Scranton presumably, testified on June 19, 1929, that he had been clerk since December, 1927, and that so far as he remembered, Mr. Watson had never appeared in the federal court room. He had been in the office to file a few papers, and he thought he had acted as receiver in a few bankruptcy cases.17

Mr. George C. Sheuer had been the clerk and deputy clerk of the federal court from 1901 to 1927. He remembered that Mr. Watson had appeared in the federal court during his time, but his memory was of his appearance in relatively few cases, and in some of those his appearance had been with his father and his father's partner.18

Mr. M. J. Martin was the leader of the opposition to the confirmation. He has been a practicing lawyer in Lackawanna County for thirty-three years, and appears to be one of the leaders of the bar. He gives the impression of having great courage, as is indeed

16. Mr. Wentzel's duties required him to be in an office other than the court rooms most of the time. (R. 19-22.)
17. R. 45-46.
required in any lawyer to oppose the confirmation of a man who has been selected by the local political organization, and who, if confirmed, will be presiding over a court in which the contesting lawyer may have to appear. He very strongly opposed the confirmation of Judge Watson for the reason that he thought him to be of insufficient legal capacity for the position. His recollection was that Mr. Watson had argued only one case before the Supreme Court of Pennsylvania. No proof was ever made that Mr. Martin's memory was inaccurate in this respect. He never saw Mr. Watson examine a witness in a contested case, or argue an exception, or the admissibility of any evidence. He had heard him in pro forma motions in the common pleas court.

The most damaging item against Mr. Watson on the score of his legal ability was a letter written by Joseph Buffington, senior judge of the United States circuit court of appeals for the third circuit. The letter was written May 5, 1929. The selection of Judge Watson for the federal bench had been approved by Senator Reed on May 2.20 The first testimony on the confirmation was received on June 17. The letter was addressed to the President and was apparently very carefully considered for Judge Buffington stated that this was the first time in his judicial life that he had ever written a President on the subject of a judicial appointment. He also stated that he "was gratified to read the recent address of your distinguished Attorney-General in which he stated the high standards to be followed in the selection of federal judges and United States attorneys during your administration." After referring to the fact that in the northern part of the middle district of Pennsylvania there was such a general disregard for the prohibition law that it was regarded as one of the wettest places in the United States, he stated:

"I understand that the name of the honorable Albert L. Watson has been presented to you for appointment as district judge. After careful inquiry made by myself and others whose help I have sought as to the qualifications, experience, and fitness of Judge Watson to fill the place, I assume the responsibility as senior United States circuit judge for the third circuit of saying that in my judgment Judge


There was an effort to show Mr. Martin's prejudice by asking him if he had not stated to Mr. Warren Acker that he would not "support anybody that Mrs. Scranton urged." He denied that he made any such statement. (R. 50.) Later Mr. Acker appeared before the sub-committee and an offer was made to have him testify that Mr. Martin made that statement. The sub-committee was not sufficiently interested to listen to Mr. Acker. (R. 112.) Previously Mrs. Scranton had testified to what Mr. Acker had told her. (R. 59.)

20. C. R. 815.
Watson is not qualified to fill the place and measure up to the standards of the federal bench.

"Judge Watson was appointed by Governor Pinchot to the common pleas court of Lackawanna County. He was without the experience of a successful practicing lawyer. During his service as the governor's appointee, I learned that seven or eight of the eleven cases he tried, which were reviewed by the appellate courts, were reversed . . .

"Judge Watson is a man of agreeable personality. He has heritage, the association and friendship of people of social standing; he has strong political support, but in my judgment he is unfitted for the federal bench which calls in that district for a man of able judicial capacity, of unquestioned reputation, and of great firmness of character.

"In my judgment he has been weighed in the balance and found wanting by the appellate courts of the state, by the action of the voters, and by members of the bar who, better than anyone else, know their fellow members of the profession. I regard his appointment would be (sic) a distinct lowering of the standards of the third circuit which we have inherited, have sought to maintain, and propose handing to our successors."21

In the words of the editorial writer in the American Bar Association Journal, this was the advice of one who was in the "best position to judge." It does not appear that the advice of Judge Buffington was solicited, and it seems rather obvious that it was not given as much consideration as the wishes of the political organization in Pennsylvania.

Mr. Watson had many witnesses in his behalf. The first was Mr. W. W. Atterbury, a member of the national Republican committee for Pennsylvania. He knew nothing of Mr. Watson's legal ability. Indeed, he had never met him until after he had recommended him. He testified, however, that Mr. Watson's legal ability had been approved by Chief Justice von Moschzisker, and apparently by Justice Shaefer and Justice Kephart of the Supreme Court of Pennsylvania, and he had a report that Mr. Owen Roberts was favorable to him.22

In a political way, Mr. Watson is chiefly indebted to Mrs. Worthington Scranton for his appointment. She, as stated, is a member of the national Republican committee for Pennsylvania, and was the first to speak to Mr. Watson about his appointment.23 He had been her next door neighbor, and she testified in the most positive

22. R. 1-13. See also C. R. 745, 823.
23. Senator Borah asked: "How did you become interested in the judgeship?" Mr. Watson replied: "Mrs. Scranton suggested to me one time that possibly there might be a vacancy in the middle district of Pennsylvania, and she asked me whether I thought that I would like to have the position. I told her that I thought it would interest me." (R. 140.)
manner as to her opinion of Judge Watson's qualifications and also as to his reputation as a very able lawyer. She testified also that they were very warm friends and it must be stated that no mother ever more zealously defended her child than Mrs. Scranton defended her selection for the federal bench for the middle district of Pennsylvania.  

Mr. James J. Powell, a lawyer of Scranton for thirty-three years, testified that Mr. Watson was qualified and would make a splendid judge. He used many adjectives describing Mr. Watson as fair, competent, honest, good, capable, amply qualified, and thoroughly qualified. He also thought Judge Buffington had given an improper estimate of Judge Watson, although he made an even stronger statement than Judge Buffington concerning the fact that Mr. Watson had met with eight reversals and two affirmations out of ten cases which he decided while judge of the common pleas court. On the whole, it seems fair to observe that Mr. Powell did not regard Mr. Watson as an outstanding judge, or that he could fairly be said to be a leader of the Scranton bar.

Mr. H. C. Reynolds, an attorney of Scranton, Pennsylvania, ventured the statement: "You could not get three representative lawyers to come here and say an unkind word" as to Judge Watson's ability as a lawyer or his competency as a judge. Then there were eighteen lawyers who assented to Senator Borah's suggestion that they all agreed "in a general way as to the fitness . . . and ability of Judge Watson."

A careful reading of the record and all of the exhibits leaves the writer with the impression that the most that can be said for Judge Watson upon any discriminating basis is that he is nothing

24. "When I suggested Judge Watson's name I felt very certain that I was submitting a name of a man who was outstandingly qualified to be a federal judge in our district, and I submitted it, as we always do, those connected with the organization, through the regular channels; that is, our Senator from Pennsylvania . . .

"Mr. Martin. Did you consult any members of the bar association of the middle district about Judge Watson?"

"Mrs. Scranton. No." (R. 15.) Her testimony will be found in the record 14-19, 23-24, 58-60.

There was one item of testimony to indicate that Mrs. Scranton insisted that Judge Watson be given the chairmanship of a local Pinchot campaign committee. (R. 28.)

Senator Borah called "attention to the fact that the real credit for this man being put to the front belongs to a woman" (C. R. 824).

25. R. 62-76. He also referred to certain opinions written by Judge Watson and referred to them as "very able" and "very splendid."

26. R. 79.

27. R. 79-80.
more than an average lawyer with at least an unfortunate record in the Superior Court of Pennsylvania as to reversals.

It is impossible to understand on the basis of the record how it can be argued seriously that Mr. Watson is anything more than an average political appointment from the standpoint of legal ability. Not being particularly familiar with the personnel in the third circuit, the writer should be inclined to say that Judge Buffington's assertion that Mr. Watson represents a distinct lowering of their standards has not been overcome.  

Fortunately, no charge against Mr. Watson's character was made by the St. Louis Post Dispatch. Character is the most important quality in any man. It is more important even than his ability. On this score, the weight of the testimony is strongly in favor of Mr. Watson. Indeed, there was no contest about his character except that it was strongly asserted by Mr. Martin that he lacked courage and moral fibre to resist influences. It was conceded that his personal and social background was excellent and that his instincts were good. The only concrete situation which throws a light upon Judge Watson's character will be discussed in reference to the so-called "two-judge orders."

3. It was charged that Mr. Watson had the support of W. W. Atterbury of the Pennsylvania Railroad. This may be considered in connection with the sixth allegation that the Pennsylvania Railroad is a great factor in the middle district of Pennsylvania and that

28. Senator Borah voted for and made an argument for Judge Watson. He was impressed with his character, his freedom from corporate practice, and the strong support he had from labor unions.

"However, Mr. President, let me discuss further the question of Judge Watson's ability as a lawyer. Understand me perfectly; I do not contend that he was a leading lawyer of that bar; I do not contend that he is a great lawyer; but I do contend that he is an industrious, painstaking, and careful lawyer. I have no doubt at all, if he is honest, as I believe him to be; if he is industrious, as I believe him to be, his legal attainments will enable him to meet the duties of the bench." (C. R. 823.)

"If we are going to nominate a leading lawyer in Pennsylvania, a man of great practice, from what avenue of life would he draw his practice? Where would he get his clients and clientele which would make him a leading lawyer? He would have to get them from the great corporations of Pennsylvania. Believing as I do that Judge Watson is honest, upright, industrious, and uncontrollable, I will take chances on his finding out what the law is. I believe he would have the right viewpoint, the broad view, and as to the law he will have little difficulty." (C. R. 822.)

29. R. 49, 53, 107. For the sake of accuracy it should be stated that there were three witnesses who testified to attempted political manipulation on the part of Judge Watson. It is more or less discreditable if it is the truth. Nobody, however, seemed to give the testimony the slightest credence and the printed page would seem to disclose that the witnesses were unprincipled politicians. See the testimony of Alfred Bright (R. 32-39), Samuel Weinstein (R. 39-42) and Shandor Kovaco (R. 42-45).
Mr. Atterbury's efforts had placed Mr. Watson under obligation to the railroad. As was pointed out, Mr. Atterbury as a politician approved Mr. Watson's appointment without any personal knowledge of him. He also very frankly stated that the Pennsylvania Railroad had seventeen thousand nine hundred and fifty-nine employees in the middle district and two thousand nine hundred and two miles of railroad track in the district. He also stated that the Pennsylvania Company, a holding corporation, owned stock in the Lehigh Valley Railroad Company, which had tracks and employees in the district, and he did not deny that the Pennsylvania Company owned as much as thirty per cent of the stock of the Lehigh Valley.30

Mr. M. J. Martin attempted to draw a conclusion from these facts that the Pennsylvania Railroad Company was interested in the judgesship.31 In the judgment of the writer, this conclusion is hardly justified. The Pennsylvania Railroad Company is a Pennsylvania corporation and for that reason is not in a position to remove cases to the federal court on account of diversity of citizenship among the various states in the union. Accordingly, it was the testimony of Mr. Sheuer, deputy clerk and clerk of the federal court from 1901 to 1927, that the Pennsylvania Railroad was a party in six trespass cases in the federal court during 1927, and in about twenty cases in which the United States was a party on account of alleged violations of the hours of service law.32 In other words, the undisputed testimony is that the Pennsylvania Railroad Company only appears as a litigant in the federal court of the middle district with comparative infrequency.33

So it must be concluded that it was not Mr. Atterbury's interests as the president of the railroad company but his interests as a practical politician that caused him to go forward in behalf of Mr. Watson. Of this, he was unashamed, and testified as follows:

"Senator Walsh. General Atterbury, is it a part of the functions which devolve upon you as national committeeman to make recommendations for judicial positions in the State of Pennsylvania?"

31. R. 51-52. Mr. Martin stated in his brief that "the district is composed of a mixed population, many of whom are not citizens of the United States and can get into the United States court on that ground" . . . (R. 159).
32. R. 47.
33. S. W. Hofford, chief deputy clerk of the federal court for the middle district from October 15, 1911, to August 27, 1929, made a statement on the latter date under seal that the Pennsylvania Railroad had been defendant in only nine cases in trespass during that time. In two of them nonsuits were granted because of no diversity and in only one had there been a trial. (R. 117-118.)
"Mr. Atterbury. I should think that it would be. I have always so considered it, and I think it is a perfectly natural assumption, Senator, that if any appointments came up my recommendation would be asked."

As for the support of Joseph R. Grundy, he testified before a sub-committee investigating the Washington lobby that on one occasion, presumably April 29, 1929, he gave a dinner which was attended by General Martin, chairman of the Pennsylvania Republican committee, Senator Reed, Governor Fisher, W. L. Mellon, and State Senator Flynn, among others. One of the things discussed was the vacancy in the middle district and it was the sentiment of the group that Senator Reed's judgment in favor of Mr. Watson should be approved. As stated by Mr. Grundy, now the junior Senator from Pennsylvania, . . . "and everybody was willing to leave that selection to Senator Reed."

4. The position of Attorney General Mitchell as to the Watson appointment for a time was mysteriously veiled from public view. It was revealed in part only by a curious combination of circumstances. There was testimony by Mr. Martin that he was "told" that the Department of Justice had sent a man to the middle district to investigate Mr. Watson and others. It was suggested that the report of the investigator should be presented to the sub-committee. So far as appears this was never done. In a sworn statement by Senator David A. Reed, he informed the sub-committee that the Attorney General "wanted to satisfy himself before he recommended him (Watson) to the President and he did, after considerable study, and he expressed himself to me as perfectly satisfied that Judge Watson was a good lawyer, and a capable judge."

Whereupon Senator Borah stated as follows: "Well, Senator Reed, it has been represented to me that Judge Watson really was not the choice of the Attorney General; that the Attorney General finally yielded his judgment to the pressure of yourself and others." Senator Reed replied: "As to that, I don’t know, but because of the delay there is no doubt that the people in Scranton were exasperated and aggrieved, and I took steps to hurry up the Attorney General's decision one way or the other. I had the impression very strongly that he was satisfied."

Despite this testimony which was given October 17, 1929, for reasons which have never been disclosed so far as the writer has

34. R. 13.
35. C. R. 813-814.
36. R. 105.
37. R. 144-145.
been able to discover, the Attorney General was very loathe to express himself. This attitude seems to be wholly undesirable. The American public and particularly the American bar are entitled to be taken into his confidence on matters of such importance. It is enough to make one wonder whether the Attorney General lost his bearings in this particular appointment, and whether he slipped before the power known as Senator David A. Reed—"Beloved King David"—of Pennsylvania.

Senator Borah was the chairman of the sub-committee which investigated the Watson appointment. He read into the congressional record a letter he wrote to the Attorney General asking him to advise the committee concerning Judge Watson. The Attorney General had an assistant in his office talk to Senator Borah's secretary over the telephone and say that the Attorney General desired to make his statement personally before the committee, and that he did not wish to make any written statement. Senator Borah then determined that any statement that was made would have to be uttered before the full judiciary committee.

The Attorney General did appear before the full committee, but requested that his statement be not taken down in written form.

38. It may be the fact that President Hoover, instead of Attorney General Mitchell, is the one who "slipped." Senator Norris stated:

"Mr. President, I have a good deal of sympathy with the President of the United States; I know that he is confronted by a different condition in Pennsylvania than that by which he was confronted in Florida or in the other Southern States, but I had hoped, I do now hope, that the President, who had courage enough to swat the dirty machine in Florida, will hit the same kind of machine the same kind of a blow, no matter where it may be, whether in Pennsylvania or elsewhere. But, of course, it is expecting a good deal, I admit, to ask that even of the President of the United States. It may be easy to lay down the law, and to give publicity to it over the country, to wealdings down in Florida and stop them from peddling out patronage for selfish reasons to incompetent aspirants, but it is a different thing to go against the machine in Pennsylvania. There, Mr. President, is Mr. Mellon; there is Mr. Grundy; there is Mr. Vare; there is the Pennsylvania Railroad Co.; and last, but perhaps not least, there is our own beloved 'King David'—the Senator from Pennsylvania (Mr. Reed). (Laughter.) That is a combination that might well put fear into the heart of any man, and also, I presume, might reach the heart of the courageous and upright President, Mr. Hoover, who wants to clean up dirty politics in the South." (C. R. 751.)


40. C. R. 748-749. "Mr. La Follette. Mr. President, did the Attorney General give any reason as to why he did not want his testimony made a part of this record when he finally appeared before the committee?"

"Mr. Borah. The Attorney General seemed to object to being called as a witness. He was willing to come as a Cabinet officer and talk with the committee, but I drew from what he said that he did not think he should be subpoenaed or called as a witness."

"Mr. La Follette. I understand that, but I do not quite understand why he should hesitate to have whatever he had to say concerning this nomination taken down."

No satisfactory answer was ever given to Senator La Follette so far as the Congressional Record is concerned.
Then the nomination came on for confirmation. Senator Norris had one idea as to what the Attorney General had said as to Mr. Watson’s ability. Senators Borah and Steiwer had other ideas. Finally, Senator Borah stated, “So far as I am concerned, Mr. President, the Attorney General must make himself plain before this man is confirmed. If the Attorney General gives the impression and we go to confirmation of this man with the understanding that he thinks the man is not qualified, I want to know it.”

This statement was made on Monday, December 16, 1929. On the next day, December 17, Senator Borah produced a letter which he had received from William D. Mitchell, Attorney General, dated December 17. This letter contained the following:

“What I said about judge Watson and the impression I intended to convey to the committee is well summed up by a senator whose remarks are recorded in the record as follows: ‘It is my recollection at this time that affirmatively he said that this appointee was a man of good moral character; that he also said that he was not all that he could wish with respect to professional ability, but that he was the best solution that he could find for the problem.’

‘By way of explanation of this, I mentioned before the committee names of one or two other lawyers who had been put forward for this appointment with legal ability superior to Judge Watson’s, but who, on account of age or other conditions, I considered unavailable.

‘I did not state to the committee that I thought Judge Watson was not qualified for appointment to the federal bench, and I did not intend to give the committee the impression that I thought so.

‘Respectfully yours, William D. Mitchell, Attorney General.’

To this very day, so far as the writer has been able to discover, the Attorney General has not made clear to the American bar just why Judge Watson was the best solution for his problem, or whether his problem was partially a political problem. Nor has the Attorney General made it clear what were the “other conditions” that made it impossible to appoint a man whose professional ability would satisfy him. It seems to be a fair conclusion that the political

41. C. R. 748-50. Senator Walsh and Senator Borah had an argument over what the former stated to be “the rather cryptic language” of the Attorney General. (C. R. 822-23.) Finally, Senator Borah stated: “I want to say here in passing that that leads to the suggestion that hereafter when Cabinet officers come before a committee of the Senate, whatever the committee may be, they ought to take exactly the same position as other people who come before us, and have their testimony taken down. They should be sworn and cross-examined. It is very unfortunate in view of the situation that a little sensitiveness about the matter led the Attorney General to think that he should make a statement without being sworn, and so forth. When the Senator from Pennsylvania appeared before the committee he voluntarily asked to be sworn. No man ought to object to that being done.”

42. C. R. 801.
organization in Pennsylvania was too strong for the Hoover administration. 43

The most complicated question that arose with reference to the qualifications of Judge Watson concerned the so-called "two-judge orders." As judge of the court of common pleas, he was also judge of the court of quarter sessions. Unfortunately, the judges of the court of quarter sessions exercised considerable control over the political machinery in Lackawanna County. 44 It seems to be a very difficult thing in this country for those in control of the political machinery to keep away from conduct that ranges from unfairness to illegality.

Section 14 of article 8 of the constitution of Pennsylvania provides that the district election boards shall consist of a judge and two inspectors to be chosen annually by the citizens. It also provides that the election officers should be privileged from arrest on election days, and while engaged in making up and transmitting returns "except upon warrant of a court of record or judge thereof, for an election fraud, for felony, or for wanton breach of the peace." There is also a statute in Pennsylvania known as the Act of 1921. It provides that where a vacancy exists in any election board, the

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43. "This nomination furnishes the acid test of the policy which President Hoover has repeatedly emphasized as the outstanding policy of his administration. If, after all the facts have been disclosed and discussed here, this nomination is confirmed, then we shall know with what measure of sincerity this administration is proceeding to separate the federal judiciary from politics referred to by the President as one of the foundation stones upon which improved law enforcement and observance rest." (C. R. 809.)

Senator La Follette read into the Congressional Record an article by Carlisle Bargeron which was printed in the Washington Post of June 9, 1929. Among other things it was asserted that Senator Reed visited the White House and "... served notice that unless Watson was appointed the President need expect no further support from the Pennsylvania delegation in Congress ... He came away from the President white in the face. There was no doubt but that it had been a warm meeting" ... Though Senator Reed challenged many utterances during the debate over the confirmation of Judge Watson upon the occasion of the reading of this article he had nothing to say. (C. R. 815-16.)

44. "Mr. President, just a word or two about the two-judge orders. There is a law in Pennsylvania which, I think, is exceedingly unwise. I do not believe that any lawyer, upon reflection, would indorse it. That law provides that the court or the judges are to perform certain quasi-administrative duties with reference to the filling of vacancies which happen in the election machinery in the state. That is a very unfortunate law. It is unfortunate for the reason that it does not make any difference how upright and how honest a judge may be, called upon to discharge a quasi-partisan duty he will always be criticized by one side or the other, and therefore drawn into politics.

"In my state the duty which they have imposed upon the court in Pennsylvania belongs to the county commissioners. It ought to belong to some political body, instead of drawing into the election machinery the judges and the courts. But there it is." (C. R. 825.)
judge or judges of the court of quarter sessions upon proof shall fill the vacancy.48

The Act of 1921 and the constitutional provision seem to be the only written law of the statutory type governing the conduct of elections and matters hereafter to be specified. Nevertheless, before Judge Watson was a member of the court, i.e., in 1923, Judge Edwards and Judge Maxey issued the first "two-judge order."46 It was issued on November 5, 1923, and provided that "all orders pertaining to the removal or impounding of ballot boxes, or the bringing in of election boards to the courthouse after the election of Tuesday, November 6, 1923, must, in order to be valid, be concurred in by at least two judges of this court." The order was directed at Judge Newcomb, the third member of the court.47 Another order was issued by Judges Edwards and Maxey on November 6, 1925. It was similar to the first order except that there was added thereto a requirement that all orders "pertaining to the removal of judges or inspectors of elections or overseers of elections" should be signed by two judges of the court.48 Thus it will be observed that there was no constitutional or statutory provision which justified the court or any judge thereof in assuming to do anything except to fill a vacancy in an election board.

In 1927 there was passed a statute which provides "that the court of common pleas or a judge thereof" under certain circumstances shall open the ballot boxes and cause the entire vote thereof to be correctly counted.49 It will be observed that this Act of 1927 in terms concerns only the opening of ballot boxes and counting the vote. It was argued by Judge Maxey with apparent correctness that this is something distinct from the removal or impounding of ballot boxes, and also distinct from bringing election boards to the courthouse.50

On the 20th day of September, 1927, there occurred a primary in Lackawanna County. Judge Watson was a candidate at the primary to succeed himself. During the night of the nineteenth, he

45. See a brief prepared on behalf of Judge Watson. (R. 145-153.) The Act of 1921 is set forth on page 85 of the record.
46. R. 81. The "two-judge orders" seem to be peculiar to Lackawanna County. (R. 136.)
47. R. 82-83. Judge Maxey admitted that there was no statutory authority for the removal or impounding of ballot boxes nor for the bringing in of election boards to the courthouse. It was argued that the court had inherent power by virtue of the local common law to act upon such matters. (R. 82-84.)
48. R. 85-86.
49. R. 115-116.
50. R. 87-92
and Judge Maxey issued another "two-judge order." It was in terms similar to the "two-judge order" of 1925. Their excuse for making such an order was that Judge Newcomb had been in the habit of making illegal orders and that there was bitter feeling between the majority and the minority of the court. Judge Newcomb was not even on speaking terms with them. In other words, as Judge Maxey testified, the "two-judge orders" were necessary in order to prevent illegal one-judge orders.

There were apparently a number of clashes between the two factions of the court, but the worst conflict occurred over the appointment of an inspector of election for the first ward of the borough of Throop, Pennsylvania. One Francis Heffron had been elected inspector, but he had become a police officer. This, it seems to be agreed, disqualified him for the office of inspector. Accordingly, Judge Newcomb, acting upon a petition signed by five individuals, sworn to September 7, 1926, by one of them and reciting that Anthony Comerota was of the same political faith as said Francis Heffron, without consulting the other members of the court, issued an order appointing Anthony Comerota to fill the vacancy. This was followed by a "two-judge order" of Judges Maxey and Watson on September 19, 1927, without notice to Judge Newcomb. It recited that Conerota was a registered Democrat. So, his appointment was revoked in this "two-judge order" and Michael Marushok "a duly enrolled Republican" was appointed in place of Conerota. This was followed by an order on September 20, 1927, which recited that "the appointment of Michael Maruschok was improvidently made, the same is now vacated and Anthony Comeratta appointment of September 10, 1926, will stand." This order was signed "by the court," but it was Judge Newcomb's order, again without notice to the other members of the court. Following this, Judges Maxey and Watson issued another "two-judge order" without notice to Judge Newcomb, on the same 20th day of September, 1927. It vacated the last order of Judge Newcomb which purported to vacate the appointment of Michael Maruschok. It re-

51. It was issued "late on the night before the primaries" after Judge Maxey had been informed that Judge Newcomb was engaged in revoking appointments. (R. 87.) See Judge Watson's testimony. (R. 135-39.)

52. R. 95. Judge Watson in his testimony attempted to excuse himself for failure to give notice to Judge Newcomb before the issuance of the "two-judge order." His effort is not impressive. (R. 137.)

53. R. 81.

54. R. 94-96.

55. R. 152-3. Should this be 1927? Judge Maxey testified that the removal occurred in "September, 1927." (R. 94.)
cited, however, that said Michael had been placed under illegal arrest by the sheriff of Lackawanna County and had been spirited away. Therefore, it was ordered that Anthony Scrvera be appointed to fill the vacancy. Scrvera did not care for the job. So, there followed another “two-judge order” on the same day by Judges Maxey and Watson without notice to Judge Newcomb. It recited that Anthony Servera (sic) had refused to accept the appointment, and Peter Mohnach was appointed to fill the vacancy. There was also a provision in the order that it should be carried into effect by Con Morosini, chief county detective of Lackawanna County, assisted by Harry Colle and Anthony Dobyrdney, county detectives, further assisted by state troopers of Pennsylvania.

There seem to be two respects in which Judge Watson should be condemned with reference to these “two-judge orders.” In the first place, he was issuing orders concerning a primary election in which he was a candidate. In the second place, he and Judge Maxey were issuing orders without notice to Judge Newcomb, who also seems to have been guilty of unjudicial conduct. On the whole, the least that can be said with reference to the “two-judge orders” is that they give the appearance of being the product of a group of practical politicians rather than a group of judicial officers with the proper judicial standards.

While it is true that under the Constitution and federal laws the President formally nominates judges to the federal courts, it is believed that the practice from a realistic point of view is for the appointments to be made by the senators, or senator, of the same political party as the President, or the party organizations in so far as they control the senators. From this point of view, it is interesting to consider the sworn statement of Senator Reed as con-

56. R. 153. See also R. 94-96.
57. R. 154.
58. See R. 92. Senator Walsh asked if it had been the custom of judges who were candidates to join in the appointment of election inspectors. Judge Maxey replied that Judges Newcomb and Edwards had done so. To which Senator Walsh made this significant response: “We are voting on tariff legislation upstairs here now. There are probably few of the senators who are not interested in one way or another in some of the schedules but they vote just the same; but we do not tolerate that kind of thing in a judge, you know.”
59. Judge Maxey stated: “There is no question in Lackawanna County today about two-judge orders. Judge Newcomb and myself and Judge Leach get along amicably. It is clearly understood now that the court will sit together, because the Supreme Court has in the past year or two spoken in very emphatic terms in regard to this matter.” (R. 86.)

It should be stated in fairness to Judge Newcomb that he did not testify before the sub-committee and therefore his version is unknown to the writer.
tained on pages 142 to 145 inclusive of the record. It seems to be a fair statement that he there indicated that he considered it his responsibility and his privilege to select the judge for recommenda-
tion to the Attorney General with the expectation that the Attorney
General would approve his recommendation. Accordingly, he stated that: "I looked for a judge" from the Scranton-Wilkes-
Barre region. "I thought for a while that I had found a good man in Luzerne County, which is where Wilkes-Barre is, and then I thought I had found a man in Tunkhannock... I studied both of them. Then Judge Buffington and other judges... recommended Mr. Morgan Kaufman... All those men I considered. I wanted to get the best one... I started with prejudice against Judge Watson, frankly, simply because of Mr. Martin's letter, and that is one reason why I held it up so long, and I gave a lot of people up in that country, I guess, heart disease, by delaying, but I wanted to make a recommendation that I was sure of... So far as this being somebody else's choice, it is not. It is my choice. It is my free choice uninfluenced by General At-
terbury or by anybody else." He also stated: "I felt a further re-
sponsibility because Mr. Harding and Mr. Coolidge and Mr. Hoo-
er so far have always accepted my recommendations for judicial ap-
pointments in Pennsylvania."  
The nomination of Judge Watson is the first nomination to the federal judiciary that has ever been considered in open executive session. Therefore, there are many comments about it which ap-
pear in the Congressional Record. Senator Reed stated:

"The bill passed in the short session of the Congress, and then I began to look around for a suitable person to recommend to the Attorney General for nomination... Probably forty-five or fifty lawyers in the district aspired to the appointment... but the one that appealed to me most strongly was Judge Albert L. Watson... It seemed to me that it was wiser to select a lawyer who had made a good judge than to select one merely because I thought he would make a good judge... So far as I know, the recommendation was made on my judgment only. I regard such appointments as this as a

60. R. 143-145.
61. Senator La Follette stated: "We are now engaged, for the first time in the history of the Senate, in the performance of this constitutional duty to fill a judicial vacancy in open executive session. This is the first occasion upon which the Senate has publicly considered the qualifications of a nominee for federal judge. The secrecy rule was repealed at the outset of the special session, because it was generally recognized, in and out of the Senate, that it had led to abuses in the consideration of nominations comparable in character and effect to the log-rolling which accompanies a general revision of the tariff." (C. R. 809.)
responsibility which is very heavy. I reach my own conclusions altogether apart from any recommendations of politicians. This is the third time that I have had occasion to recommend for a judgeship within two or three years. I made these recommendations without consulting the politicians. My father was once a United States district judge, and I have the highest regard for the importance of the position. I do not believe that politics ought to enter into it for one moment."

After these frank statements can there be any real doubt that federal district judges in Pennsylvania in reality are being selected by Senator Reed? There is nothing in the record to make one believe that President Hoover or his Attorney General in the case of Mr. Watson tried to do anything more than to check up on Senator Reed's recommendation. That is not what the Constitution contemplates. That is believed to be different from what most lawyers wish. That is not what Mr. Hoover and the Attorney General promised the bar if by their statements they meant to change the system that existed at the time of the inauguration of Mr. Hoover.64

Now that nominations to the federal bench are to be considered in open executive sessions, we shall have the Senate in the open and it is encouraging to observe that there are some senators who are willing to permit the President to exercise his constitutional prerogative.65 Senator Norris called attention to a letter by President Hoover written September 26, 1929, to Mr. Fred E. Britten of Stuart, Florida. In this letter, President Hoover rebuked Mr. Britten for the insistence of the Republican organization that the President's appointment to a district attorneyship be defeated because he had been selected without the approval of the Republican organization. Mr. Hoover also stated in this letter that, "... no longer shall public office be regarded as mere political patronage." Senator Norris stated that this letter fully coincided with the doctrine that he had preached for "many, many years," but that in his opinion the conduct of the administration in

63. C. R. 750.

64. Senator La Follette referred to President Hoover's law enforcement speeches and to a radio address by the Attorney General. The latter stated among other things that the average citizen does not want his judges appointed as a result merely of political activity. See note 2, supra. Then the Senator observed. "I believe that the record in this case will show that if this nomination, with the facts which we have before us, is confirmed by the Senate, the policy of the President and the Attorney General, as announced in the Florida case and in the radio address to which I have referred, will not only be obstructed, it will be destroyed, and this administration will be left in a hypocritical attitude before the country on this principle of freeing the federal judiciary from political control and influence." (C. R. 810.)

65. See Senator La Follette's remarks in condemnation of the "pie counter" in the case of judicial appointments. (C. R. 809.)
the Watson appointment contradicted the position taken in the Florida case.66

Senator Borah made the statement that he would vote against the confirmation of Mr. Watson if the Attorney General would take the position that he was not qualified for the office.67 Senator Steiwer stated, when he learned that the Attorney General was coming before the judiciary committee on the Watson appointment, "I determined that I probably should be influenced and possibly controlled by the statement he made to the committee."68

So it appears that if President Hoover is really in earnest about making his own appointments to the federal bench and is really opposed to the old system whereby the senators make selections for his approval, the President will find that he will have at least a small body of the senators who will approve his conduct. At least that is what they say. Whether, as many may suspect, a refusal to appoint the favorite of any senator and the selection of one not approved by a senator may result in the appointment never leaving the judiciary committee is still a matter of doubt. It is something of an unknown factor to contemplate that mysterious thing known as senatorial courtesy. It can only be hoped that the President at some time during his administration will make the issue.

President Hoover has stated that he is greatly interested in law enforcement. The suggestion of this article is that he enforce that part of the Constitution for which he is personally responsible. By doing this, he can elevate the federal bench and he can also by the same process obtain the proper type of district attorneys so vitally important in the administration of justice.

66. See note 2, supra.
67. C. R. 749.
68. C. R. 750. The Senate "advised and consented" to the nomination by a vote of 53 yeas, 22 nays, 21 not voting. (C. R. 826.)