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The New Mexico Supreme Court, 1910-1970: Politics and the Legal Community

Susan Ann Roberts

NEW MEXICO
SUPREME COURT,
1910-1970

ROBERTS

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THE NEW MEXICO SUPREME COURT, 1910-1970:

POLITICS AND THE LEGAL COMMUNITY

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ABSTRACT OF DISSERTATION

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THE NEW MEXICO SUPREME COURT, 1910-1970:
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This study examines the history of the New Mexico State Supreme Court and its role within the political process. As a political account, it focuses on the election and appointment of judges on a partisan basis, judicial personnel and their partisan activities, attempts to manipulate the judiciary for political purposes, political controversies litigated and subsequently resolved by the court, and the legal community and its influence on the state's judicial development. As a history, it proceeds chronologically, beginning with an exposition of the territorial precedent and of the establishment of the judiciary under the state constitution. The manuscript then recounts how the state bench and its justices responded in the years that followed to political realities current within the state. Considered separately are the primarily bar-initiated efforts to reform the partisan election method of judicial selection.

The primary evidence presented comes from unpublished papers, interviews, letters, agency files, and government

documents. No papers exist for a sitting justice, so the collections and memoirs utilized are those of New Mexico governors, justices prior to their tenure on the bench, and other prominent figures. Interviews are especially vital to the analysis of the court in recent years, being conducted with former justices, sons of former justices, and former governors. Each person interviewed is identified by name. The letters cited supplement this first-hand information. Of the other sources available, the files of the New Mexico Judicial Council and state documents, notably court cases and those concerning legislative action, are of particular value. The methodology is thus dictated by the materials proving relevant to the political history of the state supreme court.

The evidence so gathered clearly shows that the supreme court is a coequal branch of politics as well as of government. Judicial selection follows the pattern of party fortunes, with the dominant party controlling high court personnel. Identified by party, justices function as active politicians both on and off the bench, securing their offices in partisan election contests or as the result of partisan appointments. On occasion courts become pawns in the struggle for political power. More frequently the court undertakes the resolution of political

controversies when properly presented. Throughout the legal community demonstrates its political influence, providing the personnel who accede to the bench and lobbying to enhance its position by supporting judicial candidates and by attempting to effect a method of judicial selection more conducive to bar control.

Within this political framework, the supreme court exhibits other identifiable characteristics. It is a basically conservative institution, opting almost exclusively for maintenance of the status quo. It occupies the center ground in the political arena, reflecting the interests and pressures of state rather than local politics. It responds slowly to changing conditions and is itself resistant to change.

Based on the evidence and its results, this study concludes that an analysis of a supreme court is an effective instrument for discovering the political processes of state government. Indeed, the history of this supreme court mirrors the development of New Mexico state politics. At the same time this work recognizes that the judiciary differs substantially from the other two branches of government, its function shaped by its character as a legal institution and by its institutional conservatism. Given its very nature, then, the New Mexico Supreme Court's role in the political process is quite similar in essence to the political roles played by other state courts of last resort.

TABLE OF CONTENTS

INTRODUCTION

It is the purpose of this study of the New Mexico State Supreme Court to fill two historiographical gaps. First, historians in recent years have virtually abandoned the field of public law, leaving it almost exclusively to the consideration of political scientists. Second, those historians who have written about the New Mexico statehood period and its politics have done so to the almost total exclusion of discussions of the judiciary. These two reasons alone warrant this history; both, of course, call for additional explanation.

American historians until after World War II interpreted history basically within a political framework. When they focused on constitutional issues or matters of public law, they based their conclusions on such data as cases, statutes, and constitutional documents enacted or revised. They believed that the judiciary, because of its unique province of law and justice, necessarily differed from the other branches of government. The courts simply interpreted policy based on constitutional doctrine and precedent. The

executive and legislative branches made policy. Their belief that the courts were non-political, moreover, was widely shared by the American people themselves. Indeed, it was also the accepted interpretation of political scientists, lawyers, and law professors.

Even the judges themselves did much to perpetuate and substantiate this public posture of impartial statesmanship. Chief Justice of the United States John Marshall commented as early as 1824: "Judicial power, as contradistinguished from the power of the law, has no existence. Courts are the mere instruments of the law, and can will nothing."[1] More than one hundred years later, in 1936, Supreme Court Justice Owen Roberts declared in a similar vein:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,--to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment.[2]

Despite Roberts' protestations to the contrary, the overt policy-making role played by the New Deal Court on which he served exploded what until that time

was perhaps the most potent and persistent myth in American political life. As defined by one New Deal scholar, it was "the myth that the Court is a non-political body, a sacred institution on which politics must not lay its profound hands." It was the myth that justices did not make law but simply discovered law and applied it to the circumstances of individual cases.[3] Even though the political history of the judiciary, of the Supreme Court, was always written for all to read, most scholars and most Americans remained untaught. It took the New Deal Court to teach them, its performance showing the reality of courts as policy-making bodies. Thus instructed, constitutional scholars had a new perspective from which to study public law.

But then a curious thing happened. Historians, having lost interest in political history, abdicated their hithertofore dominant position in the field of public law. To be sure, some historians continued to write constitutional history, doing so in the basically traditional way. They have written biographies, histories of various periods of the United States Supreme Court, some state histories, histories of specific constitutional doctrines and struggles, and

the like. They have not, however, really focused on considerations of courts and judges as policy-makers, as active participants in the political process.

In large part due to an increasing focus on social and intellectual history, this turning away by historians from matters constitutional also resulted from the eagerness with which political scientists entered the public law field. Having accepted the theory that the judicial process is political, political scientists began in the late 1950s to search for the determinants of judicial behavior. In so doing, they adopted and have continued to adopt new methods of research in exploring any and all areas where these determinants might conceivably be found. Regarding method, they have (many as behavioralists) drawn and built upon methodology used in such social science fields as psychology, social psychology, sociology, and cultural anthropology and upon post-World War II methodology used specifically in constitutional law.

Regarding areas of inquiry, political scientists have turned to studying the importance of background characteristics of judges and how these characteristics have correlated with and have theoretically influenced

judicial behavior; judicial selection processes and their relative merits; the judicial process as acted upon by various external forces; and the role of the judiciary in state political systems. They have turned out voluminous literature with respect to all of these areas except the last, that involving state courts in the political process. Their findings, dominating as they have the literature on law and politics, do warrant consideration.

In the area of background characteristics of judges, the emphasis has been on the correlation of differences in background with different decisional tendencies. Studies, moreover, have dealt with both non-political and political variables. The literature, in the first instance, has looked at the social backgrounds of judges, their ethnic affiliations, religions, off-the-bench attitudes, and other factors, and how these have correlated with decisions from the bench.[4] The literature, in the second instance, has focused directly on the relationship between party and the judiciary. Examining the judges' party affiliations and voting records, these studies have concluded that

the one has influenced the other.[5] The literature of background characteristics has dealt with both federal and state courts.

It must be noted here, however, that such correlation studies have not gone uncriticized, especially in recent years. A general criticism has been that this scientific assertion by behavioralists of a direct link between a man's background and his performance as a judge has been, in effect, overdrawn, oversimplified, and impossible to prove. A further criticism has been that such literature has ignored other factors which might well have influenced judicial decisions. Specifically, such literature has tended to abstract the backgrounds/decision equation from the very process concerned, the judiciary, and has thereby avoided consideration of other variables possibly complicating the situation. Among these have been situational factors that have helped to shape judges' orientations toward issues, factors such as family background, party activism, the socializing process of becoming a judge (perception of the judicial role), the selection process, and the institutional setting

itself. In this setting have existed policy choices from which judges have made their choices, choices limited by law and precedent and by the necessity of interaction among judges. In short, such criticism has taken the behavioralists to task for ignoring the unique features of the judiciary.[6]

In the area of judicial selection processes, discussion has come in the form of debate on what the best method of judicial selection has been, on what role the public has played and should have played in the selection of judicial personnel, and on what kinds of judges have actually been chosen under each selection method. Here the literature has been quite extensive and has taken various forms. Some of it has simply described the selection process in operation at both federal and state levels.[7] Some have supported one selection method as being best, with the appointive, the partisan election, the non-partisan election, and the Non-Partisan Court Plan (Missouri Plan) methods all having their defenders.[8] Much of the literature has focused specifically on this last method of selection, for the Missouri Plan--or a modified version thereof--has been adopted by a number of states. It

has been considered by still others, including the State of New Mexico. This plan, a plan specifically designed to eliminate parties and partisan politics from the judicial process, has, consequently, come in for some recent in-depth analysis.[9]

In the area of the judiciary and how it has been influenced by various external forces, studies have focused on those in a position to influence the judicial process. They have generally concluded that such forces have had a definite effect on the judiciary, especially in the area of judicial selection. Bar associations logically have wielded the greatest impact, almost to the point of controlling who any candidate for a judgeship has been--although not to the point of actually naming judges.[10] Other forces that have influenced the judicial process have been found in the executive and legislative branches of government and in the realm of special interest groups.[11]

In the final area of the role of the judiciary in state political systems, far too few studies have been done. The literature has been limited simply because state courts have not generated interest among students

of state political systems. Those scholars who have studied state courts have regretted this void, as they have clearly seen the courts as an integral part of the political system, the judicial process interacting with and impinging on other parts of the political system. They have argued that the jurisdiction of courts has been dependent not so much upon its legal definition as upon the perceptions of potential litigants. They have also argued that the judicial process has been intimately affected by the remainder of the political system and that, in turn, judicial actions have had repercussions on other political institutions. On the basis of these arguments they have held that the study of judicial systems has been a necessity in understanding the operations of state political systems.[12]

As a consideration of these studies reveals, then, the field of public law or law and politics has come in for a great deal of scholarly attention. Political scientists have written the bulk of the literature, and even they have neglected by and large state judiciaries, especially with respect to studying how the judiciary has functioned in terms of and in

interaction with the larger political structure of a state. This is not to suggest that the judiciary has simply been a mirror of a state's partisan structure; such a suggestion would negate the unique role of the courts in terms of their work, organization and staffing, and position in the public eye.[13] It is to suggest, however, that the judiciary provides an additional key to the understanding of a state's political structure.

When it comes to the specific consideration of New Mexico state politics, this key to understanding, the judiciary, has simply not received meaningful attention. This neglect, furthermore, becomes of even greater concern when it is recognized that New Mexico is and has always been an extremely and uniquely political state. As historian Warren A. Beck has put it:

> To understand properly the politics of New Mexico it is necessary to remember that the state "may be in the United States but is not of the United States," for the political history of New Mexico is unlike that of any other of the fifty states.

He then has added:

> New Mexico is one of the last frontiers in politics, just as it is in many other areas. . . . Competition for office on all levels is keen, and the electoral battles are bitterly fought.[14]

In an edited work on western state politics, political scientists Harry P. Stumpf and T. Phillip Wolf have emphasized the intensity of New Mexico political activity by simply entitling their article on the state's politics, "NEW MEXICO: The Political State."[15]

So it is that New Mexico's politics have been accepted as vigorous and somewhat different, yet there has been only one comprehensive political study of the statehood period, Jack E. Holmes's Politics in New Mexico. As a political scientist, Holmes has divided post-statehood politics into three separate periods and has measured each in terms of the "two-party model." In addition, he has early delimited and defined the nature of his study:

> The three institutions selected for review--party, legislature, and governorship--are those deemed essential to an understanding of the state's politics and government since statehood was achieved.[16]

He has then proceeded in terms of his stated aims.

The contention here is that in the process Holmes has lost much of the flavor of New Mexico politics. First, he has abstracted politics from the realm of history, thereby ignoring the value of historical

perspective and omitting much of the color of the people who have made the politics unique. Second, he has totally left out the judiciary, an equally valuable path to an understanding of the state's politics and government. Thus, the only comprehensive study of state politics has accomplished its author's intent, but it has not provided the entire picture of what has occurred politically. Further, it has stood as an exercise in political science and not in history.

What it all comes down to, then, given these gaps in historiography, is a need for much greater emphasis on statehood history and its law and politics. This study is but one small effort in that direction. It is written in the belief that the judicial system merits consideration, for lawyers and the courts have long influenced politics in New Mexico. Or, stated differently, to get an overall grasp on New Mexico political history, one cannot help but look at legal history as it traverses the territorial and statehood periods. To do so provides both historical perspective and continuity. To do so provides an additional key to an understanding of New Mexico political life.

Approached from this direction, New Mexico political history, both territorial and state(hood), falls into some distinguishable and distinctive periods. R. E. Twitchell, historian--and himself a leading member of the bar--early recognized this in his discussion of the territorial period. He identified specific judicial periods, the first being that of the Kearny court. The second judicial period lasted from 1851 (the organization of New Mexico into a territory) to the 1880s (the advent of railroads into New Mexico). During this second period of better than thirty years, according to Twitchell, New Mexico remained virtually isolated from the rest of the world. Law books were few; only one compilation of the laws of the territory existed. Under these conditions judges and lawyers worked hard, and within their districts judges were the law unto themselves.[17]

The third judicial period came with the construction of railroads. Entering New Mexico in 1879, railroads opened an all-rail route across New Mexico to San Francisco, with the Santa Fe and Southern Pacific railroads linking up at Deming in 1881. The entrance of railroads meant a new era in the history of the territory,

as it brought a great influx of "Americans" who built towns, purchased and stocked cattle ranches, prospected and developed mines, and established industrial enterprises.[18] It also meant a new era in legal history. From approximately 1879 to 1882, a time of transition between the old condition of affairs and the new era of progress and development, court caseloads increased and changed in nature as trials and litigation centered around railroads and the increased value and conduct of business. The very practice of law in the courts changed, and a new compilation of the laws of the territory appeared.[19]

As for the third judicial period itself, it included lawyers drawn to New Mexico by the many opportunities opened up by the railroads. Some, near the end of their careers, primarily influenced the territorial period. Others, just beginning their careers, helped carry New Mexico through its successful struggle for statehood, its constitution-making, and its formative years as a state. Their influence saw its demise in the years following World War I. Among this latter group, a group of lawyers particularly significant because of how they helped shape the early judicial and political

history of the state, were to be found Frank W. Parker, Harvey B. Fergusson, Merritt Mechem, Clarence J. Roberts, and Richard H. Hanna.[20] Parker, Roberts, and Mechem were all territorial judges. Parker, Roberts, and Hanna won election to the first state supreme court. A delegate from the territory to Congress, Fergusson represented the state as one of its first Congressmen. Mechem served as governor of the state.

Having thus helped to bring New Mexico from territory to established state, the lawyers clearly did much to mold political life. Their impact on politics, furthermore, did not stop once statehood was a reality. Nor was the existence of judicial periods confined to the territorial period. Instead, discernible groups of lawyers continued to leave their mark upon the bench, bar, and politics of New Mexico during the period after 1912. Where relevant, this study examines these shifts and interrelationships, recognizing that overlapping between eras does occur.

Such periodization can and does help provide a sense of continuity for this assessment of New Mexico judicial history. It furnishes an overall framework

through which to examine, more specifically, the history of the New Mexico State Supreme Court in the political process. At the same time, it does not, of course, negate the value of other standards of assessment. This study follows the judiciary wherever it leads in lending insight into state history, its law and its politics.

The beginning of the path to understanding, if continuity and historical perspective are to be observed, lies in the territorial period. Therein originated many of the modes of procedure shaping the legal community's interaction within the larger political structure. Indeed, to ignore these precedents is to separate artificially the two supreme courts. For each court was, as a co-equal branch of government, deeply involved in the political process. Each existed to serve as the balance wheel of the constitutional system and to interpret the constitution and the laws.

Because the two courts are thus so inextricably tied together, one cannot fully appreciate a history of the New Mexico State Supreme Court without first looking, albeit in a cursory manner, at the role of the territorial supreme court in the political process. This is done not

as an attempt to supplant a most delightful account of territorial justice, Arie W. Poldervaart's Black-Robed Justice.[21] Rather, it is done as an attempt to show how that early court operated and was operated upon politically. It is simply an effort to discover the territorial precedent.

NOTES--INTRODUCTION

[1]Osborn v. Bank of the United States, 9 Wheat. 739.

[2]United States v. Butler, 297 U. S. 1.

[3]C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1949 (New York, 1948), pp. 14-15. This book stands as a seminal work which marks the first really major theoretical break with the past.

[4]David J. Danelski, "Values as Variable in Judicial Decision-Making," Vanderbilt Law Review, XIX (1966), 721-40; Sheldon Goldman, "Backgrounds, Attitudes, and the Voting Behavior of Judges: A Comment on Joel Grossman's 'Social Backgrounds and Judicial Decisions,'" Journal of Politics, XXXI (1969), 214-22; S. Sidney Ulmer, "Analysis of Behavior Patterns on the Supreme Court," Journal of Politics, XXII (1960), 629-53; Stuart S. Nagel, "Ethnic Affiliations and Judicial Propensities," Journal of Politics, XXIV (1962), 92-110; and Nagel, "Off-the-Bench Judicial Attitudes," Judicial Decision-Making, ed. by Glendon Schubert (New York, 1963), pp. 29-54.

[5]Stuart S. Nagel, "Political Party Affiliation and Judges' Decisions," American Political Science Review, LIV (1961), 843-50; Nagel, "Political Parties and Judicial Review in American History," Journal of Public Law, XI (1962), 328-40; John R. Schmidhauser, "Stare Decisis, Dissent, and the Background of the Justices of the Supreme Court of the United States," University of Toronto Law Review, XIV (1962), 194-212; Glendon Schubert, "The Michigan Supreme Court," Quantitative Analysis of Judicial Behavior, ed. by Glendon Schubert (New York, 1959), pp. 129-41; and S. Sidney Ulmer, "The Political Party Variable in the Michigan Supreme Court," Journal of Public Law, XI (1962), 352-62.

[6]Joel B. Grossman, "Further Thoughts on Consensus and Conversion: A Reply to Professor Goldman," Journal of Politics, XXXI (1969), 223-29; Grossman, "Social Backgrounds and Judicial Decision," Journal of Politics, XXIX (1967), 334-51; and David W. Adamany, "The Party Variable in Judges' Voting: Conceptual Notes and a Case Study," American Political Science Review, LXIII (1969), 57-73.

[7]Evan Haynes, The Selection and Tenure of Judges (New York, 1944); Jack W. Peltason, The Missouri Plan for the Selection of Judges (Columbia, Mo., 1945); and Bancroft C. Henderson and T. C. Sinclair, Judicial Selection in Texas: An Exploratory Study (Houston, 1964).

[8]Warren Burnett, "Observations on the Direct-Election Method of Judicial Selection," Texas Law Review, XLIV (1966), 1098-1102; Claude J. Davis, Judicial Selection in West Virginia (Morgantown, W. Va., 1958); Herbert Jacob, "The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges," Journal of Public Law, XIII (1964), 104-19; and Malcolm C. Moos, "Judicial Election and Partisan Endorsement of Judicial Candidates in Minnesota," American Political Science Review, XXXV (1941), 69-75.

[9]The Missouri Plan has elicited any number of articles, some favorable and some unfavorable. Largely supported by the legal community, the Plan has found as its primary champion Glenn R. Winters--"One-Man Judicial Selection," Journal of the American Judicature Society, XLV (1962), 198-203. The single most comprehensive assessment of this method of judicial selection is Richard A. Watson and Randall G. Downing, The Politics of the Bench and the Bar (New York, 1969).

[10]John E. Crowe, "Subterranean Politics: A Judge is Chosen," Journal of Public Law, XII (1963), 275-89; E. J. Fox, Jr., "The Selection of Federal Judges: The Work of the Federal Judiciary Committee," American Bar Association Journal, XLIII (1957); 685-88, 761; Joel B. Grossman, Lawyers and Judges: The ABA and the Politics

of Judicial Selection (New York, 1965); and B. G. Segal, "Judicial Appointments," Massachusetts Law Quarterly, XLVI (1961), 138-51.

[11]R. W. Cooley, "The Department of Justice and Judicial Nominations," Journal of the American Judicature Society, XLII (1958), 86-90; S. Sidney Ulmer, "Congressional Predictions of Judicial Behavior," Political Research: Organization and Design, V (1962), 15-17; and Richard L. Watson, Jr., "The Defeat of Judge Parker: A Study in Pressure Groups and Politics," Mississippi Valley Historical Review, L (1963), 213-34.

[12]Herbert Jacob and Kenneth N. Vines, "The Role of the Judiciary in American State Politics," Judicial Decision-Making, ed. by Glendon Schubert (New York, 1963), pp. 245-56.

[13]Kenneth N. Vines, "Courts as Political and Governmental Agencies," Politics in the American States: A Comparative Analysis, ed. by Herbert Jacob and Kenneth N. Vines (Boston, 1965), pp. 239-87. This is the most complete analysis of state courts available. A student of Vines recently completed an investigation of the judicial role in four different states. See Henry Robert Glick, Supreme Courts in State Politics (New York, 1971).

[14]Warren A. Beck, New Mexico: A History of Four Centuries (Norman, Okla., 1971), p. 296.

[15]Harry P. Stumpf and T. Phillip Wolf, "NEW MEXICO: The Political State," Politics in the American West, ed. by Frank H. Jonas (Salt Lake City, 1969), pp. 258-95.

[16]Jack E. Holmes, Politics in New Mexico (Albuquerque, N. M., 1967), p. i.

[17]Ralph Emerson Twitchell, The Leading Facts of New Mexican History, II (6 vols.; Cedar Rapids, Ia., 1912-1917), 393-95.

[18]Ibid.

[19]Ibid., pp. 492, 494.

[20]Ibid., passim.

[21]Arie W. Poldervaart, Black-Robed Justice (Santa Fe, N. M., 1948).

CHAPTER I

THE TERRITORIAL PRECEDENT

"Hear Ye! Hear Ye! The honorable Supreme Court of the Territory of New Mexico is adjourned sine die." These words, spoken on the evening of January 10, 1912, marked the end of a sixty-six year history in territorial high court politics and justice. Present at the epoch-ending ceremonies were both the newly elected state supreme court justices and the outgoing territorial justices. Judge John R. McFie, dean of New Mexico territorial justices by virtue of his eighteen years of service on the bench, presided. Briefly recalling the history of the court which had spanned the six decades from the Kearny Code to the statehood proclamation, McFie swore in the new justices. The New Mexico Territorial Supreme Court officially expired.[1]

The territorial court did not, however, expire without leaving an indelible impression on the history of New Mexico high court politics and justice. In effect, it provided the statehood precedent. It, like its successor, functioned and found itself manipulated

politically. It, like its successor, found that the administration of justice involved more than the resolution of cases based on facts or law. Indeed, the court found from its very beginning that such fundamental matters as organization, appointment and tenure, and the judiciary's role as arbiter of the constitutional system of checks and balances and separation of powers placed it squarely in the political arena.

The first territorial court system resulted from the Kearny Code of September, 1846. Based on both the laws of Mexico and existing state and territorial laws, the code covered "Courts and Judicial Powers" in eleven different sections. The superior [supreme] court was to consist of three justices, each of whom was also to preside over one of the three judicial circuits into which the territory was divided. Its jurisdiction was defined as "appellate" and pertained to both civil and criminal cases. To that first court Kearny appointed Joab Houghton, Antonio José Otero, and Charles Beaubian.[2] No man of Spanish origin again served on New Mexico's highest court until almost one hundred years later.[3]

The Kearny Code remained as the fundamental law for four years, during which time political factionalism and discontent arose. Two of the judges actively involved themselves in politics. Houghton and Beaubian helped lead the Territorial party, a party which favored immediate statehood, and later Houghton played an active role in writing the constitution of 1850.[4] Noting the adoption of this constitution by voters with virtually no opposition, the "state" legislature met in Santa Fe on July 1, 1850, and memorialized Congress about the lack of self-government under military rule. Claiming that "the military is independent of and superior to civil power," the legislature also decried the absence of an independent judiciary: "Some power other than the congress of the U. S., has made judges dependent on its will alone for the tenure of their offices, and the amount and payment of their salaries."[5]

The statehood movement came to nought in 1850, as the Compromise of 1850 included the act organizing New Mexico as a territory and took precedence over the state organization. The Organic Act, detailing the organization of the new territorial government, dealt

(in Section 10) with "Courts--Jurisdiction--Judicial districts--Clerks--Appeals." Under the new act judicial power fell to the supreme court, district courts, probate courts, and justices of the peace. The supreme court consisted of three justices, who were to hold an annual term at Santa Fe, who were to hold office through presidential appointment for four years, and each of whom was to preside over and reside within one of the three judicial districts. The Organic Act set certain limitations on jurisdiction; other jurisdictional limitations were to be set by law. Under the act the supreme court alone enjoyed appellate powers.[6]

From this point on little happened to change either the basic organizational or jurisdictional structure of the territorial courts. The judiciary, lawyers, and the law did gradually adapt to changing conditions, but each innovation was a long time in the making. In civil actions common law replaced the civil law and the Kearny Code in 1876, holding sway until legislative adoption of a new civil code of procedure in 1897. The New Mexico Bar Association, organized in 1886, sought to provide rules for practice before the

courts and rules for admission to the bar. The association could also claim credit for the civil code of 1897. But even with these changes, the court system did not always function smoothly.[7]

For one thing, the courts fell further and further behind in their dockets. For another, Congress seemed indifferent to the plight of the courts.[8] For still another, this one proving the greatest stumbling block to an impartial administration of justice, the appellate process resulted in the trial judge at the district court level being one of the three judges at the supreme court level to hear an appeal on a case he had previously decided. Too often the whole process of review gave way to the judge of record trying to persuade his colleagues of the correctness of his decision. Thus, in the case of Armijo v. County Commissioners, the supreme court stated as the totality of its opinion: "This case is affirmed for the reasons given in the opinion of the learned judge before whom the case was tried in the court below."[9] Following this statement appeared the opinion of the trial judge.

Congress eventually did much to alleviate the problems of too heavy case loads and the duality of

jurisdictions but only after years of indifference and the subjection of Congress to considerable pressure. Governor Edmund G. Ross, taking note of the shortcomings of the court system, made these observations in his annual report for the year 1885:

> . . . they are greatly embarrassed in the discharge of their duties, and are often unable to clear the docket in one county before court begins in another; important cases, civil and criminal, are obliged to be held over to a later term, to the great detriment of litigants, and with great wrong and the denial of justice to alleged criminals. . . . Another serious phase of this matter is the fact that, with but three judges to constitute the Supreme Court of the territory, each of the three is required, in order that there might always be a majority . . . , to sit in judgment and reviewal of his own decisions in the court below.[10]

Ross concluded with the recommendation for the creation of a fourth judicial district, a recommendation followed by Congress two years later.

However, within three years the situation again grew so serious that the New Mexico Bar Association launched a campaign to have the number of districts increased from four to six. Pointing out the growing wealth and population of the territory and the volume of litigation that accompanied such growth, the association appealed to Congress, plaintively stating, "In

some of the Districts the Courts are as much as two years behind with the business."[11] Again, Congress responded piecemeal by creating one of the asked-for districts. It established the sixth district in 1904 and the seventh district five years later. In addition to speeding up the judicial process, the enlarged number of courts meant that a district judge no longer had to pass on his lower court decision while presiding on the supreme court. It also meant--largely due to the efforts of Chief Justice William Pope--that the territorial supreme court was able to clear its docket and leave a clean record for the state supreme court.[12]

The very nature of the organizational and jurisdictional structure of the territorial courts, then, placed them within the political process. At one time or another this structure was to become the concern of the judges themselves, legislators, the governor, and lawyers, the latter acting as a special interest group. Each branch of the territorial government and the bar association, along with a reluctant Congress, acted in large part out of concern for the judicious administration of the law. At the same time, they did not act in

a way that adversely affected themselves politically. But whereas the matter of organization only tangentially felt the manipulative influence of politics, the very issues of judicial selection and tenure insured concerted and continuous political activity.

Poldervaart, who has not by any means attempted a political history of the territorial court, has early noted some of the pitfalls of the selection method. First, members of the supreme court were political appointees. Second, membership on the court depended upon which party controlled the presidency, this fact tending "to militate against an impartial judiciary. Some judges were accused of being too easy upon lawless characters, others were said to favor members of the political party which had brought about their appointment."[13] And when Grover Cleveland, the first Democrat President to be elected since the Civil War, took office in 1885, a complete turnover in court personnel occurred. "Cases which were pending had to be rearranged and started anew. . . . The result was a serious and unfortunate delay for the litigants in the settlement of the disputes."[14] It was quite evident, then, that the whole

system of appointment and tenure was frought with political overtones. The following case histories merely illustrated this point.

Kirby Benedict, the leader of the New Mexico bench during the judicial period up to the advent of railroads in 1879, excited controversy among his contemporaries as he has generated interest among historians since. Described by Poldervaart as "the most bizarre of all New Mexico Territorial Supreme Court judges," Benedict initially served as an associate justice under an 1853 appointment from President Franklin Pierce, being elevated to the position of chief justice in 1858. There he remained through the Lincoln Administration despite the fact he was not a Republican and notwithstanding the many accusations questioning his fitness for the bench.[15] Reviewing one particular set of charges leveled against Benedict, charges that centered on the judge's indulgence in intoxicants, President Abraham Lincoln responded:

> Well, gentlemen, I know Benedict. We have been friends for over thirty years. He may imbibe to excess, but Benedict drunk knows more law than all the others on the bench in New Mexico sober. I shall not disturb him.[16]

As long as Lincoln was President, Benedict remained firmly entrenched.

All this changed when Andrew Johnson acceded to the White House. Indeed, as the time drew near for the judge's reappointment as chief justice, attacks on Benedict increased. Politically motivated, Benedict's enemies again tried to topple the leader of the then dominant political party in the territory.[17] This time their campaign succeeded. Utilizing the editorial pen of James L. Collins of the Santa Fe Gazette, they spared no invective. They placed his courtroom squarely in the political arena and proceeded to the questioning of Benedict's impartiality. They charged that

> He turns his court into an electioneering machine and threatens litigants with the displeasure of the chief justice if they do not conform to his political notions. Grand juries and witnesses are summoned to attend the United States courts not to investigate offenses against the law or give evidence but to make party capital. . . .
>
> The demagogism of Judge Benedict is so ingrained and he imagines himself such a shrewd politician that he forgets where courts end and caucuses begin. . . .
>
> He must dabble, dabble, dabble in the dirty pool of politics which he, himself, stirs up and from which he constantly bespatters himself with the most filthy mire.[18]

They also charged Benedict with drunkeness and hinted of family trouble. They condemned him without respite.

Benedict, of course, had friends, and they threw their political clout behind the judge in an effort to secure his reappointment. His supporters in the territorial legislature passed and sent to Washington resolutions which condemned the editors of the Gazette and praised their champion for his impartiality, integrity, and both official and private conduct. His old friends from Illinois court days similarly came to his aid. David Davis, a Supreme Court Justice who later resigned to accept an appointment to the Senate in 1877 rather than serve as the swing vote on the Committee of Fifteen selected to determine the outcome of the 1876 election, wrote a strong letter of defense: "I believe all opposition to him is factious--I practiced law with Judge Benedict for many years and know him to be pure and above reproach."[19]

Lyman Trumbull and Richard Yates, Illinois' two Senators in 1866, joined to recommend his retention. Trumbull, a conservative, eventually voted against Johnson's removal in the impeachment trial, being one of few Republicans to do so; Yates went with the Radicals.

Most New Mexico lawyers sided with Benedict. But resolutions and supportive letters did no good. Perhaps persuaded by the charges of Benedict's political enemies--perhaps motivated by the desire to exercise his own authority as President--Johnson named Civil War hero John P. Slough chief justice.[20] Benedict stayed on in the territory to practice law and to add thereby to the folklore of the bench and the bar. Along the way he fell victim to the politics of appointment and tenure.

With Benedict's fall from the court, the history of both the bench and territorial politics entered a new era. In terms of the legal community, it witnessed the emerging dominance of "railroad lawyers." In terms of politics, it meant the appearance of a new power structure, one most simply and easily identified as the "Santa Fe Ring." An amorphous group, the ring consisted primarily of Republicans, who as lawyers, businessmen, and politicians, allied themselves in an effort to control the territory for both power and profit. Among some of its most notable members were Thomas B. Catron, Stephen B. Elkins, Henry Waldo, William Breeden, L. Bradford Prince, Samuel B. Axtell, Charles H. Gildersleeve, and William T.

Thornton. Over the years the ring's goals became synonymous with those of the Republican party and the New Mexico Bar Association.[21]

So constituted and so dedicated in its objectives, this group became deeply involved in the judicial politics of the territory. As already noted, the bar association led the drive for court reorganization during the latter part of the territorial period. Similarly, the ring and its lawyer members influenced the judiciary when it came to the court arbitrating political questions involving the powers of the governor. And in the area under discussion, that of appointment and tenure, ring members sought to influence the selection and removal of New Mexico justices for three decades. They did so by trying to alter the very method of judicial selection, pushing for direct election of judges as in the proposed constitution of 1889. They also did so by involving themselves in cases concerning individual justices.

An early example of ring involvement in judicial politics came in 1872 at a time when it was in the process of solidifying its power. At stake was not the removal of a justice from the bench but rather the transfer of a justice from the territorial capital.

The incident resulted from a legislative act transferring Chief Justice Joseph Palen, a ring ally, from the first to the third judicial district, a maneuver by Democratic opponents of the ring to secure a more friendly judge in the Santa Fe district. Republican Governor Marsh Giddens vetoed the act only to have the anti-Palen forces seize control of the legislature after adjournment in an attempt to override the veto. The ring then turned to the supreme court which ruled in its favor, holding the legislature to be illegally constituted for the purpose of conducting business. The ring thus thwarted an attack on one of its partisan judges.[22]

A decade later the ring faced the actual removal of one of its justice allies from the supreme court. This matter--the second of the case histories concerning the politics of appointment and tenure--showed the full determination of the ring to effect its control over judicial personnel even given the reality of presidential appointment and retention of judges. Specifically, it showed the ring maneuvering to retain in office Chief Justice L. Bradford Prince. Significantly, it came during what was discussed in the introduction as Twitchell's

transitional era of legal history, a period from approximately 1879 to 1882 when conditions within the territory were changing. This was the time when progress and development asserted themselves, coinciding with the arrival of railroads in 1879. It was also the time when court case loads increased and changed in nature, with trials and litigation centering around railroads and the increased value and conduct of business. As a transitional era, it meant uncertainty in both territorial and judicial politics, the question of Prince's tenure clearly demonstrating this fact.

Prince's troubles began in 1881 when it was rumored that someone was to be appointed chief justice in his place. Based on these rumors, Prince began an active political campaign to remain in office in the spring or early summer of 1881. In two quite similar letters, a copy of one sent to President James Garfield and a copy of the other sent to Attorney General Wayne MacVeagh, Prince stated his case. He did so by playing down the political turmoil within the territory and by playing up the matters of his accomplishments and of judicial tenure.

He began the letters by saying that he had not applied for retention for two reasons. First, he supposed

it to be the policy of the administration not to remove a judge during his tenure except for cause. Second, to make such an application meaningful, it should be backed by the territory's leading citizens, "and they are just the men having the most litigation, and to whom no judge should like to be under special obligation."[23] In both letters he professed his interest in the territory and deep liking for his position, a position virtually unequaled in terms of giving a man an opportunity to do great good and to form the institutions of the future. He reviewed his past record of public service, the fact that he accepted the appointment only at "the most urgent solicitation of W. Evarts," and his compilation of the laws of the territory.[24]

He then set forth his views on judicial tenure, believing it to be an absolute necessity in terms of judicial independence. He also took the opportunity to proclaim his own non-partisanship and lack of political ambition and, at the same time, his determination to be heard:

> I have never been an office seeker, and it really rather galls me to write about such matters at all; but a "removal" to my mind implies something unsatisfactory, and so I do not feel that I should keep entirely silent.[25]

Prince remained in office throughout the remainder of the year, engaging in a public feud with Governor Lionel A. Sheldon in December, 1881, over court and personal expenses, but this dispute was tangential to the larger battle for political power within the territory.[26] One participant in this battle was the ring; the other was the newly arrived business-interest group. The ring backed Prince, and, as rumors of his removal became more persistent, its members came to his defense. They did so in an 1881 petition signed by most lawyers of the first judicial district and in a January 5, 1882, series of legislative resolutions. Their efforts struck the same note, hinting that private interests, desirous of a partial judiciary controlled by them, were responsible for the attack on Judge Prince.

The lawyers of the first judicial district acted first in terms of a formal appeal, probably sometime late in 1881. Signed by such notable and historically significant Santa Fe attorneys and ring members as C. H. Gildersleeve, Jose D. Sena, Thomas B. Catron, Frank W. Clancy, and William Breeden, the petition read as follows:

> The undersigned members of the bar . . . , learning that a few persons whose motives are well understood here, but may not be known at

> Washington, have been endeavoring to bring about a change in the Chief Justiceship of this Territory, hereby join in representing to the President that the interests of the Territory demand the retention, as Chief Justice, of Hon. L. Bradford Prince.

They cited Prince's "ability," "industry," "fidelity," and "integrity" plus the confidence and esteem he had won of the best citizens as their reasons for so supporting him.[27]

The ring-controlled territorial council and house of representatives passed resolutions that likewise blamed private interests for the judge's woes. The council responded to rumors that "attempts are being made in Washington by interested parties to obtain the appointment of a new Chief Justice of the Territory."[28] The house responded to information that "certain designing persons who desire to further personal ends only, have made charges and statements against the Hon. L. Bradford Prince, as Chief Justice of this Territory, which are unfounded in fact and prompted by private interests."[29] Both went on to commend Prince and to recommend his continuation in office. Again, the key was political.

These ring activities did not, however, stay action from Washington. Aware of the political difficulties troubling New Mexico, President Chester A. Arthur did go with the status quo in late 1881 but by January, 1882, felt justified in sending agents to investigate conditions, especially judicial conditions, within the territory. The investigating agents reported that there were indeed grounds for removing Prince in that territorial residents believed him to be incompetent in rendering decisions and to be untrustworthy in administering cases in which large sums of money were involved. They then said this about the ring and its support for Prince:

> During our investigation we have become satisfied that there exists in Santa Fe a number of lawyers who combine for the purpose (and who have unfortunately--as a rule succeeded) of controlling the action of the court. . . . Most of these men speak in contemptious [sic] terms of Judge Prince both as a lawyer and judge, and yet they plead for his retention.

They concluded on the note that "Judge Prince is unquestionably under the controls [sic] to a greater or lesser degree, of this combination and unfortunately he cannot free himself from it."[30]

The fact of this investigation added to his continuing difficulties led Prince to make one final appeal to the politically influential, this time in a

long letter to his friend and former Secretary of State William M. Evarts. Writing in January, 1882, he pinpointed the political climate of the territory as the factor basic to his insecurity in office. Noting the recent arrival of "large corporations, railroads, mining and owners of land grants," each of whom wanted "to own a judge," Prince lamented, "Among these people the idea that a Judge should act from principle and decide each motion on its own merits without regard to the parties, was apparently unthought of." In fact, the situation was such that a judge's tenure depended directly upon "executive favor" and indirectly upon "the extent to which certain influential politicians may be satisfied with his decisions."[31]

But neither Prince's personal appeals nor the activities of ring members on his behalf worked. Faced with the inevitability of removal, the chief justice tendered his resignation from the supreme court on May 9, 1882. In so doing, he gave as his reasons personal financial considerations. He wrote President Arthur that the supreme court salary simply did not provide for the future. Only in stating why he chose that particular

moment to step down did he hint at the political conditions which prompted his decision:

> I had therefore intended to tender my resignation at the close of last year, but the pendency just then of an effort to displace me by certain persons who needed a partial and subservient judge in order to carry out their plans, made such resignation then practically impossible.
>
> I have waited therefore until that effort passed, and until I felt no public interest would be injured by resignation.[32]

Prince's resignation took effect on August 7, 1882, yet it was not until April 23, 1923, some months after the death of the former chief justice, that the final version of his resignation appeared on the public record. Speaking in memory of the man who was "the soul of the Historical Society of New Mexico," Frank W. Clancy, ring member and clerk of the supreme court during Prince's tenure, offered this as the true account. In 1882 Prince thought that he might receive the Republican nomination for delegate to congress, "but believing there would be gross impropriety in seeking other political office while occupying a judicial position, . . . he resigned his office with the avowed purpose of seeking the nomination for delegate to Congress."[33]

Clancy went on to recount how Prince lost the nomination in 1882 but refused to be an independent candidate because of his loyalty to party. According to Clancy, Prince calmed those who demanded his candidacy with words something like these:

> No gentlemen, I cannot do that; I am a republican and believe in party organization, and to preserve that organization is of more importance than the gratification of any man's individual ambition.[34]

The story of L. Bradford Prince's judicial tenure was complex. Prince, in an effort to save his public image by making his resignation appear voluntary, cited financial motives as the basis for his decision to step down. Yet, he stayed in New Mexico and accepted appointment as territorial governor in 1889, a position offering little by way of future financial security. He constantly proclaimed his impartiality and denied any office-seeking ambitions. Yet, he retained his political alliance with both the ring and the Republican party and remained in the forefront of party councils. As most aptly described by one historian (this at the time of his gubernatorial appointment), he was "a former territorial judge, a willing member of the ring, an ambitious, suave, affable politician."[35] Quite simply, Prince the politician fell

victim to the politics of judicial appointment and tenure.

The Santa Fe Ring failed in its fight to retain its ally Prince on the bench, but it did not consequently cease its efforts to manipulate the judiciary. Rather, it continued in its determination to influence matters concerning judicial personnel, concerning itself not only with the issue of retention in office but also with that of initial accession to office. Indeed, it was most active in the following two case histories on judicial appointment and tenure. In the first instance, the ring sought to block the appointment of Justice Albert B. Fall. In the second instance, the ring tried to shape the appointments that came during the administration of Governor Miguel A. Otero. Ring leader Thomas B. Catron deeply involved himself in both. By the time of the fifth case history--that dealing with the reappointment of Justice John R. McFie--the ring's power was past its peak. Still, the new generation of dominant Republican politicians could and did draw from the example of its predecessor, the Santa Fe Ring. So doing, these politicians were no less determined to effect a judiciary friendly to them.

Albert B. Fall accepted appointment to the territorial supreme court in April, 1893. By all accounts the appointment was clearly political and not without opposition. Fall, at that time and for some years earlier the Dona Ana County Democratic chief, was early cognizant of his position in relation to the political structure of the territory. Acknowledging the political influence of Thomas B. Catron, "the generally accepted Republican boss at Santa Fe," and associates, Fall recognized that his role as county chief of the opposition party engendered resentment, especially as it "threatened their supremacy in southern New Mexico." Indeed, such was the strength of the Republican organization and its leaders, asserted Fall, that when it "was able to enforce its demands for Federal patronage, they controlled the nomination of land officers, Judges, and other District & Territorial Federal officers."[36]

After the election of 1888, according to Fall's own account, some of the leaders of the Republican party invited Fall to join them and offered to secure for him a federal appointment. Fall--while "not a partisan Democrat" yet "a Southern man"--declined, but not before

> It was hinted to me at the close of the conference, if such it may be called, that the gentlemen comprising this committee were in the habit of securing what they desired; and if I did not join them, I might expect their active opposition not only in political matters in the future, but also in business matters, and in particular in opposition to my growing law practice.[37]

Whatever the truth of this personal recollection by Fall, it is a fact that his appointment to the high bench following Cleveland's election as President in 1892 did arouse considerable negative response, each such response being recorded in a book with a decided anti-Fall bias.

As so chronicled, the opponents of Fall--many of them fearful for their livelihood as lawyers should he be chosen to preside over the third judicial district--bombarded President Cleveland, Attorney General Richard Olney, and leading United States Senators with letters, telegrams, and petitions denouncing Fall's nomination and warning of the dire results if their appeals were disregarded. From outgoing Governor Prince came the telegram: "Fall's nomination for Judge is worst possible." Catron had this to say:

> Mr. Fall is wanting in every element of honesty. . . . He is a partisan who would not shrink to do anything. His

> being allowed to occupy that position means persecution for Republicans and immunity for Democrats. It means judicial interference in political matters to further political ends.

And in the estimation of Clancy, Catron's law partner, Fall was "entirely destitute of the natural qualities which the holder of a judicial position should have. . . . He is violent in temper and vindictive towards his enemies, and would, I believe, be a tyrant upon the bench."[38]

The anti-Fall campaign organized initially by Colonel Albert Jennings Fountain, southern New Mexico Republican leader, failed. Confirmed as an associate justice of the territorial supreme court, Fall served in that capacity until 1895. He also rode the circuit in the third judicial district. By and large he found judicial life dull and routine and wrote but few opinions; these were of little significance. As might be expected, his resignation from the supreme court was shrouded with controversy, with Republicans claiming that while on the bench Fall was more of a politician than a jurist. On the other hand, his supporters maintained that he was being unjustly vilified.[39] The story of Fall's judicial tenure, from appointment to

resignation, was but one more example of how even the judiciary could not help but get embroiled in the political struggles of the period.

Miguel A. Otero, territorial governor from 1897 to 1906, observed first hand the machinations of judicial appointment. Indeed, he, himself, decided who three of the judges would be when the Republicans triumphed after four years of Cleveland and Democratic control. The personal appointee of President William McKinley, Otero journeyed to Washington on two separate occasions to confer with the President concerning territorial appointments. According to Otero, he was most anxious to do so, for

> . . . as early as the week of my inauguration, Mr. Catron had gone to Washington with the announced intention of working for the judicial appointments for the territory, . . . "to see that the right men were appointed."

Otero's second trip finalized the appointment of the judges, with Catron failing to secure his selections, for "neither Senator Hanna nor the President had any use for Catron."[40]

Having been granted the opportunity to name three of the judges, Otero named as chief justice,

William J. Mills, and as associate justices, John R. McFie and Frank W. Parker, all three residents of New Mexico. The governor then went about securing confirmation of his appointees, having to overcome considerable objections to the McFie appointment, including a personal appeal to the President from New Mexico's delegate in Congress and a Democrat, Harvey B. Fergusson. Making a special trip to Washington, Otero succeeded in having all objections withdrawn, thus ensuring the confirmation of his choices. He ended his recollections on the proud note that "neither scandals nor complaints were ever raised against any of these three judges during their tenure of office."[41]

Otero never indicated why he selected the three men he did, but his motives were clearly political. When asked by McKinley how many judicial appointments he wanted, Otero responded, "I think I ought to have three, a majority of the court, as you appointed me governor of the territory, and it is very important that I know just who the judges are to be."[42] He might well have added that it proved equally important

for a governor to know the politics and decisional tendencies of the judges with whom he dealt.

Appropriately, the last of the case histories involving judicial appointment and tenure concerned John R. McFie, for whose confirmation Otero labored very diligently. In 1909--with two vacancies soon to occur in district judgeships--President William Howard Taft sent to the Senate the names of John R. McFie and E. C. Abbott. There a bitter fight against their confirmation ensued, much to the consternation of Taft. Criticized by the President for having recommended the two, Governor George Curry reminded Taft that he simply had not done so. Curry later explained that "I had not recommended Judge McFee [sic], as he was then serving as a judge and I knew of no reason why he should not be retained."[43] McFie's name was withdrawn.

By early 1910, with McFie up for reappointment, the question of retention became critical. On February 11, 1910, Curry wrote Holm O. Bursum, chairman of the Republican territorial central committee, concerning this matter. He told Bursum he had written a private letter to the President "in which I said that I hoped he would be able to appoint Judge McFie, but if he finds

that it is impossible to do so I suggested three names. . . ." Curry then told Bursum that

> . . . of course, I am for McFie first as we have endorsed him and I believe in sticking to the man we endorsed, but by the time you reach Washington it will have been decided whether McFie can be appointed or not. Of course, if he cannot be, the next best thing is to get the best man we can.[44]

Not content to leave his fate entirely in the hands of others, McFie himself wrote to Bursum detailing his difficulties and pinpointing the causes. He said that Richard Hanna, one of the three justices to be elected to the first state supreme court, and Francis C. Wilson, a prominent Santa Fe lawyer, had filed charges against him. He had responded fully. McFie wrote, "I . . . fortified my reply with a very large number of affidavits from all the attorneys in the case referred to in the charges, clearly exonerating me from any blame in connection with them." He then said that Hanna and Wilson (along with such notable New Mexico lawyers as George Prichard, Napolean B. Laughlin, and L. Bradford Prince) had further signed a petition requesting the appointment of another judge in his place, with Prince being a candidate for a judgeship.[45]

McFie finished his letter by discussing the support he had in Washington, adding,

> I feel satisfied that there will be no further opposition to me from this end of the line. I understand Messrs. Hanna & Wilson concede that I will be reappointed and Mr. Hanna has practically said that he would not carry the matter further.

As to the reason for the heavy opposition to the judge, perhaps it was as personally motivated and as politically simple as McFie maintained:

> You know, Mr. Bursum, that these persons are unfriendly to me over personal matters without any regard to my fitness for the position, and you know that all but Prichard have no real interest in the republican party of New Mexico and these charges show on their face that their object, to a large extent, is to attack the republican organization over my head. Mr. Wilson so told me personally. He said they were against anybody that the republican organization was for.[46]

Or perhaps the reason lay in the special interest groups McFie allegedly represented, groups opposed by the likes of Hanna, Wilson, and company. Thus it was, according to Arthur T. Hannett, later a liberal Democratic boss and governor, that the corporations sent McFie to Gallup soon after statehood to open a law practice and blunt the legal success of Hannett. In their first encounter before a jury, McFie abused Hannett

for forty-five minutes, with Hannett calmly responding: "You bald-headed old buzzard, you served the corporations far more ably on the bench than you ever will at the bar."[47] Whatever, McFie won confirmation for yet another term as judge. He was around to preside over the closing ceremonies of the territorial supreme court.

The last aspect of the territorial court in the political process considered here concerned the court's interaction with the other two branches of government, the executive and the legislative. Primarily, the three branches met in the political thicket during the first Cleveland administration, for his term in office meant the first Democratic control of federal offices in the territory since pre-Civil War days. It meant the appointment of a Democratic governor, Edmund G. Ross, and an entirely new supreme court membership, all of whom were Democrats. It did not, however, mean a change in the basic political power structure within the territory. For example, the Republican organization gained control of two-thirds of the votes in each legislative house, having unseated a number of Democrats to do this. They could and did pass bills at will over Governor Ross's

veto, with the Republican caucus guiding legislation.[48] But the real struggle was not so straightforward. The issues became as basic as executive power and judicial independence, and both found themselves resolved politically.

The very appointment of Ross as governor set off the antagonism. A Radical Republican Senator from Kansas turned Democrat, Ross arrived in Albuquerque in 1880, having witnessed the end of his political career with his vote against Andrew Johnson's impeachment some twelve years earlier. He was the first Democratic governor of New Mexico in twenty-four years and the first reformer since Lew Wallace. His administration was, moreover, opposed not by Republicans alone, for, as he discovered, both C. H. Gildersleeve, chairman of the Democratic central committee, and Antonio Joseph, Democrat and delegate to Congress, were allies of the famous Santa Fe Ring.[49] Antagonism erupted into a power struggle when Ross suspended for cause the district attorney of the third judicial district, Edward C. Wade, and suspended for cause the attorney general of the territory, William Breeden.[50] Both suspensions reached the territorial

supreme court on appeal; both dealt with the fundamental constitutional question of executive power, the power of appointment.

Of the two cases, the matter of the attorney general proved more politically significant, for Breeden had not only served in that office since 1881 but was also chairman of the Republican party. Further, Governor Sheldon--in a blatant political move to prevent Democratic appointments--reappointed Breeden and other officials (at the request of the Santa Fe Republicans) just before leaving office. In theory this meant Ross had to wait a year before making appointments of his own, for the legislature, not scheduled to meet again until the winter of 1886-1887, could not hold confirmation hearings until that time.[51] Ross, of course, chose not to wait, precipitating a battle waged both in the press and through personal correspondence before its judicial resolution.

On November 25, 1885, Ross replied to a Breeden communication concerning the matter of suspension from office. He took Breeden to task for his "derisive hilarity," superfluous and ill-timed legal arguments,--"the courts are fully competent to and will determine all the legal points involved, in proper time,"--and use

of newspapers as the forum for discussion. He then went into "the why" of removal:

> As to the "cause" for your suspension, permit me to say, and without intention of giving personal offense, but for the vindication of a public act, and in conservation of the public interest, that you were suspended for drunkenness, licentiousness, gambling, and misfeasance, malfeasance and nonfeasance in office; crimes which ought not to be tolerated in a public official.[52]

The cause in Ross's estimation, moreover, ran even deeper, as revealed in his private correspondence. In a January 15, 1886, letter marked "personal," Ross described Breeden as the almost "de facto governor" during Sheldon's incumbency. Ross complained that Breeden

> . . . attempted to play that role after I came in & made himself so obnoxious by his officiousness in attempting to cover up the frauds and steals of the former administration, & to prevent the correction of glaring abuses, . . . that I was forced, . . . to dismiss him.[53]

The territorial supreme court rendered its decision in the matter on January 11, 1886. The court assumed its duty to be the mere determination of who was attorney general in fact rather than who held the title de jure. It then accepted as binding precedent the New Mexico Supreme Court's decision in Territory v. Stokes, 2 N. M. 63,

declaring:

> That cause stands, not as the opinions of the judges upon the bench, but as the solemn adjudication of the highest judicial tribunal of the territory, binding upon this court, and must be to us in this informal consideration the measure of the governor's power to appoint.

Ignoring all other information, including Ross's presentation through counsel of arguments based on supportive decisions of other high courts, the opinion ended without passing on the question of executive power or legal right. The law on that subject was to remain "as declared by the highest judicial tribunal of the territory, until overruled or modified by a cause in court."[54] In short, the court said that Breeden was attorney general in fact.

Ironically, the 1881 precedent dated from the incumbency of Governor Lew Wallace who was also intensely disliked by principal attorneys and political wheelhorses of Santa Fe. It came in an opinion written in the first instance on February 24, 1880, by Chief Justice Prince while sitting in the first judicial district. Wallace attempted to appoint Eugene A. Fiske as attorney general; Breeden, a member of the legislative council, defeated confirmation until adjournment.[55] Wallace again appointed Fiske at the end of the session, but to no avail.

It was Prince's decision that the office of attorney general was vacant, "the term of the late incumbent having expired by law, and the governor having no power to fill vacancies, except those occasioned by death or resignation, without the concurrence of the council."[56] The supreme court concurred in Prince's opinion on January 13, 1881, printing his decision in its entirety and agreeing with its statements of fact and reasons.[57] Such a judgment could only have reinforced Wallace's observation that the office of governor had little power, its function being to keep count of sheep and people for the annual report.[58]

The decision of the court in 1886 both enraged and mystified Ross, for, as he saw it, "a Democratic Court, appointed to purify the judicial atmosphere of this Territory," downed him and cheered the special interest groups, the landowners, and the cattlemen. Ross wrote that he did "not wish to be understood as impugning the integrity of the Court in the least," but then speculated as to what might have happened. He felt that Judge William Brinker had concurred with reluctance while Judges Elisha Long and William Henderson, "strangers to

the conditions here," might well have succumbed to the social climate of Santa Fe:

> The social element of this City is a powerful factor in politics. It seeks industriously & in cunning ways refined by a quarter of a century of experience & practice, to capture every Federal appointee the moment he enters the town, & it has heretofore generally succeeded. It has wined & dined these gentlemen & delicately ministered to their every desire till they seem to have become enveloped in its magic spell. Their social & general relations, daily and hourly association is almost solely with the opponents of the Administration & Mr. Cleveland's policy.[59]

These opponents, according to Ross, centered in a trio of disgruntled Democrats: Judge William A. Vincent, friend of the Santa Fe Ring removed by Cleveland from the chief justiceship; Judge William T. Thornton, would-be but not attorney general because he chose not to dissolve his partnership with Tom Catron ("the most conspicuous & successful Spanish Grant thief in the Territory"); and Chairman Gildersleeve, "another Spanish Grant thief grown rich by success."[60]

Whatever the correctness of Ross's evaluation of the Democratic Court, the court took one more swipe at the governor's power in January, 1887. It did so by

upholding the appeal of Edward C. Wade, stating that he and not Singleton M. Ashenfelter was "the lawful and rightful district attorney for the Third Judicial District." Adding insult to the decision itself was the fact that the suit was brought on behalf of the territory, with Attorney General Breeden acting as counsel for Wade; the two, Wade and Breeden, had, of course, received notifications of their suspensions from office within days of one another.[61]

Ross lost again, Judge Long's apparent attempt to placate him notwithstanding: "In what has been said upon the law of this case, there has been no wish or purpose to cast the least imputation on the motives of the executive." Long concluded with a discussion of the interaction of the branches of government, it being the unavoidable duty of the judiciary "to pass upon the acts of either of the others" and to discharge this duty "with the highest respect for the other departments, and with the single purpose to establish only those principles of law firmly established. . . ."[62]

Ross remained governor until replaced by President Benjamin Harrison in 1889. Stripped of whatever power he

might have possessed by virtue of his office, the governor saw one after another of his actions negated by the Republican organization. William Breeden stayed on as attorney general until the expiration of his term in 1889, at which time the 28th legislative assembly abolished the office, creating in its place that of solicitor general. The political bosses did this in order to keep a Ross appointee from remaining in office after the confirmation of a new governor. The legislature further stipulated that the solicitor general's office was to remain vacant until October 1 following adjournment of the assembly (by that time there would be a new governor) and even made it a felony for anyone to impersonate this official.[63]

All in all, the 28th legislative assembly passed 145 laws, virtually all of which were first considered and recommended by the committee of the New Mexico Bar Association, an association founded in 1886 under the leadership of ex-Judge William A. Vincent. Ross vetoed many of the bills only to see them passed over his veto.[64] Clearly, the dominant political organization wanted to insure that its authority would never again be seriously challenged from any side, be it the executive or the

judiciary. And if that meant restructuring and discrediting the court system, even to the point of smearing the Democratic judges who had helped emasculate Ross, then so be it. Indeed, an indication of that very intent came as early as January, 1888, even before the reality of a return to Republican control of federal appointments, during the third annual session of the New Mexico Bar Association. At that meeting retiring president Neill B. Field spoke at length about court clerk malpractices, and Frank W. Clancy followed up with a similar statement complete with a copy of a fee bill, thereby particularizing "a most glaring abuse by an officer of one of the courts."[65] Such action merely foreshadowed events yet to come.

By the time the legislature met in late 1888 and into 1889, Benjamin Harrison's election as President assured Republican ascendancy in Washington. The legislature wasted no time in attacking the courts, the remaining possible threat, appointing a special joint committee to investigate the conduct and expenses of the courts, specifically the Democratic courts of 1886, 1887, and 1888. The avowed purpose of the investigative committee

was to explore the "official misconduct . . . of certain Federal and Territorial officials in this Territory." The committee, its study completed, reported on the increase in court expenses excluding judge's salaries for the three years in question, concluding that

> . . . this increase cannot be attributed to any increase of legitimate business coming before the court, but is, without doubt, the result of a deliberate system of spoilation which seems to have been agreed upon and sanctioned by officials in power.[66]

Specifically, the committee singled out three district judges as having at the very least consented to this system, for their failure to protect the public from such gross abuses forced the committee to "the conviction that more than one Federal Official was possessed with an 'itching palm.'" The Democrats could merely demur. The minority report of the committee pointed out that no Republicans were subpoenaed, although some of them were in such positions, and expressed the feeling that "the only purpose of such resolution [calling for the investigation] and of such committee was political." It bluntly stated: "The attention of this committee has been directed to besmirching the fair name and character of Democratic officials."[67] But such protests fell on deaf ears.

The 28th legislature wasted no time in attempting to legislate future court activities, among others passing acts regulating district court clerk fees, redrawing district court boundaries, and granting special preference for some cases for supreme court review.[68] This latter bill elicited a special veto message from Ross. Ross labeled the bill unconstitutional and "special legislation of the most vicious character." Specifically, Ross charged that the act was for the sole purpose of allowing counsels Catron, Knaebel, and Clancy to secure a review of a case in the supreme court that could not have been reviewed under the law as it stood. Wrote Ross, "Few of us enjoy the extraordinary advantage of having laws passed for our special benefit, to say nothing of participating in their passage ourselves."[69] Needless to say, Ross's veto did not stand.

The Republican power structure, its extraordinary advantage having been secured at the expense of Democratic Governor Ross and a Democratic court structure, did not soon relinquish its dominant position. Indeed, in referring to the cooperation between the nascent bar association, founded in part to thwart Ross and his associates, and the legislature, accepting as its own

the acts written and introduced by the association, one historian has noted: "Never had all the elements making up the Santa Fe Ring functioned so cleverly and brilliantly in defeating a governor's program."[70] And as for the dominant powers of New Mexico as a whole--the Republican party, the Santa Fe Ring, and many business interests and lawyers--"after four years of Democratic rule they wanted to make sure that never again could a hostile administration disturb the internal affairs of New Mexico."[71]

As the territorial precedent so clearly indicated, then, not even the supreme court could remain above the political fray, the fundamental struggle for political influence and power. The matter of organization, as conditions changed, became the concern of all the various actors of the political process. Significantly, the bar association, a special interest group allied with the political powers of the territory, most influenced the law and the organization of the courts. The matter of appointment and tenure clearly witnessed the manipulative influence of politics with the judges themselves often actively involved in the political struggles of the times. Finally, the matter of the judiciary's role as arbiter of

the political process demonstrated just how deeply the court could find itself caught in the political thicket. The only truly "political cases" decided by the territorial court found the court on the side of the power structure and against the two intensely disliked reform governors.

The state supreme court did not, of course, simply mirror its predecessor, but the precedent was such that there was no escaping its influence. The state court, too, functioned and found itself manipulated politically. An early indication of this came at the constitutional convention of 1910 when the framers organized the judiciary. When it came to the courts, just as in other areas of constitution-making, politics and political considerations proved the decisive determinants.

NOTES--CHAPTER I

[1]Poldervaart, Black-Robed Justice, p. 211.

[2]New Mexico, Kearny Code, New Mexico Statutes Annotated, 1953 Comp., I, 66, 76-77.

[3]Eugene Lujan was elected to the supreme court in 1944. David Chavez was appointed in 1959, winning election in his own right in 1960. Currently S. Z. Montoya and J. L. Martinez are serving on the bench.

[4]Twitchell, Leading Facts, II, 271-72.

[5]Letter of R. H. Weightman, 1852, quoted in Ralph Emerson Twitchell, Old Santa Fe: The Story of New Mexico's Ancient Capital (Santa Fe, N. M., 1925), p. 322.

[6]New Mexico, Organic Act, New Mexico Statutes Annotated, 1953 Comp., I, 160-61.

[7]Frank D. Reeve, History of New Mexico, II (2 vols.; New York, 1961), 305.

[8]Ibid., p. 306.

[9]Poldervaart, Black-Robed Justice, pp. 4-5.

[10]Ibid., pp. 9-10.

[11]Ibid., pp. 10-11.

[12]Ibid., pp. 12, 201-11; and Reeve, New Mexico, II, 306.

[13]Poldervaart, Black-Robed Justice, p. 7.

[14]Ibid.

[15]Ibid., p. 49; and New Mexico (Territory), Report of the Secretary of the Territory, 1909-1910, and Legislative Manual, 1911 (Santa Fe, N. M., 1911), pp. 176-77.

[16]Quoted in Twitchell, Old Santa Fe, p. 351.

[17]Poldervaart, Black-Robed Justice, p. 60.

[18]Santa Fe Gazette, October 21, 1865, as quoted in Aurora Hunt, Judge Kirby Benedict (Glendale, Calif., 1961), p. 185.

[19]Ibid., pp. 186-87.

[20]Ibid., pp. 187-88.

[21]For general descriptions of the ring and its members, see Howard Roberts Lamar, The Far Southwest, 1846-1912: A Territorial History (New York, 1970), pp. 136-70; Robert W. Larson, New Mexico's Quest for Statehood, 1846-1912 (Albuquerque, N. M., 1968), pp. 137-46; and Victor Westphall, Thomas Benton Catron and His Era (Tucson, 1973), pp. 97-99. These first two works tend to place the ring in a direct, political context of the territory's development. The last work seems to strain to prove that there was no organized ring, although the author does acknowledge the existence of an amorphous group that might be considered the Santa Fe Ring.

[22]Poldervaart, Black-Robed Justice, pp. 89-96.

[23]Prince to Garfield, 1881 (undated), L. Bradford Prince Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[24]Ibid.; and Prince to MacVeagh, 1881 (undated), ibid.

[25]Prince to Garfield, 1881 (undated), ibid.

[26]Walter John Donlon, "LeBaron Bradford Prince: Chief Justice and Governor of New Mexico Territory, 1879-1893" (unpublished Ph. D. dissertation, University of New Mexico, 1967), pp. 95-96.

[27]Undated 1882 petition, Prince Papers.

[28]Resolutions of the Council and House of Representatives Relative to Chief Justice Prince, January 5, 1882, ibid.

[29]Ibid.

[30]The quotations from the report of special investigators Z. L. Tidball and J. W. Bowman are from Donlon, "Prince," pp. 108-109.

[31]Prince to Evarts, January 3, 1882, as quoted in ibid., p. 112.

[32]Letter of Resignation of Chief Justice Prince, May 9, 1882, Prince Papers.

[33]Frank W. Clancy, In Memory of L. Bradford Prince (Santa Fe, N. M., 1923), p. 8.

[34]Ibid.

[35]Lamar, Far Southwest, p. 186.

[36]Albert B. Fall, The Memoirs of Albert B. Fall, ed. by David H. Stratton (El Paso, 1966), p. 36.

[37]Ibid., p. 37.

[38]A. M. Gibson, The Life and Death of Colonel Albert Jennings Fountain (Norman, Okla., 1965), pp. 199-201.

[39]Editor's note, Memoirs of Fall, p. 60.

[40]Miguel Antonio Otero, My Nine Years as Governor of the Territory of New Mexico, 1897-1906 (Albuquerque, N. M., 1940), p. 7.

[41]Ibid., pp. 8-9.

[42]Ibid., p. 8.

[43]George Curry, George Curry, 1861-1947: An Autobiography, ed. by H. B. Hening (Albuquerque, N. M., 1958), p. 243.

[44]Curry to Bursum, February 11, 1910, Holm O. Bursum Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[45]McFie to Bursum, February 26, 1910, ibid.

[46]Ibid.

[47]Arthur Thomas Hannett, Sagebrush Lawyer (New York, 1964), p. 53.

[48]Twitchell, Leading Facts, II, 501.

[49]Lamar, Far Southwest, pp. 177, 179.

[50]Ross to W. F. Henderson, November 4, 1885, and Ross to Breeden, November 13, 1885, Edmund G. Ross Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[51]Lamar, Far Southwest, p. 180.

[52]Ross to Breeden, November 24, 1885, Ross Papers.

[53]Ross to Van H. Manning, January 15, 1886, ibid.

[54]In Re Attorney General, 3 N. M. 524.

[55]Ross to Manning, January 15, 1886, Ross Papers.

[56]In the Matter of the Attorney-General, 2 N. M. 49.

[57]For the final supreme court disposition of this case, see Territory of New Mexico v. Stokes, 2 N. M. 63.

[58]Lamar, Far Southwest, p. 151.

[59]Ross to Manning, January 15, 1886, Ross Papers.

[60]Ibid.

[61]Territory v. Ashenfelter, 4 N. M. 93.

[62]Ibid.

[63]Twitchell, Leading Facts, II, 503.

[64]Ibid., p. 501.

[65]New Mexico Bar Association, Proceedings, January 3, 1888 (Santa Fe, N. M., 1888), p. 28.

[66]New Mexico (Territory), Legislature, Special Joint Committee, Report of the Special Joint Committee of the Council and House of Representatives of the 28th Legislative Assembly of New Mexico Upon the Conduct of the Courts and Court Expenses during 1886, 1887, 1888 (Santa Fe, N. M., 1889), pp. 1-2.

[67]Ibid., pp. 16-17.

[68]New Mexico (Territory), An Act Fixing the Fees of the Clerks of the District Courts and for Other Purposes, Acts of the Legislative Assembly of the Territory of New Mexico, Twenty-Eighth Session (1888-1889), ch. 69, pp. 146-49; Joint Resolution No. 8, ibid., pp. 354-55; New Mexico (Territory), Governor's Message on the bill to Amend Supreme Court Bill, House Journal, Twenty-Eighth Legislature (1888-1889), pp. LXXX-LXXXIII; and Twitchell, Leading Facts, II, 501.

[69]Governor's Message on Supreme Court Bill, House Journal, 28th Legis., p. LXXXIII.

[70]Lamar, Far Southwest, p. 182.

[71]Ibid., p. 185.

CHAPTER II

THE EVOLUTION OF A PARTISAN JUDICIARY, 1910-1911

The constitutional convention of 1910 was by no means the first such gathering held during the territorial period. Nor was it the first fruitful exercise in constitution-making. The struggle for statehood had been long and arduous, lasting from 1846 until 1912. During that period three especially serious attempts to achieve the admission of New Mexico as a state resulted in conventions, each one drawing up a constitution. All of these constitutions, dated 1850, 1872, and 1889, had a separate article setting up the organization, function, and jurisdiction of the courts. Each article reflected the political climate of that time and helped point the way to the judiciary as established under the state constitution.

The constitution of 1850 covered the judicial department in Article V. Based on the United States Constitution, it established one supreme court, with inferior courts to be provided as needed by the legislature. The supreme court was to have appellate jurisdiction

only and was to consist of one chief justice and three associate justices. Each of the justices after 1851 was to preside over one of the four judicial districts. Anticipating what later proved one of the biggest jurisdictional problems of the territorial supreme court, Article V went on to state that no judge was to sit on the supreme court in review of a case he had determined at the district court level. In terms of selection the governor was to appoint with the consent of both legislative houses. Judges were to hold office for six years, with removal possible for any cause if so voted on by two-thirds of the members of both houses.[1]

The constitution of 1872 dealt with the judiciary in much greater detail. It basically provided for a three-member supreme court, with the possibility of two additional members if the legislature so wished. Again, the judges were to preside over the state's district courts. They were to receive their appointments from the governor with senate confirmation but were only to hold office for four years. This constitution even fixed the salaries for supreme court justices and specifically enumerated the court's powers and jurisdiction. It also

vested judicial power in a number of lesser courts. It ended on the issue of tenure in office, an issue that proved politically controversial during the territorial period. Judges could be removed only when four-fifths of the members of both legislative houses so voted. In addition, the judge in question had the opportunity to represent his cause in person or by counsel, and no member of the legislature was eligible to fill a vacancy so occasioned by removal.[2]

The constitution of 1889 followed much the same format as its predecessors when it came to the general makeup of the supreme court. It foresaw an appointive supreme court of three members (five later on) with six-year terms and salaries fixed by law. But then the article on the judiciary diverged, demonstrating a growing political awareness among territorial politicians and lawyers and anticipating the events of 1910. This divergence, moreover, fell into two separate areas, that concerning supreme court justices and that concerning district court personnel.

First, supreme court aspirants had to meet strict qualification requirements. They were to be between the

ages of thirty and seventy, members of the bar for six years, and United States citizens and New Mexico residents for two years. They were subject to impeachment for "corruption, official malfeasance or nonfeasance, wilful neglect of duty, or incompetency," and pending their exoneration or conviction, they could exercise none of their judicial duties. The chief justice, no longer a specifically designated official, was simply to be the justice having the shortest time to serve.[3] In short, justices were to be dependent upon internal political conditions and considerations.

Second, district courts became separate entities manned by their own personnel. Of greatest significance was the fact that district judges were to run for office, being elected by the qualified voters of the districts for four-year terms. They, too, had to qualify for office. Similarly, district court clerks and district attorneys were to stand for election as were probate court judges. Vacancies in any of these offices necessitated the calling of a special election if more than one year remained in an unexpired term. Otherwise, the governor was to fill the vacancy by appointment.[4] Local political considerations once more dominated.

What this progression of constitutions meant was that the territory was maturing politically. In an era of isolation, the period including the constitutions of 1850 and 1872, both judges and the need felt for certain tenure were respected. Serving by appointment and virtually free from the threat of removal, supreme court justices--as so envisioned by the framers--were simply to carry out their judicial duties. In the more complex days of the 1880s, constitution-makers were not so naive. Fresh from their struggles with Governor Ross, the dominant Republican political forces of the territory wanted a powerful hand with the judiciary as well. Content to leave qualified supreme court justices appointive, although fairly easily removable, the framers made district court offices elective and subject to direct political influence and pressure.[5] This change in attitude toward the courts and their role in the political process continued to grow during the remaining years of the territorial period.

In addition to internal political maturation, the change also reflected a growing objection to external control over judicial personnel, control resulting from presidential appointment. On occasion, this objection

was merely personal, as in the case of L. Bradford Prince--his special concern was the lack of tenure. As he put it, with no stability of tenure accruing to judicial offices, judges were placed in the position of having to consider decisions in light of their effects on retention in office. Afraid to offend powerful litigants, judges thereby lost much of their independence. Concluded Prince, "An appointive judiciary, with such uncertain tenure, would be worse than an elected one; as the latter at least has the advantage of a fixed tenure."[6] Those judges who fell victim to the uncertainty of tenure undoubtedly shared Prince's concern.

But the larger objection to presidential appointment, to external control, was not that of tenure. Rather, the issue was clearly that of making the courts responsive to the will of the people and their representatives in the legislature. The constitution of 1889 clearly demonstrated this. Thomas B. Catron (leader of the political group trying to control the courts) cleverly used it as his basic argument in an 1896 address to the New Mexico Bar Association that focused on two main points. First, he complained about presidential appointment of supreme

court justices, maintaining that such a system resulted in a judiciary whose members were responsible only to the President and the federal government. According to Catron, the temptation of ingratiating themselves with the appointing power was thus too great, causing these men

> . . . to overlook the rights of the people, to slime over litigation, to practice favoritism and truckle to the government, and at the same time by sustaining each other's opinions and rulings, establish a reputation of being infallible--a weakness which is encouraged by the condition of things.[7]

Second, Catron advocated change, maintaining that "judges who are directly responsible to the people or local authorities, would not give way to such weakness." At the very least he wanted a system whereby a separate review court sat in judgment of cases on appeal. This was to be an impartial and independent court, concerned only with doing right. Throughout, he came consistently back to the theme of giving a voice to the people, those immediately interested in the administration of the judicial system.[8] Catron, influential in the writing of the 1889 constitution, wielded similar influence in 1910.

By 1906 open advocacy of direct election of judges found its way into the minutes of the bar association's annual session, generated, of course, by the desire for a responsible judiciary. In addressing the association, Alonzo B. McMillen got into the matter of the best method of judicial selection. Defending the direct election system, he rejected the notions that the people could not intelligently select judges and that they could be too easily influenced in their choices by politicians and especially lawyer politicians. He also dismissed the appointive system as preferable. He did so by arguing that a judiciary lost its independence and thereby its ability to administer justice in the interest of the people when its judges were responsible for their appointment and tenure to either the executive or legislative branch. But perhaps most significant was the very manner in which McMillen opened his discussion of judicial selection: "The lawyers of New Mexico should be intensely interested in having the very best judicial system that can be devised."[9] For the lawyer delegates who attended the constitutional convention of 1910, "the very best judicial system" was indeed an issue. The majority, moreover, reflected the attitude toward the courts and

their role in the political process that had been growing throughout the territorial period.

When the constitutional convention opened in 1910, the condition of things political had in appearance changed very little since the late 1880s and 1890s. Republican leaders, now designated "Old Guard," dominated the scene and perpetuated their seeming predominance for some years into the statehood period. The legal community still consisted primarily of "railroad lawyers," and many of its members closely allied themselves with the Republican party. In fact, so overwhelmingly superior was the Old Guard organization and control of political conditions that Republicans attained seventy-one seats at the convention, leaving twenty-eight to the Democrats and one to a Socialist. In this sense the constitution drafted along with its judicial article were products of a conservative era, an era shaped by men who were attempting to spawn a new one in that same image. That their control was tenuous at best became clearly evident in the years up to 1930. During that time they lost about as many state-wide elections as they won.[10]

A spirit of partisanship ruled from the outset. Indeed, the Old Guard allegedly proclaimed it was their

purpose to have a Republican convention and to frame a Republican constitution. Leading Republicans who attended and who largely shaped the constitution as finally written were Thomas B. Catron, Charles A. Spiess, Charles Springer, Holm O. Bursum, Albert B. Fall, Clarence J. Roberts, Frank W. Parker, and Soloman Luna. Main spokesman for the Democratic minority was Harvey B. Fergusson, leader of the so-called "irreconcilables," a faction of Democrats determined to write a progressive constitution.[11] Fergusson and his faction aside, the makeup of the total delegation was definitely conservative, its basic outlook on government and economics influenced but little by the progressive ideas making headway throughout the nation in 1910.[12]

Ideologically conservative, the delegates also represented the special interest groups most concerned in the affairs of New Mexico: railroads, coal mining companies, copper mines, the sheep industry, cattle interests, and land grants, the last being most powerfully represented. Ethnically, the membership stood at sixty-five of Anglo-American descent and thirty-five of Spanish descent.[13] By occupation the delegation had as its largest group the thirty-two attorneys in attendance,

a reflection of the leading political role played by the "railroad lawyers" during the territorial days and on into the statehood period.[14]

Concerning the continuing influence of attorneys in the political process, it might well be noted here that of the thirty-two in attendance, seven later served on the state supreme court: Roberts, Parker, Herbert F. Raynolds, Stephen B. Davis, Charles R. Brice, Andrew Hudspeth, and Thomas J. Mabry.[15] Indeed, until January 1, 1951, the New Mexico State Supreme Court was not without one or more members who served in the convention.

Whatever the philosophical, interest group, ethnic, or occupational makeup of the delegation, Republican control was complete. The Republican majority--so directed by the leaders of the party--kept a tight grasp on the convention, usurping a task normally falling to the president of such a convention, in this case Spiess. They did so by passing a resolution providing for a twenty-one member committee on committees chaired by Solomon Luna. This special committee selected all committees and their members and, in addition, did the primary work of the convention, dictated the policies of the Republican majority, and had the final say as to the

ultimate adoption of any and all articles of the constitution.[16] What this meant, of course, was that the Republican caucus dictated the drafting of the judicial article.

The judicial department, committee number six, included some of the convention's more prominent Republicans. Serving as chairman was Parker, then a territorial justice and an elected member of the first state supreme court. Other major Republican members were Catron, chosen as United States Senator in 1912; Roberts, also an elected member of the first supreme court; Fall, the other of New Mexico's first United States Senators; Raynolds, a later member of the supreme court; and Reed Holloman, a later district judge. Only Granville A. Richardson, a district judge during the statehood period, among the Democratic members could be called noteworthy, with none of the Democrats subsequently serving on the high bench.[17]

The intent of the committee from the outset was to produce an elected judiciary. Democrat Richardson early filed a resolution calling for judges of all courts to be elected by the people, with the supreme court to be

made up of three members, each of whom was to be selected for a period of not less than ten years. Significantly, Richardson called for the membership of this court to be non-partisan.[18] The nature of the elections, whether partisan or non-partisan, did generate debate; the matter of an elected judiciary did not. While some Republicans and some Democrats fought for some kind of appointive system, the overwhelming majority of both parties favored the election of all judges.[19] The larger legal community also supported this majority position. Members of the Las Cruces bar, for example, responding to a letter from Parker soliciting lawyers' opinions, expressed a preference for an elected supreme court.[20]

As the proceedings continued, the one major area of party disagreement continued to be the very nature of the elections. Here, the Democrats tried through a minority report to change a totally unrelated section of the majority committee report, one dealing with district attorneys (section 23), to one dealing with the non-partisan election of judges. Their substitute read that at elections for supreme and district court judges, "no candidate for such offices shall be nominated by any political party or convention." Nominations were to be

by petition, with the names of all candidates placed on the ballot; the top vote-getters were to be the winners.[21] This major difference alone remained, for both parties agreed with minor variation on the basic structure (three members with five allowable after 1920) and jurisdiction of the supreme court. They also seemingly agreed on six-year terms for the justices.[22]

Yet, from the time of the proceedings as printed to the final adoption of the article on the judiciary, changes did occur. The article got its hearing before the entire convention on November 9. At that meeting voting split along party lines, with every minority amendment readily defeated, including one last attempt at a non-partisan judiciary. The amendments that did win approval were those amendments committee chairman Parker introduced. Most were minor in nature, the one exception being that concerned with length of term for high court judges. Parker simply entered an amendment making the length of term for supreme court judges eight years. It--like the other amendments he sponsored--passed handily.[23]

The article on the judiciary received its final reading and adoption on November 18. Its provisions

require no detailed examination here, although certain observations are in order. In the first place, the long-developing trend toward favoring an elected judiciary found its realization in 1910. The fact that partisan elections won out over non-partisan elections reflected the confidence of Old Guard Republicans who, fresh from their smashing victories in electing convention delegates, felt sure they were to dominate state politics for years to come. In the second place, the lawyers most certainly took care to see that the very best selection method from their point of view was adopted. All the leading members of the judiciary committee were lawyers. All were also Republicans. Even lawyers not attending the convention sought to protect what they perceived to be a vested interest. In the third place, Frank W. Parker, chairman of the committee, played an inordinately influential role in drafting the article as finally adopted. It was more than mere coincidence that he served on the supreme court until his death in 1932. Finally, Democratic objections to the judicial system as set up were voiced many times as the parties drew lines in the ensuing campaign for constitutional ratification. All in all, the constitution of 1910 was

most conservative in nature, and nowhere was this more clearly evident than in the article concerning the judiciary.[24]

The convention ended on November 21, 1910, with nineteen Democratic delegates voting against the constitution, although all but seven of these later signed the document. Still, many Democratic leaders, not all of them delegates, continued to fight ratification until election day. Indeed, they met in Santa Fe and issued a statement of objections, dated December 17, 1910, for consideration by the voters. They specified thirteen reasons for so objecting, the second and third items referring specifically to these shortcomings concerning the judiciary: the inexcusable extravagance of the provisions establishing the judiciary system (too many judicial districts and too high salaries); the investment of power in the legislature to create additional judicial offices in a district without constitutional limitation; the lack of a non-partisan judiciary; and the provision for too long terms of offices for judges.[25]

Generally, then, the Democratic party as an organization opposed the constitution as submitted and

fought its adoption on the basis of its conservative character and particularly with reference to the lack of direct democracy provisions. The judiciary as well as other constitutional provisions also aroused concern. But Democratic forces found themselves badly split, so much so that the party's central committee necessarily resolved that party loyalty was not to be tested by the vote on the constitution, with all Democrats free to vote as "their conscience should dictate."[26] The irreconcilables, hardly satisfied by such temperance, carried on the fight against ratification. Their leader was Harvey B. Fergusson.

Fergusson, a demagogic orator and writer in the best progressive tradition, had actually undertaken his campaign against any such conservative constitution before the 1910 document was a reality. Between the time of delegate selection and the convention itself, Fergusson debated Attorney General Frank W. Clancy on the making of a constitution before a gathering at the University of New Mexico. Arguing eloquently for the provisions of direct democracy, Fergusson concluded on the note that "it is therefore, earnestly to be hoped that if, by the influence of special interests, these progressive

provisions are not inserted in the constitution, the people will reject it." He felt that a reassembled convention, so instructed by the vote of the people, had to yield on these matters. But, "if not," said Fergusson, "let us reject statehood on such debasing conditions."[27]

Fergusson did, of course, continue the fight during the convention, speaking out for progressive principles whenever he could. One such opportunity presented itself on November 9, the day the judiciary article reached the floor before the entire convention. He expressed opposition to partisan elections because it meant exposing the highest judges to the fury of politics and the need to solicit large campaign contributions.[28] Still, his most concerted efforts against the constitution came in the post-convention ratification struggle. They consisted of speeches, newspaper articles, letters, and a printed treatise.

He began his letter-writing campaign on November 29, dashing off fourteen letters to various people throughout the territory, and continued it up to election day. He wrote the same message over and over again, stressing the need to defeat what he perceived to be an

anti-progressive, pro-vested-interest document: "By all means let us defeat this abortion called the constitution which is intended to protect the ring which has mis-governed New Mexico for twenty years--perhaps for another full twenty years under the New State."[29] Sometimes he itemized objections to specific constitutional provisions, always including the article on the judiciary. Throughout, he decried the lack of party unity and the support rendered the constitution by many leading Democrats.[30]

His printed treatise, "The CONSTITUTION: Its Dangers and Defects," further demonstrated the extent of his opposition. The constitution warranted defeat, he wrote, because of its lack of direct legislation provisions and a corrupt practices law. It warranted defeat because those in control at the convention were railroad corporations and their agents and attorneys, powerful oil companies, and various county bosses, "making up the territorial ring." The constitution warranted defeat, moreover, because of its very provisions, some "absurd," some "jokers," and still others "pernicious." Among

these Fergusson cited Article VI on the judiciary, calling it "one of the most objectionable provisions of the constitution."[31]

Fergusson, joined by a number of his fellow Democrats, did not stand alone in opposing ratification of the constitution. On January 19, 1911, two days before the election, a committee composed of ministers, church members, temperance people, and members of the anti-saloon league and Women's Christian Temperance Union met and issued a catechism against the constitution. Of great significance, especially in view of court interpretations concerning the powers of the corporation commission during the nascent statehood years, was the committee's statement that "most dangerous to pure government and justice is the judiciary provision and the railroad-commission clause." Seeing the commission as a figurehead whose orders were not to go into effect until passed upon by the high bench, the committee predicted that

> This means that the railroads will dictate the nomination and election of judges to the supreme court, as in California, for years, and the supreme court will of necessity become corrupt, prostituting the highest tribunal of justice in the state.

The absence of a direct primary system and the provision for electing judges at the general election also meant that judges were to become the tools of bosses and were themselves to be pure politicians.[32]

In spite of such efforts to defeat the constitution, pro-ratification forces had the better of the fight. The Republican party was at the pinnacle of its strength, having controlled the selection of convention delegates and the document they wrote. It suffered from no lack of unity during the ratification campaign. Indeed, the party enjoyed the company and assistance of a number of Democrats. Furthermore, the people of New Mexico, truly anxious for statehood, were not likely to turn down the constitution, for its conservative nature could but prove an asset with Taft as President. These advantages plus superiority of organization proved decisive.

Superior Republican organization meant a multi-faceted campaign for ratification. For one thing, it meant the solicitation of money. Holm Bursum, chairman of the Republican central committee for New Mexico, sent letters to county leaders asking for donations. In one such letter requesting fifty dollars to help with the campaign, he stated, "We cannot run any chances of either

being defeated or having the majority cut down. I hope to have this campaign well started by the first of January."[33] For another, it meant that leading Republicans took to the hustings to promote ratification. Clarence J. Roberts, at the time a territorial justice, wrote Secundino Romero, convention delegate and boss of San Miguel County, "After next Sunday I will be footloose for a couple of weeks. Is there anything I can do in your county to help along Statehood?"[34]

It even meant a possible effort to rig the election, such an allegation finding its way into the House of Representatives Committee on the Territories hearings held in February, 1911. Introduced on behalf of the protesting citizens of New Mexico, the charge was that there was only one printed ballot in many counties and that one distributed by the secretary of the Republican committee and at that time clerk of the territorial supreme court, Jose D. Sena. A supposed copy of a Sena letter to one of the county committeemen showed Sena's instructions concerning the printing of ratification ballots. In those instructions Sena was quoted as saying, "Be sure if you can to see that no ballots against the constitution are printed."[35]

Whatever the truth of this charge, the outcome of the ratification election was never in doubt. The constitution carried the state by a vote of 31,742 to 13,399. Statehood awaited only congressional and presidential approval. The hearings before the House Committee on the Territories provided only the first stumbling block to approval. They also presented an opportunity for the Democrats to charge election fraud and to delay the proceedings. Pro-state forces, recognizing the danger, flooded Washington with statements that the election had been neither crooked nor irregular. Sworn statements came from court personnel as well as other territorial leaders, including memoranda from W. H. Pope, chief justice of the territorial supreme court; Frank W. Parker; David J. Leahy, United States Attorney for New Mexico and later district judge; and Stephen B. Davis, Leahy's assistant and later state justice.[36] Such forceful affidavits along with Taft's recommendation for approval won both committee and House approval.[37]

Further delays, however, ensued, with final congressional approval not coming until August 19, 1911. The machinations of Congress need no detailed recounting

here, although the last-ditch efforts of the Democrats to defeat the constitution or at least change it do deserve some comment. This effort centered around the Flood resolution which allowed New Mexico's constitution to be amended by a simple majority vote of the people.[38] Fergusson, an author of the resolution, again took his pen in hand. At stake was whether the constitution could be easily changed to include progressive principles. Referring to Albert B. Fall and Charles Spiess as "those two precious specimens of predatory wealth agents of our Territory," Fergusson expressed special concern over Fall's objections to the blue ballot provision of the resolution. This provision ensured that voters at the first state election could vote for or against an easier amendment article on a separate, distinctive ballot. If this provision were changed, it meant probable defeat for the resolution. Said Fergusson, "the schemers will mark ballots beforehand in every county where they dare do so; and the voters will not be allowed to see any but marked ballots."[39]

Final approval of statehood meant a modified amendment resolution and a series of compromises concerning Arizona's admission as well, all designed to secure

President Taft's concurrence and the admission of both remaining territories as states. New Mexicans were still to vote on a somewhat easier amendment proposal, with the vote having no bearing on admission itself. This vote was to be by blue ballot. Yet, no sooner had New Mexico been assured statehood than again the two parties drew battle lines. The fight began as soon as Governor William J. Mills called for the first state election to be held on November 7, 1911.[40] To the Democrats, well aware of the superiority of the Republican organization, this seemed too soon and quite unfair. But whatever the date chosen and whatever their apparent strengths, both parties fought vigorously, for at stake was the very control of the first state government.[41]

The Republicans met first, holding their convention in Las Vegas on September 28. From the outset friends and supporters of Holm Bursum controlled the proceedings, effecting the nomination of Bursum for governor on the first ballot. The Bursum faction then proceeded to dictate most of the remaining nominations and the report of the resolutions committee condemning the blue ballot. Overlooking and ignoring the complaints of non-Bursum

Republicans, this faction acted in the belief that the Republican majority was to hold sway and that opposition to Bursum's nomination was simply overestimated.[42]

George Curry, former territorial governor who received one of the two nominations for United States Representative, alone spoke against the party platform:

> I told the convention frankly that I felt the condemnation of the Blue Ballot by the Resolutions Committee was a mistake and that I would not ask the people of New Mexico for their support and at the same time tell them they were incapable of amending their own constitution.

For his efforts Curry very nearly saw his resignation demanded, with only procedural matters saving his nomination. Such rigidity and factional control typified the Republican convention. Specifically with respect to supreme court nominations, the convention rewarded party loyalty and incumbency. The positions on the Republican ballot went to Frank W. Parker, Clarence J. Roberts, and Edward R. Wright, all at the time serving on the last territorial supreme court.[43]

The Democratic state convention followed, convening on October 2 in Santa Fe. Joining the gathering were "Independent Republicans" Herbert J. Hagerman, former territorial governor, and Richard H. Hanna, a prominent

attorney. The result was a fusion ticket headed by the gubernatorial nominee William C. McDonald, a businessman whose conservative principles appealed to the business interests of the new state. Nominated for supreme court positions were fusion candidate Hanna and Democrats Summers Burkhart and W. A. Dunn. In addition to the support rendered the Democratic ticket by Hagerman and Hanna and their friends throughout all parts of the state, the prohibitionists worked to defeat Republican candidates. The Democrats also helped their own cause by endorsing the blue ballot, a move that caused many Republicans to cross party lines at election time.[44]

The ensuing contest was bitter. Hagerman and Hanna waged a separate campaign under the banner "Progressive Republicans," a campaign directed specifically against Bursum. They revived the charges that had led Hagerman to remove Bursum as superintendent of the state penitentiary and thereby influenced a number of voters.[45] To what extent Hanna and the other Democratic supreme court nominees campaigned actively in their own behalf is difficult to assess. It is clear that both Hanna and Burkhart were active politicians and unlikely

to sit out a campaign where their own candidacies were involved.[46]

The Republicans joined the fray just as vigorously. They did agree, however, that their candidates for the supreme court were not to campaign actively. But when told that he was likely to lose, Frank W. Parker did not hesitate to go throughout his judicial district and greet the people. According to Curry's personal account, "while the Judge made no speeches, he was an expert and tireless handshaker. But for this trip, I think Parker might have been defeated."[47] The activities of the other two supreme court nominees are not discussed, but it is difficult to imagine C. J. Roberts, an extraordinary politician whether as a legislator, a justice pushing for statehood, or a member of inner Republican party circles, sitting idly by during his own election contest.

The election of November 7 saw neither side clearly victorious--Democrats carried the statehouse but lost both legislative houses. The rest of the state offices were fairly evenly split, with Parker and Roberts along with Hanna winning seats on the supreme court. The voters also expressed overwhelming approval of the blue ballot. How the Democrats, so badly outmaneuvered at the constitutional

convention, could have done so well in 1911 has quite naturally evoked much discussion. Curry, an active participant in that election, was convinced that Republican opposition to the blue ballot was the major reason. Twitchell, also a contemporaneous observer, saw it as a rebuke to boss rule and machine methods and by no means a triumph for democratic principles. A recent scholar has simply attributed it to the too strong combination of Democrats and Progressive Republicans. Still another has assessed it in terms of the fragility of the Old Guard's power.[48] Whatever the reasons for the outcome of the election, New Mexico had entered the statehood era.

Statehood did not, at the same time, mean a total break with the past. Indeed, the first state supreme court was a direct product of years of cumulative thinking concerning the judiciary and its place within the governmental system. As territorial conditions and politics became more complex, attitudes toward the judiciary shifted. Accordingly, political leaders began to demand courts responsible to territorial conditions and to the people who resided therein. Lawyers recognized their considerable political influence and looked

to the courts as their special province within the structure of government. These attitudes found expression in the constitution of 1889 and at bar association meetings. These attitudes found actualization in the new state constitution.

Specifically, the judiciary as established reflected the political temper of the times in these ways. First, judges were elected on a partisan basis during the general election, chosen, in other words, along with the other partisanly elected state officers. Second, judges were--especially at the district court level--responsible to the voters, to the will of the people. Finally, the supreme court, given its jurisdiction and "the intent of the framers," was to act as a conservative influence to curb efforts toward progressive legislation or corporate regulation.

The new supreme court justices also mirrored these prevailing attitudes, although certainly to varying degrees. Frank W. Parker (who served on the supreme court--both territorial and state--for more than thirty years) was an ideological conservative and rather inert to change. He was a Republican with strong Old Guard

connections but did not actively participate in inner-party circles. Clarence J. Roberts was also a conservative and, more importantly, a seasoned party veteran. He correspondingly played a much more active political role than Parker, maintaining close ties with Republican leaders throughout the state. Richard H. Hanna, the third member of the court, won election as a Progressive Republican. A most active politician, as demonstrated in his campaign against Bursum, Hanna later ran as a Democrat for both governor and United States Senator.

Whatever their individual persuasion, these three justices joined together to serve on the first state supreme court. Basically, they wrote a conservative record, leaving in their wake much by way of precedent. 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.

NOTES--CHAPTER II

[1]New Mexico, Constitution (1850), art. 5.

[2]New Mexico, Constitution (1872), art. 8.

[3]New Mexico, Constitution (1889), art. 6.

[4]Ibid.

[5]Larson, Quest for Statehood, pp. 161-69. The constitution of 1889 was a Republican document and not nearly as progressive as that of 1872. As such, it angered Democrats who led the opposition against it on a partisan basis. This included such Democrats as Antonio Joseph and C. H. Gildersleeve, both of whom as landowners and ring affiliates had much to gain economically by statehood. Because of this opposition and the objection to religious and cultural as well as political issues, the voters rejected the new constitution by a vote of 16,180 to 7,493.

[6]Prince to MacVeagh, 1881, Prince Papers.

[7]New Mexico Bar Association, Minutes, July 27, 1896 (Las Vegas, N. M., 1897), pp. 13, 15.

[8]Ibid., pp. 15, 17.

[9]New Mexico Bar Association, Minutes, August 22-23, 1906 (Santa Fe, N. M., 1906), p. 53.

[10]Holmes, Politics, pp. 145-49, provides a good discussion of the general political set-up of the period.

[11]Thomas J. Mabry, "New Mexico's Constitution in the Making--Reminiscences of 1910," New Mexico Historical Review, XIX (1944), 172-74. Mabry, a Democrat and the youngest delegate in attendance, based these conclusions on his personal observations. Concerning the role of Fergusson, Mabry said he often wondered how deeply Fergusson might have stirred the convention and how different the outcome might have been had he been of the majority persuasion. Allied with Fergusson as "irreconcilables" were (according to Mabry) M. D. Taylor, C. M. Compton, E. D. Tittman, R. W. Heflin, and J. W. Childers. Leading Democrats who worked to get as much as possible of their party's philosophy and program accepted without unduly antagonizing the majority included C. R. Brice, G. A. Richardson, A. H. Hudspeth, J. L. Lawson, and H. W. Daugherty.

[12]Thomas C. Donnelly, "The Making of the New Mexico Constitution," New Mexico Quarterly Review, XII (1942), 435.

[13]Reuben W. Heflin, "New Mexico Constitutional Convention," New Mexico Historical Review, XXI (1946), 61-62. Heflin, a Democrat, attended the convention.

[14]Larson, Quest for Statehood, p. 275. Larson discusses at length the make-up and organization of the convention, pp. 272-77.

[15]Mabry, "New Mexico's Constitution," p. 183.

[16]Twitchell, Leading Facts, II, 585-86; and Edward D. Tittman, "New Mexico Constitutional Convention: Recollections," New Mexico Historical Review, XXVII (1952), 183. Tittman, an irreconcilable Democrat at the convention, discusses the totality of Republican domination. According to him, the Republican caucus dictated that no Democratic proposal on the floor should receive adoption or approval unless previously approved by the Republican executive committee. Consequently, few Democratic motions passed.

[17]New Mexico, Proceedings of the Constitutional Convention of the Proposed State of New Mexico Held at Santa Fe, New Mexico: October 3rd to November 21st, 1910 (Albuquerque, N. M., 1910), p. 14.

[18]Santa Fe New Mexican, October 12, 1910. Richardson actually introduced Proposition No. 2 on October 10. See, New Mexico, Proceedings, p. 22. It should also be noted that this judiciary article made no mention of removal from office for supreme court justices.

[19]Mabry, "New Mexico's Constitution," p. 173.

[20]Santa Fe New Mexican, October 22, 1910.

[21]New Mexico, Proceedings, pp. 143-44.

[22]Ibid., pp. 136-37, 143.

[23]Santa Fe New Mexican, November 9, 1910.

[24]Gordon Morris Bakken, "Rocky Mountain Constitution-Making, 1850-1912" (unpublished Ph. D. dissertation, University of Wisconsin, 1970), pp. 236-37. According to Bakken, the New Mexico and Arizona constitutional conventions were testing grounds for progressive arguments. In New Mexico this resulted in a battle over the initiative and referendum and, to a lesser degree, over the courts. The Democratic minority perceived that the courts had exceeded their authority through intervention in the economy, but the resulting article on the judiciary was, of course, the handiwork of the Republican majority. Accordingly, says Bakken, "the court system was conservative in structure, traditional in jurisdiction, and unresponsive to legislative or popular restructuring."

[25]Twitchell, Leading Facts, II, 586-88.

[26]Mabry, "New Mexico's Constitution," p. 171; and Donnelly, "Making of Constitution," p. 446.

[27]Harvey B. Fergusson and Frank W. Clancy, The Making of a Constitution (Albuquerque, N. M., 1910), p. 14.

[28]Santa Fe New Mexican, November 9, 1910.

[29]Fergusson to W. A. Merrill and Fergusson to R. G. Bryant, November 29, 1910, Harvey B. Fergusson Letters, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[30]Fergusson to E. C. de Baca, December 3, 1910, ibid.

[31]Harvey B. Fergusson, The Constitution: Its Dangers and Defects, pp. 1-3. This campaign pamphlet is found in the Bursum Papers.

[32]Catechism reprinted in U. S., Congress, House, Committee on the Territories, Constitution for the Proposed State of New Mexico (Washington, D. C., 1911), pp. 70-71.

[33]Bursum to Secundino Romero, December 19, 1910, Secundino Romero Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[34]Roberts to Romero, January 4, 1911 (misdated 1910), ibid.

[35]U. S., House, Constitution for New Mexico, p. 64.

[36]Ibid., pp. 135, 168-69, 305.

[37]Larson, Quest for Statehood, pp. 286, 289-90.

[38]Ibid., pp. 293, 296.

[39]Fergusson to Senator George E. Chamberlain, June 17, 1911, Fergusson Letters. An almost identical letter is Fergusson to A. A. Jones, June 19, 1911, ibid.

[40]Larson, Quest for Statehood, pp. 296-97.

[41]On September 15, 1911, for example, Fergusson wrote William Jennings Bryan soliciting money for Democratic candidates so that New Mexico might be Democratic from the start. He did so because he feared the influx of corporate contributions to keep the Republicans in power. Fergusson to Bryan, September 15, 1911, Fergusson Letters.

[42]Twitchell, Leading Facts, II, 597.

[43]Curry, Autobiography, pp. 248-49.

[44]Ibid., p. 260; and Twitchell, Leading Facts, II, 599-600.

[45]Curry, Autobiography, pp. 260-61.

[46]Burkhart, although defeated in 1911, remained most active in Democratic party circles. In November, 1912, he was urging Andrew H. Hudspeth to declare his candidacy for the chairmanship of the Democratic state central committee, was busily seeking party endorsement for a federal appointment, and was advocating the calling together of the party's executive committee for the purpose of considering questions relating to federal patronage. Burkhart to Hudspeth, November 26, 1912, Andrew H. Hudspeth Correspondence, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[47]Curry, Autobiography, p. 261.

[48]Ibid.; Twitchell, Leading Facts, II, 601; Larson, Quest for Statehood, p. 298; and Holmes, Politics, p. 148.

CHAPTER III

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 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 its 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 through 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. . . .[1]

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

> . . . 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. . . .[2]

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 notably a 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, a majority of the latter to be New Mexico citizens and residents.[3] Written some seven years before the coming of railroads, this constitution and its authors reflected the political attitudes then prevalent, attitudes shaped by the very 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 with corporate monopolies, it was neither as progressive nor as specifically regulatory as had been the constitution of 1872 with its anti-railroad provisions.[4] 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 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 regulatory congressional acts meant victory at the federal level for the commission principle of administration.[5]

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.[6]

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,

thereby 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 twenty-three days before its other order, yet the court determined the Seward case more than a month earlier.[7] Perhaps Seward provided the high bench with a better opportunity for laying down ruling precedent.

The court rulings--the facts of the cases aside--laid down these principles. First, the constitutional provision for judicial review of commission action meant adherence to the intent of the framers. Through this provision, the court maintained, the constitution-makers attempted to expedite judicial inquiry into the reasonableness and lawfulness of the commission's order. This inquiry necessitated the court deciding cases "on their merits," in no way bound by the commission's findings of fact or by presumptions that the commission's order was prima facie just and reasonable.[8] 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 with the corporation commission. Wrote Roberts,

"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.[9] 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.[10]

Taking refuge in strict constructionism, the court thus stripped the corporation commission of any real power. Under constitutional mandate it 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."[11]

During this first decade of statehood the supreme court simply continued to decide corporation commission cases along these same lines of interpretation. 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.[12]

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.[13]

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.[14]

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. Heard on 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 on behalf of the mining company 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.[15] A personal account of how this reversal came about reflected on the political awareness of Roberts in his bid for retention in office.

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 of affirmation in abeyance until he met with the top corporate lawyers throughout the state. 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 at that time enjoyed a virtual monopoly on mining company and railroad personal injury cases. Indeed, concluded Hannett's recounting, "it is certain that they did lobby through such an act, which limited attorneys' fees to ten per cent of recovery."[16] 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. In the first place, from and after January 1, 1919, the state was to have nine judicial districts instead of eight, and all nine judges were to run for election within their districts during the 1918 general election and each sixth year thereafter. In the second place, the new ninth judicial district was to include among its four

counties Quay County, it being moved over from the eighth district.[17]

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.[18] The latter being precisely the desire, the Republicans turned to the amendment procedure as a way to circumvent their own constitutional provision, in retrospect a self-made error. The error to be rectified and the partisan advantage 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 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 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.[19] Another Democratic delegate also remarked on the bitter controversy over the districting provision, with the charge of "gerrymandering" being heard for the first twenty years of statehood.[20] 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. Any constitutional amendment before submission to the voters required that the house and the senate, sitting separately, pass it by a majority vote of its members.[21] The house passed the

amendment thirty-one to seventeen, dividing along party lines. Only three Democrats voted for the resolution; only one Republican voted against.[22] The senate also split in terms of party, with the final vote being twelve for and eleven against, the ten Democratic senators being joined by a lone Republican. A twenty-four member body, the senate witnessed exactly one-half of its members approving the proposal, not the constitutionally stipulated majority. Nevertheless, the president of the senate declared the resolution passed, and it duly found its way into the Senate Journal.[23]

The allowability of this amendment, its printing and presentation to the voters, eventually became a matter for supreme court determination. But in the meantime, Democrats voiced their concern. The first point of issue raised involved the secretary of state's office and its inclusion of the amendment in the 1917 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. Albeit true the proposal in question had not passed by a majority of senate members, the duty of the secretary's

office was to publish all proposed amendments. Its duty did not entail going into the record of whether or not they passed in accordance with constitutional provisions. The duties of the secretary's office thus completed, it was up to interested parties to enjoin the secretary of state from printing this amendment at election time.[24]

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 also expressed anger as to the lack of a majority vote in the senate and their determination to test the matter in the courts. To that end they were retaining the services of former Attorney General Frank W. Clancy and asked for contributions. They 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."[25] 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, it having been claimed that under this amendment he must stand for reelection in 1918. Elected in 1914 for a six-year term, he was normally to stand for reelection in 1920.[26] A Roswell attorney even mapped out potential campaign strategy, strategy to be pulled off at the last minute. 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.[27]

The Democrats did proceed with legal action, the case reaching the supreme court on appeal from Reed Holloman's first judicial district. Justice Parker reviewed the facts of the case, the injunction being sought on the ground that the resolution was not adopted as required by the constitution. He then cited the legislative journal in which appeared the president's declaration that the resolution had passed the senate

and noted that the court below also found the resolution duly passed. Having thus 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 down 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 twelve 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.[28]

Parker thus affirmed the judgment of the lower court with Hanna and Roberts concurring.

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 one thousand votes. In fact, only seven of the twenty-eight counties passed it and these by small majorities.[29] Still, the political implications of the resolution remained. The legislature (through its Republican majority) attempted to increase its control of district court officers, both judges and district attorneys, from four to six while reducing, at the same time, Democratic control from four to three. Significantly, they 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 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 in terms of decisions rendered, perhaps governed by the realization 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 true nature

of the case. Its personnel, too, 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 but 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 again his political fortunes before the voters was C. J. Roberts. Having drawn by lot the four-year term provided under 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. (The Republican supreme court nominees, it will be recalled, were not then to campaign actively.) 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 resumé of information on the state and each county, by the Republican publicity bureau, the judge kept in touch with 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."[30] 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.[31]

Concerning C. J. Roberts the politician and partisan, it might well be noted here that he enjoyed a place within the innermost Republican party circles throughout his career, both on and off the bench. While still on the bench he did not hesitate to recommend an 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."[32] 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.[33]

Once off the bench his partisanship became simply all the more obvious. This extended to concern for the Santa Fe Bank, the Republican party being hurt materially

in his judgment unless it was reorganized.[34] 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.[35] It also extended to consultations with Senator Bursum, Roberts having evidently 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.[36] 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 a thousand votes. It was an apparently quiet contest.[37] Hanna, initially elected to the bench because of his political stand, lost as a result of the partisan election process. While on the bench Hanna remained almost totally inconspicuous by virtue of his own opinions and concurrences in the opinions of the court. 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.[38] 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, also brought charges against the kind of campaigner Hanna was. 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.[39] 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 in the special election for United States Senator in 1921. He lost that election to Bursum by 5,515 votes.[40] 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 six thousand votes.[41] 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 inner-party circles. In essence, he was conservative because of his political philosophy rather than because of his partisan loyalties. One of the ironies of New Mexico history was his involvement as the focal point of that case in judicial politics mentioned in connection with Hanna. Roberts, too, participated, with he and Hanna as the antagonists and Parker in the middle.

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. What transpired during this period of rapid changeover in personnel was an exercise in partisan politics. Quite simply, 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 and ink. The other two letters of resignation received by Mechem were stamped "resignation accepted."[42] 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 story given for Roberts' leaving the bench was his desire to enter private law practice in Santa Fe.

On 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.[43] 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 out of Las Vegas in Roberts' old territorial judicial district and the home 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 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 on accepting the supreme court appointment, Davis said that he was unable to state his candidacy for election to the remainder of Roberts' unexpired term in November, 1922.[44] 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.[45]

What this meant, of course, was a supreme court slot to be filled by gubernatorial appointment until November, with a permanent replacement then elected. 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 current matter of 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.[46]

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 Court on the ticket."[47] 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."[48]

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 credence 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.[49]

But warning signs also appeared before the party's convention. T. E. Mitchell, a party veteran, wrote Bursum to this effect: "This business of Larrazolo and his dickering with the leaders, if there are any such, is disgusting to me and if he is put on the ticket, I do not expect to have anything to do with the election." He then referred to the rumor that Mechem might appoint Larrazolo to the supreme court vacancy and said he hoped it was untrue. He ended his discussion of the matter on a racial note:

> . . . Larrazolo, in my opinion is not only a snake in the grass, but is as un american as he can be. While I do not admire Sec. Romero his mention of Larrazolo as the man from Old Mexico, fits him to a turn, and it is certainly beneath the dignity of any self respecting American to give him room for consideration, beyond that of a front seat with all charges prepaid, for a trip down the river.[50]

As it turned out, 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 supreme court on September 18, 1922.[51]

That the whole Republican ticket was weak, the result of bitter in-party fighting, was a fact gleefully acknowledged 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.[52]

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, 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, gone along with a nomination for Larrazolo. The results were simply 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.[53] Notably, 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, his resignation becoming effective on or before November 15.[54] 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

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.[55]

Newspaper speculation was one thing. Political reality was another. This time lawyers, the interest group perceiving itself to be 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 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.[56]

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 the more impressive. His support appeared more statewide in nature,

including endorsements from numbers of 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.[57]

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."[58] Another echoed these sentiments, writing, "I think we are mighty lucky in getting 'shed' of Reynolds [sic]."[59] It also showed that the lawyer lobbyists were capable of subterfuge if Botts's law partner was 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.[60]

These lobbying efforts by the bar evidently paid off. The Santa Fe New Mexican reported that the governor's office announced on November 21 its offer of the vacant seat to Davis. The newspaper also cited the many recommendations received at the governor's office.[61] Davis, the primary candidate of the bar, was also Mechem's first choice. Davis, who was in line for a federal appointment, did not accept the position, the spot on the bench remaining 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.[62]

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, of relying on the presupposed intent of the framers. Through the example of its personnel appeared the reality of partisan politics. 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.

NOTES--CHAPTER III

[1]New Mexico, Constitution, art. 11, sec. 7.

[2]Ibid.

[3]Larson, Quest for Statehood, p. 100.

[4]Ibid., p. 161.

[5]Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origin and Development (3rd ed.; New York, 1963), pp. 606-11.

[6]Seward v. D. & R. G., 17 N. M. 557.

[7]Ibid.; and Woody v. R. R. Co., 17 N. M. 686.

[8]Seward v. D. & R. G., 17 N. M. 557.

[9]Ibid.

[10]Woody v. R. R. Co., 17 N. M. 686.

[11]Seward v. D. & R. G., 17 N. M. 557.

[12]Santa Fe G. & C. M. Co. v. A. T. & S. F. Ry. Co., 21 N. M. 496.

[13]In re Coal Rates in New Mexico, 23 N. M. 704.

[14]In a book on the New Mexico Corporation Commission, Frederick C. Irion follows the long-range effects of these precedents. They meant not only limited commission powers by way of judicial determination but also the prohibition of meaningful legislative attempts to aid the commission.

They even meant, in terms of their strict construction of the constitution, the necessity of establishing a separate public service commission in 1941. Frederick C. Irion, The New Mexico Corporation Commission (Albuquerque, N. M., 1950).

[15]Melkusch v. Victor American Fuel Co., 21 N. M. 396.

[16]Hannett, Sagebrush Lawyer, pp. 64-65.

[17]New Mexico, Legislature, Senate Journal, Third Legislature (1917), p. 347.

[18]New Mexico, Constitution, art. 6, sec. 16.

[19]Tittman, "New Mexico Constitutional Convention," p. 179.

[20]Mabry, "New Mexico's Constitution," p. 174. Mabry does note that "the complaint in respect to the Gerrymander has largely subsided since the democrats, many years ago, obtained control of both the senate and the house, and, likewise, came to elect most of the district judges."

[21]New Mexico, Constitution, art. 19, sec. 1.

[22]New Mexico, Legislature, House Journal, Third Legislature (1917), pp. 320-21.

[23]Senate Journal, Third Legislature, p. 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 twenty-three votes were tabulated.

[24]Adolph P. Hill, assistant secretary of state, to Arthur Seligman, August 2, 1917, New Mexico State Central Democratic Committee Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[25]C. B. Kohlhausen, H. L. Bickley, and H. A. Kiker to Seligman, August 29, 1917, ibid. Bickley and Kiker later served on the supreme court.

[26]Richardson to Seligman, October 8, 1917, ibid.

[27]Gilbert to Sullivan [sic], November 1, 1917, ibid.

[28]Smith et al. v. Lucero, Sec'y of State, 23 N. M. 411.

[29]Ernestine D. Evans, Secretary of State, New Mexico Election Returns, 1911-1969 (June 1, 1970), unpaged.

[30]Roberts to H. B. Hening, September 19, 1916, Thomas B. Catron Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[31]N. M. Election Returns, 1911-1969.

[32]Roberts to Bursum, January 25, 1921, Bursum Papers.

[33]Roberts to M. C. Mechem, March 8, 1921, ibid.

[34]Roberts to Bursum, December 21, 1921, ibid.

[35]T. E. Mitchell to Bursum, August 20, 1922, ibid.

[36]Bursum to Roberts, August 29, 1922, ibid.

[37]N. M. Election Returns, 1911-1969; and Herbert F. Raynolds Date Book, 1918, Raynolds Family Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico. Herbert Raynolds made absolutely no date book notations indicating 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 November 5, 1918, "Election Day."

[38]Democratic Committee Papers, August 3, 1920-October 31, 1920. Chairman Seligman sent out the letters on September 4, 1920. Replies were received through October 22, 1920.

[39]James A. Hall to John B. McManus, Speaker's Bureau, October 27, 1920, ibid.

[40]N. M. Election Returns, 1911-1969.

[41]Ibid.

[42]Resignations, Merritt Mechem Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[43]Santa Fe New Mexican, September 12, 1921, and November 1, 1921.

[44]Ibid., September 12, 1921.

[45]Ibid., August 7, 1922.

[46]Miguel A. Otero to Burt New, March 6, 1922, Miguel A. Otero Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico. There was also a letter written some weeks before Davis' resignation soliciting the appointment to the supreme court vacancy of ex-Governor Washington Lindsey. The writer began his letter, "I am informed Supreme Court Justice Davis contemplates resigning from the Bench to become a candidate before the Republican

Convention, for U. S. Senate." Albert Morgan to Merritt Mechem, July 27, 1922, Merritt Mechem Papers.

[47]Bursum to Frank Hubbell, August 7, 1922, Bursum Papers. Octaviano Larrazolo served as New Mexico's governor in 1919 and 1920.

[48]Bursum to Ben C. Hernandez, Night Letter, August 10, 1922, ibid.

[49]Hubbell to Edward E. Young, August 15, 1922, ibid.

[50]T. E. Mitchell to Bursum, August 20, 1922, ibid.

[51]Resignations--Applications and Appointments for the Supreme Court, Merritt Mechem Papers.

[52]Otero to Carl Magee, September 9, 1922, Otero Papers. Otero was a very strong supporter of the Cutting faction.

[53]Holmes, Politics, p. 157; and N. M. Election Returns, 1911-1969.

[54]Resignations--Applications and Appointments for the Supreme Court, Merritt Mechem Papers.

[55]Santa Fe New Mexican, November 15, 1922.

[56]Catron to Merritt Mechem, November 18, 1922, Merritt Mechem Papers.

[57]Applications and Appointments for the Supreme Court, ibid.

[58]Pearce C. Rodey to Merritt Mechem, November 16, 1922, ibid.

[59]Etienne de P. Bujac to Merritt Mechem, November 18, 1922, ibid.

[60]John F. Simms to Merritt Mechem, November 20, 1922, ibid.

[61]Santa Fe New Mexican, November 21, 1922.

[62]Applications and Appointments for the Supreme Court, Merritt Mechem Papers.

CHAPTER IV

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 determiner of state politics. This predominance 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. The court also experienced a continuous high turnover in personnel. 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. And with the election of 1930 high bench control by Democrats became the rule in New Mexico politics. In other words, state politics was in great turmoil from 1922 to 1930, with

the Republican party making its last stand often through the instrumentation of the judiciary.

One case in particular illustrated these political upheavals, and that involved an Albuquerque newspaper editor, Carl C. Magee. Magee, an Oklahoma lawyer and journalist, came to New Mexico in 1917 seeking a more healthful climate for his wife. He edited a weekly until he gained control of the Albuquerque Journal, a daily newspaper with the largest circulation in the state.[1] By the early spring of 1921 he found himself in deep financial trouble and on the verge of losing the newspaper. His difficulty stemmed from his editorial comments on the systematic looting of the state land office and the need for cleaning up the Republican party. At that point Albert Fall, who earlier told Magee that the land office was Republican organized primarily for the benefit of southern New Mexican cattlemen, personally warned the editor to lay off or be broken.[2]

Magee did not heed the warning and soon learned that his financing of the Journal through a Kansas City bank was being terminated under directions from Fall. His informant was Holm Bursum, New Mexico's Junior

Senator and a Fall antagonist. What ensued was a series of telegrams between Magee and Bursum concerning the newspaper's economic status, beginning on the note: "Your information concerning Kansas City deal correct [stop] Must liquidate in twenty days or lose control [stop]."[3] The telegrams indicated an apparent willingness on Bursum's part to help secure new financing but probably not without strings. Indeed, Magee wired the senator this in acknowledgment of a possible deal:

> Not sure I made myself clear [stop] Fully expect to support you in September and have no objection to personal obligation to you or Hitchcock but do not wish to be obligated to interests which I might feel harmful to the state [stop].[4]

Having been notified by Bursum that no new out-of-state financing was available, Magee proceeded with his drive for public funding through bond subscriptions. This soon became a partisan matter, with a number of Democrats attending a public fund-raising meeting in Albuquerque and with several Democrats over the state sending in subscriptions.[5] By June Magee was in a position to continue for a time the publication of the Journal, prompting Bursum to write Magee's chief competitor, a loyal Republican editor:

> You are perfectly free to use your own judgment of what you think is the best thing to do. I only meant the request [for the Albuquerque Evening Herald not to interfere with Magee's fund raising] pending at the time he was in trouble, and did it on the theory that it was better to have him as a competitor than possibly some one else more formidable.[6]

In short, Bursum predicated his actions not on his love for Magee but rather on political realities generally and on his hatred for Fall specifically.

From that time on Magee ran his newspapers in a partisan Democratic fashion. The only major exception was his endorsement of Bursum in the special senatorial election of September, 1921.[7] More typical of Magee's activities was his involvement in a libel suit brought by John M. Raynolds, president of the First National Bank of Albuquerque and brother of Justice Herbert F. Raynolds. Arising from an editorial on the mine-tax law published at the same time as the attack on the land office, the court action charged Magee with having libeled Raynolds by naming him a member of a "gang" operating to oppress and rule the people under an unjust law. Characteristically, Magee used the matter to

expound upon freedom of the press.[8] He was becoming an increasingly sore spot with Republican leaders.

Magee--in the next two years--continued his partisan attack, striking out in all directions. He fired his most irritating shots, as it turned out, in the direction of the northern counties. In editorials spaced over fourteen months, Magee attacked Secundino Romero, Republican boss of San Miguel, Mora, and Guadalupe Counties; David Leahy, judge of the fourth judicial district encompassing those counties; and Sec's so-called henchmen. By the spring of 1923 he had his readers thinking in terms of San Miguel County as "Sec Romero's Empire" and of the political organization there as Sec's "copper-riveted machine." Sec, himself, he described as an unjust boss who exploited the Spanish people, at once "narrow, bigoted, arrogant, malicious" and "interested only in his own selfish plans." Judge Leahy came in for the following criticism: "Over this enormous estate of the people, the Hon. Dave Leahy, right hand bower of Sec Romero is a dictator by reason of his appointing power as district judge." As a chief henchman Magee singled out Jonathan H. Wagner, president

of the New Mexico Normal University in Las Vegas, charging that Wagner ran the school as an asset to Sec's political machine.[9]

In the face of these attacks Sec Romero and company could only demur.[10] Magee, after all, resided in Albuquerque, seemingly safely beyond the grasp of the fourth judicial district. But then the Albuquerque newspaperman made a tactical error. On June 8, 1923, he wrote an editorial on the handling of state supreme court funds. According to this account, Jose Sena, clerk of the court, had deposited court money without bond and in his private name in a thereafter defunct Santa Fe bank. Magee called for the removal of Sena from office at the very least and addressed his article to Justices Botts and Bratton by way of informing them as to what was going on. He carefully avoided suggesting any wrongdoing on the part of Chief Justice Parker but did say that Parker "has grown too accustomed to old methods to see anything wrong in what has happened."[11]

Done in the muckraking manner of so many of his editorials, Magee probably had better grounds for calling into question the financial matters of Sena and Parker

than even he himself realized. In March, 1921, and again in February, 1923, Sena wrote to Secretary of Interior Fall soliciting the job of governor of Puerto Rico. In both letters he complained of his lowly salary as supreme court clerk. In the first instance, he wrote,

> The salary I am receiving of $3000 hardly enables me to live and I am not able to pay debts but very gradually [no period] . . . With the salary of $3,000 and having out of that to contribute largely as I have done to the Republican Cause, I cannot save anything and I would like to have you help me in this matter.[12]

In the second instance, he again begged Fall's help:

> I am getting along in years and as I stated to Mr Bursum would like to obtain something where I would not be compelled to work so hard as I have work [sic] for the last years and at least be able to save something for my older days.[13]

On the other hand, Parker's awareness of financial matters--both court-related and personal--seemed at best naive. His territorial district court clerk, William Martin, was involved in all sorts of irregularities when it came to court deposits, irregularities that extended from 1907 to 1910 and involved deposits in a number of different banks. In January, 1910, Parker wrote Bursum to the effect that his clerk failed to make two deposits in the First National Bank of Santa Fe, adding, "This

ought to be deposited at once."[14] In August, 1910, the traveling auditor's report referred to "the claims against ex-clerk Martin."[15] Parker's personal finances showed similar carelessness involving two outstanding bank notes ignored by Parker when called due. At a given point one of the two banks involved threatened:

> Several times we have sent you notices and you have not been interested enough to favor us with a reply, our patience is about exhausted, if you cannot voluntarily take care of your obligations perhaps you might be forced to do so.[16]

With these facts to back up his allegations, Magee might have found his position more secure. Without them he presented his San Miguel County enemies the opportunity they were waiting for, even though Magee purposefully deleted the article on the court from the newspapers addressed to that county. This precaution notwithstanding, Judge Leahy charged the editor with the criminal libel of Justice Parker and issued a "Forthright Warrant" for his arrest.[17]

What followed was a political trial, not the first such maneuver in New Mexico political history. In 1916 a Bursum follower, Henry Dreyfus, sued the Santa Fe New Mexican for libel. Dreyfus won a judgment at the district

court level, Merritt Mechem presiding, only to see the case appealed to the supreme court by Bronson Cutting. Pending the appeal, Cutting and his managing editor, E. Dana Johnson, used the opportunity to print attacks against Mechem. The judge cited them for contempt of court, with the supreme court then deciding on appeal both the original case and the contempt citation. The court overturned both actions, Cutting thereby winning a show of strength against Bursum. More significantly, New Mexico's highest court in effect ruled that the press did have the right to criticize the courts.[18]

Undeterred by this precedent of a press free to criticize the judiciary, the partisans of the fourth judicial district continued apace. As the Magee matter proceeded, it eventually came out that O. O. Askren, former attorney general, brilliant trial lawyer, Las Vegas resident, and personal counsel to Secundino Romero, and former Justice C. J. Roberts were behind the various court actions.[19] Their roles in the case added to the parts played by both prosecution and defense personnel made the proceedings read like a political "who's who." Chief prosecutor for the state was Luis E. Armijo,

district attorney in San Miguel County and Leahy's successor as district judge of the fourth judicial district. Assisting the prosecution at Armijo's request were Askren, Roberts, and C. W. G. Ward, a former district attorney.

Chief defense attorneys were former Justice Richard H. Hanna and his law partner, Fred Wilson, a future attorney general. Assisting in Magee's defense were Las Vegas attorneys George Hunker, chairman of the Democratic state central committee, and M. E. Noble, a future supreme court justice, and an Albuquerque attorney and future United States Senator, Dennis Chavez.[20]

The court case began simply enough as a libel action, with Magee transported to Las Vegas to stand trial for allegedly having libeled the chief justice of the supreme court. Ironically, the issue was drawn before the principal party in the action was even aware of Magee's article concerning him. Interviewed in Santa Fe some days after the fact, Judge Parker said:

> I wish to state that the procuring of said indictment was without my knowledge, and it came to my attention after it had been returned by the grand jury, and I was not a party, directly or indirectly, to its procurement.

Having by then read the article in question, he did say that he considered it a "gratuitous insult" to a justice and as possibly justifying action. Still, he added that had he been asked, he probably would have advised passing the matter without notice.[21]

The libel trial itself was brief. The state called few witnesses, with Askren and Hanna concluding with impassioned pleas for their respective sides.[22] Judge Leahy then instructed the jury to find

> from the evidence complained of that Magee intended to state and did convey the idea that Frank W. Parker in the capacity of Chief Justice of the Supreme Court had been so accustomed to seeing wrong done that he would intentionally condone a violation of law.[23]

The verdict returned was guilty, with Leahy pronouncing sentence--a term in the penitentiary--and denouncing Magee at the same time. At one point in his extremely long and personal dissertation, Leahy said to Magee:

> You cowardly, wickedly, wantonly, falsely, and maliciously attempt to assassinate the character of Judge Parker, and destroy the reputation which he has built up in good conscience by many years of faithful, efficient and honest public service, and you do so in the name of liberty--liberty of the press. You evidently mistake liberty of the press to mean license to villify [sic] and abuse with no regard for the truth.[24]

Not content with the finding in this criminal libel action, Magee's antagonists further looked for a way to break him financially and to put the Democratic editor away beyond even the reach of gubernatorial pardon. Thus during the course of the libel action, Leahy issued four orders to show cause why the defendant should not be adjudged in contempt of court.[25] These orders were the result of Magee's continuing assault on Leahy's court, comments that appeared in the Tribune as sent from Las Vegas. Magee stated, for example, that "the secret of Sec Romero's copper-riveted machine in San Miguel County is his influence over the district court and his ability to influence its conduct." He also wrote that Leahy was "still sitting as the sole judge of his own misconduct."[26]

The contempt charges lumped together, Magee was back in Leahy's court on July 10. There, Magee repeated his newspaper charges in open court. In a question-and-answer session with his attorney Hanna and with state's attorney Askren, Magee repeated his assertions that Romero ran the county and was aided specifically by, among others, Leahy, Stephen B. Davis, O. O. Askren, Luis E. Armijo, and C. W. G. Ward. He also said he thought Leahy was a political judge, one who went to the polls and one who,

Magee feared, was capable of stealing a verdict. Pursuing this matter, Askren asked about other judges, whether Judge Hanna, for example, ever took part in politics while on the bench. Hanna quickly rose and challenged Askren to point to one instance where he as judge dabbled in politics, the interplay demonstrating the charged atmosphere of the courtroom.[27]

The contempt trial, its spirited exchanges played out, ended with Leahy pronouncing the court's verdict. The judge sentenced Magee to 360 days in the San Miguel County jail and fined him seven dollars and the Magee Publishing Company, $4,050.[28] Within a matter of days Governor James F. Hinkle granted Magee a full pardon from both the criminal libel sentence and the contempt of court sentence. In so doing, the governor gave these as his reasons: the indictment for libel was filed without the consent of the party supposedly libeled; neither Magee nor Parker lived in the district where the trial was held; and the proceedings seemed "to be a conspiracy, and more of a persecution than a prosecution." The contempt charges Hinkle specifically dismissed as harsh and beyond reason, with the whole affair being a blot and a disgrace upon the state.[29]

Two days later Governor Hinkle offered additional explanation for his pardon. Originally planning to wait until after the exhaustion of court appeals, Hinkle learned from Hanna that Magee did not intend to perfect his appeal to the supreme court. This fact added to a contemplated Democratic "pow-wow" to hear demands for a special legislative session to act as a court of impeachment in the matter of district four judicial personnel prompted the governor to act immediately. Quite simply, he wanted to avoid the charge of having succumbed to partisan political pressure.[30]

Incredibly, even a full pardon for Magee did not end this bizarre exercise in partisan judicial politics. This became evident when Leahy's court decided to deal with yet another political enemy, Magee's chief defense attorney, a former supreme court justice, and an ardent Democrat, Richard H. Hanna. Open hostility toward Hanna was shown throughout the trial, with every defense motion overturned and with personal malice clearly present as in Askren's remarks suggesting political activity by Hanna while on the bench. Apparently regarding these harassments as insufficient, Leahy's court brought formal charges against the attorney.

The charge originated with Askren who swore to a lengthy information charging professional misconduct on the part of attorney Hanna. Setting out that Hanna's conduct made him unworthy to practice law, the information focused on speeches Hanna delivered during the course of the Magee trial both in Las Vegas and in Albuquerque. It alleged that in those speeches Hanna sought to bring the court into disrepute by referring disrespectfully to an (unnamed) attorney for the prosecution, failing to show a respectful attitude toward the judiciary, and appealing to public sentiment.[31]

Seeking to translate this information into suspension or even disbarment of Hanna, C. J. Roberts took up the fight. With this twist the New Mexican reporter covering the Las Vegas trials could not help but remark:

> The spectacle of a former chief justice of New Mexico conducting a legal battle with the object of disbarring or suspending another former chief justice, and his own associate on the supreme court bench for seven years, drew an audience that nearly filled the district court room yesterday afternoon.[32]

And quite a spectacle it turned out to be. Roberts, in arguing the proceeding, went so far as to suggest that

Hanna aided and abetted Magee in his partisan newspaper campaign. He also challenged Leahy's critics to try to impeach the judge and his own and Askren's critics to file formal charges against them.[33] In short, the whole episode, highlighted by the antagonism between two former supreme court justices and colleagues, degenerated into a highly partisan and sordid affair played out in a supposedly impartial court of law.

After two days of hard-fought battles Judge Leahy fined Hanna twenty-five dollars for contempt and suspended him temporarily from practice in the fourth judicial district. From the district court Hanna's case was to go right up to the supreme court, the court to decide finally whether to suspend or to disbar Hanna permanently. In the meantime, the San Miguel County trials stopped, specifically pending supreme court resolution of the Hanna disbarment case. Still to be heard were yet more contempt charges against Magee, at least one and perhaps as many as three more.[34]

As the capstone of the state's judicial system, then, the supreme court ultimately found itself in a position of having to resolve political questions resulting from highly partisan activities at the district court level.

Its first such case, however, was not the matter of Hanna's disbarment but rather the issue of Magee's exoneration. As such, it involved the fundamental question of the governor's power to pardon, thereby adding the additional dimension of separation of powers. This case, long debated and extensively researched, was decided during the court's January term, 1924. Justices Samuel Bratton and Clarence M. Botts, joined by District Judge Raymond Ryan, heard the case, Parker having disqualified himself for obvious reasons.

The case involved Magee and his publishing company's conviction for contempt of court. The facts were these. Originally planning to appeal the decision to the supreme court, Magee and his attorneys announced their intention not to after all. So informed, the governor granted Magee a full pardon, with the attorney general interposing a motion to dismiss. The attorney general did so on the grounds that the governor had the power to pardon and that the state could not further maintain the case. The supreme court took the motion and the cases themselves under advisement, determining both upon their merits. Reviewing the questions involved, Justice Bratton delivered the opinion of the court.[35]

In this opinion Bratton carefully avoided references to the partisan nature of the original trials. Indeed, he cleverly sought to sidestep any political confrontation, and that included a fundamental confrontation between the judicial and executive branches of government. He began by ruling as inherent the power of the courts to punish for contempt. He then asked, "Does a conviction and punishment upon such a charge come within the pardoning power of the Governor?" In answer to this question he gave full discussion to all sides of the issue, basic in terms of residual constitutional powers. He reviewed, for example, contentions that to construe the pardoning power as being existent in criminal contempt cases meant the following results: weak, ineffective, and vassal courts, with the executive not able to influence their actions but quite able to control their effect.[36]

Responding to these and similar arguments, Bratton fell back to fundamental democratic tenets. He simply said that the power to pardon resided in the sovereign people. They, in turn, vested this power in the governor of the state. The wisdom of this action or of the governor's exercise of this power were not matters for

the court to decide. For, said the justice in a final note of judicial self-restraint, "When we have determined that the power is vested in the Governor, our connection with the matter ceases, as courts exist for the purpose of construing and enforcing laws, not to make them."[37]

What this meant was the barring of the state from any further prosecution, the pardons having been ruled valid and effective. Justice Botts concurred; District Judge Ryan found himself unable to do so. In a rare dissent, compromise and concurrence being the rule in state supreme courts, Ryan felt compelled to offer a separate opinion given the constitutional question of power existing between the judiciary and the executive. It was his opinion that the constitution conferred no power upon the executive either to review or interfere with court proceedings. "On the contrary," wrote Ryan, "a vigorous independent judiciary is the very bulwark of our institutions. The Constitution reflects such a conception of the judiciary."[38]

The supreme court also heard the Hanna disbarment case in 1924. The case took that long to reach the court because of another judicious maneuver. The high

bench initially referred the matter to a special commission of three members of the bar, the state board of bar examiners. The commission was to hear evidence and to report its findings as to its conclusions and recommendations. Based upon that report, the supreme court rendered its decision, Justice Botts speaking for the court. Agreeing with the committee, he took Hanna to task for improprietous and unprofessional conduct by his participation in public meetings held to create sympathy for his client. He then verbally slapped the former justice, stating:

> The respondent [Hanna] is a member of the bar of long standing, who has held high office in this state, and his training and experience have been such that he could not have failed to know that his conduct was improper and most unbecoming. . . . There can be no justification or excuse for him.

Botts did not, however, follow up this verbal condemnation with similarly harsh legal action. Adding reprimand and severe censure to the period of suspension already suffered, he ruled these sufficient punishment to satisfy the ends of justice. Chief Justice Parker did not sit in this case as well.[39]

But even these two supreme court decisions were not the final word on the story of Carl C. Magee. Less than two weeks after his pardon in July, 1923, he wrote yet another ill-considered editorial, this one entitled "Illustrating Roberts, C. J." In it he charged that Roberts, rendering a decision as supreme court justice, threw out six to eight hundred Democratic ballots in the 1916 Read-Crist district attorney contest. He added, "Such gall and chicanery is an index to Roberts' character."[40] Roberts correctly pointed out that he had disqualified himself in that case, and when no retraction but only reassertion was forthcoming, he filed a criminal charge against the Albuquerque editor.[41] Brought to trial in Santa Fe District Court in January, 1924, Magee was found not guilty by a jury which ignored the judge's instructions.[42]

And then it was back up to Las Vegas for Magee and one last courtroom confrontation with Judge Leahy. It was now July, 1924, more than a year after the beginning of this sordid partisan affair. This time Leahy found Magee guilty of direct contempt of court and sentenced him to three months in the San Miguel County jail. Incarcerated immediately, Magee again received a gubernatorial pardon

but not his freedom, as the sheriff of the county contended that a governor could not pardon for a direct contempt charge. Ignoring the adjutant general's request to free the prisoner by use of the National Guard, Governor Hinkle chose instead to arrange Magee's release on bond until the supreme court could hear the case on appeal.[43]

The supreme court, when it met, finally put the libel-contempt proceedings against Carl C. Magee to rest. Ironically, the spokesman for the court was none other than Chief Justice Parker, the unwitting and unwilling harbinger of Magee's legal woes. The court again faced the task of determining the governor's power to pardon, it being argued by attorneys O. O. Askren and C. J. Roberts that this power did not extend to matters of direct contempt. Parker dismissed this argument, finding no essential differences between the classes of contempt, along with the argument that the independence of the judiciary was in jeopardy.[44]

The chief justice then added a human note, the only one offered during any of the court's decisions concerning this affair. Recognizing the inherent power of the courts to punish for contempt, he pointed out that this highest form of judicial power was exercised by one man without jury consultation. And, as Parker said:

> Judges are human, the same as Governors and legislators. The power to punish for contempt in cases like the present is exercised under the stress and sting of insult, and human nature may not always be able to withstand such stress without losing the poise and calm judgment so necessary to the proper exercise of judicial power. It may be wise, then, to have a check upon such arbitrary power in the form of pardons by the executive.[45]

All that was missing was direct reference to the most human nature of Judge David J. Leahy. Carl C. Magee, as far as the supreme court was concerned, was permanently a free man.

Leahy and Magee met one more time in an episode that began on the evening of August 9, 1925. In Las Vegas to chair a meeting of the state hospital board, Magee was sitting in a hotel lobby when Leahy entered. Leahy challenged Magee, knocked him to the floor, and continued to beat him. Magee managed to free the gun he was carrying, fired it three times, two shots hitting Leahy in the arm and the third hitting and killing a bystander who was attempting to drag Leahy off. On June 16, 1926, Magee was tried for manslaughter in the same district court where he stood trial so many times before. He was once more defended by Hanna, but Askren and Roberts were no

longer around. And on the bench sat a different figure, Luis E. Armijo, Leahy's successor as judge of the fourth judicial district. Based largely on Leahy's self-incriminating testimony, Judge Armijo directed a verdict of acquittal, and the jury complied.[46]

Before this final tragedy Magee seemingly had a bright political future as a reform Democrat. He did try for the party's United States Senatorial nomination but lost, returning to Oklahoma soon after his wife's death. Still, his influence on New Mexico politics in general and the Republican party in particular was considerable. Almost singlehandedly, he smashed Secundino Romero's political machine. He also helped to bring down Albert Fall. In testimony given under oath before a congressional committee investigating Fall in November, 1923, he told of Fall's successful takeover of the Albuquerque Journal and of his sudden wealth. He then tied Fall in with the Las Vegas trials, the overall plan being to bankrupt Magee and to drive him and his partisan muckraking press out of business. Magee based these assertions on the likely premise that Fall and Romero were plotting to divide up the state in terms of political power and Republican party control.[47]

Of little doubt was the partisan nature of the fourth judicial district trials themselves. They were a blatant example of a boss-ridden machine attempting to enhance its power through its absolute political control of a judicial district and its judicial personnel. Such an occurrence, of course, reflected on the possible extent of partisan judicial involvement in state politics. Also reflecting on that involvement was the part played by the supreme court, especially that of its first three justices. Chief Justice Parker, to be sure, was only nominally involved; Justices Roberts and Hanna were key players. The latter two exhibited extreme partisan behavior, calling into question the matter of their political activity while on the bench. If the disbarment proceeding against Hanna was correct in its assertion that there was no justification for his behavior, the same could similarly be said about Roberts' conduct.

The supreme court which sat in review of the district court fiasco acquitted itself much more admirably. It managed to rise above the petty partisan atmosphere created below, even to the point of deciding a fundamental constitutional question of separation of powers to its own seeming disadvantage. It did so, moreover, on a

bipartisan basis, in the process nullifying use of a district court for partisan purposes. The court could not avoid specific comment on former Justice Hanna, but it could and did stop short of making him a partisan political martyr. Appropriately, it was left for Chief Justice Parker to remind court officers about the "poise and calm judgment so necessary to the proper exercise of judicial power."

The Magee affair was just one example of Old Guard Republicanism asserting itself during the 1920s, unafraid to use the courts if they seemed the appropriate vehicle. Another example of such partisan activity during this period involved a running duel between Arthur T. Hannett and Reed Holloman, both attorneys and avid partisans but aligned with different parties. Their feud, intensely partisan in nature, lasted from 1924 to 1930 when it was finally resolved through litigation. Again, the courts were the media for settlement of party matters.

Arthur T. Hannett was a liberal Democrat who lived in Gallup, New Mexico, and proceeded to build a political machine within the Democratic party. He was of an age that was moving away from the philosophies and legal

concepts of the "railroad lawyers." Indeed, it was he and his liberalism that prompted the corporations to send ex-territorial Justice John R. McFie out to Gallup to do legal battle with Hannett. It was also he, the result of his work in personal injury cases against railroads and mining companies, who prompted the corporation lawyers to lobby through special legislation limiting lawyers' fees in such cases. Despite this opposition, Hannett served as mayor of Gallup and captured the Democratic gubernatorial nomination and the statehouse in 1924.[48]

Reed Holloman was of the older generation. An Old Guard Republican and member of the constitutional convention committee on the judiciary, Holloman served for years as judge of the first judicial district seated in Santa Fe. It was he whom Bursum and Roberts discussed as the strongest possible gubernatorial candidate for the Republicans in 1922, although he did not receive the nomination. And he, like Hannett, was most candid about his dedication to and involvement in partisan politics. While on the bench he corresponded with many different party leaders concerning the state's political condition.

In 1918, for instance, he concerned himself with the coming election and party nominations, all relative to his understanding of the political situation.[49]

By the 1920s he was more secure in his position, clearly a recognized power within the party. In March, 1921, he wrote Governor Mechem about the appointment of a United States Senator. So doing, he identified himself "as a citizen of the State of New Mexico, a Republican, a member of the County Republican Committee, and representing at least two members of the State Central Committee, of this county." He then said, "As you know, I am naturally a partisan in any matter in which I have any interest, and in this matter it may be thought that my partisanship for Mr. H. O. Bursum would cloud my better judgment." But having studied the matter from every angle, he stated that he was "convinced beyond a doubt that the only proper thing to do is to appoint Mr. Bursum as Senator."[50]

With Bursum as senator and about to stand for election in the special contest of September, 1921, Judge Holloman reported that the northern counties seemed in excellent condition and summed up the overall situation in this way:

> I never saw Santa Fe County in better condition, and the reports that come to me every day from Rio Arriba are to the same effect. The only question I believe is the estimate of the majority, and that will depend largely on our ability to get out the vote.[51]

The judge was not simply a party man, a necessity given the fact of a partisan judicial election system. Rather, he was an active and interested politician, by his own definition a partisan in any matter in which he had any interest.

The gubernatorial election of 1924 presented just such a matter, for Hannett won by a scant 199 votes. Given the closeness of the election, Hannett fully expected the opposition to contest it. According to his memoirs, the Old Guard held a meeting in Santa Fe and agreed that Manuel B. Otero, the loser, was to file an action against Hannett in the first judicial district. Holloman attended the gathering, and Hannett had this to say about the outcome:

> Judge Holloman was quoted as saying he would unseat me. At that meeting it was revealed that the Old Guard not only planned to contest my election but also the positions of Attorney General, Land Commissioner, State Auditor, and United States Senator.[52]

Republicans were no happier with the 1924 election than they were with that of 1922, and they meant to rectify the situation through the courts, specifically through their partisanly controlled district one court.

As events turned out, two separate actions were filed. The newly elected Attorney General John W. Armstrong, a Democrat, placed the election contest in the second judicial district in Albuquerque presided over by a Democrat. The Republicans countered, with Otero filing quo warranto proceedings in district one.[53] Yet even before these actions, Hannett demonstrated his shrewdness and determination to head off Holloman by hiring two detectives from the Burns Detective Agency in Chicago. As Hannett told the story, the detectives arrived in Santa Fe representing themselves as potentially large investors in the state if Republican statehouse control, sympathetic to corporations, could be insured. Judge Holloman, who attended one of their parties, told them about the case pending against Hannett in his court and went on to say he could virtually assure them a Republican governor in the person of Otero.[54]

Armed with this information, Hannett recalled how he promised to impeach Holloman unless the latter disqualified himself. The judge did disqualify himself, attempting to save face in the process.[55] A newspaper story quoted Holloman as saying:

> In a case of this character any party to the action really doubts that he will receive a fair trial before me as presiding judge. I will not hesitate to disqualify without any investigation as to whether those doubts are well founded or not. . . .[56]

He also said that he had planned for over a month not to sit in the case.

Left unsaid by either Hannett in his retelling of this story or Holloman in his public statements was the fact that a house committee drew up a formal resolution of impeachment against Holloman. It cited him for bringing his office into disrepute, to-wit: "That he has been actively engaged in Republican partisan politics and in violation of his oath of office and contrary to the Constitution of the State of New Mexico" (as an active candidate for governor while serving as judge). The committee further found that Holloman conspired with Otero and others to procure a suit against Hannett in

Holloman's courtroom, it being predetermined in the resolution's words "that the said Manuel B. Otero would win said suit and the said Arthur T. Hannett would lose the same, regardless of the facts in said cause and in total disregard of the law therein. . . ."[57]

The committee added to these other articles of impeachment and both served Holloman with a "Notice of Impeachment" and introduced its report to the full house of the seventh state legislature in March, 1925.[58] The matter proceeded no further, apparently ended by Holloman's announcement of disqualification. The Republicans finally decided to drop their challenge to the 1924 elections, the issues ultimately settled in August and September, 1925.[59] All these occurrences--Hannett's use of detectives, the threat of impeachment, Holloman's disqualification, and Republican dismissal of the suits--ironically transpired after Republican victory seemed within grasp. For in a February, 1925, decision the state supreme court ruled that Otero could bring his suit into Holloman's court as a private citizen.[60]

The Hannett-Holloman fight, temporarily laid to rest in 1925, resumed in 1927 and continued until 1930.

This time the matter originated in the sphere of finances. In 1924 a reluctant Hannett (by his account) purchased thirty percent of the Gallup Electric Power & Light Company and became its president and directing officer. He continued in that capacity while governor and after his defeat in 1926. In 1927 he ran into trouble on an agreement with the town of Gallup concerning the improvement of boulevard lighting. Indeed, he learned from the company's primary owner that unless the company contract went through, he faced loss of his entire interest in the company.[61]

It was at this point that Holloman entered the picture. According to his personal account, Hannett heard from Abraham Lincoln Zinn, a Hannett Democrat and future supreme court justice, that Holloman proposed to break him financially. He further heard that a group of attorneys headed by Holloman planned to place the Gallup Electric Company in receivership for the express purpose of ruining his stock in the company. Again using the Burns Detective Agency to investigate, Hannett found out that these allegations were true.[62]

Hannett reacted publicly in hard-hitting, uncompromising statements. In his own column written for the

Albuquerque Journal, "New Mexico Day by Day--by A. T. Hannett," he repeatedly accused Holloman of being a political judge. In one especially vituperative article, he said this about his old nemesis:

> . . . Holloman has brought disgrace to the bar of New Mexico. If there is any depth to which Holloman has failed to drag the judicial ermine, he has remained from doing so only as a matter of expediency. . . . I have personally known Holloman to be intoxicated on the bench, to gamble all night and take up the collection in church on Sunday. . . . Holloman is not a judge he is an unscrupulous politician.[63]

For such journalistic exercises as these Hannett found himself facing Holloman-initiated charges of misconduct before the state board of bar commissioners.

The hearing lasted for more than two weeks, with the board placing the burden of proof on Hannett to establish the truth of his accusations. In Hannett's opinion he did just that through the testimony of a Burns detective concerning the Gallup Electric Company and Holloman's receivership activities. But this testimony failed to carry the issue, for, in Hannett's words, a majority of the board "was composed of lawyers who were my personal, political, and professional enemies. . . ."[64]

Whatever the truth of Hannett's personal views, the seven-man board consisted in fact of five Republicans and two Democrats. The bar commission in its majority report suspended Hannett from law practice for one year, declaring that he failed to prove all his charges and that he damaged the reputation of Judge Holloman. The two Democrats dissented.[65] Unwilling to accept the validity of this decision, Hannett took the matter into district court, Henry A. Kiker, a future supreme court justice, presiding. Kiker ruled in Hannett's behalf, the matter ultimately reaching the state supreme court for final resolution.[66]

Chief Justice Parker delivered the opinion of the court, the real issue being whether the state board of bar commissioners possessed the power to suspend or disbar attorneys from practice by itself. Ruling the board to be a tribunal but certainly not a court within the meaning of the constitution, Parker found that the supervisory control of district courts over inferior tribunals extended to all cases. The district court, then, did have the power to issue the writ of certiorari staying the action against Hannett, the jurisdiction of the state board not including the suspension of an attorney under

any circumstances. The chief justice noted, at the same time, that the district court proceeding was not designed to review the correctness of the board's judgment on its merits, thereby offering the bar commissioners and Holloman partisans the only solace they were to receive in the Hannett matter.[67]

There was one last attempt made to hold Hannett accountable. It again involved the alleged receivership conspiracy against Hannett and his newspaper articles concerning it. Albuquerque attorney Francis E. Wood, named by Hannett as one of Holloman's co-conspirators, sued Hannett and the Journal Publishing Company for libel. The supreme court heard the case on appeal and failed, in the words of the court, "to find the publication to have been libelous per se."[68] With this decision delivered in January, 1930, the Hannett-Holloman duel ended. Both men behaved throughout in a blatantly partisan fashion. What made their confrontation significant was the use or the attempted use of the courts to effect their political goals.

The two incidents involving Magee and Hannett-Holloman demonstrated the turmoil and the partisan

bickering that ran throughout state politics in the 1920s. Also indicative of shifting party fortunes was the very instability of the supreme court in terms of the men who served. The turnover began in 1924 and concerned the two men who succeeded to the high bench in January, 1923. Both Clarence M. Botts, Mechem's last appointee to the court, and Samuel G. Bratton, Democratic victor in the 1922 election, faced reelection contests if they desired to remain on the bench. As events transpired, neither man chose to remain.

Botts decided not to run for any elective office. Bratton opted for a run at the United States Senate. Bratton's decision particularly surprised party regulars, for they anticipated a further strengthening of the party through duplication of their 1922 victories. In 1924 they had a chance to unseat Senator H. O. Bursum and thus break one of the last remaining remnants of Old Guard Republicanism. They also hoped to retain control of as many state offices as possible, and that included both the statehouse and at least one seat on the supreme court. For these reasons much of the party's political correspondence centered around the possible senatorial nominee and how generally to enhance Democratic power.

One most informative letter discussed all these matters. Written to Judge Kiker, a party insider, by a party regular in the northern part of the state, it covered the senatorial position in great detail, initially mentioning Justice Bratton and Arthur Seligman, former chairman of the Democratic state central committee, as the most likely nominees. Specifically, the letter stated:

> Bratton would make a mighty good man for the place, of course, but he would be sacrificing a sure thing, his reelection, for a doubtful one, and besides he could not finance a campaign for the senate. . . . Bratton will strengthen the ticket if nominated for reelection. Seligman would strengthen the ticket further if he were nominated for the senate.[69]

The writer than went on to discuss how these nominations and others meant the strongest possible ticket. Seligman had the money necessary to finance a senatorial campaign, and his nomination insured Bronson Cutting's strong financial backing of the entire ticket, both through his organization and his paper. (Seligman and Cutting were political allies.) This did mean the dropping of incumbent Governor Hinkle from the ticket, Cutting opposing him and his overall candidacy for

reelection regarded as weak by many Democrats. But this represented no major problem as either Joe Baca, who stood to strengthen the ticket with native voters, or Arthur T. Hannett, who was a strong contender and a desirable candidate, were acceptable gubernatorial nominees.[70] If all these political maneuvers succeeded, the Democrats were in good position to achieve their goals.

Bratton upset part of this strategy by capturing the senatorial nomination. The Democrats did nominate Hannett for governor and nominated Howard L. Bickley, Kiker's law partner, for the supreme court eight-year term, and Numa C. Frenger, a lawyer and state legislator from Dona Ana County, for the two-year term on the court. The Republican party countered with supreme court nominations for O. A. Larrazolo, Bursum's choice in 1922, and John C. Watson, a Deming attorney. They were to run for the full and unexpired terms respectively. The Republicans also nominated Bursum for the Senate and Manuel B. Otero for governor.

Yet even before the fall elections, a supreme court vacancy occurred when Bratton resigned to devote his energies to the senatorial campaign. In his place

Governor Hinkle appointed Tomlinson Fort, a Roswell attorney, the appointment being effective only until the end of the year. Hinkle elevated neither of the Democratic nominees to the supreme court for some very good political reasons. Stated Hinkle:

> It was my first thought to appoint one of the nominees to fill the vacancy created in the membership of the supreme court by the resignation of Judge Bratton. But after further consideration and in view of the fact that the nominee would be more or less in the campaign I decided to appoint some other person. In addition to this both Mr. Bickley and Mr. Frenger requested me not to consider them for the vacancy.[71]

In other words, Bickley and Frenger wanted to be free to campaign for office "more or less," judicial candidates ethically restrained from too active campaigning by the very nature of the office at stake.

Overall, the Democratic party could hardly have written a better script, for in the general elections they scored victories in the United States Senate, gubernatorial, and most top state office races. Notably, the party retained its recently acquired supreme court slot, as Bickley won the full term by the largest margin of any successful candidate for office.[72] The only major disappointment was Frenger's loss to Watson, and--while

a party misfortune--this particular contest probably turned out best for both the court and the state, at least in the opinion of a fellow Dona Ana County attorney, Edwin L. Mechem. Four-term governor of the state and currently a United States District Judge, Mechem recently said this about Frenger: "Numa was a fine, kindly person who had no business on the bench. He hated to make decisions--any decision."[73]

Supreme court elections and appointments throughout the remainder of the 1920s witnessed Republican retention of a majority on the court and a resurgence of Republican political fortunes generally. Justice Watson won a full eight-year term in 1926, and Justice Parker won yet another full term, his third, in 1928. In those two election contests Republican Richard C. Dillon was the successful gubernatorial candidate, thereby becoming the first two-term governor in New Mexico history.[74] These victories, important in terms of Republican power at that time, were actually but straws in the political wind. Of far greater significance was the fact that Frank W. Parker, who spanned more than three decades of judicial history through his service on both the territorial and state supreme court benches, was the last Republican ever to win election to New Mexico's highest court.

One last significant event in terms of judicial history occurred during the decade under consideration, and that was the expansion of the supreme court from three to five justices in 1929. Such expansion could have taken place earlier but did not given the uncompromising partisanship of the 1920s. With political conditions considerably calmer at decade's end and with litigation increasing, the governor and the state legislature were able to put aside party squabbles and take necessary action under the constitution:

> . . . the legislature shall have the power [after the 1920 census] to increase the number of justices of the supreme court to five; provided, however, that no more than two of said justices shall be elected at one time, except to fill a vacancy.[75]

In January, 1929, Governor Dillon sent a message to the ninth legislature recommending this increase in the size of the court. In so doing, he cited the physical impossibility of three justices handling the case load, the records showing over one hundred fifty cases on file awaiting attention. At the same time, he recommended a constitutional amendment providing for separate special elections of judicial personnel, a suggestion ahead of its time but one that foreshadowed a reform effort of succeeding decades. He stated:

> It is unfair to a candidate for the high office of judge, whose duty is to fairly and impartially mete out justice, to throw him into the turmoils of a general political campaign where his good name and reputation are attacked to an extent that even if elected, he must assume office under the handicap of a prejudice established among a considerable portion of the people.[76]

Leaving out Dillon's second recommendation, also a footnote on state judicial politics in the twenties, the legislature expanded the court under House Bill 31. In an obviously bipartisan move the legislature then passed it as an emergency measure, meaning there was no delay in its taking effect. The house vote was forty to five; the senate vote, twenty-three to one.[77] This gave Dillon the immediate opportunity to appoint two new justices, and lobbying efforts by the bar to make its voice heard began immediately. Thus, attorneys throughout the state wrote the governor in an attempt to influence his choices.

Many such letters had a most interesting theme in common. They suggested that bipartisan legislative action probably resulted from an unstated agreement that Dillon was to appoint one Republican and one Democrat, with the state bar narrowing the list of potential appointees.

One clear indication of this was a petition that stated:

> . . . it is our understanding that the appointment of two additional judges for the Supreme Court under the Bill recently enacted, may be made from a list of attorneys recommended by the State Bar Commissioners, three to be recommended from each of the dominant political parties in the State. . . .[78]

Another was Judge Kiker's letter to Dillon, which stated:

> It is rumored here that at your suggestion the Bar Commissioners of the state have made recommendations of names of three attorneys from each of the political parties for your consideration in appointing two new members of the Supreme Court.[79]

Emerging as the most desirable Republican appointee, in the opinion of most members of the bar, was Charles C. Catron, son of Senator Catron and candidate for appointment to the court back in 1922.[80] There were letters concerning other Republicans, but these were few. An interesting one concerned local news stories to the effect that Dillon planned to elevate District Judge Luis E. Armijo of Las Vegas to the high court, replacing him with the notorious David J. Leahy. United States Senator O. A. Larrazolo, aghast at this possibility, wrote, "If, perchance that information is correct, I beg leave to very respectfully suggest that in view of Judge Leahy's

past record on the bench it would be a great mistake and a great political disaster to make such an appointment."[81] Indeed, there was only one other indication that anyone besides Catron was considered. This came in a letter written more than twenty years later, when a father congratulated his son on his appointment to a United States District Judgeship: "I [Albert T. Rogers] wondered why you [Waldo H. Rogers] would accept the judgship [sic], as you know I declined my appointment to the Supreme Court by Governor Dillon in 1929."[82]

There were two main Democratic contenders, John F. Simms of Albuquerque, Botts' law partner, and Daniel K. Sadler of Raton, a future supreme court justice in his own right. Sadler mounted an extensive campaign, soliciting and receiving endorsements from all over the state. He even wrote a letter in his own behalf:

> I have for years had the ambition to sit on the Supreme Court of my State, and if I should have the honor of receiving one of the appointments, I assure you, I will, to the best of my ability, endeavor to fill the place acceptably. . . .[83]

Simms, whether or not he actively campaigned for the position, received endorsements from some powerful

Republican figures, including Frank A. Hubbell, Merritt C. Mechem, and Reed Holloman.[84]

On March 15, 1929, Governor Dillon appointed Charles C. Catron and John F. Simms to the supreme court.[85] The appointments were bipartisan, with Catron's active candidacy and Simms' support from Republicans evidently paying off. These two men served on the last Republican court in terms of popular support under the partisan election system, for with the election of 1930 the balance of power swung to the Democrats. All in all, considering the politics of that particular era, the Republican court acquitted itself quite nicely. It even enjoyed some lighter moments, with two anecdotes in particular worth retelling.

The first story concerned a justice who spent six months laboring over one opinion, thereby undoubtedly adding to the already heavy work load. When finished, the justice and the opinion merited and received much professional praise, including a special award from a California college. The justice then informed his two colleagues, who were trying to get him to do more work, that he was taking off to receive the award in person. He left, leaving one exasperated judge to say to the

other, "Goddammit! We've been doing all the damned work. We deserve the honorary award."[86]

The second story involved both a future and an incumbent supreme court justice. It began with James B. McGhee in an opening argument before the court reading the appropriate constitutional provision only to have the assistant attorney general say that was no longer the law. At this point, according to the account, "Justice Catron who was very hard of hearing, shook his hearing aid and said 'How's that?' The attorney repeated the statement. Justice Catron said, 'Oh Hell,' disconnected the hearing aid and did not further listen to that lawyer's argument."[87]

Unfortunately, however, there were far too few light moments in the period from 1922 to 1930. Participants in partisan politics played the game as if their lives depended on it. In many cases their political lives did, for this period in New Mexico state politics witnessed the demise of Old Guard Republicanism. The Old Guard did not, to be sure, give up without a fight and demonstrated a willingness to go to any lengths to retain its power. This too often meant using the courts, specifically partisan-controlled district courts, in efforts to stifle and to remove those who threatened its power. Admirably,

the supreme court, given the nature and the tone of its decisions, managed to remain above these most disgraceful partisan maneuvers. Still, the justices were partisans and behaved as such when it became a matter of election or appointment to the court. The selection method insured this behavior, just as the Democratic party dominance of state politics that came in the 1930s meant Democratic control of the state supreme court as well.

NOTES--CHAPTER IV

[1]Milton C. Nahm, Las Vegas and Uncle Joe: The New Mexico I Remember (Norman, Okla., 1964), p. 145. Magee was initially a Republican, an important fact given his early confidences with Fall and his later difficulties with this same party leader. His Republican party affiliation also explains how he managed to secure control of the Albuquerque Journal, a reliable party newspaper before he took it over, and how he became a Bursum correspondent and supporter in 1921.

[2]Ibid., pp. 145-47.

[3]Magee to Bursum, (Telegram) April 4, 1921, Bursum Papers.

[4]Magee to Bursum, (Telegram) April 8, 1921, ibid.

[5]Jerre Haggard to Bursum, April 14, 1921, ibid.

[6]Bursum to H. B. Hening, June 3, 1921, ibid.

[7]Magee may well have supported Bursum out of a sense of obligation. In doing so, he hardly pleased his Democratic subscribers and backers. Anti-Bursum Republicans were not happy either. Bernard S. Rodey, one-time Republican territorial delegate to Congress, responded to Magee's endorsement in the following public statement: "I desire to state for the benefit of my friends throughout the state, and to whom I have said and written many things in praise of Carl C. Magee, that I do not follow Mr. Magee in his support of Mr. Bursum in this campaign." Albuquerque Morning Journal, September 13, 1921.

[8]Ibid., November 3, 1921.

[9]Nahm, Las Vegas, pp. 148-49.

[10]Romero did use the press to rebut Magee, relying particularly on El Independiente, a Spanish-language newspaper he owned and published in Las Vegas. In front-page editorials this newspaper proclaimed the goodness of Romero. One such editorial Magee reprinted in English, a section of it proclaiming, "Furthermore, this same madness which causes his powerlessness does not permit him to understand that the New Mexico people will NEVER, NEVER, change gold for copper, that is to say, never will underestimate men who have sacrificed themselves in defense of its interests--as Secundino Romero, the king of San Miguel County, has done so many times--to pay any attention to the empty preachings of Mr. Magee." Albuquerque Morning Journal, May 27, 1921. Copy from the Bursum Papers.

[11]New Mexico State Tribune, June 8, 1923. Magee did lose control of the Journal, a loss he attributed to the financial machinations of Fall. Nahm, Las Vegas, p. 191. He then became editor of the semi-weekly, Magee's Independent, which supported the Democratic ticket during the 1922 general election. He converted the semi-weekly to a daily paper, the New Mexico State Tribune, shortly after that election. Santa Fe New Mexican, July 9, 1923. Magee's switch to the Democratic party prompted the former owner of the Albuquerque Evening Herald to write Bursum, "Your 'friend' Magee has erected a new press and will have a daily newspaper going within 30 days." Thomas Hughes to Bursum, August 4, 1922, Bursum Papers.

[12]Sena to Fall, March 5, 1921, Albert B. Fall Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[13]Sena to Fall, February 24, 1923, ibid.

[14]Parker to Bursum, January 7, 1910, Bursum Papers.

[15]C. V. Safford to Attorney General Frank W. Clancy, August 31, 1910, ibid.

[16]The Socorro State Bank, Socorro, N. M., to Judge F. W. Parker, August 23, 1918, ibid. The other F. W. Parker note was with the First National Bank of Albuquerque. In both cases H. O. Bursum acted as intermediary, receiving notification about the loans along with Parker. In at least one of the two cases, the bank simply charged the note to Bursum's account. The First National Bank of Albuquerque to Bursum, October 19, 1916, ibid.

[17]Nahm, Las Vegas, p. 150.

[18]The actual supreme court decision was State v. N. M. Pub. Co., 25 N. M. 102. The whole matter of the Bursum-Cutting duel and the contempt charges leveled by Mechem is discussed in Patricia Cadigan Armstrong, A Portrait of Bronson Cutting Through His Papers, 1910-1927 (Albuquerque, N. M., 1959), pp. 18-19; Gustav Leonard Seligmann, Jr., "The Political Career of Senator Bronson M. Cutting" (unpublished Ph. D. dissertation, University of Arizona, 1967), pp. 40-43; and John Paul Seman, "The Administration of Governor Merritt Cramer Mechem (1921-1923)" (unpublished M. A. thesis, University of New Mexico, 1953), pp. 27-33.

[19]O. O. Askren alone was responsible for the Parker libel action. Roberts assisted him in drawing up the Wagner libel action, J. H. Wagner having been early pinpointed by Magee as one of "Sec's henchmen." Askren then initiated the action against Hanna. Santa Fe New Mexican, July 23, 1923. Askren was an attorney of some note. Justice James McGhee in his memoirs placed him among "the best and most experienced." James B. McGhee, Happenings In and Around New Mexico Courts, 1909 to January 1, 1947, Plus an Early One in Texas (Santa Fe, N. M., 1965), p. 11. The reporter who covered the Magee trials for the Las Vegas Optic said of him, "Askren was, in the opinion of New Mexico's legal fraternity, the ablest trial lawyer in the history of the state." Nahm, Las Vegas, p. 154.

[20]Nahm, Las Vegas, p. 154.

[21]Santa Fe New Mexican, June 14, 1923.

[22]Ibid., June 21, 1923.

[23]Nahm, Las Vegas, p. 155.

[24]Santa Fe New Mexican, June 30, 1923.

[25]Ibid. The contempt of court citations resulted from Magee's intemperance while on trial, as he continued to lash out editorially at the Republican leaders of the fourth judicial district. One contempt proceeding specifically concerned an article about Leahy and his court. It charged that Magee published this article "for the purpose of embarrassing the court and the judge thereof in the administration of justice and for the further purpose of creating public sentiment in favor of said defendant, Carl C. Magee." This and other informations in criminal contempt can be found in the Carl C. Magee Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[26]Nahm, Las Vegas, p. 158.

[27]Santa Fe New Mexican, July 11, 1923.

[28]Ibid., July 13, 1923.

[29]Ibid., July 16, 1923.

[30]Ibid., July 18, 1923.

[31]Ibid., July 10, 1923.

[32]Ibid., July 21, 1923.

[33]Ibid.

[34]Ibid., July 23, 1923.

[35]State v. Magee Pub. Co. et al., 29 N. M. 455.

[36]Ibid.

[37]Ibid.

[38]Ibid.

[39]In re Hanna et al., 30 N. M. 96.

[40]New Mexico State Tribune, July 26, 1923.

[41]Santa Fe New Mexican, July 28, 1923.

[42]Edward Michael Praisner, "A Political Study of James F. Hinkle and His Governorship, 1923-1925" (unpublished M. A. thesis, University of New Mexico, 1950), p. 98.

[43]Ibid., pp. 98-99.

[44]Ex parte Magee, 31 N. M. 276.

[45]Ibid.

[46]Nahm, Las Vegas, pp. 213-17.

[47]Ibid.

[48]Hannett wrested the nomination away from incumbent and one-term governor, James F. Hinkle, and went on to defeat Republican candidate Manuel B. Otero

by 199 votes. New Mexico Election Returns, 1911-1969. Hannett was open about his politics, a fact readily in evidence throughout his autobiography, Sagebrush Lawyer.

[49]Holloman to Bursum, August 8, 1918, Bursum Papers.

[50]Holloman to Merritt Mechem, March 9, 1921, ibid.

[51]Holloman to Curry, September 10, 1921, ibid.

[52]Hannett, Sagebrush Lawyer, p. 142.

[53]Robert G. Thompson, "The Administration of Governor Arthur T. Hannett: A Study in New Mexico Politics, 1925-1927" (unpublished M. A. thesis, University of New Mexico, 1949), pp. 41-42.

[54]Ibid., pp. 42-43; and Hannett, Sagebrush Lawyer, pp. 142-43.

[55]Thompson, "Hannett," p. 43; and Hannett, Sagebrush Lawyer, p. 143.

[56]Albuquerque Herald, March 16, 1925, as quoted in Thompson, "Hannett," p. 43.

[57]Resolution of Impeachment, Arthur T. Hannett Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[58]Ibid.

[59]Hannett, Sagebrush Lawyer, pp. 143-44; and Thompson, "Hannett," pp. 49, 61-62.

[60]State ex rel. v. Ct. 1st Dist., Santa Fe Co. et al., 30 N. M. 300.

[61]Hannett, Sagebrush Lawyer, p. 99.

[62]Ibid., pp. 99-100.

[63]Albuquerque Journal (evening edition), May 9, 1927, as quoted in Thompson, "Hannett," p. 135.

[64]Hannett, Sagebrush Lawyer, p. 101.

[65]Thompson, "Hannett," pp. 135-36.

[66]Kiker, judge of the eighth judicial district, heard the case in the first district as the result of Judge Holloman being disqualified. Kiker was a Democrat and a Hannett supporter. Kiker actively campaigned for Hannett's gubernatorial nomination in 1922, the year Hinkle secured that position on the Democratic ballot. In one letter sent out before the convention, Kiker wrote, " . . . Hannett is sure to be the nominee unless something slips. That means we are going to have a real Governor of New Mexico if democracy prevails as I think it will surely do this year. Also, we are going to have a friend in Santa Fe when he gets there. So, please line up all of our friends who get on the delegation, if it can be done, to stand for Hannett." Kiker to C. L. Collins, August 25, 1922, Henry A. Kiker Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[67]State ex rel. Bd. of Com'rs. of State Bar v. Kiker, 33 N. M. 6.

[68]Wood v. Hannett et al., 35 N. M. 23.

[69]C. L. Collins to Kiker, March 25, 1924, Kiker Papers.

[70]Ibid.

[71]Santa Fe New Mexican, September 19, 1924; and Certificate of Appointment of Tomlinson Fort, September 19, 1924, James F. Hinkle Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[72]New Mexico Election Returns, 1911-1969.

[73]Letter from the Hon. Edwin L. Mechem, United States District Judge, January 14, 1974.

[74]New Mexico Elections Returns, 1911-1969.

[75]New Mexico, Constitution, art. 6, sec. 10.

[76]Message of Richard C. Dillon, Governor of New Mexico, to the Ninth State Legislature, January 8, 1929 (Santa Fe, N. M., n. d.), unpaged.

[77]Section 16-2-1, New Mexico Statutes Annotated, 1953 Comp. Information for the bill's passage came from the original on file in the State Archives.

[78]Undated petition from members of the Colfax County Bar, Richard C. Dillon Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico. Since there are two sets of Dillon Papers, the other being in the New Mexico Records Center and Archives, the University of New Mexico Library collection will hereafter be referred to as Dillon Papers (U. N. M.).

[79]Kiker to Dillon, February 26, 1929, ibid. Other correspondence with Dillon containing evidence of this agreement came from United States District Judge Orie L. Phillips, district attorney Fred C. Stringfellow, candidate for appointment Daniel K. Sadler, and attorneys Charles W. G. Ward, Michael J. McGuinness, and A. C. Voorhees. All these letters are in the Dillon Papers (U. N. M.).

[80]Catron apparently actively campaigned for the appointment given the extent of his recommendations. Evidence of this also appeared in a letter from United States District Judge Orie L. Phillips who said Catron wrote him asking his endorsement as Catron was a candidate for one of the positions. Phillips complied, stating that Catron "would in my judgment make a good Justice of the Supreme Court." Phillips to Dillon, February 13, 1929. This and other letters on Catron are in the Dillon Papers (U. N. M.).

[81]Larrazolo to Dillon, February 23, 1929, ibid.

[82]Albert T. Rogers, Jr., to Waldo H. Rogers, January 20, 1951, Waldo H. Rogers Papers, Special Collections Division, University of New Mexico Library, Albuquerque, New Mexico.

[83]Sadler to Dillon, February 26, 1929, Dillon Papers (U. N. M.). Sadler received virtually all of his endorsements from Democratic attorneys throughout the state. There were also letters from ex-Justice R. H. Hanna and future Justice H. A. Kiker in the Dillon Papers (U. N. M.).

[84]These letters of recommendation are in ibid.

[85]Executive Order in compliance with House Bill No. 31, Richard C. Dillon Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[86]John T. Watson, Ex-Supreme Court Justice, personal interview with the author, Santa Fe, New Mexico, August 29, 1973.

[87]McGhee, Happenings in New Mexico Courts, p. 30.

CHAPTER V

THE DEMOCRATIC COURT, 1930-1958

The 1920s was the decade during which the two-party system in New Mexico state politics functioned most vigorously. This was due both to the demise of Old Guard Republicanism and to the rise of the Democratic party as a viable opponent. Nowhere was this more evident than in the case of the supreme court. By 1929 the court's makeup included three Republicans and two Democrats; after 1930 it included two Republicans and three Democrats. This switch in party dominance came in the 1930 election, as Democrats Daniel K. Sadler and Andrew H. Hudspeth won positions on the high bench.[1]

Sadler, whose tenure on the court was to extend until his resignation in 1959, truly aspired to be a justice, unsuccessfully seeking in 1929 one of the two appointments of Governor Dillon. Hudspeth enjoyed a single term, holding his position as a reward for long and loyal service to the Democratic party. As a party veteran, he attended the constitutional convention in 1910, served as the party's chairman during the 1911

election, and held a federal appointment as the state's United States Marshall from 1913 to 1921.

These two Democratic victories proved but a part of the significance of the 1930 election, for that election was pivotal in the overall history of state politics. Democratic gubernatorial candidate Arthur Seligman captured the statehouse with the help of the Bronson Cutting faction, defeating a former justice, Clarence M. Botts, in the process. Cutting's support additionally meant the transition of many Spanish-Americans from Republicans to Democrats, this process aided by the advent of Dennis Chavez to a place of power and accelerated by the depression and subsequent Democratic control of patronage. Without the Spanish-American bloc the Republican party started on its path to oblivion in New Mexico politics, the migration of Texas Democrats into the state's east side only adding to its loss of effective power.[2]

From 1930 on, then, state politics became Democratic party politics, and each new event that affected political conditions only strengthened this reality. With respect to the supreme court Old Guard Republican

Frank W. Parker died on August 3, 1932. His death left but one Republican on the court and ushered in something of a new era. Gone from the legal community, for the most part, were the old "railroad lawyers" who helped to bring New Mexico from territorial to statehood status under the banner of the Republican party. In their stead came a younger generation of attorneys, men who arrived after statehood and who viewed politics and political offices as necessities due to the times, notably the depression. Mostly Democrats, they made their move into judicial politics at all levels, eventually coming to dominate the supreme court.

An early example of this new breed was Abraham Lincoln Zinn, elected in 1932 to the supreme court to fill Parker's unexpired term, thereby becoming at the age of thirty-eight the youngest man ever to serve on that bench. A New Mexico arrival after World War I, Zinn moved from Tucumcari to Gallup at the invitation of Arthur T. Hannett to pick up the threads of the latter's law practice. He entered law, moreover, at the direction of Hannett who told him: "If you want to amount to anything in politics, you have to be an attorney." Hannett also stressed the desirability of

practicing law vigorously and without regard to possible consequences, his maxim being, "You're not worth a damn as a lawyer until you've been brought before the grievance committee three times."[3]

A Hannett protegé politically, Zinn was throughout his career an "ardent Democrat," serving his party as chairman of Quay County even before his move to Gallup.[4] In early 1924 while still a Tucumcari resident, he wrote to Governor Hinkle protesting an advertisement for a state road contract that appeared in an opposition newspaper. Concerned with what he termed the minor details of party affairs, he stated:

> If you will go over the files of this paper for the past fifteen years, and if you can find anything at any time where this paper has said aught but ill of the Democratic Party, I'll go naked down on Central Avenue, Albuquerque in forfeiture of my statement. Why, when, how or where this newspaper, or any other Republican Newspaper should receive any help aid or assistance, in any manner shape or form from the Democratic Party is beyond my understanding of Party politics.[5]

Later in 1924 he played an active role in Hannett's gubernatorial campaign, an observer of that contest describing Zinn's character in the context of his ability as a poker player:

> He sat in with the big cattlemen and sheepmen, never blinking an eye when a thousand-dollar pot hung on the turn of a card. He brought that same courage and vigor to the Hannett campaign. He was a whirlwind.[6]

His partisan efforts brought him the party's supreme court nomination in 1932, but even before the party's nominating convention and the fall election, Governor Seligman had the opportunity to appoint an interim justice upon Parker's death in August of that year. He could have followed the Republican precedent of 1922, choosing the party's nominee to fill the vacancy.[7] Instead, he considered the matter from the standpoint of his position within the Democratic party.[8]

As in the past an impending gubernatorial appointment produced lobbying efforts on behalf of potential appointees.[9] Among the many candidates endorsed, the most significant in terms of party and state politics were Zinn, David Chavez, and Tom W. Neal. Zinn was significant because he became the party's nominee and won the November election. A typical letter on his behalf stressed his party loyalty: " He has been a life-long Democrat whose regularity is unquestionable, and has worked for the State organization at all times."[10]

David Chavez was significant because of his brother Dennis' rise to power and because of the recent Spanish-American crossover to the Democratic party. His base of support came mainly from the north, including endorsements from Democratic county chairmen in Mora, Taos, Rio Arriba, and Sandoval Counties. Ironically, Chavez supporters struck the same note, that being the favorable effect of the appointment on the native voters. One petitioner who talked with people in the north wrote the governor:

> All the people know David Chavez and we have never had a Spanish-American on the Supreme Court. . . . I believe this [Chavez's appointment] would help you very much politically in Rio Arriba County, and the Spanish-American Counties. . . .[11]

Chavez was not, however, an active candidate for either appointment or the party's nomination.[12]

Tom W. Neal was significant for a number of reasons. First, he actively sought the nomination, sending identical telegrams to the secretary of state's office and to the secretary of the Democratic state central committee. In them Neal stated: "If your personal and political obligations permit I will appreciate your suggesting to Governor Seligman my appointment to the Supreme Court Bench to

succeed the late Justice Parker."[13] He solicited other support as well, with even his son, a future district court judge, unabashedly writing:

> I feel that Dad is qualified in every particular to fill the position . . . and I feel that a candidate for the Supreme Court on the ticket from the Southeastern part of the State will materially aid us in this section.[14]

Second, Neal was Seligman's appointee in what was one of the most curious cases of appointment to the supreme court ever. For the actual appointment became effective on November 13, 1932, succeeding not only the Democratic nominating convention but also the election itself.[15] Zinn by that time was both nominated and elected. What this meant was that Seligman, successfully reelected for a second term, bypassed a fellow Democrat and office-holder designate, elevating Neal to the court for one-and-a-half months. Still, the move must have made sense to Seligman in terms of these party matters.

Neal was a "Cutting Democrat"; Zinn, an anti-Cutting or Hannett Democrat. Also, Neal came from the southeastern part of the state, a section where Seligman's support was most uncertain. Further, the letters of recommendation concerning the appointment came from party

regulars as much as from lawyers, an unusual occurrence in the politics of appointment to the supreme court. These party regulars consistently pointed out to the governor that he should follow their suggestions if he wished to benefit politically. Seligman acknowledged every such letter with the words, "your esteemed favor. . . ." The appointment of Neal, given these considerations, was Seligman's way of paying off his political and his party debts.

Party affairs in the next few years continued to set the tone for the judiciary's role in the political process. In the 1934 supreme court race a former district judge, Charles R. Brice, defeated John C. Watson, the last remaining Republican on the high bench.[16] Also in that year occurred the big Dennis Chavez-Bronson Cutting battle for the United States Senate. It was an intensely waged contest, one that exposed the very factionalism of New Mexico politics. It also involved the supreme court, with a sitting justice in the middle of the fray and with the court itself eventually determining its outcome.

Essentially, the election became by its very nature a political and personal vendetta against Bronson Cutting. Cutting, a progressive and owner of the

influential Santa Fe New Mexican, played both sides of New Mexico politics in the 1920s and early 1930s. He alternately supported Republicans and Democrats, helping to factionalize the internal structure of the parties themselves. As already mentioned, he backed Democratic Governor Seligman in 1930 and 1932 while representing New Mexico in the United States Senate, and in 1934 he ran for reelection as the Republican candidate. As the campaign progressed, the issue was clearly Cutting against the regular Democratic machine and its allies, anti-Cutting Republicans led by Holm O. Bursum.

Cutting helped draw the battle lines, using his newspaper to lash out at his political foes. In one particularly open attack the New Mexican spoke of "the necessity of exterminating the system of government and the relief for old guard Democrats only, which had been fastened upon the state by the present administration." It named as chief exponents of this system gubernatorial candidate Clyde Tingley, Dennis and David Chavez, the latter a "race prejudice agitator," A. L. Zinn, and A. T. Hannett, "favorite legal representative of those caught in vice dragnets in Gallup." It ended by saying:

> Two more years of it would fasten it tighter around the neck of the proletariat which pays sales taxes to support a very small-caliber political ring, in government for what there is in it for themselves.[17]

The New Mexican's attack continued throughout the campaign, with this note appearing in October under the heading, "Political Pleasantries: The political landscape is getting over-cluttered with Abe Lincolns, including Bursum, Zinn, Kiker, Dennis Chavez and Tingley, born in humble two story brick cabin with an opened ballot box in his mouth."[18] On October 27 the New Mexican's headline read, "GALLUP CROWD CHEERS: Bursum Democrats, Abe Zinn Pure Judiciary, Gallup Tammany Hall, Hockenhull's Tax Pills, Topics." The story concerned a Cutting speech in Gallup and at one point stated:

> Hannett has moved to Albuquerque and Zinn has been elevated to the bench, but the machine they made famous, even attracting the unwelcome attention of a United States grand jury to vice conditions here, continues to thrive.[19]

Then, on October 30, just days before the election, Cutting's paper took a direct swipe at Justice Zinn. It focused on the Democratic platform's call for legislation effecting a non-partisan judiciary and questioned Zinn's activities in light of this pledge: " . . . we find the

Honorable Abraham Lincoln Zinn, justice of the supreme court, occupying a desk at Democratic state headquarters throughout nearly every day and the better part of some nights." It reported that Chief Justice Watson, a candidate for reelection, devoted his time by contrast to the work of the court, taking no part in the political campaign.[20]

Whatever the effect of the New Mexican's campaign against the Democrats, it did succeed in making Zinn, a sitting supreme court justice, a primary figure and issue in the senatorial contest. Its influence might also have accounted in part for Cutting's victory, as he narrowly defeated Chavez by 1,284 votes.[21] It definitely upset the Democrats it vilified, they having opposed Cutting from the outset through a coalition with Bursum Republicans. Still, the newspaper could in no way have upset the Chavez backers as much as the election returns, for according to Hannett's account, "When the results were announced after midnight, Judge Zinn became very emotional while Judge [David] Chavez, who had neither eaten nor slept in several days, fainted."[22]

Hannett and Zinn decided to contest the election, with what Hannett recorded as the blessing of President

Franklin D. Roosevelt provided they could show Chavez was indeed elected. As formulated, the action reached the New Mexico Supreme Court in December, 1934. Significantly, the court split, Daniel K. Sadler delivering the majority opinion. The majority took a very narrow line in reaching its decision and relied on strict definitions as to what constituted election "returns" and the powers of the state canvassing board. It simply declared that the election law carried with it a strict statutory definition in directing the state board to canvass and declare the result "from the returns certified to the secretary of state by the election officials of the several precincts."[23] Two district judges concurred in the Sadler opinion. Neither Justice Watson, a member of the canvassing board, nor Justice Hudspeth heard the case.

Howard L. Bickley and Zinn wrote a strong dissent. The minority opinion took a wider tack, initially agreeing with the state canvassing board's definition of "returns" as meaning more than merely certificates. It also viewed the powers of the board in much broader terms, holding that the board could in effect look behind the election returns and examine voter registration lists

and other election papers. It held that if the board found any certificates false and fraudulent in terms of these papers on file with it, it could refuse to canvass such supposed returns. Thus, as the minority concluded in this classic dissent:

> To say, as the prevailing opinion apparently does, that the state canvassing board and the courts are 'confronted with a disgraceful situation,' with respect to the conduct of an election, and that they cannot do anything about it, even to the extent of looking at the registration books, the constitutional and legislative yardstick by which the right to vote, right to receive votes, right to count votes, right to canvass votes, right to return votes, is a doctrine in which we cannot acquiesce.[24]

The canvassing board never actually considered whether any of the returns of the 1934 senatorial election were false. It never got that far. The effect of the supreme court's decision was to certify Cutting's election in one of the most hotly, internally contested supreme court opinions ever. Either Watson or Hudspeth might have thrown the election the other way, but this was not to be. Still, the outcome notwithstanding, the real significance of the 1934 election lay in these post-election maneuvers, the contest challenging the election and its resolution by the state supreme court.[25]

Viewing the wreckage of the Republican party, the result of the Republican cooperation with Democrats in the nearly successful effort to break Cutting, one observer could only say, " . . . but we were counted out."[26]

The aftermath of that election and the supreme court's ruling had other effects on New Mexico politics as well. It led, in the first place, to the immediate legislative adoption of the Hannett Election Code. Proposed originally in 1925 as a bipartisan measure, the code provided for an individual registering for himself in his own district, a bipartisan registration board supervising the election, only one voter entering an election booth at a time, and modern methods of handling ballot boxes. Old Guard Republican and Cutting opposition defeated this reform effort in the 1920s, Cutting alleging that the code was an attempt to disenfranchise Spanish-Americans. He argued that these voters needed assistance at the polls to help them understand the ballot.[27] In 1935 the Hannett code passed easily. Cutting in the throes of fighting for his political life could not again block its passage. Ironically, the code's enactment grew directly out of Cutting's election as contested in the Chavez case before the supreme court.[28]

The aftermath of the Chavez-Cutting election led, in the second place, to the United States Senate. Hannett filed an official contest against Cutting, presenting a bill of particulars before the committee on privileges and elections. A bitter fight ensued, finding its counterpart in the activities of politicos within the State of New Mexico. Miguel A. Otero, Sr., whose son District Judge Miguel A. Otero, Jr., sat and concurred in the supreme court's majority opinion in the Chavez case, warned Cutting about the results of a possible recount. Noting Chavez's presence in Washington and basing his fears on the 1924 Hannett election, Otero wrote Cutting:

> Should a recount of the votes be ordered, you must see that it includes all the counties in the state, and such a procedure must be watched very carefully in every county. You remember, Hannett was elected, no <u>not</u> elected, but counted in, after a precinct certificate was purloined from returns made and filed in the Secretary's office, from Quay county, and a bogus certificate inserted in its place, with a showing of enough votes to overcome Manuel's [Otero] majority. It was a clean steal, and that bunch representing Dennis Chavez are capable of doing anything irregular.[29]

Otero's warning was most timely, especially in light of the concern expressed by Democrats over ballot

box keys and the shipping of ballots to Washington. Carl A. Hatch, successful Democratic candidate for the United States Senate's short term in 1934, wrote Governor Tingley about this very matter. Referring to the role of the sargeant-at-arms, Hatch stated: "He will supervise the shipping of the ballots so there will be no chance for skullduggery."[30]

In addition to this concern shown and care taken by the Democratic party, Cutting also had to worry about the opposition party's united action on behalf of Chavez. Typical of this was a unanimous resolution of the Bernalillo County Democratic central committee which read:

> This committee endorses and ratifies the policy which has been adopted by Hon. Dennis Chavez in contesting the election of Bronson Cutting as Senior Senator to the Congress of the United States from the State of New Mexico, and pledges its undivided support to Hon. Dennis Chavez in his efforts to secure the seat as Senior Senator of our State.[31]

The Senate committee but further added to Cutting's worries. It refused Cutting's request for dismissal of the contest and proceeded with plans to take testimony at Las Vegas, New Mexico, San Miguel County being singled out in the Hannett bill of particulars. Returning to Washington

after conferring with his attorneys, Cutting was killed in a plane crash. According to Hannett, Holm O. Bursum, Jr., offered this epitaph as representing the feelings of many state politicians: "We took care of the Progressive Republicans and God took care of Cutting!"[32] The irony of Cutting's death was complete upon the appointment of Dennis Chavez to the Senate seat left vacant.

The election of 1934 thus ended, but many of its key figures were and remained very much on the spot politically both during and after the contest. In particular, A. L. Zinn, the justice who so ardently represented the Democratic party in its opposition to Cutting, found that his woes were not limited to the publication of adverse newspaper stories. Rather, he faced a supreme court and a state bar association skeptical of his ethics as an attorney, a skepticism which led to eventual disbarment proceedings against him. This disbarment action, moreover, took place while he was a justice of the supreme court.

Zinn's problems preceded his election to the court, beginning on June 17, 1932. At that time he was special assistant to the tax attorney for the state tax

commission and was in charge of collecting delinquent taxes in McKinley County. Receiving $500.00 on account to hold while a delinquent taxpayer sued for lower taxes, Zinn and his wife deposited this money along with their own for use by a brokerage firm in stock speculation. On September 15 he received another $500.00 from the same man and invested it similarly. Finally, on January 31, 1934, Zinn turned the money paid over to the clerk of the district court in McKinley County, having learned two days earlier that the taxpayer in question filed suit for tax adjustment in May, 1933.[33]

In July, 1934, the supreme court took up this matter. At issue was a motion by the court-appointed investigator asking the court to require of Zinn more definite and certain answers concerning his actions.[34] The purpose of this motion, according to a newspaper account, was to make Zinn say where he had the $1,000.00 on deposit, this money alleged by the defense to have been intact at all times. Also at issue was the matter of who was to sit in judgment of Zinn. The defense as well as the special prosecutor preferred that the court itself try the case in the first instance.[35]

Initially taking the motion under advisement, the supreme court ruled that the respondent, Zinn, could not assume a purely defensive attitude. It said that Zinn could divulge the information if he liked but that if he did not, he was in effect admitting "that there is no sufficient or effective denial that the moneys were not kept intact as a trust fund; which allegation of the charges will be deemed an admitted fact."[36] The court then opted not to sit in the original disposition of the disbarment proceeding, ordering the grievance committee of the state board of bar commissioners to look into the question of fraud or fraudulent intent.

In March, 1935, the matter was once again before the high bench. The grievance committee, having looked into the matter, recommended to the entire board of bar commissioners the filing of formal charges against Zinn. The board concurred, setting down seventeen findings of fact. It concluded that Zinn did not act with fraudulent intent but that he violated his duties as a member of the bar through the comingling of the moneys received with his own. Based on the board's report, the supreme court issued as its judgment, "that respondent, A. L. Zinn,

should be, and he is hereby, severely reprimanded, and that he should pay the costs of this proceeding. . . ."[37]

The New Mexican commented on the case of its old nemesis the day following the decision. It scored the fixing of the minimum penalty but also noted that the court "inflicted a serious punishment by mere affirmation of the judge's culpability. It is said to be the first time on record that members of a court thus indicted a fellow justice." The newspaper went on to reason that public confidence in Zinn as a justice was severely impaired, especially with reprimand added to the general belief of the judge's partisan activities while on the bench. Recalling the justice's words in an opinion to the effect that "a judge must be as free of reproach as Caesar's wife," the editorial concluded: "There seems to be an absurd lack of necessity for anyone to make the superfluous suggestion that he resign immediately as a justice of the supreme court."[38]

Zinn did not resign from the court but instead tested public confidence by seeking reelection in 1936. Opposed by the highly respected former Justice Watson and dogged by his past, Zinn won easily. The public thereby expressed its confidence in the justice or,

perhaps, in the Democratic party's nominee and ignored the New Mexican's maxim of "GO AND Zinn no more."[39] Other Democrats who won supreme court contests in the 1930s were Sadler, reelected in 1938, and Thomas J. Mabry, nominated and elected in 1938 to fill the seat Hudspeth no longer wished to occupy.[40]

Mabry's victory was particularly significant in that it signaled the advent to the high bench of yet another member of the new generation of attorneys. Like Zinn, he became a lawyer after his initial entry into politics, an entry highlighted by his participation in the constitutional convention as its youngest member. Like Zinn, he was a loyal party man, having already served as state senator, crusading district attorney, and district judge. He was later to be the state's governor.[41]

The 1940s began where the previous decade left off, with each supreme court election only further demonstrating the absolute nature of Democratic party control. Justice Bickley won his reelection contest in 1940; Justice Brice, in 1942.[42] Also in common with the 1930s was the continuation of controversy surrounding A. L. Zinn. He as well as other state

officers entered the army in the 1940s. He did so in the summer of 1942 for two reasons. First, he regretted not having fought in World War I. Second, he believed that to get anywhere in politics after the war, a man needed to have served in the armed forces.[43] What he did not do was resign from the supreme court.

He was not alone in the matter of retaining his office, but he was apparently unique in continuing to draw pay from the state. Paid on a quarterly basis, he received a check as late as January 1, 1943, and was to receive his next increment at the end of March, 1943. Indeed, the clerk of the court presented the usual payroll voucher to the state auditor at that time, it being Zinn's claim that he was acting on precedent in "red pencilling" his army check in favor of compensation from the state. Rejecting this claim, the state auditor announced: "I am withholding pay of Justice Zinn as a member of the supreme court and as a trustee of the state law library because he is not here and has not been here during the past three months. It is his next move."[44]

The next move was actually legislative, and it involved a bill which in part gave the governor power to fill the temporarily vacated seats of Zinn and two

district attorneys. The question of the bill's constitutionality arose.[45] Nevertheless, the legislature enacted it into law.[46] Zinn then made his move. He apparently did not contest the matter of his salary. He decided instead to resign, writing Governor John J. Dempsey to that effect in May, 1943. He began by stating that the war effort was more important than either litigation challenging the constitutionality of the law or his right to retain office. He also acknowledged that army regulations prohibited him from seeking reelection in 1944. For these reasons, said Zinn, and

> . . . to permit you to appoint someone to my place on the bench without any cloud on the title of that position, I hereby tender my resignation as Chief Justice of the Supreme Court of the State of New Mexico, effective as of this date.[47]

Speculation as to Zinn's successor began immediately. Initially mentioned as possibilities were Henry A. Kiker, then practicing law in Santa Fe and a former district judge; Fred Wilson, attorney of the interstate streams commission and Hanna's old law partner; Martin A. Threet, Las Cruces district attorney; and Herbert B. Gerhart, clerk of the supreme court.[48] The Santa Fe New Mexican on May 21 advocated the

appointment of Gerhart as a way to help get politics off the bench. On May 26 it reported that Kiker decided not to take the position, he being Dempsey's first choice. And on the first day of June it announced the actual swearing in of Threet as the new supreme court justice.[49]

It was appropriate that Martin A. Threet replaced Zinn, for he was another new generation lawyer. His reputation was that of a real crusading district attorney whose efforts to eradicate gambling in the southern part of the state were well known.[50] A stern man of unimpeachable character, he resigned his position as officer of the third judicial district in order to accept the supreme court appointment.[51] As suggested by a fellow Dona Ana County attorney, Threet's appointment may well have been a nice way of kicking him upstairs.[52] In other words, he was possibly pushed out of the district attorney's office by those interests unsympathetic to his anti-gambling crusade.

As the 1944 election approached, it became apparent that Threet's supreme court seat was to be challenged by two other Democrats. Threet, himself a candidate in the Democratic primary, did not campaign, having suffered a heart attack and having been told by his colleagues that

supreme court justices simply did not actively seek office. And also affecting his reelection hopes was the lack of expected support from Dempsey.[53] For these reasons Threet ran third, with his opponents turning the party's primary into an extremely close two-man race.

The two who outpolled Threet were George L. Reese, Jr., and Eugene D. Lujan. Reese, a Carlsbad attorney, was an active member of the bar who was later to push for reform of the judicial selection method. Lujan, also an attorney, had already served as an officer of the court, first as district attorney of the second judicial district and later as district judge of the seventh district. These two candidates by virtue of the primary's results as first reported were separated by a mere seventy-seven votes, with Lujan the apparent winner.[54]

The contest did not, however, end there. Yet to come were a number of challenges, the supreme court itself hearing two cases and, in effect, deciding who was to sit on that very bench. But even before the issue reached the point of judicial resolution, the state canvassing board took action. In early July it voted to issue Lujan the election certificate while, at the same

time, withholding it pending an expected Reese writ of mandamus.[55] Reese then filed for the writ in the supreme court, leading to the first of the two cases heard therein.

Reese, in directing his writ to the state canvassing board, asked its members to do more than simply certify the results of the primary election. What he wanted was for the board to go behind the returns, contending that enough unregistered electors (voters not shown to be Democrats) voted in the primary for Lujan to change the results of the election if they were purged. He based his argument on the adoption of the Hannett code as the direct outcome of the Chavez case of ten years earlier and maintained that the election laws so enacted applied to party primaries as well as to general elections.[56]

Concurring in Reese's interpretation of the laws, Justice Mabry, joined by Justices Bickley and Brice, delivered the majority opinion of the court. Adopting a broad interpretation of the constitution's admonition that the legislature and the canvassing board were to secure pure elections, the court said:

> We are not inclined to "chop technicalities" to the end that the broad purposes and legislative policy manifested by the acts, as here construed, may be defeated; or that the powers and duties of the State Canvassing Board may, by strained definition, be cramped into such narrow compass that it cannot function in the public interest.

It then made Reese's writ of mandamus absolute, retaining jurisdiction in the cause in the event further relief was applied for.[57]

The two district judges who sat in on the case dissented. Strictly interpreting the election laws and the power of the judiciary, they maintained that the legislature, presented with at least two different opportunities to do so, did not include party affiliation as an index to action by the canvassing board. Based on this fact, they concluded that

> . . . if the legislature by over-sight or neglect failed to put in sufficient provision to make it [the statute] workable then it is not the province of this Court to provide that which it believes the legislature forgot and thereby assume the duties of the legislative branch of Government.[58]

The majority opinion of course prevailed, and a recheck of the ballots gave Reese a two-vote lead as of September 29. On October 3 the board issued Reese a

certificate of election, only to have Lujan request a recount three days later. The recount completed by October 18, Lujan was shown winning by thirty-five votes, and he received the board's certificate of election.[59] This game of swapping votes and election certificates prompted one last action, with Reese again appealing to the supreme court.

This time Reese asked that the entire votes of six precincts be thrown out as the result of non-Democrats voting there. This the majority of the court, Mabry and the earlier dissenting district judges, refused to do. They could not do so, as Mabry put it, because of the "reluctance of the Courts to permit a wholesale disfranchisement of qualified electors through no fault of their own. . . ."[60] This time Bickley and Brice dissented, remaining adamant in their demand for a fair election. They asserted that the board "failed to follow any method which would accomplish the paramount purpose of the law and as declared in the mandamus, to wit, to find out who 'received the highest number of legal votes in their respective races.'"[61]

This second supreme court decision, rendered but two weeks before the general election, meant that Lujan

was the Democratic candidate. As the party's standard-bearer, he carried the November election, becoming in the process the first Spanish-American to serve on the state's highest court.[62] There then followed a number of other changes in court personnel. Mabry resigned from the bench in March, 1946, telling Dempsey:

> As you know, I am very anxious to enter actively into my campaign for the Democratic nomination for Governor of New Mexico. Your promptness in naming my successor to qualify at once will, therefore, be greatly appreciated.[63]

Dempsey complied, naming former Justice Hudspeth an obvious interim appointee on March 30.[64] Democrat James B. McGhee, a district judge, succeeded to the seat, winning both the primary and the general election.[65]

On March 4, 1947, Bickley died. The choice of his successor was more complicated than that necessitated by Mabry's resignation, for the appointee was to serve for almost two years or until the next general election. Still, Mabry, now the governor of the state, acted quickly. He appointed H. A. Kiker, among other things Bickley's one-time partner, to the position on March 8.[66] It was a popular choice, one that received editorial commendation: "Governor Mabry lent dignity and ability to the New Mexico Bench when he appointed H. A. Kiker to

the supreme court vacancy created by the death of Justice Howard Bickley."[67]

The matter might have ended there, but it did not. Kiker wrote the governor that the pressures of his private law practice prevented him from accepting the position, and as he wished to be fair to both the court and the state's chief executive, he asked Mabry to withdraw the appointment. Expressing his "deep regret" concerning Kiker's decision, Mabry announced his intention to fill the vacancy at once.[68] True to his word, he appointed District Judge James C. Compton to the supreme court that very day.[69] Compton, who was to remain on the court for over twenty years, won election in his own right in 1948.[70]

During the remainder of the 1940s, notably, the supreme court undertook to clean up gambling activities centered in Dona Ana County. An old problem, District Attorney Threet crusaded actively against such illicit behavior in both the 1930s and the early 1940s, but with his removal to the high bench, the problem got progressively worse. It became so bad, in fact, that a committee of prominent Las Cruces lawyers turned to the supreme court for help. Chief Justice Brice decided to act in

order, according to one observer, to "save Tom Mabry's administration from any manipulation by gamblers." Having so decided, the chief justice turned the district court and grand juries loose with broad powers to rectify the situation. The campaign was a complete success; the gamblers moved out of the state.[71]

As much as anything this episode reflected on the character of Charles R. Brice. A strong personality and recognized as having one of the best legal minds among those who have served on the New Mexico Supreme Court, he did not hesitate to act or speak out when he felt moral issues were at stake or that he was right. In this instance he probably overstepped the boundaries of judicial power in issuing the broad mandate for action to the courts and juries.[72] On other occasions he was equally forthright, exhibiting such behavior in this confrontation with Hannett.

Appearing before the supreme court for the third time as the attorney in a case, Hannett recalled how Brice interrupted his opening argument, the justice saying, "Governor Hannett, this is the third time you have been up here, and I wrote the opinion the last time. As far as I am concerned, I am going to decide the case

against you." Hannett, as he remembered it, regained his composure and courteously replied, "If Your Honor please, I greatly appreciate your frankness. Now may I offer the suggestion that you will remain silent during the remainder of my argument so I may have the opportunity to address the members of the Court who have open minds!"[73]

As the supreme court moved into the 1950s, it was to be an institution of personalities more than one of jurists handing down decisions of major constitutional or political consequence. It decided no major political contests as it previously had in 1934 and again in 1944. Still, the conditions of state politics as much as other considerations helped shape this very nature of the court. It was a time when prominent legal figures sought to cap their careers by serving as supreme court justices. It was a time when a Republican governor ascended to the statehouse, the first Republican to be so elected since 1928. It was also a time of relative instability on the court.

The change in court personnel began in 1950. Justice Brice was up for reelection, and he indicated a definite willingness to run. He apparently conducted an extensive letter-writing campaign, soliciting help from

Republican as well as Democratic attorneys. Reviewing a judicial career that included nine years as district judge followed by sixteen years as supreme court justice, he announced his candidacy for the Democratic party's nomination in the primary. He then asked for aid, writing this to an Albuquerque lawyer of Republican persuasion:

> My record of service on the bench is well known to you as a lawyer. It is on that record that I seek renomination and reelection. Any assistance you can give me among your Democratic friends in securing renomination, and among the voters at large in my reelection, if renominated, will be greatly appreciated.[74]

But neither Brice's bid for renomination nor reelection came to pass. One possible reason for this was suggested by a student of the court. According to him, Brice was the only justice at that time who had a true legal mind, with none of the other justices really caring about legal points. A misfit, Brice was literally pried off the court, announcing to his colleagues as he left that he had already made two fortunes in legal practice and that he intended to make yet a third. After leaving the bench, he did precisely that.[75]

Whatever the reason, Brice did not enter the 1950 Democratic party primary. The opponents in that contest were Zinn and Henry G. Coors. Coors handily carried the primary, mainly due to a big push from Albuquerque, his hometown.[76] In the general election campaign his Albuquerque-based support continued to provide the impetus. Behind him was an influential bipartisan organization of local attorneys who spared no effort.

Tightly structured, this organization made use of a number of committees. First was the "Lawyer's Canvassing Committee" headed by a future Republican justice, Augustus T. Seymour. It was to solicit lawyer endorsements and letters from lawyers to clients advocating Coors's election. Second was the "Committee to Compose and Print Lawyers Letters" directed by Waldo H. Rogers, a future Republican United States District Court Judge. Third was the "Publicity Committee" chaired by then Democratic district attorney and later district judge, D. A. McPherson. It was to get radio time and newspaper advertisements. Fourth was the "Finance Committee" which had the duty of securing campaign contributions.[77]

In addition to its superb organizational features, this campaign effort also revealed a remarkable attempt

by members of the bar to insure the election of a judge sympathetic to them. Not a new effort, many of these same lawyers worked in Coors's 1948 district judge campaign. The tactics were much the same and included a form letter lawyers favoring Coors were to send to their clients. It suggested, for example, that these clients might become enmeshed in litigation and that they would want their matters heard by such a judge as Coors. But even more significant in terms of the politics of judicial selection was this section of the letter:

> Regardless of your political faith I hope you will support Judge Coors as the importance of this Judge transcends party lines. (Note: If the writer is a Republican the following is suggested:) As you know I am a life-long Republican and have rarely scratched my ticket. It is because of Judge Coors outstanding qualifications and his non-partisan and objective approach to all judicial matters that I find myself urging you and other of my clients to support him.[78]

Coors won the 1950 supreme court election. Also elected was the Republican gubernatorial candidate, Edwin L. Mechem. In 1952 Justice Lujan was successful in retaining his seat on the high bench.[79] And then in the summer of 1953 Coors, having capped his career as supreme court justice, resigned in ill health. This gave Governor

Mechem an opportunity to appoint the first Republican justice to the supreme court since Watson left the court in defeat at the end of 1934. While definitely a great opportunity, the matter of appointment was also complicated. For Mechem hoped to appoint a man willing to run as a Republican candidate for election in 1954, not an easy task given total Democratic domination of supreme court elections for nearly twenty years. He found such a man in Augustus T. Seymour, appointing him to the court on July 8, 1953.[80]

In the 1954 general election Seymour's opposition came from Kiker. Kiker--who had been long on the scene--ran for the supreme court in 1926, losing to Watson, and turned down in the 1940s appointments tendered him by both Governors Dempsey and Mabry. His decision to run in 1954 was still quite simple. He wished to end his career at the pinnacle of his profession. Thus, in his announcement of candidacy this member of the New Mexico bar for forty years said, "I will consider it a great honor to be privileged to conclude my legal career with service on the state's highest bench."[81] Kiker was accorded that honor, easily defeating Seymour for a four-year term in the November election. Two years later Justice Compton was returned to the court.[82]

Finally, the court in the 1950s which began on a note of changing supreme court personalities ended in the same manner. Kiker, content with a tenure of four years, was never a candidate for renomination. This meant a hotly contested Democratic primary, but it meant more than that, for Kiker died in March, 1958. This accorded third-term Governor Mechem one last chance to name a Republican justice. With W. Morris Shillinglaw of Las Vegas unopposed for the Republican party's supreme court nomination, speculation focused on his possible appointment.[83] On March 31 Mechem ended all speculation, appointing Shillinglaw because that appointee was a willing and active candidate for the position in his own right.[84]

Shillinglaw was on the court for less than a year, but he was one of its most interesting personalities, in part because he was something of a tragic figure. Apparently crippled by a virus, he decided to read the law and become a lawyer. Given some law books by Dick Modrall, a prominent and eminently respected New Mexico attorney, he studied for about a year and then announced his intention to take the bar examination. Modrall told him no one could pass the bar after only one year of

study, but Shillinglaw was insistent: "Well, I've already hired a hearse, and I'm going." His posture permanently rigid, he could have travelled by either ambulance or hearse, but as the latter was cheaper, he chose it. So, he rode down to Santa Fe in a hearse; he also passed the bar examination.[85]

Shillinglaw further demonstrated his determined character by serving in the state legislature. He maneuvered by means of a walker and rode around in the back seat of a car only being able to lie prone. Thought highly of by all who knew him, he accepted Mechem's appointment with great enthusiasm, an enthusiasm not shared initially by Justice James B. McGhee. According to Mechem, McGhee walked over to the governor's office and said, "You can't appoint Shillinglaw; he's a cripple. You can't do that." McGhee, whose concern was more with the amount of work done by any one justice than with the quality of work done, had a change of heart within a month or two. Returning to Mechem's office, McGhee conceded: "It's all right. He [Shillinglaw] is doing even more than his share."[86]

A Republican, Shillinglaw stood virtually no chance of winning the election, the contest in 1958 thus centering

in the Democratic primary. Announced as candidates even before Kiker's death were two strong contenders, Albuquerque attorney Waldo Spiess and District Judge David W. Carmody. The two utilized different strategies, with Spiess making his main effort in Albuquerque and Carmody hitting all thirty-two counties.[87] Carmody won the primary by more than ten thousand votes and went on to defeat Shillinglaw in the general election.[88] Democratic domination of the supreme court remained intact.

Distinguished by its personalities more than by its decisions, the 1950s court proved frustrating to some who served on it as well as to some who practiced before it. Justice McGhee expressed this frustration in terms of the lonely existence of a supreme court justice during that decade:

> So far as I know, a happening with a human interest angle seldom happens in the Supreme Court or growing out of its actions. When one becomes a member of that Court he is removed from the area where things of interest are happening. Except for the time taken at oral arguments and short vacations, a Justice of that Court has, for all practical purposes, taken the veil.[89]

Attorney Hannett expressed this frustration in terms of practicing law before the bench during this decade:

> The Supreme Court judges, particularly in the State Supreme Court, are very often afflicted with the "intellectual itch" and try to write literary masterpieces. The worst fault of all is found in the appellate court where it is common practice for judges to write opinions which state facts entirely unsupported by the record, in order to bolster up a bad decision. Frequently they ignore evidence appearing in the record and cite facts which never happened but which make a bad decision look good.[90]

McGhee and Hannett possibly spoke only for themselves. Still, Mechem's election excepted, state or Democratic politics was during this period of time most predictable, a state of affairs naturally influencing the supreme court's role within the political process. Under Democratic control for two decades the court largely became an institution where some attorneys ended their careers and where others sat as the next logical step up from district judgeships. It also became an institution attracting the attention of a legal profession determined to effect its control over the selection of judicial personnel. As a judicial institution, it heard mostly routine cases.

The Democratic court of the previous two decades was, of course, more directly involved in political matters. It resolved such political issues as a United

States Senate contest, a disbarment proceeding against one of its own members, and a primary election race for a position on the court. Yet, the Democratic bench during all three decades shared much in common. First, colorful personalities were to be found on the court at any given time. Second, the court acted more to preserve the status quo than to upset it, although at times some members seemed willing to assert the authority of the bench for constructive change.

NOTES--CHAPTER V

[1]New Mexico Election Returns, 1911-1969.

[2]Beck, New Mexico, pp. 311-12.

[3]Frank B. Zinn, New Mexico District Judge, personal interview with the author, Albuquerque, New Mexico, March 1, 1974.

[4]Ibid.

[5]Zinn to Hinkle, January 14, 1924, Hinkle Papers.

[6]Kyle Crichton, Total Recoil (Garden City, N. Y., 1960), p. 80.

[7]One prominent attorney suggested just this, recommending that Seligman appoint no one until after the Democratic convention and then that he appoint the party's nominee. As he put it, " . . . should someone be appointed until the 1st of the year, he would be honor bound to accept the appointment, even though for the brief space of time that it would be, and if he were not nominated it would be a hardship on him, and as well work to the detriment of whoever would be nominated." Noting the bright outlook for Democrats in 1932, he added, " . . . there should be no cause for trouble or strife, if it can possibly be averted." J. C. Gilbert to Seligman, August 9, 1932, Arthur Seligman Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[8]An indication that Seligman had to keep in mind his base of support came from a Clovis Democrat who reminded the governor of efforts to suppress active opposition against Seligman in that part of the state, efforts that were not entirely successful. The writer then indicated that the right supreme court appointment

might be of help, saying, "I feel that my suggestion to you would cut a great big chunk of ice in Eastern New Mexico. In fact, I do not think, I know." C. A. Scheurich to Seligman, August 4, 1932, ibid.

[9]In an undated statement Seligman listed seventeen separate individuals who were recommended to him for the vacancy on the supreme court. Ibid.

[10]Carlos Manzanares to Seligman, August 15, 1932, ibid.

[11]Matias Velarde to Seligman, August 13, 1932, ibid. The other Chavez endorsements also appear in the Seligman Papers.

[12]Letter from David Chavez, Jr., Ex-Supreme Court Justice, February 25, 1974.

[13]Identical telegrams from Neal to Maguerite P. Baca and to John Bingham, August 7, 1932, Seligman Papers.

[14]Caswell S. Neal to Seligman, August 12, 1932, ibid.

[15]Proclamation of Appointment, November 13, 1932, ibid.

[16]New Mexico Election Returns, 1911-1969.

[17]Santa Fe New Mexican, September 25, 1934. Seligman died in 1933 and was succeeded by A. W. Hockenhull. This led to adjustments in both party and policy organization and solidified Democratic control of the state. For these changes see Holmes, Politics, pp. 230 ff.

[18]Santa Fe New Mexican, October 20, 1934.

[19]Ibid., October 27, 1934.

[20]Ibid., October 30, 1934.

[21]New Mexico Election Returns, 1911-1969.

[22]Hannett, Sagebrush Lawyer, pp. 210-11.

[23]Chavez v. Hockenhull, 39 N. M. 79.

[24]Ibid. Bickley's dissent here is considered among his most important. See "In Memoriam," p. xvii of 51 N. M.

[25]The Chavez-Cutting election contest of 1934 has received much scrutiny and sparked controversy among historians in recent years. For example, see William H. Pickens, "Bronson Cutting VS. Dennis Chavez: Battle of the Patrones in New Mexico, 1934," New Mexico Historical Review, XLVI (1971), 5-36; T. Phillip Wolf, "Cutting VS. Chavez Re-Examined: A Commentary on Pickens' Analysis," ibid., XLVII (1972), 317-36; William H. Pickens, "Cutting VS. Chavez: A Reply to Wolf's Comments," ibid., pp. 337-59; and G. L. Seligmann, Jr., "The Purge That Failed: The 1934 Senatorial Election in New Mexico: Yet Another View," ibid., pp. 361-81. All tend to argue about the election in such interpretive contexts as the reasons why Chavez sought Cutting's seat, why Roosevelt supported Chavez, analyses of voting trends by county, and the effects of the election upon Spanish-Americans within the political process. They tend to ignore the question of possible fraud, subsequent supreme court actions, legislative passage of election reform legislation, and the overall effect of these matters on the New Mexico political process.

[26]Holmes, Politics, p. 173.

[27]Hannett, Sagebrush Lawyer, pp. 160-61.

[28]The supreme court recognized this fact in Reese v. Dempsey, 48 N. M. 417.

[29]Otero to Cutting, February 21, 1935, Otero Papers.

[30]Hatch to Tingley, March 26, 1935, Clyde Tingley Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[31]Unanimous Resolution of the Democratic Central Committee of Bernalillo County, April 10, 1935, ibid.

[32]Hannett, Sagebrush Lawyer, p. 216. For a discussion of the contested action before the Senate, see pp. 215-16.

[33]In re Zinn, 39 N. M. 161.

[34]In re Zinn, 38 N. M. 449.

[35]Santa Fe New Mexican, July 10, 1934.

[36]In re Zinn, 38 N. M. 449.

[37]In re Zinn, 39 N. M. 161.

[38]Santa Fe New Mexican, March 22, 1935.

[39]Ibid.

[40]New Mexico Election Returns, 1911-1969.

[41]Scott Mabry, Albuquerque attorney, personal interview with the author, Albuquerque, New Mexico, January 28, 1974.

[42]New Mexico Election Returns, 1911-1969.

[43]Zinn Interview.

[44]Santa Fe New Mexican, March 29, 1943.

[45]Ibid., April 5, 1943.

[46]Chapter 123, Laws of New Mexico, 1943.

[47]Zinn to Dempsey, May 15, 1943, John J. Dempsey Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[48]Santa Fe New Mexican, May 19, 1943.

[49]Ibid., May 21, 1943; May 26, 1943; and June 1, 1943.

[50]Martin E. Threet, Albuquerque attorney, personal interview with the author, Albuquerque, New Mexico, January 2, 1974.

[51]Letter of Resignation from Threet to Dempsey, May 27, 1943; and Proclamation of Office, May 29, 1943, Dempsey Papers.

[52]Edwin L. Mechem, United States District Judge, personal interview with the author, Albuquerque, New Mexico, January 9, 1974.

[53]Threet Interview. Following legislative provision in the late 1930s, both major parties began conducting party primaries in 1940.

[54]New Mexico Election Returns, 1911-1969.

[55]Santa Fe New Mexican, July 5, 1944.

[56]Reese v. Dempsey, 48 N. M. 417.

[57]Ibid.

[58]Ibid.

[59]Santa Fe New Mexican, September 29, 1944; October 3, 1944; October 6, 1944; and October 18, 1944.

[60]Reese v. Dempsey, 48 N. M. 485.

[61]Ibid. Brice's dissent was in keeping with his strong dislike for fraudulent election returns. While sitting as chief justice on the state canvassing board in 1942, he wrote: "Where the returns themselves show to a moral certainty that the certificate [of election] is false and that the returns are false, we can hold that there are no returns. . . ." Special Report: Contested Election, 1942, John E. Miles Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[62]New Mexico Election Returns, 1911-1969. It should be noted that there were not all that many Spanish-American lawyers during this period. See Nancy L. González, The Spanish-Americans of New Mexico: A Heritage of Pride (Albuquerque, N. M., 1969), pp. 158-60.

[63]Mabry to Dempsey, March 27, 1946, Dempsey Papers.

[64]Proclamation of Office to A. H. Hudspeth, March 30, 1946, ibid.

[65]New Mexico Election Returns, 1911-1969.

[66]Proclamation of Office to H. A. Kiker, March 8, 1947, Thomas J. Mabry Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[67]Santa Fe New Mexican, March 10, 1947.

[68]Ibid., March 18, 1947. Kiker's reasons for declining the appointment were largely financial. He had a family to raise, and the salary of a justice was small. Mabry Interview.

[69]Santa Fe New Mexican, March 19, 1947.

[70]New Mexico Election Returns, 1911-1969.

[71]Mechem, whose father was one of the prominent Las Cruces attorneys, recounted their appeal to the court. He also noted the success of the crusade. Mechem Letter. William A. Keleher, who observed these activities, relates the whole anti-gambling affair in his Memoirs: 1892-1969, A New Mexico Item (Santa Fe, N. M., 1969), pp. 149-52.

[72]Keleher, Memoirs, p. 150.

[73]Hannett, Sagebrush Lawyer, pp. 252-53.

[74]Brice to Waldo H. Rogers, March 15, 1950, Rogers Papers.

[75]Threet Interview.

[76]New Mexico Election Returns, 1911-1969; and Zinn Interview.

[77]Undated (1950) letter to the chairmen of committees for Coors's campaign, Rogers Papers.

[78]Undated (1948) letter advocating Coors's election, ibid.

[79]New Mexico Election Returns, 1911-1969.

[80]Certificate of Appointment, July 8, 1953, Edwin L. Mechem Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico. As Mechem recalls this matter, he was talking to Robert W. Botts, Albuquerque attorney and son of Clarence M. Botts, about the need to find a replacement for Coors. Botts suggested

Seymour with Mechem replying, "He won't take it." Botts said, "He just might." Of course Seymour did accept the appointment, Mechem feeling that a bond was created between Seymour and Botts by the fact that they both graduated from Harvard Law School. Mechem Interview.

[81]Santa Fe New Mexican, March 26, 1958.

[82]New Mexico Election Returns, 1911-1969.

[83]Santa Fe New Mexican, March 26, 1958.

[84]Certificate of Appointment, March 31, 1958, Mechem Papers. The reasons for the Shillinglaw appointment are from Mechem Interview.

[85]Mechem Interview.

[86]Ibid. Mechem's admiration of Shillinglaw was clearly shared. Judge Waldo H. Rogers, writing to his parents, said, "I am glad Morris Shillinglaw was appointed to the Supreme Court. I fear the balance of the year is his sole tenure there. I have always admired him in learning law alone in bed, and in getting around as well as he does." Rogers to Mr. and Mrs. A. T. Rogers, Jr., April 1, 1958, Rogers Papers.

[87]David W. Carmody, Ex-Supreme Court Justice, telephone interview with the author, Bradenton, Florida, February 23, 1974.

[88]New Mexico Election Returns, 1911-1969.

[89]McGhee, Happenings in New Mexico Courts, p. 30.

[90]Hannett, Sagebrush Lawyer, p. 249.

CHAPTER VI

THE MOVEMENT FOR JUDICIAL SELECTION REFORM, 1914-1955

New Mexico's judiciary, as evidenced by its personnel and participation in the state's political process in the period up into the 1950s, was often partisan in nature. This was largely due to the partisan election of judges, a system unchanged from its inception in 1910 until today. Yet, the system persisted not out of universal acceptance but rather because its opponents proved ineffective. An early example of this came at the constitutional convention. The Democratic minority favored the non-partisan election of judges, a futile gesture given the fact of Republican dominance and the guiding hand of Justice Frank W. Parker in drawing up the judicial article. And through the years similar efforts to modify or change the judicial selection effort were to prove equally futile.

Still, these efforts were significant in the state's judicial history, for they had as their stated goal the removal of court personnel from party affairs. They also showed a continuous dissatisfaction with

partisan elections, with advocates of judicial reform cropping up in every decade from statehood to the present. Considered here are the more serious and persistent reform attempts made up through the 1950s. These movements included both direct legislative and constitutional amendment methods of reform. They focused with variations on two major plans: non-partisan elections and the Missouri or Non-Partisan Court Plan. They reflected in common an actively interested bar at work to protect its own best interests.

The role of the bar began immediately after statehood, with many of the reform actions then and thereafter originating with the bar. At the annual meeting of the state bar association in 1914, Attorney General Frank W. Clancy, the association's chairman of a committee on corrupt practices and other election laws, presented four bills for consideration. The third, calling for separation of the judiciary from politics, virtually duplicated a bill introduced at both sessions of the first state legislature.[1] Clancy noted the adverse reporting of the bill each time and then cited possible reasons for its defeat. Active politicians objected, saying they preferred candidates for judicial positions to participate in

political campaigns and to contribute to campaign funds like any other candidate. They also claimed it was unfair to the candidates themselves not to be able to present their qualifications to the voters.[2]

Clancy rejected such arguments as invalid and as growing out of practices lawyers wished to suppress. He countered by saying that in terms of fairness to judicial candidates, their friends and supporters were better able to represent the candidates before the voters than were the office-seekers themselves. Then, unwilling to let the matter drop, Clancy and the association asked the legislature to pass an act securing the purity of judicial elections. Its provisions were two. First, no candidate for judicial office, other than justices of the peace, could lawfully participate or contribute money in any political campaign in his own behalf. Further defined, such unlawful action included making public speeches for or against any political party or a candidate for any office, soliciting votes for himself or any other candidate, or assisting by way of advice, recommendation, or control the management of any political campaign.[3]

Second, if a candidate violated any of the provisions of section one, he faced a misdemeanor charge

punishable by a minimum fine of fifty dollars and/or imprisonment of thirty days, the sentence to be imposed at the discretion of the court. The violator upon conviction also faced absolute disqualification from holding any judicial office in the state for four years after conviction. The district courts were to have original jursidiction over such prosecution, with the prosecution in no way barring the institution of impeachment proceedings under the constitution.[4] This bar association act languished, as the legislature never enacted it. Still, attorneys demonstrated their concern with the matter of judicial selection and perhaps, at the same time, offered critical comment on how the first candidates for judicial office under statehood conducted their campaigns.

The reform movement, like the bill itself, faded during the remainder of that decade and well into the 1920s. Lawyers contented themselves with lobbying on behalf of their favorite judicial candidates whether a matter of party nomination, election, or gubernatorial appointment. In 1922, therefore, they deluged Governor Merritt Mechem with endorsements for potential appointees. In 1929 they acted in a similar fashion with respect to

Governor Dillon's two appointments to the supreme court. Even the bar association had its day in the latter situation, initially narrowing to three names from each party the choices he was to have. The only try at reform throughout was Dillon's 1929 recommendation for separate judicial elections, and that, as already noted, was ahead of its time if only slightly so.

For it was in the 1930s that the first big push for reform occurred. Again, the bar association was in the forefront, beginning its drive at its 1934 annual meeting. Although no specific selection system proposal grew out of that meeting, both the impetus for change and the determination of lawyers to dominate any system did. The committee on the judiciary, chaired by Clarence M. Botts, supreme court justice in 1923 and 1924, made these two points unmistakably clear. It did so, in the first instance, by criticizing the partisan election system. It charged that while political parties did take into account judicial qualifications in selecting candidates, they usually allowed the candidates' vote-getting abilities for themselves and their parties to outweigh all other considerations.[5]

The committee made its point, in the second instance, by bemoaning layman control of party nominations. The argument here was that professional selection of judicial candidates meant a much better judiciary. Holding this to be true, Botts ended the committee's report in this way:

> We think it the duty of every fair-minded lawyer to put forth every effort to give the public the right point of view in this respect, and that the lawyers should strive to bring about a condition where they can and will exert a greater, if not a dominant, influence in the selection of members of the judiciary.[6]

The bar association carried on its movement the following year but not before Governor Clyde Tingley called for judicial reform in an address to the legislature in January, 1935. Holding to the 1934 Democratic party platform, he called for legislative enactment of a non-partisan election system, stating:

> This in my opinion, will largely remove the judiciary from politics, and to make this policy effective, the law should contain adequate provision prohibiting any judge from engaging in any manner in partisan politics.[7]

Adhering to Tingley's recommendations, attorney J. D. Atwood proposed two senate bills in the 1935

legislative session. Both resulted from cooperation between a special committee of lawyers who worked them out and the governor's advisory committee who recommended their passage.[8] The first, Senate Bill 52, simply provided for a non-partisan election method, the names of candidates to be placed alphabetically in separate columns without party designation.[9] The second, Senate Bill 53, dealt with the manner in which candidates were to be nominated, there being two ways to get on the ballot. Its key feature was the role it designated for members of the legal community.

One way for judicial candidates to assure their own nominations was to file petitions with the secretary of state ninety days before the general election. Any candidate for the supreme court had to have his petition signed by three percent of the state's voters who voted in the last general election. A candidate for a district court position needed signatures of three percent of the district voters who voted in the last general election. The other avenue to nomination became the sole function of lawyers. All members of the bar voted for one candidate for the supreme court, the two persons with the most votes being nominated and certified, in this case 120 days

before the general election. The members of the bar from each district also designated one candidate for district judge, with the two top vote-getters nominated and certified ninety days before the election.[10]

Senate Bill 53, having outlined for attorneys a separate but equal role in naming candidates, went even further. If a person received seventy-five percent or more of the bar vote, he became the sole nominee of the bar. Any vacancies due to death or withdrawal of lawyers' candidates prior to the election became the prerogative of the state board of bar commissioners to fill. The senate judiciary committee did institute one change--district judge candidates to be voted on by all members of the legal community throughout the state--but this was minor.[11] The role of the bar remained.

Taken as a whole, this second part of the bill reflected the determination of bar association members at least to share and hopefully to dominate the selection of judicial personnel. First, they had an equal opportunity to nominate candidates, an opportunity enhanced by their supreme court candidates' probable certification some thirty days before that of self-announced office-seekers. Second, they could band together and have one

man stand out as the sole nominee of the bar. What this meant was that in each judicial contest one man or possibly two stood as the approved candidates of their professional colleagues. Any challengers ran against the wishes and judgment of their peers. Given the lack of voter sophistication generally in contests for judicial office, these advantages enjoyed by the bar probably meant selection of the judiciary by the bar.

Senate Bill 53 met legislative resistance largely because, in the opinion of those who defeated it, it gave too much power to the bar.[12] In fact, Senate Bill 52, the non-partisan election bill, also failed. The legal community, undaunted by such failures, continued in its campaign to get the people and their representatives to share its view concerning how best to effect a quality judiciary. It did so through both its annual meetings and a public conference. Its primary spokesman (as in 1934) was Clarence M. Botts.

At the bar association's annual meeting in 1935, Botts delivered an address on judicial selection, proposing a new system to avoid or lessen the detracting and enervating influences of popular election. He felt it was especially important for the change to occur at that

time, with the judges relieved from political pressures and fear that their decisions might lead to their party's rejection of them as candidates for reelection. He also said that while lawyers were aware that state judges were for the most part never consciously influenced by political considerations, this awareness was not shared by the people. To the contrary, said Botts, "It is rather a common belief that pull and politics play an important part in the cases before the Court for consideration."[13]

In finding change especially important at that time, Botts undoubtedly expressed a concern that transcended state politics. Throughout the nation people were beginning to question the concept of a non-political judiciary. They did so quite naturally in light of United States Supreme Court rejection of much New Deal legislation. Whether or not this public questioning of judicial impartiality was actually current in New Mexico, Botts and his fellow attorneys certainly exploited it to the advantage of bar-initiated and bar-directed change. Thus, Botts could and did tell his colleagues:

> We all agree that the influence of the Courts lies not only in the integrity and soundness of their judgments, but in their acceptance as of that character

> by the public, and so long as judges are dependent upon political parties and politicians for their nomination and election, I fear that public confidence will not be increased.[14]

How to change the selection system and to increase public confidence while making its own influence dominant became the next problem for the bar. To this end Botts advocated no one system but rather proposed a conference made up of state interest groups, they to meet in conference and to come up with a solution. The bar association, maintaining its leadership position, assumed the task of getting other groups to cooperate. The final benefit possibly accruing from such a conference was a new judicial selection method supported not only by attorneys but also by the participating groups. Acting upon Botts's recommendation, Judge Henry A. Kiker, speaking for the association's committee on the judiciary, asked for the appointment of a bar committee to prepare for the conference.[15]

The committee consisted of two former state supreme court justices, Samuel G. Bratton and John C. Watson, and then Assistant Attorney General Quincy Adams.[16] The committee did its work well, as representatives from interested groups throughout the state

met at the University of New Mexico in May, 1936. Bratton presided and chose the wife of a prominent attorney, Mrs. J. O. Seth, to serve as secretary. State groups represented included the Press Association, Educational Association, Federation of Women's Clubs, Railroad Brotherhood, State Taxpayers' Association, Veterans of Foreign Wars, American Legion, New Mexico Bar, Kiwanis, and Twenty-Thirty Club. Also in attendance were a number of other interested citizens.[17]

When all was said and done at the end of the day's gathering, the conference was without a specific plan, although the sense of the conference did favor a non-political method of selecting judges. With that in mind representatives passed a motion calling for a committee composed of a member from each group present, it to formulate a plan or plans for action at a later conference.[18] According to Bratton's subsequent report to the state bar, a special subcommittee met on August 4, 1936, and came up with a tentative plan, one highly favorable to the bar and one not unlike the Non-Partisan Court Plan.

Under this plan the governor appointed judges but only from a list (five names, supreme court; three names, district court) submitted to him by a judiciary council.

This council of seven had as permanent members the chief justice, the attorney general, and the state bar association president and as selected members four outstanding laymen from different parts of the state, these four chosen by the other three. In the case of a judicial vacancy the council submitted its list, the governor made his selection, and members of the bar then approved or disapproved his appointment. Supreme court justices were to serve ten-year terms, their retention in office dependent upon the favor of four council members. District court judges were to serve an initial four-year term, their records submitted to district voters for acceptance or rejection at six-year intervals thereafter.[19]

Bratton also reported the subcommittee's awareness that implementation of such a plan necessitated amendment of the constitution. Pending that, the group suggested lobbying through the next legislature a non-partisan election system with judicial candidates listed but not identified by party affiliation. Bratton then advised the association membership to avoid endorsing any particular plan, undue haste possibly leading to public rejection and thus to failure. The bar, in other words, opted to proceed with caution.[20]

The citizens' conference met again just prior to the convening of the 1937 legislative session. It went on record as favoring non-partisan elections, a small step toward reform, for only the ballot and not the nominative procedure changed form.[21] Shortly thereafter, attorney and State Senator A. K. Montgomery introduced this measure as Senate Bill 95. The bill virtually duplicated Senate Bill 52, one of the two bills in 1935 jointly sponsored by a special committee of lawyers and the governor's advisory committee. The new bill provided for only one change, and that was the location on the ballot of the column entitled "Judicial Officers." Otherwise, this measure, like its predecessor, provided for the alphabetical listing of judicial candidates without party label.[22]

Senate Bill 95 died in the judiciary committee of the senate, another victim of substantial opposition to any change in the partisan structure. It did not fail, however, through any lack of effort by the bar association's committee on the judiciary. This committee wrote to each member of the bar informing him of the legislative proposal and asking him to communicate with Senator Montgomery. Why the bill failed the committee chairman

Bratton could not say. He could only end on the despondent note that

> I do not know whether the majority favors any change in the method or not. I do not know whether the association is prepared to take a definite position one way or the other on the subject at this time or drop the whole matter and discharge the committee. . . . I simply report to you what we have done up to date.[23]

This uncertainty was but a harbinger of things to come, for by 1938 the bar association's drive for change simply ran out of steam. The committee on selection of judges announced that it had no progress to report at that year's annual meeting. It did state its belief that satisfactory solution to the problem required constitutional changes. It also recommended endorsement by the bar and legislative action on some kind of appointive system that included submission of a judge's record to the electorate at fixed periods.[24] And with this report the bar association simply dropped the matter. It experienced too many setbacks during that decade to keep from becoming discouraged. It was also by 1938 clearly an association divided against itself.

The movement for judicial selection reform during the 1930s undoubtedly failed for a number of reasons. One very important reason was the obvious distrust of the

bar by the legislature itself. Realization of this factor found expression in both the bar's 1935 and 1937 meetings following the failure of Senate Bills 52-53 and 95. Summing up this attitude, a participant in the non-political selection of judges conference said,

> Speaking as a member of the legislature and not as a cow-man, too often bills advocated by the bar don't get sympathetic reception. They feel like the lawyers are trying to cram something down their throats. The thought occurs to me that whatever we arrive at, . . . the bill should not be recommended by the bar, but recommended and endorsed by the various associations present at our meeting here today, with the bar's recommendation probably coming last.[25]

Another reason was the lack of consensus among lawyers themselves. Some active government servants--many of whom were also attorneys--felt that the partisan selection system was good either for them or for the people. The following officials exemplified this attitude, all at one time serving on the New Mexico Supreme Court.

Martin A. Threet, a crusading district attorney thoughout much of the 1930s, was absolutely opposed to any change in the selection system. He disliked both the non-partisan and appointive systems. Concerning the

latter, he felt an appointed judge could become too insulated, too autocratic. It was his belief that a judge should answer or be answerable to the people.[26]

Abraham Lincoln Zinn, who served on the high bench in the 1930s and 1940s, did not favor judicial selection under the merit selection system, appointment under the Non-Partisan Court Plan as it evolved. He believed that judges had to have competence in the area of simply knowing people, of dealing with human beings. He further believed that they had to have both aspects and assets of a politician. In other words, they had to get out and know the people, and even on the highest bench, they had to be aware in reading cases on review that there were people involved.[27]

Thomas Mabry, who served as both district attorney and district judge, was a partisan election man all the way. He was never for either a non-partisan or an appointive system for judges. Specifically under the appointive system or merit selection plan, he feared that a judge once on the bench simply could not be touched. This system in his opinion tended toward a high-powered vested interest on the bench because such vested interests determined who got on the list of

acceptable appointees. Mabry never liked partisan politics on the court and deplored the fact that judges had to run for office like all other candidates. Still, he felt that the partisan election system was the best, for it gave the little man a chance of ascending to the supreme court.[28]

The attitudes of Threet, Zinn, and Mabry were not unique and were certainly not confined to the 1930s. And, significantly, these outspoken proponents of judicial selection by partisan election were within the legal community. They shared the belief that court officers, like any other public servants, had to be accountable to the people. Defining accountability at least in terms of a partisan election contest, Merrill E. Noble, another future justice, wrote his constituents of the fourth judicial district that "I believe you will agree with me that the offices of District Judge and District Attorney are perhaps of more direct concern to the people than any other offices."[29] From the standpoint of the pro-partisan election members of the bar, he might well have added the office of supreme court justice.

And to these two reasons for failure to reform could be added a third. This was simply inertia to

change, the reluctance to give up a known system, one in effect for more than twenty years, for an unknown one. Still, the precedent and the lessons of the 1930s remained. The Democratic party went on record in its 1934 platform as favoring reform. The state bar association pushed for reform from 1934 to 1938. It was the motives of the latter, given its vested interest in the selection of the "right" judicial personnel, that caused many of the problems. Even the association's attempt to involve interest groups other than itself did not lay to rest the suspicions of laymen.

The drive for a new selection system hit a lull in the 1940s. The bar (as an identifiable entity) remained silent. The legislature alone dealt with the matter, rejecting two identical bills introduced four years apart. Basically, the bills provided for nomination by petition followed by a non-partisan primary judicial ballot. The two top vote-getters in the primary became the nominees in the general election. Again, there was a special ballot for judges, both supreme court and district court, with the two candidates running without party identification.[30]

The bill introduced in 1943 died in the House--killed by a 21-18 vote.[31] The 1947 bill (sponsored by two future governors, Republican Edwin L. Mechem and Democrat John F. Simms, Jr.) similarly failed. In fact, the latter bill even met with opposition from a sitting supreme court justice, James B. McGhee. McGhee told Mechem, "You can't do this. This will make judges enter politics, and they will have to campaign." What McGhee was saying was that without party identification judges faced having to get out and campaign hard.[32]

Rejection of a non-partisan plan in the 1940s followed similar setbacks in the 1930s. Moreover, bills introduced in these two decades dealt with non-partisan elections as the only legislative alternatives offered to partisan elections. The 1935 citizens' conference's subcommittee alone proposed as a second alternative merit selection, gubernatorial appointment from an approved list and unopposed judges seeking reselection on their records. It was to be this second alternative that received the most attention among reformers from 1947 on. Indeed, Mechem indicated that after his legislative experience in that year, he began to give much study to the matter of merit selection.[33] So, too, did the bar

association, reasserting itself in the forefront of the reform effort in the late 1940s and continuing into the 1950s.

The state bar meeting in 1948 witnessed the beginning of this movement. A group of lawyers proposed a resolution putting the association on record in favor of merit selection, alternately known as the Missouri Plan and the Non-Partisan Court Plan. The resolution did not pass but was renewed the following year by the state bar commissioners. The commissioners also presented to the members a concrete plan, the handiwork of supreme court aspirant George L. Reese, Jr. In 1950 (bar members having studied the plan for a year) the bar heard from an active leader in Missouri's successful campaign for judicial selection reform, 1938-1940. As the result of these carefully orchestrated maneuvers by leaders of the bar, the bar association almost unanimously approved the basic plan.[34]

This plan--patterned after the Missouri precedent--spelled out an entirely new judicial article for the constitution. As amended by the bar association in 1950, the system was to work this way. First, the governor filled judicial vacancies, appointing one of three persons from a list provided by a non-partisan nominating

commission. For supreme court nominations the commission consisted of the state board of bar commissioners and the chief justice. For district court nominations the commission was made up of two lawyers chosen by the district bar and two laymen, one the choice of the governor and the other the choice of the supreme court.[35]

Second, appointed judges faced the voters at a general election within a year and thereafter at regular intervals. In these elections the judges ran unopposed, the sole question being whether or not they should be retained in office. If any candidate encountered majority opposition, a vacancy occurred, and the whole process of nomination and appointment began over again.[36]

Third, the legislature had the power to change the nominating commission for supreme court justices. They could modify either the personnel or the tenure of the members but only within limitations. Any new members had to be state bar members chosen by non-partisan election and with representation from every judicial district in the state.[37]

The bar association adoption of this plan was only the first step. The second came when the Republicans

nominated as their gubernatorial candidate in 1950, Edwin L. Mechem. A member of the Las Cruces bar, Mechem, as already noted, was a proponent of judicial selection reform as a state legislator in the 1940s. In his gubernatorial campaign he made such reform a part of his platform. He won the election to become the first Republican governor since 1930 but came into office with a Democratic legislature.[38]

Legislative consideration of reform began when State Representatives I. M. Smalley and Waldo Spiess, both attorneys, introduced House Joint Resolution No. 9. Duplicating the basic plan submitted to the bar association in 1949, this resolution necessarily proposed a constitutional amendment, the new article, "nonpartisan election of judges," to be numbered article 25.[39] The resolution, following referral to the judiciary committee, initially met defeat in the house by a big majority. It eventually passed the house but only after amendment. Added to the section providing for removal of an incumbent judge from office by a majority of those voting on the question was the additional stipulation that " . . . the total number of votes shall be at least fifty percent of

the total number of legal voters voting at the election." This amended version secured almost unanimous senate approval.[40]

Now in the form of a constitutional amendment, this proposal for reform faced one last test, the voters to decide its ultimate fate in a special election on eight constitutional amendments scheduled for September 18, 1951. Yet even before that special election, intensive campaigning both for and against took place. As could be expected, the state bar was the main proponent. The state board of bar commissioners led the fight for adoption primarily through the figures of George L. Reese, Jr., and Robert W. Botts, the latter following in his father's train. Governor Mechem continued his active support, graphically demonstrating this by filling a newly created district judgeship under the proposed procedure. He not only created the nominating committee but even chose from its list of three, a Democrat. United States Senator Clinton P. Anderson added his support to that of the governor.[41]

Besides these advocates for the amendment were endorsements from many state professional and civic organizations: the American Legion, Cattle Growers'

Association, Farm and Livestock Bureau, Sheriff and Police Association, Taxpayers' Association, and Theatre Operators' Association. In the eastern part of the state the Junior Chamber of Commerce was especially active.[42] Also favoring the plan were most of the state's newspapers, led by the Albuquerque Journal.[43]

Leaving little to chance, the amendment's proponents planned and waged a concerted effort (aided by monetary contributions--$2,500-$3,000--primarily from lawyers). They distributed two campaign pamphlets, concentrating on the Albuquerque area. They contacted by mail every teacher in the state. They also prepared a series of free public service radio announcements, only to see this effort fall victim to lack of cooperation from some stations.[44] And always behind the campaign and its strategy could be found the group with the most vested interests--the lawyers.

One example of lawyer involvement was the very matter of endorsements from other groups, the professional and civic organizations previously cited. What the bar clearly hoped to do was to minimize its role in the public's eye by playing up the aspect of widespread civic support for the amendment. One attorney wrote Botts reporting on progress with groups he was assigned to contact. He

successfully received consent from the Taxpayers' Association to use its name but failed to receive such permission from the Kiwanis Club, Federation of Women's Club, and the Press Association. Still unresolved was possible cooperation from the Medical Society and the Dental Society, the writer suggesting Botts personally contact both.[45]

Another example was the matter of how best to utilize campaign moneys. The state board of bar commissioners handled this issue, with letters concerning funds being routed through Lowell C. Green, clerk of the supreme court. Thus, M. E. Noble wrote Green relative to his campaign efforts in the fourth judicial district. In addition to reporting a planned address to the League of Women Voters, Noble also expressed interest in securing radio time, money permitting.[46] In reply Green wrote, "At the Commissioners' meeting Wednesday it was decided to allot each Commissioner $75 for use in advertising Amendment No. 8 in his district, in any manner believed to be most effective." Additional contributions from local attorneys were also to be retained for use in that district.[47] In short, local conditions were to dictate campaign spending.

Support for the amendment was, however, just one side of the story. Opposition was the other, and while it was not as well organized as its counterpart, it certainly did not lack for intensity. For example, both the Santa Fe New Mexican and the Albuquerque Tribune deviated from the norm of a favorable press and offered two strong arguments against the proposal.[48] First, they could not go along with the amendment, the provision concerning voting on incumbents making it virtually impossible to get a judge out of office. Columnist Will Harrison documented this contention by pointing out that only four special election questions since statehood even attracted participation by a majority of the voters taking out ballots.[49] Second, the papers objected to the amendment because it gave too much power to attorneys in the naming of judges.[50]

Opponents also resided within the ranks of the bar itself. Some believed in the partisan election system and resisted any change.[51] Some opposed the measure because of its real or imagined effect on the Spanish-American community. One of the most effective was district attorney of the first judicial district, Bertrand Prince, who circulated the following letter in Spanish:

> Do you believe that this commission, composed of corporation lawyers, ever will recommend a Spanish-American? The political power, as we well know, has been transferred to the southern part of the state. Now, do you believe that a governor from the South will ever appoint a judge from the North? I do not believe so. In my opinion, if this amendment is adopted, in fifteen years we will not have a single judge of Spanish descent.[52]

Finally, opposition to the bill came from many leading state officials of Spanish-American descent. Their opposition proved effective despite efforts to refute charges that the bill was discriminatory by virtue of its very provisions.[53] United States Representative Antonio M. Fernandez and Attorney General Joe L. Martinez both expressed their displeasure.[54] A present supreme court justice, Martinez added to the list of reasons against the proposal, charging that Amendment No. 8 left the door open for future legislative change in the method of selecting supreme court judges. It made the supreme court, in Martinez's words, "subject to the whim" of the legislative and executive branches of government.[55]

But the most decisive negative voice was necessarily that of United States Senator Dennis Chavez.

According to Mechem, District Judge David Chavez, who later served on the state supreme court, believed that this proposal if passed meant the permanent exclusion of Hispanos from the high bench. He got his brother Dennis Chavez to work against it, and the senator spread the word throughout the state not to pass it.[56] On September 18 the voters went to the polls and rejected every one of the eight proposed constitutional amendments, turning down Number 8 by the largest majority of all, 21,935 to 12,958. Only seven of the state's thirty-two counties passed it, including Governor Mechem's home county of Dona Ana by the largest margin and Bernalillo County where the proponents conducted their most extensive campaign. Every northern county defeated it overwhelmingly, some by margins of greater than ten to one.[57]

This attempt to change the method of judicial selection undoubtedly failed for more than one reason. Yet the biggest reason, reflected generally in the state's voting patterns and particularly in Dennis Chavez's position, was clearly the unity of Spanish-American voters against it. Expressing pleasure at the outcome, Attorney General Martinez stated: "Thank God that the people have prevailed over the pseudo-intelligentia and political Pagliaccis."[58] Other explanations for this

failure, those that include both the defects of the plan and the overall place of the 1951 reform effort within state politics, were not unique.[59] They reflected the many years of past and subsequent rejections of major judicial selection change, matters to be considered at the conclusion of this chapter.

Significantly, the outcome of the 1951 election and expression of voter sentiment effectively ended the bar association's enthusiasm for reform for the moment. The 1953 committee on judicial selection reported this fact in its section on the non-partisan selection of judges, stating, "No attempt was made at the last Legislature, by this Committee, to further the cause of non-political selection of Judges. As you know, the previous constitutional amendment suffered a smashing defeat in the Fall of 1951."[60]

By 1955 reformers contemplated another try, a senator introducing into the state senate a constitutional amendment which duplicated that of 1951.[61] The proposed amendment got nowhere, it being the consensus of a conference between the joint legislative committee on judicial selection and the bar association's committee on judicial selection that it was unwise to resubmit the matter so soon after the defeat of the

earlier amendment. "That view prevailing," noted the annual bar report, "no effort was made before the 1955 legislature to secure submission of any change in the present plan of judicial selection."[62] On that note the bar invited its members to consider future efforts, but the movement was, in effect, in suspension. The remainder of the 1950s and the 1960s witnessed voter consideration of not one constitutional amendment proposing change in the method of judicial selection.

Thus, a reform movement that began officially in 1914 again languished after 1951. Its avowed intent was to remove judges from politics by making the selection of judges non-political. Initially, it turned to the state legislature, content with changing partisan to non-partisan elections. This was true in the nascent statehood period, the 1930s, and the 1940s. Later, it turned to the voters, more ambitious in its desire for change. This was the case in 1951 when the movement focused on a total restructuring of judicial selection through the only procedure available, constitutional amendment. In every instance, the reform effort failed.

The reasons for failure were, of course, many, with most of them traceable to the bar association which

actively sponsored most attempts at change. First, attorneys who have wielded extraordinary influence in New Mexico state politics appeared suspect in their motives. Their desire to effect a better quality judiciary carried with it the expressed hope of dominating the selection process. This led many legislators, already resentful of the legal community's role in politics, to kill every legislative attempt at reform. The basic charge was that the bills gave too much power to the bar, the bar association in the 1930s noting this accusation as one of the primary reasons why legislation failed. Critics of the 1951 proposal similarly cited this danger of increased power for the bar as one of their major objections.

Second, attorneys were divided in their opinions concerning the best method of judicial selection, endorsing change through their state bar association only at the point of enthusiasm for reform, in 1914, in 1935, and again in 1950. But endorsement of bar association resolutions favoring reform could not obscure the fact of a factionalized bar. Lawyers simply did not unite behind even the most concerted bar campaigns in the 1930s and 1950s but rather expressed either pleasure

with the existing system or displeasure with the proposed modifications.

Third, the state bar underestimated or ignored the very political conditions that have made New Mexico politics unique. It attempted to broaden the base of support for judicial selection reform through participation and endorsement of civic and professional groups other than itself. It also secured non-partisan support, the Democratic platform of 1934 and the makeup of the 1951 amendment's proponents as examples of this. Yet, it early underestimated the independence of the legislature and later that of the voters, in the latter case the bloc of Spanish-American voters. It even ignored the fact that New Mexico state politics have always flourished in the arena of hotly contested partisan elections.

The reform movement simply had no real chance of succeeding, the efforts of a highly organized vested interest group notwithstanding. Born of partisan politics, judicial selection through partisan elections persisted. This was true during the early statehood period; it was equally true during succeeding decades.

NOTES--CHAPTER VI

[1]New Mexico Bar Association, Report, August, 1914 (Santa Fe, N. M., 1914), p. 6. The original bills were searched for in the copies of proposed legislation on file in the New Mexico State Supreme Court Archives, but the search turned up no further relevant data thereon.

[2]Ibid.

[3]Ibid., pp. 6, 30.

[4]Ibid., p. 30.

[5]New Mexico Bar Association, Proceedings, August 14-15, 1934 (Clovis, N. M., 1934), p. 22.

[6]Ibid.

[7]Message of Governor Clyde Tingley to the Twelfth Legislature of the State of New Mexico, January 8, 1935 (n. p., n. d.), unpaged.

[8]"Proceedings of the Conference for the Non-Political Selection of Judges, Held in Rodey Hall, University of New Mexico Campus, May 15, 1936," New Mexico Business Review, V (1936), 198.

[9]New Mexico, Legislature, Senate, An Act Providing for a Non-Partisan Election of Justices, 12th Legis., 1935, S. B. No. 52.

[10]New Mexico, Legislature, Senate, An Act Relating to the Method of Nominating Justices of the Supreme Court and Judges of the District Courts, 12th Legis., 1935, S. B. No. 53.

[11]Ibid.

[12]New Mexico Bar Association, Proceedings, August 9-10, 1935 (Albuquerque, N. M., 1935), p. 48.

[13]Ibid., pp. 46-47.

[14]Ibid., p. 47.

[15]Ibid., pp. 49-50.

[16]New Mexico Bar Association, Proceedings, August 14-15, 1936 (Santa Fe, N. M., 1936), p. 10.

[17]"Conference for Non-Political Selection," p. 194.

[18]Ibid., p. 216; and Proceedings, 1936, p. 19.

[19]Proceedings, 1936, pp. 19-20.

[20]Ibid., pp. 20-21.

[21]New Mexico Bar Association, Proceedings, October 8-9, 1937 (Santa Fe, N. M., 1937), p. 17.

[22]New Mexico, Legislature, Senate, An Act Relating to Elections; Providing for a Non-Partisan Election of Justices of the Supreme Court and District Judges, 13th Legis., 1937, S. B. No. 95.

[23]Proceedings, 1937, pp. 17-18.

[24]New Mexico Bar Association, Proceedings, October 14-15, 1938 (Albuquerque, N. M., 1938), p. 10.

[25]"Conference for Non-Political Selection," p. 204.

[26]Threet Interview.

[27]Zinn Interview.

[28]Mabry Interview.

[29]Circular campaign letter from M. E. Noble, October 12, 1948, Merrill E. Noble Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico. Noble sent this letter to Democratic party men throughout the district.

[30]New Mexico, Legislature, House, An Act Relating to the Nomination and Election of Justices of the Supreme Court and District Judges, 16th Legis., 1943, H. B. No. 203; and New Mexico, Legislature, House, An Act Relating to the Nomination and Election of Justices of the Supreme Court and District Judges, 18th Legis., 1947, H. B. No. 12.

[31]Santa Fe New Mexican, March 27, 1943.

[32]Mechem Interview.

[33]Ibid.

[34]Glenn R. Winters, "The New Mexico Judicial Selection Campaign--a Case History," Journal of the American Judicature Society, XXXV (1952), 167.

[35]The original plan drafted by Reese appears in New Mexico Bar Association, Proceedings, October 7-8, 1949 (n. p., n. d.), pp. 24-26, and is entitled "Article 25, Nonpartisan Selection of Judges." Winters, "Selection Campaign," p. 167, summarizes the plan in slightly modified form.

[36]Winters, "Selection Campaign," p. 167.

[37]Ibid.

[38]Ibid., p. 166.

[39]New Mexico, Legislature, House, A Joint Resolution Providing for the Nonpartisan Selection of Judges, 20th Legis., 1951, H. J. R. No. 9.

[40]Winters, "Judicial Selection," p. 168.

[41]Ibid., pp. 168-70. Mechem's support in the campaign is covered in the Albuquerque Tribune, September 17, 1951. For Anderson's backing, see the Albuquerque Journal, September 20, 1951.

[42]Albuquerque Journal, September 16, 1951.

[43]Ibid. The Journal not only endorsed the measure but also quoted other newspaper endorsements. For example, the Journal quoted from the Tucumcari Daily News in its September 15, 1951, edition.

[44]Winters, "Judicial Selection," pp. 168-69.

[45]Howard F. Houk to Botts, August 1, 1951, Judicial Council of New Mexico Files, Albuquerque, New Mexico.

[46]Noble to Green, September 5, 1951, ibid.

[47]Green to Noble, September 6, 1951, ibid.

[48]Albuquerque Tribune, September 17, 1951; and Santa Fe New Mexican, September 12, 1951.

[49]Santa Fe New Mexican, August 29, 1951.

[50]Ibid., September 12, 1951.

[51]Winters, "Judicial Selection," p. 174.

[52]Ibid., p. 170.

[53]Will Harrison, for example, pointed out that of the fifty-one district judges since statehood, only four had Spanish surnames, and that of the twenty-four supreme court justices, only one, Eugene Lujan, had a Spanish name. As he put it, "It is hard to believe this situation would be any worse under the proposed system." Santa Fe New Mexican, August 29, 1951. Governor Mechem also protested the racial appeals of opponents to the measure, labeling them "demagogues." Albuquerque Tribune, September 17, 1951.

[54]Winters, "Judicial Selection," p. 170.

[55]Santa Fe New Mexican, September 17, 1951.

[56]Mechem Interview.

[57]New Mexico Election Returns, 1911-1969.

[58]Albuquerque Journal, September 20, 1951.

[59]Winters analyzes both the strong points and defects of the 1951 effort in "Judicial Selection," pp. 173-76, as does Charles B. Judah in his study, Proposed Constitutional Amendments in New Mexico, 1951 (Albuquerque, N. M., 1951), pp. 11-16. It should also be noted that Winters has never been a disinterested observer of judicial reform. A long-time executive of the American Judicature Society and proponent of merit selection of judges, Winters has maintained an active interest in the New Mexico judiciary. On March 12, 1970, for example, he wrote the state bar concerning Governor David F. Cargo's method of filling judicial vacancies, Judicial Council Files. Also, he visited the state in 1973, the Albuquerque papers reporting his continuing opposition to the partisan election method. But the significance of the 1951 effort for the purposes of this study is that it did fail.

[60]New Mexico Bar Association, Proceedings, October 23-24, 1953 (n. p., n. d.), p. 33.

[61]New Mexico, Legislature, Senate, A Joint Resolution Proposing an Amendment Providing for the Nonpartisan Selection of Judges, 22nd Legis., 1955, S. J. R. No. 24.

[62]New Mexico Bar Association, Proceedings, October 13-15, 1955 (n. p., n. d.), p. 37. Daniel K. Sadler, at the time a supreme court justice, chaired the association's committee on the judiciary in 1955.

CHAPTER VII

THE COURT IN THE 1960s: STABILITY AND TRANSITION

The New Mexico Supreme Court in the 1960s enjoyed an historically unprecedented period of stability, albeit a period both preceded and succeeded by a rapid turnover in court personnel. The years 1959-1960 and 1969-1970 each witnessed the appearance of four new faces on the high bench, but these upheavals only highlighted the significance and the accomplishments of the court in the intervening era. For this court--a court with no changes in personnel occurring from 1960 to 1969--was able to push for reform and concerted court action in several areas. It did so through the personages of five Democratic justices who culminated the generation of attorneys that matured in the post-World War I era.

The transition began in 1959 as David W. Carmody, the newly elected justice, ascended to the high court. It was further precipitated that year by legislation designed to make judicial retirement more attractive. Passed by the Democratic legislature, it resulted in the retirement of three justices, each vacancy being filled by Democratic Governor John Burroughs. The first vacancy

occurred immediately when Daniel K. Sadler, a high court judge since 1931, stepped down. Clearly motivated by the actions of the state legislature, Sadler simply said, "Seeking to take advantage of the recent amendment of our Judicial Retirement Act, I hereby announce my retirement from the Supreme Court, effective May 15, 1959." Eugene D. Lujan then retired on December 31, 1959; James B. McGhee, on August 1, 1960. All three acted upon having reached the stipulated retirement age of seventy-two.[1]

Governor Burroughs proceeded to fill these vacancies, with only the matter of Lujan's successor causing controversy. To Sadler's seat the governor named Irwin S. Moise of Albuquerque, whom he described as a man "who has won a reputation as a fine attorney, and who proved his judicial judgment during his term as a district judge."[2] Moise accepted the appointment after thinking about it overnight, he being the only one to his knowledge considered for the position.[3] To McGhee's seat the governor named Merrill E. Noble of Las Vegas, an attorney who received the support of the legal community in Santa Fe and the north.[4]

Neither of these two appointments aroused either the political or the legal community. The appointment

in between did, undoubtedly due in large part to the fact that Lujan's retirement meant the loss of the only state justice ever of Spanish-American descent. With ethnic considerations present, lobbying efforts to influence Burrough's decision ensued, Filo Sedillo and David Chavez emerging as the two main contestants. Of the two, Sedillo, currently a district judge, was the recipient of the more concerted effort. His supporters deluged Burroughs with telegrams, one endorsement specifically describing Sedillo as "representative of a large group in New Mexico who should always have a voice in our Supreme Court."[5]

But not all or even most correspondence concerning Sedillo was ethnically motivated. Nor was it all favorable. J. R. Modrall, an Albuquerque attorney, responded to the rumor that Sedillo's appointment was being urged by "so-called plaintiff's lawyers" desirous of having representation on the court sympathetic to them. Wrote Modrall:

> If this is true, it in itself, in my opinion, should indicate Filo's unqualifiedness for the position. Certainly I have never heard of any theory in connection with the judiciary which indicates that any particular sides should be represented on the court. This sort of thing would make our administration of justice intolerable in my opinion.

Recommending no particular individual for appointment, Modrall urged Burroughs to stick with his expectations of choosing judges of the same caliber as Justice Moise: "I hope that political pressure will not sway you from this announced position."[6]

The lobbying surrounding Chavez, while not as obvious or vociferous, was nevertheless significant. He did receive written endorsements from the Santa Fe Democratic county chairman and from Emilio Naranjo, an administrator in the state motor vehicles department and a political wheelhorse in the north.[7] Still, Chavez's strength lay more in the direction of unstated rather than stated areas of political considerations. He was, after all, the brother of New Mexico's Senior Senator, Dennis Chavez. He was also, as previously discussed, touted as early as 1932 for a position on the court. His eminence as one of the state's political leaders made him a contender for the appointment. His eminence as a politician also rendered him vulnerable to attack.

One particularly vituperative letter against Chavez came from an Albuquerque resident. It objected to the appointment of Chavez for ten different reasons.

Racist in tone, it accused the Chavez brothers of conspiring to incite racial riots, specifying at one point,

> . . . the unusual, unpatriotic, and traitorous political activities by David Chavez during election campaigns in the State of New Mexico to incite and foment racial riots and by his rabid statements before large audiences and particularly in northern New Mexico as follows: "THE SPANISH FOR THE SPANISH . . . . . AND TO HELL WITH THE ANGLO'S (AMERICANS)!"[8]

But when all was said and done, including the recommendation of several other possible appointees, Burroughs chose Chavez.[9] Furthermore, it was a straightforward, non-political appointment in the views of the two principals involved. According to Chavez,

> There is no story behind my appointment by Governor Burroughs. He came to my home here in Santa Fe with Justice Carmody before appointing me and asked me if I would accept the appointment. I advised him that I would have to advise two people, one was Archbishop Byrne and Senator Dennis Chavez. After consulting with them, I advised Governor Burroughs that I would accept the appointment and he appointed me.[10]

According to Burroughs, there was similarly no story involving politics behind his choice. He did say that both Chavez brothers opposed him in 1958. But he also pointed out that David Chavez was neutral in the 1960 election. In fact, he said that he appointed

Chavez and Chavez accepted the appointment to the supreme court with the stipulation that the justice was to be neutral, that nothing was expected of him as a result of the appointment.[11] The appointment nevertheless pleased Senator Chavez who wired the governor: "Dear John: Most grateful and appreciative Dave's appointment. Happy New Year to you and yours."[12]

Burroughs' appointments taken together reflected a preconceived plan. He tried to achieve both a geographic and ethnic balance on the court. In this he succeeded, for Moise represented Albuquerque; Chavez, the state's ethnic minority; and Noble, the north. A fourth appointment, were there one, was to have gone to the state's east side. Burroughs' appointments, indeed his very opportunity to appoint, also revealed the anxiety of the bar. As a non-lawyer, the governor spooked the bar association who came to him and asked outright for the chance to make the appointments. Taking the position that he was elected by the people and should therefore do the appointing, Burroughs cooperated to the extent that he made his selection from a bar list of fifteen qualified candidates.[13]

The new justices as appointees soon faced contests to secure election to the court in their own right. Governor Burroughs made sure that whoever he appointed was willing to seek the party's nomination and to campaign actively in the general election. All three met that criterion, but after watching the ineptitude with which they campaigned, the governor became convinced that lawyers were the worst politicians in the world.[14] Moise had the most difficult time, for he was opposed in both the primary and the general election. He credited such opposition to his name as much as anything, it sounding strange to people, especially in the southern and eastern parts of the state.[15] Still, he retained his position on the bench, with the primary proving the closer of the two contests, a victory to which he himself referred as "my narrow squeak."[16]

Noble's problem was more fundamental, for he experienced trouble in getting on the ballot. His appointment occurred after the party's primary but before the November election, thereby creating a question settled ultimately by the supreme court. At issue was whether the secretary of state should place Noble's name on the ballot, there having been no such office (a second

two-year supreme court term expiring December 31, 1962) voted on in the primary election. In the attorney general's opinion this was not to be. Indeed, his opinion was that Noble did not have to seek office until 1962, that being the next general election at which he could properly run for office.[17]

The court, Justice Carmody delivering the opinion, disagreed. By considering various statutes, it ruled that the Democratic state central committee acted legitimately in certifying Noble as the party's supreme court candidate for the other unexpired term. Wrote Carmody, "Certainly, the cause of the vacancy occurred after the primary, and any political party to which the act applies should be entitled under the statute to fill the vacancy."[18] Thus, Noble joined Moise and Chavez in the election of 1960. All three won, Noble and Moise winning two-year terms, Chavez, an eight-year term.[19] All three served with Compton and Carmody for an uninterrupted period that lasted until 1969.

During the course of their tenure on the supreme court, these five justices faced election contests, each doing so in his own way. Noble proved to be an active campaigner:

> I have gotten back to work after a somewhat strenuous campaign. I really did not realize how large New Mexico is until I started making every town in the state. I do want to say however, that I met a lot of very fine people.[20]

Moise by his own account was not at all an active campaigner, it being his stated view that "judges should not have any political aspirations."[21] Noble and Moise won full court terms in 1962, easily winning despite opposition in both the primary and general elections.

Chavez, unopposed in 1960, chose not to run for reelection but did serve until 1969. Compton, who had been on the court since his appointment in 1947, faced opposition in neither the primary nor the general election in 1964, thereby securing for himself a third eight-year term. Carmody, first elected in 1958, won another full term in 1966, his reelection being altogether uncontested.[22] These justices, then, simply did not have to campaign, even within the ethically allowable limits of campaigning for a judicial position.

In the universally shared opinion of the justices interviewed, not having to campaign was good because all a judicial candidate could promise was to do his impartial

best.[23] In the opinion of those who favored an elected judiciary, among them Governor Burroughs, uncontested elections with the need for campaigning eliminated were not necessarily desirable. For Burroughs, holding an opinion shared by other judicial election advocates, felt that election contests made judges more humanistic. They became human while out beating the bushes and meeting the people, not realizing what the people were really like until they did this. He said that more than one judge came to him and told him that they never knew what the State of New Mexico and its people were all about until they were out on the campaign trail.[24]

Whatever the feeling about an elected judiciary, these five justices were elected and did function as the most stable supreme court in New Mexico history. As such, this court was able to make a number of innovations. First, it began sitting in panels of three instead of all five sitting en banc as had been done previously. Its justices sat in on the same number of cases, assigned to those cases through a numbering system that was fouled up only occasionally by a justice eliminating or disqualifying himself. All five heard cases involving constitutional questions, first-degree murder, and matters of

great public interest, this being an unwritten rule of the court.

Second, the court sent a number of cases to district judges. These judges simply wrote the opinion handed down to them, a task which saved the high court considerable time. Altogether, the district judges took care of some thirty cases in this way. These two steps helped the supreme court catch up on its work load, it having fallen badly behind by 1959. These two time-saving innovations also marked the beginning of an effort toward establishment of an intermediate court of appeals.[25]

Additionally, this stable court made contributions in both the civil and criminal areas of constitutional law. One justice specifically cited the court's decisions in the field of workmen's compensation. The court could take up such important matters because of the reduction of its work load, especially in terms of criminal cases, following the institutionalization of the court of appeals in 1966.[26] Another justice referred to the court's deliberations in highway cases. In fact, this justice, Justice Moise, dissented in a number of highway cases before bowing to the will of the majority.[27]

These innovations and contributions resulted from the very stability of the personnel who served. They got along well together for the most part--a factor that facilitated change. They even shared similar views as to the proper role of judges in politics, generally agreeing, for example, as to the best method of judicial selection. Still, total concurrence on the court was not always present and cannot be established in this instance. Compton's precise views on the selection process are unknown. Noble's views were mixed. Burroughs did describe Noble as "not active politically," and Noble did (as an official of the bar) support the constitutional amendment for reform of the process in 1951. However, according to his son, Noble "was never dissatisfied with the election system for judges, and felt that that system had many advantages, as did the so-called 'Missouri Plan.'"[28]

On the other hand, Chavez, Moise, and Carmody all expressed strong dissatisfaction with the present method of judicial selection. Chavez stated his position in uncompromising terms:

> The matter that gives me the greatest concern is that Justices of the Supreme Court and the Court of Appeals must go out and politic in order to get elected.

> I think this is wrong and for that reason I am of the opinion that we would have better judges if they were selected by a group of the New Mexico Bar Association with some representation on the part of outstanding citizens of New Mexico.[29]

Chavez, in other words, favored adoption of the Missouri or Non-Partisan Court Plan. Moise agreed completely, although he did see weaknesses of the plan, including the ability of a hostile press to defeat a judicial candidate. He also recognized why such a plan failed to be adopted in New Mexico.[30] Carmody shared the views of these two judges.

Indeed, Carmody proved himself to be one of the primary backers of this reform. He said that he became a supporter of the Missouri Plan in 1949, a time when the state bar association was beginning its reform effort. Referring to the 1951 attempt at constitutional amendment, he held, "We'd be in better shape today had we passed it." He then said this concerning the partisan election of judges: "It is horrible. The people have no knowledge of judicial candidates." Yet, he realized that modification of the present system was difficult, believing that the way to change the system was, in his words, "to start with reforming the supreme court and work down."[31]

These views favoring merit selection of judges added to their concern for streamlining the judicial process brought the court's personnel, as members of the bar, into the political process. For the effort to reform the judiciary, dormant since the 1950s, revived during the 1960s. It began again in 1962 with the appearance of the chairman of the state bar association's committee on the judiciary before the board of bar commissioners. He reported that results of questionnaires returned by December showed ninety-five bar members favoring non-partisan selection and forty-five opposing it. The results also showed that a large number of attorneys were interested in increasing the size of the supreme court.[32]

The board further considered the problems of the judiciary at a meeting in early 1963. Justice Moise attended and laid some groundwork for changing the judicial structure itself, stating that the supreme court's backlog was a problem needing solution. Based on this report, the bar commissioners decided not to introduce a non-partisan court plan into the legislature. Instead, they planned to study the possibility of

increasing the size of the New Mexico Supreme Court and negating the "majority" decision in the state constitution.[33] In deciding on this course of action, they focused on the problem of handling court cases on appeal rather than on the specific matter of judicial selection. They also looked to a larger supreme court as the solution rather than to an intermediate court of appeals, the latter innovation not being favored by the vast majority of lawyers responding to the questionnaire.[34]

To build public interest on the whole question of reforming the judiciary, the state bar pushed for a citizens' conference similar to that held in 1936. Again, prominent New Mexicans received invitations, with one hundred of the state's leading citizens meeting from June 11 to June 13, 1964. At the end of their deliberations they issued a report entitled, "The Consensus of the Conference." They opened their report with the statement that the court system was out of step with the demands of the present:

> Major weaknesses of the present antiquated system include partisan election of judges, uncertainties of judicial tenure and retirement, no appropriate disciplinary machinery, and a lack of unified organization and administration in the courts of New Mexico.[35]

They next discussed what they perceived as necessary changes.

First, these citizens advocated implementation of the Missouri Plan for selecting judges. Concerning this recommendation, they specified coupling such a system with a sound method for removing and disciplining all judges. They also spelled out a role for laymen equal to that for lawyers in deciding which names were to be submitted to the governor: "In particular, it was the general feeling that the composition of the nominating commission should be evenly divided between laymen and lawyers with the judge member voting when necessary to break a tie."[36]

Second, these citizens suggested specific changes with regard to court personnel. Viewing judicial tenure as necessary, they nevertheless preferred a mandatory retirement age to a system of a life term in office. They also found impeachment inadequate as a way to supervise the conduct of judges while in office. They wished to supplement impeachment by establishing an independent commission of laymen, judges, and lawyers to investigate complaints and to discipline judges when warranted.[37]

Third, these citizens turned to the matter of court organization and administration. They criticized the lack of efficient adjudication and the system of essentially autonomous courts, courts largely unsupervised and lacking in adequate administrative control. To remedy these weaknesses, they recommended a simplified and unified court system that included broader supervision of the courts by the supreme court and its chief justice, a court administrator, and a judicial council.[38]

Finally, these citizens set down their priorities for improvement. They included in them the need for a definite program to improve the administration of justice, the undertaking of a broad educational program to acquaint citizens with the problems and possible corrections of the court system, and the formation of a citizens' committee to support judicial reform. They also stated:

> The Constitutional Revision Committee should be commended for its efforts and urged to continue to develop an acceptable draft of a constitutional amendment to provide a modernized court system for New Mexico.[39]

The constitutional revision committee to which they referred was active in both 1963 and 1964. Its

function was to find ways to improve the state's constitution, including the article on the judiciary. It therefore participated in the citizens' conference. It also received assistance from such reform leaders of the bar as Donald Moses, Robert W. Botts, and Justice Carmody.[40] With its work completed, this committee issued an official report that reflected both the input of laymen (the 1964 citizens' conference) and of the legal community (the state bar association).

The judicial article in this constitutional revision committee report opened with a call for a unified court structure composed of a supreme court, a court of appeals, district courts, and magistrate courts. Specifically, it proposed a five- to seven-man supreme court and a three-man court of appeals to function as constitutional courts, with district and magistrate courts serving as legislative courts, the legislature having authority over them.[41] Eliminated from the structure were justice of the peace courts, the object of much criticism at the citizens' conference. Indeed, the consensus of that conference was that these courts--with few exceptions--failed "to provide speedy, economical, efficient and impartial justice. . . ."[42]

Next, the proposed judicial article took up the matter of selecting judges. It recommended merit selection, the governor to appoint supreme court, court of appeals, and district court judges from a list of three names submitted by a nominating commission. But in defining this commission, the report diverged from the wishes of the citizens' conference, as laymen were simply not to have an equal say in the selection of nominees. For there was to be a committee of seven, consisting of the chief justice as chairman, three lawyers, and three laymen. Further weighting the position of the bar was the provision allowing the chief justice to select the judicial nominee if the governor failed to make an appointment within sixty days of the list's presentation to him.[43]

Lastly, the article provided for a method of supervising judges' conduct in addition to impeachment. This was in keeping with the consensus of the citizens' conference. Under this provision a judge faced discipline or removal for "wilful misconduct in office or wilful and persistent failure to perform his duties or habitual intemperance" or retirement for "disability seriously interfering with the performance of his

duties. . . ." A special commission to investigate charges and to recommend appropriate action to the supreme court, this body was to have the power to order removal, discipline, or retirement. But here, too, the bar maintained dominance, for the commission was to consist of more lawyers than laymen.[44] And, of course, the supreme court had the final say. Seemingly strict, this provision for overlooking judicial conduct was essentially self-policing.

Following the reports of both the conference and the revision committee came concerted action for reform in the 1965 state legislature. The resolution as introduced was basically the same as the proposed judicial article, differing only in some of its finer points of detail and in the transposition of some materials. Its two main provisions, given the fate of the bill, concerned establishment of an intermediate court of appeals and of an appointive method for selecting judges, the Missouri Plan.[45]

The proposal received a favorable report in committee but garnered only six votes on the floor of the senate. The appointive judges provision undoubtedly caused its defeat, leading to deletion of the appointive

system. Senate passage of the resolution followed.[46] The house judiciary committee further cut the original legislation, eliminating everything except the court of appeals provision. In this form the measure passed.[47] Now entitled, "A Joint Resolution Proposing an Amendment to Article VI, Section I of the Constitution of New Mexico to Provide for the Establishment of an Intermediate Court of Appeals," it faced ultimate approval or rejection by the voters at a September 28, 1965, special election.[48]

Justice Carmody, an active proponent for judicial reform prior to and throughout the efforts of the 1960s, helped push for voter ratification of the amendment. He spoke in its behalf around the state. He also solicited support from others:

> The whole trouble with this type of constitutional amendment is that there is very little interest generated, and the more we can bring attention to the public at large the better.[49]

Primarily, he focused on securing the active participation of lawyers in the ratification campaign by personally appealing to members of the bar: "Please do what you can to assist. Many lawyers are writing to and talking with friends and clients. Won't you?"[50]

The efforts of Carmody and associates proved successful, as the voters approved the constitutional amendment providing for a court of appeals.[51] The state bar association, also a prime mover behind the campaign for reform, must have received additional satisfaction from Governor Jack M. Campbell's expressed willingness to cooperate with the association in the selection of the three new judges. For Campbell, authorized by law to make the appointments, wrote to the chairman of the judiciary committee of the state bar and asked that this committee suggest not more than eight names as possible appointees.[52] The committee responded within a week of this request by submitting a list of nine nominees. Its chairman stressed the qualifications of committee members as well as the objectivity of the group's deliberations and then thanked the governor: "On behalf of the Committee and on behalf of the State Bar Association, I want to express our appreciation of your invitation to participate in the filling of the initial positions on the court."[53]

These two actions, the addition of an intermediate court and the governor's informal acquiescence in merit selection, pleased advocates of judicial reform. Still,

they were not entirely satisfied and continued to push for reform. Justice Carmody remained an active advocate of change.[54] The constitutional revision committee reported in 1967, as it had three years previously, the need for a totally new judicial article.[55] This felt need for added reforms notwithstanding, the state's most historically stable supreme court could take much of the credit for the institutionalization of the court of appeals. Through its personnel this supreme court streamlined the procedure for handling cases and publicized the need for help in reducing the appellate work load. Its personnel also gave impetus to consideration of other judicial reforms.

Having made real contributions to the judicial history of the state in the field of constitutional law as well as in the area of a more modern court structure, this court began to break up. Chavez retired from the bench effective at the end of his term, and Democrat Paul Tackett, district judge and long-time district attorney, ran for and won his seat in 1968.[56] Shortly thereafter, within the span of a year, Carmody, Noble, and Moise all left the bench. Carmody retired April 30, 1960; Noble died November 13, 1969; and Moise retired March 30, 1970.

Of the five justices who served together from 1960 to 1969, only Compton remained. In addition, Chavez's retirement left the court without a Spanish-American member for the first time since 1945.

The changes coming when they did were most notable in that they meant a Republican majority on the high court, the first such court in some forty years. Republican David F. Cargo was the state's governor, and he proceeded to fill the three vacancies with attorneys from his party. To Carmody's seat he appointed John T. Watson, son of the last elected Republican justice to leave the court; to Noble's seat, he appointed Daniel A. Sisk; for Moise's seat, he chose Thomas F. McKenna.[57] These appointments, moreover, came only at the end of considering each within a framework of complex deliberation.

According to Cargo, his system operated in the following way. First, he contacted the state bar about a vacancy, asking the association to supply him with five names and to specify its three top preferences. Second, he met with a personal committee of about ten top attorneys, later inviting in some good judges. This committee narrowed the list down to two possible appointees, men who were really interested in sitting on

the court. Third, he talked to the two informally and subsequently met again with the man selected.[58] His choices were limited primarily to practicing attorneys, for Democrats held most judgeships. His choices were further restricted because any Republican appointee faced almost certain defeat in the next general election. His two top choices for each of the vacancies were Arturo Ortega and Avelino Gutierrez, but they felt they could not accept, as they were of the wrong political (Republican) and ethnic (Spanish-American) backgrounds.[58]

The three Republicans who accepted appointment did so for a variety of reasons. Watson was nearing the end of his career as a practicing attorney. In his meeting with the governor, Watson told Cargo, " You don't have to appoint me. I won't do a thing for you." Cargo replied, "Respectability will help." Watson rejoined, "I'll try to be respectable."[60] Sisk was the member of a large Albuquerque law firm, and it was easier for him to leave and later to return to private practice than it might have been for a single practitioner.[61] McKenna left Santa Fe when the law firm of which he was a member broke up and was in the process of setting up his office as a single practitioner when

contacted about his possible appointment.[62] In other words, all three men were in situations that allowed them to accept admittedly temporary places on the supreme court. As McKenna put it concerning the possibility of remaining in office, "We all knew that we wouldn't win."[63]

Four new justices, with Tackett included, thus sat on the court until the end of 1970. They did not have much time to leave their mark on the history of the bench, but they had definite attitudes concerning the best possible system of justice. In terms of the selection process and the judiciary in politics, the four expressed these views. Tackett favored an appointive system like the Missouri Plan to get the judiciary out of politics. He said that when an election was held, the electorate was totally unaware of who the candidates were, with perhaps as few as five percent even knowing the names of the contestants for the judiciary. Judicial candidates themselves, Tackett felt, could campaign only on the issue of being fair and impartial in their determination of cases, although they could permissibly attend political meetings.[64]

The three Republicans likewise supported the removal of judges from politics. Watson expressed preference for any selection method that gave seventy-five percent good judges. Once an advocate of non-partisan election, he came to regard it as the worst possible system. Thus, he leaned toward the Missouri Plan.[65] Sisk stated preference for no specific plan, although he wished for something similar to the Missouri Plan or the federal judicial system.[66] McKenna believed the proper impetus for changing the system lay in the direction of taking judges off the ballot. Concurrent with this was also the necessity of establishing a good solid judicial standards committee to remove not only incompetent but also immoral judges.[67]

These justices also expressed their opinions as to what made a good appellate judge. McKenna stressed as necessary attributes humility--followed closely by a great degree of compassion. He felt that humility could modify the power of the intellect, the most powerful weapon of a judge, and that without humility one could simply not be a good judge.[68] Sisk said that an appellate judge should have practiced law for a considerable number of years. Otherwise, he did not

have the broad practical experience which was essential to do a good job. He said that judicial experience was not, at the same time, a necessary prerequisite.[69] Watson talked about a judge having to be very much aware of his prejudices and his opinions, there being some internal chemistry that caused him to tell himself: "I'm not prejudiced. I'm convinced I've got an open mind." If aware of this pitfall, a judge could devote himself to what Watson called "the ecology of the law," adherence to the rule of law rather than to individual biases.[70]

As an example of what he meant, Watson discussed a case involving Sunday liquor sales. A case of great public interest as well as one causing disagreement, it was decided by all five justices. While in conference one judge said, "I like a drink on Sundays." Another responded, "Sunday is the Lord's day. Oh, no, no." Watson maintained that the judges did, of course, decide the case according to the law, but he sometimes wondered how his feelings came into play as he, too, liked a drink on Sundays. Watson, joined by Tackett, dissented because he felt that the case was asking for an advisory opinion from the attorney general and was consequently

not a justiciable controversy.[71] McKenna, unpersuaded by Watson's argument, wrote the majority opinion concurred in by Compton and Sisk.[72] Based in interpretations of the law, even though differing, these opinions reflected concern for the ecology of the law. Individual beliefs were simply irrelevant.[73]

Finally, the justices assessed the accomplishments of the court on which they served. Tackett was proud of his and the court's ability to keep up to date with the case load. He completed the cases assigned to him immediately, a fact that undoubtedly contributed to his belief that trial judges--once on the court--were better equipped to get insight into a case than were former practicing attorneys.[74] Sisk also mentioned the clearing of the docket, there being a tremendous backlog at the time of his appointment due to Noble's incapacity for better than a year prior to his death. He said that the Cargo appointees realized they were not to be there long and set out to make as great a contribution as they could in the time that they had.[75]

The Republican majority carried the supreme court to the end of 1970. In the meantime, the close of the 1960s witnessed one final attempt to revise the state's

constitution. Meeting in August and September, 1969, a constitutional convention drafted a new document and thereby brought to fruition a movement in motion since its inception in 1963. The article on the judiciary, like the original one of 1910, was hotly debated, but this time the decisions were not along party lines. Indeed, two Democrats led the opposition to one another and found support from both within and without their party.

The judiciary committee as constituted consisted of nine laymen and five lawyers, the latter group including the two chief antagonists, David W. Carmody and Filo Sedillo.[76] Carmody chaired the committee, and it soon became apparent that the major issue was again to be that of judicial selection. Consistent with his previous activities, the former justice pushed for adoption of the Missouri Plan. He said that if this method were turned down, the committee intended to look into the following options: non-partisan election, the appointment of only appellate judges, and the election of appellate judges from districts.[77]

On September 3 the committee voted on the Missouri Plan and split right down the middle, with seven members

favoring the plan and seven members favoring no change in the selection method. In debate attorney Robert Poole, a Republican and an advocate of the plan, said, "It seems to me laymen have the impression lawyers are trying to put something over on them."[78] Also in debate Sedillo, leading opponent of the plan, stated, "The appellate courts are the policy-making courts and there's nothing wrong with them going out to meet the people. If we adopt this Missouri Plan we could send this constitution down the drain." He further held that judges with life tenure tended to act "like they're little gods."[79]

The committee issued two minority reports as a result of the tie vote, although by a nine-to-five consensus it asked the entire convention to consider making only appellate judgeships appointive.[80] But in between committee action and convention consideration emerged growing opposition to reform. Most significantly, a coalition of Spanish-Americans and conservatives formed in the convention to defeat any change in the selection process.[81] The coalition succeeded in its determination, as it decisively killed the provisions

suggesting change. The convention voted 47 to 20 against appointment of appellate judges and 38 to 28 against non-partisan elections.[82]

The debate on the floor showed once more that the issue was neither partisan nor a matter of profession. Sedillo restated his belief that "this one issue could defeat the constitution." Mary Walters, similarly an attorney and a Democrat, offered this as an argument against an appointive method: "Judge Carmody is a magnificent example of what can be obtained by the elective system. No one has ever intimated that his opinions were ever influenced by political considerations." Poole could only demur, saying the plan was "designed to get judges out of the kind of politics we feel degrades the judicial function." By voice vote the delegates retained the partisan election process.[83] They also approved an article on the judicial branch that proved a compromise between the existing constitution and proposed reforms. The new constitution met with defeat at the hands of the electorate on December 9, 1969.[84] But by this time the judicial article was no longer an issue.

Then, in November, 1970, the Cargo appointees faced election contests. All ran, fulfilling one of the stipulations of their appointments. All were aware that they probably could not win. Yet, each campaigned. Watson, the most experienced of the candidates in terms of running for elective office, was the least active, fully expecting to be "a former justice."[85] Sisk tried to run a respectable race, realizing that as the election approached he did not want to lose, although he knew that he would.[86] McKenna campaigned the most and ran the best race of the three. Unable to campaign in the traditional sense, he cited the following as his most effective political speech. Attending a dinner in Belen, he was asked to stand and make a few remarks. He told the audience that there were not enough bathrooms in Santa Fe but that each justice had his own. He then invited any of them to use his private bathroom when visiting the state's capital.[87]

The outcome of the 1970 supreme court contests were as predictable as these Republican candidates imagined. Watson lost to Donnan Stephenson, a Santa Fe attorney, 113,260 to 149,063, Sisk, to John B. McManus, Jr.,

a district judge, 118,292 to 148,499; and McKenna, to LaFel Oman, a court of appeals judge, 122,360 to 134,237.[88] The Cargo appointees were simply unable to stem the tide of New Mexico political history that last saw a Republican elected to the supreme court in 1928. Still, these three justices continued to work hard through the final day of their tenure on the bench.[89]

Taken as a whole, the decade of the 1960s saw a tremendous amount of activity in terms of the judicial history of the state. It began and ended with almost entirely new justices sitting on the supreme court, the majority of the changes coming initially through gubernatorial appointment. The Burroughs appointees remained on the court because they were Democrats. The Cargo appointees tried to remain but failed because they were Republicans. Yet, each of the courts on which they served left its mark, the Democratic court in terms of streamlining the court system and deciding matters of constitutional law and the Republican court in terms of contributing hard work in an effort to clear the docket.

Concurrent with the activities of these two courts came efforts to restructure the state's judicial system.

Such efforts were broad-based, involving the state bar, justices of the supreme court, and interested citizens from throughout the state. Reform became the topic for consideration at bar association meetings, a citizens' conference, constitutional revision committee deliberations, a session of the legislature, and a convention called to draft a new state constitution. The movement's primary success was the establishment of a court of appeals, an innovation largely attributable to the justices of the stable supreme court of the 1960s. Its biggest failure was in the area of judicial selection, repeated attempts to change the system proving unsuccessful.

Finally, the 1960s were significant as an era of transition. Older practitioners of the law gradually gave way to a younger generation of attorneys, men who grew to professional maturity in the period following World War II. The Cargo appointees basically reflected this phenomenon while the men that since succeeded to the supreme court have epitomized it.

NOTES--CHAPTER VII

[1]Lujan to Burroughs, December 7, 1959; Sadler to Burroughs, April 29, 1959; and McGhee to Burroughs, July 1, 1960, John Burroughs Papers, New Mexico State Records Center and Archives, Santa Fe, New Mexico.

[2]Undated Burroughs statement; and Executive Order appointing Moise effective May 16, 1959, ibid.

[3]Irwin S. Moise, Ex-Supreme Court Justice, personal interview with the author, Albuquerque, New Mexico, August 28, 1973.

[4]John Burroughs, Ex-Governor of New Mexico, personal interview with the author, Albuquerque, New Mexico, February 3, 1974; and Executive Order appointing Noble effective August 1, 1960, Burroughs Papers.

[5]Telegram from W. Peter McAtee to Burroughs, December 14, 1959, Burroughs Papers. Some twenty telegrams plus a letter from District Judge James A. Maloney, all recommending Sedillo's appointment, appear in the Burroughs Papers.

[6]Modrall to Burroughs, December 21, 1959, ibid.

[7]Johnny Vigil to Burroughs, undated; Naranjo to Burroughs, December 9, 1959, ibid.

[8]Audrey I. Cutting to Burroughs, December 15, 1959, ibid.

[9]Executive Order dated December 29, 1959, appointing Chavez effective December 31, 1959, ibid.

[10]Chavez Letter.

[11]Burroughs Interview.

[12]Dennis Chavez to Burroughs, December 30, 1959, Burroughs Papers. The reason for discussing the Chavez appointment in terms of political considerations is because of Governor David F. Cargo's contention that a political deal was the basis for Burroughs' decision. Cargo maintained that Burroughs used the appointment to placate Senator Chavez. The Republicans, having learned of the deal, said they would oppose David Chavez in the general election unless Dennis Chavez supported the Republican gubernatorial candidate. With David Chavez already on the court and unopposed in the primary, Cargo said the Chavezes had nothing further to gain from either the Democratic party or Burroughs. Thus, Senator Chavez supported Mechem and opposed Burroughs in the 1960 gubernatorial contest. David F. Cargo, Ex-Governor of New Mexico, personal interview with the author, Albuquerque, New Mexico, October 18, 1973. It is a fact that David Chavez was unopposed in both the primary and general elections. It is also a fact that Dennis Chavez supported Mechem in 1960. But Cargo's "deal of political deals" has not received substantiation from either David Chavez (Chavez Letter) or Burroughs (Burroughs Interview) or any other source, for that matter. Indeed, Burroughs said that Joseph M. Montoya, a bitter Chavez enemy, was responsible for Senator Chavez's opposition in 1960, the result of Montoya's manipulation of the lieutenant governor's race. Burroughs Interview.

[13]Burroughs Interview. By virtue of this action, Burroughs became the state's first governor to cooperate fully with the bar association in the selection of judicial personnel. A letter from the president of the state bar substantiates this cooperation: "Within the next few days some members of the Committee on Judicial Selection Tenure and Compensation of the State Bar will contact you for the purpose of again bringing to your attention those members of the bar whom we feel qualified to assume the duties of Supreme Court Justice." Benjamin M. Sherman to Burroughs, December 16, 1959, Burroughs Papers.

[14]Burroughs Interview.

[15]Moise Interview.

[16]Moise to Waldo H. Rogers, May 13, 1960, Rogers Papers. Moise thanked Rogers for his congratulations and help during the campaign. Rogers, the day before, both congratulated and encouraged Moise: "After two more years on the Bench, I doubt if you will even have any opposition in 1962. As you know, I am a Republican, but I attempted to do more for you than I ever have for any candidate." Rogers to Moise, May 12, 1960, ibid.

[17]State v. Fiorina, 67 N. M. 366.

[18]Ibid.

[19]New Mexico Election Returns, 1911-1969.

[20]Noble to Rogers, December 1, 1960, Rogers Papers.

[21]Moise Interview.

[22]For the actual results of these election returns, 1962, 1964, and 1966, see New Mexico Election Returns, 1911-1969.

[23]All the former justices interviewed held this same opinion. Indeed, they favored some kind of non-political selection system for judges, ending altogether the matter of partisan election contests.

[24]Burroughs Interview. This same attitude was expressed by the sons of former Justices Zinn, Threet, and Mabry.

[25]Moise Interview. Carmody also discussed these innovations. Carmody Interview.

[26]Carmody Interview; and Letter from James V. Noble, Santa Fe Attorney, August 5, 1974.

[27]Moise Interview; and Watson Interview.

[28]It can be inferred from the various accounts that Compton was the least enthusiastic of the justices when it came to change. Burroughs' assessment of Noble is from the Burroughs Interview. For Noble's activities in 1951, see Chapter VI. The assessment of Noble's son is from the Noble Letter.

[29]Chavez Letter.

[30]Moise Interview. Justice Moise's reasons mirror those given for the 1951 failure in Chapter VI.

[31]Carmody Interview.

[32]"Minutes of the Meeting of the Board of Bar Commissioners of the State Bar of New Mexico, Held Saturday, December 8, 1962, University of New Mexico School of Law," Judicial Council Files.

[33]"Minutes of the Meeting of the Board of Bar Commissioners Held in Santa Fe, Friday, January 23, 1963, N. M. E. A. Building," ibid. Sec. 5 of the judiciary article requires a majority of the justices on the court to concur in a judgment. This requirement negates the potential influence of an increase in supreme court personnel.

[34]Paul W. Robinson, Chairman of State Bar Committee on Judicial Selection, Tenure and Compensation, to Eugene E. Klecan, President, Albuquerque Bar Association, January 11, 1963, ibid.

[35]Mimeographed copy of the "Consensus of the Conference" of A Citizens' Conference on New Mexico Courts, University of New Mexico, Albuquerque, June 11-13, 1964, ibid.

[36]Ibid.

[37]Ibid.

[38]Ibid.

[39]Ibid.

[40]New Mexico, 1964 Report of the Constitutional Revision Commission to Honorable Jack M. Campbell, Governor of New Mexico, and to Members of the Twenty-Seventh Legislature of the State of New Mexico (n. p., n. d.), p. vii.

[41]Ibid., pp. 23-32.

[42]"Consensus of Conference," Judicial Council Files.

[43]1964 Report of Revision Commission, pp. 27 ff.

[44]Ibid.

[45]New Mexico, Legislature, Senate, A Joint Resolution Proposing an Amendment to the First 23 Sections of Article 6 of the Constitution of New Mexico to Provide for the Establishment of a Unified, Efficient and Independent Judiciary in the Judicial Department of this State; and Repealing Sections 25, 26 and 27 of Article 6 of the Constitution of the State of New Mexico, 27th Legis., 1965, S. J. R. No. 5.

[46]Lynn A. Buckingham, Benjamin L. Crosby, III, and Joseph L. Martinez, "Judicial Reform in New Mexico" unpublished research paper in possession of Dr. Harry P. Stumpf, Department of Political Science, University of New Mexico, Albuquerque, New Mexico, p. 22.

[47]Ibid., p. 23.

[48]Copies of S. J. R. No. 5 and its subsequent legislative alterations can be found in the Judicial Council Files.

[49]Carmody to Russell D. Mann, June 16, 1965, ibid.

[50]Form letter from Carmody to BAR MEMBER, September 17, 1965, ibid.

[51]New Mexico Election Returns, 1911-1969.

[52]Campbell to James E. Sperling, March 3, 1966, Judicial Council Files.

[53]Sperling to Campbell, March 9, 1966, ibid.

[54]Carmody still believes in the need for the Missouri Plan of judicial selection. Carmody Interview. See also his article, "Non-Political Justice," Western Review, II (1965), 57-58, in which he advocates adoption of the Missouri Plan.

[55]A 1967 report of the constitutional revision committee was almost word for word an exact duplication of the 1964 committee report and Senate Joint Resolution No. 5. It thus called for merit selection as well as for a unified court structure, removal procedures to supplement impeachment, and other reforms heretofore mentioned. New Mexico, Report of the Constitutional Revision Commission, State of New Mexico, to Honorable David F. Cargo, Governor of New Mexico, and to Members of the Twenty-Eighth Legislature of the State of New Mexico (n. p., n. d.), pp. 75-99.

[56]New Mexico Election Returns, 1911-1969.

[57]Executive Order appointing John T. Watson, May 23, 1969; and Executive Order appointing Daniel A. Sisk, December 30, 1969, David F. Cargo Papers, New

Mexico State Records Center and Archives, Santa Fe, New Mexico. McKenna took office on April 6, 1970. The New Mexico Reports for these years cite the retirement dates of Carmody and Moise and the date of Noble's death.

[58]Cargo Interview. Cargo did cooperate with the state bar, as shown in two letters from Bar President John J. Wilkinson to Cargo, April 22 and May 6, 1969, Judicial Council Files.

[59]Cargo Interview.

[60]Watson Interview.

[61]Daniel A. Sisk, Ex-Supreme Court Justice, personal interview with the author, Albuquerque, New Mexico, September 7, 1973.

[62]Thomas F. McKenna, Ex-Supreme Court Justice, personal interview with the author, Albuquerque, New Mexico, August 30, 1973.

[63]Ibid.

[64]Paul Tackett, Ex-Supreme Court Justice, personal interview with the author, Albuquerque, New Mexico, August 27, 1973.

[65]Watson Interview.

[66]Sisk Interview.

[67]McKenna Interview.

[68]Ibid.

[69]Sisk Interview.

[70]Watson Interview.

[71]Ibid.

[72]McKenna Interview. For the actual decision in this case, see State ex rel. Maloney v. Sierra, 82 N. M. 125.

[73]Watson Interview.

[74]Tackett Interview.

[75]Sisk Interview. McKenna and Watson similarly referred to the accomplishment of clearing the docket. McKenna said, "We're proud of the work we did." McKenna Interview. Watson wanted to and did write fifty opinions while on the court. Watson Interview. District Judge Frank B. Zinn also credited these justices with getting their opinions out faster than their predecessors. Zinn Interview.

[76]Albuquerque Journal, September 3, 1969.

[77]Ibid., September 2, 1969.

[78]Ibid., September 4, 1969.

[79]Ibid.

[80]Ibid., September 13, 1969.

[81]Ibid., September 20, 1969.

[82]Ibid.

[83]Ibid.

[84]New Mexico Election Returns, 1911-1969; and New Mexico, Constitution (1969).

[85]Watson Interview.

[86]Sisk Interview.

[87]McKenna Interview.

[88]New Mexico, Secretary of State, State of New Mexico Official Returns, 1970 Primary and General Returns (n. p., n. d.), unpaged.

[89]McKenna mentioned the very last decision that he wrote was completed at seven or eight P. M., December 31, 1970. McKenna Interview.

CHAPTER VIII

THE NEW MEXICO SUPREME COURT EXPERIENCE IN PERSPECTIVE

This study has offered a general historical account of a state judicial system and has considered the specific role of a supreme court within its state's political history. In so doing, it recognized New Mexico as being intensely political throughout both its territorial and statehood periods. It recognized that such political activity lay in stiff competition for power and in bitterly fought electoral battles. It especially recognized that such political activity reflected and reflected on the long and substantial influence of lawyers and courts. Based on these realizations, it found that the judiciary necessitated consideration in getting an overall grasp on New Mexico political history. Based on the evidence, it showed that the New Mexico Supreme Court was a coequal branch of government in terms of involvement in the political process.

At the same time, this study of the New Mexico State Supreme Court, a history of politics and the legal community, has provided an historical emphasis too long

disregarded in the political accounts of states. Historians in recent years have generally ignored constitutional history, and political scientists who have in contrast written a great deal on the judiciary have not done so from the standpoint of the evolution or development of judicial systems. Rather, the latter have primarily done analyses in terms of behavioralism, in terms of finding and measuring the determinant of judicial behavior. In addition, they--like historians--have especially neglected state courts. Given the status of the literature on law and politics, this history thus embarked on an exploratory historiographical venture.

The supreme court's involvement in the political process began during the territorial era and revolved around questions of organization, appointment and tenure, and the judiciary as arbiter of the political system. The organizational structure of the courts shifted with the changes in New Mexico, although usually lagging behind. The most significant changes occurred after the breakdown of the territory's isolation and witnessed the addition of courts and court

personnel as well as modification of the courts and the law.

Appointment and tenure was an issue by virtue of the fact that judicial officers were political appointees. A judge held office by presidential appointment and was subject to retention or removal based on political conditions in both the nation's capital and the territory. Some judges fell victim to this system of politics and were removed. Others achieved their positions or remained in office due to this very same system. It all depended on where a judge stood in relation to the political situation at that time.

The supreme court when called upon to arbitrate the political system did so, but its actions were also predicated on political realities. In fact, politics was the key in all three of these areas. Quite simply, the territory's power structure manipulated the judiciary as best it could, this being especially true from the 1870s on. For by that time there was a discernible power structure within New Mexico, one consisting of the Republican party, the Santa Fe Ring, lawyers, and business interests. So constituted, it affected law and politics in these ways.

It determined judicial organization, acting in this instance through a bar association it helped to found. It involved itself in the matter of judicial personnel, particularly with respect to L. Bradford Prince's tenure fight, for Prince was a member of the ring. But it reserved its most concerted action for the struggle that ensued when a Democrat and antagonist, Edmund G. Ross, became governor of the territory. In that struggle the political powers of the territory utilized the supreme court to limit the governor's power, the power to appoint. They then censured the Democratic courts and rammed through their own legislative program, including laws that further enhanced their control over the courts.

Taken as a whole, the role of the territorial judiciary served as a precedent in that it demonstrated the extent to which this third branch of government could get involved in politics. Significant as well was the position of power enjoyed by attorneys. In addition to being an identifiable interest group, they were most influential within both the Republican party and the Santa Fe Ring. Mostly conservatives, those "railroad lawyers" of the later territorial period

continued to influence politics, playing prominent roles at both the constitutional convention of 1910 and during the early statehood period.

Placed in broader perspective, this experience of the territorial judiciary was not truly unique. Indeed, a survey of the literature indicates that the New Mexico experience closely paralleled that of other Rocky Mountain and Pacific West territories. Such a paralleling was in many respects inevitable given the facts that western territorial governments were under a general organization administered from the nation's capital and that territorial inhabitants shared similar problems and attitudes. Specifically, similarities in terms of territorial courts were to be found in the areas of court organization, attempts to manipulate judicial officers, and the interaction of the judiciary with the other branches of government.

Territorial court organization throughout this region followed from and reflected the development of the West. Relative isolation was initially a common factor, with the shortage of judges and long distances of travel afflicting all the sister territories.[1]

Similarly, the subsequent growth of the territories hastened especially by railroads meant more complex litigation, judicial systems, and legal communities. In other words, these territories witnessed a two-fold evolution of their judiciaries. As one writer has noted in discussing the courts of Montana, Wyoming, and Colorado,

> In all three territories the character and contributions of the early bench are distinct from those of the later judiciary. The earlier courts . . . were greatly concerned with the pragmatic demands of organization and establishment of order. . . . Of the many effects the railroads had on the West, one virtually ignored . . . was that they indirectly improved the quality of courts. . . . An expanding economy . . . accounts for a contrast in the complexion of the courts of the formative and mature territorial periods.[2]

He might just as well have been writing about the evolution of New Mexico's territorial courts.

Attempts to manipulate judges followed from and reflected internal struggles for political power. The Palen incident of 1872, an effort to redistrict a judge in order to remove him from a certain location, was like cases occurring in Colorado, Utah, Wyoming, Montana, and Washington.[3] So, too, the larger politics of tenure and appointment were not solely a New Mexico phenomenon,

as territorial politicians repeatedly sought to effect the direct removal of some judges and to influence the selection of others.[4]

Finally, the courts' interaction with other governmental branches followed from and reflected territorial political conditions. Thus, the Ross problems with territorial officers and legislative interference occurred in similar form in such Rocky Mountain territories as Montana and Idaho.[5] In short, this phase of New Mexico's judicial experience mirrored its status as a territory, an experience and a status shared by the other western territories. This fact did not, however, detract from the precedent set thereby nor from the part played by the legal community in the ensuing years. That it was to be a most significant part was demonstrated as New Mexicans in 1910 gathered in convention to frame a state constitution.

At this convention Republicans exercised absolute control over the framing of the new state constitution, including the article on the judiciary. Specifically, prominent Republican attorneys, lawyers representing the single largest professional group among the delegates, dominated the judicial department committee

and its final product. They opted for an elected judiciary on a partisan basis, and in so doing, they formalized a preference that evolved during the territorial period. Politically motivated, it was the desire to place the courts under the influence of the political powers by making judges (particularly district judges) subject to partisan election and partisan manipulation. Such a determination was evident from the 1870s, finding expression at bar association meetings and in the proposed 1889 constitution.

The badly outmanned Democratic minority, predominantly a progressive minority, fought for non-partisan election of judges but to no avail. So complete was Republican preponderance that the judicial department chairman, Frank W. Parker, was easily able to push through the partisan selection system along with a last-minute extension of supreme court terms to eight years. Many Democrats continued to protest in an effort to make the constitution more progressive, and while they did succeed in securing an easier amendment provision, they failed to alter the judicial article.

When compared with constitution-making of the other western states, the New Mexico judicial article, indeed

its entire constitution, demonstrated a major break with what were the shared similarities of the territorial experience. Nowhere was this clearer than in the contrast between New Mexico's constitution and that of her neighbor, Arizona. Arizona's constitution was the product of liberal dominance, liberal Democrats who refused to compromise with either conservative Democrats or Republicans.[6] As such, it contained any number of progressive ideas, including the non-partisan election of judges and even a provision for the recall of judges.[7] New Mexico's constitution was, of course, the product of conservatives. The partisan election of judges was but one indication that " . . . the political patterns built by the Republican party--using local customs--still remained; the patron system still worked."[8]

But New Mexico's divergence from the pattern of its western counterparts was not limited solely to the example of Arizona. Rather, the state broke from the pattern of every Rocky Mountain and Pacific West territory entering the Union as a state both just before and just after the turn of the century. The very method of selecting judges exemplified this fact. Colorado excepted (admitted as a state in 1876), New Mexico alone

of these nascent states opted for a partisanly elected judiciary. The other six western states of the period 1889 to 1912 chose the non-partisan election method of judicial selection. Consistent with the times, these new states joined in the progressivism that affected much of the nation but especially the West. As one writer has pointed out, "Fourteen of the sixteen states that use the non-partisan method of election may be grouped as part of the regional response to the Progressive Movement in the Northwest and the West."[9]

New Mexico's Constitution was thus out of step with those of its neighbors. The state's progressives, a vocal minority, tried to follow the lead of the other western states but were unsuccessful. Entrenched, dominant Old Guard interests simply had no liking for progressive principles. They rejected non-partisan elections, fully intending for the judiciary to play a political role in support of conservative ideals and Old Guard power. They chose as their vehicle partisan elections, direct elections of judges having been originally adopted during the Jacksonian era for two basic reasons. It was viewed as a means of making judges close to the people and reflective of popular attitudes.[10]

It was also seen as a way of actually removing judges from the partisan power struggle and as a way of getting judges out of the political arena.[11] The former reason served the purposes of Old Guard Republicans; the irony of the latter one escaped them.

Neither did these entrenched interests like such aspects of progressivism as corporate regulation.[12] In this area as well they intended for the judiciary to play a key conservative political role. By so intending, they again showed themselves at odds with their western contemporaries, men who hoped that their judiciaries might sanction the opposite position, a regulatory position. For as one scholar has written:

> During the Progressive era some Western states were concerned about the conservative effects of court decisions and the way in which state court decisions favored "interests" . . . the railroad, mining, and grain processing companies.[13]

Given the perspective of contemporaneous politics, New Mexico's constitutional experience was clearly quite different and unique. Still, its constitution and specifically its judicial article were representative of the state's political temper of the times in a number of ways. First, judges ran for election with party

designation, elected at the same time as the other partisanly elected state officers. Second, all judges, but especially district judges, were nominally responsible to the voters and subject to the prevailing political attitudes of the state. Finally, the supreme court guided by its jurisdiction and "the intent of the framers" was expected to act as a conservative influence to curb efforts toward any progressive legislation.

The first state supreme court did not disappoint the framers of the constitution. In fact, two of the three justices helped draw up the article governing their branch of government and were themselves both "railroad lawyers" and Old Guard Republicans. Their court initially took charge of corporation commission findings by asserting the power of actually settling any controversies. It decided cases in favor of the corporations, doing so in the name of the framers' intentions and by placing the burden of proof on the commission. In this area it clearly demonstrated its role of conserving the status quo, specifically the preferred position within the state of special interest groups.

The first court next revealed its conservative nature by deciding a "political question" in behalf of

Republican legislators who attempted to gerrymander district courts to their advantage. At stake was the likely increase of Republican control over district court offices from four to six with attendant reduction of Democratic control from four to three. At issue was an irregularity in the state senate's passage of the amendment. The court settled the question by upholding the amendment's legitimacy and did so by limiting its inquiry in the matter to the problem of which source of evidence was to control. Still, the political implications of the resolution and of the court's decision remained.

Finally, the court to the end of 1922 showed its adherence to the state's political conditions through its very personnel. The first justices were active politicians, especially the two future antagonists in the Magee trials, Republican Clarence J. Roberts and Democrat Richard H. Hanna. Further, the three appointments that fell to Governor Merritt C. Mechem reinforced the close alignment between the judicial branch of government and state politics. Political leaders and lawyers alike sought to effect appointments advantageous to them.

All in all, the supreme court over the first decade of its existence found itself and its personnel involved in the political process. It set important precedents in limiting the effectiveness of the commission principle of government and in being willing to arbitrate political matters. It also emphasized the reality of partisan politics, for both elected and appointed justices proved themselves integral parts of party organizations. Republican and conservative by persuasion and action, the judiciary continued in this same pattern throughout the remainder of the 1920s.

Beginning in 1922 state politics became ever more competitive, but Republican predominance nevertheless prevailed. Indeed, so determined were Republicans to retain their leadership positions that they did not hesitate to use their district courts against political opponents. Two instances in particular demonstrated this fact. The first saw Republican officers of the fourth judicial district trying to silence Carl C. Magee, muckraker and Democratic editor of an Albuquerque newspaper. The second saw Republican District Judge Reed Holloman determined to decide the 1924 gubernatorial contested election in favor of the losing Republican

candidate. Neither maneuver by the partisan court worked, in large measure due to responsible action taken by the state supreme court itself.

Then, in 1929 the supreme court was expanded from three to five members. Such action, given the intense partisanship of that time, was possible only because one appointment was to go to the Republican party and one to the Democratic party. This gentleman's agreement was actualized through the governor's nominations but was most significant as an indication of the decline of Republican domination of state politics. For while Republican incumbent judges retained their positions on the bench during the 1920s, Republican setbacks proved troublesome. Republicans successfully manipulated district courts but failed to achieve thereby the defeat of their opponents. This reality added to a Republican governor's appointment of a Democratic justice in 1929, the only crossover appointment in state history, heralded the demise of Old Guard Republicanism.

The election of 1930 was a watershed in New Mexico political history, for it marked the beginning of Democratic control of politics. It similarly meant Democratic domination of the judiciary. Supreme court personnel

clearly reflected this state of affairs, with only Democrats winning election to the high bench from 1930 on. This set of political conditions further saw the Democrats picking up bloc support from Spanish-Americans. What this meant was that Democratic politics became state politics, and a Democratic supreme court now played its role within the political process. This era also witnessed the rise of a new generation of attorneys, men who arrived in New Mexico after World War I and who entered law to enhance their political opportunities and who sought public office to insure their financial survival of the depression.

The first phase of the Democratic court lasted from 1930 to 1958. During this period the court found itself confronted with some very controversial political questions. In 1934 it took up the contested United States Senatorial contest and failed to reach a consensus. The majority opinion, delivered by one justice and two district judges, relied on a strict interpretation of the election laws. It thereby authorized the election returns showing Republican Bronson Cutting the winner and Democrat Dennis Chavez the loser. The minority of two justices strongly dissented, giving broader meaning to the law and to the

power of the state canvassing board. They felt that election returns could be investigated, with any false and fraudulent certificates not being canvassed. The election contest along with the dissenting opinion led to direct political action, for the state legislature immediately enacted a new election code.

The supreme court during this time also took part in monitoring its own personnel. In the 1930s it finally settled a disbarment proceeding against one of its sitting members. It censured the justice but stopped short of disbarring him. In the 1940s it sat in judgment of a primary election contest involving two aspirants for a position on the court. The justices failed to reach a unanimous conclusion just as in the senatorial election case of a decade earlier. Once again as well, the majority took a rather narrow interpretive route by allowing the election returns with some exceptions to stand as initially certified.

The Democratic court also continued within its narrow, basically conservative path in the 1950s. This was a time when some Democratic attorneys ascended to the high bench as the capstone of their careers. It was a time when two Republican justices sat, achieving

their positions through appointments tendered them by a Republican governor. And it was a time when any Democratic candidate for supreme court justice automatically won in the general election, the result of partisan political conditions within the state.

The Democratic court during these three decades was therefore by no means a progressive institution. Its decisional tendency was conservative, with only some of its members willing to assert the authority of the bench for constructive change. Its members were nevertheless colorful and added greatly to the folklore of New Mexico politics and politicians. Perhaps it was their total reflection of existing political conditions that partly prompted a movement to get judges out of politics by dropping partisan election of judges in favor of some other selection process.

This possibility noted, these three decades witnessed a series of attempts to reform the method of judicial selection. Operating as a vitally concerned interest group, the legal community through its representative, the state bar association, led the fight. It began its drive in the 1930s, its stated goal being to exert a greater if not dominant influence in selecting

judges. Its determination to effect this change meant involvement in politics and came in two forms: efforts to secure legislative action and efforts to insure support from various citizens' groups. It enjoyed only partial success, as a citizens' conference agreed that the selection process needed modification. The legislature did not similarly agree, thus ending hope for enactment of a law at least converting the method from partisan to non-partisan election.

A discouraged bar largely dropped the matter of reform during the late 1930s and throughout most of the ensuing decade. It next took up its crusade in the last years of the 1940s and pushed its effort all the way to the point of voter approval or disapproval. This time the state bar opted for merit selection, appointment and tenure of judges under the Missouri Plan, and turned to the political instrumentality of constitutional amendment. It again failed to realize its goal, as voters rejected the amendment. A public suspicious of bar motives, a divided legal community, a wary Spanish-American community, and a political atmosphere nourished by partisan election contests were all reasons why the movement floundered.

Partisan politics, then, ushered the supreme court through the 1960s. The bench remained Democratic in terms of its elected personnel, enjoying unprecedented stability from 1960 through 1968. As a stable court, it was able to accomplish much in the areas of court procedures and constitutional law. Some of its members also actively participated in yet another effort to reform the judiciary, a movement that did accomplish the establishment of a court of appeals but that did not accomplish a change in the partisan judicial election method. Party and the judiciary remained firmly entrenched, a reality that led to a brief Republican majority on the supreme court in 1970 when a Republican governor was afforded the opportunity to elevate three of his party's attorneys to the high court.

Born in the highly charged partisan atmosphere of the constitutional convention, the New Mexico Supreme Court followed its predetermined course. Its members, subject to partisan election or partisan appointment, reflected most accurately the realities of state politics. The Republican party dominated state politics from 1912 to 1930; it commanded a majority of justices throughout. The Democratic party dominated state politics from 1931

to 1970. The year 1970 excepted, it commanded the supreme court's majority throughout. These two periods, examined more closely, exemplified the court as the mirror of partisan politics.

During the period of Republican dominance, 1912-1930, thirteen justices sat on the court. Eight were Republicans; five were Democrats. Four Republicans initially acceded to the court by election: Clarence J. Roberts in 1911 (reelected in 1916), Frank W. Parker in 1911 (reelected in 1920 and again in 1928), Herbert F. Raynolds in 1918 (defeated incumbent Justice Hanna), and John C. Watson in 1924 (reelected in 1926; defeated twice in the 1930s). Four Republican justices acceded by appointment: Stephen B. Davis, Richmond P. Barnes, and Clarence M. Botts, all appointed by Republican Governor Merritt C. Mechem in the early 1920s, the first two, to fill Roberts' unexpired term, and the third, to fill Raynolds' unexpired term. Charles C. Catron was appointed by Republican Governor Richard C. Dillon in 1929 to one of the two newly created positions.

Three of the Democrats initially acceded to the court by election: Richard H. Hanna in 1911 (elected first as a Progressive Republican and defeated for

reelection as a Democrat in 1918), Samuel G. Bratton in 1922 (filled out the remaining years of Roberts' term), and Howard L. Bickley in 1924 (won the seat Bratton vacated when the latter ran for the United States Senate). Two Democratic justices acceded by appointment: Tomlinson Fort was appointed ad interim by Democratic Governor James F. Hinkle in 1924; John F. Simms was appointed by Republican Governor Dillon in 1929 to one of the two newly created positions.

Republican domination, controlling as it did a majority on the court at all times during this period, showed up strongest at election time. From the election of 1911 to that of 1928, there were eleven contested supreme court races. Republicans won eight; Democrats won only three, including the victory of Hanna who at the time of his successful candidacy was running under the party label of Progressive Republican. The court, then, mirrored the reality of Republican supremacy during this early period of statehood. Indeed, in terms of actual supreme court contests the Republican party proved more successful at winning these races than at controlling the outcomes of election for other state offices.

During the period of Democratic dominance, 1931-1970, the totality of party control was even clearer. Twenty-two justices sat on the bench, seventeen Democrats and five Republicans. Eleven Democrats initially acceded to the court by election; seven acceded by appointment. (Andrew H. Hudspeth both won election and was appointed, accounting for the total of eighteen.) Each of the seven was appointed by a Democratic governor. All five Republican justices acceded by appointment: two were appointed by Republican Governor Edwin L. Mechem and three were appointed by Republican Governor David F. Cargo. The Democratic party as well proved more successful at controlling supreme court contests than the contests for other state offices. For while Democrats lost not a single seat on the court, they lost the statehouse on six different occasions, four times to Mechem and twice to Cargo.

The reality of supreme court justices sitting by party was but one more indication of their involvement, both as politicians and as an institution, in the political process. Such involvement was natural and indeed predetermined given the very nature of partisan politics within the state. And whether manipulating or being

manipulated by political conditions, the judiciary proved significant in terms of adding to an overall understanding of the state's political history.

Still, questions remain concerning the overall implications and inferences of the supreme court's history, questions arising from the fact that New Mexico's judiciary was political and that its supreme court acted as a coequal branch of politics as well as of government. And while this study can be placed in perspective relative to other state courts, this does not provide definitive answers, for too little work has been done in this area. As one political scientist has recently bemoaned, "Much has been written about the United States Supreme Court, but the functions, processes, and roles of state courts and of lower federal courts have been largely ignored."[14] There are, however, a number of conclusions that can be made about state courts generally and about New Mexico courts specifically.

From the start it can be said that courts have always been an integral part of the states' governmental and political structure. They have thus been subject to many of the same pressures as other governmental agencies,

including the pressures of interest groups, party, and the electoral process. Courts have--like their institutional counterparts--also become involved in political controversies as a natural result of the American political scene. Yet, it would be wrong to assume that courts have acted exactly like the legislative or executive branches of government in carrying out their role in the political process, for courts (because of their very nature) have occupied a peculiar position within the political system. This peculiar position has resulted, moreover, from characteristics that are unique to the judiciary and that affect the basic attitude of the judiciary in response to the political process.

In terms of its unique characteristics, the judiciary has acted in a manner different from the other two branches of government when involved in the political arena. A difference of kind as well as of degree, it has functioned as a legal institution. This has meant that the judiciary has settled political controversies only after their appearance in the form of litigated cases and only after the exhaustion of other remedies. It has, in other words, meant the resolution of controversies through decisions cloaked in legalistic

reasoning, decisions quite possibly intended to effect a result lying in a direction different from the narrow guidelines of the opinion. In viewing this as the role of the judiciary, one writer has observed:

> Thus while we can conclude that courts were fully immersed in political affairs, we cannot go on to say that political considerations entered into judicial decisions in the same way as they did in legislative and executive decisions. [15]

In light of this as a court's political role, like observations can be applied to the history of New Mexico's judiciary. As the court of last resort, the state supreme court resolved political controversies only when such controversies were properly litigated and only when other remedies had been tried and failed. Within these limitations it heard many cases of a political nature, among others those involving court reorganization, gubernatorial powers, contested elections, and disbarment proceedings. It decided them within the narrow legalistic guidelines of the prevailing evidence, the intent of the framers and of legislators, and the findings of other state agencies. At the same time, the court effected results that were usually politically expedient. Still, its legalistic reasoning, indeed the

very form in which these issues appeared, was significant, for it exemplified the peculiar and limited action possibly taken by a state court in its resolution of political controversies.

In terms of its basic attitude in response to the political system, the judiciary at the state level has assumed a conservative stance. Its conservatism has again grown out of the nature of courts, their jurisdiction, and their makeup. For one thing, courts have enjoyed the protective myth of judicial independence. For another, their apparent complexity has made lawmakers and the public loath to meddle with them. For yet another, they have been historically enmeshed in institutional traditionalism, the legal method being one of looking backward. "As a result," one scholar has written, "many lawyers and much of the bench join the most conservative elements of the population. They embrace change only when absolutely necessary."[16] Another has put it this way: "We suppose, then, that conservatism does make a difference and that the institutional conservatism of state courts is one of their significant characteristics."[17]

Institutional conservatism has indeed affected the response of state judiciaries, with most state courts reacting to the political structure both locally and nationally in a conservative fashion. For example, the 1958 Conference of Chief Justices adopted by a 36 to 8 vote a measure reprimanding the Warren Court for its decisions. The chief justices charged that the United States Supreme Court of that time was undercutting states' rights and upsetting the balance of the federal system through its exercise of judicial activism and legislative powers.[18] Quite simply, state judges have been jealous of the prerogatives of state judiciaries, and these prerogatives have primarily laid in the direction of the perceived status quo.

In light of this as a court's basic attitude, like observations can again be applied to the history of New Mexico's judiciary. The decisional tendencies of the New Mexico Supreme Court displayed a basically conservative pattern. This was true from the beginning of the statehood period and remained true thereafter. Even the party identification of justices made little difference, for the court advocated judicial self-restraint and avoided real innovation under both Republican and

Democratic control of the judiciary. On occasion justices came out for constructive change, but they were inevitably in the minority. Only in the 1960s did the stable court take up in a major way constitutional issues, and it did so some thirty years behind the times in some of the more significant areas of the law, one example of this coming in the field of workmen's compensation.

Initially, then, it can be concluded that state courts, while a coequal branch of government, have responded in a special way to the political process. They have done so precisely because they are both legal and conservative institutions. With respect to these institutional characteristics limiting state court action, New Mexico's judiciary did not deviate from the norm. Nor did it deviate noticeably when examined in terms of such other institutional considerations as the relationship of the appellate court to lower courts and the role perceptions of judges. And both these considerations have proved significant in further detailing the functions of courts in state politics.

In relating to lower courts, state appellate courts have assumed a position distinguished by their representation of state rather than local interests.

States with elected judiciaries, such as New Mexico, have exemplified this fact, for supreme court justices have run for longer terms than their district court counterparts, the latter having necessarily to be atuned to local conditions. Thus, "while district judges may remain connected with a predominantly local political machine, Supreme Court judges are by the nature of their role thrust into the arena of state politics and inevitably cultivate state interests and experiences."[19] It follows that supreme court judges have been more in the center of state politics and more under pressure from the prevailing interests within a state. It has fallen to them in hearing cases on appeal to bring local court decisions into line with state values and state political practices.

New Mexico's judges fit this basic pattern. District judges like David J. Leahy and Reed Holloman were clearly in tune with local political conditions and, indeed, maintained their connections with predominantly local machines. Supreme court justices, on the other hand, overruled the likes of Leahy and Holloman on numerous occasions, the Magee case being but the most notorious example. These justices were seeking the

center ground through their opinions, a ground they most definitely occupied when it came to affiliation with the dominant party and to concurrence in the wishes of prevailing interest groups. Their actions were especially significant, as so many of them acceded to the high bench after having earlier served as district court judges. The very act of becoming a supreme court justice elevated these men above local concerns and largely accounted for why the New Mexico Supreme Court acquitted itself in a comparatively admirable fashion in cases so dismally decided on a strictly political basis at a lower level.

With respect to role perceptions appellate court judges have likewise responded to institutional pressures. They have actively participated in perpetuating the myth of judges as law interpreters and as non-partisans in political matters. They have done so, moreover, in a number of ways, one of the more significant indications of this being the extremely low rate of dissents in state supreme court decisions. Confining their disagreements within the court, justices have dissented infrequently, and when they have, they have rarely offered written or articulated reasons for their deviations.

States with elected judiciaries, such as New Mexico, have again exemplified this fact, as supreme court justices have had to run for election and reelection. A recorded vote has provided a potential campaign issue. Concurrence in a unamimous decision has meant anonymity for the judges so voting.

Then there is the additional matter of how judges have described their proper role functions, an important area of inquiry, for as one student of judicial roles has noted, "Because judges or lawyers think they ought to behave in a particular manner in a certain interacting situation, they will, in fact tend to behave this way."[20] And of all possible roles, the one most affecting and affected by the political process is whether a judge has believed he should act as law interpreter, lawmaker, or somewhere in between. Focusing on this particular attitude, researchers have discovered that "some evidence exists . . . that the differences are related to important features of court development and political ideology." Specifically, they have found that judges in states with elective judiciaries have tended to adopt the law-interpreter orientation, with those in

Louisiana, a one-party state with judges elected on a partisan basis, having done so almost exclusively.[21] The adoption of this orientation has meant that judges, as described by one judge, have accepted this as their function:

> We can only act in one way: that is to be solely interpreters of the law. The moment he steps out of the role of interpreter, he violates the Constitution which separates the legislative and executive from the judiciary.

New Mexico's Supreme Court Justices acted in a manner consistent with these perceptions of judicial roles. Non-unanimous decisions seldom occurred, with some of the more controversial cases discussed in the text representing notable exceptions. Articulated, written dissents appeared in even fewer cases and only in instances when justices were subjected to political pressures or when they thought they were right. Realizing the possible stigma accompanying a dissenting opinion, Justice Bratton wrote:

> I must remain in the solitary and inhospitable domain of dissent. I recognize that no dissenting opinion can be justified unless it is right; that even then it is most unavailing unless it results in arresting attention, exciting inquiry, provoking

> discussion, and ultimately leads to the ascertainment of truth.[23]

Further, most New Mexican justices certainly assumed their function to be that of law interpreter. This resulted from the fact that court development and political ideology laid in a primarily conservative direction throughout the high court's history, It also reflected existing political conditions, for New Mexico, like Louisiana, elected its judges on a partisan basis and was a state where one party was in ascendancy in terms of electoral success, moving from Republican to Democratic party domination.

Placed in the perspective of how state courts and judges act in terms of their existence as judicial institutions, New Mexico's Supreme Court can be called representative. But institutional considerations alone do not totally explain the implications of state courts in their relation to state politics and state political development. Still to be considered is the question of what demands have been most influential in shaping the judiciary, a question that arises because "one unspoken premise of most political analyses is that governmental institutions develop in response to specific pressures."[24]

And as identified earlier, these pressures have come in large part from interest groups, party, and the electoral process.

Certainly the most determinative state interest group has been the legal community. Indeed, the bar has played such a strong role in judicial politics that, as one scholar has recently put it,

> The role of lawyers in the judicial process cannot be overmphasized. Lawyers often dominate legislatures which enact the laws judges must apply. Lawyers, through their briefs and arguments, set the tone for judicial decisions. Also lawyers are officers of the court and are thus obliged not only to protect their clients' interests but also to administer justice. Finally, not only do lawyers and judges share similar training and experience, but it is from lawyers that judges are selected.[25]

In New Mexico lawyers influenced the judicial process from the drafting of the constitution through continuing efforts to effect judicial selection both with respect to elected and appointed court personnel and to the very method of selection. In addition, all supreme court justices and many governors and state legislators came to their positions from the legal community.

Party as well has been instrumental in the processes of state judiciaries. Already noted were the

realities of a dominant Republican majority shaping the state constitution and its judicial article and of supreme court justices being affiliated with the predominant party. The fact of partisan elections and party responsibility necessarily affected judges, for they had to make a conscious and purposeful identification with a party. New Mexico's experience demonstrated how judges' electoral successes tended to follow party success, as Democratic domination from 1930 on meant the election of only Democrats to the high bench. This experience, at the same time, belied the competitive nature of New Mexico politics and was, indeed, representative of one-party states where minority party judges have been virtually excluded.[26]

Finally, there has been the matter of state electoral processes, the selection of New Mexico's judges coming in the form of partisan elections. Concerning this demand on the judicial process, one political scientist has noted,

> The variations in state selections of judicial personnel are deeply rooted in tradition on the one hand, and subject to constant pressures from the legal profession on the other hand to take the judiciary out of politics by changing the method of selection.[27]

Certainly true of New Mexico, the partisan election system resulted from the tradition of conservative Republican party control, a tradition but little affected by the progressivism current in other western states. So, too, the legal community was most persistent in its efforts to change this selection method.

The New Mexico Supreme Court experience in perspective thus rather consistently fit the pattern of its counterparts. The territorial court occupied a position in the political process similar to the positions of the other Rocky Mountain and Pacific West territorial judiciaries. New Mexico's constitution and its article on the judiciary did, of course, deviate from contemporaneous documents and their resulting judicial structures, but they remained true to the realities of internal political conditions. The statehood experience followed, with the supreme court acting out its role as both a governmental and political institution. As a governmental institution, it found itself involved in politics and political controversies but only within the limitations imposed by the nature of the judiciary as a legal and conservative body. As a political institution, it responded and was subjected to a number of external pressures and demands. Regarding both these institutional roles, New Mexico's Supreme

Court and its justices tended to be representative of state courts in general.

It would, however, be absurd to conclude that the history of the New Mexico Supreme Court has been identical to that of any other judiciary. The politics and political development of each state are singularly unique. Likewise, the history of every state institution is different. The peculiar significance of this political supreme court is what it meant to the overall political development of New Mexico. So considered, it provided a major forum for the settlement of political controversies. It further acted in a primarily restrictive fashion, checking the actions of other governmental institutions and agencies. Whatever its specific machinations, moreover, it reacted to and acted upon state politics in a manner exemplifying the historically conservative nature of political development in New Mexico.

Given the fact that New Mexico's Supreme Court has been a political institution, one final question remains and that is the question of the possibility or even the desirability of removing judges from politics. The legal community has insisted that judges can and

should be removed from politics and has in recent years advocated merit selection as the way to accomplish this goal. Considering the power enjoyed by the bar under this selection system, its motives have been most suspect. Based upon the findings of how this system has operated, its assumption that judges can be separated from politics has proved erroneous.

Ultimately, merit selection of judges has simply put the selection of judges in different hands. At the same time, students of this selection system have found that while it has minimized the power of parties per se in electing judges and in influencing their decisions once elected, it has not eliminated "politics." Rather, merit selection has actually created parties by channeling the basic cleavages in the legal profession into the issue of who should be chosen for the state bench. Under this system rival bar groups have nominated candidates and have mounted campaigns to get their men elected as lawyer members to the commission nominating individuals for the bench.

Furthermore, these scholars have discovered that bar organizations have not only assumed the role of parties in the selection process but have also possessed

characteristics differentiating them from mere "factions." They have been durable and visible, have not been dependent for their existence upon individual personalities, and have represented the important economic and social divisions in the bar as supported by conflicting ideologies. Additionally, the rival bar associations have successfully performed through their self-created "two-party" system by being able to elect their candidates at reasonably frequent intervals over the years and by being relatively effective in serving as spokesmen before the court for the social and economic group they represent.[28]

Thus, merit selection has succeeded neither in its intent of removing judges from politics nor in the elimination of parties from the judicial process. In addition, a comprehensive study of merit selection in Missouri during the first twenty-five years of its operation has uncovered these facts: not one Harvard man has yet been appointed; most judges chosen have come from local law schools; most judges appointed have been either solo practitioners or from small law firms; there has been a clear trend toward appointment of plaintiff lawyers rather than defense lawyers as judges.[29] Given these findings, merit selection has similarly failed to elevate

to the bench superior lawyers. The judges chosen have instead been parochial.[30]

Compared to merit selection, a system tending toward absolute domination of the bench by the legal community, partisan election has proved a satisfactory method of judicial selection. It has produced judges with known partisan preferences, men accountable to both party and the electorate. It has also meant that judges so chosen have had to be sensitive to current social, economic, and political problems. In its operation it has even resulted in meeting in many respects the objectives of merit selection advocates: judicial officeholders in direct election states have enjoyed both tenure and relative freedom from campaigning.[31] If the people are not well informed as to the qualifications of judicial candidates running for office, they are even less well equipped to evaluate a judge running unopposed on his record as provided under merit selection.

Still, the debate on judicial selection has continued and will continue in New Mexico. In 1972 Justice Lafel Oman said that the study committee of the New Mexico Judicial Council was to begin reviewing

possible selection systems, with recommendations to the legislature to follow. An advocate of merit selection, he held that "this takes partisan politics out of the judicial system." He further maintained, "We are not taking the right of voting away from the people. They are going to have the ultimate say in the end."[32] Since then, the New Mexico Judicial Council has indeed come up with a proposed plan. Called the New Mexico Plan, it embodies all the significant provisions of its model, the Missouri Plan.[33] Yet, even while the bar persists in its efforts to effect a new method of selection, its chances for succeeding remain poor. New Mexico will not concur in merit selection unless and until political conditions that have in the past defeated reform efforts are modified significantly. The most ardent proponents of change, moreover, recognize this fact.[34]

The key to both the method of selection and to the political reality of which men have actually served on the supreme court, political conditions within New Mexico have dictated the very history of the high court. It has in many ways been a most ordinary history, as this court, like other state courts, has necessarily functioned as both a governmental and political

institution. At the same time, the history of this particular court has been extraordinarily rich due to the short period of time New Mexico has been a state and to the forthrightness of New Mexico politicians. It is difficult to imagine the officers and political participants in other states being quite so candid in their remarks and their actions. It is even harder to imagine a more colorful court history. But the fact remains that many more studies of state courts are needed. They would provide additional perspective by which this exploratory study might be measured. They would also further help to reveal the role played by the judiciary in state political systems.

NOTES--CHAPTER VIII

[1]Earl S. Pomeroy, The Territories and the United States, 1861-1890: Studies in Colonial Administration (Seattle, 1969), p. 53.

[2]John D. W. Guice, The Rocky Mountain Bench: The Territorial Supreme Courts of Colorado, Montana, and Wyoming, 1861-1890 (New Haven, Conn., 1972), pp. 8-9.

[3]Pomeroy, Territories, pp. 56-57; and an in-depth account of the Wyoming incident involving Judge William Ware Peck can be found in Guice, Rocky Mountain Bench, pp. 81-95.

[4]Pomeroy, Territories, p. 56; and Guice, Rocky Mountain Bench, pp. 96-97.

[5]Jack Ericson Eblen, The First and Second United States Empires: Governors and Territorial Government, 1784-1912 (Pittsburgh, 1968), p. 199.

[6]Lamar, Far Southwest, p. 502.

[7]Ibid., p. 504. The recall of judges provision was deleted at the insistence of President William Howard Taft but was reinstated once Arizona became a state.

[8]Ibid., p. 500. Lamar notes that one constitutional historian termed the New Mexico Constitution a perfect 1810 model and Arizona's a 1910 one.

[9]Vines, "Courts as Agencies," p. 260. It should be noted that Colorado, too, responded to Progressivism, adopting a unique experiment, the popular recall of state court decisions. This measure was, however, struck down as unconstitutional by the Colorado Supreme Court. Ibid., p. 267. It should also be noted that

fifteen states currently use the non-partisan method of selection. Council of State Governments, The Book of the States, 1972-1973 (Vol. XIX; Lexington, Ky, 1972), pp. 130-32.

[10]Jacob, "Institutional Differences," p. 105.

[11]Herbert Jacob, "The Courts as Political Agencies: An Historical Analysis," in Studies in Judicial Politics, ed. by Kenneth N. Vines and Herbert Jacob, Vol. VIII of Tulane Studies in Political Science (New Orleans, 1963), pp. 20, 35.

[12]Earl Pomeroy, The Pacific Slope: A History of California, Oregon, Washington, Idaho, Utah, and Nevada (New York, 1965), p. 207.

[13]Vines, "Courts as Agencies," p. 267.

[14]Charles H. Sheldon, "Perceptions of the Judicial Roles in Nevada," Utah Law Review, (1968), 355.

[15]Jacob, "Courts as Political Agencies," p. 48.

[16]Ibid., p. 49.

[17]Vines, "Courts as Agencies," p. 280.

[18]Ibid.

[19]Kenneth N. Vines, "Political Functions of a State Supreme Court," in Studies in Judicial Politics, ed. by Kenneth N. Vines and Herbert Jacob, Vol. VIII of Tulane Studies in Political Science (New Orleans, 1963), p. 73.

[20]Sheldon, "Judicial Roles in Nevada," p. 357.

[21]Henry Robert Glick and Kenneth N. Vines, "Lawmaking in the State Judiciary: A Comparative Study of the Judicial Role in Four States," Polity, II (1969), 147.

A 1974 study indicates that "over half of the judges strongly believed they should restrict themselves almost exclusively to 'interpreting' the law." It also concludes that the antecedent political ideologies of judges are closely related to how they see their role: "Every political conservative adopted the law-interpreter position. . . ." These findings are most significant in terms of the New Mexico Supreme Court. John T. Wold, "Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges," Western Political Quarterly, XXVII (1974), 240, 242.

[22]Glick and Vines, "Law-making," p. 145.

[23]Bd Com'rs Guadalupe Co. v. Dist. Ct. 4th Jud. Dist., 29 N. M. 244.

[24]Jacob, "Courts as Political Agencies," p. 9.

[25]Sheldon, "Judicial Roles in Nevada," p. 356.

[26]Already noted as a primary feature of New Mexico politics has been the stiff competition for power and the bitterly fought electoral contests. Still, as Holmes has pointed out, party balance from the election of 1930 on tipped most definitely in the Democrats' favor. From 1930 to 1964 they controlled 97 percent of all statewide and congressional elections and held 77 percent of all legislative seats. Holmes, Politics, p. 7. Of equal interest has been the reality of unequal party representation on most state supreme courts. The South aside, Democrats have been grossly underrepresented on courts (33 percent) in terms of their relative strength as a party in these states. Significantly, only New Mexico and Arizona of non-Southern states and with different selection systems had exclusively Democratic supreme court personnel in 1955. Stuart S. Nagel, "Unequal Party Representation on the State Supreme Courts," Journal of the American Judicature Society, XLV (1961), 63.

[27]Vines, "Courts as Agencies," p. 259.

[28]These conclusions are drawn from an intensive study by Watson and Downing, Politics of Bench, passim.

[29]These arguments are from a summary from the Cleveland Bar Journal of August, 1973, attached to Memorandum from the Executive Secretary of the Judicial Council of New Mexico to Members of the Judicial Council, July 3, 1974.

[30]Vines's findings substantiate this conclusion. Judges chosen under the Non-Partisan Court Plan ranked first in terms of attending both in-state and sub-standard law schools. Vines, "Courts as Agencies," p. 261.

[31]Also, many judges in these states have initially acceded to the bench by appointment. In New Mexico 50 percent of the supreme court justices and 80 percent of the district judges were first appointed rather than elected to their positions. Memorandum from Executive Secretary to Members of Judicial Council, July 3, 1974.

[32]Clipping from Santa Fe New Mexican, June 30, 1972, in Judicial Council Files.

[33]For specific provisions of the New Mexico Plan, see Judicial Council of New Mexico, Fourth Annual Report, December 31, 1972 (n. p., n. d.), pp. 15-30.

[34]The men interviewed by the author expressed the belief that the selection system would not soon be changed. Even Justice Oman is reported to be very discouraged about the prospects for reform.

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