

## Senator-Elect

THE THIRD SESSION of the Sixty-second Congress convened on Monday, December 2, 1912 at noon with Senator-elect George Norris on hand to complete his service as a member of the House. He had resumed bachelor quarters at the Y.M.C.A. and plunged into congressional duties. For the first part of the session his time and energies were devoted to the impeachment trial of Judge Robert W. Archbald of the United States Commerce Court.

On July 11, 1912, the House had voted 223 to 1 to impeach the judge.<sup>1</sup> Norris, as a member of the Judiciary Committee, had been appointed one of the House managers to prosecute him before the Senate convened as a court of impeachment. The trial committee usually consisted of five members. This time, however, the chairman had appointed and the House approved a seven-member committee so that Norris and John W. Davis of West Virginia, both of whom were among the ablest lawyers in Congress, but neither of whom had been on the Judiciary Committee long enough to warrant the appointment, could serve. From December 2, 1912, until Archbald's fate was decided on January 13, 1913, Norris appeared in the Senate chamber every day that Congress was in session, an experience which introduced him to a body wherein he would play a significant role for the next thirty years.

This impeachment trial was the ninth in the history of the federal government. In essence, the charges against Archbald were that he had engaged in business deals with litigants before his court and had sought favors from them to an extent that violated the canons of good behavior and constituted high crimes and misdemeanors. He had been appointed by William McKinley in 1901 as a district judge. In 1911 he had been promoted by President Taft and confirmed by the Senate as an additional circuit judge, designated to serve on the United States Commerce Court which had been created under the Mann-Elkins Act of 1910. Thirteen articles of impeachment were prepared with the last serving as a summary article. They called attention to

eleven distinct acts of misconduct and misbehavior. Five of the charges had occurred during his district judgeship, the remainder during his circuit judgeship. From the beginning many senators were dubious about convicting a person of charges that had occurred while serving in a previous position, different from the one he held at the time of the trial.<sup>2</sup>

Of the six counts against Archbald as a circuit judge, five had to do with transactions between himself and officers of railroads or their subsidiaries in the Pennsylvania anthracite coal region, and one pertained to correspondence between Archbald and counsel for a railroad company with reference to a pending case. In no instance was he involved in the expenditure or investment of money, but in each instance he and his friends gained or stood a chance of gaining handsome profits. Archbald did not actively seek such activity, but was usually approached by a third party who requested him to take up a matter with a railroad company or one of its subsidiaries. No railroad could afford to incur the displeasure of a judge of the Commerce Court, which concentrated on litigation pertaining to rates and facilities offered by railroads engaged in interstate commerce. Hence it was argued that Judge Archbald by his conduct had undermined public confidence in his honesty and had cast suspicion upon his judicial integrity.

As a House manager in these proceedings Norris played a minor role. He questioned witnesses only occasionally, but at the conclusion of the proceedings he delivered an effective summary argument. Representing Judge Archbald, as his chief counsel, was Colonel A. S. Worthington, a capable lawyer whom Norris would encounter in later years as a lobbyist for public utility corporations. Appearing every day in the Senate Chamber, Norris, as a former prosecuting attorney and judge, keenly followed the trial. But he had further reason, a more personal and individual one, for his great interest in the outcome.

During the Judiciary Committee's investigation of Judge Archbald, Norris met and befriended William P. Boland, owner and president of the Marian Coal Company of Scranton, Pennsylvania. Boland, associated with anthracite mining all his life, was being ruined by railroad rate practices, and was convinced that Archbald was trying to take advantage of his plight for his own benefit. Norris listened with interest to Boland's story. It seemed that in the summer and fall of 1909, the Marian Coal Company was defendant in a case pending before Judge Archbald's court. Archbald, a district judge at this time, had drawn a note for five hundred dollars payable to himself and then agreed to allow the note to be presented to either Boland or

his brother for the purpose of having it discounted. At the time Archbald's note was presented to the Bolands, the Marian Coal Company was a litigant in his court. In spite of this inducement to accept the note, William Boland refused. Archbald soon found someone else to accept it but, as of the end of 1912, this person had not yet been paid.

Then just prior to Archbald's service on the Commerce Court, the Marian Coal Company had filed before the Interstate Commerce Commission a complaint against the Delaware, Lackawanna & Western Railroad Company and five other interstate railroad companies, charging discrimination in rates and excessive fees for the transportation of coal. While the case was pending, Boland employed an attorney, George M. Watson, to settle the matter by selling to the Delaware, Lackawanna & Western Railroad Company two-thirds of the stock of the Marian Coal Company. If the case were not settled out of court, any party to the dispute had the option under the Mann-Elkins Act of appealing the decision of the Interstate Commerce Commission to the United States Commerce Court which had just welcomed Judge Archbald as a new member.

Judge Archbald, knowing of the general plight of the Marian Coal Company, and informed of further details by Watson, had agreed for a consideration to assist Watson in the sale of Marian Coal Company stock to the Delaware, Lackawanna & Western Railroad Company. Archbald interfered in this matter without the consent of the Boland brothers; Watson had merely raised the price to include the fee Judge Archbald would receive.

William Boland, distraught over his business situation, became frantic when he learned of Archbald's interference in his affairs. He denounced the judge and began to collect evidence he thought would reveal Archbald's culpability. Most people in Scranton, however, thought his suit before the ICC was affected by his impending financial collapse and dismissed his accusations; others thought him a crank casting aspersions on judicial integrity. Norris, however, took him seriously. He had listened sympathetically in the Judiciary Committee hearings, during long walks, and in other conversations to Boland's tale of personal woe and judicial disgrace. He had even advised Boland how to prepare his case before the ICC. Boland's story eventually became the basis of the second and eighth articles of impeachment, both of which the Senate, sitting as a court of impeachment, rejected.<sup>3</sup>

In his summary argument requesting the conviction and removal of Robert W. Archbald from judicial office, Norris did not discuss the facts as they had been developed in the case. Rather he came to the core of the problem and discussed the constitutional issues involved.

Archbald's lawyers had claimed that while he may have been guilty of misbehavior in office, he was not guilty of any offense which could properly be the subject of prosecution in a criminal court. They forcefully argued that a man may be impeached only for offenses which are criminal in their nature and could legally be the subject of prosecution by indictment.

Norris rejected this position and proceeded to demonstrate, citing the Constitution and several commentaries, that a federal judge could be impeached, convicted, and removed from office "for any act from treason down to conduct that tends to bring the judiciary into disgrace, disrespect or disrepute." Furthermore, holding that an official with a fixed tenure of office should not be impeached and removed for misdemeanors that were not indictable offenses was entirely different from holding that a judge, who usually enjoyed a lifetime tenure, should not be impeached and removed. Norris claimed that the framers of the Constitution had this distinction in mind when they wrote the section which applies exclusively to the judiciary and which provides that judges shall hold their offices during good behavior. If this were not so, he stated, Congress and the country could not get relief from a judge who had dragged "the judicial ermine down into disgrace" but who at the same time had been careful not to commit any criminal offense. Judge Archbald, Norris admitted, had not committed any criminal offense. But by secretly engaging in private agreements with attorneys on one side of a case, and by continually and carefully asking favors of litigants in his court, he was guilty of misbehavior and was perverting the ends of justice. Unless his interpretation of the Constitution were accepted, such conduct could continue unabated and the whole judicial system would be undermined. The government, he concluded, could not perform its function unless courts were above reproach and judges above suspicion.<sup>4</sup>

On January 13, 1913, the Senate voted on the articles of impeachment against Judge Archbald. While he was adjudged not guilty of eight charges, he was found guilty on five counts, including article thirteen, the summary article. It was the judgment of the Senate that Archbald be removed from office and "forever disqualified to hold and enjoy any office of honor, trust or profit under the United States."<sup>5</sup>

This trial was the most important piece of congressional business in which Norris engaged during this short session. Once the verdict was announced, he returned to the House and resumed an active interest in legislative matters pending before that chamber. At the time, evidence was being collected in cases involving violations of the Sher-

man Antitrust Act. The method of acquiring this information, however, was being challenged and highly publicized.

The evidence was being taken by referees or masters traveling to many localities throughout the country. In 1912, in the case of the *United States v. The United Shoe Machinery Company of New Jersey et al.*, pending in a district court, the defendants objected to the taking of testimony by the master in public, and the question was submitted to the court. After an exhaustive hearing and the filing of briefs, the court issued an order excluding the public from such proceedings. According to Norris, who consulted Attorney General Wickersham on the matter, this was the first time that the question had been raised. If the decision of the court stood and Congress did not take immediate action, Norris believed that in all suits arising under the Sherman Antitrust Act the government would be asked to take evidence in private. He was convinced that such secrecy was not only contrary "to the fundamental idea of our jurisprudence," but would often result in a denial of justice. Throughout his career he opposed secrecy in public affairs, whether in party caucuses or conferences of diplomats. In this particular instance, he thought secret hearings would surround the courts with "a mystery of doubt" and bring them into disrepute. He realized that there would have to be exceptions to this general proscription, but, he argued, "If our courts are to retain the confidence and respect of the country generally their official conduct must be entirely free from any suspicion of star-chamber proceedings."<sup>6</sup>

On March 2, just before the end of the session, he had the satisfaction of voting with the majority for a bill prohibiting testimony from being taken in secret in suits arising under the Sherman Antitrust Act. Norris himself had introduced this measure at the request of the attorney general. It had previously passed the Senate and was signed into law by President Taft on March 3, his last full day in office. Thus Norris, as he ended his service in the House, was cooperating closely with the Taft administration, an administration which had fought him and which he in turn had attacked throughout most of its stormy course.

Other bills to improve the effectiveness of the antitrust law or to deal more directly with the problem of monopoly were also under consideration, but Norris' measure was the only one upon which Congress acted. Norris desired further legislation along these lines, favoring, for example, certain patent-law changes that would lessen the power of patent monopolies. He wanted to amend the law so that a person would lose his patent if he did not begin manufacturing his

article within a reasonable time. Thus, improvements on patented items could not be kept off the market and out of public reach. Norris believed that the patentee should have the exclusive right to manufacture an article, but that the public should have the benefit of the patent on reasonable terms. Under existing law, as construed by the Supreme Court, the owner of a patent could attach conditions to the use of items produced under it. Norris, bearing in mind the recent Supreme Court decision wherein the United Shoe Machinery Company was allowed to control the leasing and use of their patented machinery while requiring manufacturers to use other items entirely independent of these patented machines, thought the law was giving too much power to monopoly.<sup>7</sup>

The Panama Canal, which interested Norris early in his Senate career, briefly caught his attention during the last days of this session. His remarks revealed his pacifism as well as his maturity as a legislator. Though he had opposed fortification of the canal when the matter was originally before the House, after Congress had decided to fortify it Norris deemed it foolish and even unpatriotic to prevent proper implementation of a decision that had been made. He explained:

As long as we have decided to fortify, as long as we have decided to take any particular port and fortify it, we ought not to do it in any slipshod or half-way manner. The minute we begin to fortify the Panama Canal we invite the attack of any nation that is at war with us, and it would be silly, it seems to me, to build any fortification that is not ample, that is not absolutely the best that modern ingenuity can devise.<sup>8</sup>

This pattern of initial, strenuous opposition followed by final support of the majority view was one that would be repeated by Norris on a more dramatic scale at the time of World War I.

As the short session drew to a close, its time was given to the consideration of necessary appropriation bills. Other items were cast aside in the rush to provide the functioning agencies of government with necessary funds. Norris, though interested in some of the other items, realized that nothing would come of them at this time and that he would have another chance to consider most of them in the Senate. He looked forward to service in the other branch of the federal legislature, and it was with some anticipation early in January that he awaited his formal election as a United States senator by the Nebraska legislature.

Shortly after the election, defeated Democratic candidates for seats in both houses of the state legislature from Douglas County an-

nounced they would contest their rivals' victory. Rumor had it, however, that their real objective was to prevent Norris from becoming senator. If the Democrats could control the legislature, they could choose someone other than Norris for the post, despite their pledge to vote for the people's choice. This potential threat, however, did not materialize. Early in December the Democrats dropped their contest.<sup>9</sup>

Norris was too busy to pay much attention to these charges. Returning to McCook during the Christmas recess, he devoted most of his time to congressional matters, particularly the Archbald impeachment. He did not discuss politics, though McCarl assured him that he had nothing but good reports about members of the state legislature who would be meeting to choose a United States senator on January 22.<sup>10</sup>

By the end of the second week in January, things seemed "to be in mighty good shape"; the legislature would probably elect him without a hitch. Nevertheless, rumors were rampant. According to law and the personal pledge of many members, the legislature would have to vote for Norris, but for the first time since Nebraska adopted the "Oregon" pledge system in 1909, one house of the legislature was not of the same political persuasion as the people's choice for senator. The legislature would vote in joint session, and the fact that the Democrats outnumbered the Republicans seventy-one to sixty-two made observers anxious about Norris' selection. McCarl insisted that Norris be in Lincoln on January 22 to forestall by his presence any untoward action and, if none occurred, to address the legislature and promote political goodwill.<sup>11</sup>

At this time it was rumored that Norris might be appointed to Wilson's cabinet. This report may have helped to insure Norris' unanimous selection by the Nebraska legislature. In January, the *New York Times* announced that Wilson was considering placing a political opponent in his cabinet and that Norris was the opponent in question. Liberals in the Democratic party, especially those from New Jersey, argued that the progressives were largely responsible for recent changes in public sentiment on economic issues; placing a prominent exponent of their point of view in the cabinet might lead many such individuals into the Democratic party.<sup>12</sup> Norris was not appointed and never mentioned the suggestion, but the episode helped his election by the legislature to go smoothly even in his absence.

On January 21, the Nebraska legislative bodies, meeting separately, unanimously elected George Norris as United States senator from Nebraska. The next day in joint session they repeated the formality in an election which was significant in several ways. Norris was the first

and only senator from Nebraska to receive the unanimous vote of the entire legislature. He was the first and only Republican to be elected by a Democratic legislature and the only senator in the history of the state to receive his election while absent from the state. His election, furthermore, was the last in which the Nebraska legislature elected a senator. Several months later the Seventeenth Amendment to the Constitution went into effect and direct election of senators became the established procedure.<sup>13</sup>

Members of the legislature who had not signed a pledge during the campaign, emphatically voted for Norris; others, who had supported him, spoke his full name "in sonorous tones that respectfully but emphatically expressed their joy at the happy culmination of his campaign." One Lincoln newspaper commented, "Never in the history of this state has a man gone to the United States Senate more closely identified with the people and possessing a larger degree of confidence on the part of the public, than Senator Norris."<sup>14</sup>

McCarl, who was present at these proceedings, summarized by saying "it was splendid." He reported that Democrats and Republicans vied with one another in lauding Norris, while visitors in the galleries and members on the floor applauded. A large group from the Fifth District, including old friends from Beaver City, were on hand for the ceremony and were prepared to give him a royal reception. But legislators and visitors were not totally disappointed by Norris' absence; the secretary of the senate read a letter he had written to the joint session expressing his gratitude for the confidence placed in him and apologizing for his absence.<sup>15</sup>

Norris was delighted with the reports he received of the proceedings in Lincoln. A number of things about his election seemed remarkable to him, especially when compared to the situation that had existed before the insurgency revolt and the broader progressive movement. He would enter the Senate with a clear conscience, beholden to no man. It gave him much pleasure to think that during the recent campaign, one of the most hotly contested in the history of the state, he had never been asked even indirectly to make any promise or pledge. No member of the legislature had approached him after the election with a suggestion that could in any way be construed as an effort to control his vote. Recalling the political bartering that had occurred in the past, Norris thought that all Nebraska citizens were to be congratulated. He was convinced that his efforts in Congress against boss rule and blind partisanship, in favor of progressive legislation and the restoration of governmental control to the people, had not been in vain. He appreciated the efforts that were made in his

behalf because they represented a vindication of the democratic process and of popular government. Thus, having received support for his past efforts, he intended to continue to pursue the same path even though progressive-minded citizens were confused about their future course.<sup>16</sup>

Norris was keenly aware of the dispute raging among progressives concerning organization. As long as they remained divided, he felt they could accomplish little and hoped that all progressive-minded citizens would eventually unite in a separate party. But so great were the prevailing divisions and so bitter the feeling among numerous leaders that he did little to ally himself with the debilitated third party, though Roosevelt considered him a leading Progressive.<sup>17</sup>

Norris himself was confused about his political status. Preparing a biographical sketch for the forthcoming *Congressional Directory*, McCarl retained the word "Republican," though he was not sure of Norris' wishes on this matter. He told Norris he could change it, and suggested "Progressive-Republican" as a more satisfactory delineation. However, in the *Congressional Directory* for the first session of the Sixty-third Congress, Norris listed himself as a Republican.<sup>18</sup>

On February 17, 1913, Senator Norris Brown, recognizing the action of the Nebraska legislature, presented to the president pro tempore of the Senate, Jacob H. Gallinger of New Hampshire, the credentials of his successor and asked to have them read. The secretary of the Senate read the credentials of George Norris, chosen by the legislature of Nebraska as senator for the term beginning March 4, 1913, and they were ordered to be filed.<sup>19</sup> Two weeks later Norris' notable career as a member of Congress from the Fifth Congressional District of the state of Nebraska came to an end, and a more distinguished one—one that would span the following thirty years—began. As a congressman, Norris had proven himself one of the most forceful and intelligent fighters in the House, alert to every parliamentary opportunity to advance the progressive cause. Strong in debate, knowing neither fear nor favor, he had been a most valuable member. While his apprenticeship as a legislator had come to an end, the character, ideas, and approach to national problems of the senator-elect were already defined. The future years in the Senate of the United States would write in large letters on the national scene what was already evident in smaller print to the citizens of Nebraska. Thus Norris had gradually moved from a conservative Republican politician to a prominent progressive leader who, already entitled to historical notice for his role in the insurgency revolt, was destined to become one of the outstanding legislators in American history.