NEW MEXICO LAW REVIEW

Volume 5
Issue 3 *Special Issue: A Political History of The New Mexico Supreme Court 1912-1972*

Fall 1975

The Democratic Court, 1930-1958

Susan A. Roberts

argument before the court reading the appropriate constitutional provision only to have the assistant attorney general say that it 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."[147]

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.

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 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.

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 served 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 Marshal from 1913 to 1921.

147. J. McGhee, Happenings in and Around New Mexico Courts, 1909 to January 1, 1947, Plus an Early One in Texas, 30 (1965).

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 conversion of many Spanish-Americans from Republican to Democratic party affiliation. This process was aided by the rise of Democrat Dennis Chavez to a place of power and accelerated by the Depression and subsequent Democratic control of patronage. Without the Spanish-American bloc Republican party domination of New Mexico politics waned, the migration of Texas Democrats into the state's east side only adding to the Republican loss of effective power.[148]

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 a new era. Gone from the legal community, for the most part, were the old "railroad lawyers" who helped to bring New Mexico to statehood 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 valuable assets of a legal practice. 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 A. L. Zinn, elected in 1932 to the state Supreme Court to fill Parker's unexpired term, thereby becoming at the age of 38 the youngest man ever to serve on that bench. Arriving in New Mexico 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."[149]

A Hannett political protegé, Zinn was throughout his career an "ardent Democrat," serving as party chairman of Quay County even

148. W. Beck, New Mexico: A History of Four Centuries, 311-12 (1971).
149. Interview with Frank B. Zinn, New Mexico District Judge, Mar. 1, 1974.

before his move to Gallup. 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.[150]

Later in 1924 he played an active role in Hannett's gubernatorial campaign. An observer of that contest described 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 the card. He brought that same courage and vigor to the Hannett campaign. He was a whirlwind.[151]

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.[152] Instead, he considered the matter from the standpoint of his position within the Democratic party.[153]

As in the past, an impending gubernatorial appointment produced

150. Letter from A. L. Zinn to James F. Hinkle, Jan. 14, 1924, in Hinkle Papers, *supra* note 134.

151. K. Crichton, Total Recoil, 80 (1960).

152. One prominent attorney suggested that Seligman appoint no one until after the Democratic convention and then appoint the party's nominee. 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." Letter from J. C. Gilbert to Arthur Seligman, Aug. 9, 1932, in Arthur Seligman Papers, on file in New Mexico State Records Center and Archives.

153. 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 to 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." Letter from C. A. Scheurich to Arthur Seligman, Aug. 4, 1932, in Seligman Papers, *supra* note 152.

lobbying efforts on behalf of potential appointees.[154] Zinn eventually 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."[155]

The proposed appointment of two other men had significance for state and party politics. 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 support came mainly from the north, including endorsements from Democratic county chairmen in Mora, Taos, Rio Arriba, and Sandoval Counties. Chavez supporters also emphasized political considerations, including the favorable effect the appointment would have on Spanish-American 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. . . .[156]

Chavez was not, however, an active candidate either for the appointment or for the party's nomination.[157]

Tom W. Neal was significant for a number of reasons. 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. Neal said: "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."[158] He solicited other support as well. Even his son, a future district court judge, unabashedly wrote:

> 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

154. In an undated statement Seligman listed 17 separate individuals who were recommended to him for the vacancy on the Supreme Court, in Seligman Papers, *supra* note 152.

155. Letter from Carlos Manzanares to Arthur Seligman, Aug. 15, 1932, in Seligman Papers, *supra* note 152.

156. Letter from Matias Velarde to Arthur Seligman, Aug. 13, 1932, in Seligman Papers, *supra* note 152. The other Chavez endorsements also appear in the Seligman Papers, *supra* note 152.

157. Letter from David Chavez, Jr., former Supreme Court Justice, to Susan Roberts, Feb. 25, 1974.

158. Identical telegrams from Caswell S. Neal to Marguerite P. Baca and to John Bingham, Aug. 7, 1932, in Seligman Papers, *supra* note 152.

from the Southeastern part of the State will materially aid us in this section.[159]

Neal was Seligman's appointee. His appointment was most curious because the actual appointment became effective on November 13, 1932, succeeding not only the Democratic nominating convention but also the election itself.[160] Zinn by that time was both nominated and elected. This meant 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 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 uniformly suggested 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, then, was Seligman's way of paying off political and 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. Also in that year occurred the Dennis Chavez-Bronson Cutting battle for the United States Senate. The contest was intensely waged and exposed the 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 for Chavez supporters a political and personal vendetta against Bronson Cutting. Cutting, a progessive 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

159. Letter from Caswell S. Neal to Arthur Seligman, Aug. 12, 1932, in Seligman Papers, *supra* note 152.

160. Proclamation of Appointment, Nov. 13, 1932, in Seligman Papers, *supra* note 152.

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," and A. L. Zinn. A. T. Hannett he described as "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.[161]

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."[162] 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, which concerned a Cutting speech in Gallup, at one point said:

> 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.[163]

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 nonpartisan judiciary and questioned Zinn's activities in light of this pledge: ". . . we find

161. Santa Fe New Mexican, Sept. 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, *supra* note 1, at 230 et seq.

162. Santa Fe New Mexican, Oct. 20, 1934.

163. Santa Fe New Mexican, Oct. 27, 1934.

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, by contrast, devoted his time to the work of the Court, taking no part in the political campaign.[164]

Whatever the effect of the *New Mexican's* campaign against the Democrats, it did succeed in making the candidacy of Zinn, a sitting Supreme Court justice, a significant factor in the Senatorial contest. Its influence might also have accounted in part for Cutting's victory; he narrowly defeated Chavez by 1,284 votes. 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 distressed 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."[165]

Hannett and Zinn decided to contest the election, with, according to Hannett, the blessing of President Franklin D. Roosevelt, provided they could show Chavez had been rightfully elected. The case reached the New Mexico Supreme Court in December 1934. The court split, with 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 declared that the election law strictly defined returns by 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."[166] 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 broader approach, 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

164. Santa Fe New Mexican, Oct. 30, 1934.
165. Hannett, *supra* note 54, at 210-11.
166. Chavez v. Hockenhull, 39 N.M. 79, 39 P.2d 1027 (1935).

light of these papers on file with it, it could refuse to canvass such supposed returns. The minority concluded its 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.[167]

The canvassing board never got as far as considering whether any of the returns of the 1934 Senatorial election were fraudulent. The effect of the Supreme Court's decision was to certify Cutting's election. Still, the outcome notwithstanding, the real significance of the 1934 election lay in the post-election maneuver to challenge the election and resolution of the contest by the state Supreme Court. 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."[168]

The aftermath of that election and the Supreme Court's ruling had other effects on New Mexico politics as well. It led to immediate legislative adoption of the Hannett Election Code. Proposed originally in 1925 as a bipartisan measure, the Code required an individual to register himself in his own district and created a bipartisan registration board to supervise the election. It further prescribed that only one voter could enter an election booth at a time, and that modern methods were to be used to handle ballot boxes. Old Guard Republican and Cutting opposition defeated the 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 pools to help them understand the ballot.[169] 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 the Cutting election as contested in the Chavez case before the Supreme Court.[170]

---

167. *Id.* Bickley's dissent here is considered among his most important. See Watson, "In Memoriam," 51 N.M. xvii (1947).

168. Holmes, *supra* note 1, at 173.

169. Hannett, *supra* note 54, at 160-61.

170. The Supreme Court recognized this fact in Reese v. Dempsey, 48 N.M. 417, 152 P.2d 157 (1944).

The aftermath of the Chavez-Cutting election eventually reached 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, which involved New Mexico politicos. Before the matter could be resolved, Cutting was killed in a plane crash. According to Hannett, Holm O. Bursum, Jr., offered this epitaph, representing the feelings of many state politicians: "We took care of the Progressive Republicans and God took care of Cutting."[171] The irony of Cutting's death was complete when Dennis Chavez was appointed to the Senate seat left vacant.

The election of 1934 thus ended, but many of its key figures remained 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 disbarment proceedings against him while he was still a justice of the Supreme Court.

Zinn's problems began before his election to the Court. On June 17, 1932, 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 dollars 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 dollars 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.[172]

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.[173] The purpose of this motion, according to a newspaper account, was to make Zinn reveal where he had deposited the 1,000 dollars, which he alleged had been intact at all times. Also at issue was the matter of who was to sit in judgment of Zinn. The defense as

171. Hannett, *supra* note 54, at 216. For a discussion of the contested action before the Senate, *see* 215-16.

172. In re Zinn, 39 N.M. 161, 42 P.2d 776 (1935).

173. In re Zinn, 38 N.M. 449, 34 P.2d 1097 (1934).

well as the special prosecutor preferred that the Court itself try the case in the first instance.[174]

Taking the motion under advisement, the Supreme Court ruled that the respondent, Zinn, could not defend by silence. It said that if Zinn did not divulge the information 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."[175] The Court then opted not to sit in the original 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 board of bar commissioners the filing of formal charges against Zinn. The board concurred, setting down 17 findings of fact. It concluded that Zinn did not act with fradulent intent but that he violated fiduciary duties of a member of the bar by comingling of moneys received with his own. Based on the board's report, the Supreme Court issued its judgment: "[T]hat respondent, A. L. Zinn, should be, and he is hereby, severely reprimanded, and that he should pay the costs of this proceeding. . . ."[176]

The day after the opinion was handed down the *New Mexican* criticized imposing only 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 asserted that public confidence in Zinn as a justice was severely impaired. 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."[177]

Zinn did not resign from the Court but instead tested public confidence by seeking reelection in 1936. Although 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 and ignored the *New Mexican's* maxim of "GO and Zinn no more."[178] Other Democrats who won

174. Santa Fe New Mexican, July 10, 1934.
175. In re Zinn, *supra* note 173.
176. In re Zinn, *supra* note 172.
177. Santa Fe New Mexican, Mar. 22, 1935.
178. *Id.*

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.

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 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.[179]

The 1940's, like the previous decade, saw each Supreme Court election demonstrate further the absoluteness of Democratic party control. Justice Bickley won his reelection contest in 1940; Justice Brice, in 1942. As in the 1930s, A. L. Zinn remained controversial. He as well as other state officers entered the army in the 1940s. He enlisted in the summer of 1942 for two reasons. First, he regretted not having fought in World War I. Second, he believed that a man would need to serve in the armed services to succeed politically after the war.[180] What he did not do was resign from the Supreme Court.

He was not alone in 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. Zinn claimed 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."[181]

The next move was actually legislative. It involved a bill which gave the governor power to fill the temporarily vacated seats of Zinn and two district attorneys. Though the bill's constitutionality was questioned,[182] the legislature enacted it into law.[183] Zinn then made his move. He decided to resign rather than contest, writing Governor John J. Dempsey to that effect in May 1943. He said that the war effort was more important than either litigation challenging the con-

179. Interview with Scott Mabry, Albuquerque attorney, Jan. 28, 1974.
180. Zinn interview, *supra* note 149.
181. Santa Fe New Mexican, Mar. 29, 1943.
182. Santa Fe New Mexican, Apr. 5, 1943.
183. New Mexico Session Laws, ch. 123 [1943] Laws of N.M. 250.

stitutionality 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 some one 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.[184]

Speculation as to Zinn's successor began immediately. Mentioned as possibilities were Henry A. Kiker, then practicing law in Santa Fe and a former district judge; Fred Wilson, attorney for 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.[185] 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 Dempsey's first choice, Kiker, decided not to take the position. And on the first of June it announced the actual swearing in of Threet as the new Supreme Court justice.[186]

It was appropriate that Martin A. Threet replaced Zinn, for he was another new generation lawyer. His reputation was that of a crusading district attorney whose efforts to eradicate gambling in the southern part of the state were well known.[187] 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.[188] A fellow Dona Ana County attorney suggested that Threet's appointment may well have been a nice way of kicking him upstairs.[189] He may have been 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 would be challenged by two other Democrats. Threet, himself a candidate in the Democratic primary, did not campaign. He had suffered a heart attack and was told by his colleagues that Supreme Court justices did not actively seek office. Also

---

184. Letter from A. L. Zinn to John J. Dempsey, May 15, 1943, in John J. Dempsey Papers, on file in New Mexico State Records Center and Archives.

185. Santa Fe New Mexican, May 19, 1943.

186. Santa Fe New Mexican, May 21, 1943; May 26, 1943; and June 1, 1943.

187. Interview with Martin E. Threet, Albuquerque attorney, Jan. 2, 1974.

188. Letter of Resignation from Threet to Dempsey, May 27, 1943; and Proclamation of Office, May 29, 1943, in Dempsey Papers, *supra* note 184.

189. Interview with Edwin L. Mechem, United States District Judge, Jan. 9, 1974.

affecting his reelection hopes was the lack of expected support from Dempsey.[190] For these reasons Threet ran third.

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 later pushed 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. The primary returns showed Reese and Lujan separated by a mere 77 votes, with Lujan the apparent winner.

The contest did not, of course, end there. Yet to come were a number of challenges. The Supreme Court itself would hear two cases and, in effect, decide who was to sit on that bench. But even before judicial resolution of the case, 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.[191] Reese then filed for the writ in the Supreme Court.

Reese requested a writ directing the state canvassing board to go behind the returns to determine whether Lujan's margin consisted of votes illegally cast. He contended that the votes of unregistered electors, voters not shown to be Democrats, who voted for Lujan in the primary determined the results of the election. Reese argued that the Hannett election code, enacted after the Chavez case, applied to party primaries as well as to general elections.

The Court held for Reese in an opinion authored by Justice Mabry, joined by Justices Bickley and Brice. 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.[192]

The two district judges who sat 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

190. Threet interview, *supra* note 187. Following legislative provision in the late 1930's, both major parties began conducting party primaries in 1940.

191. Santa Fe New Mexican, July 5, 1944.

192. Reese v. Dempsey, *supra* note 170.

opportunities to do so, did not include party affiliation as an index to action by the canvassing board. 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.[193]

The recheck of the ballots required by the Court's writ gave Reese a two-vote lead on 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 35 votes, and he received the board's certificate of election.[194] This game of swapping votes and election certificates prompted one last action, with Reese again coming before the Supreme Court.

This time Reese asked that all votes from six precincts be disregarded because votes of non-Democrats had been counted in those precincts. The Court's majority, Mabry and the earlier dissenting district judges, refused the request. They emphasized the "reluctance of the Courts to permit a wholesale disfranchisement of qualified electors through no fault of their own. . . ."[195] 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.' "[196]

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 the first Spanish American to serve on the state's highest court. 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

193. *Id.*

194. Santa Fe New Mexican, Sept. 29, 1944; Oct. 3, 1944; Oct. 6, 1944; and Oct. 18, 1944.

195. Reese v. Dempsey, 48 N.M. 485, 153 P.2d 127 (1944).

196. *Id.* Brice's dissent was in keeping with his strong dislike for election fraud. 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. . . ." New Mexico State Canvassing Board, Special Report: Contested Election, 1942, in John E. Miles Papers, on file at New Mexico State Records Center and Archives.

> for the Democratic nomination for Governor of New Mexico. Your promptness in naming my successor to qualify at once will, therefore, be greatly appreciated.[197]

Dempsey complied, naming former Justice Hudspeth, an interim appointee, on March 30.[198] Democrat James B. McGhee, a district judge, succeeded to the Hudspeth seat, winning both the primary and the 1946 general election.

On March 4, 1947, Bickley died. The choice of his successor was complicated by the fact that the appointee would serve for almost two years, until the next general election. Still, Mabry, now governor, acted quickly. He appointed H. A. Kiker, Bickley's one-time partner, to the position on March 8.[199] 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."[200]

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.[201] True to his word, he appointed District Judge James C. Compton to the Supreme Court that very day.[202] Compton, who was to remain on the Court for more than 20 years, won election in his own right in 1948.

During the remainder of the 1940s, the Supreme Court undertook the clean up of gambling centered in Dona Ana County. 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 progressively worsened. 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

197. Letter from Thomas J. Mabry to John J. Dempsey, Mar. 27, 1946, in Dempsey Papers, *supra* note 184.

198. Proclamation of Office to A. H. Hudspeth, Mar. 30, 1946, in Dempsey Papers, *supra* note 184.

199. Proclamation of Office to H. A. Kiker, Mar. 8, 1947, in Thomas J. Mabry Papers, on file in New Mexico State Records Center and Archives.

200. Santa Fe New Mexican, Mar. 18, 1947. Kiker's reasons for declining the appointment were largely

200. Santa Fe New Mexican, Mar. 10, 1947.

201. Santa Fe New Mexican, Mar. 18, 1947. Kiker's reasons for declining the appointment were largely financial. Mabry interview, *supra* note 179.

202. Santa Fe New Mexican, Mar. 19, 1947.

order, according to one observer, to "save Tom Mabry's administration from any manipulation by gamblers." 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.[203]

As much as anything this episode reflects the character of Charles R. Brice. A strong personality, 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 it necessary. In this instance he may have overstepped the boundaries of judicial power in issuing the broad mandate for action to the courts and juries.[204] On other occasions he was equally forthright, exhibiting such behavior in a 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!"[205]

As the Supreme Court moved into the 1950s, it became an institution more of personalities than of jurists handing down decisions of major constitutional or political consequence. It decided no major political contests as it had previously. Still, the conditions of state politics helped shape the nature of the Court. It was a time when prominent legal figures sought to cap their careers by serving as Supreme Court justices, a Republican governor ascended to the statehouse for the first time since 1928, and Court personnel turned over rapidly.

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 and 16 years

203. 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. Letter from Edwin L. Mechem, United States District Judge, Jan. 14, 1974. William A. Keleher, who observed these activities, related the whole anti-gambling affairs in Memoirs: 1892-1969, A New Mexico Item 149-52 (1969).

204. *Id.* at 150.

205. Hannett, *supra* note 54, at 252-53.

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.[206]

But Brice did not formally bid for renomination. A student of the Court has suggested that Brice was the only justice at that time who had a good legal mind. None of the other justices really cared about legal points. A misfit, Brice was pried off the Court. He announced to his colleagues on leaving 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.[207]

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, due mainly to a big push from Albuquerque, his hometown.[208] In the general election campaign an influential bipartisan organization of Albuquerque attorneys continued to support him.

Tightly structured, this organization made use of a number of committees. The Lawyers' Canvassing Committee was headed by a future Republican justice, Augustus T. Seymour. It solicited lawyer endorsements and letters from lawyers to clients advocating Coors' election. The Committee to Compose and Print Lawyers Letters was directed by Waldo H. Rogers, a future Republican United States District Court Judge. The Publicity Committee, chaired by then Democratic district attorney and later district judge, D. A. McPherson, sought radio time and newspaper advertisements. The Finance Committee had the duty of securing campaign contributions.[209]

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. Many of these same lawyers worked in Coors' 1948 district judge campaign. The tactics in both campaigns were much the same and included a form letter which lawyers favoring Coors were to send to their clients. It suggested, for example, that these clients might become enmeshed in

206. Letter from Charles R. Brice to Waldo H. Rogers, Mar. 15, 1950, in Rogers Papers, *supra* note 142.

207. Threet interview, *supra* note 187.

208. Zinn interview, *supra* note 149.

209. Letter to campaign committee chairmen, 1950, in Rogers Papers, *supra* note 142.

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.[210]

Coors won the 1950 Supreme Court election. Also elected was the Republican gubernatorial candidate, Edwin L. Mechem. In 1952 Justice Lujan successfully campaigned to retain his seat on the high bench. In the summer of 1953 Coors resigned from the Court 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 in 1934. The matter of appointment was complicated because 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 and appointed him to the Court on July 8, 1953.[211]

In the 1954 general election Seymour's opposition came from H. A. Kiker. Kiker, who had been long on the scene, ran for the Supreme Court in 1926, lost to Watson, and turned down appointments in the 1940s tendered him by Governors Dempsey and Mabry. He decided to run in 1954 because he wished to end his career at the pinnacle of his profession. Thus, in his announcement of candidacy this 40-year member of the New Mexico bar said, "I will consider it a great honor to be privileged to conclude my legal career with service on the state's highest bench."[212] Kiker easily defeated Seymour for a four-year term in the November election. Two years later Justice Compton was returned to the court.

Finally, the Court in the 1950s ended as it began, with a change in personnel. The death of Kiker in March 1958 provided Governor

210. Letter, 1948, in Rogers Papers, *supra* note 142.

211. Certificate of Appointment, July 8, 1953, in Edwin L. Mechem Papers, on file in New Mexico State Records Center and Archives. 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 and Mechem replied, "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, *supra* note 189.

212. Santa Fe New Mexican, Mar. 26, 1958.

Mechem one last chance to name a Republican justice. W. Morris Shillinglaw of Las Vegas was unopposed for the Republican party's Supreme Court nomination and, after some speculation,[213] he was appointed to complete Kiker's unexpired term.[214]

Shillinglaw was on the court for less than a year, but he was one of its most interesting personalities. Crippled by a virus, he decided to become a lawyer. Given some law books by Dick Modrall, a prominent and respected New Mexico attorney, Shillinglaw studied for 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 travel only by ambulance or hearse. Since the latter was cheaper, he chose it. So, he rode to Santa Fe in a hearse; he also passed the bar examination.[215]

Shillinglaw further demonstrated his determination by serving in the state legislature. He moved with the aid of a walker and rode in the back seat of a car, lying prone. He accepted Mechem's appointment with 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 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."[216]

A Republican, Shillinglaw stood little chance of winning the election. The contest in 1958 centered on the Democratic primary. Announced candidates even before Kiker's death were two strong contenders, Albuquerque attorney Waldo Spiess and District Judge David W. Carmody. The two employed different strategies, with Spiess making his main effort in Albuquerque and Carmody hitting all 32 counties.[217] Carmody won the primary by more than 10,000 votes and went on to defeat Shillinglaw in the general election. Democratic domination of the Supreme Court continued.

213. *Id.*

214. Certificate of Appointment, Mar. 31, 1958, in Edwin L. Mechem Papers, *supra* note 211. The reasons for the Shillinglaw appointment were given in the Mechem interview, *supra* note 189.

215. Mechem interview, *supra* note 189.

216. *Id.* 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." Letter from Waldo H. Rogers to Mr. and Mrs. A. T. Rogers, Jr., Apr. 1, 1958, in Rogers Papers, *supra* note 142.

217. Interview with David W. Carmody, former Supreme Court justice, Feb. 23, 1974.

The Court of the 1950s frustrated some who served on it as well as some who practiced before it. Justice McGhee expressed this frustration in terms of the lonely existence of a Supreme Court justice:

> 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.[218]

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.[219]

McGhee and Hannett may have spoken only for themselves. Still, Mechem's election excepted, state and Democratic politics was during this period most predictable, which naturally influenced the Supreme Court's role within the political process. Under Democratic control for two decades, the Court became a place for some attorneys to end their careers and a place to which others stepped up from district judgeships. The legal profession remained determined to control selection of the Court's personnel.

Although less involved in political controversy than its predecessors, the Court of the 1950s still had much in common with earlier Courts. Colorful personalities were still to be found on the Court. The Court continued to act 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.

THE COURT IN THE 1960s: STABILITY AND TRANSITION

The New Mexico Supreme Court in the 1960s enjoyed an unprecedented period of stability, 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 accomplish-

218. McGhee, *supra* note 147, at 30.
219. Hannett, *supra* note 54, at 249.