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The Republican Court, 1912-1922

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Whatever their individual persuasion, these three justices joined together to serve on the first state Supreme Court. Basically, they wrote a conservative record. Of special significance were their early decisions concerning the Corporation Commission, decisions that would prevail for years. All in all, the framers of the judiciary article, Parker and Roberts among them, could not have been more pleased.

THE REPUBLICAN COURT, 1912-1922

The New Mexico Supreme Court during the first decade of statehood made an indelible impression on the political process. From the outset it proved to be the conservative force the framers intended it to be, a fact quite evident in its handling of corporation matters. The court also decided some political cases, one such case involving partisan manipulation of the district court structure. In terms of personnel Republicans dominated, a domination little affected by the high turnover of justices in the early 1920s. In short, the nascent state Supreme Court acted out its role in the governmental structure politically and did so through highly political court officers.

As already seen, the nature of politics as New Mexico embarked on its new status in 1910 through 1912 was conservative. This persuasion shaped the judiciary article and affected the selection of the first Supreme Court justices. It also determined the kind of Corporation Commission the new state would have, its regulatory powers dictated by constitutional provisions. Specifically, the constitution provided that

> . . . the commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of railway, express, telegraph, telephone, sleeping cars, and other transportation and transmission companies and common carriers within the state. . . .[39]

While granting the Commission what appeared adequate power to regulate rates in the public interest and what seemed extensive regulatory powers in other areas, the framers of this article made sure the Commission's orders were reviewable. Thus, if a corporation refused compliance with a Commission order or unless it removed that order to the Supreme Court, it became the obligation of the Commission itself to remove the issue. The Court was to sit in continuous session for consideration of such cases and give them precedence. This section of the constitution then ended on the note that

39. N.M. Const. art. 11, § 7.

> . . . in addition to the other powers vested in the Supreme Court by this Constitution and the laws of the State, the said court shall have the power and it shall be its duty to decide such cases on their merits, and carry into effect its judgments, orders and decrees. . . .[40]

Placed in perspective, this constitutional article with its procedural provision reflected the evolution of political thought in the years up to 1910. The constitution of 1872 was a notably progressive document with respect to railroad regulation. It empowered the legislature to fix maximum rates, to correct abuses, to prevent extortion and unfair discrimination, and to enforce its laws through penalties. In addition, it set down strict regulations with respect to railroad consolidation, stock issuance, and corporate directorships.[41] Written some seven years before the coming of railroads, this constitution and its authors reflected the political attitudes then prevalent, attitudes shaped by the isolation of the territory. Once the railroads arrived, the political atmosphere of the territory became quite different. No longer isolated, the territory enjoyed more economic prosperity. At the same time, it became politically more conservative. Thus, while the constitution of 1889 did show some concern over corporate monopolies, it was neither as progressive nor as specifically regulatory as had been the constitution of 1872 with its anti-railroad provisions.[42] The same was also true of the 1910 constitution, the cumulative result of modified political conditions and considerations within New Mexico. "Railroad lawyers" and vested corporate interests wielded considerable political clout at the convention. They drafted the Corporation Commission article and insured themselves of a hearing before a sympathetic Supreme Court.

A weak system of corporate regulation, then, was most definitely in step with New Mexico politics; however, it was decidedly out of step with national political considerations. For there the trend was toward reviving the Interstate Commerce Commission and giving it meaningful power. The Hepburn Act of 1906, for example, gave the Commission positive rate-setting powers and placed the burden of appeals upon the railroads rather than upon the Commission. Further, the United States Supreme Court gave substantive support to such regulatory authority. It did so by interpreting its review function narrowly and recognizing the rate-fixing powers of the Commission. It also indicated it would not attempt to take over the Commission's policy-making role. These decisions reinforced by additional

40. *Id.*
41. Larson, *supra* note 1, at 100.
42. *Id.* at 161.

regulatory Congressional acts meant victory at the federal level for the commission principle of administration.[43]

In New Mexico the fate of the commission principle followed its predetermined course. Wasting no time, the first Supreme Court left the Corporation Commission without meaningful regulatory powers as early as April and May 1913. Chief Justice Roberts, cognizant of a growing progressive trend nationally, made it clear that his state and his court were different:

> The provisions of our constitution are peculiar to New Mexico. So far as we have been able to ascertain, no other state, either by statute or constitutional provision, has the same method of procedure.[44]

Translated into action, this meant that the state Supreme Court intended to usurp the policy making functions of the Corporation Commission, a matter it quickly attended to under the dual guises of "intent of the framers" and "burden of proof."

The Court basically relied on two cases to effect its ultimate authority in corporation matters. Known as the Seward and Woody decisions, the two had these points in common. The Commission found against the railroads in each instance. In neither did the railroad, the defendant, comply with the Commission order, thus necessitating the removal of the cause to the Supreme Court by the Commission itself. With respect to both the Court refused to uphold the Commission's orders, ruling in favor of the railroads. The only odd note concerning these cases, given their essential similarities, was the time element. The Commission issued its order in the Woody case some 23 days before its other order, yet the court determined the Seward case more than a month earlier.[45] Perhaps Seward provided the high bench with a better opportunity for laying down ruling precedent.

The Court's rulings—the facts of the cases aside—laid down the following principles. First, judicial review of Commission action required adherence to the intent of the framers. Through the provision requiring review, the Court maintained, the constitution-makers attempted to expedite judicial inquiry into the reasonableness and lawfulness of the Commission's orders. This inquiry necessitated the Court's deciding cases "on their merits," in no way bound by the Commission's findings of fact or by presumptions that

43. A. Kelly & W. Harbison, The American Constitution: Its Origin and Development 606-11 (3rd ed. 1963).

44. Seward v. Denver & R.G.R.R., 17 N.M. 557, 131 P.980 (1913).

45. *Id.*; and Woody v. Denver & R.G.R.R., 17 N.M. 686, 132 P. 250 (1913).

the Commission's orders were prima facie just and reasonable.[46] In other words, the Court would hear each case de novo.

Second, the Court, still operating within the framework of original intent, placed the burden of proof squarely on the Corporation Commission. Roberts wrote, "it was the evident intent of the framers of the instrument, that all the known evidence should be produced before the commission in the first instance." This, stated the Court, meant that on removal of the case by the Commission, no new evidence could be heard. If, on the other hand, the corporation removed the case, it could introduce both new evidence and new facts.[47] Accordingly, said Roberts, in the second of the Court's two rulings,

> This court can determine the reasonableness and lawfulness of an order made by the commission only upon the evidence adduced before the commission, and presented to this court by the record. It is the duty of the commission to develop such evidence as will show the order made by it is reasonable and lawful.[48]

Taking refuge in strict constructionism, the Court thus stripped the Corporation Commission of any real power. Under constitutional mandate the Court was to decide every case on its merits, with the Commission obligated to justify its orders. The bench then sought further refuge by assuming a posture of judicial self-effacement. It did so by dismissing the attorney general's contention in Seward that the Court could raise or lower rates in a rate case. To do otherwise would mean the exercise of legislative powers by the judiciary, a policy not in keeping with the doctrine of separation of powers. And, as Roberts put it, ". . . we would not construe the provision as conferring legislative power upon this body, unless compelled to do so by clear and unmistakable language."[49]

During the first decade of statehood the Supreme Court continued to decide Corporation Commission cases along the same lines. In 1916 it set aside a Commission order for compensation by the railroads. Justice Parker did so on the grounds that

> . . . before any power to award reparation, which is the equivalent of awarding a money judgment, can be held to be possessed by a corporation commission, there must be a grant of such power in direct terms. Such a power cannot be given by implication.[50]

46. Seward v. Denver & R.G.R.R., *supra* note 44.
47. *Id.*
48. Woody v. Denver & R.G.R.R., *supra* note 45.
49. Seward v. Denver & R.G.R.R., *supra* note 44.
50. Santa Fe Gold & Copper Mining Co. v. Atchison, T. & S.F. Ry., 21 N.M. 496, 155 P. 1093 (1915).

In 1918 Justice Roberts, citing *Seward* and *Woody* as binding precedents, negated a Commission order requiring a railroad to show cause why a given rate should not be established. Rather, ruled the Court, it was up to the Commission to produce evidence justifying its action in fixing a rate.[51]

The political persuasion of that first Court, then, found clear expression through its handling of these cases. Justices Parker and Roberts had attended the constitutional convention. They did not hesitate to speak authoritatively on their intent and the intent of their fellow delegates. They quickly established the authority of the judiciary over the Commission, and through their interpretation of the constitution they drastically limited the powers of that Commission. They were, after all, conservatives spawned in the legal tradition of "railroad lawyers." Significantly, their early decisions remained as viable and ruling precedent in the area of corporate regulation for many years thereafter.[52]

Giving voice to their political philosophies through court decisions, these first justices were also not above acting out their roles in a politically advantageous fashion. The best example of this was Roberts' posture in a coal mining case that reached the Court in 1916, the year Roberts stood for reelection. An appeal from the district court presided over by Herbert F. Raynolds, the case involved a personal injury suit brought against a mining company. Raynolds, who served on the Supreme Court from 1919 through 1922, decided the issue in the mining company's favor without referring the matter to a jury. The case reached the New Mexico Supreme Court on appeal where the decision was reversed with directions to award a new trial.[53] One account of this reversal suggests that the decision reflects upon Chief Justice Roberts' political awareness.

This account, written by Arthur T. Hannett, attorney for the plaintiff, was based on a story told him by Justice Hanna. Chief Justice Roberts, so the story went, initially affirmed Raynolds in a long opinion with Hanna strongly dissenting. With his reelection set, Roberts held his decision to affirm in abeyance until he met with the state's top corporate lawyers. Together they reached the conclusion that Roberts should reverse Raynolds, with the attorneys in the meantime lobbying for a compensation act aimed directly at Hannett, who enjoyed a virtual monopoly on representing plaintiffs in

51. In re Coal Rates in New Mexico, 23 N.M. 704, 171 P. 506 (1918).

52. In a book on the New Mexico Corporation Commission, Frederick C. Irion follows the long-range effects of these precedents. F. Irion, The New Mexico Corporation Commission (1950).

53. Melkusch v. Victor American Fuel Co., 21 N.M. 396, 155 P. 727 (1916).

mining company and railroad personal injury cases. Indeed, concluded Hannett's story, "it is certain that they did lobby through such an act, which limited attorneys' fees to ten per cent of recovery."[54] It was equally certain that Roberts decided this case in a philosophical vein not in keeping with his otherwise conservative opinions in corporation matters. Still, his decision was most politic.

The first Supreme Court did, of course, hear hundreds of cases. Most were routine, but on occasion political matters did reach the bench for final resolution. Not all of these were really significant; not all placed the Court in the political thicket to the same extent. Nevertheless, the Court did demonstrate a willingness to tackle some major political questions, one such resulting from a proposed constitutional amendment adding a ninth judicial district and redrawing the boundaries of the eighth. This occurred in 1917 when the Republican-controlled legislature pushed through a joint resolution amending two sections of the judicial department article of the constitution. The amendments provided, first, for nine judicial districts instead of the original eight, and further that all nine judges were to run for election within their districts during the 1918 general election and each sixth year thereafter. Second, the new ninth judicial district was to include among its four counties Quay County, originally in the eighth district.[55]

On the surface a simple enough proposal, this legislative maneuver was on examination singularly partisan. The constitution allowed the legislature to increase the number of judges within a district. It did not, however, allow the legislature to rearrange or increase the number of judicial districts until after publication of the 1920 census.[56] The latter being precisely the desire, the Republicans turned to the amendment procedure as a way to circumvent their own constitutional provision. The errors to be rectified and the partisan advantages to be gained were these. The Democrats stood to lose one of their judgeships with the removal of Quay County, a strongly Democratic area, from the eighth to the ninth judicial district. The Republicans, thereafter safely in control of district eight, stood to gain at least one judgeship and probably two, depending upon the outcome of the election in district nine. The amendment also meant that all judges were to be up for election in 1918, regardless of the number of years left in their terms.

This blatant attempt at partisan Republican gerrymandering was, moreover, simply in keeping with the party's antics of 1910, at least

54. A. Hannett, Sagebrush Lawyer 64-5 (1964).
55. N.M. Senate Journal, 3rd Legis. 347 (1917).
56. N.M. Const. art. 6, § 16.

according to the Democrats. By all accounts the question of apportionment and districting surfaced as one of the most hotly contested subjects at the constitutional convention. One Democrat in attendance suggested districting along the lines of communication only to see the Republicans district in terms of party strength.[57] Another Democratic delegate also remarked on the bitter controversy over the districting provision, with the charge of "gerrymandering" being heard for the first 20 years of statehood.[58] What all this meant was that the majority party drew up districts, whether legislative or judicial, to its best advantage. The minority party then assumed the role of protestor.

The Democrats did indeed protest the redrawing of the ninth judicial district in 1917, and they had very sound legal grounds for so doing. The Constitution provides for its own amendment when a proposed amendment has been approved by the voters after both the House and the Senate, sitting separately, pass it by majority vote.[59] The House passed the redistricting amendment 31 to 17, dividing along party lines. Only three Democrats voted for the resolution; only one Republican voted against.[60] The Senate also split by party, with the final vote being 12 for and 11 against, the ten Democratic senators being joined by a lone Republican. A 24 member body, exactly one-half of its members approved the proposal, instead of the constitutionally stipulated majority. Nevertheless, the president of the Senate declared the resolution passed, and it duly found its way into the *Senate Journal.*[61]

The allowability of this amendment, its printing and its presentation to the voters eventually became a matter for Supreme Court determination. In the meantime, Democrats voiced their concern. They first challenged the secretary of state's inclusion of the amendment in the 1917 enacted laws. Answering an inquiry from Arthur Seligman, chairman of the Democratic state central committee, the assistant secretary explained the duties of his office as simply ministerial: to publish all proposed amendments. Its duty did not entail going behind the record to determine whether or not they were passed in accordance with constitutional provisions. It was up

57. Tittman, *supra* note 10, at 179.
58. Mabry, *supra* note 6, at 174.
59. N.M. Const. art. 19, § 1.
60. N.M. House Journal, 3rd Legis. 320-21 (1917).
61. N.M. Senate Journal, *supra* note 55, at 346. Lieutenant Governor Washington Lindsey had succeeded to the governorship on the death of Ezequiel C. de Baca, leaving one of the senators to act as President of the Senate. It is also interesting to note that all senators were counted as being present; yet, only 23 votes were tabulated.

to interested parties to enjoin the secretary of state from printing this amendment at election time.[62]

Democrats in the affected areas of the state expressed special concern. Three prominent attorneys noted, "Of course, it is plain that this is a political move on the part of the Republicans to make this Judicial District Republican by cutting off Quay County which returns a Democratic majority." They were also angered by the lack of a majority vote in the Senate. They decided to test the matter in the courts. To that end they retained the services of former Attorney General Frank W. Clancy and solicited contributions. The solicitation concluded with the observation that "this is very important to our future party success as well as from the standpoint of good citizenship in preventing the illegal amendment of our constitution."[63] As residents of Colfax County and the eighth judicial district, the three might well have added that it was vital to their future political successes.

From Granville A. Richardson, member of the constitutional convention judiciary committee and at the time district judge of the fifth district, came the charge that the proposed amendment "was based on politics." He was also personally interested, for under this amendment he would stand for reelection in 1918. Elected in 1914 for a six-year term, he would otherwise stand for reelection in 1920.[64] A Roswell attorney even suggested potential campaign strategy. He wrote:

> I believe that you should take this up with your county chairman and have him to instruct each precinct committeemen to have from one to two workers at every voting box in this state, and have these poll workers to advise every Democrat to vote against this judicial district amendment.[65]

The Democrats did proceed with legal action, the case reaching the Supreme Court on appeal from Reed Holloman's first judicial district. The injunction was sought on the ground that the resolution was not adopted as required by the constitution. After reviewing the facts Justice Parker cited the legislative journal in which appeared the president's declaration that the resolution had passed the Senate and

62. Letter from Adolph P. Hill, assistant secretary of state, to Arthur Seligman, Aug. 2, 1917, in New Mexico State Central Democratic Committee Papers, on file in University of New Mexico Library.

63. Letter from C. B. Kohlhausen, H. L. Bickley, and H. A. Kiker to Arthur Seligman, Aug. 29, 1917, in Democratic Committee Papers, *supra* note 62.

64. Letter from Granville A. Richardson to Arthur Seligman, Oct. 8, 1917, in Democratic Committee Papers, *supra* note 62.

65. Letter from Gilbert to Sullivan [sic], Nov. 1, 1917.

noted that the Court below also found the resolution duly passed. Having laid the groundwork complete with the insertion of pertinent constitutional provisions and arguments by counsels for both sides, Parker proceeded to state the opinion of the Court.

According to Parker, the question came to the simple matter of which source of evidence was to control. Was it to be the journal record that the proposed amendment received only 12 votes, one less than the required number? Or, was it to be the enrolled and engrossed resolution, authenticated and filed with the secretary of state's office? Finding the journal entry filled with uncertainty and doubt, the Court concluded that

> It will be sufficient to say that in view of the policy as established by the constitutional convention as appears in the articles set out above, the enrolled and engrossed resolution is to be given controlling force in the determination of this matter.[66]

Parker, Hanna and Roberts concurring, thus affirmed the judgment of the lower court, which refused to enjoin submitting the question to the voters.

The constitutional amendment submitted to the voters at a special election on November 6, 1917, met with decisive defeat. The total vote was 16,812 for and 22,336 against, with Quay County alone returning a majority against of better than 1,000 votes. In fact, only seven of the 28 counties passed it and these by small majorities.[67] Still, the political implications of the resolution remained. The measure was a Republican attempt to increase control of district court officers, both judges and district attorneys. Significantly, it did not meet defeat at the hands of the courts themselves but rather at the hands of the voters.

First, the district court presided over by Judge Holloman, a highly partisan Republican as demonstrated by his constitutional convention activities and as accentuated by his political performance in the 1920s, decided in favor of the amendment's authenticity by dismissing the bill. Second, Charles A. Spiess, Stephen B. Davis, and E. R. Wright, Republicans *par excellence,* gave even more substantive proof of the heavily charged partisan nature of the proposal. They acted as the attorneys in its behalf. Finally, the Supreme Court resolved the issue, thus bringing the Court into the political arena. Hearing on appeal a "political question," the kind of question high courts have been loath to consider, the Court retreated to a position of strict

66. Smith v. Lucero, 23 N.M. 411, 168 P. 709 (1917).

67. E. Evans, New Mexico Election Returns, 1911-1969 (1970). This is also the source for subsequent references to New Mexico election results.

constructionism. It gave precedence to what it called "the policy established by the constitutional convention."

What all this tended to show, along with the Corporation Commission decisions, was the extent to which the courts and their personnel involved themselves in the state's political processes. To be sure, the Democrats did in this case choose the courts as the forum for resolution of a political issue. Still, the courts willingly accepted the challenge. Also shown was the continuing conservative nature of the Supreme Court and its personnel. The Court was again unanimous in its decision. As Chief Justice, Hanna might have written the opinion of the court. As a Progressive Republican-Democrat, he might well have dissented. He did neither, maintaining a low profile, perhaps realizing that he was up for reelection in 1918.

By its decisions, then, the first Supreme Court was consistent. It played the role of watchdog, strictly construing the constitution no matter what the nature of the case. Its personnel remained stable, at least until 1918, and then underwent a great number of changes, one occasioned by defeat at the polls, the others by resignations. Whatever the cause for turnover, the changes further demonstrated how the Court and its justices functioned and were viewed as integral parts of the state's partisan political structure.

The first Supreme Court justice to try his political fortunes before the voters was C. J. Roberts. Having drawn by lot the four-year term provided by the constitution, Roberts faced reelection in 1916. In that contest he proved himself a seasoned politician, a fact less easily documented with respect to his election in 1911. His political awareness and activity in this second election at the very least extended to his keeping abreast of local conditions. Sent the Red Book, a resume of information on the state and each county, by the Republican publicity bureau, the judge kept in touch through this party service. For example, on one occasion he sent the bureau a list of names handed him by "a colored man." Observed the candidate, "These people all live in Raton, and I thought possibly you might desire to send some literature to the colored voters."[68] Indeed, all his correspondence with this news service indicated a similarly active interest in the campaign. This interest did pay off, as Roberts defeated a strong contender in Neill B. Field by 894 votes.

Concerning C. J. Roberts the politician and partisan, it might well be noted that he enjoyed a place within the innermost Republican party circles throughout his career, both on and off the bench. While

68. Letter from C. J. Roberts to H. B. Hening, Sept. 19, 1916, in Thomas B. Catron Papers, on file in University of New Mexico Library.

still a judge he did not hesitate to recommend appointment of a friend to state office on the basis that "she is a good Republican and has always taken an active interest in politics."[69] Nor did he hesitate to endorse the candidacy of one of the party's major leaders:

> While I have spoken to you on several occasions in favor of the appointment of the Hon. H. O. Bursum to be United States senator to succeed Ex-senator Fall, I want to go on record to the same effect.[70]

Once off the bench his partisanship became all the more obvious. This extended to concern for the Santa Fe Bank, the Republican party being materially hurt, in his judgment, unless it was reorganized.[71] It extended to his writing letters to Republican leaders throughout the state recommending the nomination of Stephen B. Davis as the party's Senatorial candidate in 1922.[72] It also extended to consultations with Senator Bursum, Roberts having become a key Bursum link to internal state politics. In a letter Bursum wanted given no publicity for fear it would appear he was trying to dictate the Republican ticket, Bursum agreed with Roberts that Judge Reed Holloman was undoubtedly the best gubernatorial candidate. Still, he cautioned Roberts to be prepared to compromise, Bursum himself having written David Leahy, a northern New Mexico district judge of considerable influence, about the coming election.[73] C. J. Roberts, then, was clearly a strong partisan, an Old Guard Republican. To what extent he served his party while a justice—given this partisan activity—is certainly cause for speculation.

The second Supreme Court justice to retest the state's political waters was Richard H. Hanna, recipient of the Court's six-year term. Elected as a Progressive Republican in 1911 in a campaign directed against Bursum, Hanna by 1918 was a Democrat. In the Supreme Court contest of that year, Hanna lost to Herbert F. Raynolds, district judge and member of an old and prominent New Mexico banking family, by just over 1,000 votes. It was a quiet contest.[74] Hanna,

69. Letter from C. J. Roberts to Holm O. Bursum, Jan. 25, 1921, in Holm O. Bursum Papers, on file in University of New Mexico Library.

70. Letter from C. J. Roberts to M. C. Mechem, Mar. 8, 1921, in Bursum Papers, *supra* note 69.

71. Letter from C. J. Roberts to Holm O. Bursum, Dec. 21, 1921, in Bursum Papers, *supra* note 69.

72. Letter from T. E. Mitchell to Holm O. Bursum, Aug. 20, 1922, in Bursum Papers, *supra* note 69.

73. Letter from Holm O. Bursum to C. J. Roberts, Aug. 29, 1922, in Bursum Papers, *supra* note 69.

74. Herbert F. Raynolds Date Book, 1918, Raynolds Family Papers, on file in University of New Mexico Library. Herbert Raynolds made absolutely no date book notations indicat-

initially elected to the bench because of his political stand, lost because of the partisan election process. While on the bench Hanna remained inconspicuous by virtue of his opinions and concurrences. Once off the bench he again became a most zealous partisan.

In 1920 he was the Democratic gubernatorial candidate. Seeking to capitalize on Hanna's judicial tenure, the party chairman wrote prominent Democratic lawyers and district attorneys throughout the state inviting them to speak in the campaign. Among those contacted were a number of one-day Democratic Supreme Court justices, relatively young attorneys waiting in the background to take over when the Old Guard finally faltered. Replies to this request came from these future justices: Henry G. Coors of Burkhart & Coors; Thomas J. Mabry; H. A. Kiker, district attorney of the eighth judicial district and candidate for reelection; Howard L. Bickley, Kiker's law partner; Daniel K. Sadler; and John F. Simms.[75] All expressed a willingness to help their party, a prerequisite if their party was eventually to help them under the partisan election system.

This campaign, conducted vigorously by both sides, saw charges of unfair campaign tactics aimed at Hanna. To the charge that Hanna was throwing mud, one of his supporters dismissed it as the work of Bursum and his cohorts, fearful that they might lose.[76] Mud or no mud, the enmity of Hanna and Bursum continued unabated. Hanna lost the 1920 gubernatorial election to Merritt C. Mechem by some 3,671 votes. He came back to challenge his old nemesis, Bursum, in the special election for United States Senator in 1921. He lost that election to Bursum by 5,515 votes. Hanna did not again run for office, but he continued his active political role, a role that involved him in one of the most bizarre cases of judicial politics in New Mexico history.

The third of the state's first three justices was Frank W. Parker. Elected to a full eight-year term in 1911, he easily won reelection to the Court in 1920 by over 6,000 votes. Throughout his long tenure on the bench and in state politics, he maintained a much lower partisan profile than his colleagues. A loyal party man, Parker did attend Republican conventions and meetings, but he never influenced or became a part of the inner-party circles. In essence, he

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ing he campaigned for the Supreme Court. In fact, only three references to the election appear: two personal reminders to file an election expense statement and a lone entry for Nov. 5, 1918, "Election Day."

75. Democratic Committee Papers, Aug. 3, 1920-Oct. 31, 1920. Chairman Seligman sent out letters on Sept. 4, 1920. Replies were received through Oct. 22, 1920.

76. Letter from James A. Hall to John B. McManus, Speaker's Bureau, Oct. 27, 1920, in Democratic Committee Papers, *supra* note 75.

was conservative because of his political philosophy rather than because of his partisan loyalties.

The stability of the first Supreme Court, both by decision and by personnel, lasted until 1918 and the defeat of Hanna by Raynolds. From that point to January 1, 1923, a number of additional changes occurred. This period of rapid changeover in personnel was an exercise in partisan politics. Political leaders from all over the state perceived that they had a stake in who was to serve on the state's highest court. They therefore expended considerable energy to insure that the "right" man got the job. With respect to the appointments occasioned by resignations, the Republicans controlled all three. Merritt C. Mechem was governor, and in a state where a partisan judiciary was the reality, he appointed only Republicans to fill the vacancies.

C. J. Roberts initiated the political maneuverings by tendering his resignation on September 12, 1921, the resignation to take effect on November 1. He evidently did so in the presence of Governor Mechem, for both his letter and Mechem's acceptance of it were handwritten, seemingly by the same pen. The other two letters of resignation received by Mechem were stamped "resignation accepted."[77] How long Roberts anticipated resigning was not disclosed, but the date of his resignation was the very day Mechem appointed Stephen B. Davis of Las Vegas to succeed him. The official reason given for Roberts' leaving the bench was his desire to enter private practice in Santa Fe.

Upon stepping down from the court, Roberts did indeed begin private practice immediately. On November 1 he asked the Supreme Court for an extension of time to file a brief on behalf of a former county treasurer convicted of embezzling funds.[78] He made his motion, or so it seemed, as he was in the very process of taking off his judicial robes. But surely other considerations besides law practice came into play. For one thing, Davis was from Las Vegas, in Roberts' old territorial judicial district, the seat of the Republican machine run by Secundino Romero. No appointment could have pleased Roberts more. For another, Bursum was set to face Hanna in the special election for United States Senator on September 21, just nine days after Roberts met with the governor. As already mentioned, Roberts thereafter openly functioned as one of Bursum's primary political contacts within the state.

Whatever the whole story behind Roberts' resignation, it caused

77. Resignations, in Merritt Mechem Papers, on file in New Mexico State Records Center and Archives.

78. Santa Fe New Mexican, Sept. 12, 1921, and Nov. 1, 1921.

few ripples. Republicans, given no opportunity to lobby for their candidates, learned about Davis' appointment as an accomplished fact. The same situation did not similarly arise when a second vacancy occurred, for on this occasion Republican party leaders entered the picture out of concern for the 1922 general election. The vacancy itself fell open when Davis declared his candidacy for the Republican nomination for United States Senator. Even when accepting the Supreme Court appointment, Davis said that he was unable to declare his candidacy for election to the remainder of Roberts' unexpired term in November 1922.[79] By August 7 Davis publicly announced that his political ambition lay in the direction of the Senate:

> I came to this decision only very recently and have not prepared a more extensive statement. One reason I haven't done this is because I've been on the bench and there was so much business to be disposed of I couldn't resign until now.[80]

What this meant, of course, was a Supreme Court slot to be filled by gubernatorial appointment until November, with a permanent replacement to be elected then. How best to fill this position obviously became a problem for Republican politicos: their governor was to do the appointing. They had ample time to consider the possibilities, furthermore, because Davis' decision was no recent matter, regardless of his public declarations to the contrary. Indeed, as early as March 1922 it was a matter of current political gossip that Davis was eyeing the Senate. In a letter discussing the political conditions of the state, Miguel A. Otero, former territorial governor, wrote:

> From all I hear, Stephen B. Davis, Jr., of East Las Vegas, N.M., at present a member of the Supreme Court of the State, will be the Republican nominee for the Senate, against Senator Jones. Davis is a clean fellow, has plenty of money and I understand he wants the nomination.[81]

Once Davis made his move, the Republican leaders began discussing the long-contemplated possibilities in earnest. Senator Bursum, still the nominal head of the party, considered the matter in light of what was best for the organization. Concerned with getting all Independent Republicans in line for the upcoming election, he wrote: "The place that I had in mind for Larrazolo, in case that it was agreeable and that it would help out, would be for the Supreme

79. Santa Fe New Mexican, Sept. 12, 1921.
80. Santa Fe New Mexican Aug. 7, 1922.
81. Letter from Miguel A. Otero to Burt New, Mar. 6, 1922, in Miguel A. Otero Papers, on file in University of New Mexico Library.

Court on the ticket."[82] He also thought that "it would be wise to appoint whoever the Republican Convention nominates for Supreme Court inasmuch as the Convention will be held in the very near future."[83]

These two suggestions became the focal points of intra-party machinations, with the matter of ex-Governor Octaviano A. Larrazolo causing the most controversy. Initially, at least, it seemed as if the party leaders were willing to go along with Bursum. Frank A. Hubbell, a Bursum lieutenant for years, gave substance to this probability in writing to a fellow party member:

> I am surely pleased to hear that Governor Mechum [sic], Secundino Romero, yourself and others are taking so much interest in uniting the party by the way they have spoken favoring Larrazolo for the Supreme Court.... With Larraxolo [sic] on the ticket this fall, means several thousand votes for the Republican Ticket in the State.[84]

But obviously not all Republicans were of the same mind, for the Republican convention nominated Richmond P. Barnes for the Supreme Court. Evidently the candidate of the party regulars, Barnes came from Albuquerque. Governor Mechem, in order to make the party's nominee the incumbent, officially appointed Barnes to the court on September 18, 1922.[85] That the whole Republican ticket was weak, the result of bitter in-party fighting, was a fact gleefully noted by Miguel A. Otero. Wrote Otero:

> Senator Bursum can get but little comfort out of the nominations of Davis, Otero-Warren, Hill and Barnes, as they are all "tarred with the same stick" & carry the paraffine odor of the "Teapot District" and the "special interests" gallantly and openly led by the *second crop* of statesmanship hatched by careful incubation and the combined "hot air" of El Paso, Texas and Otero County, New Mexico.[86]

No regular Republican received any comfort from the elections themselves. The Independent Republicans, led by Bronson Cutting, biparty factional leader and owner of the *Santa Fe New Mexican,*

82. Letter from Holm O. Bursum to Frank Hubbell, Aug. 7, 1922, in Bursum Papers, *supra* note 69. Octaviano Larrazolo served as New Mexico's governor in 1919 and 1920.

83. Telegram from Holm O. Bursum to Ben C. Hernandez, Aug. 10, 1922, in Bursum Papers, *supra* note 69.

84. Letter from Frank A. Hubbell to Edward E. Young, Aug. 15, 1922, in Bursum Papers, *supra* note 69.

85. Resignations–Applications and Appointments for the Supreme Court, in Merritt Mechem Papers, *supra* note 77.

86. Letter from Miguel A. Otero to Carl Magee, Sept. 9, 1922, in Otero Papers, *supra* note 81.

ostensibly supported the Republican gubernatorial candidate, C. L. Hill, and, at the same time, the Democratic Senatorial candidate, A. A. Jones. Actually, they devoted most of their attention to county politics. Bursum's hope of holding the Independents in line vanished, along with a nomination for Larrazolo. The results were disastrous. Barnes lost the Supreme Court contest to Samuel G. Bratton by more than 10,500 votes. Senatorial candidate Davis and gubernatorial candidate Hill lost by even larger margins, with Democrat James F. Hinkle set to take over the statehouse on January 1, 1923.[87] Bratton–by virtue of his victory–became the first regular party Democrat to win election to the Supreme Court.

One other change in court personnel occurred before the Democrats took over the statehouse. Just four days after the election Justice Herbert F. Raynolds resigned, effective on or before November 15.[88] This gave Mechem one last appointment to the Supreme Court, an appointment good until the election of 1924. As such, it caused considerable newspaper speculation. Early stories mentioned as possible successors Stephen B. Davis, R. P. Barnes, and Charles C. Catron. Davis, rumor had it, had the position for the asking, as Mechem greatly admired him. If Barnes got the nod, he had to resign from the bench in order to go back on the bench. Bratton could qualify at once, freeing Barnes without the necessity of such political gymnastics, but this eventuality seemed unlikely. As the sitting district judge in Curry County and a Democrat, partisan considerations dictated that Bratton wait for the Democratic governor to take office and be in a position to name his successor as district judge. For, as the reporter for the *Santa Fe New Mexican* acknowledged, "in the ordinary primer of politics it is written that an officeholder should throw as much power to his party as possible." Catron's advantage was that he came from Santa Fe and a northern county.[89]

Newspaper speculation was one thing. Political reality was another. This time lawyers, the interest group perceiving itself most affected by the change, organized massive campaigns to influence Mechem's decision. As matters proceeded, Barnes and Catron received virtually no support. Indeed, the only support for either candidate was a letter from Catron in his own behalf, and even it was qualified. Wrote Catron,

> I learned that Stephen B. Davis was being urged to accept the appointment as Judge of the Supreme bench to succeed Judge

87. Holmes, *supra* note 5, at 157.

88. Resignations–Applications and Appointments for the Supreme Court, in Merritt Mechem Papers, *supra* note 77.

89. Santa Fe New Mexican, Nov. 15, 1922.

> Reynolds [sic]. If Judge Davis will accept this, I am not a candidate, but in the event that Judge Davis should decline to accept the appointment, I wish you would consider me as a candidate for the office and give me an opportunity to present to you endorsements.[90]

This letter aside, the contest developed into a two man show, with attorneys throwing their support either to Davis or to Clarence M. Botts of Albuquerque. Of the two lobbying efforts, that for Davis was more impressive. His support appeared more statewide, including endorsements from lawyers in Raton, Clayton, Carrizozo, Deming, Artesia, Las Vegas, and Chavez County. Sixteen attorneys wrote individual letters of recommendation, the greatest number of them from Santa Fe. A signed petition even arrived from the business and professional men of Albuquerque. Botts's support came primarily from Albuquerque, with a smattering from elsewhere, including Carlsbad, his old home town.[91]

This correspondence did, in addition to extolling the virtues of the candidates, shed some interesting light on the politics of the bench and the bar. It showed, for instance, that some attorneys were not totally satisfied with the competence of the court. One attorney wrote, "without mentioning any names, in times past there has been considerable 'dead timber' on the Supreme Bench and that situation is not entirely past at the present writing."[92] Another echoed these sentiments, writing, "I think we are mighty lucky in getting 'shed' of Reynolds [sic]."[93] It also showed that the lawyer lobbyists were capable of subterfuge if Botts's law partner is to be believed. He wrote the governor that

> A great many members of the Albuquerque bar have been told that unless Judge Davis was appointed, Judge Clancy would receive the appointment, and they have expressed themselves as preferring Judge Davis under circumstances which gave most of them to understand that Mr. Botts would not be considered for the place. I am sorry that the friends of Judge Davis left this impression.[94]

These lobbying efforts by the bar evidently paid off. The *Santa Fe*

90. Letter from Charles C. Catron to Merritt Mechem, Nov. 18, 1922, in Merritt Mechem Papers, *supra* note 77.

91. Applications and Appointments for the Supreme Court, in Merritt Mechem Papers, *supra* note 77.

92. Letter from Pearce C. Rodey to Merritt Mechem, Nov. 16, 1922, in Merritt Mechem Papers, *supra* note 77.

93. Letter from Etienne de P. Bujac to Merritt Mechem, Nov. 18, 1922, in Merritt Mechem Papers, *supra* note 77.

94. Letter from John F. Simms to Merritt Mechem, Nov. 20, 1922, in Merritt Mechem Papers, *supra* note 77.

New Mexican reported that the governor's office announced on November 21 its offer of the vacant seat to Davis. The newspaper also reported the many recommendations received by the governor's office.[95] Davis, the favorite candidate of the bar, was also Mechem's first choice. Davis, who was in line for a federal appointment, did not accept the position and the spot on the bench remained open until December 11. On that day Mechem turned to the second choice of both himself and the bar and elevated Clarence M. Botts to the Supreme Court.[96]

The Supreme Court as it began its January term in 1923 was just over a decade old. Its first years demonstrated that neither it nor its personnel could avoid involvement in the state's political process. Through its decisions the court set precedents limiting the effectiveness of the commission principle of government for New Mexico. It also set a precedent for future judicial arbitration of political matters when it heard the ninth judicial district case. As its decisional point of departure the court repeatedly turned to the doctrine of strict construction and to reliance on the supposed intent of the framers. Elected and appointed on a partisan basis, the justices were integral parts of party organizations. They owed their very positions to the partisan structure and could not but be affected by this fact. In 1923 Old Guard Republicanism, conservative in nature, was still dominant. Yet, its decline in power was already evident; its ultimate demise was less than a short ten years away.

THE JUDICIARY AND THE DECLINE OF THE REPUBLICAN OLD GUARD, 1923-1930

The dominant Republican party, badly shaken by factionalism and the 1922 election, recovered sufficiently during the remainder of the 1920s to assume once more its role as primary dictator of state politics. This dominance did not, however, continue either unchecked or uncontested. Partisan feelings ran high at all levels, with the courts much involved in the vigorous conduct of party affairs. As for the Supreme Court itself, it again became ensnared in the political thicket, the result of Republican attempts to use politically controlled district courts for partisan purposes. Turnover in Court personnel also remained high. By 1925 only Justice Parker of the three men sitting in January 1923 was still on the bench. By 1929 the Court consisted of five judges, three Republicans and two Democrats.

95. Santa Fe New Mexican, Nov. 21, 1922.

96. Applications and Appointments for the Supreme Court, in Merritt Mechem Papers, *supra* note 77.