



J. Whitaker Thompson

Born: August 19, 1861, in Stroudsburg, Pennsylvania.

Died: January 7, 1946, in Philadelphia, Pennsylvania

Federal Judicial Service:

Judge, U.S. District Court for the Eastern District of Pennsylvania

Nominated by William H. Taft on June 5, 1912, to a seat vacated by John B. McPherson.

Confirmed by the Senate on June 16, 1912, and received commission on July 16, 1912.

Service terminated on February 3, 1931, due to appointment to another judicial position.

Judge, U.S. Court of Appeals for the Third Circuit

Nominated by Herbert Hoover on December 4, 1930, to a new seat authorized by 46 Stat. 538.

Confirmed by the Senate on January 22, 1931, and received commission on January 29, 1931.

Assumed senior status on May 1, 1938. Service terminated on January 7, 1946, due to death.

Education:

University of Pennsylvania Law School (now Carey Law School), LL.B., 1887

Professional Career:

Assistant U.S. Attorney, Eastern District of Pennsylvania: 1900-1904

U.S. Attorney for the Eastern District of Pennsylvania: 1904-1912

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Judicial Biography

*Upon Judge John McPherson's induction as a Court of Appeals judge in 1912, President William Howard Taft turned to Joseph Whitaker Thompson as McPherson's replacement on the District Court. Thompson had been an Assistant United States Attorney under Holland and had followed him as United States Attorney after Holland was appointed as a District Judge in 1904. Both men would again be colleagues for the short time before Holland's death. Thompson was the eleventh person to serve on the court.

The son of a Methodist minister, Thompson hailed from Stroudsburg, Monroe County, Pennsylvania where he was born in 1861. He received both his bachelor's and law degrees from the University of Pennsylvania. Following law school, he joined the law firm of his cousin Samuel Whitaker Pennypacker. The latter became Governor of Pennsylvania in 1903 with the help of Senator Quay, who also happened to be Pennypacker's cousin. Thompson was involved in Republican politics and served as a trustee of the University of Pennsylvania. He remained a District Judge until January 1931. At that time, the Senate confirmed him as a judge of the Court of Appeals on the nomination of President Herbert Hoover.

Thompson was the first federal judge in the Eastern District to have been graduated from law school. All his predecessors were admitted to the Bar after reading and studying law under an experienced practitioner.

A statute passed by Congress during the Progressive Era of the early twentieth century was the Mann Act which made it illegal to transport any person across state lines with the intent that such person engage in prostitution. Defendant Evan Gwynne was indicted for taking Anna Ward from Philadelphia to Baltimore for that illicit purpose. The case, which was heard by Judge Thompson shortly after he joined the bench, had a highly unusual twist. After the alleged offense occurred but before the trial, Gwynne and Ward were married. Gwynne's counsel objected at trial to the Government's calling his wife as a witness against him. Judge Thompson overruled the objection, and Gwynne was convicted.

Gwynne then filed a motion for a new trial and upon further consideration, Thompson granted the motion. He noted that the admission of testimony in criminal cases in federal court is governed by state law as it existed when the Judiciary Act of 1789 was passed. It was well settled at the time that a wife was not a competent witness against a husband except in circumstances involving violence against the wife. Here, however, even assuming that the crime was one of violence, Ward was not Gwynne's wife at the time the crime was committed. Thompson held that the exception allowing a wife to testify applies only when injuries are inflicted or threatened during the marital relationship. Accordingly, he concluded he should not have compelled her to testify against her husband. While the government argued that such a

* The following material is excerpted from JUDGE HARVEY BARTLE, III, MORTALS WITH TREMENDOUS RESPONSIBILITIES, A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, 3-12 (Saint Joseph's University Press, 2011). Reproduced with the permission of the author, Judge Harvey Bartle, III, and the publisher, Saint Joseph's University Press.

ruling would allow a defendant to marry the woman who may be the only witness against him and thus avoid conviction, the judge responded that it was for Congress and not the Court to change the law in this regard.

Many antitrust actions were filed in the Eastern District. In 1915, Judge Thompson presided over the vigorously contested case of *Bluefields Steamship Co. v. United Fruit Co.* involving an alleged monopoly and restraint of trade in the importation and distribution of bananas from Nicaragua into the United States. Plaintiff sought \$5,000,000 in damages which would be trebled under the Sherman Act if it were to win the lawsuit. That was a huge sum of money in those days. The jury trial, which lasted from the beginning of November 1915 to the end of January 1916, was the longest of its kind in the Eastern District up to that time. A defense verdict resulted, and it was affirmed on appeal.

Judge Thompson, like Judge Butler before him, was assigned to preside outside the Eastern District but in this instance for one specific case. In 1917, he was designated to sit in the District Court of Delaware to decide *DuPont v. DuPont*, a high profile, contentious, and complex corporate litigation pitting members of the DuPont family against one another for control of E.I. DuPont de Nemours & Co. The Delaware District Judge had recused himself because of familial relationships with both sides of the dispute. Judge Thompson decided the case without a jury, and the Court of Appeals affirmed in all essential respects.

During this period, events in Europe were entangling the United States. World War I had begun in August 1914, shortly after the assassination in Sarajevo of Archduke Franz Ferdinand, the heir to the Austro-Hungarian throne. The United States remained neutral, although not unaffected, until Germany made its fateful decision in early 1917 to undertake unrestricted submarine warfare with attacks on all sea traffic, including American merchant ships, around Great Britain, France, Italy, and the Eastern Mediterranean.

On April 6, at the urging of President Wilson, Congress declared war against Germany. Congress enacted the Selective Service Act shortly thereafter in May. The Espionage Act followed and became law on June 15, 1917. Philadelphia area industries became involved in the war effort. The Cramp Shipyard built torpedo boat destroyers, Midvale Steel manufactured guns for destroyers, and Baldwin Locomotive Works produced artillery shells and railroad gun-mounts. While there was a ground swell of patriotic fervor, the Socialist Party and others opposed conscription and the war effort. The District Court would soon be drawn into this clash.

In the midst of the war, Charles T. Schenck, the General Secretary of the Socialist Party in Philadelphia, directed that a circular be printed and distributed through the mail to men who had been drafted. The circular compared conscription with slavery outlawed by the Thirteenth Amendment and declared "Do not submit to intimidation" although urging only peaceful measures such as petitioning to repeal the draft law. It called the draft the work of "cunning politicians and a mercenary capitalist press," promulgated "in the interest of Wall Street's chosen few." It denied the power of the Government to order citizens to "foreign shores to shoot up people of other lands."

Schenck and others were indicted for conspiracy to violate the Espionage Act. Schenck was charged with causing and attempting to cause insubordination in the armed forces of the United States and obstruction of recruiting and enlistment when the United States was at war with the German Empire. He was also indicted for mailing prohibited material. The United States Attorney at the time was Francis Fisher Kane, the grandson of the John Kane, who had been the Judge in the Eastern District of Pennsylvania from 1846 to 1858.

The jury convicted Schenck and codefendant Dr. Elizabeth Baer, but Judge Thompson directed the jury to acquit three others for insufficient evidence. Thereafter, the post-trial motions of the two remaining defendants claiming lack of evidence were denied. However, at sentencing, he commented that Schenck and Baer were really minor players and imposed on them prison terms of only six months and ninety days, respectively. The defendants remained free pending appeal.

Judge Thompson's opinion denying the post-trial motions makes no reference to free speech. However, this issue was at the heart of the decision of the Supreme Court which agreed to hear the matter. Indeed, it was the first significant case in which the Supreme Court had construed the clause of the First Amendment prohibiting Congress from making any law "abridging the freedom of speech." In unanimously upholding the convictions, the Court through Justice Oliver Wendell Holmes determined that Schenck intended his mailings to influence people to obstruct the draft. Holmes then wrote these oft-quoted words:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

Judge Thompson was nominated by President Herbert Hoover to be a judge of the United States Court of Appeals for the Third Circuit in 1930 and was confirmed by the United States Senate on January 29, 1931. He assumed senior status on May 1, 1938.

His service on the Third Circuit terminated on January 7, 1946 due to his death in Philadelphia, at the age of 84.