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Judicial Selection in New Mexico: A Hybrid of Commission Nomination and Partisan Election

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JUDICIAL SELECTION IN NEW MEXICO: A HYBRID OF
COMMISSION NOMINATION AND PARTISAN
ELECTION
LEO M. ROMERO*

I. INTRODUCTION

In 1988, the citizens of New Mexico approved an amendment to the state
constitution1 that changed the way judges are selected. Before 1988, judges were
selected by partisan election,2 although the governor had absolute discretion to fill
interim vacancies by appointment3 of persons who met the constitutional qualifica-
tions. The new process, which became effective in January 1989, provides for
nominating commissions to screen applicants and make recommendations to the
governor who can appoint only from the list of nominees. The judge appointed
by the governor serves only until the next general election, and, if the judge wishes to
continue in office, the judge must run and win in that partisan election. The person
winning the partisan election, either the appointed judge or a challenger, serves until
the expiration of the original term. A judge elected in a partisan election then
comes eligible to run in periodic retention elections in which the electorate votes
to either retain or reject the judge on a nonpartisan ballot.

The New Mexico system for selecting judges is a unique compromise with
aspects of a commission nomination-gubernatorial appointment system and an
electoral system.4 The nomination-appointment aspect of the compromise involves
evaluation of applicants by a judicial nominating commission, recommendation of

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* Professor of Law, University of New Mexico School of Law. As dean of the Law School from 1991 to
1997, he served as chair of the judicial selection commissions in New Mexico and wrote the Rules Governing
Judicial Nominating Commissions. He wishes to acknowledge the invaluable assistance of Ida Hernandez, his
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Assistant Professor, Tufts University, for valuable comments on data presentation and interpretation, to the
Honorable W. John Brennan, Chief Judge of the Second Judicial District Court, for reviewing the history of the
judicial selection system approved by the voters in 1988, and to Dean Robert J. Desiderio for providing financial
support for this project.

1. See N.M. CONST. art. VI, §§ 33-36.
2. See id. § 4 (amended 1988) ("The supreme court of the state shall consist of three justices, who shall
be elected at the general election for representatives in congress for a term of eight years."); id. § 12 ("The state
shall be divided into ... judicial districts and a judge shall be chosen for each district by the qualified electors
thereof at the election for representatives in congress."); id. § 28 ("The court of appeals shall consist of not less than
three judges whose ... election ... shall be as provided by law ... "). Sections 4 and 12 of Article VI of the New
Mexico Constitution were part of the 1911 Constitution of the State of New Mexico, adopted Jan. 21, 1911 (1915
Codification). Section 28 of Article VI was added to the New Mexico Constitution in 1965.
3. See N.M. CONST. art. XX, § 4 (amended 1988). This section provided: "If a vacancy occurs in the office
of district attorney, judge of the supreme or district court, or county commissioner, the governor shall fill such
vacancy by appointment, and such appointee shall hold such office until the next general election. His successor
shall be chosen at such election and shall hold his office until the expiration of the original term." This section was
amended in 1988 with the adoption of the new judicial selection system that made all judicial vacancies subject
to commission nomination as a predicate to gubernatorial appointment. Section 4 of Article XX now applies only
to vacancies in the offices of the district attorney and county commissioner.
4. This article avoids the use of the term "merit" to describe either of the two judicial selection systems.
Rather than label either system with value-laden terms, this article describes the features of each system without
suggesting that one is better than the other. See infra note 5 and accompanying text.
nominees to the governor by the commission, appointment by the governor from the list of nominees, and retention elections. The compromise limits the tenure of the appointed judge to the next general election and subjects the judge to the political and electoral process in that partisan election. Other lawyers may challenge and unseat the appointed judge in the primary election or general election.

This article has three purposes: (1) to determine the impact of the partisan election on the retention of judges nominated by a commission and appointed by a governor; (2) to determine the influence of the nomination-appointment process on electoral results; and (3) to determine how women and minority lawyers fared under the new compromise system. This article first provides a brief overview of the judicial selection methods in the United States and a brief history of judicial selection in New Mexico. It then describes the operation of the existing system, including the nomination and appointment process and the electoral process that follows the appointment of judges.

Subsequent sections examine the results of the first ten years under the new system—both the results of the nomination and appointment process from January 1989 to December 1998, as well as the electoral results of the first ten years. In particular, this article looks at what happened in the partisan and retention elections to the judges appointed during this period.

Based on the review of these results, this article analyzes the effect of the electoral law on the nomination and appointment aspects of the New Mexico judicial selection system. It assesses the impact of the electoral system on the appointment process and the influence of commission nomination on the partisan election. It does not, however, take a position on the debate over whether judicial selection by commission nomination and gubernatorial appointment or election selection is the better method of choosing judges. This article, therefore, attempts to answer with empirical evidence the questions of how the two systems operate together, whether the compromise favors one aspect at the expense of the other, the costs of the compromise, and how women and minority lawyers fared under the compromise system.5

5. The literature on judicial selection includes the classical arguments in support of both systems, and a review of those arguments is unnecessary here in view of the fact that the New Mexico system includes aspects of both. See, e.g., HARRY P. STUMPF, AMERICAN JUDICIAL POLITICS 141-152 (2d ed. 1998); Jona Goldschmidt, Selection and Retention of Judges: Is Florida's Present System Still the Best Compromise?, 49 U. MIAMI L. REV. 1, 6 (1994). An evaluation of whether the compromise system produces better judges than the old system is beyond the scope of this Article. Determining and applying measurements for evaluating and ranking judges are exceedingly complicated problems with no consensus among commentators about how to measure what makes for a good judge. Legitimate questions can be raised about the validity and reliability of lawyer polls and rankings of judges. See STUMPF, supra at 143, where the author states that the difficulty in determining which type of selection method produces better judges lies in the "near impossibility of operationalizing the concepts of 'good' and 'better.' Beyond a consensus that judges ought to be 'judicious,' have proper 'judicial temperament,' be objective, and perhaps have prior judicial experience... there remains no direct measure of what a 'good' judge is." A recent effort to measure the relationship between quality of judges appointed and their later performance appears in a report of the ALASKA JUDICIAL COUNCIL, FOSTERING JUDICIAL EXCELLENCE: A PROFILE OF ALASKA'S JUDICIAL APPLICANTS AND JUDGES (1999).
II. OVERVIEW OF JUDICIAL SELECTION METHODS IN THE UNITED STATES

The New Mexico plan is best understood in the context of the debate over the best method of selecting judges. Historically, there has been considerable controversy over selection of judges, and this debate has produced a variety of methods in the United States over time. The U.S. Constitution confers on the president the authority to appoint justices of the Supreme Court subject to the advice and consent of the Senate. The same language has been construed to apply to federal district court and appellate judges.

The states, however, have adopted various methods of selecting judges. During the colonial period, the King of England appointed judges. After the Revolution, many states placed judicial appointments under legislative control with legislatures either selecting judges directly or having veto power over gubernatorial selections. Starting in 1812, states gradually began adopting elective systems for selecting judges. The rise of Jacksonian Democracy and a desire for popular accountability made this method of judicial selection the predominant one in the nineteenth century. Critics, however, feared that the partisan election of judges could be controlled by party leaders or political machines, and as a reaction to this, some states opted for nonpartisan judicial elections. This method also had its critics, who believed party leaders were controlling the selection of candidates for nonpartisan elections.

In the early part of the twentieth century, criticism of both partisan and nonpartisan elections led to calls for selection of judges from pools of qualified lawyers and not just those who were friends of politicians. The American Judicature Society, founded in 1913, proposed a plan in which the chief justice would appoint judges from a list of candidates suggested by a judicial council. A variety of other plans subsequently emerged, but all had the common feature of a nominating commission. Some were introduced in state legislatures as early as the 1930s. In 1940, adopting a plan endorsed by the American Bar Association, Missouri became the first state to embrace a judicial nominating commission system. Known as the Missouri plan, it provided for a nonpartisan commission of lawyers and non-lawyers who nominated the most qualified candidates to the governor, appointment by the governor from the list, and periodic retention elections in which the electorate decided whether or not to retain the judge.

The commission plan, often called "merit selection," has been adopted in different forms by thirty-four states for selection of all or some state judicial positions. The selection plans in these states differ markedly in their details. Some states use nominating commissions for some courts and not others. The composition of the commissions also varies among state plans. About thirty states use elections

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7. See U.S. Const. art. II, § 2.

8. See STUMPF, supra note 5, at 169-70.

9. The following discussion is taken from STUMPF, supra note 5, at 133-41.

to select some, most, or all their judges. Partisan elections are used in thirteen states, and nonpartisan elections are used to choose some, most, or all judges in seventeen states. The following chart shows the judicial selection plans in effect in 1996.

JUDICIAL SELECTION IN THE STATES
Appellate and General Jurisdiction Courts
Summary of Initial Selection Methods

<table>
<thead>
<tr>
<th>Merit Selection through Nominating Commission*</th>
<th>Gubernatorial (G) or Legislative (L) Appointment without Nominating Commission</th>
<th>Partisan Election</th>
<th>Nonpartisan Election</th>
<th>Combined Merit Selection and Other Methods</th>
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</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>California (G)</td>
<td>Alabama</td>
<td>Georgia</td>
<td>Arizona</td>
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<td>Colorado</td>
<td>Maine (G)</td>
<td>Arkansas</td>
<td>Idaho</td>
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<td>Connecticut</td>
<td>New Hampshire (G)</td>
<td>Illinois</td>
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<td>Indiana</td>
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<td>Delaware</td>
<td>New Jersey (G)</td>
<td>Louisiana</td>
<td>Michigan</td>
<td>Kansas</td>
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<tr>
<td>District of Columbia</td>
<td>Virginia (L)</td>
<td>North Carolina</td>
<td>Minnesota</td>
<td>Missouri</td>
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<td>Wyoming</td>
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</tbody>
</table>

* The following ten states use merit plans only to fill midterm vacancies on some or all levels of court: Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota, West Virginia, and Wisconsin.

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III. HISTORY OF JUDICIAL SELECTION IN NEW MEXICO

Before the current selection plan was adopted by the voters in 1988, all judges in New Mexico were selected by the voters in partisan elections. Vacancies occurring between elections were filled by the governor, who had absolute

11. See id. at 46.
12. See id.
13. See Kenneth W. Miller & Gilbert K. St. Clair, State Judicial Selection: The New Mexico Plan 3 (Mar. 1992); see also supra notes 1-3 and accompanying text.
discretion in filling the vacancy. This system had its origin in the 1910 constitution which provided for a partisan-elected judiciary.

The 1988 amendment to the New Mexico Constitution adopting the new judicial selection system was the culmination of over fifty years of efforts to reform the method of selecting judges. A 1952 article in the *Journal of the American Judicature Society* describes the early efforts at reform. In 1933, the New Mexico legislature considered two bills to change the partisan election of judges. One bill provided for election of judges on a nonpartisan ballot and the other provided for a bar primary in which the New Mexico Bar Association would decide who should be on the ballot in judicial races. Neither bill passed, but in 1935, the State Bar of New Mexico convened a conference of a dozen statewide organizations to discuss possible improvements in the selection of judges. The conference adopted a resolution favoring nonpolitical selection of judges, and appointed a committee to develop a specific plan for consideration at a subsequent meeting of the conference. It does not appear that a plan was produced or that the conference ever met again.

During World War II, another unsuccessful effort was made to move to nonpartisan selection of judges. At the annual meeting of the state bar in 1948, a group of Las Cruces lawyers proposed a resolution to have the organization go on record as favoring the Missouri plan for selection of judges, but the resolution failed. The next year, the state bar reconsidered the proposal and submitted a draft plan to the membership for study and approval at the next meeting. At the 1950 annual meeting, the state bar approved the draft plan that provided for nomination of three persons by a nominating commission, with appointment by the governor from the list of nominees, followed by retention elections. This proposal was introduced in the 1951 legislature, and after an amendment that changed the number of votes required to reject a judge in the retention election, the plan was passed and went before the voters for approval in September of 1951. The voters defeated the judicial selection plan by a substantial margin, with most of the negative votes coming from heavily Hispanic populated counties in Northern New Mexico. Opponents of the plan argued that Spanish-Americans would not be recommended by commissions or appointed by governors, and Hispanic politicians opposed the amendment.

Governor Ed Mechem, who supported the proposed constitutional amendment, instituted his own plan modeled on the one rejected by the voters. He created an ad hoc judicial nominating commission to recommend candidates to him for appointment, and he limited his selection to those recommended by the commission. All governors since Governor Mechem have used some form of
“voluntary merit selection” in which the state bar has played a key role in recommending lawyers to fill interim vacancies.\textsuperscript{24} The appointed judges, however, were required to run in partisan elections if they intended to retain their position.

The 1969 constitutional convention considered changing the electoral system of selecting judges, but the judicial committee of the convention was divided on a proposed appointive system.\textsuperscript{25} The convention, sitting as a committee of the whole, rejected the proposed change and retained a partisan-elected judiciary.\textsuperscript{26} Another effort to eliminate partisan election of judges failed in 1982. The legislature proposed a constitutional amendment that provided for commission nomination of candidates for appointment by the governor and for nonpartisan retention elections. The nominating commission would have also evaluated judges before retention elections, and the commission’s recommendation would appear on the ballot next to the candidates’ name. The voters defeated the proposed amendment.\textsuperscript{27}

The reformers finally succeeded in changing the system for selecting judges in 1988 with the approval of the constitutional amendment that provides for a compromise between selection of judges based on commission nomination and partisan election of judges. The original proposal called for a pure nomination-appointment-retention system, but the legislature insisted on a compromise requiring one partisan election before a judge could be eligible for retention elections.\textsuperscript{28} All judges sitting in 1988 would be considered to have met the competitive election requirement and would face only retention elections.\textsuperscript{29} The compromise plan went before the voters in November, 1988. Described on the ballot as “judicial reform,”\textsuperscript{30} the voters approved the plan by a vote of 203,509 to 159,957.\textsuperscript{31} The new judicial selection system went into effect on January 1, 1989.

The impetus for the reforms adopted by the voters in 1988 came primarily from the Second Judicial District Judges in Bernalillo County.\textsuperscript{32} Judge W. John Brennan and Judge Rebecca Sitterly, both of the Second Judicial District in Albuquerque, wrote the original proposal submitted to the legislature and limited the proposal to the appellate courts and courts in Bernalillo County.\textsuperscript{33} The proposal called for a nomination-appointment-retention election system for selecting judges similar to the Missouri plan.\textsuperscript{34} The judges from the Second Judicial District in Bernalillo County amended the proposal to include all of the judicial districts in the reform plan. Judges from the other judicial districts in New Mexico objected to the limitation and indicated that they would support the proposal if it applied to all of the judicial districts in the state.\textsuperscript{35} The New Mexico District Judges Association, headed by District Court Judge W. John Brennan, Common Cause, the League of

\begin{itemize}
\item \textsuperscript{24} See id.
\item \textsuperscript{25} See Eric D. Dixon, A Short History of Judicial Reform in New Mexico, 73 JUDICATURE 48 (1989).
\item \textsuperscript{26} See id.
\item \textsuperscript{27} See id.
\item \textsuperscript{28} See id.
\item \textsuperscript{29} See id. at 49.
\item \textsuperscript{30} See id.
\item \textsuperscript{31} See id.; see also the note following N.M. CONST. art. VI, § 35.
\item \textsuperscript{32} Telephone Interview with Judge W. John Brennan, Chief Judge of the Second Judicial District (1999).
\item \textsuperscript{33} See id.; see also Miller & St. Clair, supra note 13, at 6.
\item \textsuperscript{34} See Dixon, supra note 25, at 48.
\item \textsuperscript{35} See Telephone Interview with Judge Brennan, supra note 32.
\end{itemize}
Women Voters, and a group called Court Update supported the reform plan submitted to the legislature. Because of opposition in the legislature to the proposal, the Judges Association agreed to the addition of a partisan election to the plan. This change in essence formalized the system that had been in effect since Governor Mechem adopted the use of ad hoc nominating commissions to recommend candidates to fill interim vacancies.

The compromise plan that emerged from the legislature that went to the voters in November of 1988 established a nominating committee process and preserved the partisan election of judges. It also brought the legislature into the judicial selection process by giving to the speaker of the house of representatives and the president pro tempore of the senate the power to appoint members of the nominating commissions.

During the debate over the proposed constitutional amendment, the three groups that had successfully lobbied the proposal through the legislature formed a coalition called “People for Judicial Reform.” The coalition engaged in fund raising and promoted the amendment in a statewide campaign. Proponents emphasized the benefits of removing judicial selection from the political arena. In particular, they argued that the amendment would favor competence rather than political skills, produce more qualified judges, and eliminate the effects of campaigning on judicial impartiality. They also argued that the proposed amendment would, after the first partisan election, avoid political judicial races that force judges to seek campaign money from attorneys who appear before them. Proponents also addressed the concern about accountability by arguing that retention elections would give voters an opportunity to reject judges. In short, the proponents asserted that the proposed amendment would improve the quality of the judiciary and minimize the influence of politics even though the amendment included one partisan election.

The amendment had its opponents. Three of the five supreme court justices opposed it and actively campaigned against it, claiming that the plan was elitist in that lawyers dominated the nominating commissions. Opponents forcefully premised their arguments on the theme that a democracy requires the selection of public officials, including judges, by the people in open elections. They saw the nominating commission and retention elections as taking power away from the electorate. They also claimed that retention elections granted judges de facto life tenure, and that the amendment, instead of taking politics out of judicial selection,
shifted the politics from the electoral system to the nominating commission. Finally, they argued that the new system would not produce any better judges than the partisan election process.

Proponents of the amendment appeared to be better organized than the opponents as they raised money for advertisements and obtained the endorsements of two of the influential newspapers in New Mexico, the *Albuquerque Journal* and the *Santa Fe New Mexican*. The amendment passed by a rather comfortable margin, with voters in nineteen of the thirty-three counties approving the plan. The three most populous counties in the state all approved the amendment.

IV. DESCRIPTION OF THE JUDICIAL NOMINATION AND APPOINTMENT PROCESS

New Mexico’s hybrid system for selecting judges became effective on January 1, 1989, and applies to the selection of appellate judges for the Supreme Court of New Mexico and the New Mexico Court of Appeals, as well as trial judges for the district courts and the metropolitan court. The constitutional amendment created fifteen separate judicial nominating commissions to recommend candidates to the governor. These commissions consist of the Appellate Judges Nominating Commission, which screens and nominates candidates for the supreme court and court of appeals; thirteen District Court Judges Nominating Committees for each of the thirteen judicial districts in New Mexico; and the Metropolitan Court Judges Nominating Committee for the one Metropolitan Court in Bernalillo County (Albuquerque).

The new judicial selection system in New Mexico differs substantially from the nomination-appointment-retention plans in other states and also from the *Model Judicial Selection Provisions* developed by the American Judicature Society. First, the New Mexico compromise plan, unlike any other state employing a system of nominating commission and retention elections, interposes a partisan election between the nomination-appointment and retention elections. Second, the New Mexico system, with three non-lawyers on a commission of fourteen, has a smaller percentage of non-lawyers on the nominating commission than any other state. Third, with three judges on the commissions, New Mexico has more judges on

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49. See id.
50. See id.
51. See id.
52. See id.
53. See id. The most populous counties are Bernalillo (Albuquerque), Dona Ana (Las Cruces), and Santa Fe.
54. See N.M. CONST. art. VI, § 35.
55. See id. § 36.
56. See id. § 37.
57. See id. §§ 35-37.
58. See id.
59. The Model Judicial Selection Provisions are included in the *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS* published by the American Judicature Society (1985); see also Dixon, supra note 25, at 49.
60. See N.M. CONST. art. VI, § 33.
61. See id.
62. See Dixon, supra note 25, at 49.
nomination commissions than any other state. Fourth, unlike the model provisions and the provisions in other states requiring commissions to nominate a certain number of candidates to the governor for appointment, usually two to five, the New Mexico plan has no specific number of candidates that must be nominated by the commissions. Finally, the New Mexico plan, unique among the states and contrary to the Model Judicial Selection Provisions, allows the governor to request additional names to be added to the list of nominees.66

A. Commission Composition

Each of the commissions includes the dean of the School of Law at the University of New Mexico (the only law school in the state) as chair, three judges, three non-lawyers, and at least seven lawyers. According to article VI section 35 of the New Mexico Constitution, the Appellate Judges Nominating Commission shall include the chief justice of the supreme court, or his designee, and two judges of the court of appeals appointed by the chief judge of the court of appeals. In addition to the judges, the state’s leading political officials appoint six members to the commission. The governor, president pro tempore of the senate, and the speaker of the house of representatives each appoint two commissioners—one who is a lawyer licensed to practice law in New Mexico, and one who is a citizen of New Mexico who is not licensed to practice law in any state.68 To complete the commission membership, the president of the state bar of New Mexico, in consultation with the judges on the commission, appoints at least four members of the state bar, representing civil and criminal prosecution and defense.69 Because the constitution requires that the commissions be politically balanced, with an equal number of members from each of the two largest political parties, the president of the state bar and the judges may appoint additional members of the bar in order to achieve political parity.70 These additional appointments must insure that the diverse interests of the state bar are represented, and the dean of the law school is named as the final arbiter of whether the diverse interests are represented.71 The persons serving as dean during the first ten years have interpreted diverse interests to include not only law practice diversity, but geographic, gender and ethnic diversity as well.72

Because of the requirements of political balance and diversity, most commissions have fourteen to eighteen commissioners, not counting the chair.73 Counting the

63. See id.
64. See Model Judicial Selection Provisions, supra note 59, art. 1 § 1.
65. The Model Judicial Selection Provisions do not include a provision for commissions to submit additional nominees at the governor’s request.
66. See N.M. CONST. art. VI, § 35.
67. See id.
68. See id.
69. See id.
70. See id.
71. See id.
73. See ANNUAL REPORTS OF THE JUDICIAL SELECTION OFFICE (on file at the University of New Mexico School of Law) [hereinafter JUDICIAL SELECTION REPORTS]. The Judicial Selection Office compiles annual
required three judges on each commission, the six political appointees, and at least
four lawyers appointed by the state bar president and judges, a commission would
have thirteen members. Unless one of the appointees is not registered in one of the
two largest political parties, a thirteen-member commission will be unbalanced. As
a result, the state bar president and judges appoint more than four lawyers in order
to achieve political balance and diversity.

Appointments to the commissions must be made every time a judicial vacancy
occurs because at present there is no term for commissioner appointments. The
constitution provides that commissioners shall be appointed for such terms as may
be provided by law,74 but the New Mexico Legislature has not enacted any law
specifying the terms for commissioner appointments. In the absence of any terms
for commissioners, each of the appointing authorities is asked each time a vacancy
occurs whether the same appointees will be retained or replaced. In most commis-
sions, there is some, but not much, turnover in the composition of the commission
from vacancy to vacancy.75

As an example of the composition of one of the commissions, Table 1 sets forth
the membership of the Appellate Judges Nominating Commission,76 the only
statewide commission.

Table 1: Composition of Appellate Judges Nominating Commission

Chair
1. Dean of University of New Mexico School of Law

Three Judges
1. Chief justice of the Supreme Court or designee
2. Judge of the Court of Appeals appointed by the Chief Judge of the Court of
   Appeals
3. Judge of the Court of Appeals appointed by the Chief Judge of the Court of
   Appeals

Six Political Appointments
4. Lawyer appointed by the Governor
5. Citizen appointed by the Governor
6. Lawyer appointed by the Speaker of the House
7. Citizen appointed by the Speaker of the House
8. Lawyer appointed by the President Pro Tempore of the Senate
9. Citizen appointed by the President Pro Tempore of the Senate

74. See N.M. CONST. art. VI, § 35.
75. See JUDICIAL SELECTION REPORTS, supra note 73.
76. See N.M. CONST. art. VI, § 35.
Four Appointments by the State Bar President and the Judges on the Commission

10. Lawyer
11. Lawyer
12. Lawyer
13. Lawyer

Additional Lawyer Appointments to Achieve Political Balance and Diversity

14. Lawyer(s) appointed by the State Bar President and the Judges

The District Court Nominating Commissions differ in composition from the Appellate Judges Nominating Commission chiefly with respect to the judges on the committees. The chief judge of the district where the vacancy exists replaces one of the judges from the court of appeals so that the three judges are a supreme court justice, a judge from the court of appeals, and a district court judge. In addition, the lawyer and citizen members must reside in the judicial district.

The Metropolitan Court Judges Nominating Committee, likewise, differs in composition only with respect to the judges on the committee. The three judges are a justice of the supreme court, a judge of the district court in which the metropolitan court is located, and the chief judge or designee of the metropolitan court where the vacancy exists. Like the district court committee members, the attorney and citizen members must reside in the judicial district in which the metropolitan court is located.

Each commissioner takes an oath of office at the start of the commission meeting requiring the commissioner to swear that he/she will faithfully and impartially discharge the duties of judicial selection commissioner. Although personal or professional relationships between a commissioner and an applicant do not disqualify a commissioner from participating in the evaluation of the applicant pool, a commissioner must disqualify him/herself if the commissioner feels the he/she cannot be impartial and cannot comply with his/her oath of office as to any applicant. In order to insure that any relationships are made public, the Rules Governing Judicial Nominating Commissions require each commissioner to disclose to the commission all current or past professional, family, business, and other special relationships with any of the applicants. This disclosure occurs during the interview stage of the commission meeting.

77. See N.M. CONST. art. VI, § 36.
78. See id.
79. See id.
80. See id. § 37.
81. See id.
82. See id.
83. See Rules Governing Judicial Nominating Commissions of the State of New Mexico § 3(A), published as an appendix to N.M. CONST. art. VI [hereinafter Rules Governing Judicial Selection Commissions].
84. See id.
85. See Rules Governing Judicial Selection Commissions § 3(B).
B. Notice of Vacancy

The judicial selection process applies whenever a judicial vacancy occurs in the appellate court, district court, or the metropolitan court. A vacancy can occur due to a resignation, death, expiration of a term, or the creation of a new judicial position by the legislature. Upon the occurrence of a vacancy, the chair of the judicial nominating commission issues a notice of vacancy soliciting nominations and applications from lawyers who meet the constitutional or statutory qualifications for the vacant judicial position. The notice of vacancy, announcing the deadline for applications and the meeting date of the judicial selection commission, is published in the New Mexico Bar Bulletin and in state-wide and local newspapers. In addition, the notice is sent to all of the specialized bar associations, such as the Women’s Bar Association, the Hispanic Bar Association, the Black Lawyers Association, and the Indian Bar Association. The chair also provides notice of the vacancy to the persons charged by the constitution with the duty of appointing commissioners and coordinates their appointments.

C. Qualifications for Judicial Positions

The constitutional qualifications for appellate and district court judges are quite minimal. To qualify for the supreme court and court of appeals, a person must be at least thirty-five years of age, have resided in the state for at least three years, and have been in the actual practice of law for at least ten years preceding assumption of office. To be qualified for the position of district judge, a person must be thirty-five years of age, have actually practiced law for six years, and be a resident in the district in which the judicial position is located. The statutory qualifications for the metropolitan court include membership in the bar and the practice of law in New Mexico for at least three years, but no age or residency requirements.

D. Commission Evaluation of Candidates

The constitutional amendment prescribes a process for the initial selection of judges on the basis of merit. Section 35 of article VI provides that, for any vacancy, the nominating commission “shall actively solicit, accept and evaluate applications from qualified lawyers” and shall “submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by

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86. See N.M. Const. art. VI, §§ 35-37.
87. See id. § 35; Rules Governing Judicial Selection Commissions § 2(A).
88. Rule Governing Judicial Selection Commissions section 2(A) requires that the Chair publicly announce the vacancy. Rule section 2(A) does not prescribe to whom the notice should be given, but the practice of the Judicial Selection Office has been to notify the bar through the New Mexico Bar Bulletin, special bar associations, and the general media.
89. See Rules Governing Judicial Selection Commissions § 2(B).
90. See N.M. Const. art. VI, § 8 (qualifications for justices of the supreme court), and § 28 (qualifications for judges of the court of appeals). The qualifications for appellate judges were changed in 1988 in a constitutional amendment. The changes in the qualifications were part of the amendment changing the judicial selection method.
91. See N.M. Const. art. VI, § 14. The constitutional amendment that changed the judicial selection method also changed the qualifications for district judge.
a majority of the commission.\(^{93}\) This language requires the commission to make two decisions: (1) whether the applicant is qualified, and (2) should the applicant, if qualified, be recommended to the governor based on the evaluation of the application.

The phrase, "qualified for the judicial office," is not defined in article 6 section 35. Qualified may refer solely to the constitutional requirements for judicial positions,\(^{94}\) or the term may encompass a broader notion of those qualities that define a good judge. A commission’s determination that a candidate meets the constitutional requirements does not mean that the person must be recommended for appointment. The use of the word “and” between “qualified” and “recommended” in article VI section 35 makes clear that the “qualified” determination and “recommended” decision are separate. Even if “qualified” is interpreted to include the qualities that a good judge should possess, the recommendation language in section 35 contemplates that a commission could find a candidate to be qualified in its broader sense, that is, to have the qualities of a good judge, but decide not to recommend the candidate. The language of section 35, therefore, does not require that all qualified candidates be recommended, however qualified is defined.

Because the qualifications specified for judges in the constitution concerning age, years of practice of law, and residency, do not involve evaluation by the commission, section 35 contemplates that the decision to recommend will be based on merit after an evaluation of the application and applicant. In fact, the constitution specifically authorizes the commission to “require an applicant to submit any information it deems relevant to the consideration of his (her) application.”\(^{95}\)

The constitution does not require the commission to recommend any particular number of nominees to the governor. According to the constitution, all candidates receiving a majority of the votes of the commission will be nominated.\(^{96}\)

In order to effectuate the constitutional language requiring the commissions to assess applications, evaluative criteria have been adopted in the Rules Governing the Judicial Nominating Commissions.\(^ {97}\) The evaluative criteria specified in the Rules were borrowed from the Handbook for Judicial Nominating Commissions\(^ {98}\) published by the American Judicature Society. They include the following:

-physical and mental ability to perform the tasks required
-impartiality
-industry
-integrity
-professional skills
-community involvement
-social awareness
-collegiality

\(^{93}\) N.M. CONST. art. VI, § 35 (emphasis added).
\(^{94}\) See supra text accompanying notes 90-92.
\(^{95}\) N.M. CONST. art. VI, § 35.
\(^{96}\) See id.
\(^{97}\) See Rules Governing Judicial Selection Commissions § 4.
\(^{98}\) See HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS, supra note 59, at 57-63.
The New Mexico Judicial Selection Commissions have agreed that these criteria specify the qualities that make for a good judge and should be used in evaluating judicial candidates. These criteria in essence define qualified in its non-constitutional sense, but more importantly, they guide the commissions' recommendation decision.

Because the New Mexico Constitution authorizes commissions to require applicants to submit any information relevant to the consideration of their applications, commissions have adopted, as part of the application process, a questionnaire that asks for information relevant to the evaluative criteria. In addition, the Rules require the chair of the commission to obtain information about the applicants from the Disciplinary Board and from the Judicial Standards Commission, the commission that investigates charges of misconduct by judges. The Rules also authorize the chair, upon the written request of any commissioner, to seek additional information from an applicant or other persons relevant to the evaluative criteria. Finally, the commissions obtain relevant information by interviewing every candidate in open and public meetings. The commission may, for good reason, question any applicant on a confidential subject in closed session.

E. Applicant Questionnaire

Attorneys interested in applying for a judicial position must complete a questionnaire that has been approved by all of the judicial selection commissions and adopted as part of the Rules Governing Judicial Nominating Commissions. It includes questions concerning education, employment history, involvement in professional and civic activities, physical and mental health, any criminal or professional rule violations, the nature of practice experience, and the extent of experience in appellate and trial work, including jury trials. The questionnaire also asks candidates to submit five letters of recommendation, to include a current resume, to explain their reasons for applying for a judicial position, and to list the factors that they believe make them well-suited for it. Once the deadline for applications has passed, the names of the candidates are published both state-wide and locally, and the completed questionnaires are considered public documents available for anyone to see.

100. N.M. CONST. art. VI, § 35.
101. See Rules Governing Judicial Selection Commissions § 2(D); Applicant Questionnaire, N.M. CONST. art. VI app.
102. See Rules Governing Judicial Selection Commissions § 2.
103. See id. § 2(J).
104. See id. §§ 5, 6.
105. See id. § 6(E).
106. See Applicant Questionnaire, N.M. CONST. art. VI app.
107. See Preface to Applicant Questionnaire, N.M. CONST. art. VI app.
F. Inquiry to Disciplinary Board and Judicial Standards Commission

Once the deadline for applications has passed, the names of all applicants are sent to the Disciplinary Board and the names of those who have served or currently serve as judges are sent to the Judicial Standards Commission, asking if any of the applicants have been the subject of formal disciplinary proceedings. The applicant questionnaire requires a signed and notarized waiver of confidentiality authorizing the judicial selection commission to obtain otherwise confidential information regarding charges and determinations of professional and judicial disciplinary bodies. Notwithstanding the breadth of the waiver required, commissions are not interested in all complaints filed against applicants but only those complaints that result in some finding of misconduct. Misconduct may result in either formal discipline, like suspension or reprimand, or informal dispositions, like informal admonitions, that do not invoke the full panoply of disciplinary proceedings.

Apart from the inquiry to disciplinary bodies, the commissions do not independently investigate the backgrounds of the applicants or attempt to verify the information supplied by the candidates in the questionnaire. If allegations relevant to the criteria come to the attention of the commission, the commission chair will then investigate the allegations and report the findings to the commission. Also, upon written request by a commissioner, the chair may seek additional information from the applicant or others relevant to the evaluation criteria.

G. Commission Meetings

According to the constitution, the commissions must meet within thirty days of the actual occurrence of a vacancy and report their recommendations to the governor. The meeting is open to the public and the media are given notice of its date, time, and location. Candidates also may attend the meeting, including the interviews of other candidates, but only after their interview is completed. The chair establishes the order of interviews randomly.

The commission meetings open with a determination of a quorum, introduction of commission members, and the administration of the oath taken by each commissioner to faithfully and impartially discharge the duties of the office of

108. See supra text accompanying notes 100-102.
109. See Applicant Questionnaire, N.M. CONST. art. VI app. Question 23 of the questionnaire asks applicants, "to your knowledge, has any formal charge of violation of any rules of professional conduct ever been filed against you in any jurisdiction? If so, when? How was it resolved?"
110. According to the Disciplinary Counsel, many complaints against lawyers are without merit and are dismissed. See NM RULES OF PROFESSIONAL RESPONSIBILITY 17-206 (1995) for the types of discipline.
111. See id.
112. The Rules Governing Judicial Selection Commissions impose no obligation on the Commission or the Chair to conduct an independent investigation or to verify information contained in the questionnaire. But see infra note 113 and accompanying text.
113. See Rules Governing Judicial Selection Commissions § 2(J).
114. See N.M. CONST. art. VI, § 35.
115. See Rules Governing Judicial Selection Commissions § 5(B).
116. See id. § 5(C).
117. See id. §§ 2(G), 6(A).
The agenda includes the report of the chair on actions taken on behalf of the commission, public comment, candidate interviews, closed session discussion of the applicants, and the public vote. There is an opportunity for public input during the public comment part of the agenda, and members of the public are allotted time either for questions or comments on the policies and procedures of the commission or for comments concerning individual applicants.

Most of the commission meeting time is devoted to interviews of all applicants—no matter the number. Some vacancies have attracted more than twenty applicants, but the commission rules do not authorize any preliminary screening to reduce the number of interviews by the full commission. Each commissioner is given the opportunity to question each applicant, and the rules admonish commissioners to ask applicants about any information which the commissioner has learned or heard regarding the applicant and which the commissioner intends to raise in closed session. This rule attempts to provide applicants with an opportunity to respond to negative information that might be raised about their candidacy in the closed discussion. The commission may, for good reason, hear any applicant on a confidential subject in closed session. If an applicant chooses to submit information on a confidential basis, the chair makes such information available to the commissioners but will not disclose it to the public unless the commission votes to make it public. Typical of the information submitted confidentially is psychological counseling following a divorce or loss of a close family member. This information would be responsive to the item on the questionnaire asking if there is any mental or physical problem that would affect the ability of the applicant to perform the duties of judge.

Following the interviews, the commission meets in closed session to discuss the applicants’ qualifications and to evaluate them according to the evaluative criteria specified in the Rules Governing Judicial Nominating Commissions. The state Open Meetings Act permits commissions to discuss personnel matters in closed session. The discussion during closed session is confidential, but the extent of confidentiality is determined by each individual commission. Most commissions adopt a rule of total confidentiality that prevents disclosure of anything said in closed session. The interest in promoting full and frank discussions supports the rule of total confidentiality. Commissioners supporting total confidentiality express...

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118. See id. § 3(A). See N.M. CONST. art. VI, § 37 (10(A)) for the oath of office for Judicial Selection Commissioners.
120. See id. § 6(C).
121. See id. § 6(D).
122. See id. § 6(E).
123. The Rules Governing Judicial Selection Commissions do not address this situation. This was the experience of the author while serving as Chair.
124. See Applicant Questionnaire question 21, N.M. CONST. art. VI app.
125. See Rules Governing Judicial Selection Commissions § 7(A).
126. See N.M. STAT. ANN. § 10-15-1(H)(2) (Supp. 1995). This provision exempts hiring discussions from the requirement that meetings of public bodies be open to the public. This provision also specifies that "[j]udicial candidates interviewed by any commission shall have the right to demand an open interview."
127. See Rules Governing Judicial Selection Commissions § 7(A).
fears that they cannot be candid in the discussion if their comments about candidates can be disclosed, especially when some of the candidates are sitting judges. Some commissions have adopted a rule of partial confidentiality, a rule that allows commissioners to disclose to candidates, other lawyers, or the media the substance of the discussions concerning any candidate, but prevents disclosure of any information that would identify particular comments by particular commissioners. Supporters of partial confidentiality argue that applicants deserve to know what considerations led the commission to exclude them from the list of nominees and that commissioners should be able to respond to questions from members of the bar or media asking why certain candidates made the list and others did not.\textsuperscript{128} The partial confidentiality rule attempts to balance the interest of honest and candid discussions about candidates with the interest of public disclosure of information. Neither rule, of course, prohibits disclosure of information that was part of the open part of the meeting, including the interviews, or information included on the questionnaire, a public document. Nor does either rule preclude a commissioner from disclosing his or her own personal opinion about the strength or weakness of any applicant.

The Rules require that straw votes, non-binding and by secret ballot, be taken in closed session to determine the degree of support for each applicant.\textsuperscript{129} Before each round of straw votes, the applicants under consideration are discussed.\textsuperscript{130} In the straw vote each commissioner votes for as many of the applicants that he/she wishes to see on the list of nominees that goes to the governor.\textsuperscript{131} The commission must hold at least two rounds of straw votes in closed session, and when it believes that it is ready to decide which candidates to recommend, the commission reconvenes in public session for a final vote.\textsuperscript{132}

The formal and official vote takes place in public session.\textsuperscript{133} A vote of the majority of the commissioners present is required to recommend any nominee to the governor,\textsuperscript{134} and, according to the constitution, the chair may vote only in the event of a tie.\textsuperscript{135} Although the constitutional provision does not mandate any specific number of nominees, the Rules Governing Judicial Selection Commissions recognize that the governor, not the commission, has the authority to appoint judges. Thus, the Rules encourage commissions to strive to recommend two or more names for each position.\textsuperscript{136}

Commissions attempt to give the governor some choice in the appointment process but also try to limit the governor’s choice by recommending only the most qualified applicants. The American Judicature Society in its Model Judicial Selection Provisions supports a limit on the number of candidates to be nominated. Indeed, according to the Model Provisions, nominating commissions should

\begin{itemize}
\item 128. This statement comes from the author’s personal recollection of the debates surrounding the issue.
\item 129. See Rules Governing Judicial Selection Commissions § 7(B).
\item 130. See id. § 7(C).
\item 131. See id. § 7(D).
\item 132. See id. § 7(E).
\item 133. See id. § 8(B).
\item 134. See id.
\item 135. See N.M. CONST. art. VI, § 35.
\item 136. See Rules Governing Judicial Selection Commissions § 8(C).
\end{itemize}
recommend "no more than five nor less than two qualified persons for each
vacancy." This language gives commissions the flexibility to submit fewer names
whenever they have difficulty finding five qualified nominees, a situation that may
occur in less populated areas. The commentary to the Model Provisions justifies the
maximum number of five nominees as necessary to insure that commissions
nominate only the most qualified candidates. The minimum number of two,
according the American Judicature Society, allows commissions to limit, but not
eliminate, the choice of the appointing authority.

Because most commissioners do not want to be on record as voting against
particular applicants, especially the lawyer commissioners who will have an
ongoing relationship with the lawyers and judges who did not get nominated, the
formal vote usually comes in the form of a motion to recommend a slate of
candidates to the governor. This motion is usually approved by a majority vote.
In this way, commissioners do not have to vote on each applicant individually.
Moreover, this vote format prevents public disclosure of the degree of support for
each candidate so that applicants will know only if they did or did not have support
from a majority of the commission. They will not know if they had virtually no
support, substantial support, or overwhelming support. In addition, the practice of
not ranking the nominees serves to avoid unnecessarily labeling of the successful
candidates as highly qualified or just barely qualified.

By voting on a slate of candidates, commissions do not publicly embarrass
unsuccessful applicants or label unsuccessful applicants as unqualified. The chair
sends the names of the nominees to the governor in alphabetical but unranked
order.

H. Appointment Process

The governor has thirty days after receipt of the list of recommended candidates
in which to appoint someone from the list to fill the judicial vacancy. The
governor, however, may make one request of the commission for submission of
additional names, and upon such a request, "the commission shall promptly submit
such additional names if a majority of the commission finds that additional persons
would be qualified and recommends those persons for appointment to the judicial
office." The governor may make such a request only once. If the governor fails
to make an appointment from the final list of nominees within thirty days, the chief
justice of the supreme court shall appoint someone on the list.

When the governor requests additional names, the commission reconvenes within
thirty days of the request and votes on those applicants who were not recommended

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138. See id. at 14.
139. See id.
140. See id.
142. See N.M. CONST. art. VI, § 35.
143. Id.
144. See id.
JUDICIAL SELECTION IN NEW MEXICO

the first time. No new applications are accepted, and the commission generally does not re-interview the candidates. The commission discusses the applicants in closed session, conducts straw votes, and then votes in public. The constitution does not require the commission to submit additional names, even if requested by the governor. If no applicants obtain a majority vote of the commissioners, no new names will be recommended.

Commission screening of candidates provides a valuable service to the governor, especially for vacancies occurring at the district court level. The governor can avoid local political pressure to appoint a particular lawyer if the lawyer is not recommended by the commission. Because the lawyer is not on the list of nominees, the governor does not offend the political leaders by appointing someone other than their choice. Before the adoption of the current nomination and appointment system, governors voluntarily used an informal ad hoc nominating commission in part to eliminate lawyers who would make poor judges but who had the support of the political forces.

V. DESCRIPTION OF THE ELECTORAL PROCESS

The current New Mexico judicial selection system requires that appointed judges participate in two types of elections—first, a partisan election which may be contested, and second, uncontested retention elections. According to the constitution, any person appointed to fill a vacancy under the judicial selection process described above serves until the next general election. Then he or she must run as a candidate in order to remain on the bench. The winner of that election holds the office until the expiration of the original term. This provision subjects the appointed judge to New Mexico election law, which includes primary elections for the selection of candidates by political parties and general elections contested by the nominees of the political parties. The person winning the partisan election becomes eligible for a nonpartisan retention election at the expiration of the term. The constitution, therefore, submits all judges to the New Mexico election laws.

A. Partisan Election

Briefly, New Mexico election law depends on political parties to name the candidates to be on the ballot at general elections. A person seeking to be listed on the general ballot, therefore, must be nominated by one of the political parties

145. See id.
146. See id.
147. See id. The specific language states that the appointed judge’s successor “shall serve until the next general election.”
148. See id. Judges of the supreme court and court of appeals have terms of eight years, and judges of the district court have terms of six years. Metropolitan court judges have terms of four years. A vacancy created by resignation or death of a judge is filled for the duration of the term held by the judge who is replaced. See N.M. CONST. art. VI, § 33.
149. See N.M. STAT. ANN. §§ 1-8-1 to 1-24-4 (Supp. 1999).
150. See N.M. CONST. art. VI, § 33.
151. See N.M. STAT. ANN. §§ 1-8-1 to 1-24-4 (Supp. 1999).
152. See id. § 1-10-4 (1995).
or file as an independent candidate. Generally, to obtain a party’s nomination, a person must win the party’s primary election. A person may also receive the party’s nomination without running in the primary election. If the judicial vacancy occurs too late for the appointed judge to be included in the primary election or occurs after the primary election, the central committee of the political party designates its nominee for the general election.

The central committee may select its party’s nominee for vacancies that occur either before or after the primary. The central committee can designate the party’s candidate before the primary when a judicial vacancy occurs or will occur after the date of the issuance of the governor’s primary election proclamation. General elections take place every two years, and the governor must issue a primary election proclamation the last Monday in January of each even-numbered year. In a mandamus action in the Supreme Court of New Mexico, the court ruled that the governor is subject to a mandatory, non-discretionary duty when issuing a primary election proclamation to include judicial offices, “which by virtue of facts known on the date the proclamation is issued (the last Monday in January of each even-numbered year) has resulted or will result in a vacancy, such that the successor of the person appointed . . . to fill the vacancy must be chosen at the general election in November of that year.” Applying that ruling to five cases before it, the court concluded that two new judgeships created by the legislature effective in January of the election year must be included in the primary election proclamation because these vacancies were known on the date of the proclamation. In addition, two judicial positions—one that became vacant the year before and one that became vacant in January of the election year, but before the last Monday, must be included in the proclamation, even though no one had been appointed to fill that position by the date of the required proclamation. With respect to a resignation that would not become effective until after the proclamation date although the resignation had been tendered before the proclamation date, the court ruled that this vacancy was “not known” as of the proclamation date. The court, therefore, concluded that the governor had no duty to include this office in the primary election proclamation.

A fair reading of the court’s decision regarding the judicial offices, which must be included in the primary election proclamation, suggests that the determination turns on the date of the vacancy, not the date that it is known that a vacancy will occur. In the case involving a vacancy occurring in February, it was known before the proclamation date that the vacancy would occur because of the letter of

153. See id. § 1-8-48 (Supp. 1999).
155. See id. § 1-8-7(A) & (B) and § 1-8-8(A).
156. See id. § 1-8-7(A)(2).
157. See id. § 1-8-12.
158. See State ex rel. Montoya, Nos. 21,964, 21,991, and 21,994 (N.M. Mar. 10, 1994). The New Mexico Supreme Court issued an unpublished Order granting in part and denying in part the consolidated petitions for a writ of mandamus.
159. Id.
160. See id.
161. See id.
162. See id.
163. See id.
resignation. The court stated that this resignation did not become effective until February 8, 1994, and "accordingly it was not known as of January 31, 1994, that that office would become vacant." Apparently, the court views a vacancy as known only when the vacancy actually occurs. In all of the other cases before it, the actual vacancy as defined by the court occurred before the proclamation date. For example, in the case of a metropolitan judge appointed to the district court three days before the proclamation date, the court treated the appointment as effectively creating a vacancy even though the judge had not effectively resigned from the metropolitan court. The court ruled that the appointment of an incumbent judge to fill another judicial vacancy was the equivalent of a vacancy due to death, effective resignation, removal, or creation of a new judgeship by the legislature.

The governor may amend the proclamation to include later vacancies, but only those vacancies due to removal, resignation or death. The proclamation can only be amended between the time of its issuance and the time set in the original proclamation for filing declarations of candidacy or statements of candidacy for convention designation. The election law provision authorizing an amended proclamation states that the "Governor may amend the proclamation." This language, discretionary and not mandatory, suggests that the governor need not include a later qualifying vacancy in the primary election proclamation by issuing an amended proclamation. The discretionary language in the proclamation amendment statute constrained the court from issuing an order mandating the governor to issue an amended proclamation to include the judicial position that became vacant only eight days after the proclamation date. In cases where vacancies are not included in the primary proclamation, the central committees of the political parties designate their nominees.

In addition to designating nominees for judicial vacancies not included in the governor’s primary proclamation, the central committee of a party may also designate a nominee for the general election after the primary election if the party’s nominee, either elected or designated, will not appear on the general election ballot for any reason. The time period for designation by the central committee to fill vacancies in the list of a party’s nominees depends on the cause of the vacancy. If the vacancy on the general ballot is due to the death of the nominee, the central committee may appoint another person of the same party affiliation to fill the vacancy up until five days before the general election. For any other cause of a vacancy on the general ballot, the central committee must make its appointment to fill the vacancy at least fifty-six days before the general election.

164. Id.
165. See id.
166. See id.
168. See id.
169. Id. (emphasis added).
170. See State ex rel. Montoya.
171. See N.M. STAT. ANN. § 1-8-7A(2) (1995).
172. See id. § 1-8-8.
173. See id. § 1-8-8(C).
174. See id.
The primary election is the usual way of selecting the party's candidate for the general election, and the election law imposes several requirements on a person seeking to run in the primary election. A person must file a declaration of candidacy for the elective position and file a nominating petition with the requisite number of signatures of voters of the candidate's party. Generally, a candidate needs signatures amounting to at least three percent of the total vote of the candidate's party in the last election in order to get on the primary election ballot. If a political party chooses to convene a convention for the purpose of designating candidates on the primary ballot, a candidate needs a number of signatures amounting to at least two percent to be considered by the convention delegates for designation. Every candidate receiving twenty percent of the delegates' votes will be placed on the primary ballot. Candidates who do not receive the convention designation may still get on the primary ballot by collecting additional signatures that total at least four percent of the total vote of the candidate's party at the last election.

Apart from the system for selecting political party nominees for the general election, a person may get on the general election ballot as an independent candidate. In order to qualify as an independent candidate, a person must file a declaration of independent candidacy and submit a nominating petition with voter signatures amounting to at least three percent of the votes cast in the last election. For a statewide office, like judges of the supreme court or court of appeals, the three percent refers to the votes cast in the state, and for a district office, like district judge, the three percent refers to votes cast in the district.

New Mexico election law also provides for write-in candidates at the primary election stage.

B. Retention Election

The person who wins the partisan election, either the appointed judge or challenger, holds the judicial office until the expiration of the original term. Terms for justices of the supreme court and judges on the court of appeals are eight years, six years for district court judges, and four years for metropolitan court judges. At the expiration of the original term, the judge elected in the partisan

175. See id. § 1-8-21 (Supp. 1999).
176. See id. § 1-8-33 (1995).
177. See id. § 1-8-33(B).
178. See id. § 1-8-21.1(C).
179. See id. § 1-8-21(A) and § 1-8-33(D) (Supp. 1999).
180. See id. § 1-8-46 (1995).
181. See id. § 1-8-48(A) (Supp. 1999).
182. See id. § 1-8-51(C) & (E).
183. See id. § 1-8-51(C).
184. See id. § 1-8-51(E).
185. See id. § 1-8-36.1. This provision applies to elections for district judges, magistrates, and offices voted on by all voters of the state. Because the judicial positions on the supreme court and court of appeals are state-wide positions, this provision would apply to elections for appellate judges.
186. See N.M. CONST. art. VI, § 35.
187. See id. § 33.
election is eligible for a nonpartisan retention election. The judge in such an election has no opposition on the ballot, and the only question presented to the voters is whether to retain or reject the judge. To be retained, a judge must receive at least fifty-seven percent of the votes. Additionally, a judge seeking retention must file a declaration of candidacy by the deadline for filing a declaration of candidacy in a primary election.

VI. RESULTS UNDER THE NEW NOMINATION AND APPOINTMENT SYSTEM

This section reviews the results of the judicial selection system in the first ten years of its operation from the commission nomination to the appointment by the governor. It examines the number of vacancies filled, commissions convened, and the number of applicants reviewed and recommended. It also examines demographic data regarding the applicants, nominees, and appointed judges in this period. The next section will review the electoral results involving the appointed judges.

A. Number of Vacancies

In the first ten years under the new judicial selection system, from January 1, 1989, through December 31, 1998, eighty-one judges were appointed to fill the eighty-two vacancies that occurred. The unfilled vacancy resulted from the refusal of one judicial selection commission to nominate anyone to fill a vacancy because of the short-term and temporary nature of the vacancy because of unusual circumstances. The eighty-one appointments under the new system filled vacancies in every court in New Mexico during the ten-year period. Table 2 sets forth the number of appointments to each court during this period.

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188. See id.
189. See id.
190. See id. § 34.
191. The information for this section comes from the records of the Judicial Selection Office at the University of New Mexico School of Law. The records include files on every vacancy filled since the new judicial selection system went into effect on January 1, 1989, as well as annual reports reflecting the number of vacancies, commissions convened, applicants, nominees, and judges appointed in each year beginning with 1989. The records also include a cumulative report of the annual reports. The annual reports include gender and ethnic data on the commissioners, applicants, nominees, and appointed judges.
192. This vacancy, in the Third Judicial District in June 1996, occurred when the appointed judge resigned after losing in the primary election. Because the judicial position would be filled at the November general election by one of the two candidates winning the Democratic and Republican party nominations in the primary elections, the vacancy caused by the resignation would be short-term and temporary, at most for five months. The Judicial Selection Commission refused to recommend any candidate to fill this vacancy. The governor asked the Commission to reconvene and to submit recommendations to him for appointment, but the Commission again declined to nominate anyone. Members of the commission in open session offered as the primary reason for their refusal that two of the candidates for the vacancy were also the candidates on the general election ballot who, it was believed, wanted to be appointed in order to be the incumbent on the ballot. Members of the commission felt that their nomination would be essentially a meaningless act, at best, and would be perceived as a political act, at worst. The above account is the recollection of the author who served as Chair of the Judicial Selection Commission during 1996.
Table 2: Number of Appointments from 1989-1998

<table>
<thead>
<tr>
<th>Judicial District</th>
<th>Number of Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
<td>7</td>
</tr>
<tr>
<td>Court of Appeals</td>
<td>7</td>
</tr>
<tr>
<td>First Judicial District</td>
<td>6</td>
</tr>
<tr>
<td>Second Judicial District</td>
<td>16</td>
</tr>
<tr>
<td>Third Judicial District</td>
<td>6</td>
</tr>
<tr>
<td>Fourth Judicial District</td>
<td>1</td>
</tr>
<tr>
<td>Fifth Judicial District</td>
<td>5</td>
</tr>
<tr>
<td>Sixth Judicial District</td>
<td>1</td>
</tr>
<tr>
<td>Seventh Judicial District</td>
<td>3</td>
</tr>
<tr>
<td>Eighth Judicial District</td>
<td>1</td>
</tr>
<tr>
<td>Ninth Judicial District</td>
<td>2</td>
</tr>
<tr>
<td>Tenth Judicial District</td>
<td>1</td>
</tr>
<tr>
<td>Eleventh Judicial District</td>
<td>4</td>
</tr>
<tr>
<td>Twelfth Judicial District</td>
<td>3</td>
</tr>
<tr>
<td>Thirteenth Judicial District</td>
<td>3</td>
</tr>
<tr>
<td>Metropolitan Court</td>
<td>15</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>81</strong></td>
</tr>
</tbody>
</table>

B. Number of Commissions Convened and Reconvened

In order to fill the eighty-two vacancies, seventy-three commissions were convened, and seven of those commissions were reconvened at the request of the governor who asked for additional names after receiving the list of nominees. Of the seven commissions reconvened, three commissions added names to the list and three commissions resubmitted the same names. One commission, reconvened after recommending no names to the governor, refused to nominate anyone.

C. Number of Nominees Recommended by Commissions

Although the constitutional amendment does not require that judicial selection commissions recommend a specific number of nominees to the governor and only requires that the commissions recommend those candidates receiving a majority of the votes of the commissioners, most of the commissions sent more than one name to the governor. Of the seventy-three commissions convened, nine sent only one name and one sent no name. The governor asked for additional names in only four cases where the nine commissions recommended only one candidate. In the other cases, the governor appointed the single nominee. In those four cases where

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193. Some commissions had multiple vacancies to fill. For example, when the legislature created three new judicial positions for the court of appeals effective July 1, 1991, the Appellate Judges Nominating Commission met once to recommend candidates for the three vacancies.

194. See N.M. CONST. art. VI, § 35.
the governor asked the commission to submit more than one name, the commission resubmitted the same single name in three cases. The governor appointed the single nominee in two of those cases and refused to appoint in the third, leaving the appointment to the chief justice of the supreme court.

The different judicial selection commissions recommended a total of 278 nominees to the governor to fill the eighty-two vacancies during the ten-year period of this study. This total reflects an average of 3.39 nominees per vacancy even though for nine of the vacancies, the commissions nominated only one person. Of the 278 nominees, sixty-seven, or twenty-four percent, were women and ninety-two, or thirty-three percent, were minority lawyers. The minority nominees included eighty Hispanics, five African Americans, and seven Native Americans.

The requirement of a majority vote by the commission for recommendation to the governor also explains the occasionally different results for some candidates who applied for more than one vacancy. Some candidates who were recommended to the governor to fill one vacancy did not receive a majority vote of the commissioners when they applied for another vacancy in the same court. The pattern of differential results for these candidates includes those who were first nominated and later did not make the list, those who did not make the list of nominees the first time and later were nominated, and those who were recommended, later not nominated, and later recommended. Why these once-successful candidates did not get a majority of the commissioners to include them on the list of nominees for a different vacancy cannot be answered because no record exists that explains the votes of the commissioners. Critics of the commission nomination system point to the inconsistent results for some candidates as an indictment of the process.\(^{195}\) It should be noted, however, that for each vacancy, the commission often has some different members because commissioners are not appointed for terms and the appointing authorities may change their appointments for each vacancy. Also, the applicant pool is usually different for each vacancy even though it often includes some repeat applicants.

Table 3 shows that thirty-six applicants, or 21.3%, of the 169 candidates who applied for more than one vacancy in the same court and received at least one nomination experienced different results for different vacancies in the same court.\(^{196}\) On the other hand, 133 candidates who applied for two or more vacant judicial positions in the same court were nominated every time they applied.

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196. The Fourth, Sixth, Eighth, and Tenth Judicial Districts had only one vacancy through 1998. In those districts, candidates for the one vacancy could never have a different result.
### Table 3: Candidates with Different Results for Different Vacancies

<table>
<thead>
<tr>
<th>Vacancies</th>
<th>Recommended</th>
<th>Not Recommended for Another Vacancy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
<td>7</td>
<td>15</td>
</tr>
<tr>
<td>Court of Appeals</td>
<td>7</td>
<td>15</td>
</tr>
<tr>
<td>1st Judicial District</td>
<td>6</td>
<td>16</td>
</tr>
<tr>
<td>2nd Judicial District</td>
<td>16</td>
<td>39</td>
</tr>
<tr>
<td>3rd Judicial District</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>4th Judicial District</td>
<td>Only one vacancy</td>
<td></td>
</tr>
<tr>
<td>5th Judicial District</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>6th Judicial District</td>
<td>Only one vacancy</td>
<td></td>
</tr>
<tr>
<td>7th Judicial District</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>8th Judicial District</td>
<td>Only one vacancy</td>
<td></td>
</tr>
<tr>
<td>9th Judicial District</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>10th Judicial District</td>
<td>Only one vacancy</td>
<td></td>
</tr>
<tr>
<td>11th Judicial District</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>12th Judicial District</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>13th Judicial District</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Metropolitan Court</td>
<td>15</td>
<td>36</td>
</tr>
<tr>
<td>Totals</td>
<td>81</td>
<td>169</td>
</tr>
</tbody>
</table>

### D. Number of Appointments of Judges of the Same Political Party as the Governor

Three governors made appointments under the judicial selection system during the ten years from 1989 to 1998. Two were Republicans, Gov. Gary Carruthers and Gov. Gary Johnson, and one was a Democrat, Gov. Bruce King. As might be expected, Table 4 shows that each governor tended to appoint judges belonging to his political party, but the percentage of same-party appointments varies significantly among the three governors.

Governor Carruthers, midway through his four-year term when the new judicial selection system became effective in 1989, was the first governor to make appointments under the new system. From 1989-90, Governor Carruthers made fourteen appointments, including ten Republicans and four Democrats. Although nominating commissions sent only one name for three vacancies to Governor

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197. The primary source of the party affiliation for the appointed judges is the election returns for the judicial races. Since the appointed judges must run in the next general election in order to retain their position, the primary and general election returns reflect the party affiliation of the appointed judges in the partisan elections.
Carruthers, all three single nominees were Republican lawyers and Governor Carruthers appointed the single nominee in each case.

Governor King succeeded Governor Carruthers, and, during his term from 1991-94, appointed thirty judges to the bench, including twenty-nine Democrats and one Republican. For two of the vacancies filled during Governor King’s term, nominating commissions sent a single nominee. In one of those cases, where the single nominee was a Democrat, Governor King appointed the single nominee. In the other case, where the single nominee was a Republican, Governor King requested additional names of the commission. When the commission reconvened and sent the same name, Governor King appointed the Republican nominee.

Governor Johnson succeeded Governor King, and, during his first term as governor, from 1995-98, made thirty-seven appointments, nineteen Republicans and eighteen Democrats. For four of the vacancies filled during Governor Johnson’s first term, nominating commissions sent him just one name, and all four single nominees were Democrats. In one of those cases, Governor Johnson appointed the Democrat without requesting additional names from the commissions. In the other three cases, Governor Johnson asked the commissions to reconvene and send him additional names. In two of those cases, the same single Democrat was recommended and Governor Johnson appointed one and refused to appoint the other, leaving it to the chief justice of the New Mexico Supreme Court to make the appointment in accordance with the N.M. Constitution. In the third case in which the commission was requested to send additional names, the commission added one name to the list sent to the governor, and Governor Johnson appointed the Democrat who had been the single nominee recommended by the commission the first time. For all four vacancies in which a single nominee was sent to Governor Johnson, Democratic judges were appointed even after requests for additional names.

Unfortunately, data are not available to show the political affiliation of the candidates recommended to the three governors. The nominating commissions do not request information about the candidates’ political affiliation in the applicant questionnaire. Such data would provide a more complete picture of the political influence at the appointment stage because it would show the political options that the commission list presented to the governors. Even without this information, the available data show a significant political influence at the appointment stage.

Table 4: Comparison of Gubernatorial Appointments

<table>
<thead>
<tr>
<th></th>
<th>Carruthers (R)</th>
<th>King (D)</th>
<th>Johnson (R)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Appointments</td>
<td>14</td>
<td>30</td>
<td>37</td>
</tr>
<tr>
<td>Number of Democrats Appointed</td>
<td>4 (28.6%)</td>
<td>28 (93.3%)</td>
<td>18 (48.6%)</td>
</tr>
<tr>
<td>Number of Republicans Appointed</td>
<td>10 (71.4%)</td>
<td>1 (3.3%)</td>
<td>19 (51.4%)</td>
</tr>
</tbody>
</table>
E. Demographic Data Regarding Applicants, Nominees, and the Eighty-One Appointed Judges

Table 5 summarizes the gender and ethnic data regarding the applicants, commission nominees, and the judges appointed to the bench during the period from January 1, 1989, to December 31, 1998. The eighty-two vacancies in the first ten years under the new system attracted 932 applicants, which produced 279 nominees and eighty-one gubernatorial appointments.

Table 5: Gender and Ethnic Data Regarding Applicants, Nominees, and Appointed Judges (1989-1998)

<table>
<thead>
<tr>
<th></th>
<th>Applicants</th>
<th>Nominees</th>
<th>Appointed Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
<td>Number</td>
</tr>
<tr>
<td>Total</td>
<td>932</td>
<td>278</td>
<td>81</td>
</tr>
<tr>
<td>Women</td>
<td>234</td>
<td>25.1%</td>
<td>67</td>
</tr>
<tr>
<td>Minority</td>
<td>244</td>
<td>26.2%</td>
<td>92</td>
</tr>
<tr>
<td>Hispanic</td>
<td>218</td>
<td>23.4%</td>
<td>80</td>
</tr>
<tr>
<td>African American</td>
<td>9</td>
<td>1.0%</td>
<td>5</td>
</tr>
<tr>
<td>Native American</td>
<td>17</td>
<td>1.8%</td>
<td>7</td>
</tr>
<tr>
<td>Asian American</td>
<td>0</td>
<td>0.0%</td>
<td>0</td>
</tr>
</tbody>
</table>

These figures show that the commissions do an effective job of limiting the number of candidates for the governor’s consideration. Only about thirty percent of the applicants have been recommended to the governor over the ten-year period of this study. Critics of the new nomination-appointment system point to the small number of nominees as proof that the commissions often do not recommend candidates who would be good judges as measured by the evaluative criteria.198 Although there is a difference of opinion as to whether some candidates should be recommended or not, there is little or no disagreement about others who are not nominated. In short, commissions are expected to screen applicants and nominate only the top candidates.199

The eighty-one judges appointed under the new system include twenty women and twenty-two minority lawyers (seventeen Hispanics, three African Americans, and two Native Americans). A substantial number of the appointed judges were women or minority, with women at almost twenty-five percent and minority appointments at just over twenty-seven percent. It should be noted that some of the women judges include minority women and some of the minority judges include women.

198. See REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON JUDICIAL SELECTION, supra note 195, at Ex. E, 2 ("Committees also have refused to recommend former supreme court justices who obviously were qualified for district court.").
199. See id. at 9.
The data suggest that women and minority lawyers have not been disadvantaged by the commission screening process under the new system. The number and percentage of women and minority lawyers appointed under the new system tracks quite closely the numbers and percentages of women and minority applicants and nominees. Table 5 shows that the percentage of women applicants, 25.1%, produced 24.1% of the nominees and 24.7% of the appointed judges. Minority applicants, who constituted 26.2% of the applicant pool, did even better. This applicant pool produced 33.1% of nominees and 27.1% of the appointed judges.

An examination of the gubernatorial appointments of women and minority candidates reveals small differences in the appointment of women by the three governors during the period of this study but significant differences in the appointment of minority lawyers. Table 6 shows that all three of the governors appointed women to fill vacancies in the twenty to thirty percent range. Their appointment of minority lawyers, however, ranged from zero to 46.6%.

**Table 6: Comparison of Gubernatorial Appointments of Women and Minority Lawyers**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percent</td>
<td>Number</td>
</tr>
<tr>
<td>Total Appointments</td>
<td>14</td>
<td></td>
<td>30</td>
</tr>
<tr>
<td>Women Appointed</td>
<td>3</td>
<td>21.4%</td>
<td>6</td>
</tr>
<tr>
<td>Minority Appointed</td>
<td>0</td>
<td>0.0%</td>
<td>14</td>
</tr>
</tbody>
</table>

A comparison of the number of minority judges in 1988, appointed or elected under the old system, with the number of minority judges appointed under the new constitutional amendment from 1989 to 1998, confirms that minority lawyers have suffered no disadvantage under the new system. According to the 1990 Task Force on Minorities in the Legal Profession Report, twenty-seven percent of the eighty-one judges in New Mexico in 1988 were of minority descent. This percentage mirrors the percentage of minority judges, 27.1%, appointed under the new system. The percentage of minority lawyers appointed to the bench also compares favorably to the percentage of minority lawyers in the bar. In 1988, minority lawyers represented seventeen percent of the lawyers in New Mexico and twenty-seven percent of the judges. In 1998, they represented twenty-two percent of the

201. See supra tbl. 5.
202. See State Bar of New Mexico Task Force on Minorities in the Legal Profession, supra note 200, at 84.
and during the first ten years under the new system of judicial election, they received 27.1% of the appointments to fill judicial vacancies. The eighty-one appointments under the judicial selection system resulted in seventy-nine judicial races in partisan elections in the first ten years. Two of the appointed judges resigned before the next election, and two other judges were appointed to fill the vacancies created by their resignations. The latter two judicial appointees ran in the next election. These four appointments, therefore, resulted in only two partisan elections.

Of the seventy-nine judicial races, seventy-eight included appointed judges. The appointed judges won fifty-eight races and lawyer candidates defeated the appointed judges in the other twenty races. In one race, the appointed judge did not file a declaration of candidacy, and, of course, a lawyer candidate won that seat.

The history of the eighty-one judges appointed during the ten-year period from 1989 to 1998 shows that while most of them, forty-nine, continue to serve in the original appointed position at the end of 1998, their individual histories differ. The length of their service varies depending on the date of their appointment. Some have served as long as ten years if appointed in early 1989, and some as little as several months if appointed in 1998.

A. Number of Appointed Judges Surviving the Next General Election

Table 7 shows the history of the eighty-one judges appointed to fill vacancies in the first ten years under the judicial selection system. It shows that fifty-eight won in the next general election, twenty lost in either the primary or general election, two resigned and did not run in the partisan election, and one, who was appointed

204. See supra tbl. 5.
206. The State Bar of New Mexico 1998-1999 Bench and Bar Directory contains the names of current judges. See Judicial Selection Reports, supra note 73, for the names of judges appointed during the ten year period.
late in 1998, after the 1998 election, will stand for election in the year 2000. Of the twenty who did not survive the next general election, nine lost to opponents in the primary election and nine lost in the general election. One did not get on the general election ballot because the Democratic Party Central Committee, after the primary election, selected someone other than the appointed judge as the party's candidate. One did not get on either the primary or general ballot because he did not file a declaration of candidacy or a petition with the requisite number of signatures by the deadline. The vacancy occurred shortly before the deadline, and the timing of this particular vacancy meant that candidates seeking the nomination had to file a declaration of candidacy and a petition before the scheduled meeting of the nominating commission. This candidate did not have enough signatures going into the commission interview, and the candidate knew that if nominated by the commission and appointed by the governor he would only serve until his successor had been elected in the partisan election. When the governor appointed him, he knew that he could not run in the partisan election.

**Table 7: History of the Eighty-One Appointed Judges**

| Number surviving the partisan election | 58 |
| Number losing in the primary election | 9  |
| Number losing the party's central committee nomination | 1  |
| Number losing in the general election | 9  |
| Number not filing a declaration of candidacy | 1  |
| Number resigning before the election | 2  |
| Number appointed too late to run in the 1998 election | 1  |

An examination of the electoral results for statewide judicial elections shows striking differences between the results for supreme court and court of appeals races. In the six supreme court partisan elections during the period of this study, three appointed justices lost to challengers. By comparison, all of the seven court of appeals judges recommended and appointed in this period won in the partisan election.

Examination of the election results on a district-by-district basis also reveals significant variations. In five judicial districts—the Fifth, Sixth, Seventh, Ninth, and Tenth—all of the recommended appointed judges won in the partisan election. In four judicial districts—the Third, Fourth, Eighth and Eleventh—the appointed judges lost in fifty percent or more of the partisan races. In fact, seven of the twenty appointed judges who did not survive the partisan election lost in these four districts. In the most populated metropolitan area of the state, most of the appointed
judges survived the partisan election. Fourteen of sixteen appointed judges in the Second Judicial District won, and ten of the fourteen appointed metropolitan court judges won.

B. Number of Appointed Judges Winning Retention Elections

At the end of 1998, after ten years under the new system, only thirty-one of the eighty appointed judges had stood for a retention election and all of them were retained. As noted above, fifty-eight survived the partisan election and therefore would be subject to retention elections in the future. Of the fifty-eight appointed judges eligible for retention elections, thirty-one had stood for retention by the end of 1998, and twenty-one had not yet been in the judicial position long enough for a retention election. The remaining new judges did not stand for retention for various reasons, the most common being their resignation from the bench before the time for their retention election. All thirty-one of the appointed judges who stood for retention were retained. The percentage of the vote required for retention was increased from a simple majority to fifty-seven percent in 1994.

Although two judges lost retention elections in the ten-year period under review, both of those judges were on the bench before the amendment came into effect on January 1, 1989, and pursuant to the amendment, subject only to retention elections. Both lost after the percentage required for retention was raised from fifty to fifty-seven percent.

C. Partisan Election Results for the Appointed Judges

An analysis of both the primary and general election results for the 1990, 1992, 1994, 1996, and 1998 elections reveals interesting data regarding the eighty-one judges appointed in the first ten years under the new system. All but three of the eighty-one ran in the next election. The three who did not run included two who resigned before the election, one who retired and one who accepted an appointment as a federal administrative law judge. The remaining judge who did not run served until his successor was elected in the general election.

1. Results in Primary Elections

Twenty-one of the seventy-eight appointed judges who ran for election, almost twenty-seven percent, had no opposition in the partisan election. These fortunate twenty-one had no opposition in either the primary or general election. Another twenty-three faced no one in the primary but drew opposition in the general election. A total of forty-four, therefore, did not face a contested primary election. Another nine skipped the primary election because the vacancy that they filled occurred too late to be included in the primary election. These nine judges were placed on the general election ballot as a result of their nomination by their political

207. None of the judges who came to the bench by defeating appointed judges in the partisan election lost a retention election during the period of this study. Some of these judges, however, had not stood for retention by the end of 1998.
208. See N.M. CONST. art. VI, § 33.
209. See id.
party's central committee, and three of them ran unopposed in the general election. Counting the forty-four judges who had no primary opposition and the nine who bypassed the primary election due to the timing of the vacancy, a total of fifty-three of the seventy-eight judges, or sixty-eight percent, were placed on the general election ballot without facing a contested primary election.

An examination of the forty-four judges running unopposed in the primary elections in 1990, 1992, 1994, 1996, and 1998, discloses no trends. In four of the five elections, more than fifty percent of the appointed judges faced no opposition at the primary stage. Only in the 1994 election did the percentage fall below fifty percent.

In the 1989 to 1998 period, twenty-five judicial races included contested primary elections, and twenty-four of these contested primaries involved appointed judges. The other contested primary involved a race in which the appointed judge did not run. In the twenty-four contested races including appointed judges, the appointed judges won sixteen and lost eight, a 66.6% win rate.

Table 8 shows the number of uncontested and contested primary elections in judicial races for each of the five elections as well as the results of the contested elections. In addition, the table shows the number of judicial races in which the judicial candidate on the general election ballot was designated by the central committee rather than selected by voters in the primary election.

### Table 8: Primary Election Results for Appointed Judges

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of races</td>
<td>13</td>
<td>16</td>
<td>10±</td>
<td>18</td>
<td>21</td>
<td>78</td>
</tr>
<tr>
<td>Uncontested primary</td>
<td>9</td>
<td>8</td>
<td>2</td>
<td>11</td>
<td>14</td>
<td>44</td>
</tr>
<tr>
<td>Chosen by party’s central committee</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>1*</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Contested primary</td>
<td>3</td>
<td>6</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>24</td>
</tr>
<tr>
<td>Won</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>16</td>
</tr>
<tr>
<td>Lost</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Success rate in contested primaries</td>
<td>100%</td>
<td>67%</td>
<td>75%</td>
<td>60%</td>
<td>50%</td>
<td>67%</td>
</tr>
<tr>
<td>Total advancing to general election</td>
<td>13</td>
<td>14</td>
<td>8</td>
<td>15</td>
<td>18</td>
<td>68</td>
</tr>
<tr>
<td>Percentage advancing to general election</td>
<td>100%</td>
<td>88%</td>
<td>80%</td>
<td>83%</td>
<td>86%</td>
<td>87%</td>
</tr>
</tbody>
</table>

*One appointed judge not designated by Central Committee
±One contested primary, but the appointed judge did not run

A summary of the results of the primary elections in the seventy-eight judicial races in this study indicates that sixty-eight appointed judges survived the primary hurdle under the election law and ran in the general election. Looking at the ten

judges who did not advance to the general election, eight lost in primary elections, one did not win the nomination of the central committee, and one did not run in the primary. Looking at the sixty-eight judges who advanced to the general election, forty-four had no opposition in the primary, sixteen won in contested primary elections, and eight received the nomination of their party’s central committee. In all, eighty-seven percent of the appointed judges survived the primary stage and ran in the general election.

2. Results in General Elections

Of the eighty-one judges appointed from 1989 to 1998, seventy-eight had participated in a partisan election by the 1998 election. By the time of the general election, however, ten appointed judges had lost in the primary election or had not been selected as their party’s nominee by the central committee. In the seventy-eight elections, forty-four were contested and thirty-four involved only one candidate on the general election ballot. Of the sixty-eight appointed judges who advanced to the general election stage, thirty-one faced no opposition and thirty-seven faced a contested election. Three of the ten lawyer candidates who defeated appointed judges in the primary election also faced no opposition in the general election. The other seven challengers ran in contested elections. The total of thirty-one uncontested general elections for appointed judges included twenty-one who also faced no opposition in the primary election, seven who won in the primary election, and three who were nominated by their party’s central committee. Just over forty percent of the seventy-eight judges who ran in elections to keep their seats on the bench faced no general election opponent. An analysis of these figures as reflected in Table 9 below shows that in the elections of 1990, 1992, and 1994, just over fifty percent of the judicial races in the general elections were uncontested and that 48.7% of the appointed judges were not challenged in the general election. In the 1996 general election, the percentage of appointed judges in uncontested races dropped to 27.7%, and in the 1998 election, the percentage went up to thirty-eight percent.

In looking at the results of the thirty-seven contested elections involving appointed judges, twenty-seven appointed judges won and ten lost, a 72.9% win rate. This winning percentage in general elections is slightly better than the winning percentage of 66.6% for judges in contested primary elections.

To summarize the electoral results, both primary and general, of the seventy-eight judicial races during the first ten years under the new judicial selection system, only ten judges did not survive the primary stage, and one of those did not run. Of the sixty-eight moving into the general election, only ten lost. In short, eighty-seven percent of the appointed judges advanced to the general election, and eighty-five percent of those won in the general election. In total, fifty-eight appointed judges survived the partisan election, a 74.3% survival rate.
Table 9: General Election Results

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Races involving Appointed Judges</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td>3</td>
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<td>10</td>
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<td>0</td>
<td>2</td>
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<td>100%</td>
<td>33%</td>
<td>100%</td>
<td>55%</td>
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<td>3</td>
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<td>2</td>
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<tr>
<td>Overall success rate of appointed judges</td>
<td>77%</td>
<td>88%</td>
<td>60%</td>
<td>83%</td>
<td>62%</td>
<td>74%</td>
</tr>
</tbody>
</table>

*Includes races where the appointed judge lost in the primary or was not selected by the central committee

3. Results in Partisan Elections for Women

The twenty women appointed to the bench were quite successful in the partisan election. Seventeen of them, representing eighty-five percent, survived the partisan election, and six of these women had no opposition in either the primary or general elections.

At the primary stage, twelve women judges had no opposition, six ran in contested primaries, and two did not have to run in the primary and were nominated by their party’s central committee. In the six contested primary elections, the women judges won five and lost one. Overall, nineteen of the twenty women judges advanced to the general election, a much higher percentage, ninety-five percent, than the group of judges as a whole, eighty-seven percent.

At the general election stage, fifteen of the seventeen women judges on the general ballot won. Seven faced no opposition and twelve ran in contested races, ten winning and two losing.

Tables 10 and 11 show the primary and general election results for women in each of the five elections in the period reviewed.

211. See id.
Table 10: Primary Election Results for Women Judges

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<td>0</td>
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<tr>
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<td>1</td>
<td>0</td>
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<td>Lost</td>
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<td>1</td>
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<tr>
<td>Success rate in contested primaries</td>
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<td>100%</td>
<td>NA</td>
<td>50%</td>
<td>83%</td>
</tr>
<tr>
<td>Total advancing to general election</td>
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<td>3</td>
<td>2</td>
<td>5</td>
<td>6</td>
<td>19</td>
</tr>
<tr>
<td>Percent advancing to general election</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
<td>86%</td>
<td>95%</td>
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Table 11: General Election Results for Women Judges

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<td>6</td>
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<td>4</td>
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<td>12</td>
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<td>1</td>
<td>1</td>
<td>4</td>
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<td>Lost</td>
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<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Success rate in contested elections</td>
<td>50%</td>
<td>100%</td>
<td>50%</td>
<td>100%</td>
<td>100%</td>
<td>83%</td>
</tr>
<tr>
<td>Overall success rate of appointed judges in general elections</td>
<td>50%</td>
<td>100%</td>
<td>50%</td>
<td>100%</td>
<td>100%</td>
<td>89%</td>
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</tbody>
</table>

4. Results in Partisan Elections for Minorities

The results for minority judges running in the partisan election are not as favorable as the results for women. Although twenty minority judges were appointed from 1989 to 1998, only nineteen ran in the partisan election. One

212. See id.
213. See id.
resigned to accept an appointment as a federal administrative law judge, one was appointed too late to run in the 1998 general election and must run in 2000, and the other did not file a declaration of candidacy. The results, therefore, track only the nineteen minority judges (fifteen Hispanics, three African Americans, and one Native American) who participated in partisan elections. Fourteen minority judges (eleven Hispanics, two African Americans, and one Native American) survived the partisan election, representing sixty-eight percent of the nineteen minority judges, and five of them (four Hispanics and one Native American) faced no opposition in either the primary and general elections.

At the primary stage, fourteen minority judges (ten Hispanics, three African Americans, and one Native American) had no opposition and three ran in contested primaries (all Hispanics). Two minority judges were spared a primary election and were nominated by their party’s central committee (both Hispanics). In the three contested primary elections, the appointed minority judges (all Hispanics) won one and lost two (both to other Hispanic challengers). Overall, seventeen (thirteen Hispanics, three African Americans, and one Native American) of the nineteen minority judges who ran in partisan primary elections advanced to the general election. In percentage terms, just over eighty-nine percent of the minority judges advanced to the general election. This figure is not quite as high as the percentage for women judges at ninety-five percent, but slightly higher than the percentage of all appointed judges at eighty-seven percent.

At the general election stage, of the seventeen minority judges on the general ballot, thirteen won (ten Hispanics, two African Americans, and one Native American) and four lost (three Hispanics, and one African American). Five (four Hispanics, and one Native American) faced no opposition, and twelve ran in contested races (nine Hispanics and three African Americans), winning eight (six Hispanics and two African Americans) and losing four (three Hispanics and one African American).

Looking at the results for each minority group, seventeen Hispanics were appointed, fifteen ran in partisan elections to retain their seats, thirteen (eighty-six percent) survived the primary round and ran in the general election, and ten won in the general election. Hispanic judges faced only three contested primary races, winning one and losing two, and faced nine contested general elections, winning six and losing three. Overall, 66.6%, or ten of the fifteen Hispanic judges who ran, survived the partisan election.

All three African Americans appointed to the bench ran in the partisan election, all survived the primary stage without opposition, and two of the three won in the general election. The one Native American judge who ran in the partisan election won both the primary election and general election without opposition.

Tables 12 and 13 show the election results for the minority appointed judges in the five elections during the first ten years under the new judicial selection system.
### Table 12: Primary Election Results for Appointed Minority Judges

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<thead>
<tr>
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</tr>
</tbody>
</table>

* Although six minority judges had been appointed to the bench and subject to the partisan election, two did not run in the partisan election.

** Five minority judges were appointed to the bench and subject to a partisan election, but one (Hispanic) was appointed too late to run in the 1998 general election and will stand for election in 2000.

214. *See id.*
Table 13: General Election Results for Appointed Minority Judges²¹⁵

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<td><strong>Success rate in contested election</strong></td>
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D. Data Regarding the Lawyers Who Challenged Appointed Judges in Partisan Elections

In the seventy-nine judicial races in the first ten years of the new judicial selection system, eighty-nine lawyers ran for judicial positions held by appointed judges. The number of lawyer candidates challenging appointed judges includes those who ran in primary elections and those who were designated by their party’s central committee. The total includes twenty-three women and thirty-three minority lawyers. The breakdown of the minority lawyers reflects thirty-one Hispanics, one Native American, and one Asian American. Looking at party affiliation, fifty-four of the eighty-nine lawyers sought the Democratic nomination and thirty-five sought the Republican nomination.²¹⁶ Most of the minority lawyers, twenty-eight, also ran

²¹⁵ See id.
²¹⁶ See id.
as Democrats. Only five ran as Republicans. The women lawyer candidates included fourteen Democrats and nine Republicans.

Table 14 shows the numbers of lawyers, including their gender and minority status, running for judicial office in each of the five elections. It also shows that the number of lawyers seeking judicial office through the partisan election route has increased from the first two elections, 1990 and 1992, to the last three, 1994, 1996, and 1998. In the 1990 and 1992 elections, the number of lawyer candidates did not exceed the number of judicial races. In the 1994, 1996, and 1998 elections, the number of lawyers running exceeded the number of judicial races.

Table 14: Lawyers Contesting Judicial Races

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<td>16</td>
<td>10</td>
<td>18</td>
<td>21</td>
<td>78</td>
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<td>7</td>
<td>15</td>
<td>14</td>
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<td>10</td>
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<td>54</td>
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</tbody>
</table>

Just over forty-six percent of the eighty-nine lawyers running for a judicial position never applied to the judicial selection commission for the position they sought. Table 15 shows that these forty-one lawyers bypassed the commission screening and went directly to the electorate in the partisan election. Interestingly, twenty-eight members of this group never submitted an application for any vacancy and never subjected themselves to the commission interview and screening process. Instead, they chose the electoral route. The other thirteen lawyer candidates who bypassed the selection commission had applied at least one time for a judicial vacancy but chose not to apply for the position for which they ran in the partisan election.

Forty-eight of the eighty-nine lawyer candidates tried, unsuccessfully, the judicial selection commission route before they ran for the judicial position. This group of forty-eight lawyers includes twenty-four who applied for the position when the vacancy was announced, were recommended for the position by the commission but were not appointed by the governor. The other twenty-four lawyers who submitted applications for the vacancy and went through the interview process did not get nominated by the commission.

217. See id.
### Table 15: Lawyer Candidates and Applications for Judicial Selection Commissions

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Never applied for any vacancy</td>
<td>4</td>
<td>4</td>
<td>2</td>
<td>9</td>
<td>9</td>
<td>28</td>
<td>5</td>
<td>17.9%</td>
</tr>
<tr>
<td>Did not apply for position</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>5</td>
<td>2</td>
<td>13</td>
<td>3</td>
<td>23.1%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>6</td>
<td>6</td>
<td>4</td>
<td>14</td>
<td>11</td>
<td>48</td>
<td>8</td>
<td>19.5%</td>
</tr>
<tr>
<td>Applied and recommended</td>
<td>2</td>
<td>4</td>
<td>5</td>
<td>4</td>
<td>9</td>
<td>24</td>
<td>8</td>
<td>33.3%</td>
</tr>
<tr>
<td>Applied and NOT recommended</td>
<td>4</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>5</td>
<td>24</td>
<td>4*</td>
<td>16.6%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>6</td>
<td>8</td>
<td>10</td>
<td>10</td>
<td>14</td>
<td>48</td>
<td>12</td>
<td>25.0%</td>
</tr>
<tr>
<td>Total number of lawyer candidates</td>
<td>12</td>
<td>14</td>
<td>14</td>
<td>24</td>
<td>25</td>
<td>89</td>
<td>20</td>
<td>22.5%</td>
</tr>
</tbody>
</table>

*One applicant withdrew before the interview and was not considered

Table 15 also shows that the lawyers who were recommended by a commission and not appointed had the best success rate in the partisan election with a 33.3% win rate (eight of twenty-four). Adding these eight challengers to the fifty-eight appointed judges who survived the partisan election, eighty-four percent of the judges winning the partisan election went through all parts of the process and succeeded at both the nomination and the electoral stages.

**E. Data Regarding the Lawyers Who Came to the Bench by Defeating Appointed Judges**

As mentioned earlier, twenty of the judges appointed under the new judicial selection system in the first ten years did not survive the first partisan election. The twenty lawyers elected in the partisan election ran for the positions filled by judges appointed by the governor after nomination by judicial selection commissions. The lawyer challengers won three judicial positions on the supreme court, thirteen on the district courts, and four on the metropolitan court. Nine of these elected judges defeated appointed judges in the primary election, and nine defeated appointed judges in the general election. One defeated the incumbent judge by winning the nomination of the Democratic Party Central Committee after the primary, and

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218. See id.
another won the partisan election although the appointed judge did not declare his candidacy and did not run in the primary or general election.

Looking at this group of twenty successful challengers to the appointed judges, eight bypassed the judicial selection commissions and did not submit applications or submit to interviews by the commissions. The other twelve applied for the position they eventually ran for, although one withdrew before the commission interview and was not considered for nomination. Of the twelve who applied and went through the interview process, eight were included on the list of applicants recommended to the governor. The other four were not recommended to the governor.

An examination of the political affiliation of the twenty lawyers elected in partisan elections shows that sixteen ran as Democrats and four as Republicans. In the three supreme court races won by challengers, all three ran as Democrats. The four winning Republicans won two district court positions and two metropolitan court positions.

An examination of the number of successful challenges to incumbent judges in each of the five general elections during the ten-year period shows that the percentage of successful challengers has varied and no trends emerge. The first election, in 1990, resulted in three of thirteen appointed judges (twenty-three percent) losing in the partisan election. In the 1992 election, two of the sixteen appointed judges (12.5%) lost; in the 1994 election, four of ten (forty percent) lost; in the 1996 election, three of eighteen (16.6%) lost; and in last election studied, the 1998 election, eight of twenty-one (38.1%) lost. These figures show that fifteen of the twenty judges who did not survive the partisan election lost in the last three elections, and the largest number of defeated judges in an election, seven, lost in the last election.

Looking at the eight elected lawyers who chose to bypass the judicial nominating commission process, seven of them successfully challenged appointed judges in the last three elections of the period under review, 1994 to 1998. Four of these successful challengers unseated appointed judges in the last general election of the period, 1998.

F. Demographic Data Regarding the Lawyers Elected to the Bench and the Defeated Appointed Judges

An examination of the twenty elected lawyers who successfully ran for the position held by an appointed judge, shows that they included six women, eleven Hispanics, one Native American, and one Asian. The twenty appointed judges who did not survive the first partisan election included three women, six Hispanics, and one African American. Six of the seven minority defeated judges lost to minority challengers.

219. See supra tbl. 15.
220. See id.
221. See id.
222. See id.
The number of women and minority lawyers elected to the judiciary increased the number of women and minority judges who came to the bench under the new selection system. Counting the appointed judges who survived the partisan election and the minority challengers who defeated appointed judges in the electoral process, there was a net increase in the number of women, Hispanic, and Native American judges as a result of the partisan election. The number of women judges increased by three to a total of twenty-three, Hispanic judges increased by five to a total of twenty-two, and Native American judges increased by one. The number of African Americans decreased by one. Table 16 shows the number of women and minority judges appointed or elected during the ten-year period of this study and the results for the appointed judges in the partisan election.


<table>
<thead>
<tr>
<th></th>
<th>Women</th>
<th>Hispanics</th>
<th>African Americans</th>
<th>Native Americans</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointed judges</td>
<td>20</td>
<td>17</td>
<td>3</td>
<td>2*</td>
</tr>
<tr>
<td>Appointed judges lost</td>
<td>3</td>
<td>6</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Challengers won</td>
<td>6</td>
<td>11</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Net gain/loss</td>
<td>3</td>
<td>5</td>
<td>-1</td>
<td>1</td>
</tr>
<tr>
<td>Total Number of judges</td>
<td>23</td>
<td>22</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

* One Native American judge resigned before partisan election.

VIII. COMPARISON OF RESULTS FOR WOMEN AND MINORITY LAWYERS UNDER THE OLD AND NEW METHODS OF SELECTING JUDGES

The number of vacancies filled under the new compromise system has produced slightly more women and minority judges than did the old system. According to a 1992 study, the old system, from 1981 to 1988, filled 12.8% of the new judicial vacancies with women, either by partisan election or gubernatorial interim appointment. In the first three years under the new system adopted by the voters, 18.7% of the vacancies were filled by women appointees. The results after ten years under the new system show an even greater percentage of women appointees, 24.7% (twenty of eight-one).  

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223. See JUDICIAL SELECTION REPORTS, supra note 73; STATE OF NEW MEXICO OFFICIAL RETURNS, 1990, 1992, 1994, 1996, 1998, supra note 205; see also supra tbls. 10 and 11 (election results for women); tbls. 12 and 13 (election results for minority judges and lawyers).
224. See Miller & St. Clair, supra note 13, at 10.
225. See id.
226. See JUDICIAL SELECTION REPORTS, supra note 73.
The results for minority lawyers, although not showing the same gains as for women, reflect an increase in minority appointments to the bench under the new system. According to the 1992 study, minority judges selected under the old system in the period from 1981 to 1988 was 24.7%, and in the first three years under the new system, increased slightly to twenty-five percent. The results after the first ten years under the new system show an even greater percentage of minority appointees, 27.5% (twenty-two of eighty-one).

The commission nomination and appointment system has not operated to the disadvantage of women and minorities based on the results through the first ten years. Indeed, the data in Table 17 suggest that women and minority lawyers fare better in the new selection system that they did under the political appointment-partisan election system that existed before the constitutional amendment.

Table 17: Comparison of Results of Women and Minority Lawyers Appointed under the Old and New Methods of Selecting Judges

<table>
<thead>
<tr>
<th></th>
<th>Percent Women</th>
<th>Percent Minority</th>
</tr>
</thead>
</table>

The electoral process, however, did not favor minority judges appointed after commission screening. Seven of the twenty-two appointed minority judges lost in the partisan election. These losses, however, were more than compensated for by the number of minority lawyers defeating appointed judges in the partisan election. Counting the fifteen minority judges who survived the partisan election and the twelve minority lawyers who won races against appointed judges, the net result was a gain of five minority judges.

The electoral system did not work to the disadvantage of women appointed to the bench. In the partisan election, seventeen of the twenty judges won, and the number of women judges increased by three when the six successful women layers challengers are counted.

This study shows that women and minority lawyers have fared quite well under the new system for selecting judges at the nomination, appointment, and electoral stages. The data dispel the arguments and fears raised by opponents of the new system that women and minority lawyers would not do as well as they had in the purely electoral system. At the nomination and appointment stages, the data show that the number and percentages of women and minority lawyers appointed under the new system closely tracks the numbers and percentages of women and minority

227. See Miller & St. Clair, supra note 13, at 10.
228. See JUDICIAL SELECTION REPORTS, supra note 73.
229. See supra tbl. 16.
230. See id.
231. See id.
applicants and nominees. Clearly, women and minority lawyers have not been at a
disadvantage under the commission screening and gubernatorial appointment
process.

Women and minority lawyers have also been quite successful at the electoral
stage, either as appointed judges or lawyer challengers. Tables 10 and 11 show the
favorable election results for women appointed judges, and Table 16 for women
challengers. Tables 12 and 13, likewise, show favorable results for minority
appointed judges, and Table 16 shows even more favorable results for minority
challengers.

IX. IMPACT OF THE ELECTORAL PROCESS ON NOMINATION-
APPOINTMENT SELECTION

The most significant impact of the New Mexico compromise judicial selection
plan can be seen in the number of appointed judges who did not survive the partisan
election. In the first ten years under the system, the partisan election system led to
the defeat of twenty of the eighty-one judges appointed by the governor after
recommendation by a nominating commission. Some of the appointed judges who
lost in the partisan election did not receive the nomination of their political party
and, therefore, were denied the opportunity to keep their seat in the general election
in which the entire electorate could vote.

The interposition of a partisan election between the appointment and retention
election has meant that lawyers seeking judicial positions need not go through the
screening process by the judicial selection commission. In fact, forty-one of the
eighty-nine lawyers (forty-six percent) who ran for judicial positions bypassed the
commission screening stage and went directly to the electoral process. They did
not fill out the questionnaire asking for information relevant to their qualifications,
nor did they subject themselves to inquiries to the Disciplinary Board about their
professional conduct. Moreover, they did not undergo the interview process at open
meetings of the judicial nominating commissions. And most important, they did not
submit to evaluation by the commissions on the basis of the evaluative criteria. If
more lawyers choose to bypass the commission, the nomination-appointment stages
may become less meaningful.

The partisan election requirement in the New Mexico compromise plan forces
appointed judges to enter the political arena. The election law in New Mexico
depends heavily on partisan politics to narrow the number of candidates on the
general election ballot, and appointed judges must comply with all of the election
law requirements. They must file a declaration of candidacy with the requisite
number of signatures on petitions. They must obtain the nomination of their party
or run as an Independent candidate in order to get on the general election ballot.
Because of the centrality of the party system in the election law, they must run in
the primary election of their party or seek the designation by the central committee.
They must raise money, get a campaign treasurer, and file reports on their campaign
contributions and expenditures. They must mount a campaign and appear at political

232. Of the forty-one lawyers who bypassed the commission screening, only eight were successful. See supra
tbl. 15.
rallies. They must spend time away from the job of judging to carry their campaign to the voters in both the primary and general elections.

The current system presents appointed judges with some handicaps in the partisan election. The 1998 amendment does not give the appointed judge the benefit of an automatic right to be on the general election ballot. In order to be placed on the general election ballot, the appointed judge must get involved in party politics and receive a party's nomination. In addition, the timing of the appointment and the election sometimes affords insufficient time for the judge to establish a record to take to the voters. Some vacancies in the ten-year period of this study occurred within several months of the next general election, and the appointed judges had to begin the campaign for the primary and general election immediately after appointment, and in some cases had to begin collecting signatures even before the commission met. In these cases in which the timing of the vacancy occurred shortly before the election, the judge devoted time to campaigning instead of building a record that would support the advantage of incumbency. In recognition of this problem, a Task Force of the State Bar recommended that an appointed judge serve for at least one year before standing for election. It further recommended that the appointed judge be given a place on the general election ballot without the need for nomination by one of the political parties and without complying with the requirements for getting on the ballot as an Independent candidate. Under this proposal, the appointed judge would be automatically on the ballot by reason of nomination and appointment.

The unique New Mexico plan formalizes a hybrid method of selecting judges, combining a commission nominating and gubernatorial appointment process with an electoral process. Each part of the system has its influence. The nomination-apppointment process gives the advantage of incumbency to appointed judges in the partisan election as almost seventy-five percent of the appointed judges win the election. On the other hand, the electoral part of the system provides an alternative route to the bench, a route that permits applicants to bypass commission screening and public scrutiny. The data show that the partisan election part of the compromise has played a significant role, producing the other twenty-five percent of the judges. Based on the electoral results in the first ten years, the odds of winning the partisan election favor appointed judges. Just over seventy-four percent of the appointed judges survived the partisan election. By comparison, only 22.5% of the lawyers challenging appointed judges in the partisan election were successful.

Is the loss of twenty-five percent of these judges in the partisan elections acceptable? The New Mexico plan does not suggest a proper balance between the two methods of selecting judges. On one hand, a loss of twenty-five percent means that substantial investments in time and effort by the commissions and governor

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233. See REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON JUDICIAL SELECTION, supra note 195, at 7-8. The 1993 Constitutional Revision Commission recommended that for vacancies occurring after the general election proclamation the appointed judge would run in the next succeeding general election. Because the election proclamation is issued on the last Monday in January of election years, this recommendation would give appointed judges almost two years in the position before running in the partisan election. See REPORT OF THE CONSTITUTIONAL REVISION COMMISSION 53 (Dec. 1995).

234. See id. at 8.
have been negated in the electoral forum. In addition, there is a personal and perhaps professional cost borne by the individuals who shut down their practice or resigned from a position only to lose in the partisan election. Another cost, harder to measure, would be the possible effect on potential applicants. Is a twenty-five percent chance of losing in a partisan election sufficiently high to deter some good lawyers from applying, even if they are willing to undertake the risks of being nominated and appointed? On the other hand, the compromise plan contemplated the defeat of some of the appointed judges in contested elections. It provided an alternate route to the bench, a route that could bypass the nomination-appointment process. Should the compromise produce seventy-five percent of the judges by the nomination-appointment process and twenty-five percent by the electoral process as it has in the first ten years? If the percentages were reversed, would the judicial selection system be working properly? Would the value of the nomination-appointment part of the system become less meaningful and less justifiable if the electoral route began to produce most of the judges? Unfortunately, the New Mexico plan offers no answers to these questions.

The partisan election feature of the New Mexico plan could theoretically dominate the commission process completely if all lawyers seeking to be judges bypassed the commission screening and ran for the judicial position. Governors would lose the power of appointment, judicial vacancies would remain unfilled until the next general election, and courts would be shorthanded. Some lawyers would undoubtedly continue to seek nomination and appointment in order to gain the advantage of incumbency. But if most lawyers seeking judicial positions bypass the commission screening process and a greater percentage of these lawyers win the partisan election, the commission-appointment process would become less meaningful and the investment in that process less justifiable.

If commission screening under the New Mexico plan serves a valuable function in evaluating judicial applicants, it should be accorded significance at least equal to that accorded the partisan election. To be selected as a judge under the present system, all lawyers must pass the electoral test, but not all lawyers need submit their candidacy to the commission evaluation process. One way to give commission evaluations equal significance would be to make recommendation by a commission a prerequisite for the partisan election. With this change, only lawyers who were nominated by a commission for the vacancy would be eligible to challenge the appointed judge in the partisan election. This requirement would insure that all judges have met the criteria used by commissions, and it might also move commissions to recommend more candidates knowing that a recommendation is a predicate for the partisan election as well as for appointment by the governor.

Another way to increase the influence of the commission nomination process, but not as much as the nomination requirement, would be to require all candidates in the partisan election to submit to the commission screening process. This change would mean that all candidates in the election would have been subjected to commission evaluation. Voters would also know whether candidates were

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235. It should be noted that the risk of losing the partisan election may differ by position as well as by district.
recommended for appointment. This change, while expanding the role of the commission nomination in the electoral forum, would not be as significant a curtailment on the electoral process as the nomination predicate would be.

X. CONCLUSION

The results of this study raise a central question about the unique New Mexico compromise, should the citizens accept the way the compromise works and continue with the hybrid system? Or do the conflicts in the compromise present problems serious enough to warrant abandonment of the compromise and adoption of one system or the other? In other words, does the New Mexico hybrid system include the best of both systems or the worst of both?

Two in-depth examinations of the compromise system concluded that the current system should not be jettisoned and recommended changes that might improve the system. The State Bar of New Mexico's Task Force on Judicial Selection found that the current system is not perfect, but nevertheless concluded that no statutory or constitutional revisions be made at this time that would change the system. The Task Force recognized that efforts at improving the New Mexico plan might backfire and lead to the repeal of the present system and a return to the purely elective method of selecting judges. The Task Force had reason to fear repeal of the current system since a minority of the Task Force filed a report recommending the elimination of the commission-nomination part of the New Mexico plan. In addition, in every legislative session since 1988, bills have been introduced to repeal the hybrid system and to return to the electoral method of choosing judges. The conclusion of the Task Force to accept the imperfect system with its unique compromise reflects its sense "that the 1988 amendment has increased the quality of New Mexico's judges."

The 1993 New Mexico Constitutional Revision Commission also concluded that the current system should not be abandoned. In its final report submitted in 1995, the Constitutional Revision Commission noted that the compromise system "continues to draw considerable criticism from among the judiciary, the bar and the public at large." The criticism came from those who wished to return to a purely elective system as well as from those who preferred a purely commission-appointment system. A third group supported the present hybrid system based on

236. See REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON JUDICIAL SELECTION, supra note 195, at 4.
237. See id.
238. See id.
239. See id. at Ex. E.
243. Id.
244. See id. at 53; id. App. E at 12-17 (minutes of first meeting).
the view that it includes values of both systems. 245 After considering the debate and noting the definite trend among the states to move away from pure partisan election of judges, the Constitutional Revision Commission decided to recommend no changes in the structure of the current hybrid system but to recommend improvements to the current system. 246

Despite criticisms of the hybrid system, there appears to be no consensus to change it, or more accurately, how to change it. Neither the proponents of a pure nomination-appointment system nor the proponents of a partisan election system have been able to muster the political support to impose their system. Each side of the debate, however, seems to have sufficient political power to prevent adoption of either of the two pure systems. It appears, therefore, that the forces that produced the compromise still exist ten years after the compromise was struck. Neither the State Bar Task Force nor the Constitutional Revision Commission recommended abandonment of the compromise even though it combines contradictory values that do not complement each other; indeed, the two parts of the compromise provide alternative routes to the bench. Because the hybrid includes aspects that each side wants, both sides have been willing to live with the compromise even though they criticize it and would prefer their own system.

This study shows that both sides have learned to live with the compromise, since both the nomination-appointment aspect and the electoral aspect have played significant roles in the selection of New Mexico judges. Most of the judges serving at the end of 1998 had successfully undergone favorable scrutiny by a commission and by the voters, and some of the judges had come to the bench by the electoral route. Women and minority lawyers have been reasonably successful in getting nominated, appointed and elected. If the results in the future remain close to the results found in the first ten years, the New Mexico plan should continue to be an acceptable compromise. If, however, the results change and favor the partisan election route, support for the compromise may disappear and lead to an attempt to adopt a pure nomination-appointment system. Such an attempt would undoubtedly be opposed and would unleash a political struggle for adoption of one system or the other.

245. See REPORT OF THE CONSTITUTIONAL REVISION COMMISSION, supra note 233, at 53.
246. See id. The Commission made four recommendations. The first change would permit the governor, the speaker of the house, and the president pro tempore of the senate to appoint two non-lawyers to a commission rather than requiring one of the appointments to be a lawyer. The second change would permit the dean to designate someone to serve as chair. Under the third amendment, a judge appointed after the general election proclamation was issued would not have to run in that general election but would have to run in the next succeeding general election.