

**IN THE FIRST JUDICIAL DISTRICT COURT  
IN AND FOR SANTA FE COUNTY  
STATE OF NEW MEXICO**

FILED  
FIRST JUDICIAL  
DISTRICT COURT

2015 NOV 13 AM 10:44

CASE NO. D-101-CV-2015-02454

**STATE OF NEW MEXICO,  
Ex Rel. Stuart L. Stein,**

**Plaintiff/Relator,**

**vs.**

**DISTRICT JUDGE  
JUDITH K. NAKAMURA,  
Appointee of Gov. Susana  
Martinez to the New Mexico  
Supreme Court,**

**Defendant/Respondent.**

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**COMPLAINT FOR WRIT OF  
QUO WARRANTO**

**COMES NOW** Plaintiff STATE OF NEW MEXICO, by and through its Relator STUART L. STEIN, and hereby files this Complaint to obtain a Writ of Quo Warranto and in support thereof states as follows:

**INTRODUCTION**

This action concerns the limited powers granted by the New Mexico Constitution to the Appellate Judges Nominating Commission and the impact of the Commission's illegal and unauthorized *sua sponte* expansion of its constitutional authority. It is not a personal attack on Defendant/Respondent as the governor's appointee as Justice to the New Mexico Supreme Court.

## **JURISDICTION**

1. This court has original jurisdiction and power to issue writs of quo warranto under N.M.Const. Art. IV, Sect. 13.

## **VENUE**

2. That this matter questions the legality of the gubernatorial appointment of Defendant/Respondent District Judge Judith K. Nakamura to the Supreme Court of New Mexico Supreme Court and, therefore, whether she has a right to a seat on said court, located in Santa Fe County for which this Court is the correct venue.

## **PARTIES**

3. Plaintiff/Relator Stuart L. Stein is a private citizen of the State of New Mexico.

4. Defendant/Respondent District Judge Judith K. Nakamura is the gubernatorial appointee to the New Mexico Supreme Court announced on November 12, 2015.

## **STANDING**

5. Plaintiff/Relator Stuart L. Stein has standing to bring this action upon the refusal to act by the New Mexico Attorney General. On October 15, 2015, Plaintiff/Relator Stuart L. Stein sent an email to the Dean of the University of New Mexico Law School who is the Chair of the Appellate Judges Nominating Commission. This email had attached to it a memorandum titled POINT OF ORDER TO APPELLATE JUDGES NOMINATING COMMISSION which raised the same

constitutional issues contained in this complaint. This email and its attachments were copied to Attorney General Hector Balderas ([hbalderas@nmag.gov](mailto:hbalderas@nmag.gov)) and James Hallinan ([jhallinan@nmag.com](mailto:jhallinan@nmag.com)), the attorney general's media contact. The Attorney General took no action concerning the illegal acts of the Commission. *See*, Composite Exhibit A which includes the email from Raylene Weis, Coordinator, Judicial Nominating Commissions, noting that the original email and attachment was to be copied to Dean Alfred Mathewson, Chair of the Appellate Judges Nominating Commission.

6. On November 4, 2015, an email was sent to Attorney General Hector Balderas ([hbalderas@nmag.gov](mailto:hbalderas@nmag.gov)) and copied to James Hallinan ([jhallinan@nmag.com](mailto:jhallinan@nmag.com)), the attorney general's media contact, formally requesting that the Attorney General bring this quo warranto action. *See*, Exhibit B. On November 12, 2015 the undersigned received a telephone call from Attorney General Chief Counsel John Wheeler stating that the Office of the Attorney General would not be filing any quo warranto action on this matter.

7. Under the authority of N.M.S.A. § 44-3-4, since the Attorney General will not be filing, this action is being brought by Plaintiff/Relator Stein in the name of the state as a private citizen on his own complaint.

#### **FACTS OF THE CASE**

8. In June of 2015, Justice Richard C. Bosson of the New Mexico Supreme Court announced his retirement from the bench to occur on October 31, 2015.

9. Sometime after Justice Bosson's retirement announcement, the Chair of the Appellate Judges Nominating Commission announced an application deadline of October 9, 2015, for applicants seeking to replace Justice Bosson. The announcement included notice of the October 15, 2015 meeting of the Appellate Judges Nominating Commission to conduct interviews of applicants and determine which applicants' names would be submitted to the governor for appointment to the soon to be vacant seat.

10. The New Mexico Constitution, Art. VI, § 35, ¶ 3 states as follows:

**Upon the occurrence of an actual vacancy** in the office of justice of the supreme court or judge of the court of appeals, **the commission shall meet within thirty days and within that period** submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.

Id., emphasis supplied. All power of the Appellate Judges Nominating Commission is derived from the above constitutional provision. Further, this “. . . initial announcement, application, and evaluation process runs on a **strict** thirty-day time frame . . .” *State of New Mexico, ex. rel, Bill Richardson v. Fifth Judicial District Nominating Commission*, 2007-NMSC-023 ¶21, 141 NM 657, 663, 160 P.3d 566, 572, emphasis supplied. And that time frame begins only “. . . upon the occurrence of an actual vacancy. . .” Art. VI, § 35, ¶ 3, above.

11. The meaning of the words “actual vacancy” is not subject to expansion of its natural meaning to any anticipated or future vacancy. In this case, any meeting of the Appellate Judges Nominating Commission could only be validly

held after Justice Bosson left the bench. Neither statute nor rules of the commission can deviate from the constitutional mandate.

12. The voters of the State of New Mexico recognized the potential for cronyism by a soon-to-be-retired appellate judge or justice should they be sitting on the Appellate Judges Nominating Commission. To avoid this, the New Mexico Constitution makes it clear that the Commission is empowered to meet only after the “. . . occurrence of an actual vacancy in the office of justice of the supreme court . . .” *Id.* Yet, the Commission, by meeting before there was a vacancy on the Supreme Court, ignored the will of the voters of New Mexico and the plain meaning of the constitutional provision. Cronyism has, indeed, raised its specter by having retiring Justice Bosson on the Commission and allowing him to vote on his successor.

13. As of the October 19, 2015 meeting of the Appellate Judges Nominating Commission, there was no actual vacancy amongst the five justices of the supreme court. There was, on that date, an anticipated or upcoming vacancy of the supreme court seat then held by Justice Bosson.

14. The people of the State of New Mexico through their Constitution gave the Appellate Judges Nominating Commission no power to exercise its powers unless and until there is “. . . the occurrence of an actual vacancy.” *Id.* (*See, also, Leo M. Romero, Judicial Selection in New Mexico: a Hybrid of Commission Nomination and Partisan Election, Vol. 30, Spring 2000, Pg. 177, New Mexico Law Review at pg. 191: “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.” Dean Romero recognizes no power of the Commission to fill upcoming judicial vacancies this extensive treatise.)

15. It follows in logic and reason that any meeting of the Appellate Judges Nominating Commission held before an actual vacancy on the Supreme Court is a nullity. Such premature meeting is invalid; the Commission has no power to interview candidates and recommend names of any interviewees to the governor to fill a future, anticipated or expected vacancy on the Supreme Court.

16. And, further, it follows that the governor’s selection of Defendant/Respondent District Judge Judith K. Nakamura is not a constitutionally valid appointment and is subject to this Complaint for a writ of quo warranto to keep the Defendant/Respondent from usurping, intruding into or unlawfully holding or exercising the office of Justice of the Supreme Court of New Mexico.

**NAME OF PERSON RIGHTFULLY  
ENTITLED TO OFFICE**

17. Pursuant to N.M.S.A. § 44-3-6 Plaintiff/Relator Stuart L. Stein does not know the name of the person rightfully entitled to the office, and will not, until the Appellate Judges Nominating Commission meets again, without Justice Bosson sitting on the Commission, to select applications for the seat and send names to the governor for selection of one candidate to lawfully accept the appointment and take the office of the now vacant Justice of the Supreme Court.

**QUESTIONS FOR JURY DETERMINATION**

18. Pursuant to N.M.S.A. § 44-3-2, Plaintiff/Relator Stuart L. Stein requests that the Court summon a jury to determine questions of fact. This Court has

the power, if it deems it proper, to summon a jury for this purpose from the present jury pool in Santa Fe, County.

### **REQUEST FOR JUDICIAL NOTICE OF TIME REQUIREMENTS**

19. Plaintiff/Relator Stuart L. Stein requests that the Court take judicial notice of N.M.S.A. § 44-3-8 which requires that the issues raised in this matter shall be heard and determined within six (6) days from the date of service of a demurrer (or motion to dismiss) to the complaint and times for the filing of an answer or amended complaint and that the issues shall stand for trial forthwith.

**WHEREFORE**, Plaintiff/Relator Stuart L. Stein prays for the following relief:

A. Should the Court deem it proper, summon a jury to consider any factual issues raised by this quo warranto complaint.

B. That should the jury or the court without a jury or the court based on the jury's determination, find that the meeting of October 19, 2015 of the Appellate Judges Nominating Commission was unconstitutional due to the fact there was no then actual vacancy on the New Mexico Supreme Court, it should then declare the meeting and its resulting recommendations of names to the governor to be void as having no force or effect.

C. That the Appellate Judges Nominating Commission forwarding of names of candidates to the governor for appointment to the New Mexico Supreme Court on October 19, 2015 was likewise unconstitutional as being void and having no force or effect.

D. That the appointment of Defendant/Respondent District Judge Judith K. Nakamura is, therefore, void and invalid and subject to a writ of quo warranto to keep the Defendant/Respondent from usurping, intruding into or unlawfully holding or exercising the office of Justice of the Supreme Court of New Mexico.

E. That as a condition of the writ of quo warranto being issued that Plaintiff/Relator Stuart L. Stein post a cost bond of \$100.00 with the clerk of the court under N.M.S.A. § 44-3-5.

F. Any further relief this court deems just under the New Mexico Constitution and the applicable quo warranto statutes.

A handwritten signature in black ink, appearing to read "Stuart L. Stein", written over a horizontal line.

Stuart L. Stein, Plaintiff/Relator  
P.O. Box 29598  
Santa Fe, NM 87592  
Telephone: 505-450-5002

QuoWarranto.001.complaint



# **EXHIBIT A**

**Stuart Stein**

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**From:** "Weis, Raylene" <weis@law.unm.edu>  
**Date:** Thursday, October 15, 2015 8:34 AM  
**To:** "Stuart Stein" <Stuart.Stein@lobo.net>; <herring@law.unm.edu>  
**Cc:** <rrivera@sfnewmexican.com>; <phaywood@sfnewmexican.com>; <hbalderas@nmag.gov>; <jhallinan@nmag.gov>; <npapas@abqjournal.com>; <sulloa@lcsun-news.com>  
**Subject:** RE: Judicial Nominating Commission - October 19th Meeting

Mr. Stein –

Thank you for the email and the attachment. For your further information, David Herring's tenure as the Dean of the law school ended on July 31, 2015. Alfred Mathewson is one of our two Deans, and is the Chair of Judicial Nominating Commissions. He will receive a copy of this email and your request.

**Raylene**

Raylene Weis  
 Administrative Assistant to Dean Alfred Mathewson  
 and Dean Sergio Pareja  
 Coordinator, Judicial Nominating Commissions  
 UNM School of Law  
 1117 Stanford Dr NE, MSC11-6070  
 Albuquerque, NM 87131-0001  
 Phone: 505.277.4700  
 Fax: 505.277.1597  
 Email: [weis@law.unm.edu](mailto:weis@law.unm.edu)

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**From:** Stuart Stein [mailto:Stuart.Stein@lobo.net]  
**Sent:** Thursday, October 15, 2015 7:47 AM  
**To:** herring@law.unm.edu  
**Cc:** Weis, Raylene; rrivera@sfnewmexican.com; phaywood@sfnewmexican.com; hbalderas@nmag.gov; jhallinan@nmag.gov; npapas@abqjournal.com; sulloa@lcsun-news.com  
**Subject:** Judicial Nominating Commission - October 19th Meeting

Dear Dean Herring:

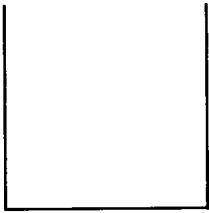
As Chair of the Judicial Nominating Commission I am attaching a memorandum to show why, in my opinion, the Commission meeting set for October 19, 2015 is unconstitutional since it is being called in violation with the New Mexico Constitution concerning its operation.

It was felt that bringing this up at the public input portion of the meeting on Monday without notice to you and the Commission would violate the spirit of due process notice.

The web site does not have the email address of all members of the Commission or I would have copied them. I respectfully request that you forward a copy of this email and attachment to each of them so they have adequate notice on this issue.

Stuart L. Stein  
 P.O. Box 29598  
 Santa Fe, NM 87592

Cell: 505-450-5002



This email has been checked for viruses by Avast antivirus software.

[www.avast.com](http://www.avast.com)

**POINT OF ORDER TO  
APPELLATE JUDGES NOMINATING COMMISSION**

Mr. Chairman and Members of the Commission:

**(1) Constitutional Challenge to Meeting of October 19, 2015**

The New Mexico Constitution, Art.6 § 35, ¶ 3 states as follows:

**Upon the occurrence of an actual vacancy in the office of justice of the supreme court or judge of the court of appeals, the commission shall meet within thirty days and within that period submit to the governor the names of persons qualified for the judicial office and recommended for appointment to that office by a majority of the commission.**

Id., emphasis supplied.

All power of this commission is derived from the above constitutional provision. Neither statute nor rules of the commission can deviate from the constitutional mandate.

As of October 19, 2015, there is no actual vacancy amongst the five justices of the supreme court. There is currently an anticipated or upcoming vacancy of the supreme court seat now held by Justice Richard C. Bosson.

The New Mexico Constitution gives this commission no power to exercise its powers unless and until there is "... the occurrence of an actual vacancy."

Id. An *actual vacancy* in a judicial position is the death or resignation of the office holder which leaves the position without an incumbent or the establishment of another legal cause resulting in the inability of one to perform the duties of the office.

*See, Grindle v. Bunker, Sec. of State, 115 Me. 108 (1916).*

"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.” Leo M. Romero, *Judicial Selection in New Mexico: a Hybrid of Commission Nomination and Partisan Election*, Vol. 30, Pg. 177, New Mexico Law Review at pg. 191. Dean Romero recognizes no upcoming judicial vacancies that would be covered by the commission in this extensive treatise.

Further, this “. . . initial announcement, application, and evaluation process runs on a strict thirty-day time frame . . .” *State of New Mexico, ex. rel, Bill Richardson v. Fifth Judicial District Nominating Commission*, 2007-NMSC-023 ¶21, 141 NM 657, 663, 160 P.3d 566, 572, emphasis supplied. And that time frame begins only “. . . upon the occurrence of an actual vacancy. . .” Art.6 § 35, ¶ 3, above.

The reasoning for this is obvious. First, it eliminates the ability of a soon to be retired judge or justice to sit on the commission and exert undue pressure on other commissioners, be them lay members, lawyers or other judges, to vote for his or her choice or choices for replacement. A seat on the Supreme Court or the Court of Appeals is not an inheritance or boon to be passed along by a retiring jurist. Since the constitution requires the commission to include justices and judges, it was clearly the drafters’ intent to avoid this problem by having the commission meet *only* “upon the occurrence of an actual vacancy.” *Id.*

It is important to note that the operative constitutional phrase of “occurrence of an actual vacancy” is not to be found anywhere in the Rules Governing Judicial Nominating Commissions. “Occurrence of an actual vacancy” morphed to just “occurrence of a judicial vacancy” and then was somehow

supplemented and expanded with: “ an upcoming judicial vacancy.” See, Section 2.A. and Section 4.A., Rules Governing Judicial Nominating Commission.

There is nothing in the constitution allowing the Chair or the commission to exercise powers concerning “. . . an upcoming judicial vacancy.” Id. It must be the “. . . occurrence of an actual vacancy. . . ” as required by the constitution. Ibid.

Second, there is no restriction as to whether a jurist may announce their retirement four months (as did Justice Bosson) or a year in advance. Say a jurist announced their retirement six months in advance. Pursuant to the existing commission rules allowing anticipation of an upcoming vacancy, a commission chair can call the meeting immediately upon the retirement announcement. Because the constitution requires that the commission name and send nominees to the governor within 30 days and the governor’s selection must be made within the following 30 days, we can have an appointed, unpaid designee-justice who will not take office for four (4) months who may not be subject to the Judicial Cannons of Ethics. The corruption potential here is as great as one’s imagination.

**(2) - Section 2.A. of the  
Rules Governing Judicial Nominating Commissions  
is Unconstitutional**

There is no constitutional authority to allow the Chair to call the commission to meet and send recommendations to the governor for any “. . upcoming judicial vacancy.” Section 2.A. Judicial Nominating Commission Rules. This quoted portion of the commission rule is unconstitutional as in direct contravention of the New Mexico Constitution Art.6 § 35, ¶ 3, and is, therefore, without any force or

effect.

Only an amendment to the New Mexico Constitution approved by the voters of the state can grant this commission the power to send names to the governor for an anticipated upcoming judicial vacancy.

**(3) - There Was No Adequate Notice to the Public**

The Judicial Nominating Commission Open Meetings Resolution states:

. . . notice of the date, time, place and agenda shall be placed in the Bar Bulletin and **newspapers of general circulation in the state** . . . The Secretary shall also mail copies of the written notice or provide telephone notice to those broadcast stations . . . and newspapers of general circulation which have made a written request for notice of public meetings.

WHEREAS, ¶ 4., emphasis supplied. This is a two-pronged attempt to give notice to the public. First, there needs to be a legal advertisement in the classified sections of the newspapers of general circulation which includes the necessary elements of agenda and ADA requirements of the Open Meeting Act. This is no different from what a county commission does before its meetings. Second, by giving telephone notice or mailing copies to the media, it is hoped that a story will appear on television or as a news item in the papers.

Other than the press release, no required legal notice of this meeting appeared in any newspaper that the undersigned has been able to find. Should this be true, then there was no actual constructive public notice for the general public and no notice whatsoever to the disabled as required by WHEREAS ¶ 6.

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## Conclusion

Therefore, this meeting should be adjourned, *sine die*, or cancelled and the chair should start the process anew when an actual vacancy of the Supreme Court position now held by Justice Bosson occurs after he leaves the bench and retires.

Respectfully submitted,

Stuart L. Stein  
P.O. Box 29598  
Santa Fe, NM 87598

/s/

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Telephone: 505-450-5002

email: [stuart.stein@lobo.net](mailto:stuart.stein@lobo.net)

judicial selection.001



# **EXHIBIT B**

**Stuart Stein**

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**From:** "Stuart Stein" <Stuart.Stein@lobo.net>  
**Date:** Wednesday, November 04, 2015 9:51 AM  
**To:** <hbalderas@nmag.gov>  
**Cc:** <jhallinan@nmag.gov>  
**Subject:** Unconstitutional Section of New Supreme Court Justice

Dear Mr. Attorney General:

On October 15, 2015 you and Mr. Hallinan of your office were copied with my email and attached memorandum concerning the unconstitutional meeting of the Judicial Nominating Commission then set for October 19, 2015 that was sent to Dean Herring at University of New Mexico Law School as chair of the Commission. (Dean Herring's tenure ended on July 31, 2015 and the email and memorandum was forwarded to Dean Alfred Mathewson, the current co-dean and chair of the Commission.)

Neither the Chair nor the Commission itself responded to the Memorandum's challenge to its unconstitutional actions in having their meeting prior to an actual vacancy occurring on the Supreme Court. When I questioned the Chair about my memorandum during the public comment period at its meeting on October 19, 2015 all I was told was that it wasn't on their approved agenda. The important question of jurisdiction and constitutionality of that meeting was intentionally ignored. The question of jurisdiction and constitutionality of any court or commission may be raised at any time and has a determination priority before any other actions.

Any names sent to the governor from an unconstitutional meeting of the Judicial Nominating Commission is without any force or effect and any appointment by the governor of any of the four names sent from the October 19, 2015 unconstitutional meeting cannot have a valid claim on the position.

Neither you nor your office responded to the copy of the October 15, 2015 email and memorandum. I considered same as a complaint to your office for which, considering your silence, no action will be taken by your office to challenge any appointment of the governor via a quo warranto action in District Court.

To avoid any misunderstanding, I hereby formally request that you bring an action seeking a writ of quo warranto against any appointment made by the governor from the four names sent to her by the Commission from its meeting on October 19, 2015 since the meeting of the Commission was unconstitutional and any names forwarded to the governor were not constitutionally obtained and any appointment is without any force or effect.

Under the last paragraph of N.M.S.A. 44-3-4 your silence since October 15, 2015 on this matter to indicates that you refuse to bring an action seeking a writ of quo warranto against the future named appointee of the governor. Therefore, I will bring such action in the name of the state on my own complaint and attach a copy of the October 15, 2015 email copying you and your office and this email as evidence of my right of standing to bring the action.

On the other hand, should you give me written assurances that your office will file the quo warranto action in my name as Relator – or your own name as Relator upon your own information – I will not file my action.

11/6/2015

Yours truly,

Stuart L. Stein  
P.O. Box 29598  
Santa Fe, NM 87592

Cell: 505-450-5002